CONSTRUCTION INSURANCE AND UK CONSTRUCTION CONTRACTS

SECOND EDITION

EDITED BY
MARSHALL LEVINE
AND
ROGER TER HAAR QC

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CONSTRUCTION INSURANCE AND UK CONSTRUCTION CONTRACTS SECOND EDITION

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FOREWORD

The Right Honourable
Lord Justice Jackson

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To Susan, James, Katie and Georgie

Marshall Levine

To Sarah, James, Camilla and Harry

Roger ter Haar

and to Jack and Purdey, our dogs!

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FOREWORD

BY THE RIGHT HONOURABLE LORD JUSTICE JACKSON

This book is a masterly review of (a) insurance law, as it impacts upon the construction industry, and (b) construction law and practice, with particular emphasis on insurance aspects.

The book begins with a survey of the UK construction industry, then a survey of insurance law and of "legal liability" generally. After that the book delves into more specialist topics, with individual chapters on categories of insurance and also on legal issues which commonly arise in construction insurance disputes (such as the meaning of "damage"). The authors lucidly and methodically explain the bewildering array of modern standard form construction contracts. They also discuss the insurance issues which arise in relation to each form of contract. There are chapters on "captive" insurance, third party rights, the CDM Regulations and similar matters.

This book will be an extremely useful source of reference for lawyers and other professionals who are called upon to advise on problems in this specialist field. Also, it is in the public interest that those who engage upon construction projects or the insurance of such projects have a clear understanding of their rights and liabilities. This book will assist in promoting such understanding.

This book will no doubt progress into many future editions and I wish the venture well.

Rupert Jackson
31 July 2008

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PREFACE AND ACKNOWLEDGEMENTS

The first edition of this book, published in 1991, was conceived as a collaboration between a construction lawyer and an insurance lawyer from Linklaters, who both felt that the legal market needed a practical book that addressed the legal background to issues that came up in the construction market as they are affected by insurance.

Since the publication of that first edition the legal market in construction has become more sophisticated; there have been new statutes and regulations; an enormous number of new cases in insurance and construction; a splendid number of new contractual forms and precedents; and new methodologies for building as design and construction has moved into a new age.

In fact, the construction market has shifted on a couple of generations with the advent of frameworking, benchmarking, supply chain management, project and design management, health and safety, and lots of other subjects. The insurance and risk management industries have equally kept pace as covers have been procured in the UK and global insurance markets.

Seventeen years after the first edition, the publishers approached again telling us that the market needed a new edition, and a new collaboration was borne between one of the original authors and a new set of lawyers (made up of solicitors and barristers) to write the second edition.

The editorial team was made up of Marshall Levine of Marshall F. Levine & Associates and Roger ter Haar QC of Crown Office Chambers, Temple, who have both edited and co-written some of the chapters of the book, whilst other lawyers (acknowledged later) contributed to the development of many of the other chapters. Roger ter Haar QC has spent an inordinate amount of time on this project writing many chapters, editing, and pushing some members of Crown Office Chambers to bring in their copy, and Marshall Levine takes this opportunity to thank him for all his hard work without which this project would never have happened.

The second edition is much longer than the first edition, more wide ranging, and more of a legal textbook than the first edition ever was, and hopefully combines the "practical" with the "academic". It has 33 legal chapters, many new, some revised, and some very similar to those in the first edition, as well as better researched legal authorities. It has a skeleton format which vaguely resembles the first edition but clearly the second edition puts a lot more legal flesh on the bones

We would wish to thank as well the following organisations: International Federation of Consulting Engineers (FIDIC); GC Works; the Joint Contracts Tribunal (JCT); Institution of Civil Engineers (ICE); IChemE and the Institution of Mechanical Engineers (IMech) for allowing the authors to attach extracts of the insurance provisions from various modern construction contracts.

We would like to extend our thanks and acknowledge the contribution of the following other authors who have worked so hard on the book: Richard Anderson; Christopher Causer; Simon Howarth; Anna Laney; Andrew Pike; Charles Pimlott; Andrew Rigney; Edward Banyard Smith; Matthew E. Smith; Antony Edwards-Stuart QC; and Neil White.

In producing this new edition we have had assistance from many in and associated with the insurance market: from the solicitors' profession, Chris Wilkes of Beachcrofts and Geoff Lord

of Kennedys; from the construction industry, Michael Blacker of Amec, Kirk Woodward of the Black & Veatch Corporation and David Reid of the Fluor Corporation; from insurers and underwriters, Bill Dewsall of Gable Holdings, Peter Gray of the Beazley Syndicates and Peter Hamilton of the Chaucer Syndicates; and from the world of brokers, Ian McGowan of Price Forbes and Andrew Harrison-Sleap of Jardine Lloyd Thompson. This assistance has been invaluable in many ways. Roger ter Haar would also like to acknowledge in particular the assistance he has had from fellow members of chambers—not only those acknowledged as authors of various chapters, but also Andrew Bartlett QC whose analysis of the law is the bedrock upon which Chapters 8 and 13 are founded, and Michael Harvey QC who allowed his work on Directors' and Officers' Liability policies to be freely plagiarised. Above even their assistance, we are grateful to Andrew Phillips who carried out much of the essential research and to Antony Edwards-Stuart QC who not only contributed chapters to the book but also made valued comments upon the text of various chapters as they approached their final state

Finally, last but not least, we would like to thank Informa, Jessica Westwood, Dawn Wilkinson, Kate Marshall and Leigh Stutter who have patiently and with tolerance awaited the manuscript from the various authors and provided the author team with help, support, and motivation for the production of the book.

Marshall Levine
London, September 2008

Roger ter Haar
Temple, London, September 2008

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CHAPTER ONE

INTRODUCTION TO UK CONSTRUCTION INDUSTRY

Marshall Levine

GENERAL

1.1 When the first edition of this book was published in 1991 the construction industry in the United Kingdom consisted of several industries tied together within statistical information presented by the UK Government. Today, as we move towards the second decade of the 21st century, the UK construction industry, though more modernised and more complicated, still consists of several industries tied together. These are:

- energy and construction;
- nuclear industries and decontamination;
- civil engineering;
- process plant and heavy metallurgy;
- the building industry (offices, retail, leisure, residential, social housing); and
- PPPs and public private joint ventures

1.2 The interaction of construction projects within each and all of these separate but contiguous industries, and the requirement for insurance for these projects, produces a complicated mixture. Several types of insurance covers and many skills and professions are and will in the future be involved. The shift of liability resulting from the contractual requirement for insurance still after all these years results in a complex web of construction, engineering, statistics, economics, law and insurance. Furthermore, all those involved in a construction project will be required to achieve the correct allocation of risks and responsibilities in an orderly sequence, fashioned according to the demands of a particular project.

1.3 A construction project has unique characteristics, e.g.:

(1) no two are the same;
(2) the various stages in particular planning, design, construction and use involve many parties and stages;
(3) the materials incorporated in a construction project are usually produced by differing parties; some materials and manufactured items may be new and untested but may need to be evaluated by new and burgeoning techniques, e.g. life-cycle testing and quality control technologies;
(4) it is usually a long process over many years, thereby increasing the exposure of a project to many risks;
(5) the construction products are likely to be high value, long lasting and well used;
(6) a split level ownership structure is likely to follow completion of the project.

1.4 These unique characteristics provide interesting "structures" and also a wide choice of potential defendants for the wide variety of claims which can arise, both during and after the construction process. The majority of building and engineering contracts deal with insurance matters on a broadly similar basis. The contractor is generally responsible for loss

or damage to the contract works during the construction period and is responsible for repairing or reinstating them in the event of loss or damage.

1.5 The contractor is usually obliged to insure the works to the satisfaction of the employer, generally using a policy which is held in the joint names of both the contractor and the employer. In addition, the employer needs to be protected against claims arising against the contractor, either by the contractor's employees or by third parties, and usually the contractor indemnifies the employer under the contract for such claims arising.

1.6 Therefore the contractor frequently arranges the employer's liability and public liability insurance.

1.7 Broadly, there are two categories of insurance effected in relation to construction projects:

(1) liability insurance, for example, public liability insurance and employer's liability arising from claims for loss or damage;
(2) property insurance, for example, insurance of the contract works and any material, equipment and machinery associated with it.

1.8 However, in very large projects, the practice is generally reversed and it is often the employer who insures in the joint names of the employer and the contractor (there are normally cost savings and reduced insurance premiums because of the employer's status). Sometimes this reversal of positions is taken into larger building contracts and, in such cases, it is not unusual to find the employer effecting the insurances.

1.9 The professional teams, and the building construction teams engaged in the design and construction of the project will take out appropriate professional indemnity insurance to cover their design liabilities and risk of carrying out negligent design whether in contract, tort, common law or statutory liabilities.

CLASSIFICATION AND METHODS OF PROCUREMENT FOR CONSTRUCTION CONTRACTS (BUILDING AND CIVIL ENGINEERING)

1.10 Nowadays, any practitioner engaged in work in this field should have a good knowledge of the different systems of building procurement.

1.11 Without this, it is quite possible that the wrong contract may be chosen for a particular project. All the options and risks must be assessed so that the correct standard form is adopted for the construction project. Before one can understand the differing classifications and methods of procurement most commonly used for UK construction contracts, there is a need to have a working knowledge of the various classifications and species of contracts. This serves as a background to an understanding of protective insurance and the link between the construction contracts and insurance policies and wordings used in the industry.

Lump sum

1.12 The contractor agrees a fixed price to execute certain defined building works, and will receive payment when he has substantially completed them. The figure is usually arrived at by way of the bill of quantities and is agreed at the time of contract formulation when the work is also commenced. All the main forms of building contract are considered to be lump sum

contracts, even though they contain provisions for the adjustment of the sum for such things as fluctuations and variations.

1.13 However, if the contract expressly provides for remeasurement, as in two sample JCT contracts such as SBC/AQ or SBC/Q 2007, it is not actually a lump sum.

Cost contracts

1.14 The cost contract is not based upon a pre-agreed sum, e.g. JCT or PCC 2007. The contractor is entitled to be paid whatever the work(s) actually cost(s), together with an additional payment normally called a fee, which should cover its profit and overheads.

1.15 There are four common variations:

(1) Cost plus a percentage: the contractor is paid the actual cost of work reasonably incurred, plus a fee which is a percentage of the actual cost.
(2) Cost plus fixed fee: the fee is a fixed lump sum and so the contractor has an incentive to complete.
(3) Cost plus fluctuating fee: an estimate of the total cost is made and the fee varies according to actual cost.
(4) Target cost based on the bill of quantities and compared with actual adjusted target cost. If the actual cost shows a saving (or an increase), the fee is increased (or reduced) appropriately.

Remeasurement contracts

1.16 These combine a lump sum and cost contract. Parties agree rates of remuneration, not the price of the work as a whole. A typical remeasurement contract is the ICE contract (7th edition), issued by the Institution of Civil Engineers, the Association of Consulting Engineers and the Federation of Civil Engineering Contractors.

1.17 The standard form differs in every respect from the JCT, placing particular emphasis on the engineer's role. There is a form of subcontract designed for use with the ICE form, known originally as the ICE Blue Form which is due for an update. It is commonly used by subcontractors, despite the fact that it is written with main contractors in mind.

PROCUREMENT METHODS

1.18 The four most commonly used methods of procurement are as follows.

(1) Traditional contract

Standard form

1.19 The most common forms of standard building contract were originally the JCT 1998 Minor Works Contract for smaller contracts (£75,000–£250,000) or MW 2007 see (para. 1.23), the IFC 1998 (intermediate form) or IC 2007 for works of moderate value (circa £100,000–£400,000) and the JCT 1998 (traditional) or SBC 2007 series (with or without or with approximate quantities) for larger contracts.

1.20 Traditionally, the building contractor is required to construct and complete work designed for the employer using a separate professional team, including architects and engineers in their various specialist disciplines.

Responsibility

1.21 Subject to the terms of the contract, the contractor usually has responsibility for work and materials and complete responsibility for the workmanship, but he is rarely responsible for design. In a situation where the contractor does design a portion of the works, he is responsible only for the design of that portion.

Design

1.22 Much of the design work carried out under most domestic building contracts these days is actually carried out by specialist subcontractors or suppliers, particularly in relation to mechanical and electrical services. However, the performance risks will still remain with the main contractor.

Usage

1.23 Until the emergence of "fast track" development the JCT contracts, e.g. JCT 1998, IFC 1998, and the JCT Minor Works Contract 98 and the equivalent SBC, IC and MW 2007 contracts accounted for the vast bulk of building projects in the UK, originally with a complete set specifically for local authority use. Now, the new JCT 2007 contracts have no specific alternative versions designed for local authority use. There are still problems with these contracts despite their common use. The amendments made in this section can pick up defects or problem areas in relation to the text for JCT 1998 With Quantities or SBC 2007 as appropriate and provide useful solutions. The amendments can and should be adapted to address the particular requirements of both the client and the project, as each project will be unique.

(2) Design and build contract

Standard form

1.24 The most common forms of design and build contracts are the JCT 1998 (with Contractor's Design), the complete set of JCT 2007 contracts with contractor's design, e.g. DB 2007, ICD 2007, MP 2007, and MWD 2007 and the ICE Design and Construct Conditions of Contract (2nd edn, 2001). The JCT 2007 series is used on building projects, whilst the ICE Design and Construct Contract is intended for use on projects involving a civil engineering basis.

Responsibility

1.25 Subject to the terms of the contract, the contractor usually has responsibility for work and materials and the design of the project.

The employer's requirements

1.26 The most common form of standard contract used here was JCT 1998 (With Contractor's Design) or DB 2007 being its most immediate update. The basis of a design and build contract is the statement in which the developer or employer describes the purposes for which the building is intended and its basic characteristics (e.g. dimensions, mass, area, construction materials, description of site and services).

1.27 This statement is commonly known as the "employer's requirements", and a contractor tenders on the basis that it produces the design and construction capability for the development. Sometimes the employer's requirements are accompanied by a set of proposals

by the contractor, based upon the requirements of the employer, which elaborate and detail the basis for the detailed design of the development called the "contractor's proposals".

The risk

1.28 In this procurement method the designer or architect is usually appointed by the contractor as a specialist subcontractor, and the main contractor will take the design risk. In other words, he will design and build the project and lay off some of the design risks through a special subcontract with an architect or designer. The design and build contractor assumes liability not only for materials and workmanship, but also for the adequacy of design and usually for the fitness for purpose of the completed building. However, in recent times there has been strong resistance from design and build contractors to accept a "fitness for the purposes" obligation under the building contract, whether express or implied.

Management and coordination

1.29 The management and coordination of the design and construction of the development rests with the contractor; since he has the obligations to design and to procure construction he has the task of organising the works to fulfil those obligations. The contractor is required to keep constantly on site a person in charge who has authority to receive instructions from the employer or, if supplemental provisions are used, the contractor must appoint a site manager. There is also usually an "employer's agent" who is nominated by the employer to deal with the day-to-day duties of the employer under the contract, for example the giving of consents. The agent has responsibility for the management of the contract on the employer's behalf and pursuant to this is given constant access to the site.

Usage

1.30 Subject to the creation of the ICE Design and Construct Conditions (first published in 1992), design and build contracts are more frequently used nowadays in the area of domestic building, and are increasingly appropriate in more customised designs for buildings such as warehouses and industrial sheds. However, some would argue that the concepts inherent in design and build contracts can be adapted to any type of project including fit out projects particularly where the latter are two-stage tendered. The concept of design and build has also been used in the sphere of hotel and office construction. The contracts may be either lump sum or cost, although the cost arrangement is usually preferred.

(3) Management contract

Standard form

1.31 The most common form of agreement used in the industry is the JCT 1998 form and the MC 2008 suite of contracts which, as they are now published, are the most modern equivalent. The JCT regime includes a range of contracts, including works contracts and works contractors' warranties.

The concept

1.32 Management contracting forms part of a breed of fast-track procurement methods developed for common use in building projects in the early 1980s. The design of the development by the designers engaged on the project is carried out in parallel with the construction of the works, which is completed by the relevant works package subcontractors. Under a management contract regime, for example the original JCT 1998 (Management

Contract) or the recent MC 2008 series, the employer contracts both with a designer and the management contractor. The contractor's obligations are to procure the construction of the project and to conduct the overall management and co-ordination in accordance with the design of the professional consultants, including the architects and engineers. It is a prime cost contract.

Responsibility

1.33 Unlike a traditional form of contract, for example the MC 2008 contract series deals with and relies on a management, organisation and securing obligation and is not a direct building obligation, but an obligation to ensure that building work is carried out by a series of packaged subcontractors, commonly known as works contractors.

1.34 They bid for elements of the works which, in aggregate, comprise the whole of the works in relation to the development. The contractor deals with the subcontractors as main principal, although there is usually a restriction requiring the employer's, architect's or quantity surveyor's approval of the works before a tender is accepted. The employer only has a direct contractual relationship with the works contractors through separate warranty agreements entered into and given by each of them.

1.35 Consequently, it is the management contractor who is liable to pay the subcontractors. The management contractor is elevated to the role of consultant, and assists the employer in seeking to keep the costs of the development within budget, co-ordinating the organisation of the work, and enforcing the obligations of various works contractors under the works contracts. To these ends the management contractor liaises with the employer's existing professionals and is on the same level as them within the consultancy team. There are some problem areas identified with the JCT 1998 and more recently the MC 2008 versions.

1.36 For example:

(1) as the management contract is a prime cost contract, there is a distinct lack of certainty as to the final price to be paid by the client;
(2) if the management contractor fails, the client is left with severe problems in relation to the re-establishment of activity on site with works contractors;
(3) a management contract normally has low contractual risk for the contractors;
(4) the name borrowing provisions in Clause 4.27 of the JCT Works Contract/2 or the equivalent section in MCWK/C 2008 when published are very tricky, and unless the conditions are satisfied, e.g. the management contractor is given an indemnity, the arbitration provisions may not be capable of being invoked.[1]

(4) Construction management

Standard form

1.37 Due to its complexity originally JCT 1987 (now JCT 1998 or MC 2008 as appropriate), the standard contracts used in management contracting, cannot easily be amended to reflect a construction management approach but in 2002 JCT first published a standard construction management agreement and trade contract. Recently, in 2005, the JCT updated the suite of contracts for this procurement method, e.g. CM/TC 2005 and CMA 2005.

1. See *Belgravia Property Co Ltd* v *S & R (London) Ltd* (2001) 93 Con LR 59.

The concept

1.38 Under construction management agreements, the employer contracts with an architect to design the building, directly with all the trade contractors and with the construction manager.

1.39 The construction manager manages, organises and secures the project on behalf of the employer, as his agent, in a way similar to the obligations of a management contractor except that the works contracts are made by the employer in his own name rather than through a contractual chain with the management contractor in the middle. The employer requires the construction manager's expertise in getting the best possible terms from the trade contractors on his behalf.

1.40 There is no need to establish a contract sum because the management contract is not a building contract. The contractor assists the employer and does not carry out the works.

Management and co-ordination

1.41 The construction manager, like the management contractor, is a consultant and not a contractor and, as such, he takes responsibility for managing claims and enforcing rights and obligations. However, it is the employer and not the construction manager who controls payment of the trade contractors, with advice from the construction manager and the quantity surveyor.

Common features

1.42 There are some features common to management contracts and construction management. They both limit the management contractor/construction manager's liability to the employer in respect of the workmanship of the trade contractors and so expose the employer to greater risk from defective performance. However, the employer can always take comfort from the possibility of bringing an action for breach of the contractor/manager's duty to manage and organise the project.

1.43 Both arrangements attract a relatively low fee, with a similarly low risk. Indeed, projects which use these methods create contracts that are unique to the particular situation.

Variations

1.44 There have been several instances in recent years where various alternative forms of Construction Management have been tested and implemented, e.g. design and construction management.

BUILDING CONTRACTS

1.45 There are a large number and variety of building contracts for the building industry (rather than for the civil engineering industry) in the UK. These included until recently the following standard contracts produced by the Joint Contract Tribunal Ltd, responsible for preparing these contracts in the UK: JCT 1998 (Private with Quantities), JCT 1998 (Local Authorities Edition), JCT 1998 (with Contractor's Design), JCT Measured Term, JCT 98 (Prime Cost), IFC 98, JCT Management Contract 1998 edition, and others.

1.46 However in 2005 (since updated in 2007) the JCT modernised and updated the contracts, and generally intend to update them every year. They are often amended, and the standard building contracts have over the years addressed all the new legislative changes that

have occurred in the building industry, introducing new clauses to deal with them, and often in doing so reshaping the risks between client and building contractor.[2]

1.47 Furthermore, although there is immense complexity with the JCT 2005 regime; the forms of contract they present now seem to be a more consistent family of contracts. It still makes it extremely dangerous, though, to present standardised or customised amendments to these forms without a careful review of the cross-referencing difficulties in merging a complicated text with even more complicated revisions, supplements and amendments.

1.48 Thus, care should be taken when adopting a standardised text of amendments and thorough consideration should be given as to whether specific requirements of the project have been met and cross referencing is correct. There are also other "one-off" subcontracts such as short form building contracts and amendments to DOM 1 and DOM 2 to work underneath JCT 98 (overtaken by a new DSC subcontract a few years ago). This has now been overtaken by the SBC 2007 family of subcontracts (once the construction industry has got used to them). Care should be taken to ensure that these subcontracts work together, and interrelate; a proper health check on all the documents is essential before the documents are authorised.

1.49 The JCT previously issued with their original 1998 suite of contracts a series of practice notes stretching from Practice Note 1 (CIS), to Practice Note 2 (Adjudication), Practice Note 3 (Terrorism cover), Practice Note 4 (Partnering), Practice Note 5 (Choosing JCT forms) and Practice Note 6 (Main Contract Tendering). Practice Note 6 on Tendering raises an interesting set of commentary on Electronic Tendering, and how to complete the Project Information Schedule, and questionnaire amongst the JCT Tendering Information. Soon there will be revised practice notes to deal with the JCT 2007 contracts but it will take a few years before the industry gets used to them.

1.50 There are, however, guides accompanying most of the JCT 2007 contracts.

CONSULTANCY AGREEMENTS AND COLLATERAL WARRANTIES

1.51 Complementing the standard building contracts in the UK construction market, there are standard consultancy agreements dealing with the appointment of consultants engaged in the contractor industry and also direct contract between the consultants and third parties engaged as players in the construction projects: funds, purchasers, freeholders, tenants. These direct contracts are called collateral warranties and they have also become standardised as they sit alongside the consultancy agreements and building contracts.

1.52 Nowadays it is intended that all consultants, together with the relevant contractors and subcontractors, will enter into contracts which give direct rights to the ultimate beneficiaries of the development (the identity of the beneficiaries may not yet be known, but they may comprise lenders to the development, and purchasers or tenants of the completed development).

1.53 The rights can be conferred either directly by provisions within the consultancy agreements (and the contracts/subcontracts) drafted so as to give rights to the third party beneficiaries under the Contracts (Rights of Third Parties) Act 1999, or, like aforementioned, by collateral warranties in favour of the ultimate beneficiaries.

1.54 Some consultancy agreements create bespoke schedules of services whereas others adopt schedules published by standard governing bodies such as RIBA, ACE, or ICE which

2. For example, the Housing Grants, Construction and Regeneration Act 1996, Adjudication, CDM Regulations, Partnering and the principles of Health and Safety Construction.

all have their own forms of agreements as well. Organisations such as the Construction Industry Council (2007) and The British Property Federation have also in the past produced new consultancy agreements and representative sample set of schedule of services for the market. In addition the consultancy agreements produced particularly by the RIBA, ACE, and ICE will need to be updated to reflect the entirety of the JCT 2007 contract regime.

1.55 Representative sample collateral warranties for use with SBC 2007, DB 2007 and IC 2007 are available within the JCT 2007 regime. They follow a similar pattern—Warranty Agreement, Warranty Particulars, Attestation and Guidance Notes; and are available for:

- Subcontractor Collateral Warranty (for a purchaser or tenant);
- Subcontractor Collateral Warranty (for a funder);
- Subcontractor Collateral Warranty (for an employer);
- Contractor Collateral Warranty (for a funder);
- Contractor Collateral Warranty (for a purchaser or tenant).

1.56 Each of these main construction contracts contains optional requirements for the giving of these collateral warranties by the contractor and/or subcontractor subject to the necessary details being given by the contract particulars incorporated in the contract. These details should be included in the tender documents prepared for prospective contractors.

1.57 A sample adjudication agreement has been provided for the appointment (joint or otherwise) of an adjudicator under the Housing Grants, Construction and Regeneration Act 1996, as well as adjudication clauses to be introduced in "one-off" contracts for construction operations importing the provisions of the Act and the Scheme for Construction Contracts. There is also a new Adjudication Agreement under JCT 2007 (Adj 2007) as well as one produced with a named adjudicator (Adj/N 2007). In the case of JCT contracts, the various amendments suggested by the original JCT 98 contract and now again in JCT 2007 contracts have been incorporated and will automatically assume compliance with the Act and the said Scheme.

1.58 A consultant has not got ostensible authority to conclude a contract on behalf of its principal with a third party. There needs to be very robust evidence to rebut this presumption.[3]

PROJECT MANAGEMENT

1.59 This section also includes a project management/coordination agreement and a project monitoring agreement. The project manager or coordinator is to act as a consultant carrying out project responsibilities, liaising and communicating with the other consultants and the building contractor, and reporting back to the developer who is in overall charge of carrying out the development. The project monitoring consultant is more like a technical adviser to a bank or institution providing monitoring services, and reporting on a project developed by others.

1.60 The ultimate logic of the section is, having developed a network of contracts, consultancy agreements and project management/coordination agreements, to deal with ways in which the developer can dispose of his rights, enforce those rights on behalf of others, or retain them, as he wishes.

3. HHJ Francis Kirkham in *GPN Ltd (in receivership)* v *O2 (UK) Ltd* [2006] CILL [Dec/Jan 2006].

1.61 However, some clauses or even contracts, may be inappropriate to the client's particular circumstances. Indeed, our aim is to develop an understanding of the essential foundation agreements which will enable specific clauses to be edited, altered, transferred, or deleted.

1.62 There are few standard forms in the market. One that is becoming increasingly popular in project management agreements is the "Standard terms for the appointment of a Project Manager" produced by the Association for Project Management (1998). There is also the RIBA Form of Appointment for a project manager (PM/99), updated April 2004.

1.63 The liabilities of a project manager have been the subject of many cases.[4]

CONSTRUCTION MANAGEMENT

1.64 There are many varieties of procurement techniques in the building industries as explained earlier: traditional approach (involving the separation of the building contractor from the consultancy); design and build; management constructing; and construction management. Construction management introduced a different type of management contracting which allowed a fast track way of building, with a construction manager appointed alongside the consultants to advise on the building contract. They would often lead the team, and certainly coordinate with them and their design outputs.[5]

1.65 The contract to build elements of the project would be direct with the client and the client would pay them direct, and manage them with the assistance of the construction manager. As indicated the JCT has also produced some standard forms (now updated under the JCT 2007 regime as CM/TC (Construction Management Trade Contract) and the CM/A (Construction Management Agreement) which are seldom used. Previously, the author had resisted the drafting of a Management Contract (to be contrasted with a Construction Management Agreement) because these contracts were rarely used and had not found favour, including the tortuous JCT 87 family of Management Contracts. However, JCT 87 has now been updated into a consolidated JCT 98.

1.66 There is now a new JCT 2005 Management Contract version called MC 2008 which operates as a management building contract with MC WK/C 2008 being the management works contract tender agreement and contract conditions.

JCT 2007

1.67 The Joint Contracts Tribunal has released its new suite of contracts for JCT 2007. The new suite represents a complete update and redesign of all the JCT's key contract forms.

4. Jackson J looked at the role of a Project Manager in *Costain Ltd and O'Rourke Civil Engineering Ltd and Bachy Soletanche Ltd and Emcor Drake & Scull Ltd* v *Bechtel Ltd and Bassily (Fady)* [2005] CILL 2239, in the context of an examination of a NEC-style contract. The court held that it was arguable that when assessing sums payable to the contractor, the project manager did owe a duty to act impartially as between employer and contractor, thus distinguishing the project manager from the one in *Royal Brompton Hospital NHS Trust* v *Hammond (No. 9)* [2002] EWHC 2037 where Humphrey LLoyd QC described the project manager as co-ordinator and guardian of the client's interest.

5. In *Great Eastern Hotel Co Ltd* v *John Laing Co Ltd and Laing Construction plc* [2005] CILL 2217, the court found a construction manager to be in breach of his obligations. HHJ Wilcox decided that the contract imposed obligations on the construction manager of a "professional man performing professional services".

Virtually all contracts in the JCT 98 documentation have been fully revised and replaced and the process has created new contracts and guides. JCT states that the contracts have been extensively redesigned, rebranded and colour-coded, to make it easy to select the appropriate contract, subcontract or guide.

1.68 A new JCT Contracts Digital Service provides all the contract forms on CD, replacing the old JCT Forms on Disk service. The contracts have been colour-branded on front covers to mark the different "families" or specialisations. Headings, sub-headings and typefaces have been standardised across all the contracts to make them clearer and easier to use. The contracts no longer have separate supplements. Fluctuations, sectional completion and contractors' design portion have all been incorporated within contracts as appropriate. Amendments will not be published separately in print. They will be incorporated into the contract, and a revised version will be published immediately. The text of amendments will be found online free of charge for six months after they are issued.

1.69 The complete list of contracts included in the 2007 edition is as follows:

Standard Building Contract with Quantities SBC/Q
Standard Building Contract with Approximate Quantities SBC/AQ
Standard Building Contract without Quantities SBC/XQ
Standard Building Contract Guide SBC/G
Standard Building Sub-Contract with sub-contractor's design Agreement SBCSub/D/A
Standard Building Sub-Contract with sub-contractor's design Conditions SBCSub/D/C
Standard Building Sub-Contract Agreement SBCSub/A
Standard Building Sub-Contract Conditions SBCSub/C
Standard Building Sub-Contract Guide SBSub/G
Intermediate Building Contract IC
Intermediate Building Contract with contractor's design ICD
Intermediate Building Contract Guide IC/G
Intermediate Sub-Contract Agreement ICSub/A
Intermediate Sub-Contract Conditions ICSub/C
Intermediate Sub-Contract with sub-contractor's design Agreement ICSub/D/A
Intermediate Sub-Contract with sub-contractor's design Conditions ICSub/D/C
Intermediate Named Sub-Contract Tender and Agreement ICSub/NAM
Intermediate Named Sub-Contract Conditions ICSub/NAM/C
Intermediate Named Sub-Contractor/Employer Agreement IC/NAM/E
Intermediate Sub-Contract Guide ICSub/G
Minor Works Building Contract MW
Minor Works Building Contract with Contractor's Design MWD
Design and Build Contract DB
Design and Build Contract Guide DB/G
Design and Build Sub-Contract Agreement DBSub/A
Design and Build Sub-Contract Conditions DBSub/C
Design and Build Sub-Contract Guide DBSub/G
Major Project Construction Contract MP
Major Project Construction Contract Guide MP/G
Major Project Sub-Contract MPSub
Major Project Sub-Contract Guide MPSub/G

Construction Management Trade Contract CM/TC
Construction Management Agreement CM/A
Construction Management Tender CM
Construction Management Trade Contractor Collateral Warranty for a Funder CMWa/F
Repair and Maintenance Contract (Commercial) RM
Construction Management Trade Contractor Collateral Warranty for a Purchaser/Tenant CMWa/P&T
Construction Management Guide CM/G
Management Building Contract MC
Management Works Contract Tender & Agreement MCWK
Management Works Contract Conditions MCWK/C
Management Works Contractor/Employer Agreement MCWK/E
Prime Cost Building Contract PCC
Measured Term Contract MTC
Housing Grant Works Building Contract HG
Adjudication Agreement Adj
Adjudication Agreement Named Adjudicator Adj/N
Framework Agreement FA
Framework Agreement Non Binding FA/N
Framework Agreement Guide FA/G
Short Form of Sub-Contract ShortSub
Sub-sub Contract SubSub
Contractor Collateral Warranty for a Funder CWa/F
Contractor Collateral Warranty for a Purchaser or Tenant CWa/P&T
Sub-Contractor Collateral Warranty for a Funder SCWa/F
Sub-Contractor Collateral Warranty for a Purchaser or Tenant SCWa/P&T and E
Constructing Excellence Contract (CE/G and CE)
Constructing Excellence Contract Project Team Agreement (CE/P)

ICE FORMS AND FIDIC FORMS

1.70 There is another body of standard forms available in the construction industry but which focus on the civil engineering world. These contracts include the ICE 6th edition, ICE 7th edition, ICE Design and Construct and ICE Minor Works.

1.71 As with the Building Contracts forms they form the backbone of the contracts used in the industry, although for unique projects there are bespoke forms based on the ICE contracts, or amending them. Amendments are a set of supplemental provisions available to practitioners who are used to using the ICE Terms.

1.72 There is also the family of FIDIC contracts which originally only involved the Orange Book, Turnkey Contract, and the Red Book as well as the FIDIC White Book for Consultancy Services on FIDIC-related contracts. But now a new generation of FIDIC Contracts has been created.

1.73 In 1999, Yellow and Orange were replaced by a single "Plant and Design-Build" contract (a new Yellow Book) and the Red Book was also revised and issued as a new first edition Red Book. FIDIC also published in 1999 a new EPC/Turnkey Silver Book, as well as a new Short Form of Contract and a new subcontract Green Book (in November 1998, a third

edition of the White Book was published), and the virtually brand new DBO contract (2007).

1.74 All these contracts are newly geared up for the international construction market, but occasionally they are used in the UK.

OTHER CIVIL, MECHANICAL AND ELECTRICAL FORMS

1.75 Civil engineering projects can be unique with initial options for procurement and appropriate pricing provisions ranging from "lump sum" to "cost plus". These have been promoted in various forms by various types of institutions and bodies including government departments, local authorities, public corporations and indeed the private sector. They also involve lending organisations in the private sector as well as public lending organisations such as the World Bank, the Asian Development Bank, the United Nations agencies and other regional organisations. It is therefore the case that standardising these types of contract is more difficult, and because syndicates of lenders will be involved in the more complex projects, inevitably these contracts will be less standardised and more bespoke.

NEW ENGINEERING CONTRACT

1.76 The New Engineering Contract (NEC) was created in the background of Sir Michael Latham's Report "Constructing the Team" (1994) The NEC family of contracts was first published in 1994 by the Institution of Civil Engineers and other bodies. It was updated into its second edition to form the Engineering and Construction Contract (ECC), and it has now been issued in its third edition in June 2005.

1.77 Currently, the NEC/ECC family of contracts comprises:

- the Engineering and Construction Contract (June 2005);
- the Engineering and Construction Short Contract (June 2005);
- the Engineering and Construction Short Sub-contract (June 2005);
- the Engineering and Construction Sub-contract (June 2005);
- the Professional Services Contract (June 2005);
- the Adjudicator's Contract (June 2005);
- the Term Service Contract (June 2005); and
- the Framework Contract (June 2005).

1.78 The author of this book has not published with this work any standard amendments for NEC/ECC for two reasons:

(1) the NEC/ECC is intended to be used as a non-legalistic project management tool, used as an equivalent to standardized contracts. Its form and content are therefore difficult to amend; and
(2) there are various appendices and forms of procurement contract with six initial options for procurement with appropriate pricing provisions from "lump sum" to "cost plus".

To amend these forms is a formidable task.

1.79 Most users of the contract system of NEC/ECC are either initial enthusiasts or promoters but in the early years of NEC/ECC, it is fair to comment that it had limited use,

and when used it has been the subject of considerable amendment. In addition, there are still some serious issues as to clarity of expression and legal definitions contained in the forms which have worried commentators.

NEC/ECC CONTRACT STRUCTURE

1.80 As stated in "NEC procurement and contract strategies", the guide published by NEC (as endorsed by OGC), with the exception of the Adjudicator's contract, all the other NEC contracts are drafted for use in a multi-party partnering arrangement utilising the provisions of option X12 partnering.

1.81 The guide contains a very useful commentary on contract strategies and the applicability of the NEC and what options best suit the procurement as well as an analysis of partnering, X12 approach and incentivisation arrangements. It also contains a rationalisation of how NEC 3 could be used for PPI/PPP procurement. This is more optimistic because of the need for contract provisions in the PPP agreements to be stepped down to the subcontracts, which would make amending NEC 3 quite difficult.

1.82 Each NEC/ECC contract is uniquely arranged to meet the employer's needs by assembling clauses from the option structure and by particularisation in accompanying documents.

The main options

1.83 The main options within the NEC forms comprise six types of payment mechanism:

- Option A: priced contract with activity schedule
- Option B: priced contract with bill of quantities
- Option C: target contract with activity schedule
- Option D: target contract with bill of quantities
- Option E: cost reimbursable contract
- Option F: management contract
- Option G: term contract

1.84 Each of the main options is published in a separate book which includes the relevant core clauses for the particular option. There is no main option for construction management and none specifically for design and build.

Some key features

1.85 There are some interesting and unique provisions in NEC 3/ECC. They include:

- Communication—communications must be in a form that can be read, copied and recorded! Although clause 13 does not allow for confirmation by the contractor of verbal instructions, it does require parties to reply to communications within definite periods, and failure to do so by the project manager or supervisor gives rise to a compensation event.
- Early warning—the procedures in clause 16 give priority to cooperation and problem-solving as soon as possible at risk reduction meetings. This compares with other contracts which penalise bad behaviour. There is also a strong incentive for the contractor to notify the project manager of matters.

- Programme—this is clearly an extremely core part of the contractor's and project manager's obligations. The programme is better defined under ECC than under most construction contracts, and various key dates, methodologies and resources information are included in the programming obligations.
- Managing defects—as soon as the defects are notified under clause 42, they are corrected under clause 43, within stated periods of time depending on what they are (defect correction periods). In some circumstances, where defects become problematic, unnecessary or difficult, clause 44 provides for procedures where, with a reduction in the contract price, defects can be accepted.

PARTNERING CONTRACTS

1.86 Following on from the issue of the NEC/ECC suite of contracts, some promoting bodies such as the ACA have authored individual partnering agreements such as PPC 2000 (September 2000 and amended in June 2003), the first multi-party standard form partnering contract; and its sister contract SPC 2000, which was prepared to enable the partnering team in the PPC 2000 to enter into arrangements with their specialists, e.g. sub-Practice Note 4 Partnering by the JCT (accompanying the 1998 Building Contracts) discusses the concepts, and sets out the objective criteria, the process, as well as the need for Partnering Charters, and how these are to be interpreted alongside the Partnering Contract.

1.87 This contract contains some interesting provisions including:

- bonus provisions for early completion;
- risk allocation schedule containing an allocated risks register as between supplier and purchaser;
- key performance indicators;
- statements as to optional relief events; and
- supply chain information.

1.88 The contract contains all these options but it is not for the uninitiated, and requires careful thought upfront on risk allocation, particularly if all members of the supply chain —consultants, trades, contractors, suppliers—are participating. It also requires some strong input for the purchaser's brief and the design risk allocation, with an emphasis on having advanced the design significantly at the point where the BE Contract is entered into.

1.89 The BE Collaborative Contract is not strictly a Partnering Contract,[6] as described in PPC 2000 but it imports significant collaborative and partnering concepts, and is governed by the "overriding principle" which states that it is the intention of the parties to work together with each other and all other participants in a co-operative and collaborative manner. It is being tested on some smaller health projects at the moment. The BE principles have also been encapsulated in the Constructing Excellence family of contracts (2006).

1.90 There is also Prime Contracting in the Defence Estates, which incorporates the principle of "achieving excellence" to adopt strategies for procurement that integrate the supply chain. The approach involves placing fewer, larger and longer-term framework agreements (initially seven years but with an option to extend to 10 years) to save costs, and create economies, and innovation within the private sector.

6. See *Birse Construction Ltd* v *St David Ltd* [1999] BLR 4. More recently BE, the reformed Reading Construction Forum/Design & Build Forum have produced a "Collaborative Contract"/Purchase Order for the supply of construction-related services (2003).

1.91 Again, principles of value engineering, and through-life cost models set against an output-based specification should provide the Defence Estates with some value-for-money advantages. Although not an exclusive strategic alliance, partnering concepts and fostering the supply chain in a collaborative way are used in abundance. The pricing model is a target-cost incentive mechanism with a pain/gain sharing arrangement between Defence Estates and the prime contractor for both cost under-runs and over-runs up to a maximum price target cost (MPTC), with open-book audit arrangements involved.

1.92 Sometimes collaborative or partnering agreements may be drafted in too vague a fashion on the expectation that they will never need to be tested, e.g. interpreting a pain/gain sharing provision.

1.93 This sometimes leads to surprising results.[7]

FRAMEWORK CONTRACTS

1.94 Framework contracts are a type of legal binding contract used by parties where they wish to agree in advance the basic structure of commercial arrangements but where the detailed requirements are drawn down from the basic structure at a later date or dates. The terms of the detailed requirements can and usually do apply to a series of future projects. The framework contract sets out standard conditions, pre-agreed rates of reimbursement and project distribution for common areas of services, activities and work.

1.95 Each individual project sets out the detailed requirements by way of a call-off contract or works arrangement/purchase order and which contains project-specific issues and definitions of scope.

1.96 There are some advantages and disadvantages to working with framework contracts. Advantages include:

- efficient procurement reducing scope of fees and time;
- long-term arrangements and partnering; and
- commercial decision-making on different service providers for specialist tasks.

Disadvantages include:

- time-consuming to set up;
- pre-agreed prices and arrangements can work out to be inadequate if circumstances change, e.g. if there is a greater or lesser volume of work than expected; and
- arrangements can result in too-close relationships with service providers.

1.97 There are normally associated with framework contracts provisions dealing with the need for the parties to behave differently—good faith, collaborative, free flow of information, open audit. These provisions govern the relationship irrespective of contract award of works, and other specific core aspects, e.g.:

- flow of work activity committed or guaranteed;
- agreed rate for the flow of work;
- period of agreement;

7. In *Alstom Signalling Ltd (t/a Alstom Transport Information Solutions)* v *Jarvis Facilities Ltd (No. 1)* [2004] EWHC 1232 the court held that where parties to a contract had negotiated in good faith on a pain/gain sharing provision without final agreement as to that mechanism, an adjudicator or judge was the person entrusted to decide what would be a fair and reasonable provision in the absence of detail on how the provision really worked.

- renewal of agreement; and
- dispute resolution and review.

1.98 Framework contracts are simpler to deal with in relation to the EU public procurement legislation as only the framework agreement goes through the advertisement procedure and not each works' call-off arrangement.

1.99 The EU Directive—Consolidated Directive of 30 April 2004 is to be implemented before 31 January 2006 (see later in the General Introduction—Public Procurement Directives). JCT 2005 has introduced a Framework Agreement (FA and FA/N 2005) (binding and non-binding) for use in connection with building construction.

1.100 It has been designed to mould and develop relationships, to focus particularly on clients' need, to invest in product development and generally enhance commercial opportunities for both clients and contracts. For more analysis of the objectives of this new type of contract, which is not dissimilar to a partnering style contract, see JCT Guide on the Framework Agreement (2005 FA/G).

1.101 In addition the NEC3 has introduced a Framework Contract in June 2005 which is designed to allow employers to invite tenders from suppliers to carry out work on an "as instructed" basis over a set term. Normally the employer will appoint a number of framework suppliers to carry out works defined in separate scoping schedules or package orders.

FAMILIES OF BUILDING CONTRACTS

1.102 There are many standard forms of building contract now in existence and it is the responsibility of the client and the client's advisers to evaluate which is the most appropriate one for the project. The standard forms have traditionally been categorised as follows:

> "The UK Construction Industry prides ('pride has its downfall') itself on having a plethora of different forms of contract available for the construction market, although commentators have criticised the UK Building Industry for this (see Latham's Report, 'Constructing the Team' (1994))."

1.103 Some of these are presented and prepared for the market by bodies and institutions representing different sections of the construction players. The most common family of building construction contracts is prepared by the JCT, as previously described. The JCT recognises the different procurement methods that are available generally on the market, although they have certainly not prepared a specific contract to suit every procurement method available in the construction market, namely construction management, construction and design management, design manage and construct.

1.104 However, the family of contracts can be divided into three main categories:

(1) Traditional JCT contracts
The varieties of JCT 1998 (now JCT 2007), private, with or without quantities or approximate quantities, and the minor forms.

(2) Design and build contract
Predominantly JCT 1998 (with Contractor's design) (and now JCT 2007 Design and Build Contract).

(3) Prime cost or reimbursable contracts
Predominantly JCT 1998 (Prime Cost) and the Management Contract documentation under JCT 1998, as well as JCT Measured Term 1998 (all now converted into JCT 2007 and 2008 editions).

1.105 In addition to the main contracts, there are usually standard sets of underlying subcontracts accompanying these main categories.

Standard form of building contract

1.106 The original 1980 edition of the JCT standard form of building contract was developed from previous editions issued in 1931, 1939 and 1963. The 1980 contract was the subject of miscellaneous amendments from Amendment 1 (1984) to 18 (1998). Amendment 18 included the new provisions arising from the Housing Grants, Construction and Regeneration Act 1996. This contract was consolidated into a 1998 version and amendments to the 1998 form are included as a new Precedent A1A.

1.107 It has now been recreated and rebranded into SBC 2007 (part of the 2007 series)

Fixed fee form of Prime Cost Contract

1.108 Although the original form was created in 1967 and was reprinted with amendments in 1992, these were eventually replaced with the JCT 1998 version (Amendments 1 (1999) to 3 (2001)), bringing the form into the family of the 1998 contracts. However, Prime Cost Contract JCT 98 and now JCT 2005 (PCC) does differ in substance and form from the others.

1.109 The original intention behind the creation of the 1967 and the 1992 contracts were to prepare a contract for works involving extensive repairs or renovations or reconstruction of existing buildings, in circumstances where it was impossible to know in advance the likely extent of the work, making it impossible for a priced bill of quantities or full specification to be created. It was the forerunner of the modern style of management contract, in that the contractor's prime cost was fully reimbursed to the contractor during the course of the project in the manner prescribed in the contract but, unlike the management contract, the fixed fee form of prime cost contract was not entirely risk-free for the contractor. The 1998 contract and the PCC 2005 version contain provisions in relation to the disallowance of costs improperly incurred by the contractor, and also incorporate the determination provisions originally introduced into JCT 1998 (with quantities) and now reproduced in the PCC 2005 version.

Measured Term Contract

1.110 This form, now known as MTC 2005, is appropriate for use by employers who have a consistent flow of maintenance and minor works, including improvements to be carried out by a single contractor over a period of time and under a single contract. It is also to be used where work is to be instructed from time to time, measured and valued on the basis of an agreed schedule of rates; and where a contract administrator is to administer the conditions.

Agreement for minor works

1.111 It has been stated that the popularity of this form of contract, which is very widely used in both the public and private sectors, lies in the substantial number of contracts costing between £75,000 and £250,000. In other words, where contract sums are small the standard form of 1998 contract is considered to be too complicated.

1.112 Adaptations of the agreement were issued back in 1971 for use where an improvement grant under the Housing Act 1969 was to be made, and where either an architect or

supervising officer was appointed by the employer, or where no architect or supervising officer was appointed by the employer.

1.113 The Minor Works Contract used to be consolidated into a 1998 version but there is now a 2005 version known as MW 2005, and MW/D 2005 with contractor's design.

1.114 Until recently a JCT Short Form of Domestic Sub-Contract (2004 edition) was the latest form of JCT subcontract but in 2005 various subcontracts for use with SBC, intermediate, and design and build contracts were published. However, no official subcontract has been published with use of MW and MW/D. JCT Short Form Domestic Sub-Contract 2004 was suitable for small subcontract packages which are fully designed, i.e. packages of a generally low degree of risk. It is not suitable where the subcontract works are of a complex technical nature or where they involve design work. The form is not fully back-to-back with any main contract and is not intended for complex or higher risk packages.

Repair and Maintenance Contract

1.115 This JCT contract, known as RM 2007, is appropriate for work involving the repair and maintenance of a building, and where no independent contract administrator is to be appointed. It is not appropriate for repair and maintenance over a fixed term or the regular maintenance of plant (use JCT Measured Term Contract (MTC 2007)), and not felt appropriate for work on a dwelling by a residential occupier (consider using the Building Contract for a home owner/occupier who has not appointed a consultant to oversee the work (HO/B) or, if the work is very minor, the Home Repair and Maintenance Contract (HO/RM)).

1.116 The contract contains an Invitation to Tender, Contract Particulars, Tender, Contract Conditions and Guidance Notes. The primary users of RM 2007 are expected to be local authorities and other employers which consistently use small and medium-sized jobbing contracts, and which are sufficiently experienced in contractor's accounts not to need administration of the contract by a contract administrator. RM 2007 has flexibility, in terms of price, in that it enables quotes from contractors on a fixed-price or day-work basis, using a schedule of rates, or all-in labour rates in a schedule of hourly rates (see item 2 of the Contract Particulars). RM 2007 makes no provision for liquidated damages.

Standard form of design and build contract

1.117 The original JCT version of the design and build contract followed a format similar to the original 1980 Standard Building Contract, except to the extent that certain design obligations are added on to the normal building contractor's obligations under the old 1980 contract. This contract was consolidated into a 1998 version (which used to be amended periodically by the JCT).

1.118 However, there is now a 2007 Design and Build Contract (DB with a subcontract to go with it (DB Sub/A) (agreement) and DB Sub/C (conditions)).

Intermediate form of building contract (for works of intermediate content)

1.119 After publication of the old 1980 contract, the JCT concluded that there was still some work for which the 1980 edition was too complicated and the minor works contract insufficiently detailed. As a result, in 1984 the JCT issued this intermediate form of contract, which has been used quite widely in the industry.

1.120 Amendments were issued from Amendment 1 (1986) to 8 (1998). This contract was then consolidated into a 1998 version. A Nam/Sc was also produced for use with the 1998 version.

1.121 However JCT 2007 has now produced Intermediate Building Contract (IC 2007) and Intermediate Building Contract with contractor's design (ICD 2007) (with subcontract agreement (IC Sub/A) and subcontract conditions (IC Sub/C) now published.

Standard form of management contract

1.122 The appointment of one contractor to manage the construction of a building, together with groups of works contractors to execute the actual building work, necessitated the production of a standard JCT contract. The JCT originally issued that management contract in 1987, together with various other contracts, including the standard form of works contract, warranties and other ancillary and related documentation, so creating a standard form of package for management contracts. Amendments were issued in 1988 and 1989.

1.123 This contract was then consolidated into a 1998 version.

1.124 The JCT 2008 series has now converted the management contract suite into a new updated form which it calls the Management Building Contract (MC 2008) with works contract tender and agreement (MCWK), management works contract conditions (MCWK/C) and the management works contractor/employer agreement (MCWK/E). Additionally there is an option—Option F—in the NEC/ECC contract for a Management Contract to be added.

Standard form of Construction Management Agreement

1.125 Eventually, after much deliberating, the JCT produced a standard CMA 2002 and trade contract to provide interlocking contracts for this procurement method.

1.126 Drawing on the recommendations of the Centre for Strategic Studies' publication "Construction Management Forum: Report and Guidance", the forms are not that widely used at all. The reason for this relates to the "bespoke" forms already well utilised in the market.

1.127 The JCT then, following the Forum's recommendation, believed that the construction manager should be appointed as early as possible, in conformity with the designer's early appointment; appropriate mechanisms are required to deal with work stages, cost control, critical interface, brief, design manufacture, and cost and project plans for example.

Housing Grant Works

1.128 The JCT produced a form in 2002 to deal with construction works constituted by a grant under Part I of the Housing Grants, Construction and Regeneration Act 1996. The form is not dissimilar to a minor works contract, and contains Articles, Conditions, and Appendix in the usual manner.

1.129 Grants may be made to render a dwelling fit for human habitation, to remedy substantial disrepair, or put a dwelling into reasonable repair, including:

(1) renovation grants;
(2) common parts grants;
(3) disabled facilities grants;
(4) grants for multiple occupation; and
(5) home repair assistance.

1.130 JCT has now updated this contract under its 2005 series and called it Housing Grant Works building contract (HG 2007).

Major Project Construction Contract

1.131 This contract was prepared in 2004 to deal with those employers who regularly undertake major projects, and the contractors who work on those projects for them.

1.132 The style of the contract is simpler and shorter than the existing JCT standard forms of building contract, e.g. JCT 98 with quantities or SBC/Q 2005, and the intention of the contract is that the requirements under which the employer describes these particular requirements for the project contains all the information which the contractor needs in order to price and carry out the design and construction of the works. JCT has now included this contract in its new series as Major Project Construction Contract (MP 2007) with an appropriate subcontract (MP Sub) which will eventually replace the 2004 subcontract edition.

1.133 It is intended that this form of contract would place upon a contractor more risk and responsibility than under existing JCT forms, e.g. option to introduce a fitness for purpose provision, and that more work is carried out in the pre-tender stage of the works in order to appreciate construction risks and evaluate those risks.

1.134 Particular key features of the form of contract are as follows:

- Further design beyond that contained in the Requirements will be undertaken by the contractor including the design or detailing of specific elements of the whole of the design. If the employer wishes the contractor to carry over and take on all design responsibility *ab initio*, the standard form must be changed.
- The employer has the right to review and comment on all designs prepared by the contractor in order to monitor whether they comply with the contract and will only be obliged to pay for works that have been executed in accordance with designs that have either the status "no comment" or "only limited comments".
- As an option the employer can require the contractor to engage by novation certain consultants that were previously appointed by the employer in connection with the project in order that the contractor takes on total responsibility for all of the services that have been previously carried out by that consultant other than in the preparation of the requirements.
- The contract contains a document called the Pricing Document which should contain a range of options for the payment of the contract sum including procedures, staging, scheduling or other terms which the parties may wish to agree. The contract does not provide for retentions to be held from any payment. It is important that the Pricing Document is clear when the contract is concluded and needs to be edited thoroughly if this contract is chosen.
- The contract utilises the provisions of the Contracts (Rights of Third Parties) Act 1999 in order to give some specific rights to third parties. These are similar but not absolutely identical to those given by the standard JCT 2005 warranties to a funder/purchaser/tenant.
- Finally, the contract includes a useful definition of practical completion, but does not include retention provisions, provisions that deal with acceleration, the payment of a bonus for early practical completion and the sharing of the benefit of any savings or value

improvements suggested by the contractor. It goes without stating that the definition of practical completion should match the requirements of the project.

JCT Framework Agreement

1.135 JCT Framework Agreements are relatively new additions to the JCT family of contracts and come in a binding (FA 2005) and non-binding form (FA/N 2005).

1.136 Actually, as this book went to print, FA 2005 was reissued in 2008 without its binding form. Although intended to encourage collaboration between those engaged in a single project or programme of projects, the Guide to the JCT Framework Agreement (FA/G) published in 2005 states that: "the JCT Framework Agreement has been designed for use by anyone who anticipates procuring a significant volume of construction/engineering work and/or series over a period of time and who wants to see a collaborative approach . . .".

1.137 It is important to note that the Framework Agreement is not intended for use as a "stand-alone" procurement contract. It is really an overarching/umbrella agreement designed for use alongside traditional project-specific construction contracts, subcontracts and supply agreements.

Constructing Excellence Contract

1.138 The JCT Constructing Excellence Contract (CE 2006) and the Project Team Agreement (CE/P 2006) with accompanying Guide (CE/G 2006) represent the newest family of collaborative working agreements produced under the JCT 2006 regime.

1.139 The CE 2006 is intended to encourage:

- collaborative behaviour;
- the importance and use of risk management at the pre-tender stage to assist in delivering successful projects; and
- a proper and flexible supply chain which will eradicate waste.

The CE approach involves:

- a series of contracts between project participants which adopt a collaborative system within a common framework;
- a multi-party project team agreement which reinforces the CE contract's collaborative system;
- active identification and management of project risks through mandatory maintenance and updating of a risk register; and
- flexible allocation of identified risks to the party best able to manage the consequences of their occurrence.

The CE approach has certain key features:

- Flexibility—it can be used as a "one-off project" or a "series of projects" under a framework agreement using JCT Framework Agreement (FA 2008).
- Clarity—it uses clear and concise language and plain English.
- Services/works—the CE can be used for either, or a combination of both.
- Purchaser/supplier—there is wide use of intended recipients and beneficiaries.
- Risk register—conditions make provision for this register for identifying and recording risks, and allocating risks, at an early stage (refer to the BE Guide to Risk Management and the creation of a Risk Allocation Schedule).

Nominated and domestic subcontracts

1.140 Under both these kinds of subcontract, which are now quite dated and generally being phased out, the subcontractor enters into a contract with the main contractor. However, in a nominated subcontract situation the main contractor allows the architect as the employer's agent to specify a specialist to be appointed by the main contractor; a domestic subcontractor's work is for all purposes that of the main contractor in the main contract.

1.141 NSC/C—for nominated subcontractors. In accordance with clause 35 of the old JCT 1980, it was normal practice for the architect to negotiate with the subcontractor and settle the terms of subcontract without prior consultation with the main contractor, merely informing him of the terms of the proposed subcontract at the time of nomination. Clause 35 did contain the proviso that the contractor can make reasonable objection to the selection.

1.142 Form NSC/N was to be used where the architect wishes to nominate a subcontractor. There is in SBC/Q 2007 (as an example of a JCT 2007-style contract) no longer the power for the architect/contract administrator to nominate a subcontractor.

1.143 However, the architect does have a duty to renominate a subcontractor within a reasonable time of the main contractor's written application. The employer can deduct liquidated damages from sums due to the main contractor for delay in completion. As indicated earlier, renomination is no longer applicable in JCT 2007 as nomination of contractors' powers has been removed.

1.144 IFC 1998 contract—for named subcontractors. The IFC 1998 contract does not refer to nominated subcontractors, but instead refers to named subcontractors in sub-clauses 3.3.1 to 3.3.7, i.e. persons named in the specification, schedules or contract bills. They are named in the invitation to tender to the main contractor, with an indication of whether the client requires that they be invited to tender for their part of the work. In such circumstances, the JCT had prepared agreement NAM/T (collateral agreement) and the subcontract NAM/SC for use where such named persons are prescribed in the intermediate form.

1.145 Now, the 2007 JCT regime has produced a number of new subcontracts to operate alongside the suite of JCT 2005 contracts.

FAMILIES OF CIVIL ENGINEERING CONTRACTS

1.146 There are clearly many different families of civil engineering contracts used in the domestic and international markets for infrastructure and civil engineering projects. As with building contracts used in the building industry, it is the responsibility of the clients and the clients' advisers, usually the civil engineers, to decide which appropriate contract should be used.

1.147 As with building contracts, a civil engineering contract provision is made for documents to be executed under seal if the employer decides.

1.148 Civil engineering contracts can be classified into the following groups:

(1) add measurement contracts including bills of quantities or schedules of rates (see ICE Term Contract—September 2002 1st edition);
(2) lump sum contracts, such as ICE 6 which has been replaced by ICE 7;
(3) cost reimbursable contracts, e.g. cost plus percentage fee or cost plus fixed fee or cost plus fluctuating fee (note, even a target contract can be classified as such);
(4) design and construct contracts, such as the ICE Design and Construct, 1st edition;
(5) turnkey contracts;

(6) management contracts.

1.149 Each of these different types of contracts has advantages and disadvantages, and different risk profiles; turnkey and design and construct contracts have limited employer's risk, while direct labour contracts and cost reimbursable contracts have the maximum employer's risk. There are of course disadvantages with turnkey and design and construct contracts, in the sense of technical inflexibility. In this sense, they are no different a classification from the other forms of building contracts available in the market.

Standard form of civil engineering contract ("ICE 6" and "ICE 7")

1.150 The ICE 6th edition was developed from the previous 5th edition. It has its origins in the early editions in 1955, which launched the 4th edition under the care and control of the sponsoring bodies, the ICE, the FCEC and the ACE forming part of the CCSJC (Conditions of Contract Standing Joint Committee).

1.151 The ICE 6th edition has been the subject of various amendments since its publication in 1991 culminating in changes caused by the Housing Grants, Construction and Regeneration Act 1996.

1.152 In July 2004 the drafting committee (CCSJC) of the ICE forms produced and issued changes to the dispute resolution provisions (clause 66), with changes to the former dispute resolution powers of the engineer in order to create a more open and balanced procedure, e.g. the requirement for one party to give the other an advance warning of any matter which, if not resolved, could develop into a dispute, and this has led to the creation of the ICE 7th edition.

ICE Design and Construct (2nd edition)

1.153 The ICE introduced the ICE design and construct contract, an alternative sister to the ICE 7th edition, under which the engineer is an independent party. The design and construct contract, alongside JCT 98 (with contractor's design), DB 2007 and MP 2007 (part of the JCT series) in the building construction industry and other design and construction contracts, allows the employer to issue instructions under the supervision of an employer's representative or other construction adviser.

ICE Minor Works (3rd edition)

1.154 The minor works contract was intended to be used like minor works under JCT where potential risks involved in the carrying out of civil engineering works for both client and contractor were too small to be judged worthy of the ICE 7th edition and where the works were relatively simple and straightforward, usually not to exceed £500,000, and where the period for completion does not exceed six months. The 3rd edition was issued in April 2001.

ICE Term Contract (1st edition)

1.155 This contract is broadly modelled on ICE 7th edition but with a big difference. It is designed for use in connection with maintenance work for a specific period of time, e.g. similar to a jobbing contract. Under this contract, work is priced by reference to a Schedule of Rates

and Prices having regard to Work's Order, which is made up of permanent and temporary works, and the term of the contract.

ICE Ground Investigation Version (2nd edition)

1.156 As with the Measurement Version of the ICE, the Ground Investigation Version is based on the traditional pattern of an investigation designed by an engineer and implemented by a contractor. Much of the traditional position of the engineer in advising, designing and supervising the works, as well as the certifying role, has been maintained.

1.157 Further chapters within the book examine a selection of the contracts referred to in this chapter and their insurance sections.

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CHAPTER TWO

GENERAL RULES AND PRINCIPLES OF INSURANCE LAW

Roger ter Haar

DEFINITION OF INSURANCE

2.1 Before considering the application of insurance to construction contracts it is necessary to consider the basic principles relating to contracts of insurance. This chapter is by no means comprehensive but should give the reader a good understanding.[1] References in this chapter to "contract" are references to the contract of insurance.

2.2 Insurance in the construction context is generally a contract to indemnify, i.e. the insured will recover compensation for his actual loss and in order to recover will have to prove his loss. This may occur where judgment has been given, or an award made against the insured, or where, with the insurer's consent, the insured has reached a settlement with the third party. The principle of indemnity will be implied into the contract. This type of contract should be distinguished from insurance contracts that promise to pay a specified sum upon the happening of an insured event (for example life insurance, contracts of guarantee or performance bonds).

2.3 Despite the vast amount of legislation regulating insurance companies and the conduct of their business, there is no statutory definition of insurance. However, an excellent general description of the nature of insurance was given by Channell J in *Prudential Insurance Co* v *IRC*:[2]

> "It must be a contract whereby for some consideration, usually but not necessarily in periodical payments called premiums, you secure to yourself some benefit, usually but not necessarily the payment of a sum of money, upon the happening of some event . . . the event should be one that involves some amount of uncertainty. There must be either uncertainty whether the event will happen or not, or if the event is one which must happen at some time there must be some uncertainty as to the time at which it will happen. The remaining essential is . . . that the insurance must be against something."

2.4 This reasoning remains good law today, although the Court of Appeal in *Gould* v *Curtis*[3] disagreed with another requirement mentioned by Channell J that the risk must be "adverse" to the insured. The satisfaction of a contingency such as attaining a certain age could not be described as "adverse".

2.5 Channell J's description breaks down into five main requirements:

(1) contract;
(2) consideration;
(3) benefit on the happening of some event;

1. Reference should also be made to specialist works such as Clarke, *The Law of Insurance Contracts*, 4th edn and looseleaf.
2. [1904] 2 KB 658.
3. [1913] 3 KB 84.

(4) uncertainty; and
(5) against something.

2.6 First, there must a valid binding contract to indemnify the insured in certain circumstances (so the usual contractual principles of offer and acceptance, capacity, legality, etc. apply) that is, it should not be within the insurer's discretion as to whether or not it will pay out any claim. The insured is contracting for certainty that its claim will be properly considered, not that a discretion may be exercised in its favour.

2.7 The policy may be in any form, although a policy document is usually issued after the insurance is entered into (e.g. when the insured's proposal has been accepted by the insurer initialling a document known as a "slip"). The slip sets out the main terms of the insurance (see Chapter 6 below). However, the slip is not the contract of insurance but merely evidence of its terms. The policy can be rectified if it does not accurately reflect the terms of the slip.

2.8 Secondly, consideration is usually represented by a premium. Although Channell J refers to payment of a premium, there is little authority on the significance of payment of premium. In *Hampton* v *Toxteth Co-operative Provident Society Ltd*[4] a majority of the Court of Appeal held that absence of a premium was not fatal to a finding of insurance. In addition, periodical payments for premium may be inappropriate, for example in contracts of indemnity insurance where only one payment of premium is made under each contract. In practice, many insurance contracts state that payment of the premium is a condition precedent to the insurer's liability under the contract.

2.9 In practice, sometimes no policy document exists, in which case the parties to the contract are required to refer to the slip or any relevant cover notes for evidence of the terms of the contract (see Chapter 6 below for a more detailed discussion).

2.10 Thirdly, although Channell J assumed that the benefit provided by an insurer will normally be money, benefits may be conferred that are "money's worth". Sir Robert Megarry V-C in *Medical Defence Union* v *Department of Trade*[5] doubted that a satisfactory definition of insurance could ever be given and indicated that not every benefit can be the subject of a contract of insurance, but he was not prepared to go so far as holding that only a benefit in money or money's worth would suffice. The benefit conferred by the insurer is often some corresponding benefit to money, which need not be limited to money's worth. A common example of a corresponding benefit is the insurer's right to elect reinstatement. An insurance contract will very commonly provide that the insurer may reinstate at its option.[6]

2.11 Sir Robert Megarry V-C stated that in most cases there were three elements to insurance and that, in the absence of any of them, a contract was unlikely to be one of insurance. However, he stressed that the list was not necessarily definitive.

2.12 The three elements according to the Vice-Chancellor are:

(1) the contract must give the insured an entitlement to a specified benefit on the occurrence of some event;
(2) the event must involve some element of uncertainty; and
(3) the insured must have an insurable interest in the subject matter of the contract.

4. [1915] 1 Ch 721.
5. [1980] Ch 82.
6. In certain circumstances arising out of damage to buildings by fire insurance companies (but not Lloyd's underwriters) have a right to reinstate or may be compelled to reinstate pursuant to the Fires Prevention (Metropolis) Act 1774.

2.13 The Vice-Chancellor also drew a distinction between indemnity contracts and contingency contracts. He described the former as giving indemnity against some loss such as in a fire or marine policy. The latter is a payment contingent on an event such as death. However, he did not mention that indemnity policies can also be "valued" (whereby the insured states in the proposal the specific value of the insured item for the purpose of any claim) so that a payment is made even if it does not reflect the true loss.

2.14 Fourthly, the uncertainty to which Channell J referred relates to the occurrence of the event, for example, in relation to a claim under a Contractors All Risks policy arising out of loss due to storm damage, whether a storm will ever occur which will cause damage to the insured property. The uncertainty as to whether the event will occur at all can be contrasted with life assurance where the uncertainty is not whether the assured will die, but when death will occur.

2.15 Fifthly, Channell J stated that the insured must be against something, which generally means that the insured must have an insurable interest (see below) in the subject matter of the insurance.

INSURABLE INTEREST

2.16 In the first edition of this book, it was said that "although it is a fundamental requirement of an insurance contract that the insured has an 'insurable interest', the concept of 'insurable interest' is neither settled nor defined". The courts' decisions since have done little to settle that definition.[7]

2.17 What is often described as the "classic definition" of an insurable interest is to be found in *Lucena* v *Craufurd*[8] where Lawrence J said:

> "A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it . . . And whom it importeth, that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to the whole or a part of the thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of the insurance; which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment or prejudice to the person insuring. And where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of a thing and the interest devisable from it may be very different: of the first the price is generally the measure, but by interest in a thing every benefit and advantage arising out of or depending on such a thing, may be considered as being comprehended."

2.18 Lawrence J's definition was cited and approved by the Court of Appeal in *Mark Rowlands Ltd* v *Berni Inns Ltd.*[9] However, the definition has to be read together with the qualification of Lawrence J's dictum by the House of Lords in *Macaura* v *Northern Assurance*

7. In *Feasey* v *Sun Life Assurance Corporation of Canada* [2003] Lloyd's Rep IR 637; [2003] EWCA Civ 885 para 66, Waller LJ said "it is difficult to define insurable interest in words which will apply in all situations. The context and terms of a policy with which the court is concerned will be all important. The words used to define insurable interest in for example a property context, should not be slavishly followed in different contexts . . . ".

8. (1802) 2 Bos & PNR 269, HL.

9. [1986] QB 211; see also *Feasey* v *Sun Life Assurance Corporation of Canada* (note 7, *supra*).

Co Ltd[10] in which it was held that, for an insured to have an insurable interest in the subject matter of an insurance policy, the insured must stand in a legal or equitable relationship with that subject matter.

2.19 In most cases it is easy to determine whether there is an insurable interest, but some cases create greater difficulties. Thus a contractor has an insurable interest in the goods, works, plant and site in its possession. The employer of the contractor is usually the legal owner of the site and as such probably has a contractual right to the goods on site, establishing a sufficient legal relationship to establish an insurable interest.

2.20 There is an insurable interest to the extent of the insured's possible loss or liability. Although such an interest is not required under general contract law, it is necessary either because it is a statutory requirement (see below) or because such requirement is inherent in the nature of the particular contract of insurance (for example, contracts of indemnity) or for both reasons.

2.21 The statutes requiring an insurable interest as a pre-condition of the insured's ability to recover under a policy are the Marine Insurance Act 1906,[11] the Life Assurance Act 1774[12] and the Gaming Act 1845.[13] In each case the vice targeted by the statute is gambling or wagering by those not having any real interest in the subject matter of the insurance, particularly if an interest exclusively or substantially directed at the proceeds of the policy, rather than the underlying subject matter of the policy, has a propensity to encourage the insured to take steps to increase the chances of (or deliberately render certain) the insured events happening.

2.22 Despite its title, the 1774 Act applies to accident insurances[14] as well as to life insurance; however, it does not apply to modern forms of indemnity insurance.[15] In those circumstances where it does apply, the Act requires the insured to possess an insurable interest at inception[16] and the interested persons to be named or described in the policy.[17] It also limits the insured's recovery to an amount not exceeding his interest.[18]

2.23 Section 18 of the Gaming Act 1845 renders void any purported contract of insurance (including those made on goods and merchandise) which, in substance, is a wager. The essential feature of a wagering contract is that neither party has an interest (or a reasonable expectation of acquiring an interest) in the occurrence of the future risk or event other than the amount which will be won or lost under the contract.

2.24 The Marine Insurance Act 1906 applies to the marine insurance of goods or ships. It renders void any contract of insurance entered into without any insurable interest or the expectation of acquiring one and any contract which seeks to obviate the need for an insurable

10. [1925] AC 619.
11. Section 4.
12. Section 1.
13. Section 18.
14. See *Shilling* v *Accidental Death Insurance Co* (1857) 2 H & N 42. It also applies to policies related to the rise or fall in the price of shares, but this may concern only a limited number of the readers of this book: *Paterson* v *Powell* (1832) 9 Bing 320.
15. See *Mark Rowlands Ltd* v *Berni Inns Ltd* [1986] QB 211 and *Siu Yin Kwan* v *Eastern Insurance Co* [1994] AC 199.
16. Section 1.
17. Section 2 as amended by s. 50 of the Insurance Companies Amendment Act 1973. As to the degree of particularity required, see: *Feasey* v *Sun Life Assurance Co of Canada* [2003] Lloyd's Rep IR 637; [2003] EWCA Civ 885, *per* Waller LJ.
18. Section 3. See also *Hebdon* v *West* (1863) 3 B & S 579.

interest by its terms.[19] Section 5(2) of the Act provides what has been described as a non-exhaustive definition of insurable interest as being "any legal or equitable relation" to the subject matter of the insurance such that the insured would benefit if the peril insured against does not occur or will be prejudiced if it does. It is not necessary for an assured's insurable interest to be stated in the policy itself.[20]

2.25 Where, as in the case of most branches of property insurance, the subject matter of the insurance is a physical object exposed to certain perils, an insurable interest is constituted by the fact that the insured, from his relation to that subject matter, will suffer prejudice if the subject matter is lost or damaged by such perils.

2.26 In the case of liability insurance, in which the definition of insurable interest cannot be a physical object, the definition of insurable interest must be differently constructed.[21] It is sufficient if the insured has an insurable interest in the event insured against. Thus if the insured will suffer prejudice by the happening of an accident rendering him liable to third parties, the insured has an insurable interest for the purposes of a liability policy.

2.27 Construction insurance contracts are examples of contracts of indemnity, whereby the insurer undertakes to indemnify the insured against pecuniary loss caused by or arising from particular risks. Accordingly, quite apart from statute, an interest is required by reason of the nature of the contract itself. Unless the insured has such an interest at the time when the insured event occurs, he cannot claim under the contract because he has suffered no loss against which he can be indemnified. Further, as a general proposition, if the insured's interest is less than the full value of the subject matter, he can suffer no loss greater than the total value of his actual interest at the time of the loss.[22]

2.28 These matters, which might at first seem to be highly esoteric, have proved to have substantial practical importance in cases which have come before the court over the last twenty-five years.

2.29 In one case concerning business interruption insurance, the Court of Appeal was required by the structure of such policies to consider what it meant by "insurable interest".

2.30 In *Glengate-KG Properties Ltd* v *Norwich Union Fire Insurance Ltd*[23] a claim was made under a consequential loss policy by a property developer. As is normal under such policies, the consequential loss policy was parasitical upon a primary material damage policy. The consequential loss policy provided (in standard terms) as follows:

> "If . . . any property or any part thereof used by the Insured at the premises described in the Schedule hereto . . . suffers Damage . . . the Company will pay to the Insured the amount of loss resulting from interruption of or interference with the Business carried on by the Insured at the Premises in consequence of the Damage . . . Provided that in respect of the Damage there shall be in force . . . an insurance covering the interest of the Insured in the property at the Premises against such Damage . . . "

19. By s. 4 a contract of marine insurance without interest is deemed to be a gaming or wagering contract. The making of a contract by way of gambling in loss of maritime perils is a criminal offence: Marine Insurance (Gambling Policies) Act 1909.

20. See s. 26(2).

21. See in this context *Toomey* v *Eagle Star* [1994] 1 Lloyd's Rep 516 at 524.

22. A significant exception to this general principle is the position of a bailee, that is to say a person entrusted with the care of another's goods, who can recover the whole value of the goods entrusted and holds the balance of the value over his interest upon trust for those also interested—see *Hepburn* v *A Tomlinson (Hauliers) Ltd* [1966] AC 451.

23. [1996] 1 Lloyd's Rep 614.

2.31 What had happened was that some architects' drawings for a development project were destroyed in a fire. At the time of the fire, the drawings were physically located within the architects' firm's temporary offices within the redevelopment project. The developers' case was that delay to the project was caused by the destruction of these plans, resulting in substantial loss of income. In the Court of Appeal it was assumed for the purpose of argument that this was true.[24]

2.32 The curiosity of this case was that it was the developer claiming against insurers, even though the developer did not own the plans and had only (at most) an implied licence to use the plans and a contractual obligation to bear the costs of redrawing them should they be destroyed by a peril beyond the architects' control.

2.33 The insurers' case had the merit of simplicity and logic.[25] Either the developer had an "interest" in the drawings, and should therefore have insured them against the risk of physical damage so as to satisfy the proviso to the insuring clause set out above, or the developer had no such interest, in which case the material damage proviso would not be engaged. These arguments failed both at first instance and in the Court of Appeal.

2.34 The approach of the members of the Court of Appeal was not consistent. One question was whether the developer's interest in the drawings was sufficient to insure the drawings against material damage. Neill LJ considered that, as a matter of construction, the reference to "interest" in the proviso meant a personal interest rather than an "insurable interest" in the sense used by Lawrence J's definition in *Lucena* v *Craufurd*.[26]

2.35 Sir Iain Glidewell applied Lawrence J's definition in *Lucena* v *Craufurd*[27] and concluded that, on the facts of the case, the claimant had an interest in the continuing existence of the drawings and thus an insurable interest for the purpose of material damage cover. Auld LJ disagreed: he considered that the insured must normally have a proprietary or contractual interest in the property to insure against the cost of repair or replacement. The result appears to be that the courts take a broad view of what is meant by "insurable interest" at least for the purposes of what has to be insured under a material damage policy in order to underpin a business interruption policy.

2.36 The other area in which the debate as to what constitutes an insurable interest has become significant in respect of construction projects has been in relation to the circumstances in which the parties' insurance arrangements may impact upon the ability of one party to sue another party. For present purposes it may be sufficient to record that in a number of cases the extent of one insured's insurable interest has been the determining factor, or at least a highly significant factor, in deciding whether one party to a project can sue another participant in the project.[28] The cases are not easy to reconcile: this important subject is discussed further in Chapter 13 below.

24. The proceedings as to quantum between insured and insurers were settled before trial, so it was never determined whether the insured's factual case as to loss was well founded.

25. This is not an unbiased and dispassionate viewpoint as one of the editors was counsel for the unsuccessful insurers.

26. See note 8, *supra*.

27. *Ibid.*

28. See *Petrofina (UK) Ltd* v *Magnaload* [1984] QB 127; [1983] 2 Lloyd's Rep 91; *Stone Vickers Ltd* v *Appledore Ferguson Shipbuilders Ltd* [1991] 2 Lloyd's Rep 288; *National Oilwell (UK) Ltd* v *Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582; *Deepak Fertilisers and Petrochemicals Corporation* v *ICI Chemicals and Polymers Ltd* [1999] 1 Lloyd's Rep 387; *Feasey* v *Sun Life Assurance Corporation of Canada* [2003] Lloyd's Rep IR 637; [2003] EWCA Civ 885; *O'Kane* v *Jones (The Martin P)* [2005] Lloyd's Rep IR 174; [2003] EWHC 2158 (Comm); *Tyco Fire & Integrated Solutions (UK) Ltd* v *Rolls-Royce Motor Cars Ltd* [2008] EWCA Civ 286.

2.37 Summarising the present state of authorities it can probably be said that provided an assured has a legal or equitable interest in the preservation of the subject matter insured, or if the relationship between the insured and the peril insured against is such that the occurrence of the peril could prejudice the current or contingent legal rights of the insured, then the insured will have an insurable interest in the subject matter of the insurance. So far so good: but it remains unclear what is sufficient to satisfy the courts that an insurable interest exists. A rule which started as a rule designed to stop persons of low integrity gambling on whether insurers would be called upon to pay (and perhaps influencing the result of such gambles by the means available to them) has at times given the appearance of an archaic principle bearing limited relationship with modern commercial needs in respect of the certainty of insurance contracts.

UTMOST GOOD FAITH

2.38 Contracts of insurance are one of the few forms of contracts subject to the principle of *uberrimae fidei*, or utmost good faith, which requires each party to make full disclosure of all material facts which may influence the other party in deciding whether to enter into a contract, or the terms upon which to do so.

2.39 It is almost impossible to overemphasise the importance of this principle in respect of insurance contracts. There is a significant (and influential) body of opinion which regards the law as it presently stands as being unfairly weighted in favour of insurers. There is a near universal consensus of insurers disagreeing with that body of opinion.

2.40 At its heart, the problem is that insurers take on substantial economic risks relying in most (but not all) cases upon what they are told about the risk by their insured. In many cases if the insured had told the truth, insurers would not have dreamt of underwriting the risk. As so often, the application to individual cases of a legal principle intended to produce a just and fair result in that simple and understandable situation produces significant problems —for example, what is to happen where the insurer would have written the risk, but not on the same terms? For example if the insurer granted an indemnity of £100 against a premium of £1, but would have required £2 had some important fact not been withheld, should the insured recover nothing?

2.41 The classic English legal position in that position is that the insurers are relieved of all liability. The position in some other jurisdictions is that, the insured having paid half the premium that should have been paid, the insurer is only liable for half the indemnity otherwise payable.[29] There are substantial conceptual problems with adopting that approach.

2.42 Some other contracts are also subject to the obligation to exercise good faith—for example, to a limited extent, contracts for the sale of land, family settlements, the allotment of shares in companies and contracts of suretyship and partnership are also subject to this principle. However, in no other area of the interplay between law and commerce is the principle of such widespread significance.

2.43 The judgment in *Carter* v *Boehm*[30] contains the classic statement of the principle:

> "Insurance is a contract upon speculation. The special facts, upon which the contingent chance is computed, lie more commonly in the knowledge of the insured only: the underwriter

29. In a controversial judgment in *Drake Insurance plc* v *Provident Insurance plc* [2004] QB 601; [2003] EWCA Civ 1834, Rix LJ suggested that such a solution might be appropriate under English law at least in respect of insurance contracts with retail consumers. It is not the law of England at present.

30. (1766) 3 Burr 1905.

> trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risqué as if it did not exist. The keeping back of such a circumstance is fraud, and therefore the policy is void. Although the suppression should happen through mistake, without fraudulent intention: yet still the underwriter is deceived and the policy void, because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement.''

2.44 The only remedy for non-disclosure, accurately so classified,[31] is avoidance of the whole contract. Section 17 of the Marine Insurance Act 1906 states "a contract of marine insurance is a contract based upon the utmost good faith, and, if the good faith be not observed by either party, the contract may be avoided by the other party". Although the Act expressly relates to marine insurance, this statement and other provisions of the Act relating to disclosure also represent the law relating to non-marine insurance.[32]

Insured's duty to disclose material facts

2.45 The insured's obligation is to disclose to the insurer

> "before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insured may avoid the contract."[33]

2.46 There is a further requirement that what is represented to insurers must be true:

> "every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract."[34]

2.47 In most cases the information given to insurers prior to contract will be substantially contained in a proposal form, but this may well not be the entirety of the information given. For example, further information may be given by a broker orally to an underwriter or may be contained in other documentation such as a formal written presentation of the risk. Not only must what is said be true, the totality of the package of information provided must not omit any material facts.

2.48 Material facts are facts which "would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk".[35]

2.49 In the leading case of *Pan Atlantic Insurance Ltd* v *Pine Top Ltd*,[36] one of the issues before the House of Lords was whether a material circumstance was one which, if disclosed to the hypothetical prudent underwriter, would have caused him to decline the risk This suggestion was rejected by a majority of the House, holding instead that the test was whether

31. Often a non-disclosure allegation ("you told me X but failed to disclose Y") can be analysed as a misrepresentation case ("you told me X but the truth was that X was not accurate because it had to be understood in the context of Y").

32. Confirmed by Lord Mustill in *Pan Atlantic Insurance Ltd* v *Pine Top Ltd* [1995] 1 AC 501 at p. 518. See also *HIH Casualty & General* v *Chase Manhattan Bank* [2003] 2 Lloyd's Rep 61; [2003] UKHL 6 at para 5.

33. Section 18(1) of the 1906 Act.

34. Section 20(1) of the 1906 Act.

35. See section 18(2) of the 1906 Act in respect of non-disclosure and s. 20(2) in respect of misrepresentation.

36. [1995] 1 AC 501.

a prudent underwriter would take the matters which had not been disclosed into account in deciding whether to underwrite the risk and, if so, upon what terms. Accordingly it is not necessary for the insurer seeking to avoid to show that if the true and full picture had been disclosed it would have had a decisive effect on a prudent underwriter's acceptance of the risk or on the amount of premium demanded.

2.50 It is important to note that at common law in establishing whether a circumstance is material the issue is judged through the eyes of the hypothetical prudent insurer not through the eyes of a reasonable insured.[37] This has the potential to cause injustice if the insured does not know what a prudent insurer would regard as material. The law has changed in respect of certain contracts of insurance—see the discussion of the Financial Services and Markets Act 2000 and the Insurance Conduct of Business Rules below.[38]

2.51 However, merely establishing that the circumstance was material in that sense is not sufficient. At the time of publication of the last edition of this book the law had been stated by the Court of Appeal in *Container Transport International Inc* v *Oceanus Mutual Underwriting Association (Bermuda) Ltd*[39] as being that a defence of misrepresentation could succeed even if the actual underwriter's mind was unaffected by the non-disclosure. This was widely felt to be unjust and contrary to common sense. In *Pan-Atlantic* the House of Lords held that if misrepresentation or non-disclosure of a material fact did not in fact induce the making of the contract the underwriter is not entitled to rely upon it as a ground for avoiding the contract.

2.52 A question which often arises is where the burden of proof lies as to inducement. The general principles were summarised by Clarke LJ in *Assicurazioni Generali* v *Arab Insurance Group (BSC)*:[40]

(1) In order to be entitled to avoid a contract of insurance or reinsurance, an insurer or reinsurer must prove on the balance of probabilities that he was induced to enter into the contract by a material non-disclosure or by a material misrepresentation.
(2) There is no presumption of law that an insurer or reinsurer is induced to enter into the contract by a material non-disclosure or misrepresentation.
(3) The facts may, however, be such that it is to be inferred that the particular insurer or reinsurer was so induced even in the absence of evidence from him.
(4) In order to prove inducement the insurer or reinsurer must show that the non-disclosure or misrepresentation was an effective cause of his entering into the contract on the terms on which he did. He must therefore show at least that, but for the relevant non-disclosure or misrepresentation, he would not have entered into the contract on those terms. On the other hand, he does not have to show that it was the sole effective cause of his doing so.

2.53 Although the general principle is that the insured must disclose all material facts, there are significant exceptions to that general principle. The following do not have to be disclosed:

(1) matters which the insurer could be presumed to know already;
(2) matters which diminished the risk;

37. See for example *Mutual Life Insurance Co of New York* v *Ontario Metal Products Co Ltd* [1925] AC 344 and *Pan Atlantic* (note 36, *supra*) at p. 540 *per* Lord Mustill.
38. See the Law Commission Report No. 104, Cmnd 8064, para 4.51.
39. [1984] 1 Lloyd's Rep 476.
40. [2003] 1 WLR 577; [2003] Lloyd's Rep IR 131; [2002] EWCA Civ 1642 at para 62.

(3) matters in respect of which some disclosure has been made which would have put the insurer on inquiry to make further inquiries, but the insurer made no inquiry;
(4) matters of which disclosure has been waived by the insurer.

2.54 As to the first, matters which the insurer could be presumed to know already: the general principle was stated by Lord Mansfield in *Planche* v *Fletcher*:[41] "Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that whether it is established [practice] or not". For a more modern application of the same principle, see the judgment of Moore-Bick LJ in *Glencore International AG* v *Alpina Insurance Co Ltd*:[42]

> " . . . when an insurer is asked to write an open cover in favour of a commodity trader he must be taken to be aware of the whole range of circumstances that may arise in the course of carrying on a business of that kind. In the context of worldwide trading the range of circumstances likely to be encountered is inevitably very wide. That does not mean that the insured is under no duty of disclosure, of course, but it does mean that the range of circumstances that the prudent underwriter can be presumed to have in mind is very broad and that the insured's duty of disclosure, which extends only to matters which are unusual in the sense that they fall outside the contemplation of the reasonable underwriter familiar with the business of oil trading, is correspondingly limited."

2.55 The impact of this principle in the context of insurance policies relating to construction projects has not been the subject of discussion in the authorities, but is likely to be of significance. Underwriters of construction risks are generally of very great experience and indeed by the nature of their business are often likely to have much greater knowledge of what is particularly likely to lead to significant losses on their policies. The reason for the lack of authority in this context is likely to be in part at least because with that knowledge insurers know what information they require and are astute to ask for it.[43] On the other hand reinsurers abroad could not necessarily be expected to have the specialist knowledge of an underwriter writing construction risks in London.[44]

2.56 Secondly, matters which diminish the risk: that such matters do not have to be disclosed is clear.[45] In any event it would seem to be logically inconceivable that an underwriter who had written a risk would be held entitled to avoid a policy because the risk was better than he thought it was.

2.57 Thirdly, where the prudent insurer was put on inquiry to make further inquiries: obviously if the insurer made inquiries and was given accurate and complete answers to questions, then no question of non-disclosure would arise because, despite an initial failure to disclose by the time of underwriting the risk, the insurer would be in possession of all the information required. This issue is linked with whether a fair presentation of the risk has been made. The general principle was stated by Lord Esher MR in *Asfar* v *Blundell*:[46]

> "[it] is not necessary to disclose minutely every material fact: assuming that there is a material fact which he is bound to disclose, the rule is satisfied if he discloses sufficient to call the attention of the underwriters, in such a manner that they can see that if they require further information they ought to ask for it."

41. (1780) 2 Doug 511 at p. 513.
42. [2004] 1 Lloyd's Rep 111; [2003] EWHC 2792 at para 41.
43. An example of a case applying this principle in a construction case is *Margate Theatre Royal Trust Ltd* v *White* [2006] Lloyd's Rep IR 93; [2005] EWHC 2171 (TCC) at para 34.
44. See the decision of Mr Jonathan Hirst QC in *Limit No. 2 Ltd* v *AXA Versicherung AG* [2007] EWHC 2321 (Comm); [2008] LR IR Plus 4.
45. Section 18(3)(a) of the 1906 Act; *The Dora* [1989] 1 Lloyd's Rep 69.
46. [1896] 1 QB 123 at p. 129.

2.58 Thus the question is whether the insured discloses sufficient to alert the insurers to further inquiries. This principle has recently been discussed by the Court of Appeal in *Wise (Underwriting Agency) Ltd* v *Grupo Nacional Provincial SA*[47]—in particular, in the judgment of Longmore LJ at paragraph 111 emphasis was placed upon the link between fair presentation and insurers being put on inquiry.[48]

2.59 This principle may be of particular significance in respect of the insurance of construction risks. As already pointed out, insurers in this section of the market are generally very experienced and usually have a great deal more knowledge of what concerns them than the average insured. Accordingly it may often occur that something which the insured might regard as insignificant or of relatively low importance might put the insurer with the knowledge of an insurer specialising in the market on notice to make further inquiries.

2.60 Fourthly, the insurer may waive disclosure of information.[49] On one analysis this possibility overlaps with the exception of matters in respect of which the insurer has been put on notice,[50] but it goes further.

2.61 In *Roberts* v *Plaisted*[51] Purchas LJ accepted the following proposition put before the Court of Appeal:

> "The right to receive full disclosure of material matters known or deemed to be known by the proposed assured is subject to expansion, restriction or waiver by the insurers. In the case of non-marine insurance these aspects of the problem normally fall to be considered in the context of questions asked or omitted in the proposal form issued by insurers to be completed by the proposed assured."

2.62 Thus an insurer may limit the scope of the insured's duty of disclosure by the nature of questions on a proposal form: see for example *Economides* v *Commercial Union*.[52] A very typical example is where the proposal form asks for details of losses in the previous three years. Generally in that situation the insured would not have a duty to disclose losses four or more years prior to the date of the placing of the insurance. Again, given the specialist skills of those underwriting construction risks, if a lengthy proposal form is issued by insurers an insured may well be taken to have complied with his duty of disclosure if he simply answers the questions on the proposal form accurately—at least in respect of the matters touched on by the questions in the proposal form.

Material circumstances in the context of construction contracts

2.63 Against those general principles, it is possible to point to matters which are likely to be held to be material in the proposal of risks relating to construction projects.

2.64 Material facts are generally classified into two categories: first, those which relate to the insured subject matter concerning the likelihood or degree of a loss, such as physical condition and geographical environment ("physical hazard") and secondly, those relating to the insured, for example a history of deceit or dishonesty ("moral hazard").

47. [2004] 2 Lloyd's Rep 483; [2004] EWCA Civ 962.
48. See also in this context the judgment of Hobhouse J in *Iron Trades Mutual* v *Compania de Seguros* [1991] 1 Re LR 213.
49. See s. 18(3)(c) of the 1906 Act.
50. See the analysis in *Wise* v *Grupo* (note 47, *supra*).
51. [1989] 2 Lloyd's Rep 341 at p. 345.
52. [1998] QB 587; see also *Joel* v *Law Union & Crown Insurance Co Ltd* [1908] 2 KB 863 at p. 878; *Schoolman* v *Hall* [1951] 1 Lloyd's Rep 139. *Economides* was cited with approval by the Privy Council in *Zeller* v *British Caymanian Insurance Co Ltd* [2008] Lloyd's Rep IR 16; [2008] UKPC 4.

2.65 The second category is of general application to insurance contracts, particularly where an insured's history might alert the insurer to a heightened possibility of dishonest claims under the policy,[53] or to an insured's straitened circumstances which might lead to the insured cutting corners increasing the risk of an accident occurring.[54]

2.66 In the first category many matters will be particularly relevant to the insurance construction risks. The following is by no means a complete list, but the matters likely to be material to an insurer's assessment of risk in respect of a construction project will include:

(1) the type of project, e.g. office building, bridge, tunnel, dam etc;
(2) the experience of the contractor;
(3) the geographical situation of the project;
(4) local conditions;
(5) the risks associated with construction machinery and equipment will be influenced by the value of the equipment and the experience of the personnel operating it. Training and maintenance will be important factors;
(6) assessment of third party liability will be based principally upon the local environment, the proximity of the nearest buildings, how those buildings are constructed and their contents. The underwriter will need to know whether they are liable to be damaged by construction work, pile driving, tunnel work etc., for example where the project is located next to a railway line;
(7) as the method of construction will have a major impact on the underwriter's assessment of risk, he will need details of the facts in that regard;
(8) matters relating to the value of the project relevant to calculating premium.

These matters are discussed in greater detail in Chapter 6 below.

Waiver of non-disclosure or misrepresentation

2.67 We have touched above upon waiver in respect of the matters which have to be disclosed. However, a very important principle is that an insurer otherwise entitled to avoid a policy may lose that right by waiver or affirmation. The essential principle to understand is that non-disclosure or misrepresentation gives an insurer a right to avoid a policy, but the avoidance is not automatic. Accordingly an insurer is entitled to make a positive decision not to exercise a right of avoidance. In other cases the insurer may be held to have affirmed the policy, for example by accepting premium[55] or by serving a notice of cancellation which was inconsistent with treating the policy as being at an end.[56]

53. Thus, for example, outstanding charges are material facts, even if denied by the insured who is subsequently acquitted: *Inversiones Manria SA* v *Sphere Drake Insurance plc (The Dora)* [1989] 1 Lloyd's Rep 69; *Brotherton* v *Aseguradora Colseguros SA (No. 2)* [2003] Lloyd's Rep IR 746; [2003] EWCA Civ 705; *North Star Shipping Ltd* v *Sphere Drake Insurance plc* [2006] 2 Lloyd's Rep 183; [2006] EWCA Civ 378.

54. However, it will seemingly take a strong case before this type of non-disclosure will entitle insurers to avoid—see the decision of Tugendhat J in *Norwich Union Insurance plc* v *Meisels* [2007] Lloyd's Rep IR 69; [2006] EWHC 2811 (QB). An important factor will be whether the insured was honest—see also *Economides* v *Commercial Union* (note 52, *supra*).

55. *Drake Insurance plc* v *Provident Insurance plc* [2004] QB 601; [2003] EWCA Civ 1834.

56. See *Wise* v *Grupo* (note 47, *supra*).

Basis clauses

2.68 It is important to note that many policies contain clauses the effect of which is that the insured warrants the truth of answers given in a proposal form—see for example *Unipac (Scotland) Ltd* v *Aegon Insurance Co (UK) Ltd*[57] in which the proposal form contained the following declaration:

> "I/We declare that to the best of my/our knowledge and belief all statements and particulars contained in this proposal are true and complete, and that no material fact has been withheld or suppressed.
> I/We agree that this proposal shall be the basis of the contract between me/us and Aegon Insurance Company (UK) Limited and I/We agree to be bound by the terms of the policy"

2.69 The court held that the answers given in the proposal form were not true and complete and that upon the basis of that clause insurers were entitled to refuse indemnity even in the absence of an election to avoid the policy.

2.70 Thus where a "basis" clause is incorporated into the policy, insurers may be able to refuse indemnity even where a right to avoid has been lost.[58]

Duration of the insured's duty

2.71 If the insured seeks to vary the terms of the insurance once it has been effected, he will be under an obligation to disclose facts relevant to the proposed variation: see *Lishman* v *Northern Maritime*.[59] By contrast, when a policy is renewed there is a full duty to make disclosure.

2.72 Often a policy will contain a clause requiring the insured to notify insurers of any alteration in the risk. Such clauses tend to be construed strictly against the insurer.[60] In the absence of such clauses it is well established by authority that there is no continuing duty of disclosure on the part of the insured.[61] The scope of the duty post-contract was considered extensively by the House of Lords in "*The Star Sea*".[62] It was held that while in the pre-contract stages there was a positive duty to disclose all information which was material to the risk proposed and the assessment of the premium, it would be disproportionate for the insurer to be able to avoid the contract *ab initio* by reason of the post-contract failure of the assured to reveal all facts which the insurer might have an interest in knowing and which might affect his conduct. Accordingly when a claim is being made under the policy the duty is one of honesty and requires that the claim was not made fraudulently.

57. [1999] Lloyd's Rep IR 502.
58. See also in this context *Condogianis* v *Guardian Assurance Co Ltd* [1921] 2 AC 125; *Dawsons Ltd* v *Bonnin* [1922] 2 AC 413; *Rozannes* v *Bowen* (1928) 32 Ll L Rep 98.
59. (1875) LR 10 CP 179 at p. 181; see also *The Star Sea* [2003] 1 AC 469; [2001] 1 Lloyd's Rep 389 at para 54.
60. See for example *Law Guarantee & Accidental Sy* v *Munich Reinsurance Co* [1912] 1 Ch D 138; *Exchange Theatres Ltd* v *Iron Trades Mutual Insurance Co Ltd* [1984] 1 Lloyd's Rep 149; *Linden Alimak* v *British Engine Insurance Ltd* [1984] 1 Lloyd's Rep 416.
61. See for example *Niger Co Ltd* v *Guardian Assurance Co Ltd* (1921) 6 Ll L Rep 239; *New Hampshire Insurance Co* v *MGN Ltd*; [1997] LRLR 24; *NSW Medical Defence Union* v *Transport Industries Insurance Co Ltd* (1985) 4 NSWLR 107.
62. *Manifest Shipping Co Ltd* v *Uni-Polaris Shipping Co Ltd* [2003] 1 AC 469 [2001] UKHL 1.

2.73 Even that duty ends once a writ is issued—once the parties are engaged in litigation the rationale for the duty of good faith no longer applies because the parties are governed by the Rules of Court and, consequently, the duty is superseded by the rules of litigation.[63]

Fraudulent claims and fraudulent devices

2.74 It has long been held that if an insured makes a fraudulent claim—either a claim that has no honest basis at all or which is fraudulently exaggerated—all right to claim is forfeited.[64] This is so even in the absence of a clause to that effect, although well-drafted policies will include such a clause.

2.75 It has also been said in many authorities that the use of fraudulent devices in support of a claim also leads to the claim being forfeited. This proposition has been considered by the Court of Appeal in *Agapitos* v *Agnew*.[65] Having reviewed the authorities, Mance LJ said:[66]

> "What then is the appropriate approach for the law to adopt in relation to the use of a fraudulent device to promote a claim, which may (or may not) prove at trial to be otherwise good, but in relation to which the insured feels it expedient to tell lies to improve his prospects of a settlement or at trial? . . . In the present imperfect state of the law, fettered as it is by section 17, my tentative view of an acceptable solution would be: (a) to recognise that the fraudulent claim rule applies as much to the fraudulent maintenance of an initially honest claim as to a claim which the insured knows from the outset to be exaggerated; (b) to treat the use of a fraudulent device as a sub-species of making a fraudulent claim—at least as regards forfeiture of the claim itself in relation to which the fraudulent device or means is used (the fraudulent claim rule may have a prospective aspect in respect of future, and perhaps current, claims, but it is unnecessary to consider that aspect or its application to cases of use of fraudulent devices); (c) to treat as relevant for this purpose any lie, directly related to the claim to which the fraudulent device relates, which is intended to improve the insured's prospects of obtaining a settlement or winning the case, and which would, if believed, tend, objectively, prior to any final determination at trial of the parties' rights, to yield a not insignificant improvement in the insured's prospects—whether they be prospects of obtaining a settlement, or a better settlement, or of winning at trial; and (d) to treat the common law rules governing the making of a fraudulent claim (including the use of fraudulent device) as falling outside the scope of section 17 . . . On this basis no question of avoidance ab initio would arise."

2.76 In *The Mercandian Continent*[67] the Court of Appeal had to consider the use of a forged letter in the context of a liability policy. The insured had produced the forged letter in order to improve the chances of defeating the claim in respect of which indemnity would be sought. Insurers' defence was rejected—the fraudulent device was not directed towards improving the insured's chances of obtaining benefit under the liability policy.

63. *The Star Sea* (note 59, *supra*) applied by the Court of Appeal in *Agapitos* v *Agnew* [2003] 1 QB 556; [2002] EWCA Civ 247.

64. *Britton* v *Royal Insurance Co* 4 F & F 905; *Lek* v *Mathews* (1927) 29 Ll L Rep 141; *Orakpo* v *Barclays Insurance Services* [1995] LRLR 443; *Galloway* v *Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209; *The Star Sea* (note 59, *supra*) at para 62; *Axa General Insurance Ltd* v *Gottlieb* [2005] 1 Lloyd's Rep 369; [2005] EWCA Civ 112.

65. See note 63, *supra*.

66. At para 45.

67. *K/S Merc-Scandia XXXXII* v *Lloyd's Underwriters* [2001] 2 Lloyd's Rep 563; [2001] EWCA Civ 1575.

INDEMNITY

2.77 It is a fundamental principle that the insured can recover only what he has lost, so it is an implied term of a contract of insurance that it will provide no more than indemnity. There are three exceptions to this: first, relating to life policies; secondly, in relation to valued policies; and thirdly where a surplus is available following a subrogated claim.

PROXIMATE CAUSE

2.78 The principle of proximate cause inherent in a contract of insurance requires an insured to show that the loss was caused by an insured peril.

2.79 As stated above, the Marine Insurance Act 1906 sets out principles which reflect the common law as to non-marine insurance. Section 55(1) of the 1906 Act provides in respect of causation:

> "Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against."

2.80 The proximate cause means the effective, dominant or real cause (*Symington & Co* v *Union Insurance of Canton Ltd*[68]) and will be a question of fact in each case. Application of the principle depends upon whether the question is (a) was the loss caused by an insured peril, or (b) was the loss caused by an excepted cause? Although the result may be affected by the terms of the contract, generally the principle will be applied upon the basis that the policy was intended to cover any loss which can be fairly attributed to the operation of an insured peril, rather than applying fine distinctions based upon the wording of different policies.[69]

2.81 The most difficult problems occur where more than one cause has led to a loss.

Is the loss caused by a peril insured against?

2.82 Where the last of successive causes is a peril insured against, the loss is caused by that peril.[70] However, there can be cases where on a common sense basis the last of successive causes was not the real cause. In *Leyland Shipping Co Ltd* v *Norwich Union Fire Insurance Society Ltd*[71] a ship was torpedoed during the First World War. She was towed to a quay in the outer harbour at Le Havre, but the port authorities, worried that she would sink there and obstruct a quay needed for Red Cross embarkation, ordered the ship out. She was taken out where under heavy seas she sank. Perils of the sea was an insured peril, whilst the consequence of hostilities was an excepted peril. The House of Lords held that the proximate cause was the torpedo. Some loss by explosion and incoming seawater was an inevitable consequence of the ship being struck by the torpedo. Accordingly the claim failed. A similar case was *Samuel* v *Dumas*[72] in which scuttling (an excepted peril) was immediately followed by the incursion of

68. (1928) 45 TLR 181.
69. *Re Etherington and Lancashire and Yorkshire Accidental Death Insurance Co* [1909] 1 KB 591; *Becker, Gray & Co* v *London Assurance Corpn* [1918] AC 101.
70. *Trew* v *Railway Passengers' Assurance Co* (1861) 6 H & N 839; *Marsden* v *City and County Insurance Co* (1866) LR 1 CP 232; *Reynolds* v *Accidental Insurance Co* (1870) 22 LT 820.
71. [1918] AC 350.
72. [1924] AC 431.

seawater (an insured peril). The House of Lords rejected the claim, Viscount Finlay saying:[73]

> "It is obvious that the proximate cause of the loss, and indeed its only cause, was in the present case the act of scuttling. It was for the purpose of letting in the sea-water that the holes were made, and all that followed was the inevitable consequence of what had been done."

2.83 Where the preceding cause but not the last cause is the peril insured against, the question is whether the last cause was so closely connected with the preceding cause that the loss, which is the effect of the last cause, is also the effect of the preceding cause and is therefore caused by a peril insured against. Thus in *Stanley* v *Western Insurance Co*[74] Kelly CB said in respect of a policy covering loss by fire:

> "Any loss resulting from an apparently necessary and bona fide effort to put out a fire, whether it be by spoiling the goods by water, or throwing articles of furniture out of the window, or even the destroying of a neighbour's house by an explosion for the purpose of checking the progress of the fire, in a word, every loss that clearly and proximately results, whether directly or indirectly from the fire, is within the fire."

2.84 If the sequence is interrupted by a new and independent cause which is not insured, the cause of the loss is the intervening cause and therefore is not insured. To give two examples from the cases: in *Gregson* v *Gilbert*[75] the master of a slave ship, wishing to lighten his vessel because she was running out of water, threw some slaves overboard. It was held that the loss of slaves was not a loss by perils of the sea.[76] In *Taylor* v *Dunbar*[77] a ship carrying meat was delayed by a storm, in consequence of which the meat became putrid and had to be thrown overboard. It was held that the loss of the meat was not a loss by perils of the sea.

2.85 Human nature being what it is, the reaction to an insured peril will often be an act of negligence. Negligence in the face of a peril does not break the chain of causation: see *Yorkshire Dale Steamship Co* v *Minister of War Transport*.[78] Nor is it relevant if it was an act of negligence which led to encounter with the peril which causes the loss—thus in *The Warilda*[79] the House of Lords held that a collision was caused by the warlike operation on which the ship was engaged and not by the negligence in navigation immediately before the impact. However, the position will be different if negligence is the peril insured against or is an excepted peril, in which case negligence is of course relevant.

2.86 Where causes operate concurrently, one cause being an insured peril and none of the other causes being excepted perils, the cause of the loss is the peril insured against and the other concurrent causes are ignored: see *The Miss Jay Jay*.[80]

73. At pp. 452 to 453. Surprisingly, Lord Sumner dissented on this point.

74. (1868) LR 3 Exch 71 at p. 74. The passage quoted was approved in *Canada Rice Mills Ltd* v *Union Marine and General Insurance Co Ltd* [1941] AC 55 at p. 71.

75. (1783) 3 Doug KB 232.

76. This is one of a number of cases illustrating the callousness of the slavers—see also *Jones* v *Schmoll* (1785) 1 Term Rep 130n; *Tatham* v *Hodgson* (1796) 6 Term Rep 656.

77. (1869) LR 4 CP 206.

78. [1942] AC 691.

79. *Attorney General* v *Adelaide Steamship Co* [1923] AC 292.

80. *Lloyd Instruments Ltd* v *Northern Star Insurance Co Ltd* [1987] 1 Lloyd's Rep 32. See also *Dudgeon* v *Pembroke* (1877) LR 2 App Cas 284; *Grill* v *General Iron Screw Collier Co* (1866) LR 1 CP 600; *Reischer* v *Borwick* [1894] 2 QB 548.

Is the loss caused by an excepted cause?

2.87 Many of the most difficult problems arise where it can be argued by the insured that the loss has been caused by an insured peril, and by the insurer that it has been caused by an excepted peril.

2.88 Where the peril insured against is preceded by an excepted cause, there is no loss under the contract if the peril insured against results from the excepted cause: see *Leyland Shipping Co Ltd* v *Norwich Union Fire Insurance Society Ltd*;[81] *Samuel* v *Dumas*;[82] *Cornish* v *Accident Insurance Co*.[83] However, if the peril insured against is a new cause, independent from the excepted cause, the cause of the loss is the insured peril: see *Lawrence* v *Accidental Insurance Co*.[84]

2.89 Where the peril insured against precedes an excepted cause, the peril insured against is the proximate cause providing it has a causal connection with the loss: see for example *Mardorf* v *Accident Insurance Co*.[85]

2.90 Where the loss results from two concurrent and independent causes, one cause being a peril insured against and the other an excepted cause, the loss is not covered by the contract: see *Wayne Tank and Pump Co Ltd* v *Employers' Liability Assurance Corpn Ltd*;[86] *Midland Mainline Ltd* v *Eagle Star Insurance Co Ltd*;[87] *Tektrol* v *International Insurance Company of Hanover Ltd*.[88]

WARRANTIES AND CONDITIONS

2.91 A contract of insurance will contain a variety of terms: some are express and others are implied.

2.92 The following are implied conditions of every policy of insurance:

(1) that the parties will observe utmost good faith towards each other (see above);
(2) that there is a subject matter of insurance in existence at the time when the policy is effective;
(3) that the subject matter of the insurance is sufficiently clearly described in the policy to enable it to be identified and to enable the risk to be undertaken by the insurers to be defined;
(4) that the insured has an insurable interest in the subject matter of the insurance (see above).

2.93 Often these terms will be the subject of express terms of the policy. To a limited extent these terms or the effects of these conditions can be modified by agreement between the parties—for example it is very often the case that professional indemnity policies contain a clause stating that insurers will not take advantage of a right which would otherwise exist to avoid a policy where non-disclosure is unintentional and non-fraudulent.

81. See note 71, *supra*.
82. See note 72, *supra*.
83. (1889) 23 QBD 453.
84. (1881) 7 QBD 216.
85. [1903] 1 KB 584.
86. [1974] QB 57; [1973] 2 Lloyd's Rep 237.
87. [2004] 2 Lloyd's Rep 604; [2004] EWCA Civ 1042.
88. [2005] 2 Lloyd's Rep 701; [2005] EWCA Civ 845; at para 2.

2.94 An important distinction to be noted is between terms which are "warranties", terms which are "conditions precedent" and other conditions. A warranty is a term of the insurance contract which, if broken, will entitle the insurer to terminate the contract from the date of the breach, whether or not the breach is material to the risk or loss.[89] However, in respect of the effect of warranties as in other respects, it is important to bear in mind the effect of the Financial Services and Markets Act 2000 and the Insurance Conduct of Business Rules—see below.

Warranties

2.95 In the leading case of *The Good Luck*,[90] the House of Lords held that the effect of a breach of warranty is to create an automatic discharge of the insurer's future liabilities but not to confer an option upon the insurer to end the contract. However, the House of Lords pointed out that, while the insurer is automatically discharged from future liability, all previous liabilities are preserved, for example contractual obligations relating to arbitration continue.[91]

2.96 Because of the harsh effects upon an insured of breach of warranty, the courts will construe any warranty upon which an insurer wishes to rely strictly against the insurer. See for example *Hussain* v *Brown*[92] where Saville LJ said:

> " . . . it must be remembered that a continuing warranty is a draconian term. As I have noted, the breach of such a warranty produces an automatic cancellation of the cover, and the fact that a loss may have no connection at all with that breach is simply irrelevant. In my view, if underwriters want such protection, then it is up to them to stipulate for it in clear terms."

2.97 In that passage, Saville LJ referred to a "continuing warranty". This expression highlights an important distinction between "present" and "future" warranties. A present warranty is a promise that a particular state of affairs exists at the time that the warranty is made ("I warrant that Gordon Brown is Prime Minister"). A future warranty is a promise that the state of affairs will remain true ("I warrant that during the duration of this policy Gordon Brown will remain Prime Minister"). From an insurer's point of view, a future or continuing warranty is of much greater value than a present warranty—often an insurer will have good reasons for wanting to be sure that the insured maintains premises in a condition whereby the risk of loss is reduced. For example, in insurances relating to industrial premises, a fire insurer will be keen not only to know that a sprinkler system is in place at the time that the insurance is placed, but also to have a warranty that the sprinkler system will be maintained and effective throughout the contract period.

89. See for example *Thomson* v *Weems* (1884) 9 App Cas 671; *Conn* v *Westminster Motor Insurance Association* [1966] 1 Lloyd's Rep 407.

90. *Bank of Nova Scotia* v *Hellenic Mutual War Risks Association (Bermuda) Ltd* [1992] 1 AC 233.

91. For a helpful review of the authorities following *The Good Luck* reference can be made to *Lexington Insurance Company v Multinacional de Seguros* [2008] EWHC 1170 (Comm).

92. [1996] 1 Lloyd's Rep 627 at p. 630. For another example of a warranty being construed strictly against insurers, see *Paine* v *SJO Catlins* [2005] Lloyd's Rep IR 665; [2004] EWHC 3054 (TCC). Reference should also be made to the stout hearted decision of the Court of Appeal in *Kausar* v *Eagle Star Insurance Co Ltd* [2000] Lloyd's Rep IR 154; [1996] 5 Re LR 191. Another relatively recent example of the courts' approach is the Court of Appeal decision in *HIH Casualty & General Insurance Co Ltd* v *New Hampshire Insurance Co* [2001] 2 Lloyd's Rep 161; [2001] EWCA Civ 735.

Conditions precedent

2.98 Insurance policies often stipulate that certain terms are "conditions precedent". Conditions precedent can be divided into two categories—conditions precedent to the existence of the policy or to the attachment of risk[93] and conditions precedent to liability. In practice the latter category of case proves considerably more troublesome.

2.99 In contracts drafted by experienced underwriters (or competent lawyers retained by insurers), there will be an all embracing clause making compliance with the terms of the policy a condition precedent. The following is but one example of such wording:

> "Compliance with the requirements of this Policy shall be a condition precedent to the liability of the insurers."

2.100 The general principle of construction is stated as a robust principle of leaving the parties to their commercial bargain. So for example in *Thomson* v *Weems* Lord Blackburn said:[94]

> "It is competent to the contracting parties, if both agree to it and sufficiently express their intentions so to agree, to make the existence of anything a condition precedent to the inception of any contract; and if they do so, non-fulfilment is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material."

2.101 However, the courts will often find the effects of the principle of contractual freedom offensive where all the conditions precedent are likely to be suggested by the insurers with the sole (if understandable) objective of restricting underwriters' exposure. Accordingly clauses making contractual terms conditions precedent are liable to be construed against insurers' interests.[95] Indeed the courts are even willing on occasion to ignore the express words of a policy declaring a condition to be a condition precedent[96] although in the context of a modern insurance policy placed by competent brokers with specialist underwriters in respect of a substantial construction project, the courts are likely to start from the proposition that the policy means what it says.

2.102 If a condition is held by the court to be a condition precedent to liability, then (subject to the Insurance Conduct of Business Rules) compliance with the subject matter of such a condition is just that, namely a condition precedent to insurers' liability so that if the condition is not satisfied, insurers are not liable.

Other conditions

2.103 Generally if a term of the policy is not a warranty, and not a condition precedent, it is a condition which if breached will entitle the insurer to damages but not to any other relief.

93. See for example *Silver Dolphin Products Ltd* v *Parcels & General Assurance Association Ltd* [1984] 2 Lloyd's Rep 404.

94. (1884) 9 App Cas 671 at p. 683.

95. See for example *Gamble* v *Accident Assurance Co Ltd* (1870) IR 4 CL 204; *Re Etherington and Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591; *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415; *Black King Shipping Corpn and Wayang (Panama) SA* v *Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep 437 at p. 469.

96. See for example *London Guarantee Co* v *Fearnley* (1880) 5 App Cas 911.

2.104 There was a time when the courts appeared to recognise another class of contractual term, an "innominate term".[97] It is now clear that there is no such additional class of contractual terms: see *Friends Provident Life & Pensions Ltd* v *Sirius International Insurance*.[98]

Insurance Conduct of Business Rules

2.105 What has been set out above is an attempt to summarise some of the most significant common law principles likely to be applicable in considering whether payment is to be made under policies relating to construction projects. However, it should be noted that under the Insurance Conduct of Business Rules ("ICOB"), brought into effect on 14 January 2005, and having statutory effect under section 138 of the Financial Services and Markets Act 2000, rule 7.3.6 provides:

> "An insurer must not:
> (5) unreasonably reject a claim made by a customer;
> (6) except where there is evidence of fraud, refuse to meet a claim made by a retail customer on the grounds:
> (a) of non-disclosure of a fact material to the risk that the retail customer could not reasonably be expected to have disclosed;
> (b) of misrepresentation of a fact material to the risk, unless the misrepresentation is negligent;
> (c) in the case of a general insurance contract, of breach of warranty or condition, unless the circumstances of the claim are connected with the breach . . . ".

2.106 A retail customer is a natural person acting for a purpose outside his or her trade, business or profession. Whilst rule 7.3.6(2) may be of limited application in practice in respect of insurance of construction projects, rule 7.3.6(1) applies to commercial customers as well as retail customers. We discuss the implications of ICOB in relation to the role of brokers in Chapter 7 below, in respect of making and handling of claims in Chapter 32 below and in respect of dispute resolution and available remedies in Chapter 33 below.

Limitation of actions

2.107 By section 5 of the Limitation Act 1980, actions founded on a contract not under seal shall not be brought after the expiration of six years from the date on which the cause of action accrued. This general rule in respect of the limitation of actions for breach of contract has an unusual application in respect of contracts of insurance, an application which is liable to catch parties unexpectedly.

2.108 It might be thought that if an insurer is sued in respect of a refusal to indemnify an insured against a loss, the cause of action would accrue at the date of refusal. That is not the law. The position in English law is that the insurer is in breach of the contract of insurance as soon as the insured has suffered loss as a result of an insured event.

2.109 If the insurance is a contract of indemnity insurance, it is an agreement by an insurer to confer on an insured a contractual right to indemnity which on the face of it comes into existence immediately when loss is suffered by the happening of an event insured against:

97. See *Alfred McAlpine* v *BAI* [2000] 1 Lloyd's Rep 437; *Glencore International AG* v *Ryan (The Beursgracht)* [2002] 1 Lloyd's Rep 574; [2002] EWCA Civ 2051.
98. [2005] 2 Lloyd's Rep 517; [2005] EWCA Civ 601.

see *per* Lord Goff in *Firma C-Trade SA* v *Newcastle Protection and Indemnity Association (The Fanti)*.[99]

2.110 For the purposes of determining the date at which an insured's cause of action accrued, there is in general a distinction to be drawn between policies of liability insurance on the one hand and all other types of insurance on the other. The cause of action does not accrue under a liability policy until the liability of the insured is established by judgment, arbitration or binding settlement: see *Bradley* v *Eagle Star Insurance Co Ltd*.[100]

2.111 In respect of other types of insurance policy, including property, life, marine and other forms of insurance, the law has long been that, because an insurance policy is to be construed as insurance against the occurrence of an insured event, the occurrence of that event is treated as equivalent to a breach of contract by the insurer. Accordingly, in the absence of policy terms affecting the matter, the limitation period begins to run as soon as the insured event occurs, even though no claim has been made: *per* Potter LJ in *Virk* v *Gan Life Holding plc*.[101] In property insurance, the cause of action accrues on the occurrence of the peril: see *Callaghan* v *Dominion Insurance Co.*[102]

Subrogation

2.112 Subrogation is a fundamental corollary of the principle of indemnity. The insurer benefits in two ways from the principle of subrogation. First, the insurer is entitled to receive the benefit of all the insured's rights and remedies against third parties: for example by bringing proceedings in the name of the insured: see *Mason* v *Sainsbury.*[103] Secondly, the insurer is entitled to recover from the insured any benefit received which reduces the loss for which he has been indemnified: see *Castellain* v *Preston*.[104] In that case Brett LJ summarised the principle as follows:

> " . . . as between the underwriter and the assured, the underwriter is entitled to the advantage of every right of the assured, whether such right consists of contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such a right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished."

2.113 Subject to express policy terms, the right of subrogation does not arise until the insurers have admitted the insured's claim[105] and have paid the sum payable under the policy. Accordingly, where insurers dispute the insured's right to indemnity, no right of subrogation arises: see *Page* v *Scottish Insurance Corpn*;[106] *Scottish Union National Insurance Co* v *Davis.*[107]

2.114 Problems arise where the recovery from a third party does not make whole the loss in respect of which insurers have made a payment. *In Lord Napier & Ettrick* v *Hunter*[108] it was

99. [1991] 2 AC 1 at pp. 35 to 36; [1987] 2 Lloyd's Rep 299 at p. 202.
100. [1989] AC 957; [1989] 1 Lloyd's Rep 465.
101. [2000] Lloyd's Rep IR 159 at p. 162.
102. [1997] 2 Lloyd's Rep 541.
103. (1782) 3 Doug KB 61.
104. (1883) 11 QBD 380.
105. See *Midland Insurance Co* v *Smith* (1881) 6 QBD 561 at p. 564.
106. (1929) 140 LT 571.
107. [1970] 1 Lloyd's Rep 1.
108. [1993] 1 AC 713.

held that the proper approach is have regard to assumption of risk. Accordingly if there is a £100,000 loss of which the insured bears the first £1,000 as an excess so that the insurer pays out £99,000 and a third party is sued for and pays £99,000, the insurer will receive the whole of the recovery. Conversely, if the insured has suffered losses in excess of policy limits, the recoveries will be applied to reduce the insured's uninsured losses in excess of policy cover ahead of the amount insured under the policy. This approach has been described by Rix J as the "top-down" approach.[109] Thus, to change the example, if the insured suffered a £100,000 loss, but had cover only for £25,000, so that the insured bore £75,000 of the loss, the first £75,000 of any recoveries would go to the insured.

2.115 An important practical consequence of the doctrine of subrogation is that the insured is obliged to assist the insurers in enforcing any claims which the insured may have against third parties: *Dane* v *Mortgage Insurance Corpn.*[110] The obligation thus imposed upon the insured can be very burdensome. We summarise in Chapter 33 below the principal steps in litigation and arbitration. If an insurer requires the insured to commence and pursue proceedings against a third party, those proceedings are brought in the name of the insured who is, in the eyes of the court, the party before the court. Thus, for example, obligations to give disclosure of documents are imposed upon the insured as litigant. The insured will also have to be prepared to give evidence either personally (if an individual insured) or through employees (if a corporate insured). Both the preparation of witness statements and attendance at trial can be time consuming and disruptive to businesses.

2.116 The principle permits the insurer to proceed against the insured for taking any action which causes prejudice to its rights against a third party. For example, if the insured enters into a binding agreement to waive all future claims against a third party, the insurer would be able to sue for the amount otherwise claimable: *Phoenix Assurance Co* v *Spooner*;[111] *West of England Fire Insurance Co* v *Isaacs.*[112]

2.117 The insurer can therefore pursue any contractual or tortious claim against a third party provided the relevant claim arises from the insured loss. The insurer cannot sue third parties in his own name: see *Bee* v *Jenson (No. 2)*.[113] As stated above, any action will be brought in the insured's name. Accordingly any rights and remedies available to the insured will be equally available to the insurer, and any defences or other factors preventing the insured's claim from succeeding, for example, expiry of a limitation period, will be available to the third party: *Graham* v *Entec Europe Ltd*.[114]

2.118 It is to be noted that where an insured has been fully indemnified by the insurer, the insured himself will have suffered no loss. However, it is well established that generally a third party sued by an insurer exercising rights of subrogation is not entitled to rely upon the fact that the insured in whose name proceedings are brought has suffered no loss as a result of being paid by insurers.[115]

109. *Kuwait Airways Corporation* v *Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664 at p. 695. The point was not considered on appeal in that case: [1997] 2 Lloyd's Rep 686 and [1999] 1 Lloyd's Rep 806.

110. [1894] 1 QB 54, particularly at p. 61.

111. [1905] 2 KB 753.

112. [1896] 2 QB 377 at p. 383, affirmed [1897] 1 QB 226.

113. [2008] 1 Lloyd's Rep 221; [2007] EWCA Civ 923.

114. [2004] Lloyd's Rep IR 660; [2003] EWCA Civ 1177.

115. *Bradburn* v *Great Western Railway* (1874) LR 10 Ex 1; *Parry* v *Cleaver* [1970] AC 1; *The Yasin* [1979] 2 Lloyd's Rep 45.

2.119 If the insured is underinsured, he retains control of the action, even where the insurer has made full payment,[116] unless the insurer has taken an assignment of the cause of action. This will remain the position unless the insurance policy provides that the insurer has the right to reach settlements on the insured's behalf (whether or not litigation has been commenced). Any settlement reached by an insurer should make clear whether it is made on behalf of the insured as well.

2.120 As pointed out above, under rights of subrogation insurers have the right to take action in the name of the insured. However, a point for insurers is to consider the solvency of the insured, because if they use the name of a corporate insured which subsequently becomes insolvent, the insurer's action may fail because the insured will have become non-existent and cannot therefore be a party to an action.[117] Problems can also arise as to competing rights in respect of monies recovered from a third party: see for example *Re Ballast plc; St Paul Travelers Insurance Co Ltd* v *Dargan*.[118] Reference should be made to specialist works on insolvency for more information.

2.121 Rights of subrogation can be, and very often are, affected by the express terms of the insurance policy. In particular construction contracts often contain waiver of subrogation clauses. Moreover the existence of co-insurance may affect the right of one party involved in a project to sue another. This is a complicated area of law which frequently gives rise to practical problems. Because of the importance of this subject this is dealt with in a separate chapter of this book—see Chapter 13 below.

Composite policies

2.122 Composite policies are discussed in Chapter 5 below ("classes of insurance"). At this point it should be noted that distinctions are drawn between composite policies and co-insurances. The distinctions can be crucial in regard to insurers' rights to avoid for non-disclosure, insurers' remedies following breach of warranty or breach of condition, and insurers' rights of subrogation.

CONTRIBUTION

2.123 This is a very important principle in the construction context. The insured may have more than one contract covering the same loss; for example, the employer may carry its own insurance, and may also be covered as a joint insured under one of the standard form contracts discussed below which requires the contractor to arrange joint names all risks insurance on the works on behalf of the employer and contractor. For an example of such a case in a construction context, see *Bovis Construction Ltd* v *Commercial Union Assurance Co plc*.[119]

2.124 The principle of indemnity referred to above has the consequence that the party with the benefit of two policies of insurance will not be able to recover more than a full indemnity; on the other hand, in the absence of any contractual term to the contrary, the insured can choose under which policy to bring his claim.

116. See *Commercial Union Assurance Co* v *Lister* (1874) LR 9 Ch App 483.
117. See for example *Steans Fashions Ltd* v *Legal and General Assurance Society Ltd* [1995] BCC 510.
118. [2007] Lloyd's Rep IR 742; [2006] EWHC 3189 (Ch).
119. [2001] 1 Lloyd's Rep 416.

2.125 Once the insurer called upon to pay has discharged its obligation, it has an equitable right to call on the other insurers to bear their proportion of the loss pursuant to a "right of contribution". In practice, application of the principle is complex as frequently there may be difficulty in determining whether the policies are sufficiently similar. For the right of contribution to arise all the policies must:

(1) comprise the *same subject matter* relating to the claim;
(2) cover the *same peril* in respect of the loss;
(3) have a *common interest* (the same insured);
(4) be *in force at the same time* as the loss, so if one contract has lapsed or not yet attached there is no double insurance;
(5) be a *valid and effective contract* of insurance; and
(6) contain *no provision excluding any insurers from contribution*, for example where the loss is covered by more specific insurance.

2.126 In practice the loss is likely to be apportioned between insurers on the basis of various complex rules of practice that insurers have developed (and are not discussed here) and will also be influenced by whether the contractual insurance cover is subject to average or specific (that is, not subject to average).

2.127 The right of contribution crystallises at the time of the insured's loss,[120] so if an insurer against which a contribution is sought has a defence against the insured which occurred prior to the loss, the principle will not apply: see for example *Monksfield* v *Vehicle and General Insurance Co Ltd*.[121]

2.128 Some contract conditions state that if the risk is covered elsewhere the first contract will not afford cover—thus, wording not infrequently encountered is an exclusion of any loss "in respect of which the insured is entitled to indemnity under any other insurance except in respect of the excess beyond the amount which would have been payable under such insurance, if this policy had not been effected". If only one of two competing policies has such a clause, then it is effective to protect the insurer. However, if both policies contain such a clause then both policies will be held to be on risk: see *Weddell* v *Road Transport & General Insurance Co Ltd*;[122] *Austin* v *Zurich General Accident Insurance Co Ltd*;[123] *National Employers' Mutual General Insurance Association Ltd* v *Haydon*.[124]

2.129 Alternatively, the contract may provide that it will pay its rateable proportion of any loss only if any other contract covers the same risk. Such clauses are frequently found. The disadvantage of such a clause for the insured is the risk that a further insurance contract under which it is entitled to receive part payment of its claim may be unenforceable, for example, for non-disclosure, wilful misconduct, non-payment of premium or some other breach of duty, where such contract was effected by another party, for example, a contractor on a joint names basis.

2.130 In a case where the insured has a claim against more than one insurer, each having a rateable proportion clause in broadly similar terms, if one insurer pays the claim in full, it may then be unable to seek a contribution from the other insurers because it is settled law that equitable restitutionary rights do not exist in relation to voluntary payments: see *Legal &*

120. See *Legal & General Assurance Society Ltd* v *Drake Insurance Co Ltd* [1992] QB 887; [1991] 2 Lloyd's Rep 36.
121. [1971] 1 Lloyd's Rep 139.
122. [1932] 2 KB 563.
123. (1944) 77 Ll L Rep 409.
124. [1980] 2 Lloyd's Rep 149.

General v *Drake*[125] and *Bovis* v *Commercial Union*.[126] In a case where one insurer is willing to honour its bargain and the other wrongfully refuses to indemnify this can produce injustice —either the honourable insurer loses its right to contribution for no good reason, or the innocent insured must await indemnity as to the dishonourable insurer's proportion. This was the position in *Drake Insurance plc* v *Provident Insurance plc*.[127] The Court of Appeal held that the insurer who had indemnified in full was entitled to recover contribution because it had paid under reserve, however it cannot be said that this highly technical position is satisfactory.

REINSURANCE

2.131 We have said that this book is not intended to substitute for more general treatises on insurance law. Still less is this book intended or going to attempt to do more than give a general background to reinsurance.

2.132 Some explanation of reinsurance is necessary because in some cases the ability of an insurer to pay a claim will depend upon the reinsurers standing behind the insurer. This may be because the primary insurer has limited capital in the first place, because the primary insurer gets into financial trouble, or because the size of the risk being underwritten is beyond any single insurer. In case such problems occur, we give an overview of the reinsurance market here.

2.133 Reinsurance involves spreading the risk of insurance and is particularly relevant in a construction context where the risks insured are likely to exceed an insurer's capacity and financial resources. Reinsurance is essentially a form of insurance which enables an insurance company to insure itself against suffering too great a loss from its insurance by laying off or passing on part of its liability to another insurer (the reinsurer).

2.134 The three basic methods of effecting reinsurance are facultative, treaty, and facultative obligatory reinsurance. Under facultative reinsurance each reinsurance is offered individually to the reinsurer and either underwritten or declined. Generally facultative reinsurance applies to single risks and is particularly common for very large or unique construction projects.

2.135 Under facultative reinsurance the terms of the reinsurance may be negotiated by the parties and there is no obligation on the reinsured to reinsure and no obligation on the reinsurer to accept. A reinsurer may delegate its power to reinsure to a broker by means of a broker's open cover (obligatory facultative reinsurance, see below) under the terms of which the reinsurer binds itself to take any reinsurance proposals of a description specified in the broker's authority.

2.136 The second main method of reinsurance is under an obligatory treaty whereby a formal agreement obliges the reinsured to cede liability on an individual risk to the reinsurer and the latter is obliged to accept such cessions up to agreed limits. Treaty reinsurance frequently applies to a portfolio of risks.

2.137 Reinsurance treaties are either proportional or non-proportional. Under a proportional treaty the reinsurer offers to reinsure an agreed proportion of any risk accepted by the reinsured which falls within the terms of the treaty. Proportional treaties are normally in surplus form, whereby the reinsured cedes to the reinsurer in the agreed proportions the

125. See note 120, *supra*.
126. See note 119, *supra*.
127. [2004] QB 601; [2003] EWCA Civ 1834.

excess of any liability over the maximum that the reinsured is willing to pay without reinsurance. The quota share treaty is a variation under which the reinsured has no discretion to retain the risks for himself and the agreed proportion of any risk accepted by him is automatically ceded to the reinsurer. A proportion of the premium on the original business is passed on, or ceded, to the reinsurer in consideration of the reinsurer paying an equivalent proportion of any claims.

2.138 Non-proportional treaties have no fixed share. Under an excess of loss treaty the reinsurer agrees to provide an indemnity in relation to all sums paid by the reinsured in excess of its retention (sometimes referred to as the deductible or excess). A stop loss treaty, however, is concerned with the aggregate losses suffered by the reinsured and will come into effect where the reinsured's losses reach a given level. The premium is unlikely to bear any relationship to the premium for the original business.

2.139 In addition to facultative and treaty reinsurance there is a further class known as "facultative obligatory" or "open cover". Under this reinsurance arrangement the reinsured may at its own option cede a share of certain specified risks, which share the reinsurer is bound to accept. This method of reinsurance is a hybrid of facultative and treaty reinsurance. It is facultative to the reinsured because the reinsured has complete discretion over whether to make cessions. However, the reinsurance under this form of cover is more akin to a treaty because the reinsurer is obliged to accept a cession and the obligation to accept cessions applies not only to each individual risk but to all risks of a class that the reinsured may wish to cede. The fundamental requirement of facultative reinsurance, that is the reinsurer's discretion to decline any particular risk, does not apply to facultative obligatory reinsurance, hence this form of reinsurance is not particularly attractive to the reinsurer.

2.140 There is not usually any contractual relationship between the original assured and the reinsurer, so, in the event of the reinsured's default the insured has no right of action against the reinsurer unless the reinsurance policy otherwise provides by means of a "cut-through" clause. This clause confers a cause of action on the insured against the reinsurer, usually in the event of the reinsured's insolvency. However, the insured is not a party to the reinsurance agreement and the doctrine of privity of contract might deny the insured any remedy unless the Contracts (Rights of Third Parties) Act 1999 applies: it is suggested that generally the courts would hold that that Act would apply to such a clause.

Reasons for reinsurance

2.141 The main reasons for reinsurance include:

(1) Risk Transfer
Insurance companies may consider that their books of particular classes of insurance carry too large an element of a particular risk, for example, catastrophe risk, so reinsurance will be arranged to lay off the liabilities.

(2) Gross line underwriting
Reinsurance enables an insurance company to increase its insurance capacity, particularly where an insurance company views its capital and surplus as insufficient to support the capacity it requires in a particular class of business. This is advantageous when a new line of business is about to be built up and support is needed in the early stages while the portfolio is small.

(3) Arbitrage
Arbitrage in reinsurance involves the practice of selling insurance at one price and buying reinsurance at another, lower, price. This may arise because an underwriter

effectively acts as a trader, or frequently because an insurer is forced to adopt this technique where rates of the original business provide insufficient profits but cheap reinsurance is available.

(4) Spreading the risk
Reciprocity is the clearest example of this reason for reinsurance and involves exchange of a specific share of one insurance company's reinsurance treaty with a corresponding share of another company's. This arrangement is intended to reduce an insurance company's dependence on its own book of business which may be subject to severe fluctuation.

Insurable interest in reinsurance contracts

2.142 It is generally accepted that the contract of insurance gives the insurer an insurable interest which will support a reinsurance to the full amount of the insurer's liability on the original policy. If the original insured has no insurable interest, the insurer has no liability himself and therefore no insurable interest to support any reinsurance.

2.143 The usual insurable interest rules applicable to insurance also apply to contracts of reinsurance. Where, however, the reinsurance constitutes a fresh insurance on the subject matter originally insured, it must comply with the insurable interest rules affecting original insurances of that particular class.

The duty of utmost good faith in reinsurance contracts

2.144 All contracts of reinsurance, whether facultative or treaty, constitute contracts of utmost good faith and therefore full disclosure is required prior to the making of the contract. Two types of material fact are relevant to reinsurance contracts: first, facts relating to the original risk (or the direct insurance); secondly, facts relating to the reinsurance contract itself, for example, details of the insurance company underwriting the direct risk including its past claims record, financial standing, etc. The reinsurer may be able to avoid the reinsurance agreement if the original insured makes inaccurate statements to the reinsured which are passed on to the reinsurer expressly or impliedly.

2.145 The insured's net retention, the extent of the reinsured's previous losses and the inclusion in the original insurance of terms which extend the insurer's liability to an unusual extent and in respect of which the reinsurer will be obliged to provide an indemnity, are all facts held to have been material to facultative reinsurance.

Warranties in reinsurance contracts

2.146 Warranties have the same effect under the reinsurance as under the original policy of insurance. Frequently reinsurance agreements contain a term "being a reinsurance of and warranted to the same gross rate and terms and conditions as original". Such wording is intended to ensure that the insurance and reinsurance are back to back so that the reinsured's liability is matched by the reinsurers.[128] However, some terms of the original policy may be wholly inappropriate in a reinsurance agreement, or there may be a direct conflict between the express terms of the reinsurance and the terms of the original policy incorporated into it. In such circumstances such a term will be construed with qualifications.

128. See in this context the recent decision of the Court of Appeal in *WASA International Insurance Company Ltd* v *Lexington Insurance Co Ltd* [2008] Lloyd's Rep IR Plus 14; [2008] EWCA Civ 150.

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CHAPTER THREE

LEGAL LIABILITY[1]

Andrew Rigney and Roger ter Haar

INTRODUCTION

3.1 By the very nature of a construction site, where heavy machinery and plant is engaged in close proximity to workers and buildings, often in confined spaces, the risk of accidents involving personal injury and property damage is always present, despite stringent safety regulations.

3.2 In addition, new and developing technology in design and construction means that some defects in projects are almost bound to occur and may well be expensive to repair. Due to the multi-party involvement in the design and construction process, combined with probable successive multiple ownership of the completed project, comparatively few parties involved are likely to be in a contractual relationship with one another. In consequence tort-based liability is likely to be an important consideration, in addition to the rights and liabilities that arise out of contract.

3.3 The main heads of civil liability under which an aggrieved party can bring his action include:

(1) negligence;
(2) nuisance;
(3) strict liability;
(4) trespass to land;
(5) breach of statutory duty; and
(6) contractual liability.

3.4 Items (1) to (5) are generally referred to as torts. Recoverable losses in tort are broadly limited to losses involving physical harm to persons or property. Generally the law is restrictive as to the extent that pure economic losses are recoverable in tort. The law of contract does not make this distinction and express wording within building contracts is liable to widen the liabilities of the parties to a contract beyond their normal rights, duties and liabilities under the law of tort. Accordingly we start by identifying the scope of tortious liabilities, before discussing the scope of contractual liabilities.

3.5 Because fires are a common source of damage on construction sites and arising out of construction activities, and because there are some peculiarities in the law's approach to liability for fire, we consider liability in tort for fire under a separate heading.

3.6 Depending on the particular circumstances, a claimant may be able to bring a claim for damages for breach of contract, for breach of a common law duty pursuant to a claim in

1. As this chapter represents a general summary of some very complex subjects, for more information the reader should also refer to major works such as *Clerk and Lindsell on Torts* (19th edn, Sweet & Maxwell), *Charlesworth & Percy on Negligence* (11th edn, Sweet & Maxwell), and *Chitty on Contracts* (29th edn, Sweet & Maxwell).

negligence or nuisance or upon another tortious basis, or on a restitutionary basis for a reasonable sum.

3.7 At least a general understanding of these principles is necessary for those engaged in construction-related activities, so as to ensure that insurance requirements are considered in the context of potential liabilities. For an example of a case where understanding the basis upon which a party could be held liable in tort was essential to construction of a public liability insurance policy, see *Tesco Stores Ltd* v *Constable*.[2]

NEGLIGENCE

3.8 First we consider the tort of negligence, the tort most likely to give rise to liabilities on the part of those engaged in construction projects. The essential elements in establishing liability for negligence are:

(1) the existence of a duty to take care;
(2) proof of breach of that duty;
(3) proof of damage resulting from that breach;
(4) proof that the damage was within the risk against which it was the defendant's duty to protect the claimant, or (as it is more commonly put) proof that the damage was reasonably foreseeable, or not too remote.

3.9 A defendant against whom these elements are proved will be held personally responsible for damage caused by his negligence. It is also possible for a party to be "vicariously" liable for the negligence of another. Whether there is vicarious liability depends upon the nature of the parties, and this is discussed below. The reason for considering vicarious liability is usually a practical one: normally because the person sought to be made vicariously liable is insured or solvent whilst the primary tortfeasor does not have sufficient assets to satisfy a judgment. On this basis it is usual to claim against the employer of a negligent person—employers are very frequently held to be vicariously liable for the negligence of their employees.

Duty of care

3.10 In the period since the last edition of this book, the courts have continued to examine with some care the circumstances in which a duty of care will be held to exist. The battleground has raged most extensively over the extent of an alleged tortfeasor's liability for economic loss.

3.11 The modern starting point for consideration of this topic is probably *Caparo Industries Ltd* v *Dickman*[3] in which it was held that for a duty of care to be found to exist, three requirements must be satisfied:

(1) the damage in respect of which the claim is brought must be reasonably foreseeable;
(2) there must be a relationship of proximity between the claimant and the tortfeasor; and
(3) it must be fair just and reasonable to impose a duty of care.

2. [2008] 1 Lloyd's Rep IR 302; [2007] EWHC 2088 (Comm).
3. [1990] 2 AC 605.

3.12 In assessing these factors to decide whether or not a duty of care exists, the court is more likely to hold that a duty of care should be imposed where the damage caused is personal injury than if it is pure property damage, and significantly more likely to hold that a duty of care should be imposed if personal injury or property damage is caused than if the loss is pure economic loss.[4]

3.13 In giving guidance as to the process of deciding whether or not a duty of care should be imposed, and therefore in assessing the three requirements set out in *Caparo* v *Dickman*,[5] the House of Lords approved the approach recommended by Brennan J in the Australian case of *Sutherland Shire Council* v *Heyman*[6] that "the law should develop novel categories of negligence incrementally, and by analogy with existing categories . . . ".

3.14 A further consideration which has received emphasis in the cases is that the damage claimed must be within the scope of the duty imposed on the defendant. This principle emerged out of the principal case of a mass of litigation which arose out of the collapse of the property market in the United Kingdom at the end of the 1980s. In *Banque Bruxelles SA* v *Eagle Star*[7] (usually referred to by legal practitioners as "SAAMCO" because of the parties concerned when the case finally reached the House of Lords) the House of Lords considered the extent of valuers for negligence in valuation of property. Lord Hoffmann said:[8]

> "A duty of care such as a valuer owes does not exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law . . . must show that the duty was owed to him and it was a duty in respect of the kind of loss which he has suffered."

3.15 This principle has particular application in respect of claims for damages in respect of economic losses flowing out of negligent advice. The defendant will not necessarily be held liable for all losses flowing from negligent advice given by a defendant.[9] Thus in *SAAMCO* itself the negligent valuers were held not to be responsible for loss attributable to a fall in the property market, but only for the difference between the valuation given and a true valuation.[10]

Physical damage and personal injury

3.16 Where the loss which is the subject of the claim arises out of physical damage to property or personal injury that is a direct consequence of the defendant's conduct, the establishment of a duty of care is relatively straightforward.[11] For practical purposes, the test is whether the harm in question was reasonably foreseeable in accordance with the principles laid down by the House of Lords in the seminal case of *Donoghue* v *Stevenson*.[12]

4. *Marc Rich & Co v Bishop Rock Ltd* [1996] AC 211.
5. See note 3, *supra*.
6. 60 ALR 1 at pp. 43 and 44.
7. [1997] AC 191.
8. At p. 211.
9. See for example *Johnson* v *Gore Wood (No. 2)* [2003] EWCA Civ 1728 where the application of the *SAAMCO* principle was of central importance in deciding the extent of a solicitor's liability for negligent advice given.
10. For an example of the application of this principle in a construction context, see *HOK Sport* v *Aintree Racecourse Ltd* (2002) 86 Con LR 165, an architect's negligence case.
11. See *Caparo* v *Dickman* (note 3, *supra*) *per* Lord Oliver at p. 632; *Jolley* v *Sutton London Borough Council* [2000] 1 WLR 1082, per Lord Hoffmann at p. 1091.
12. [1932] AC 562.

3.17 A succession of recent cases has highlighted an exception to the general principle that the establishment of a duty of care in respect of the avoidance of personal injury is relatively straightforward—namely the position of injury caused to trespassers. Section 1 of the Occupiers' Liability Act 1984 provides:

> "(1) The rules enacted by this section shall have effect, in place of the rules of the common law, to determine
>
> (a) whether any duty is owed by a person as occupier of premises to persons other than his visitors in respect of any risk of their suffering injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them; and
>
> (b) if so, what that duty is.
>
> (2) . . .
>
> (3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if
>
> (a) he is aware of the danger or has reasonable grounds to believe that it exists;
>
> (b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of that danger (in either case, whether he has lawful authority for being in that vicinity or not); and
>
> (c) the risk is one which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.
>
> (4) Where, by virtue of this section, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by virtue of the danger concerned.
>
> (5) Any duty owed by virtue of this section in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk.
>
> (6) No duty is owed by virtue of this section to any person in respect of risks willingly accepted as his by that person (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)."

3.18 In a succession of cases the courts have denied injured trespassers compensation.[13] These cases may be of considerable significance in respect of construction risks given that building sites are often attractive to trespassers (especially children) and are very dangerous places.

3.19 Note, by contrast, that the law as codified by the Occupiers' Liability Act 1957 imposes a specific duty upon occupiers of land (which would include those having possession and control of a building site) towards lawful visitors. Section 2 of the 1957 Act imposes a "common duty of care" upon occupiers:

> "(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

13. *Tomlinson* v *Congleton Borough Council* [2004] 1 AC 46; [2003] UKHL 47; *Rhind* v *Astbury Water Park Ltd* [2004] EWCA Civ 756; *Higgs* v *WH Foster (t/a Avalon Coaches)* [2004] EWCA Civ 843; *Keown* v *Coventry Healthcare NHS Trust* [2006] 1 WLR 953; [2006] EWCA Civ 19; *Maloney* v *Torfaen County Borough Council* [2005] EWCA Civ 1762.

(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases
  (d) an occupier must be prepared for children to be less careful than adults; and
  (e) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.
(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example) –
  (a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and
  (b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for entrusting the work to an independent contractor and had taken such steps (any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.
(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)."

3.20 Thus, where personal injury arises out of the state in which premises are kept, liability will typically fall upon the occupier, with the court's willingness to impose liability depending upon whether the injured party was a lawful visitor to premises or a trespasser. In other cases the court is likely to hold that a defendant has a duty to take reasonable care to avoid causing personal injury to other human beings.

3.21 Attention should be drawn to a leading case relating to a duty to avoid personal injuries on a construction site: in *Clay* v *A.J. Crump & Sons Ltd*[14] an architect and a demolition contractor were held liable when a workman was injured by a wall which collapsed, on the basis that the wall was left standing in a dangerous condition when it should have been taken down. The basis of the architect's liability was his failure to inspect the wall before advising that it could be left standing "if it were safe to do so".

3.22 In respect of claims arising out of physical damage, an important point to be noted is where physical damage arises out of defects in buildings or chattel, namely that the claimant must establish that there has been no reasonable opportunity for intermediate inspection—i.e. that the defect complained about is latent.[15] This principle was applied in a claim against an architect for negligence,[16] where the architect was held not to be liable for very significant defects in an industrial unit which could and should have been discovered by the surveyor engaged by a subsequent purchaser of the unit.

14. [1964] 1 QB 533.

15. *Grant* v *Australian Knitting Mills Ltd* [1936] AC 85 at p. 105 and 106; *Murphy* v *Merton London Borough Council* [1991] 1 AC 398 at pp. 462 and 488.

16. *Baxall Securities Ltd* v *Sheard Walshaw Partnership* [2005] PNLR 564; [2002] EWCA Civ 9. See also *Bellefield Computer Services* v *E Turner & Sons Ltd* [2003] Lloyd's Rep PN 53; [2002] EWCA Civ 1823. However, it is to be noted that concern about the reasoning in *Baxall* has recently been expressed by the Court of Appeal in *Pearson Education Ltd* v *Charter Partnership Ltd* [2007] BLR 324.

Economic loss

3.23 As already indicated, many of the leading decisions on the law of tort over the last twenty years have concerned the extent to which the courts will recognise a duty to avoid economic loss. Types of economic loss are numerous, but examples include: reliance upon a statement made or advice given (for example advice given by a solicitor or accountant); the cost of repairs to defective goods or property (such as the cost of rebuilding a defective wall); "consequential losses" (such as loss of profit following upon destruction of physical property).

3.24 The courts have been cautious in imposing liability for economic loss because of the potential for parties being found liable for large and unpredictable losses.[17] As pointed out above, one control mechanism developed by the courts has been the adoption of the three requirements laid down by the House of Lords in *Caparo* v *Dickman*.[18] In assessing whether there is a relationship of "proximity" between claimant and defendant, and in assessing whether it is "fair, just and reasonable" to impose a duty upon a defendant to protect a claimant against a particular loss, one of the most important indicia is whether the alleged tortfeasor has assumed responsibility towards the claimant, and whether the claimant has relied upon the alleged tortfeasor in material respects.[19]

3.25 The assumption of responsibility may not always be a direct assumption of responsibility by one party for another (thus in *Smith* v *Eric S Bush*[20] valuers engaged by potential mortgagees to value property for the purpose of establishing the value of property as security for a loan were held liable to the potential purchaser of the property with whom they had no direct relationship) and the reliance may not always be by the person who suffers loss (for example where advice is given to parents for the benefit of a child—see *X (Minors)* v *Bedfordshire County Council*[21]).

3.26 The search to find a test by which it can be determined whether a duty of care is owed for economic losses has continued to trouble the courts. In a relative recent insurance broker's negligence case, a judge at first instance, Colman J, expressed the view that in respect of cases concerning the negligent conduct of services the assumption of responsibility test is the primary test rather than application of the threefold *Caparo* v *Dickman* approach.[22] The House of Lords returned to the subject in *Customs & Excise Commissioners* v *Barclays Bank plc*[23] in which the various approaches were considered.

3.27 The effect of that decision appears to be that if assumption of responsibility is established, it may be sufficient to establish a duty of care, but that to establish an assumption of responsibility is not necessary to establish a duty of care. In *Riyad Bank* v *Ahli United Bank (UK) plc*[24] the Court of Appeal considered this area of the law in the context of a chain of advisory contracts.

3.28 In many commercial contexts (such as the provision of investment advice with which the *Riyad Bank* case was concerned) the parties give careful consideration as to which parties

17. Described by a leading American judge as "liability in an indeterminate amount for an indeterminate time to an indeterminate class . . . ": *per* Cardozo CJ in *Ultramares Corporation* v *Touche* [1931] 174 NE 441 at p. 444.
18. See note 3, *supra*.
19. See *Smith* v *Eric S. Bush* [1990] 1 AC 831; *Henderson* v *Merrett Syndicates Ltd* [1995] 2 AC 145.
20. *supra*.
21. [1995] 2 AC 633.
22. See *BP plc* v *Aon plc* [2006] Lloyd's Rep IR 577; [2006] EWHC 422 (Comm) at paras 86 and 87.
23. [2007] 1 AC 181; [2006] UKHL 28.
24. [2006] 2 Lloyd's Rep 292; [2006] EWCA Civ 780.

will contract with which other parties and upon what terms. Longmore LJ[25] said that in the "usual situation" a chain of contracts would be inconsistent with the imposition of a duty of care, but "there cannot be a general proposition that, just because a chain exists, no responsibility for advice is ever assumed to a non-contractual party". This is of significance in the construction context where chains of subcontracts and sub-subcontracts are common.

3.29 Generally the existence of such a chain will be a significant indication that the parties did not intend that a party at the top of the chain would be able to sue parties at the bottom of the chain directly in tort. In *Henderson* v *Merrett*,[26] Lord Goff referred to the example of a small building contract as a situation in which duties of care would not be superimposed over and above the contractual relationships which the parties had chosen. The building owner would not usually be able to sue the subcontractor or the subsupplier because the structure of the parties' contractual relationships was inconsistent with any assumption of responsibility to the owner on the part of the subcontractor or subsupplier.

3.30 The adoption of different but overlapping approaches to the question of whether a duty of care is owed may appear inconsistent, but is understandable. The cases in which assumption of responsibility has been emphasised have tended to be cases where a professional person gives advice or makes a statement in a commercial setting[27] in which the imposition of a duty in tort is either a parallel obligation to an existing obligation in contract[28] or where the relationship is very close to a contractual relationship.[29]

3.31 On the other hand the public policy element of the third limb of the *Caparo* v *Dickman* test ("fair, just and reasonable") has been applied in the numerous cases concerning the liability of government and other public authorities.[30] This public policy has now found statutory expression in section 1 of the Compensation Act 2006 which provides:

> **"Deterrent effect of potential liability**
>
> A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—
>
> (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
>
> (b) discourage persons from undertaking functions in connection with a desirable activity."

3.32 The Explanatory Notes to the Act say of this section: "This provision reflects the existing law and approach of the courts as expressed in recent judgments of the higher courts." It seems that the provision will apply both as to whether a duty of care is held to exist and as to whether there has been a breach of a duty held to exist.

25. At para 32.

26. See note 19, *supra*.

27. For example *Smith* v *Eric S Bush* (note 19, *supra*); *BP plc* v *Aon plc* (note 22, *supra*); *Riyad Bank* v *Ahli United Bank (UK) plc* (note 24, *supra*); *Man Nutzfahrzeuge AG* v *Freightliner Ltd* [2007] EWCA Civ 910.

28. For example *Henderson* v *Merrett Syndicates Ltd* (note 19, *supra*).

29. See for example *R P Howard Ltd* v *Woodman Matthews* [1983] BCLC 117.

30. For example *X (Minors)* v *Bedfordshire County Council*; *Phelps* v *Hillingdon London Borough Council* [2001] 2 AC 619; *Brooks* v *Commission of Police for the Metropolis* [2005] 1 WLR 1495; [2005] UKHL 24; *Customs & Excise Commissioners* v *Barclays Bank plc* (note 23, *supra*); *Rowley* v *Secretary of State for Work & Pensions* [2007] 1 WLR 2861; [2007] EWCA Civ 598; *Neil Martin Ltd* v *Revenue & Customs Commissioners* [2007] EWCA Civ 1041.

Application of the rules relating to recovery of economic loss to cases arising out of construction projects

3.33 As already set out, the courts generally find little difficulty in holding that a duty of care to avoid personal injury should be imposed, and only slightly more difficulty in holding that a duty of care to avoid physical damage should be imposed. But difficulties have arisen in deciding what is physical damage for this purpose, and whether liability for mere defects should be imposed. The primary vehicle for allocating responsibility for defects in construction projects is through contract—either the primary construction contract between employer and main contractor, down the contractual chain of employer to main contractor, main contractor to subcontractor etc., or by a secondary or collateral warranty given by a party lower down the chain to a party higher up the chain, or a warranty given by a party to the construction process to a third party (for example a warranty given by an architect to a later purchaser of a building).

3.34 There are often good reasons for seeking to impose an obligation in tort—either because the party suffering a loss as a result of a building being defective has no contractual remedy at all, or only has a contractual remedy against a party without sufficient financial resources to satisfy a judgment, or because the limitation period in contract has expired.

3.35 After earlier decisions of the courts imposing extensive obligations in tort for defects in building, the law has now retreated with the courts regarding the machinery of contract as being the principal vehicle by which recompense for defects will be obtained. In *D & F Estates Ltd* v *Church Commissioners for England*[31] the House of Lords considered a claim arising out of defective plasterwork in a flat. It was held that the cost of renewing the defective plasterwork was pure economic loss which was not recoverable in tort. The House of Lords returned to the topic in *Murphy* v *Brentwood District Council*,[32] in which it was held that where a defect was discovered in a house before any injury to person or health or damage to property other than the house had been done, the expense incurred by a subsequent purchaser of the house in putting the defect right was pure economic loss for which a local authority carrying out building regulation control would not be held responsible. Although it did not arise directly for decision in that case, the House of Lords also held that a building contractor would also not be liable in such circumstances "in the absence of a special relationship of proximity". Another judgment delivered by the House of Lords on the same day in *Department of the Environment* v *Thomas Bates and Son Ltd*[33] effectively confirmed the position in respect of building contractors, holding that a building contractor was not liable to the lessees of a part of a tower block for the cost of carrying out works to remedy structural weaknesses in supporting columns.

3.36 These decisions left open the question what was the scope of duty in respect of damage to other property. In some cases the problem could be quite simple—if a wall fell down without damaging any other property, the cost of rebuilding the wall would be economic loss for which the careless builder would not normally be liable in tort. However, if the wall fell over and damaged a car parked beside it, the owner of the car could sue the careless builder for the costs of repairs to the car. To give another example, if a building on one plot of land were to fall onto a building on an adjacent plot of land, the adjoining property owner would be able to sue the negligent designer of the collapsed building for negligent defects in the design which led to the collapse. However, problems arise in defining the limits of this

31. [1989] AC 177.
32. [1991] 1 AC 398.
33. [1991] 1 AC 499.

potential liability. In *D & F Estates* v *Church Commissioners*[34] it was suggested that in some cases one part of a "complex structure" such as a house could be regarded as distinct from the other parts so that damage to one part of the structure caused by a hidden defect in another part might trigger tortious liability. In *Murphy* v *Brentwood District Council*,[35] Lord Jauncey expressed the view that the only potential application of the "complex structures" theory would be where "one integral component of the structure was built by a separate contractor and where the defect in such a component caused damage to other parts of the structure".

3.37 It has been left to the lower courts to attempt to apply these thoughts in practice. With the exception of one first instance decision,[36] the courts have shown a marked reluctance to find that one part of a structure can be regarded as a separate part of the structure for the purposes of establishing a liability in tort.[37] Where damage is caused to a part of a building by a defect in another part of the same building then if the two parts were designed and/or built by the same person or company, the courts are likely to hold that the cost of remedying the damaged part is not recoverable in tort. However, the position may be different if more than one designer or builder is involved, and different and discrete parts of the building were designed and constructed at different times. In these circumstances the court is able to make a clearer conceptual distinction between one part and the other, and it is respectfully submitted that there is scope for liability on the basis of ordinary *Donoghue* v *Stevenson* principles to attach (without the need to resort to abstract theories of complex structures).

3.38 It will be seen in Chapter 8 below that similar conceptual difficulties in distinguishing one "part" of a building damaged from another "part" causing the damage trouble the courts when considering defects coverage clauses and exclusions and that questions as to what is "damage" cause the courts construing policies problems in distinguishing between what is merely a "defect" and what is "damage".

3.39 A final point is that in *Murphy* v *Brentwood District Council*[38] it was suggested (as noted above) that a building contractor might be held to owe a duty of care in tort to avoid economic loss resulting from defects in a building if there was a "special relationship of proximity". This arose out of an earlier House of Lords decision, *Junior Books Ltd* v *Veitchi Co Ltd*,[39] but it is now clear that the cases in which such a "special relationship" will be found to exist will be so rare as to be effectively non-existent.[40] For practical purposes, the only situation in which the courts are likely to hold that such a relationship exists is where there is a contractual relationship between claimant and alleged tortfeasor, in which case the courts may be willing, following *Henderson* v *Merrett Syndicates Ltd*,[41] to hold that there is a duty owed in tort which is concurrent and coextensive with a contractual duty to exercise reasonable

34. See note 31, *supra*.
35. See note 32, *supra*.
36. *A. Jacobs* v *Morton and Partners* (1995) 72 BLR 92.
37. See *Warner* v *Basildon Development Corporation* (1991) 7 Const LJ 146; *Tunnel Refineries* v *Bryan Donkin Co Ltd* [1998] CILL 1392; *Bellefield Computer Services Ltd* v *E Turner & Sons Ltd* [2000] BLR 97; *Payne* v *John Setchell Ltd* [2002] BLR 489.
38. See note 32, *supra*.
39. [1983] 1 AC 520.
40. See for example *Simaan General Contracting Co* v *Pilkington Glass Ltd (No. 2)* [1988] 1 QB 758; *Greater Nottingham Co-Operative Society Ltd* v *Cementation Piling and Foundations Ltd* [1989] 1 QB 71; *Norwich City Council* v *Harvey* [1989] 1 WLR 828; *Pacific Associates Inc* v *Baxter* [1990] 1 QB 993; *Nitrigin Eirann Teoranta* v *Inco Alloys Ltd* [1992] 1 WLR 498.
41. See note 19, *supra*.

care and skill[42]—the main distinction between the contractual and tortious basis of liability being that there is (arguably in this context) a longer limitation period available in tort than there is in contract.[43]

Breach of duty

3.40 If a duty of care is held to exist, the standard of care necessary to satisfy that duty is set at a level of reasonableness consistent with the average competence of the defendant concerned. Such competence is to be assessed using the standards prevailing at the time of the alleged negligence: for example a professional person is required to "live up in practice to the standard of the ordinary skilled man exercising and professing to have his special professional skills"[44] or, as McNair J put it in *Bolam* v *Friern Hospital Management Committee*,[45] the standard of care to be shown is that of "the ordinary person, exercising and professing to have that special skill".

3.41 The burden is upon the claimant to establish that on the balance of probability the defendant is in breach of a duty of care, that is that the defendant has failed to take reasonable care according to the appropriate standard. As pointed out above, in determining that issue, section 1 of the Compensation Act 2006 provides expressly that in determining whether a defendant should have taken particular steps to meet a standard of care a court may have regard to whether a requirement to take those steps might prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way or might discourage persons from undertaking functions in connection with a desirable activity.

3.42 As might be expected, where what is being undertaken creates unusual dangers, the law expects an appropriately higher standard of care to be adopted—for example where there is a risk of fire[46] such as where welding and grinding operations are undertaken[47] or where explosives are being used[48] or where there is a particular risk of explosion.[49] The courts' expectation when deciding claims in negligence that a higher standard of care will be exercised because of the increased risk associated with such activities is reflected in the terms upon which insurers underwrite such risks—a common source of difficulties is the imposition by insurers of "hot works warranties".

3.43 One situation to note in the context of insurances upon construction projects is the interplay of contractual warranties and liability in negligence. A common exclusion in liability policies is along the lines of an exclusion in respect of any liability "arising out of any

42. See for example *Barclays Bank plc* v *Fairclough Building Ltd (No. 2)* (1995) 76 BLR 1; *Storey* v *Charles Church Developments Ltd* (1996) 73 Con LR 1; *Tesco Stores Ltd* v *Costain Construction Ltd* [2003] EWHC 1487 (TCC); *Mirant Asia-Pacific Construction* v *Ove Arup* at first instance [2004] EWHC 1750 (TCC); (2005) 97 Con LR 1. Compare *Payne* v *John Setchell Ltd* [2002] 7 PNLR 146.

43. Under the Limitation Act 1980 the limitation period for a claim for breach of contract where the contract is not under seal is six years from the date of breach of contract (12 years if the contract is under seal) whilst in tort the limitation period is six years from the date that the cause of action accrued, which means in the case of alleged negligence from the date that damage was caused by the negligent act or omission. See below, para 3.59.

44. *Per* Bingham LJ in *Eckersley* v *Binnie and Partners* (1988) 18 Con LR 1.

45. [1957] 1 WLR 582.

46. For example *Musgrove* v *Pandelis* [1919] 2 KB 43; *Jefferson* v *Derbyshire Farmers Ltd* [1921] 2 KB 281; *Honeywill & Stein Ltd* v *Larkin Bros Ltd* [1934] 1 KB 191.

47. *Biffa Waste Services* v *Maschinenfabriek Ernst Hesse* [2008] BLR 155; [2008] EWHC 6 (TCC).

48. For example *Miles* v *Forest Rock Granite Co* (1918) 34 TLR 500.

49. For example *Brooke* v *Bool* [1928] 2 KB 578.

performance warranties and/or guarantees . . . except to the extent that such liability would have attached in the absence of such warranties or guarantees . . . ".

3.44 It is relevant to note that where a contractor provides design and build services, a court may well hold that the contractor impliedly warranted the fitness of purpose of the design,[50] which is a more burdensome obligation than the obligation at common law upon an engineer carrying out a design to exercise reasonable skill and care. As a consequence, it is essential to review very carefully all contractual documentation to ensure consistency of obligations between the contractor and the client/employer and the contractor's rights against the design team. Failure to match the obligations may result in the design team owing only a duty of reasonable skill and care whilst the contractor has a more onerous duty to the employer.

3.45 In some situations, it is inferred that there must have been negligence on the part of the defendant because the accident could not have occurred without negligence on his part. The maxim which is applied is *res ipsa loquitur* (the facts speak for themselves). In such circumstances, the evidential burden of proof shifts onto the defendant to disprove the negligence.

Causation

3.46 There is an onus of proof on a claimant to show that the damage resulted from the defendant's breach of duty. The claimant must adduce evidence from which, on a balance of probabilities, the connection between the two may be fairly drawn. Often the "but for" test is used. That is, the defendant's act or omission may be the factor without which the damage would not have occurred. Complications arise where two factors unite in inflicting damage on the plaintiff or where there are mutually exclusive but equally possible factors causing the damage.

3.47 In *McGhee* v *National Coal Board*[51] the House of Lords held that it is sufficient for the claimant to show that the defendant's breach of duty made the risk of injury more probable even though it remained uncertain whether it was the actual cause. Recent cases have explored the issue of causation in the context of claims arising out of industrial diseases. In the difficult cases considered together in *Fairchild* v *Glenhaven Funeral Services Ltd*[52] it was held that a claimant could recover in respect of injury which could have been caused by one or more of a number of defendants, but it was not possible to say which one. In *Barker* v *Corus UK Ltd*[53] the House of Lords held that it was sufficient to establish causation that one source of the risk of injury was the tortious conduct of the defendant, even if one of the other sources was the fault of the claimant himself.

3.48 In *Barker* it was held that where more than one employer had contributed to an industrial disease (in that case mesothelioma) each employer was liable to the extent that that employer had increased the risk of the disease. In respect of mesothelioma, the result has been reversed by section 3 of the Compensation Act 2006 (making all the employers in such a case 100 per cent liable) but in respect of other diseases the decision remains good law (see for example *Holtby* v *Brigham & Cowan (Hull) Ltd*[54]) although its application is limited to what

50. See for example *Independent Broadcasting Authority* v *EMI Electronic Ltd* (1980) 14 BLR 1.
51. [1973] 1 WLR 1.
52. [2003] 1 AC 32; [2002] UKHL 22.
53. [2006] 2 AC 572; [2006] UKHL 20.
54. [2000] 3 All ER 421.

are referred to as "single agent" cases (cases where the claimant's injury or disease was caused by a number of agencies operating in substantially the same way).

3.49 In cases where the claim is for economic loss following upon negligent advice, the courts will often award damages on the basis of the loss of a chance.[55] A typical case where this approach is adopted is where a solicitor's negligence has caused a client to lose the prospects of a successful outcome of a transaction.[56] Difficult distinctions are drawn between these cases and cases where the claimant has failed to establish on a balance of probabilities that an act of negligence caused an unwanted outcome, such as cases where on a balance of probabilities it is not shown that an operation carried out competently rather than incompetently would have produced a cure or a better result.[57] In *Allied Maples Group Ltd* v *Simmons & Simmons*[58] the Court of Appeal distinguished between three types of case:

(1) cases where the defendant is guilty of a positive statement or act which was negligent. In that case the issue is what would have happened if the defendant had not so acted or advised;
(2) cases where the defendant is guilty of a negligent omission to act or advise. In that case the issue is, what would the claimant have done had the defendant acted or advised competently;
(3) cases where the issue is what a third party would have done had the defendant acted or advised competently.

3.50 In the first type of case, the claimant has to prove on the balance of probabilities what would have happened had the defendant acted or advised competently. In the second type of case, the claimant has to prove on the balance of probabilities that he would have acted differently if advised competently or if the negligent omission had not occurred. In the third type of case the claimant is entitled to damages based upon an assessment of the chance that the third party would have acted or omitted to act so as to produce a situation more advantageous to the claimant than what actually happened.

3.51 Sometimes the intervening act of a third party will be held to have broken the chain of causation.[59]

Foreseeability

3.52 It was established in *The Wagon Mound*[60] that the defendant is only liable in tort for damage resulting as a reasonably foreseeable consequence of his negligent act. The question of

55. See for example *Chaplin* v *Hicks* [1911] 2 KB 786; *Kitchen* v *Royal Air Force Association* [1958] 1 WLR 563; *Cohen* v *Kingsley Napley* [2006] EWCA Civ 66; *Talisman Property Co (UK) Ltd* v *Norton Rose* [2006] 3 EGLR 59; [2006] EWCA Civ 1104; *Phillips & Co* v *Whatley* [2007] Lloyd's Rep PN 34; [2007] UKPC 28.

56. See for example *Allied Maples Group Ltd* v *Simmons & Simmons* [1995] 1 WLR 1602.

57. See for example *Hotson* v *East Berkshire Area Health Authority* [1987] AC 750; *Gregg* v *Scott* [2005] 2 AC 176; [2005] UKHL 2. See also *Chester* v *Afshar* [2005] 1 AC 134; [2004] UKHL 41 where a claimant recovered damages where the defendant surgeon had not warned the claimant of risks attendant upon an operation. Lord Steyn at para 146 described this latter case as a "narrow and modest departure from traditional causation principles".

58. See note 56, *supra*.

59. See for example *Nichols* v *Marsland* (1876) 2 Ex D 1; *Knightley* v *Johns* [1982] 1 WLR 349; *Roberts* v *Bettany* [2001] EWCA Civ 109.

60. *Overseas Tankship (UK) Ltd* v *Morts Dock and Engineering Co Ltd* [1961] AC 388.

what is a reasonably foreseeable consequence is a mixed question of fact and law.[61] In addition to the requirement of foreseeability of damage to the claimant, there must be foreseeability of the kind of damage[62]—"It is the kind of loss, and not its size, that matters".[63] (As set out above, however, the type of loss must be a loss which it is the defendant's duty to take reasonable steps to avoid—see *SAAMCO*.[64])

DEFENCES

Contributory negligence

3.53 This was a complete defence at common law. Since the Law Reform (Contributory Negligence) Act 1945, the court has had the power to apportion responsibility and award the claimant reduced damages where the claimant is partly to blame for his loss. Unless the claimant was 100 per cent contributorily negligent this is not really a defence as such, more a reduction in the defendant's liability.[65]

3.54 The degree of carelessness needed to show contributory negligence is dependent on the circumstances. For example, in *Caswell* v *Powell Duffryn Ltd*,[66] it was held that a measure of carelessness would be ignored in arduous working conditions such as those of a workman in a factory or a mine.

3.55 The 1945 Act requires the claimant to have contributed by his negligence to the damage. Accordingly even if the claimant is totally innocent of any fault in relation to the accident in question, his damages are liable to be reduced if the extent of the damage was increased by his negligence—for example in a road traffic accident case, by not wearing a seat belt.[67]

3.56 Where a claim can be brought both in contract and in tort (typically where a parallel duty of care to take reasonable care is owed in contract and in tort, as in the relationship between a professional person and a client) a defence of contributory negligence may be available, but not otherwise.[68]

Volenti non fit injuria

3.57 *Volenti non fit injuria*, translated literally, means "to him who is willing there can be no injury". This is a general defence to a claim in tort that applies in claims for negligence where the claimant voluntarily exposes himself to a risk of injury. For example in *Morris* v *Murray*,[69]

61. For a recent discussion of foreseeability in the context of a claim for psychiatric illness, see *McLoughlin* v *Jones* [2002] QB 1312.
62. *Re Polemis and Furness Withy & Co* [1921] 3 KB 560 and *The Wagon Mound* (*supra*).
63. *Per* Arden LJ in *Johnson* v *Gore Wood (No. 2)* [2003] EWCA Civ 1728 at para 93 citing *Wroth* v *Tyler* [1974] Ch 30 and *Brown* v *KMR Services Ltd* [1995] 2 Lloyd's Rep 513.
64. *Banque Bruxelles SA* v *Eagle Star* [1997] AC 191.
65. If the claimant was 100 per cent contributorily negligent, the claim would probably fail on grounds of causation—see *Pitts* v *Hunt* [1991] 1 QB 24.
66. [1940] AC 152.
67. See for example *Froom* v *Butcher* [1979] QB 286.
68. *Forsikringaktieselskapet Vesta* v *Butcher* [1989] AC 852; *Barclays Bank plc* v *Fairclough Building Ltd* [1995] QB 214.
69. [1991] 2 QB 6.

the claimant's claim failed when he agreed to go on a flight in an aircraft after drinking alcohol with the pilot for hours.

Ex turpi causa

3.58 In certain cases, if a claimant suffers damage as a consequence of unlawful conduct he may be held unable to recover. The determining factor is whether the claimant's illegal conduct was central or collateral to his cause of action. Examples of the defence succeeding are *Clunis* v *Camden and Islington Health Authority*;[70] *Pitts* v *Hunt*.[71]

Limitation

3.59 Under the Limitation Act 1980 the limitation period for a claim for breach of contract where the contract is not under seal is six years from the date of breach of contract (12 years if the contract is under seal) whereas in tort the limitation period is six years from the date that the cause of action accrued. In the case of alleged negligence, the six-year period runs from the date that damage was caused by the negligent act or omission.[72] Section 14A of the Limitation Act 1980 introduced by the Latent Damage Act 1986 extends the period of limitation for claims in tort by three years starting from the date when the claimant had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action. There is an overriding time limit for actions for negligence (other than for personal injury) of 15 years from the act of negligence to which the damage is alleged to be attributed.

NUISANCE

Definition

3.60 A nuisance is the interference with the exercise or enjoyment of an individual's right belonging to him in the capacity of a member of the public (public nuisance) or with the ownership or occupation of land or easements or other such rights relating to the land (private nuisance) and may include such activities as the creation of noise, smells, dust or vibrations.

Public nuisance

3.61 This is a criminal offence committed when a person does an act not warranted by law, or omits to discharge a legal duty, and the effect of the act or omission is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise of rights

70. [1998] QB 978.
71. See note 65, *supra*.
72. See in this context *Nitrigin Eirann Teoranta* v *Inco Alloys Ltd* (note 40, *supra*); *New Islington and Hackney Housing Association Ltd* v *Pollard Thomas and Edwards Ltd* [2001] 1 Lloyd's Rep PN 243; *Invercargill City Council* v *Hamlin* [1996] AC 264; *Abbott* v *Will Gannon & Smith Ltd* [2005] BLR 195. These cases consider the question of when damage accrues in cases of latent defects which was raised in *Pirelli General Cable Works Ltd* v *Oscar Faber & Partners Ltd* [1983] 2 AC 1. It is difficult to see how the decision in *Pirelli* can survive the analysis in *Murphy* v *Brentwood Borough Council* (note 32, *supra*), although in *Abbott* v *Will Gannon* the Court of Appeal simply applied the decision in *Pirelli*.

common to everyone.[73] A public nuisance only gives rise to a civil cause of action when a private individual has suffered particular damage beyond the general inconvenience and injury suffered by the public.[74]

Private nuisance

3.62 Private nuisances are of three kinds.[75] They are: (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by way of interference with a neighbour's quiet enjoyment of his land. An example of the first is encroachment by tree roots[76] or the boughs of a tree overhanging a neighbour's land.[77] An example of the second is where withdrawal of support by an adjoining building causes damage to the house from which support is drawn[78] or causing damage by piling.[79] Examples of the last category include causing excessive dust[80] or making excessive noise.[81]

3.63 The hallmark of nuisance is acting unreasonably vis-à-vis a neighbour.[82] Thus, in the context of building operations some measure of inconvenience will be tolerated so long as operations are reasonably carried on and all proper and reasonable steps are taken to ensure that no undue inconvenience is caused to neighbours.[83] Some of the cases have sought to emphasise the similarities between the tort of nuisance and the tort of negligence,[84] not only in the requirement of taking reasonable steps to prevent damage or inconvenience but also in the requirement of foreseeability. In *Cambridge Water Co Ltd* v *Eastern Counties Leather plc*,[85] the House of Lords held that, to recover damages in nuisance, the damage which is the subject of the claim must be a reasonably foreseeable consequence of the activity which gave rise to it. To this extent nuisance was a fault-based tort as opposed to a tort giving rise to strict liability. However, as explained by Lord Hoffmann in *Transco plc* v *Stockport Metropolitan Borough Council*,[86] although the damage must be reasonably foreseeable, an action will lie in nuisance even if the defendant has taken reasonable steps to prevent such damage from occurring:

73. *R* v *Rimmington* [2006] 1 AC 359; [2005] UKHL 63.
74. See for example *Tate & Lyle Industries Ltd* v *Greater London Council* [1983] 2 AC 509; *Jan de Nul (UK) Ltd* v *Axa Royale Belge SA* [2002] 1 Lloyd's Rep 583; [2002] EWCA Civ 209.
75. See the speech of Lord Lloyd of Berwick in *Hunter* v *Canary Wharf Ltd* [1997] AC 655 at p. 695.
76. See for example *Delaware Mansions Ltd* v *Westminster City Council* [2002] 1 AC 321.
77. For example *Lemmon* v *Webb* [1894] 3 Ch 1; affirmed [1895] AC 1.
78. For example *Rees* v *Skerrett* [2001] 1 WLR 1541.
79. For example *Dodd Properties* v *Canterbury City Council* [1980] 1 WLR 433.
80. *Matania* v *National Provincial Bank Ltd* [1936] 2 All ER 633.
81. *Andreae* v *Selfridge & Co Ltd* [1938] Ch 1 where excessive noise and dust were caused in construction operations.
82. "It is notorious that actions in nuisance are protean but they are all concerned with unreasonable interference by one person with the enjoyment [by] another of his land"—*per* Schiemann LJ in *Jan de Nul (UK) Ltd* v *Axa Royale Belge SA* (note 74, *supra*) at para 77.
83. See *Andreae* v *Selfridge & Co Ltd* (note 81, *supra*).
84. See *Leakey* v *National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485; *Solloway* v *Hampshire County Council* (1981) 79 LGR 449; *Delaware Mansions Ltd* v *Westminster City Council* (*supra*); *Holbeck Hotel Ltd* v *Scarborough Borough Council* [2000] QB 836; *Rees* v *Skerrett* (note 78, *supra*). However, note *Bybrook Barn Centre Ltd* v *Kent County Council* [2000] BLR 55, where at para 19 Waller LJ cited part of the speech of Lord Wilberforce in *Goldman* v *Hargrave* [1967] 1 AC 645 at p. 657: " . . . the tort of nuisance, uncertain in its boundary, may comprise a wide variety of situations, in some of which negligence plays no part, in others of which it is decisive . . . ".
85. [1994] 2 AC 264.
86. [2004] 2 AC 1; [2003] UKHL 61 para 26.

> "If the [activity in question] cannot be done without causing an unreasonable interference, it cannot be done at all. But liability to pay damages is limited to damage which was reasonably foreseeable . . . "

3.64 As a matter of practice, however, it may be that where reasonable steps have been taken to prevent harm, the damage in question will be held to have been unforeseeable.

Liability

Proof of damage

3.65 Where physical damage has been caused, proof of actual and not future damage should be shown. If, however, future nuisance is anticipated, a *quia timet* (anticipatory) injunction may be obtained. With regard to the other types of nuisance, no physical damage has to be proven since there is a presumption of damage. As already mentioned, public nuisance involves proof of special damage.

The situation of the surrounding circumstances

3.66 As was held in *St Helen's Smelting Company* v *Tipping*,[87] in order to establish a nuisance in the first two types of nuisance, it is necessary to show material injury to property. However, where the nuisance involves mere interference with comfort, the test is whether serious personal discomfort has been caused. This somewhat subjective test is relative to the relevant circumstances in the neighbourhood where the events took place. Therefore acts complained of which may be lawful acts in themselves only become unlawful from surrounding circumstances, for example time, place, manner of performance, extent. It is a question of balancing interests between the right to use property for lawful enjoyment as against another's right to undisturbed enjoyment of their property. A suggested test is what is reasonable considering the ordinary usages of people in a particular society. Thus a claim for interference with the ability to receive television signals as a result of construction of a building failed in *Hunter* v *Canary Wharf Ltd*.[88]

Objective standard of comfort

3.67 The nuisance must interfere with a level of enjoyment according to the standards of an ordinary man, i.e. there will be no action if harm is caused to someone of abnormal sensitivity. The discomfort produced must be of such a degree as to be substantial to the average person occupying such land as the land involved. Therefore, the character of the neighbourhood is taken into account in considering this objective standard since what is reasonably expected in an urban area may not be the same as in a rural area.[89]

87. (1865) 11 HLC 642.

88. See note 75, *supra*. The claim also failed on the ground that the claimants did not have sufficient interest to sue: see below.

89. "What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey . . . " —authority for this proposition (which might not be regarded as self-evident to occupiers of loft apartments overlooking the Thames) is *Sturges* v *Bridgman* (1879) 11 Ch D 852.

Who can claim?

3.68 An action in private nuisance will only lie at the suit of a person who has a right to the land affected. Ordinarily, such a person can sue only if he has the right to exclusive possession of the land, such as a freeholder or tenant in possession, or even a licensee with exclusive possession. It can in exceptional circumstances even include a person in actual possession who has no right to be there. A reversioner can sue so far as his reversionary interest is affected.[90] Under section 4 of the Defective Premises Act 1972 an occupier can sue for continuance of a nuisance even though it began before he became an occupier. In relation to public nuisances, there will be liability to a criminal prosecution, or, in the case of highway nuisances, a service of a notice by the highway authority.

Who is liable?

3.69 The person responsible for the nuisance can be personally liable or liable by reason of the acts or omissions of his servants or agents. Such a person will remain liable even after the sale or lease of his building. As in the case of *Thompson* v *Gibson*,[91] a contractor who is employed to erect a building on another's land is liable if the building is a nuisance.

3.70 Where the nuisance is committed by a contractor, the question often arises as to whether the contractor's employer can be made liable for a nuisance committed by the contractor. In general the employer will be liable if the work which he has contracted to have done of its very nature involves a risk of damage to a third party[92] (for example the creation of dangers in the highway); if the carrying out of the work gives rise to a duty which the employer himself owes to the claimant (for example not to withdraw support to an adjoining house[93]); or where the employer does not impose upon the contractor a duty to avoid unreasonable damage or loss. An important element in deciding the extent to which the employer is liable for an "independent" contractor is the extent to which the employer could reasonably have foreseen that the work for which he had hired the contractor was likely to constitute a nuisance.

Defences: general

3.71 To a certain extent, arguments advanced in a defence depend on the standard of the duty involved in the particular case of nuisance. Where the defendant may have deliberately or recklessly caused the nuisance, it is no defence that the defendant believed that he was entitled to commit the nuisance or that he took all possible precautions to prevent the nuisance.[94] Where the defendant knew or should have known that as a result of the activity in question, damage to his neighbour was reasonably foreseeable, he is under a duty of care to prevent such damage. Where the defendant falls into neither of these categories, he will be liable only if the claimant can bring the defendant within the strict liability rule in *Rylands* v *Fletcher*.[95]

90. *Hunter* v *Canary Wharf Ltd* (note 75, *supra*).
91. (1841) 7 M & W 456.
92. See *Bowen* v *Peate* (1876) 1 QBD 321.
93. *Rees* v *Skerrett* (note 78, *supra*).
94. As to a deliberate and malicious act of nuisance, see *Hollywood Silver Fox Farm Ltd* v *Emmett* [1936] 2 KB 468.
95. Discussed below, p. 74.

Authorisation of nuisance by statute

3.72 If a proposed defendant is empowered by statute to carry out works which will inevitably cause a nuisance, the defendant will not be liable in nuisance—for example in *Allen* v *Gulf Oil Refining Ltd*[96] statute expressly authorised the construction of an oil refinery. Local residents affected by inevitable smell, noise and vibration from the operation of the refinery were held unable to recover in nuisance. However the burden of proving that the nuisance was inevitable rests on those having the benefit of the statutory authority. They must show that all reasonable care and skill was used in carrying out the activity concerned, and current scientific methods and knowledge will be taken into account. If reasonable care is not taken, then a defendant may be liable even if acting under statutory authority. In the case of *Tate & Lyle Industries Ltd* v *Greater London Council*[97] the defendants were held liable in public nuisance even though acting under statutory authority, when ferry terminals they constructed in the Thames caused siltation preventing access to the claimant's jetty.

Act of a trespasser

3.73 Generally there is no liability upon an occupier for a nuisance caused by a trespasser unless he had knowledge or means of knowledge of the nuisance in sufficient time to do something about it.[98]

Other lines of defence

3.74 Limitation is an available defence (see above), as is prescription.[99] Other general defences may be available such as contributory negligence, *novus actus interveniens* or *volenti non fit injuria*, but generally it is difficult to see such defences succeeding if the elements of nuisance are otherwise established.

Unacceptable defences

3.75 It is no defence that the activity is carried on at a suitable place,[100] in certain cases that due care and skill were used in preventing it becoming a nuisance,[101] that the activity is in the public interest[102] or that the claimant comes to the nuisance.[103] Nor is it a defence to show that the activity viewed alone is not a nuisance and needs to be combined with others.[104]

Damages

3.76 These cover whatever loss results as a natural consequence of the nuisance of the defendant. In many cases this will be measured by the cost of repair or reinstatement of

96. [1981] AC 1001.
97. See note 74, *supra*.
98. *Sedleigh-Denfield* v *O'Callaghan* [1940] AC 880.
99. See *Cargill* v *Gotts* [1981] 1 WLR 441.
100. *St Helen's Smelting Co* v *Tipping* (note 87, *supra*) at 11 HLC at p. 651.
101. See *Cambridge Water Co Ltd* v *Eastern Counties Leather plc* (note 85, *supra*).
102. *Miller* v *Jackson* [1977] QB 966; *Kennaway* v *Thompson* [1981] QB 88.
103. *Sturges* v *Bridgman* (1879) 11 Ch D 852 followed in *Miller* v *Jackson* (note 102, *supra*) at p. 986.
104. *Thorpe* v *Brumfit* (1873) LR 8 Ch 650 at p. 656.

property,[105] in other cases by diminution in value,[106] and in other cases by the cost of abatement of the nuisance.[107] Where the nuisance causes annoyance, inconvenience or discomfort general damages are recoverable.[108]

Nuisances relevant to the construction industry

Demolition/rebuilding

3.77 This is not actionable if the operations are reasonably carried on and all reasonable and proper steps are taken to prevent undue inconvenience.[109] In determining what may be reasonable, consideration of modern methods is relevant.

Withdrawal of support

3.78 An owner of land has a right to support of his land in its natural state from the adjacent land of owners. If such support is withdrawn, the owner can recover damages for any subsequent subsidence of land and damages for harm caused to his building. Withdrawal in itself is not a nuisance but places the person withdrawing support under a duty to take care to avoid damage.[110] To obtain damages there must be actual physical harm. Furthermore, if subsequent building or excavation to an existing building causes subsidence, the second contractor will be liable for all damage. In the last edition, based upon old authority,[111] it was said that damages will not include the diminution in the market value of property because of the risk of future subsidence damage. By reference to the first instance decision in *Marcic* v *Thames Water Utilities Ltd (No. 2)*,[112] it is possible that an unexpected effect of the Human Rights legislation is to alter this position.

Right to light

3.79 This is a right to prevent a servient tenement owner from putting up any erection which may deprive the dominant tenement owner of sufficient quantity of light. Such deprivation amounts to a nuisance. The quantity of light to which an owner is entitled is relative to the nature of the occupation and the ordinary purposes for which the premises may reasonably be expected to be used. It is not a nuisance to prevent free access of air to another's land or to spoil a view or to erect a building which impinges on the privacy of an adjacent property.

105. For example *Dodd Properties (Kent)* v *Canterbury City Council* (note 79, *supra*); *Bunclark* v *Hertfordshire County Council* (1977) 243 EG 381 and 455; *Delaware Mansions Ltd* v *Westminster City Council* (note 76, *supra*).

106. For example *Snell & Prideau* v *Dutton Mirrors* [1995] 1 EGLR 259.

107. *Wandsworth London Borough Council* v *Railtrack plc* [2001] 1 WLR 368, substantially affirmed on appeal: [2002] QB 756.

108. For example *Halsey* v *Esso Petroleum Co* [1961] 1 WLR 683; *Bone* v *Seale* [1975] 1 WLR 797.

109. See *Andreae* v *Selfridge & Co Ltd* (note 81, *supra*); *Matania* v *National Provident Bank Ltd* (note 80, *supra*).

110. The scope of an adjoining owner's liability is carefully discussed in *Rees* v *Skerrett* (note 78, *supra*).

111. *Battishill* v *Reed* (1856) 18 CB 696; *Shadwell* v *Hutchinson* (1831) 4 C & P 333; *Darley Main Colliery Co* v *Mitchell* (1886) 11 App Cas 127.

112. [2002] QB 1003.

Highway nuisances

3.80 The obstruction of a passage of the public along the highway may amount to a public nuisance.[113] Furthermore, if the individual proves special damage, then a private nuisance action may lie.[114] This may be by the placing of debris or rubbish in the middle of the road which may cause a member of the public to suffer injury, or by obstructing trading on adjacent premises by parking vehicles in an inconvenient place.[115] Even if a person has authorised an independent contractor to do work, he will be liable if he has failed to warn the public or has taken inadequate precautions to warn the public of the dangers.[116] The defendant may also be liable for negligent performance by an independent contractor of work near to or on the highway.

Lighting obstructions

3.81 A person, or his independent contractor, has a duty to take reasonable care to prevent danger by lighting an obstruction in the highway.[117]

Party Wall etc Act 1996

3.82 Many claims which might otherwise develop into a claim for nuisance are headed off by agreement between the parties before the commencement of works under the Party Wall etc. Act 1996, which came into force on 1 July 1997.

3.83 The Act achieves two aims. Firstly it allows a building owner to carry out works to a party structure or make use of a party structure. Secondly it provides safeguards for the adjoining owner where works are carried out to a party structure.

3.84 A helpful description of the operation of the Act is to be found in *Keating on Building Contracts*, Eighth Edition at pages 524 and following.

STRICT LIABILITY: *RYLANDS* V *FLETCHER*

3.85 An area in which the above principles are applied by lawyers in a rather particular way is "the rule in *Rylands* v *Fletcher*" under which there may be "strict liability".

Definition

3.86 To establish strict liability the claimant does not have to prove negligence on the part of the defendant or its agents—and it is no defence for the defendant to prove that he has taken all possible precautions to avoid damage.

3.87 The classic definition of a situation in which strict liability would be imposed was given by Blackburn J in the 19th century case of *Rylands* v *Fletcher*:[118]

113. *Marshall* v *Blackpool Corporation* [1935] AC 16.
114. See the authorities reviewed by Luxmoore J in *Vanderpant* v *Mayfair Hotel Co* [1930] 1 Ch 138.
115. *Dymond* v *Pearce* [1972] 1 QB 496 was a case where an injured claimant who crashed into a parked vehicle was held entitled to recover in nuisance.
116. See the review of authorities in *Salsbury* v *Woodland* [1970] 1 QB 324.
117. *Penny* v *Wimbledon Urban District Council* [1899] 2 QB 72.
118. (1865) 3 H & C 774; (1866) LR 1 Ex 265; (1868) LR 3 HL 330.

> " . . . any person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape . . . ".

3.88 This definition is further qualified by the need to show that there was a "non-natural use" of the land which was defined by Blackburn J as "some special use bringing with it increased dangers to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community". It is the relativity of this concept which prevents an automatic imposition of strict liability and brings a certain amount of flexibility to this area of the law. A person using land in the exercise of his ordinary rights (natural user), for example the erection of walls or buildings on land, will not be strictly liable for any damage occurring, and any liability in respect of such works will be based on trespass, nuisance or negligence.

3.89 The erection of walls or buildings would also be outside the rule in *Rylands* v *Fletcher* because such activities are not inherently dangerous—and because the concept of the risk of the escape of something potentially dangerous is at the heart of the rule.

3.90 Because the scope of this principle appeared to be very limited, and because the torts of nuisance, negligence appeared to afford those injured by the escape of dangerous things an adequate remedy, many academics questioned the continuing utility of the tort based upon strict liability. However in *Transco plc* v *Stockport Metropolitan Borough Council*[119] the House of Lords held that the rule is still firmly embedded in the common law.

3.91 That said, there will be relatively few cases in which the rule will be applied—firstly there must be a "non-natural user of land". In a modern and technologically complex world, few activities are now regarded as "non-natural users".[120] Secondly, there must be an "escape", despite attempts in one case to persuade the House of Lords to expand the ambit of the principle.[121] Thirdly, the right to recover may be precluded on grounds of remoteness: see *Cambridge Water Co* v *Eastern Counties Leather plc*[122] and *Transco plc* v *Stockport Metropolitan Borough Council*.[123] Nor can a claim for personal injuries be brought.[124]

Liability

Who is liable under the rule?

3.92 Potential defendants include not only those persons who keep or accumulate dangerous things on land but also the owners or controllers of such things. The occupier of land may also be liable if dangerous things are brought or collected on land for his purposes, with his permission.

119. See note 86, *supra*.

120. For cases falling either side of the line, see *Rickards* v *Lothian* [1913] AC 263; *Transco plc* v *Stockport Metropolitan Borough Council* (*supra*) where the use was held to be not to be "non-natural" and *Cambridge Water Co Ltd* v *Eastern Counties Leather plc* (*supra*) at pp. 308 and 309 where the storage of substantial quantities of chemicals on industrial premises was held to be "an almost classic case of non-natural use".

121. *Read* v *J Lyons & Co Ltd* [1947] AC 156 affirmed in *Transco plc* v *Stockport Metropolitan Borough Council* (note 86, *supra*).

122. See note 85, *supra*.

123. See note 86, *supra*.

124. *Transco plc* v *Stockport Metropolitan Borough Council* (note 86, *supra*).

Who may claim?

3.93 This may be the adjacent owner into whose land materials escape.

Possible defences

3.94 Act of God, act or default of the claimant, the independent act of a third party, and acting under statutory authority are all potential defences to a claim brought under the rule in *Rylands* v *Fletcher*.[125] As for the latter, where use of the dangerous thing is authorised by statute, negligence must be proved in order to establish liability. An employer will usually be held liable for the acts of a contractor.

TRESPASS TO LAND

Definition

3.95 Trespass to land is any unjustifiable impingement by a person upon land in the possession of another.

3.96 It is sufficient merely to cross a boundary.[126] Trespass also includes removing soil off the land, or any part of a building or other erection attached to the soil so as to form part of the realty.[127] The placing of anything in or on the land in the possession of another, for example dumping rubbish,[128] also qualifies as a trespass.

3.97 Every continuance of a trespass is a separate trespass which gives rise to a new cause of action. In *Holmes* v *Wilson*[129] there was one award of damages in relation to the erection of buttresses to support a road and in the second action for not removing the buttresses after notice.

Air space

3.98 Where air space is necessary for the satisfactory use of land below, it may be a trespass to intrude into its air space. In *Kelsen* v *Imperial Tobacco Co (of Great Britain and Ireland) Ltd*[130] the placing of an advertising sign four inches into the air space of a neighbour was held to be a trespass. Similarly, and significantly in the context of this book, where booms of tower cranes invaded the air space of an occupier of land, it was held to be a trespass: *Anchor Brewhouse Developments Ltd* v *Berkley House (Docklands Developments) Ltd*.[131]

Liability

Who can claim?

3.99 The person in possession of the land affected can claim damages or an injunction or both.

125. *Transco plc* v *Stockport Metropolitan Borough Council* (note 86, *supra*).
126. *Ellis* v *Lotus Iron Co* (1874) LR 10 CP 179.
127. *Lavender* v *Betts* [1942] 2 All ER 72.
128. *Kynock Ltd* v *Rowlands* [1912] 1 Ch 527.
129. (1839) 10 A & E 503.
130. [1957] 2 QB 334.
131. (1987) 38 BLR 87.

3.100 Possession is the occupation or physical control of land. Physical control is a concept relative to the land in question, i.e. in the case of a building, possession is evidenced by occupation or where the building is not occupied, by the possession of the means of entry (for example, the keys). Where there are no buildings on the land, possession is demonstrated by acts of enjoyment of the land itself such as building a wall on it or cultivating it. Possession of part of the land may amount to sufficient evidence of possession unless it can be shown that another person is in possession. Possession of the surface of the land *prima facie* includes possession of minerals also. Occupation by a servant even if exclusive from the consent of the owner does not amount to possession. Where public bodies are authorised by statute to prepare public works, they acquire an interest in the soil thereby and can therefore sue a trespasser, if the relevant statute can be so construed. A reversioner may sue if the trespass has caused "permanent injury to the land affecting the value of the inheritance".

Defences

3.101 There are justifiability defences which may be pleaded in relation to trespass. Licences granted by law may empower an individual to enter upon land against the consent of the person in possession—for example to go onto adjoining land to prevent the spread of fire, or to redeposit goods wrongfully placed on the defendant's land. Justifiability by right of way includes most private and public rights of way but the extent of such rights depends upon the purpose for which the right was granted. Some easements may give an individual the right to do some act on land to which that individual does not have exclusive possession—for example, an owner with a bare right of support by a servient tenement may enter to effect support. As for a bare licensee, if his licence is exceeded, he becomes a trespasser. However, if a contractual licence is prematurely revoked, the licensee does not become a trespasser because he has an equitable right to specific performance to enable him to stay. Finally, an alleged tortfeasor may be justified in his actions by a customary right or by necessity in entering land. An example of the former is the use of land for sport and recreation and as an example of the latter, the preservation of life will be considered a necessity.

Damages

3.102 Generally the principles of assessment of damages in trespass cases will be similar to the assessment of damages in cases of nuisance (see above, pages 68 to 74).

3.103 Damages are recoverable even if the claimant has suffered no physical or financial damage or loss and may be recoverable according to identifiable situations. Where the trespass has caused no physical damage, the measure of damages may be the price that a reasonable man might pay for a right of use of the land equivalent to the wrongful use represented by the trespass or may be a sum to recompense the claimant for any distress, discomfort or inconvenience suffered. In the case of physical damage to the land, although the general measure is the amount by which the value of the land has been reduced by the trespass, costs of repair or replacement may be awarded where reasonable. In extreme (and rare) cases exemplary damages may be awarded in the event of arbitrary, oppressive or unconstitutional action.[132] If the purpose of the trespass is the pursuit of profit, it is possible that the courts might award an account of the profits wrongfully obtained by the trespass, but this is as yet an

132. *Rookes* v *Barnard* [1964] AC 1129.

undeveloped area of the law[133]—what is more likely is an award on the basis of what the claimant might reasonably have demanded to permit the act of trespass[134] although it should be emphasised that in the context of claims in trespass this is totally uncharted territory.

Limitation and prescription

3.104 An action for trespass may only be brought within six years after the cause of action has accrued. A trespasser may also acquire a title to land by adverse possession thereby denying the true owner of any right to sue for trespass. An action for ejectment is an action for recovery of land where the claimant is out of possession of the land and demands immediate repossession. This involves the claimant proving his title to the property. An action for ejectment can only be brought within 12 years after the time when the right to bring such an action first accrued (the right of action does not accrue until there has been some adverse possession by another person).

BREACH OF STATUTORY DUTY

Definition

3.105 Breach of statutory duty involves non-compliance with an Act of Parliament or regulations made under it which gives rise to a civil action at the suit of a person who is injured as a result of the non-compliance. Many statutes contain provisions or empower the making of regulations which aim to prevent personal injury or property damage or provide legal rights to sue for breach of such provisions. Criminal sanctions will very often apply in the event of breach.

Liability

Injury

3.106 The claimant must prove that the defendant's actions and the claimant's injury fell within the scope of the statute in question.[135]

3.107 The injury must be of the type foreseen by the statute, and if non-compliance with statutory obligations results in a form of damage not anticipated by the statute, no action will lie for breach of statutory duty. This may happen if the claimant is not within the class of persons protected or if the injury is outside the scope of the Act.

Intention of the statute

3.108 Even if the injury is within the ambit of the statute, the question of whether an action will lie is dependent on the provisions of the individual statute in question. The principles

133. *Attorney-General* v *Blake* [2001] AC 268.

134. See by analogy *Wrotham Park Estate Co* v *Parkside Houses Ltd* [1974] 1 WLR 798; *Experience Hendrix LLC* v *PPX Enterprises Inc* [2003] 1 All ER (Comm) 830; [2003] EWCA Civ 323; *WWF World Wide Fund for Nature* v *World Wrestling Federation* [2008] 1 WLR 445; [2007] EWCA Civ 286.

135. *Fytche* v *Wincanton Logistics plc* [2004] 4 All ER 221; [2004] UKHL 31.

were summarised by Lord Browne-Wilkinson in *X (Minors)* v *Bedfordshire County Council*.[136]

> "The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action . . . However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach . . . "

Causation

3.109 The breach must be the cause of damage to the claimant, and the claimant must show on the balance of probabilities that the harm was caused by the defendant's breach of duty, in law and in fact. It is unusual for a breach to be actionable per se. See the discussion of causation in respect of the tort of negligence above.

Defences

Nature of the statutory duty itself

3.110 Very often the statute which is alleged to have been breached will contain exculpatory provisions—for example many provisions in the health and safety legislation impose an obligation to do something "so far as reasonably practicable". The burden of bringing himself within such a provision generally rests upon the defendant.[137]

Contributory negligence and volenti non fit injuria

3.111 The defence of *volenti non fit injuria* will rarely be available, but often a plea of contributory negligence is available, since the claimant's own acts may have contributed to the breach of statutory duty arising (for example where the claimant and a fellow worker agree upon a manner of carrying out work which is in breach of statute) or where the claimant's own actions contribute to the damage suffered (for example a claimant on an inadequately guarded platform—a potential breach of regulations—who then carries out his work carelessly, leading to a fall). The degree of carelessness needed to show contributory negligence is dependent on

136. [1995] 2 AC 633 at p. 731.
137. *Larner* v *British Steel plc* [1993] ICR 55.

the circumstances. For example, in *Caswell* v *Powell Duffryn Associated Collieries Ltd*[138] it was held that a measure of carelessness would be ignored in arduous working conditions such as those of a workman in a factory or a mine.

Delegation of duty

3.112 If statute imposes a duty upon someone, generally it cannot be delegated to a contractor. In *Dalton* v *Angus*[139] the fact that an independent contractor was employed was held to be no defence to an allegation of breach of statutory duty—it would have been a defence only if on the true construction of the statute delegation to a third party would have fulfilled the statutory obligation.

Co-extensive breaches of duty

3.113 It will very often happen that a claimant's actions may constitute a breach both by the claimant and by the claimant's employer of statute or regulation. Such a breach of duty will amount to a defence only if on a true view the claimant was entirely responsible for the breach.

Particular statutes and regulations

3.114 Particular statutes and regulations having application to construction projects are numerous, but include the following:

(1) the Occupiers Liability Acts 1957 and 1984, referred to above;
(2) the Defective Premises Act 1972;
(3) the Building Act 1984;
(4) Manual Handling Operations Regulations 1992;
(5) Construction (Health, Safety & Welfare) Regulations 1996;
(6) Provision and Use of Work Equipment Regulations 1998;
(7) Construction (Design and Management) Regulations 2007.

VICARIOUS LIABILITY

3.115 Vicarious liability derives from the principle that a principal is liable for the acts or omissions of his agent, acting within the scope of his authority. The most often encountered instance of vicarious responsibility is the liability of an employer for the acts of his employee, carried out in the scope of his employment. There is much authority on the circumstances in which a person is held to be an "employee"—generally the degree of control exercised will be a highly significant if not determining factor[140]—and not enough space here to review them. If the person guilty of the act or omission causing damage is an employee, the act or omission must still be committed in the course of that person's

138. [1940] AC 152.
139. (1881) 6 App Cas 740.
140. See, for example, *Mersey Docks & Harbour Board* v *Coggins and Griffith* [1947] AC 1. What matters is the degree of control over the manner in which work is carried out rather than control over what work is carried out: *per* Ramsey J in *Biffa Waste Services* v *Maschinenfabriek Ernst Hesse* (*supra*).

employment. This also gives rise to difficult questions—the House of Lords in *Lister* v *Hesley Hall Ltd*[141] indicated that the approach is to see whether there is a sufficiently close connection between the acts that the employee was employed to do and the tort, so as to make it just that the employer should also be held liable. The fact that the employee acts dishonestly does not in itself take the act outside the scope of the employment: see *Morris* v *CW Martin & Sons Ltd*.[142]

FIRE

3.116 Because so many of the insurance cases arising out of construction projects arise out of fires and because the application of tortious principles to liability for fire are somewhat particular, it is thought helpful to set out here some of the key legal principles in respect of liability for damage caused by fire.

3.117 First, fire is recognised as a dangerous thing placing a person starting a fire or having the power to control it under a high duty of care.[143] It has been suggested that liability for fire is a liability under the rule in *Rylands* v *Fletcher*[144] but this view has recently been rejected at least in respect of a fire starting in a domestic grate.[145] Indeed, it seems difficult to describe most fires as being a "non-natural use of land".

3.118 Secondly, it is now well established that a person who employs someone who carelessly causes a fire cannot rely upon an "independent contractor" defence.[146] A person from whose land fire escapes has a defence if the fire was started by an unforeseeable act of God[147] or by an independent third party.

3.119 Thirdly, even if the fire started on a person's land by act of nature or the act of a third party, that landowner is under a duty to take reasonable care to prevent it spreading to adjoining land.[148]

3.120 In *Johnson (t/a Johnson Butchers)* v *BJW Property Developments Ltd*,[149] HHJ Thornton QC held that a domestic householder was liable when a fire escaped and damaged an adjoining building as a result of the negligence of a contractor engaged to replace the fire surround of a fireplace.

3.121 These cases illustrate the substantial liabilities which may be held to exist arising out of an outbreak of fire. Many building operations involve the execution of hotworks (for example welding or use of a blow torch). Insurers very often impose stringent conditions on liability policies insuring contractors carrying out such works. This is an area in which consideration of the interplay of potential liability in tort, contractual conditions and insurance protection requires particularly careful thought. As will be seen in Chapter 13 below, insurance

141. [2002] 1 AC 215; [2001] UKHL 22.
142. [1966] 1 QB 716.
143. See *Musgrove* v *Pandelis* [1919] 2 KB 43; *Mulholland & Tedd Ltd* v *Baker* [1939] 3 All ER 253.
144. *Power* v *Fall* (1880) 5 QBD 597; *Gunter* v *James* (1908) 24 TLR 868.
145. *Johnson (t/a Johnson Butchers)* v *BJW Property Developments Ltd* [2002] 3 All ER 574; [2001] EWHC 1131 (TCC).
146. See *Balfour* v *Barty-King* [1957] 1 QB 496; *H & N Emanuel* v *Greater London Council* [1971] 2 All ER 835; *Johnson (t/a Johnson Butchers)* v *BJW Property Developments Ltd* (*supra*).
147. *Goldman* v *Hargrave* [1967] 1 AC 645.
148. *Goldman* v *Hargrave* (*supra*); *Sedleigh-Denfield* v *O'Callaghan* (note 98, *supra*) approving the dissenting judgment of Scrutton LJ in *Job Edwards Ltd* v *Birmingham Navigations* [1924] 1 KB 341 at p. 361.
149. [2002] 3 All ER 574; [2001] EWHC 1131 (TCC).

arrangements can play an important part in determining whether a party has liability in contract or in tort to another party for fires started negligently.

REMEDIES

3.122 The court can grant various remedies in a tortious action including damages (discussed in various places above), an injunction or specific restitution.

3.123 Damages may be compensatory, nominal, contemptuous or aggravated or exemplary. Compensatory damages reflect the loss suffered and may be general (such as an award for pain and injury following a personal injury accident) or special (such as an award for loss of earnings in such a case); nominal damages may be awarded where no actual damage has been suffered, for example where a trespass has been proved but the claimant is unaffected by that trespass; contemptuous damages are awarded to show that there may have been a technical tort committed but the action is not really justified; exemplary or aggravated damages may be very substantial (but are rarely awarded) and apply where the court wishes to mark its disapproval of the defendant's conduct as a deliberate or outrageous tort.

3.124 Different types of injunction are available. Their purpose is to prevent a continuance of a tort, particularly nuisance or trespass, or to prevent such a tort ever occurring (a "*quia timet*" injunction). Thus, for example, in a claim complaining of interference with the right to light, an injunction, not damages, will be the usual remedy.[150]

3.125 Specific restitution (or delivery up) involves the return of the claimant's property. This is a discretionary remedy and is effected by court order, as is an injunction.

CONTRACTUAL LIABILITY

3.126 Contractual liability is a liability imposed on parties voluntarily under the terms and conditions of a contract. Generally all losses, whether physical or economic, are recoverable as damages provided they arise in the natural course of things from the breach of contract, or were in the contemplation of both parties when the contract was made.[151] The parties are generally free to limit or widen their equivalent liability had a claim been brought in tort. Exclusion clauses and limitation clauses are used to limit liability and indemnity clauses to widen liability. Examples of the latter are the indemnity clauses contained in the JCT contracts.

3.127 An exclusion clause is a clause whereby one person excludes his liability to the other party to the contract. A limitation clause is a clause whereby one of the contracting parties limits his liability to an agreed figure. Indemnity clauses involve one party agreeing to indemnify the other person to the contract in respect of loss or damage suffered by him, for example the building contractor who agrees to indemnify the employer against forms of injury, loss or damage.

3.128 In the case of indemnity and exclusion clauses, these generally have to be incorporated at the time the contract was made—it is a rare case where the party disadvantaged

150. See *Regan* v *Paul Properties DPF No. 1 Ltd* [2007] Ch. 135; [2006] EWCA Civ 1319.

151. *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd* [1949] 2 KB 528; *Koufos* v *C. Czarnikow Ltd (The Heron II)* [1969] 1 AC 350, as explained in the recent decision of the House of Lords in *Jackson* v *Royal Bank of Scotland* [2005] UKHL 3.

by such clauses will be willing to allow them to be incorporated by amendment, but it can happen. Many disputes turn upon arguments as to whether such clauses have been incorporated, particularly where the clauses are part of a selling party's standard conditions of contract set out, for example, in small print amongst a mass of other clauses on the back of an acknowledgement of order form.[152] All three types of clauses are construed *contra proferentem*, that is they are construed adversely to the person seeking protection from them and who proposed that the clause be incorporated into the contract.[153] One of the most fundamental principles is that it will be presumed that the parties do not intend that a guilty party should be relieved in whole or in part from the consequences of his own negligence,[154] still less that he should be able to impose an obligation onto the other party to indemnify him against the consequences of his own negligence.[155] A clause which attempts to exclude liability for negligence entirely will be construed more strictly than one accepting some albeit limited liability.[156] For an important decision of the House of Lords applying these principles of construction to the terms of an insurance policy containing exclusion clauses protecting financing parties interested in the policy, see *HIH Casualty and General Insurance Ltd* v *Chase Manhattan Bank*.[157] For an example of a case in which these principles were applied in respect of a construction contract, see *Stent Foundations Ltd* v *MJ Gleeson Group plc*.[158]

3.129 The contractual freedom of parties to exclude liability has been significantly restricted by statute. The Unfair Contract Terms Act 1977 limits the freedom of parties to include in the contract unfair terms, particularly clauses to restrict liability. For example, a business cannot exclude liability for causing death or personal injury through negligence.[159] Generally where one party deals as a consumer or on the other party's written standard terms of business the other party can exclude or restrict a "business liability" only in so far as the clause relied upon satisfied the statutory "requirement of reasonableness".[160] The burden of satisfying that requirement is upon the party seeking to rely upon such a clause. Guidelines for the reasonableness test are provided in Schedule 2 to the 1977 Act. In cases involving commercial parties with access to specialist legal advice the court may be reluctant to strike down a clause as unreasonable.[161]

3.130 There are numerous other statutory provisions restricting the ability of parties to exclude or limit liability—for example section 3 of the Misrepresentation Act 1967 (as substituted by section 8 of the Unfair Contract Terms Act 1977) applies the requirement of reasonableness to clauses applying to liability for misrepresentation.

152. See such cases as *J. Spurling Ltd* v *Bradshaw* [1956] 1 WLR 461; *McCutcheon* v *David Macbrayne Ltd* [1964] 1 WLR 125 and *Thornton* v *Shoe Lane Parking* [1971] 2 QB 163; *George Mitchell (Cherterhall) Ltd* v *Finney Lock Seeds Ltd* [1983] QB 284, affirmed [1983] 2 AC 803.

153. See for example *John Lee (Grantham) Ltd* v *Railway Executive* [1949] 2 All ER 581.

154. *Canada Steamship Lines Ltd* v *The King* [1952] AC 192 at p. 208; *Smith* v *South Wales Switchgear Co Ltd* [1978] 1 WLR 165.

155. *Shell Chemicals Ltd* v *P & O Roadtanks Ltd* [1995] 1 Lloyd's Rep 297.

156. *Gillespie Bros Ltd* v *Roy Bowles Transport Ltd* [1973] QB 400; *Ailsa Craig Fishing Co Ltd* v *Malvern Fishing Co Ltd* [1983] 1 WLR 964.

157. [2003] 2 Lloyd's Rep 61; [2003] UKHL 6.

158. [2001] BLR 134.

159. Section 2: note a similar restriction in section 3 of the Occupiers Liability Act 1957 preventing exclusion or restriction of liability in respect of the duty of care owed to lawful visitors.

160. Section 3.

161. See, for example, *Watford Electronics* v *Sanderson* [2001] 1 All ER (Comm) 696.

3.131 Section 6(3) of the Defective Premises Act 1972 provides that any term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of the provisions of that Act, or any liability arising by virtue of any such provision, is to be void; there are restrictions upon the ability of parties to exclude or limit the effect of terms implied by statute—see for example section 6 of the 1977 Act applying to the terms implied by sections 12 to 15 of the Sale of Goods Act 1979, or sections 8 to 11 of the Supply of Goods (Implied Terms) Act 1973.

3.132 A significant incursion into the freedom of parties to contract are the Unfair Terms in Consumer Contracts Regulations 1999 introduced following an EC directive on Unfair Terms in Consumer Contracts.[162] These Regulations subject a very wide range of types of terms in consumer contracts to two requirements: (1) that the terms should be "fair" and (2) that when in writing they should be written in "plain, intelligible language". The overlap between the impact of these Regulations and that of the Unfair Contract Terms Act 1977 is complex and beyond the scope of this book.[163] The leading case as to the application of the Regulations is *Director-General of Fair Trading* v *First National Bank plc*.[164] For an interesting decision applying the Regulations to a construction contract taken out pursuant to insurance arrangements, see *Domsalla* v *Dyason*.[165]

3.133 The common law view of contracts was to require privity of contract between parties, i.e. that the only person who could take advantage of the terms of a contract was someone who was a party to the contract. There were limited exceptions to this—someone to whom a contract has been assigned can enforce rights under the contract; a beneficiary under a trust may benefit from a contract held in trust on the beneficiary's behalf by a trustee; and a party to a contract could occasionally obtain damages on behalf of another party for whose enjoyment the contract was taken out (see for example the holiday cases such as *Jackson* v *Horizon Holidays Ltd*[166]). There were also exceptions carved out by the courts in respect of building contracts[167] but problems remained.[168]

3.134 To an extent the problem has now been resolved by Statute. The Contracts (Rights of Third Parties) Act 1999 enables a third party to acquire rights under a contract if, and to the extent that, the parties to the contract so intend. To take advantage of this statutory intrusion into the common law, section 1(3) of the Act requires that the beneficiary must have been expressly identified in the contract by name, as a member of a class or as answering a particular description. This provision is significant not only because it extends the classes of persons to whom an insured under a liability policy may be found to be liable, but also because it increases the number of parties who may be able to take advantage of an insurance policy entered into between two other parties but conferring a benefit upon a third party.

3.135 One final aspect of contractual liability should be noted. Construction contracts commonly contain clauses imposing liquidated damages in consequence of contractual breaches, particularly breach of obligations as to the time for completion of a project of

162. 93/13/EEC, O.J. L95/21.

163. Reference can be made to Chapter 15 of Volume 1 of *Chitty on Contracts*, 29th edn, Sweet & Maxwell.

164. [2002] 1 AC 481; [2001] UKHL 52.

165. [2007] BLR 348; [2007] EWHC 1174 (TCC).

166. [1975] 1 WLR 1468.

167. *Linden Gardens Trust* v *Lenesta Sludge Disposals Ltd* [1994] 1 AC 85; *Darlington Borough Council* v *Wiltshier Northern Ltd* [1995] 1 WLR 68.

168. *Alfred McAlpine Construction Ltd* v *Panatown Ltd* [2001] 1 AC 518.

portions of a project. So long as such liquidated damages are a genuine pre-estimate of the losses which the wronged party will suffer in consequence of the breach, the courts will uphold such clauses[169] although such clauses may be held to be ineffective if there is no machinery available to allow for an employer's part in causing, or contributing to, delay.[170] Liabilities for liquidated damages are often very substantial.

169. See, for example, *Philips Hong Kong Ltd* v *Attorney General of Hong Kong* (1993) 61 BLR 41. For a review of the law in respect of liquidated damages provisions, albeit in the context of an employment contract rather than a construction project, see *Murray* v *Leisureplay plc* [2005] EWCA Civ 963.

170. See *Peak Construction (Liverpool) Ltd* v *McKinney Foundations Ltd* (1970) 1 BLR 111.

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CHAPTER FOUR

A BROAD OVERVIEW OF RISKS IN CONSTRUCTION PROJECTS AND THE ROLE OF INSURANCE

Roger ter Haar

4.1 Risk assessment for construction projects is a science not an art form. In any competent organisation concerned with delivering construction projects there will be a process of risk assessment. The assessment carried out will vary depending upon the commercial interests and function of the party on whose behalf the assessment is carried out—usually the developer client. At the end of the process there will be some risks which it is accepted cannot be passed on; some which will be dealt with by contractual arrangements with other parties to the construction project; and some will be dealt with by insurance. Self-evidently each party in the process will try to achieve a position whereby as much as possible of relevant risk rests with other parties and as much as possible of the chance of profit is retained. In PFI/PPP projects risks will lie usually with the party best placed to manage them (see Chapter 29).

4.2 It is helpful to consider these competing considerations at each stage of the journey from initial inspiration for a project to ultimate completion and use or disposal of the completed project.

THE VISION

4.3 Every project starts with an idea—it may be good or bad, obvious or unexpected. Construction projects range from digging a hole in the ground to construction of a multi-billion pound project such as the Channel Tunnel. In each case the project also usually commences with a person or organisation wanting to consider the feasibility of carrying out the works. In this chapter that visionary is described as the "Employer".

METHOD OF RISK ASSESSMENT

4.4 There are several construction contracts, in a modern form such as the JCT Constructing Excellence Contract (CE 2007) and the Project Team Agreement (CEIP 2006) which accompanies it, which embrace having a Risk Register dealing with all the risks (with options for allocation of these risks) discussed in this Chapter, and others in a register forming part of the Construction Contract.[1]

1. See BE *Guide to Risk Management and the Creation of a Risk Allocation Schedule* (2006).

THE ASSESSMENT OF PROJECT FEASIBILITY

4.5 Having had the vision, the Employer has to consider whether the project can be achieved and, if so, whether the balance of anticipated costs and rewards makes the proposed project desirable.

4.6 Leaving aside the very simplest projects, until about thirty years ago the participants in the vast majority of construction projects consisted of the Employer on one side of the fence, accompanied by a professional team usually including an architect, quantity surveyor and sundry engineers (civil, structural, mechanical and electrical etc.). On the other side of the fence was the "Contractor" fronting subcontractors and suppliers.

4.7 In this traditional world, as between himself and the Contractor the Employer took the design risk as well as the risks of delay caused by unforeseen circumstances necessitating changes in the work, and most market risks associated with the ultimate profitability of the original concept. The Employer relied upon his professional team to limit his risks, expecting them to carry professional indemnity insurance in order to enable them to discharge any liability arising from errors or omissions in carrying out their functions. The only risk arising out of the period before works started on site undertaken by the Contractor in this way of arranging matters related to assessment of the cost of executing the projected works as reflected in the tendered price and terms of tender.

4.8 Whilst some projects are still arranged on that traditional model, they are perhaps now a minority, certainly of the major projects commenced in recent years. At a government level within the United Kingdom (and increasingly overseas as well) the political desire, for the last decade at least, has been that large publicly funded projects should have considered an option to let as PFI[2] or PPP[3] contracts whereby so far as possible all construction and operational risk in the project is passed to the "Contractor" and/or "Operator" in return for a fixed programme of payments over a period of years from the public purse. The insurance implications of these arrangements are considered below.[4]

4.9 The first necessity for a construction project is the availability of somewhere to execute the project whether on land or at sea or both (such as a project for an oil refinery with jetties for tankers). Whether or not the Employer can acquire the necessary project area if it is not already owned is a risk usually borne by the Employer and is unlikely to be an insurable risk. If, however, the project area is already within the control of the Employer, there is always a risk of the Employer being dispossessed, for example by expropriation. Within the United Kingdom expropriation is lawfully effected through the statutory machinery of compulsory purchase which carries with it an entitlement to compensation. It is not understood that there is any significant market for insurance against expropriation risks in respect of United Kingdom–based projects. By contrast, there is a lively market for political risk insurance in respect of projects in certain countries outside the United Kingdom.

4.10 Whilst the risk of expropriation within the United Kingdom is not significant and not commonly insured against, there are nevertheless significant political risks within the UK to which the Employer is exposed. These principally concern the Town and Country Planning system. The chances of profitable development of land for any commercial purposes are dependent upon having or obtaining necessary permissions from the local or central planning authorities. In itself this is unlikely to be an insurable risk, but the Employer, if not himself

2. Public Finance Initiative.
3. Public Private Partnership.
4. See Chapter 30 below.

experienced in these matters, protects himself by engaging planning consultants to advise upon the consents likely to be available and to take such steps as are reasonably practicable within the law to obtain such consents and then by engaging an architect or other design consultant to maximise the development potential of the project within the confines of the consents obtained or likely to be obtained. The risks associated with the obtaining of consents fall primarily upon the Employer, but to the extent that losses arise from a failure on the part of his advisers to exercise reasonable skill and care, those advisers would normally be expected to have obtained professional indemnity insurance against that potential liability.

4.11 The professional indemnity insurance market has relatively limited capacity. The cost of professional indemnity insurance is a significant element of the costs of professional practices who cannot obtain unlimited insurance cover and who generally would be unable to afford such cover even if it were available. Accordingly well-advised professionals seek by agreement to cap their liabilities to their clients to a sum within the available professional indemnity insurance limit. In practice the Employer often bears the risk of losses arising from professional errors or omissions, either because by agreement the professional parties limit their liabilities or because many professionals have no significant assets with which to discharge liabilities in excess of their available insurance.

4.12 Leaving aside the prospects of profitability associated with planning or other consents, assessment of the market for a development and therefore of the project's potential profitability rests with the Employer and that risk is generally not insurable.

4.13 At the feasibility stage it is important for the Employer to consider the buildability of the proposed project: what are the possible impediments to it being built at all, built within a defined time scale, or built to a projected cost?

4.14 To take the question of whether the project can be built at all—there may be ground conditions not actually foreseen before construction works commence on site. This risk is usually mitigated by a careful consideration of the physical attributes of the project area during the feasibility and design stages. If the Employer has sufficient resources, this may be carried out in-house, with the risk therefore resting primarily with the Employer. Alternatively, the Employer may engage outside consultants, for example to carry out ground investigations such as the drilling of bore holes. In the latter case the external consultants would be expected normally to carry professional indemnity insurance against liability for negligent errors and omissions. In the former case, many contractor developers take out professional indemnity insurance which provides cover in respect of losses that would have been recompensed in the other case had external consultants been engaged. These insurances are discussed further in Chapter 10 below.

4.15 It is possible that in some cases, despite the exercise of due diligence in assessing the risks, a project is not buildable, perhaps because of unforeseen site conditions which could not reasonably have been anticipated. Such situations are likely to be rare given the wide range of techniques and equipment now available, but if they arise it seems likely that any resultant losses would be uninsurable because under English law it is not possible to insure against a loss that is certain to occur.[5]

4.16 Finally, at the feasibility stage a view will generally have to be taken as to what is likely to be the cost of the project and how long it is likely to take to build. If an employer commits

5. See *Scottish Amicable Heritable Assn Ltd* v *Northern Assurance Co* (1883) 11 R (Ct Sess) 287, 303; *Prudential Ins Co* v *IRC* [1904] 2 KB 658, 663; *Schloss Bros* v *Stevens* [1906] 2 KB 665, 673; *British & Foreign Marine Ins Co Ltd* v *Gaunt* [1921] 2 AC 41, 57; *Department of Trade & Industry* v *St Christopher Motorists' Assn* [1974] 1 Lloyd's Rep 17, 19; *Re NRG Victory Re Ltd* [1995] 1 All ER 533; *Re Sentinel Securities plc* [1996] 1 WLR 316

himself to the project based upon such assessments (for example by purchasing land at a price calculated by reference to such projections), he may suffer loss if those projections prove later to have been erroneous. In the example given, his possibilities to protect himself or to mitigate the risk are to enter into the purchase of the land conditionally, for example by obtaining an option to purchase on terms adequately protecting him, or by obtaining professional advice as to the likely cost and duration of the project. Ultimately, however, these are usually part of the commercial risks which an employer assumes knowingly as part of the price he must bear in the pursuit of profit.

4.17 Thus, at the feasibility stage, the type of insurance primarily under consideration is professional indemnity insurance providing cover in respect of liability of professionals giving advice. The professionals whose activities are insured are not necessarily only professionals external to the Employer's organisation.

THE DESIGN STAGE

4.18 It is possible conceptually to separate the feasibility stage from the design stage, although in practice the division may not be clearcut. Thus in an ideal world it might be thought that the Employer would carry out the fullest possible assessment of a project before committing himself by entering into a contract to purchase land. However, that may not be desirable or practicable. The Employer may wish to minimise costs incurred until he is certain that he has acquired legal title to land. The market may be such that the Employer has to take a view and strike while the iron is hot. It may not be feasible to carry out full investigations until the land has been bought. There are numerous permutations.

4.19 The design process carries with it substantial potential for the creation of loss. Generally the losses will only reveal themselves when construction works commence or later. Inadequacies in the design process are liable to cause losses in a large number of respects:

- delays in the design phase delaying start of the construction phase and therefore delay of completion of the project;
- unnecessary expense in the design process;
- increased cost of construction works;
- increase in the necessary time for execution of construction works;
- failure to achieve the Employer's requirements for the project;
- physical injury to persons on or off site;
- physical damage to the contract works, existing property on site or to property off site;
- consequential losses arising out of the foregoing.

4.20 As pointed out above, the traditional Employer/Contractor divide has changed substantially over recent years. In the traditional divide the risks of the above losses arising out of failures in the design process fell generally upon the Employer, who would then be left to obtain whatever recompense he could from his professional advisers.

4.21 In the PFI/PPP arrangement the Employer, that is to say the public body wishing to procure the completion of a project in the interests of the public, will seek to transfer the whole of the design risk to the PFI/PPP Contractor, in the process usually ceding to the Contractor substantial autonomy over the design process so long as certain performance targets are achieved.

4.22 Similarly, an increasing number of private projects are placed with a Contractor on a design and build basis. Here also the Employer specifies what he expects the Contractor to achieve and leaves the Contractor to achieve it. The Contractor may then use his in-house resources to carry out the design functions or subcontract them to external contractors. From the Employer's perspective his primary protection is his contract with the Contractor—he relies upon the Contractor to do what he has engaged him to do. So long as the Contractor's ability to pay damages is sufficient, then a properly drafted contract gives the Employer the protection he requires. The Contractor's ability to pay damages is often underpinned by the provision of bonds, particularly performance bonds, by financial institutions of repute.[6] The Employer will frequently also require a Deed of Warranty from any independent professionals involved in the design process, this being a collateral contract enabling the Employer to pursue the professionals involved in the design process directly. (But now see Contracts (Rights of Third Parties) Act 1999.)

4.23 If the design is carried out by external professionals, whether engaged by the Employer or by the Contractor, it is to be expected that those professionals will have professional indemnity insurance.

4.24 However, modern technology has increasingly introduced another element of complexity into the design of construction projects. It is commonplace for projects to incorporate substantial elements of proprietary technology—for example computerised control systems incorporated to regulate building services systems such as air-conditioning systems, escalators and lifts, or complex lighting systems, to name just a few examples to be found in a modern office building. The role of the traditional professional design team is to specify what elements are to be supplied and installed—few professional design consultants can be expected to have detailed specialist knowledge of these types of technology.

4.25 Usually such technology is provided by a specialist subcontractor or supplier. The Employer's primary protection is again his contract with the Contractor; the Contractor's primary protection in respect of his liability to the Employer is his contract with his subcontractor or supplier. Again the Employer may have the benefit of directly enforceable warranties in his favour from the subcontractor/supplier. Whilst the role of the subcontractor/supplier may involve substantial design elements, as often as not the subcontractor/supplier is simply supplying and installing equipment designed and manufactured by another party, often a major multinational corporation. In this situation the type of insurance which comes into play to protect the subcontractor/supplier against his potential liability, if any insurance is involved at all, is likely to be a product liability policy or (less commonly) a product guarantee policy.

4.26 A vital part of the design stage for all parties is consideration of the allocation of financial risks. These risks crystallise in the contract executed. At that stage in broad terms the Employer is committed to pay a specified price or a price calculated according to specified rules and principles for the work which is to be carried out, and the Contractor is committed to carry out those works for the specified price. An understanding of the allocation of risks to Employer, Contractor and (in so far as appropriate and agreed) insurers is vital. A large part of this book is concerned with the way in which the financial consequences of physical damage are allocated under various standard forms of construction contract.

4.27 But the process of allocation obviously involves allocation of risks not necessarily arising out of physical loss or damage. To give an example: it is standard for most properly

6. See Chapter 14 below for a discussion of the difference between bonds and insurance and of the types of bond frequently encountered.

drafted English construction contracts to include a requirement for the Contractor to pay liquidated damages on a daily or weekly basis in the event of delay in completion of the whole or sections of a project. There was a time when certain insurers and underwriters were willing to provide insurance to contractors against such liability. Such insurance is now almost impossible to obtain in the English insurance market. Accordingly, the Contractor has to approach the contract upon the basis that the burden of any liquidated damages will be borne by him. In these circumstances it is essential for the Contractor to ensure that in pricing the contract and in agreeing to the terms of the contract he has allowed appropriately in his risk assessment for the possibility of an exposure to liquidated damages. On the other hand, for example, under most standard forms of contract the losses resulting from damage to contract works by fire will be borne by some form of project insurance policy: accordingly the Contractor will only need to price for any part of the cost of insurance which he is required to bear.

4.28 Again in the traditional method of contracting, the Employer would often, perhaps usually, have had the benefit of a quantity surveyor to advise him as to the appropriateness of the terms of the proposed construction contract and the financial risks undertaken. Today, sophisticated Employers may need no outside assistance. On the other hand, a wide range of advisers may be involved in considering a proposed construction contract and advising the Employer, including quantity surveyors (as in the traditional structure of relationships), project managers, management contractors and (particularly in the case of large-scale projects such as PFI/PPP projects) solicitors and financial institutions.

4.29 Thus, as at the feasibility stage, the principal relevant role for insurers is the provision of professional indemnity cover.

THE CONSTRUCTION PHASE

4.30 During the construction phase, problems that were once only potential problems arising out of the earlier phases are now liable to emerge as actual problems and are liable to be joined by fresh problems arising out of events on site. Risks of loss during the construction phase include the following:

- delays to the project because of late possession of site;
- physical injury to persons on and off site;
- physical damage to the contract works;
- physical damage to property owned by the Employer;
- physical damage to third parties' property;
- delays to the project as the result of such physical damage;
- delays to the project as a result of design errors, because of late issue of designs or instructions, or because of changes in the design;
- delays to the project as a result of inefficiency or bad workmanship by the Contractor;
- delays to the project as a result of unforeseen events or circumstances;
- delays to the project as a result of employment disputes;
- delays to the project as a result of shortage of resources;
- contractors' additional costs/loss of profit as a result of delays;
- employer's additional costs/loss of profit as a result of delays;
- consequences of government policy.

4.31 Some of these risks are easily insurable—there is a large and healthy market providing cover in respect of physical damage to contract works under Contractors All Risk policies. Likewise, there is a large and healthy market providing liability cover for third party liability and employers' liability risks. An important purpose of this book is to set out how various standard forms of contract allocate responsibility for procurement of insurance to cover material loss and damage and for obtaining liability insurance between Employer and Contractor.

4.32 There is also adequate insurance capacity in the marketplace to provide cover in respect of at least some of the consequences of delay or disruption caused by the occurrence of physical damage, protecting the Employer's interest through either Advance Loss of Profits or other Business Interruption cover. There are also policies available to protect the Contractor against losses he may suffer following physical loss of or damage to the contract works.

4.33 Generally, as far as concerns projects in the United Kingdom, the other risks listed above are outside the remit of insurance cover and are left to be borne by the Employer or the Contractor as the construction contract may allocate.

TESTING AND COMMISSIONING

4.34 One phase of a construction contract calls for particular comment, particularly in respect of such projects as the construction of process plants or power stations: that is to say the testing and commissioning phase. At this stage elements of the plant designed to work under pressure such as boilers are pressurised, and elements designed to work at heat, such as furnaces, are fired up. Even on the best designed and constructed project, this phase presents particular hazards.

4.35 Unsurprisingly, the risks attendant upon this phase of the works can produce particular problems for the insurance industry.[7] From the insurers' standpoint, it is important to understand the risks involved and to ensure that premium and other terms reflect those risks. From the contractors' viewpoint, it is obviously important to ensure that cover is in place: particular problems can occur if a project overruns so that a contractor finds itself seeking an extension of the policy period in respect of a troubled project. The insurance market can sometimes be reluctant to extend the period of cover in such circumstances.

THE MAINTENANCE PERIOD

4.36 Most standard forms of contract provide for a "maintenance period", that is the period after practical completion or substantial completion of the construction works. During this period the contractor will often be off site but has a liability to return to site to finish off any minor elements of "snagging" or "punch list" items that remain to be completed and to put right any defects that may emerge. The period will vary from contract to contract. Generally, contractors all risks and erection all risks policy cover terminates with the issue of the

7. An example of litigation arising out of the problems associated with this phase of a major construction project is *Kennecott Utah Copper Corporation and others* v *Cornhill Insurance plc* [2000] Lloyd's Rep IR 179 and *Kennecott Utah Copper Corporation and others* v *Minet Ltd* [2003] Lloyd's Rep IR 503.

certificate of practical completion or the certificate of substantial completion:[8] however, cover can be obtained to provide some cover during this period, either on a "visits" basis or an "extended maintenance" basis.

POST-COMPLETION

4.37 The insurance of property risks after completion of construction projects is generally outside the purview of this book. An exception to this is in respect of Latent Defects Insurance policies ("Inherent Defects policies of insurance"), which are discussed in Chapter 12 below.

8. It has been suggested in two first instance cases that cover ceases under a CAR policy when construction activity ceases: *Swiss Reinsurance Co* v *United India Insurance Co Ltd* [2005] EWHC 237 (Comm) and *Mopani Copper Mines Ltd* v *Millenium Underwriting Ltd* [2008] EWHC 1331 (Comm).

CHAPTER FIVE

CLASSES OF INSURANCE CONTRACT

Roger ter Haar

5.1 It is not a particularly profound observation that construction and engineering projects involve a wide range of risks for all those involved and for third parties not directly or voluntarily involved. Those risks include the risks of physical injury, loss and damage and their financial consequences and economic losses unassociated with physical injury, loss and damage, such as loss of profits by reasons of delay in completion of a project, or simple miscalculation as to the likely costs of a project or the availability of the market for the completed project.

5.2 It is the intent of this chapter to set out a summary of the main classes of available insurance policies.

THE MAIN CLASSES OF CONSTRUCTION INSURANCE POLICIES

5.3 A construction insurance policy will be either a single project policy or a floater policy. A single project policy provides cover for the whole or part of a specific construction project. There are various classes of policy that construction contracts normally require, principally liability policies (employers' liability and public liability), and material damage policies. Insurance may be effected through composite or combined policies.

5.4 Although it might be thought ideal to obtain one insurance policy covering a single construction project, this is not generally possible because of the vast range of risks associated with construction projects and because different insurers and underwriters specialise in underwriting different risks. This frequently requires several insurance policies to be in place to cover the risks arising out of a single project, but this inconvenience is mitigated to the extent that it is usual practice to cover third party liability and material damage under one policy.

LIABILITY POLICIES

5.5 The principal types of liability policy cover employers' liability, road traffic cover, public liability and professional liability. These policies are designed to cover an insured's legal liability to third parties (i.e. liability to persons who are not a party to the insurance contract) subject to certain exceptions. An employer's liability policy covers the liability of an employer to his employees (i.e. those persons under a contract of service or apprenticeship to the employer) for personal injury or disease arising out of or in the course of their employment on the project. Employers are required by law to have such liability insurance in effect.[1]

1. See the Employers' Liability (Compulsory Insurance) Act 1969 as amended by *inter alia* the Employers' Liability (Compulsory Insurance) Regulations 1998 (SI 1998 No. 2573).

5.6 All users of motor vehicles upon roads or other public places are required to have liability insurance providing indemnity against liability for injury to parties other than the driver and for damage to the property of parties other than the driver.[2] In respect of construction projects this will involve consideration of whether vehicles are being used on a "road or other public place".[3]

5.7 Public liability insurance provides an indemnity against personal injury claims by the public (other than employees) and property damage claims by any third party, including employees.

5.8 Professional liability or professional indemnity insurance (PI) covers those professionals such as architects, surveyors, engineers, project managers and others involved with the construction project against claims of professional negligence. It is very often the case that contractors have their own design departments or carry out works on a basis whereby the contractor takes contractual responsibility for design even if carried out by a subcontractor or independent professional engaged by the contractor. Accordingly, well-advised contractors who also take on design responsibilities will also procure professional indemnity cover. See Chapter 10 below in respect of professional indemnity insurance generally.

MATERIAL DAMAGE POLICIES

5.9 This type of policy covers loss or damage to property in which the insured has an insurable interest, through ownership, possession or a contract to acquire ownership of that property. A typical material damage policy only covers loss of or damage to specified property. Not infrequently, a material damage policy may be combined with other policies. Thus commonly material damage cover will be granted in one section of the policy and public liability cover in another section; or material damage cover may be granted in one section and business interruption cover in another. Usually each section falls to be construed independently of any other section.

5.10 Material damage policies are often described as Contractors All Risks (CAR) or Erectors All Risks (EAR) policies. Typical property covered under CAR/EAR policies includes:

- contract works (temporary and permanent);
- construction plant (e.g. cranes or scaffolding) while in use in the course of construction or whilst in storage on site;
- plant erection, i.e. loss of or damage to construction plant while being erected or dismantled on site;
- goods in transit, i.e. loss of or damage to contract works materials while transported to site, although marine and aviation risks will usually be excluded;
- damage to employees' property (other than contract works).

5.11 There are many commonly found exclusions and exceptions to cover. Risks commonly excluded are marine and aviation risks, professional indemnity risks, consequential loss

2. See ss. 143 and s. 145 of the Road Traffic Act 1988 as amended by *inter alia* the Motor Vehicles (Compulsory Insurance) Regulations 1992 (SI 1992 No. 3036).

3. "Road" is defined in s. 192(1) of the Road Traffic Act 1988 as "any highway and any other road to which the public has access, and includes bridges over which a road passes". There is no separate definition of "public place".

and contract performance guarantees. Material damage (property) policies are discussed further in Chapter 11 below.

5.12 Many projects involve the incorporation of proprietary materials or products which are assumed by the participants in the construction process to be fit for a particular purpose. On occasions that assumption may prove to be ill-founded.[4] Well-advised suppliers of goods and manufacturers of equipment and fittings will have the benefit of product liability insurance. Such insurance covers liability for loss or damage caused by defects in products but not for liability for products which are merely defective.[5] There is also a very restricted market for product guarantee insurance.

CONSEQUENTIAL LOSS POLICIES

5.13 Loss of or damage to property involved in a construction project or intended to be involved in a construction project is liable to cause delay to completion of the project. Delay to completion of a project usually causes loss to the contractor who is on site longer and is often working in disruptive and uneconomic conditions as a result, and will usually cause loss to the employer of the contractor, who will incur financing costs for longer and who may miss an opportunity to sell or let the project property or to use the property for his own purposes, suffering loss in consequence. Insurance against such economic losses occasioned by physical damage is relatively easily available in the marketplace. Delay is also likely to be caused by other factors such as late issue of instructions by or on behalf of the employer, or incompetence on the part of the contractor. Losses caused by delays arising out of such matters are not commonly covered by insurance.

5.14 These forms of insurance may be together described as consequential loss policies: particular types include business interruption policies, Advance Loss of Profits policies and (what are now an almost extinct species) Liquidated Damages and Force Majeure policies.

COMPOSITE AND COMBINED POLICIES

5.15 As set out above, different forms of cover are often included in the same policy. It is perhaps more common for smaller construction companies to take out such combined covers.

5.16 Composite or combined policies may in some cases have advantages over separate policies:

- they may be significantly less expensive in terms of premiums and discounts;
- only one proposal form is required;
- as only one policy is issued, a single renewal notice and renewal premium is required; and
- only one declaration of turnover for the purposes of adjusting the premium is required.

4. See for example *Tioxide Europe Ltd* v *CGU International Insurance plc* [2005] Lloyd's Rep IR 114; [2006] Lloyd's Rep IR 31.

5. See the discussion at Chapter 8 below.

5.17 A policy may also be composite in that it covers the differing interests of more than one insured. Particularly in such cases it can be crucial legally to distinguish between joint and composite policies, as upon that distinction may turn the question of whether one insured's rights are affected by fraud, non-disclosure or breach of condition by another insured.[6] If the policy is a joint policy covering what is truly a joint interest on the part of a number of persons in the subject matter of a policy, all insureds are liable (subject to the policy terms) to be affected by defences available to an insurer in respect of any one insured. However, if the policy is a composite policy, then the position of each insured is looked at separately, so that, for example, non-disclosure or fraud by one insured will not necessarily affect the ability of an innocent co-insured to obtain indemnity (subject as always to the specific terms of the policy). The distinction between joint and composite policies was summarised by Sir Wilfrid Greene MR in *General Accident Fire & Life Assurance Corp Ltd* v *Midland Bank Ltd*:[7]

> "That there can be a joint insurance by persons having a joint interest is, of course, manifest. If A and B are joint owners of property—and I use that phrase in the strict sense—an undertaking to indemnify them jointly is a true contract of indemnity in respect of a joint loss which they have jointly suffered. Again, there can be no objection to combining in one insurance a number of persons having different interests in the subject-matter of the insurance, but I find myself unable to see how an insurance of that character can be called a joint insurance. In such a case the interest of each of the insured is different. The amount of his loss, if the subject-matter of the insurance is destroyed or damaged, depends on the nature of his interest, and the covenant of indemnity which the policy gives must, in such a case, necessarily operate as a covenant to indemnify in respect of each individual different loss which the various persons named may suffer. In such a case there is no joint element at all."

5.18 However, an important point should be noted, namely that even if a policy is a composite policy, an individual insured may be affected by non-disclosure or breach of condition on the part of a co-insured if both co-insureds rely upon a third party to make disclosure or to comply with policy conditions: see in this regard *HLB Kidsons* v *Lloyd's Underwriters Subscribing to Policy 621/PKID00101*.[8]

THE DIFFERENCE IN CONDITIONS METHOD ("DIC")

5.19 In addition to the policies discussed above, sometimes the insured will also take out a Difference in Conditions (DIC) insurance to close any gaps in cover.

5.20 A shortfall or gap in cover may exist where the policies arranged are limited in scope, a deductible applies, or levels of indemnity are inadequate. Such shortfall or gap is perhaps most likely to occur where one party arranges insurance on behalf of a number of persons interested in a project, for example where the employer arranges the type of project insurance discussed below. In such a case the contractor may consider that the cover arranged is not acceptable, perhaps because his usual cover is more extensive or because the contract insurance requirements have not been met. This sort of analysis is at the heart of a competently conducted risk management analysis.

6. See *Samuel (P) & Co Ltd* v *Dumas* [1924] AC 431; *General Accident Fire & Life Association Corporation Ltd* v *Midland Bank Ltd* [1940] 2 KB 388; *New Hampshire Insurance Company* v *MGN Ltd* [1997] LRLR 24; *State of Netherlands* v *Youell* [1997] 2 Lloyd's Rep 440; *FNCB Ltd* v *Barnet Devanney (Harrow) Ltd* [1999] Lloyd's Rep IR 459.

7. [1940] 2 KB 388, at pp. 404 and 405.

8. [2008] Lloyd's Rep IR 237.

5.21 The DIC method of protection involves treatment of the conventional policies referred to above as a primary layer with the limits of indemnity thereby provided being used as an excess. This may result in any or more of a variety of insurance arrangements, for example:

- public liability cover in excess of a contractual requirement;
- additional cost of working cover—this would cover, for example, additional plant or machinery required by the contractor following a loss to complete the project on time to meet contractual requirements;
- marine and transport insurance;
- products liability insurance;
- non-negligent liability and damage insurance;
- cover in respect of differences in excess limits.

5.22 DIC cover is also often provided to protect multi-national companies where the cover available in certain countries may fall short of what they wish (see for example pages 8 and 9 of the Allianz policy in Appendix 24.1 to this book).

PROJECT INSURANCE

5.23 Comprehensive project insurance (sometimes referred to as "wrap-up" or "overall" insurance cover) attempts to provide an all-embracing insurance policy as an alternative to requiring every participant in the project to arrange its own separate insurance policy for its part of the project and its own plant and equipment.

5.24 Project insurance typically takes the form of a combined insurance policy, usually arranged by the employer and frequently arranged in the joint names of the employer and all contractors and subcontractors.[9] Whether the existence of such insurance affects the contractual responsibility of contractors, subcontractors and suppliers is a matter of construction of the express and implied terms of any contract documents.[10] In practical terms the rights between the parties may be affected by the existence or absence of any waiver of subrogation clause. This is discussed in Chapter 13 below, as well as in respect of different standard form contracts.

5.25 Project insurance is usually limited to conventional risks covering loss of or damage to project property and public liability. It does not generally include professional indemnity or employees' liability cover for the professional design teams. It is also quite difficult to procure "long periods" in the insurance market for long and complicated projects.

5.26 However, some insurance companies do provide a wider CAR project policy to include cover for architects, consulting engineers and quantity surveyors. The policy can then provide for design damage cover, so that those professionals are covered not only for their site activities but also for the office work involved in the design of the project. The project insurance only covers damage to the works caused by negligence (not defects without such damage) which arises during the construction period (but not for any period thereafter). Although the cover is convenient, many underwriters load the premium rates and levels in

9. Note the distinction referred to above between composite/joint and combined policies.

10. See for example *The Yasin* [1979] 2 Lloyd's Rep 45, *Petrofina* v *Magnaload* [1983] 2 Lloyd's Rep 91, *Mark Rowlands* v *Berni Inns* [1986] 1 QB 211; *Co-Operative Retail Services* v *Taylor Young Private Partnership* [2002] 1 WLR 1419.

excess of CAR insurance arranged by the employer because the employer's insurers do not know the identity of all the contractors from the inception of the project and therefore have no basis upon which to rate that aspect of the risk.

5.27 If the project cover is insufficient, for example because certain risks are expressly excluded, a contractor will have to take out its own policy to cover these supplemental risks. Sometimes the project's insurance can be affected if a principal insurer (under a layered policy) goes into liquidation. The remaining insured are obliged to find a replacement as soon as possible or risk the insurance being lost.

5.28 Potential advantages of project insurance include:

- inclusion of defective design risk in the same policy, which overcomes settlement delay problems (due to the necessity of establishing the cause of loss or damage) and prevents the design team from being isolated from the employer;
- in large contracts with many contractors, avoidance of consideration of various policies and consequential delay and possible dispute between insurers, which would otherwise result in very complex settlement arrangements;
- premium saving due to reduced administrative and other overheads of brokers, insurers and reinsurers. Premium is also saved due to the elimination of double insurance which necessarily involves payment for more than one premium. The cost can be assessed before the insurance is taken out;
- the gap created by some insurers by separating the employer's and contractors' risks which they insure can be eliminated without issuing a second CAR and public liability policy;
- inconvenience caused by any dispute between the parties involved in a loss, damage or liability is avoided;
- uninsured risks in large projects, where there could be many separate insurance policies, are avoided;
- special covers can be incorporated into the programme, for example:
  - the cost of completing outstanding works,
  - the loss of anticipated profit/income by employer, and
  - end of term covers; and
- convenience.

FLOATER POLICIES

5.29 Floater policies (sometimes called annual policies) enable the insured to maintain cover on an annual basis, to provide cover for all projects undertaken by the insured during the term of the insurance. The insured is required to declare its annual turnover (together with details of any claims experience) at renewal.

5.30 Cover is provided for the contractor and usually also the employer and subcontractors, for losses in connection with the work described in the policy.

5.31 Cover is provided for all risks of a stated kind and within stated limits. The insurer effectively waives the right to information, for example, concerning moral hazard and information material when the contract is first made. Furthermore, the insurer has given up any right to decline a particular risk and has accordingly waived disclosure because the insurer has no decision to make regarding acceptance of the risk. The policy will usually exclude cover for construction of dams, bridges, tunnels, etc., i.e. the more hazardous risks.

5.32 A variation of this form of cover is the open declaration floater which covers losses occurring during the period of insurance (usually 12 months), in spite of the inception of the policy. Cover is generally wider under this type of floater because works commenced before inception are covered, loss/damage to construction plant whilst not used on project is covered and also the insured's liability for injury, damage, etc. not covered under a single project policy is insured, e.g. liability arising out of ownership, use, etc. of premiums and product liability arising after the end of the maintenance period. If cover is not renewed and does not have a specific extension of cover, the insurance will be narrower.

5.33 When fixing the premium for an annual floater the underwriter will consider, first, the type of work carried on by the contractor, i.e. builder, civil engineer, mechanical engineer, etc. Secondly, the insured's previous claims experience for the past three to five years will be considered, which will provide the underwriter with some idea of the degree of management and quality control of the contractor.

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CHAPTER SIX

PLACING THE INSURANCE

Roger ter Haar

FORMATION OF INSURANCE

6.1 In the 16 years since the first edition of this book, the process of placing insurance has been changed radically by the massively increased use of computers and by use of the Internet. However, although the process has changed, the underlying considerations remain constant.

6.2 In large construction projects, several insurance companies and/or Lloyd's syndicates are likely to participate in order to spread the risk. The formation of insurance arrangements will usually commence when the insured approaches its specialist construction broker with details of the risk to be covered including contractual details. The broker will discuss the project with the contractor and possibly also his estimator and engineer. The broker may well (probably should) ask his client the types of questions he would expect the underwriter to ask. The broker will advise on the appropriate form of insurance and relevant insurers for the risk. The broker will then compile a summary of the proposed insurance contract on an insurance slip for presentation to an underwriter known to be experienced and well respected in construction insurance.

6.3 The underwriter will also be presented with "placing information", consisting of proposal forms, details of the insured, detailed accounts of previous losses (typically for the past three to five years), surveys of the insured's risk management techniques, background information etc. and any other information likely to be material to the underwriter's consideration of the risk, such as the contracts, specifications and a summary prepared by the broker of the main features of the risk. The broker will usually supply the underwriter with a breakdown in value of the property to be insured, for example, buildings, foundations, subsoil etc. Details of the risks relevant to construction insurance are discussed in Chapter 4 above.

6.4 The broker acts as intermediary, and will negotiate the terms of the insurance on behalf of his client, the insured, and answer any questions the underwriter may raise. Details of the project will be discussed with the underwriter and in the vast majority of cases the underwriter will be able to decide whether to participate without reference to his consultant engineer or a site visit. If the project is large or has unusual features a site visit may be arranged or the broker may produce photographs. The potential insured is under a duty to reveal all material facts. It is the broker's task to procure that information and to place it before the underwriter on behalf of his client. Part of the skills expected of an insurance broker is to know and to advise his client as to what the underwriter will need to be told about. The broker's presentation to the underwriter will rely on two foundations: first, the slip; and secondly, the placing information presented in support of his arguments. Slips have tended to become longer and more complicated over recent years, particularly as the courts have frequently identified problems with placing slips and policy wordings.

6.5 When the leading underwriter has decided to accept the risk, he will stamp the slip and add his initials (referred to as "scratching" the slip or, in the case of a following

underwriter, "adding his scratch"), a reference number, and the percentage of the risk (and therefore premium) that he will accept. The broker will usually plan to offer a proportion of the risk to perhaps six or seven underwriters unless the risk has very unusual characteristics, in which case a larger number of underwriters will be approached. Once the leading underwriter has agreed to underwrite a proportion of the risk, the broker will then take the slip on to the next company (or Lloyd's underwriter). When the slip is subscribed for at least 100 per cent the broker will prepare a cover note for the insured and distribute a policy wording to insurers for their signature. Insurers and insured should eventually each receive a copy of the policy.

6.6 Lloyd's does not generally specialise in construction insurance, although a few syndicates do write this type of risk. Lloyd's has occupied a unique position in commercial activities for nearly 300 years, during which time many practices have arisen which, although well understood by those involved with Lloyd's, are frequently difficult to reconcile with general legal principles. The slip system by which a contract of insurance is formed at Lloyd's (as well as in the company market) has proved to be one of the most problematical areas of all. When Lloyd's is involved the risk is likely to be placed as follows:

Lloyd's

(1) Only a Lloyd's broker is able to approach Lloyd's underwriters, therefore the insured must first appoint the correct intermediary (which may be the same broker as above).

The broker will submit the slip and placing information to proposed Lloyd's underwriters, carefully choosing those who are most likely to subscribe to the risk, including those underwriters who specialise in construction insurance. Each underwriter presented with the slip will be a representative of a Lloyd's syndicate and will be authorised to bind the members of his syndicate in relation to specified risks.

(2) If the representative underwriter wishes to provide cover he will stamp the slip with the name of his syndicate, initial it and state the amount of liability that is to be underwritten, usually in percentage terms of the risk but sometimes in absolute financial terms. Each initialling of the slip represents a separate contract and the slip itself is treated as a bundle of individual contracts between the insured and each individual underwriter. This practice at Lloyd's was conclusively affirmed by the Court of Appeal in *General Reinsurance* v *Fennia Patria*,[1] in which it was held that neither the insured nor any underwriter had any right to withdraw from a partly subscribed slip. The later House of Lords decision of *Touche Ross* v *Baker*[2] affirms the principle that each subscription by an underwriter constitutes a separate contract of insurance. Thus in *Touche Ross* each syndicate could make its own decision upon matters such as loss settlements and renewals, even though in practice the leading underwriter's decision would normally be followed by all the subscribing syndicates. In *Touche Ross*, however, the syndicates did not bind themselves to follow the leading underwriter; in practice following syndicates will often follow the leader, but *Touche Ross* establishes that the insured may not be able to rely upon a "following leading underwriter" provision agreed between the underwriters but should institute separate proceedings against any recalcitrant syndicate.

1. [1983] QB 856.
2. [1992] 2 Lloyd's Rep 207.

(3) The slip will be presented to subsequent underwriters by the broker until at least 100 per cent subscription has been obtained. Often more than 100 per cent subscription is obtained as this will make it easier for the broker to obtain further cover when, as is frequently the case, in time the limits of cover need to be increased due to inflation, increased cost of construction etc.

(4) Since 1992 it has been possible to conclude a contract electronically by placing risks in the market by data interchange. The system allows the presentation of a risk package or proposal (and amendments to it) on screen: an electronic version of the traditional slip. Certainly outside the United Kingdom (such as in the Far East) this method of placing insurance at Lloyd's has become the norm, and is widely used within the United Kingdom. These innovations do not alter the basic legal analysis of the conduct of business at Lloyd's.

(5) Once completed, traditionally the slip was presented to the Lloyd's Policy Signing Office (LPSO) which issued a single policy on behalf of all the contributing underwriters, representing the terms and conditions set out in the slip. Whilst the practice of issuing a single policy on behalf of all underwriters continues, the functions of the LPSO have now been assigned to Xchanging ins-sure Services, which acts for Lloyd's syndicates, members of the International Underwriting Association and any other insurer authorising it to do so.

The slip

6.7 The contract of insurance is contained in the slip, but once a policy has been issued, that is the document containing the terms of the contract. As the slip represents a bundle of contracts, no subscribing underwriter can attempt to vary its terms by issuing a policy on different terms (unless the insured has positively accepted the new terms) in which case the insured would be entitled to seek rectification of the policy to accord with the slip. Frequently the slip will provide for the formal policy wording to be agreed by the leading underwriter: although it was held in *Youell* v *Bland Welch*[3] and *Punjab National Bank* v *De Boinville and others*[4] that the slip was inadmissible as an aid to the construction of the policy, that view has been modified by the Court of Appeal decision in *HIH Casualty and General Insurance Ltd* v *New Hampshire Insurance Co Ltd*[5] in which it was held that the terms of a slip could be used as an aid to construction of a policy but that in the absence of a plea of rectification a slip could not be used to alter or contradict the construction of a policy which had superseded a slip.[6]

6.8 The rights and obligations of the parties in relation to slips, including circumstances where they are partly subscribed, unsubscribed and oversubscribed, are a complicated area and if further information is necessary reference should be made to specialist works on Lloyd's insurance.

6.9 The contract will terminate in accordance with its terms as indemnity insurance takes the form of periodic contracts. Duration is therefore determined by construing the policy wording. Some policies may be renewed, others may be non-cancellable for a fixed period (e.g. 10 years for latent defects policies). This is an important practical point as construction

3. [1992] 2 Lloyd's Rep 127; [1990] 2 Lloyd's Rep 423.
4. [1992] 1 Lloyd's Rep 7.
5. [2001] 2 Lloyd's Rep 161. Followed by Gross J in *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering SDN BHD* [2003] 1 Lloyd's Rep 190.
6. *Per* Rix LJ at p. 180.

projects frequently overrun. In the English market insurers, particularly at Lloyd's, normally regard themselves as honour bound to extend the term of a policy if a project is delayed, but there have been instances, particularly in the American market, where problems have been experienced in obtaining renewal or extension of policies in such circumstances.

Assessment of risk

6.10 The underwriter has a difficult problem in assessing risks involved in construction projects, as the works do not exist at the time the insurance is proposed. Accordingly, the underwriter (and his engineer who may be in-house or an external appointee) must be in a position to examine the construction procedure on the basis of plans, specifications, etc. The proposal by the insured and the broker's information may contain only a basic summary of the works specifications, although with modern copying and documentation technology sometimes underwriters will receive an almost indigestible mass of information contained, for example, on CDs.[7] However the information is produced, most underwriters will use a check list of essential points to be considered:

(1) The type of project, e.g. office building, bridge, tunnel, dam etc.
(2) The experience of the contractor will be of great importance to the underwriter and will have a significant bearing upon the underwriter's assessment of the risk of future loss. If the underwriter has insured the company in the past he will examine any previous loss experience revealed by his own records. If not, the insured will be expected to provide details of his own experience. He will ask the broker whether the company specialises in this type of construction work or has sufficient experience with projects of a similar nature and will enquire whether the company is familiar with local conditions. The underwriter will need to know if untried methods or untried technology are being adopted. The financial standing of the contractor will also be important since, for example, circumstances may arise during the course of a development which would require additional funding or resources.
(3) The geographical situation of the project will need to be considered to take account of the probability of natural hazards such as flood, subsidence etc.
(4) Local conditions will need to be assessed for the risk of deliberate and wilful third party damage and the political, economic and social environment will also need to be considered. (These latter considerations being more relevant to projects outside rather than within the United Kingdom.)
(5) The risks associated with construction machinery and equipment will be influenced by the value of the equipment and the experience of the personnel operating it. Training and maintenance will be important factors.
(6) Assessment of third party liability will be based principally upon the local environment, the proximity of the nearest buildings, how those buildings are constructed and their contents. The underwriter will need to know whether they are liable to be damaged by construction work, pile driving, tunnel work etc., for example where the project is located next to a railway line.
(7) As the method of construction will have a major impact on the underwriter's assessment of risk, he will need details of at least the following facts:

7. This may not only be a problem for underwriters. When brokers tell their clients of the obligation upon them to make full disclosure of all material facts, often the understandable response is to deluge the broker with information, just to make sure.

- location of the construction site;
- site conditions—trial borings may be required. Exposure of site to natural elements will be important;
- site security;
- method of construction, for example whether conventional steel and concrete, slip-form etc;
- number of floors and basements;
- types of foundation;
- any lowering of ground level;
- types of supporting structure;
- danger of collapse;
- inflammable materials;
- small and valuable fixtures;
- temporary buildings;
- access to construction site, etc.

This list gives an idea of the types of questions the underwriter will need to have answered and could be extended almost infinitely. Where particularly complex engineering projects are involved, such as tunnels,[8] dams or bridges, the list is considerably longer and every detailed item is likely to require more extensive investigation or discussion with the parties involved.

(8) If floating craft are used, risks associated with pontoons' cranes are generally dealt with under a separate marine policy with different underwriters. Similarly, where complex engineering problems arise with certain marine risks, specialist engineering insurers may be called upon to underwrite the risk.

Premium calculation

The construction works, plant, temporary buildings and testing and commissioning

6.11 In general terms, the underwriter in calculating the rate of premium is most likely to apply a specified rate (which may vary depending on whether the project concerns a building, bridge, dam, tunnel etc.) to

(1) the total contract price of the works;
(2) the replacement value of the plant;
(3) the replacement value of the temporary buildings; and
(4) testing and commissioning (which will vary depending on the type of plant and the period of cover).

6.12 The rate will be a specified percentage of £thousand/million of cover, which the underwriter will total in relation to the above categories. This sum will then be divided by the total contract price to arrive at the rate for the whole contract. Assessment of the premium for third party liability is discussed below.

6.13 Other rating methods used include the object/time procedure and, much less commonly, the breakdown procedure.

8. Note that tunnelling contracts are particularly difficult to insure because of the dangers associated, with the market virtually limited to two of the world's biggest insurers.

6.14 The object/time procedure involves splitting the premium rate into a time-related and a non-time-related part. The underwriter assumes that a particular construction procedure is subject to certain work-related perils which are independent of the construction time and he will classify the projects according to their type of use and purpose, for example office buildings, factories, tunnels, dams, bridges, etc. The individual groups will be further subdivided using technical or geometrical data such as the number of floors, height, etc. In addition to this basic rate the underwriter will calculate some period-related premium rates individually, for example in relation to natural hazards such as flood, windstorm, etc. Each peril (e.g. fire, storm, collapse, etc.) is given its relevant insurance rate. In the majority of cases the full sum insured does not apply until the final stages of the construction, for example, during clearance of the site risk to materials is comparatively small although fire and security aspects will be relevant if materials are stored on site. However, work to an existing structure or close to adjacent buildings involves an immediate full exposure when the construction commences.

6.15 Progress charts can be used to assess critical exposure periods for the construction risk, which will be considered with the natural risks. The sum total of these factors will be applied to the annual ratings, which in some cases can be as low as 50 per cent of the total of the individual ratings, although in practice underwriters generally quote a rate per mille for contractors all risks, together with a further rate if third party risk is included, again assessed in relation to the particular circumstances and the amount of cover. The advantage of this procedure is its simplicity and separate assessment of natural hazards but its main disadvantage is that clarification of certain types of structure ignores the many criteria for risk assessment such as construction method, materials and location.

6.16 The breakdown procedure attempts to assess the course of the construction. The sum insured is broken down into the main individual items, such as total cost of earthworks, pile driving, lowering of ground water level, etc. These individual items are then given premium rates required for construction work in question depending on the respective degree of risk. The advantage of this procedure is that all activities are considered as an appropriate proportion of the total sum and that the time-related premium for natural hazards can be added on separately. The procurer requires the tenders for the project to be available or for the construction to have been commissioned.

Third party liability

6.17 Except for a floater policy (see Chapter 5 above), a third party liability premium may not appear separately in the contractor's all risk policy but may be added to the construction works premium thereby providing one overall rate. In assessing the premium the underwriter will consider the threat to surrounding persons and property, and the value of the property under construction. For example, the third party liability cover in respect of the construction of a new office block in the City of London, where the locality is likely to be congested and surrounded by many other office blocks, pedestrians and vehicles, is likely to be much higher than in respect of the construction of a housing estate on a greenfield site. Accordingly, the premium for third party liability is not directly related to contract price.

6.18 Third party liability may be covered in several ways, depending on the contractor's own arrangements. For example, it is common for the contractor to have a floater policy covering third party liability which already covers the risk in question, alternatively only third party cover in excess of the floater's limit may require separate insurance.

6.19 When the underwriter is rating a third party liability risk, in fixing the premium he will consider the contractor's past third party claims experience, the likelihood of damage to property and personal injury, and the possible consequential loss of adjoining property users. Once the premium has been fixed its rate per £thousand/million of cover can be calculated, which rate will be used by other insurers in fixing their rates where the insurance is placed in layers; that is, insurers on the higher layers will require a percentage rate of the underlying rate.

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CHAPTER SEVEN

APPOINTING INSURANCE BROKERS AND THE ROLE OF INSURANCE BROKERS

Simon Howarth and Roger ter Haar

7.1 The description of placing insurance in the previous chapter illustrates that placing insurance in respect of construction projects is a highly specialised task requiring sophisticated knowledge of the interrelationship between the construction projects with their attendant risks and the law and practice of insurance contracts.

7.2 The vast majority of insurances relating to construction projects and to participants in construction projects is placed through brokers with specialist knowledge of the relevant insurance markets and their practices. It may therefore be helpful to set out a few observations about the law relating to brokers.

7.3 We consider first the position as reflected in reported cases concerning brokers, and then the position under the Insurance Conduct of Business Rules introduced by the FSA pursuant to the Financial Services and Markets Act 2000.

WHOSE AGENT?

7.4 An issue frequently litigated concerns the precise role of the insurance broker as agent. This issue frequently arises when a breakdown in the flow of information between insured and insurer (and vice versa) can be identified.

7.5 The general rule is that the broker is the agent of the insured and not the insurer: see *Searle* v *Hales & Co*;[1] *Winter* v *Irish Life*;[2] *Re Great Western*.[3] It follows that where full disclosure is made to the broker, but the broker fails to pass on the relevant information to the insurer, the insured is liable to find that his claim against the insurer fails, and he is thrown back on his remedy against the broker. This principle has been criticised by the Court of Appeal,[4] but it remains good law.

7.6 Further, the broker is agent for the insured to agree the terms of the policy: *Zurich* v *Rowbery*.[5] The insured will accordingly be bound by the terms agreed by the broker as his agent. This can give rise to problems as discussed below.

7.7 Despite the general rule, the broker can be agent of the insurer for certain limited purposes. In *HIH Casualty & General Insurance Ltd* v *JLT Risk Solutions Ltd* Auld LJ commented that

> "The role of an insurance broker is notoriously anomalous for its inherent scope for engendering conflict of interest in the otherwise tidy legal world of agency. In its simplest form, the negotiation of insurance, the broker acts as agent for the insured, but normally receives his

1. [1996] QB 68.
2. [1995] 2 Lloyd's Rep 274.
3. [1997] Lloyd's Rep IR 377.
4. In *Roberts* v *Plaisted* [1989] 2 Lloyd's Rep 341 at p. 345 *per* Purchas LJ.
5. [1954] 2 Lloyd's Rep 55.

> remuneration from the insurer in the form of commission; he may, in certain circumstances, act for both. Where there is reinsurance of an insured risk, the same broker may act on behalf of the insurer in placing the reinsurance."[6]

Thus in any particular set of circumstances, to whom the broker owes duties, and the nature of those duties, may be a matter of some complexity.

7.8 For example, where he operates under a binding authority granted by underwriters, the broker will have the authority to grant cover to the insured (see *Stockton* v *Mason*[7]). However, a placing broker employed to seek business on the part of a coverholder who has been granted a binding authority by underwriters does not generally owe contractual or tortious duties to those underwriters, notwithstanding that his remuneration is derived from them. Such a broker's duties are owed to the coverholder only: *Pryke* v *Gibbs Hartley Cooper Ltd*.[8]

7.9 Moreover, in relation to issues of non-disclosure, if the insurer knows the full facts because they have come to the attention of the broker operating under a binding authority, the insurer is fixed with that knowledge, and the insured has no duty to disclose those facts. This is so, even if the insured does not know that those facts are known to the broker: *Woolcott* v *Excess*.[9]

7.10 Appropriate policy terms quite often constitute the broker as the agent of the insurer for the purposes of receiving notice of claims (although generally the broker is not the agent of the insurer for this purpose). Further, the practice of the Lloyd's market when a claim has been made will involve the broker acting as an intermediary in certain respects not only on behalf of the insured but also on behalf of underwriters, particularly in keeping files (the broker will often retain both original placing and claims documents). A broker is likely to be under an obligation not only to the insured but also to underwriters to produce such documentation—see *Goshawk Dedicated Ltd* v *Tyser & Co Ltd*.[10]

VALUE FOR MONEY—GETTING A GRIP

7.11 There is now a tendency to view the broker as having a duty to manage his client's insurance affairs in a focused and organised manner. The days of the broker being a conduit for information ("merely a post box") are over: *Alexander Forbes Europe Ltd* v *SBJ Ltd*.[11] In that case, the claimant was concerned that its activities in the field of pensions advice (specifically, advising clients to "opt out" of state or occupational pensions) had left it vulnerable to professional indemnity claims. One such client made a claim, and the relevant correspondence was passed by the claimant to the defendant broker, with instructions to notify the relevant professional indemnity underwriters. The defendants made a notification to underwriters subscribing to one policy (a group policy) which might potentially have responded to provide cover, but failed to make a notification under a policy specific to the claimant company. It was held that the group policy did not respond whereas the specific policy would have done.

6. [2007] 2 Lloyd's Rep 278; [2007] EWCA Civ 710 at para 60.
7. [1978] 2 Lloyd's Rep 430.
8. [1991] 1 Lloyd's Rep 602.
9. [1979] 1 Lloyd's Rep 231.
10. [2007] Lloyd's Rep IR 224; [2006] EWCA Civ 54.
11. [2003] Lloyd's Rep IR 432; [2003] Lloyd's Rep PN 137.

7.12 Mr David Mackie QC, sitting as a deputy high court judge, held that a focused and deliberate strategy was required of the broker:[12]

> "Brokers owe duties going beyond those of a post box. It was for the brokers to get a grip on the proposed notification, to appraise it and to ensure that the information was relayed to the right place, in the correct form. As the expert put it, they needed a strategy for handling claims . . . "

7.13 Another illustration is *Etter* v *Commercial Union*.[13] In that case the client purchased a property including a derelict barn. He intended to renovate the barn and so advised his broker. The broker failed to advise insurers of those intentions. The renovations took place and the new property was then damaged in a storm. Insurers denied liability and the broker was held liable on the basis that he should have kept himself up to date with the insured's operations on the property and advised insurers appropriately about the fact and the progress of the works.

ROLE OF BROKER

7.14 It is probably the case that the broker has an obligation to get to know his client, to understand his business and to give advice and guidance as to how his client can best obtain insurance cover which is both comprehensive and cost effective. Thus a broker advising a construction company would need to be sure that his client understood the extent of cover under various policies and the exceptions from cover, and understood the interrelationship between different types of cover such as Contractors All Risks policies and Contractors' Professional Indemnity policies.

7.15 It is also the insurance brokers' duty to act as representative and advocate for his client when a claim has to be notified to or negotiated with insurers. Particularly where brokers acting in the Lloyd's market in respect of reinsurance recoveries, brokers are likely to receive funds. In those circumstances brokers have a duty to account—see *Equitas Ltd* v *Horace Holman & Co Ltd*.[14]

What does the broker do for his money? Asking the right questions, in the right way

7.16 The broker has a duty to make enquiries of his client so as to secure relevant information: see *McNealy* v *Pennine Insurance Co Ltd*;[15] *The Moonacre*.[16] In the *McNealy* case, the claimant had motor insurance with the Pennine under a particular scheme. This scheme excluded various categories of person,[17] including full- or part-time musicians. The claimant was principally a "property repairer", but from time to time he played the guitar in a band on board cruise ships. He was thus a part-time musician and excluded from the categories of person to whom insurers were prepared to offer cover. He had an accident when returning

12. Paragraph 36.
13. (1998) 166 NSR 2d 299.
14. [2007] Lloyd's Rep IR 567.
15. [1978] 2 Lloyd's Rep 18.
16. [1992] 2 Lloyd's Rep 501.
17. There was no attempt in the judgment to analyse the sociological significance of those occupations which were excluded. Amongst the list were bookmakers, jockeys, students, service personnel and journalists, as well as musicians!

from one of his "gigs" on board a ship, and insurers, learning of his part-time occupation, avoided the policy for misrepresentation of a material fact. The claimant successfully sued his brokers. This case had certain special features which made it clear that the broker ought to have made specific enquiries: (1) the broker knew that there was a list of excluded occupations; (2) he knew that the premium was particularly low because of the restricted availability of the insurance cover. This was accordingly something of a special policy. Although the list of excluded occupations was reasonably lengthy, the Court of Appeal held that the list should have been read out to the claimant so that he could advise if he followed any such occupation.

Client's understanding

7.17 On the other hand, the broker is entitled to expect the insured to show some common sense in understanding what has to be disclosed, and is not required to cross examine his client: see for example *Fanhaven Pty Ltd* v *Bain Dawes Northern Pty Ltd*[18] (where the insured was an apparently reputable company, the brokers were not negligent in failing to discover that the directors had criminal records) and *Lyons* v *JW Bentley Ltd*,[19] where the claimant failed to disclose previous claims on other policies.

7.18 In *The Moonacre*,[20] the broker failed to take proper instructions because, during the course of interviewing the insured to complete a proposal form on his behalf, he paraphrased a question on the proposal form. The policy concerned a seagoing motor yacht, belonging to a wealthy retired businessman who lived in Spain. The yacht was laid up every winter. A question on the proposal form asked if it were to be used as a houseboat. The broker asked the insured if *he* was intending to live on the boat during the winter. The insured answered "no", but did not reveal that for security reasons he had engaged a person to sleep on the boat while she was laid up. Consequently, when the boat was damaged by fire, and the insurers successfully relied on misrepresentation as to use as a houseboat, the brokers were held liable to the insured. It was held that the broker should have put the precise question on the proposal form to the insured, rather than engaging in his own paraphrase.

Material information

7.19 The broker also has a duty to check his own records to ensure that material matters are passed on to insurers: *Dunbar* v *A & B Painters*.[21] In practice this can be important: insured persons sometimes rely on insurers or brokers keeping full records. The answer "see your records" is sometimes given on proposal forms in relation to questions about previous insurance claims. It is probable that, if there is a previous relationship between insured and broker, such an answer would give rise to a duty on the broker to call for and consider his records and to check with the insured that the records are accurate and complete.[22]

18. [1982] 2 NSWLR 57.
19. (1943) 77 Ll L Rep 335.
20. See note 16, *supra*.
21. [1985] 2 Lloyd's Rep 616 (the point was not pursued on appeal).
22. For a case where brokers were held liable in respect of the manner in which renewal was effected, see *Fisk* v *Brian Thornhill & Son* [2007] Lloyd's Rep IR 699.

Other areas of expertise

7.20 The broker is not a valuer, but he must advise as to the need to take careful steps properly to value the sum insured, and he must ensure that his client understands the importance of making a proper declaration of the value of the property to be insured: see *TW Bollom* v *Byas Moseley*.[23] Hence, it follows that the broker is not required to step outside his sphere of expertise to give advice as to the proper sums insured in relation to land or property. However, it is probably the case that the broker should consider the steps that his client has taken to estimate the relevant values properly. He should ensure that the valuations are current. If he knows that the valuation has been made on a basis which is unsound he should point this out.

7.21 A broker should have a working knowledge of insurance law—and he should also be able to recognise when he is out of his depth on a legal point so that he should advise that more specialist advice should be taken: see *Sarginson Bros* v *Keith Moulton & Co.*[24]

Market knowledge

7.22 The broker must be aware of the market and the nature of the product being purchased by his client. See for example *Bates* v *Barrow Ltd*;[25] *Osman* v *J Ralph Moss Ltd*.[26] In the *Bates* case, placing brokers effected reinsurance that was illegal owing to the reinsurer not being properly registered to carry on business in the UK pursuant to the Insurance Companies Acts. It was held that in effecting that insurance the brokers were in breach of their duty of care, albeit that that breach had caused no loss to the claimant reinsured because the contract was enforceable against insurers. In *Osman*, the brokers advised the claimant to take out a motor policy with a company whose "shaky financial foundation was . . . well known in insurance circles at that time". It was held that the recommendation was negligent and indeed this point was conceded in the Court of Appeal.

7.23 *Seymour* v *Ockwell*[27] concerned an IFA (Independent Financial Adviser) rather than a broker. However, the case is illustrative of the sorts of matters to which insurance intermediaries should have regard. Here the IFA failed to make a proper appraisal of an investment presented (and aggressively marketed) to her, and consequently was held to have mis-sold it to her clients. The IFA was held negligent for failing to note that the investment involved investing in a fund based in the Bahamas; that the prospectus presented in relation to that investment was or might have been misleading; that the safeguards allegedly present to preserve the investment were not as failsafe as was implied by the promotional material; and that the proposition was dubious applying business common sense: the product promised guaranteed returns of 15 per cent per annum at a time when the base rate was 5 per cent. The judge held that the IFA ought to have seen that the investment was too good to be true.

Need for caution

7.24 The broker should not take unnecessary risks. He can be liable for exposing unnecessarily to legal proceedings: *FNCB Ltd* v *Barnett Devanney*,[28] where the broker was held liable

23. [1999] Lloyd's Rep PN 598.
24. (1942) 73 Ll L Rep 104.
25. [1995] 1 Lloyd's Rep 680.
26. [1970] 1 Lloyd's Rep 313.
27. [2005] PNLR 39.
28. [1999] Lloyd's Rep IR 619.

for failing to obtain specific protection in the form of additional clauses tailored to ensuring the protection of the bank as mortgagee; in the event those clauses were not made part of the policy and the bank was thrown back on a more difficult argument for indemnity, on the terms of the policy as they stood, and raising an uncertain point of law as to whether the misrepresentations of the mortgagor to insurers affected the position of the mortgagee. This is consistent with the rules applying to other professions. Generally, if a professional has two possible means of giving effect to his client's instructions, one safe and the other doubtful, it is negligent to take the doubtful course and expose the client to the risk of litigation: see *Dixey* v *Parsons*[29] (a solicitor's negligence case); *Standard Life Assurance Ltd* v *Oak Dedicated Ltd*[30] (an insurance broker's negligence case).

7.25 The broker can be liable for taking a risk as to whether a fact was material: if in doubt, he should disclose it: *Aiken* v *Stewart Wrightson*.[31] He should also seek the views of insurers if he is in doubt as to the proper construction of a term in the policy (or, perhaps more importantly, he should ask insurers what view insurers would take in particular circumstances): see for example *Melik* v *Norwich Union*.[32]

Read and advise on the small print

Unusual terms

7.26 The broker should advise about unusual or onerous terms: *Bollom* v *Byas Mosely*[33]; *Baker* v *LFC*[34]; *Harvester Trucking Co Ltd* v *Davis* where Judge Diamond QC (sitting as a deputy High Court Judge) said this:

> "It is normally not an ordinary part of the broker's or intermediary's duty to construe or interpret the policy to his client, but this again is not a universal rule . . . if the only insurance which the intermediary is able to obtain contains unusual, limiting or exempting provisions which, if they are not brought to the insured, may result in the policy not conforming to the client's reasonable and known requirements, the duty falling on the agent . . . may . . . entail that the intermediary should bring the existence of the limiting or exempting provisions to the express notice of the client, discuss the nature of the problem with him, and take reasonable steps either to obtain alternative insurance, if any is available, or alternatively to advise the client as to the best way of acting so that his business procedures conform to any requirements laid down by the policy . . . "[35]

7.27 As the above passage indicates, generally the broker is not under any relevant duty in relation to standard insurance terms: see also in this context *Nsubuga* v *Commercial Union*.[36] In relation to insurance contracts relating to construction projects this divide may be difficult to identify. Many of the types of policies relating to the risks arising out of construction projects are specific to such projects (for example Contractors All Risks policies) and the interrelationship between types of policy may be intricate. It is probably the case that the broker needs to consider whether the insured understands the types of insurance available and appropriate for the insured's business and to assess the level of sophistication of the insured.

29. (1964) 192 EG 197.
30. [2008] Lloyd's Rep IR Plus 20; [2008] EWHC 222 (Comm).
31. [1995] 1 WLR 1281.
32. [1980] 1 Lloyd's Rep 523.
33. *Supra*.
34. [2000] 1 PNLR 21.
35. [1991] 2 Lloyd's Rep 638 at 643.
36. [1998] 2 Lloyd's Rep 682.

Thus greater explanation is likely to be necessary if the client is a one man firm of roofing contractors than if the client is a multinational corporation who acts through a wholly-owned insurance broking subsidiary. Obviously between these two extremes many levels of client knowledge and sophistication are likely to be encountered. If the broker is doubtful as to the level of the client's understanding then he should take appropriate steps to ensure that the client understands the options available to him and the terms of cover obtained.

Damages

7.28 If the broker is in breach of his duty to his client, the measure of damage is *prima facie* the amount of the insurance recovery which would have been obtained from insurers but for the broker's negligence. In some cases there may be a debate as to whether insurers would have underwritten the insurance even if the broker had not been negligent (for example if the broker had passed on information which should have been but was not passed to insurers prior to inception) or if insurers would in any event have taken policy points upon the insured's ability to recover under the policy, damages may be assessed on the basis of valuation of the loss of a chance—see for example the New Zealand case of *Cee Bee Marine Ltd* v *Lombard Insurance Co Ltd*.[37]

7.29 Although the general rule has been until recently that insurers are not liable for loss consequent upon an insurer's failure to make payment (for example because the lack of funds puts the insured out of business),[38] a broker may be liable for such consequential losses if the court is satisfied that but for the broker's negligence insurers would probably have paid promptly so as to avoid a cash flow crisis for the insured.[39]

INSURANCE CODE OF BUSINESS

7.30 Following the passing of the Financial Services and Markets Act 2000, the Financial Services Authority ("the FSA") introduced the Insurance Conduct of Business Rules ("ICOB") many of the provisions of which apply to brokers or other intermediaries arranging insurance cover. Some provisions relate only to "retail customers" and some relate also or exclusively to "commercial customers".[40]

7.31 ICOB imposes a layer of duties upon insurance intermediaries which in part reflects the obligations recognised at common law as explained above and in part goes further. If the terms of ICOB are not complied with, the insurance intermediary may be liable to disciplinary action by the FSA and also, subject to limits, a customer may be able to obtain compensation through the FSA. The dispute resolution role of the FSA is discussed in Chapter 33 below.

7.32 Chapter 4 of ICOB relates to advising and selling standards. Guidance paragraph 4.1.7 says that the purpose of the chapter is (amongst other things) to ensure that where a personal recommendation is made it is suitable for the customer's demands and needs. By rule

37. [1990] 2 NZLR 1.

38. *President of India* v *Lips Maritime Corporation* [1988] 1 AC 396; *Sprung* v *Royal Insurance (UK) Ltd* [1999] Lloyd's Rep IR 111. But note: these authorities may no longer represent the law following the decision of the House of Lords in *Sempra Metals Ltd* v *Inland Revenue Commissioners* [2008] 1 AC 561; [2007] UKHL 34.

39. See *Arbory Group Ltd* v *West Craven Insurance Services* [2007] Lloyd's Rep IR 491.

40. For guidance as to these terms see ICOB Guidance para 1.7.3.

4.2.8(6) in respect of non-investment insurance contracts (which will include most policies relating to UK construction projects), the insurance intermediary must say whether the intermediary has provided or will provide advice or information

(1) on the basis of a fair analysis of the market; or
(2) from a limited number of insurance undertakings; or
(3) from a single insurance undertaking.

The implication is that normally the intermediary (which includes brokers) will carry out a fair analysis of the market.

7.33 Rule 4.3.2 sets out in the Code obligations, discussed above, which a broker has been held to be under at common law:

> "In assessing the customer's demands and needs, the insurance intermediary must:
> (1) seek such information about the customer's circumstances and objectives as might reasonably be expected to be relevant in enabling the insurance intermediary to identify the customer's requirements. This must include any facts that would affect the type of insurance recommended, such as any relevant existing insurance;
> (2) have regard to any relevant details about the customer that are readily available and accessible to the insurance intermediary, for example, in respect of other contracts of insurance on which the insurance intermediary has provided advice or information; and
> (3) explain to the customer his duty to disclose all circumstances material to the insurance and the consequences of any failure to make such a disclosure, both before the non-investment insurance contract commences and throughout the duration of the contract; and take account of the information that the customer discloses."

7.34 Rule 4.3.6 provides that:

> "In assessing whether a non-investment insurance contract is suitable to meet a customer's demands and needs, an insurance intermediary must take into account at least the following matters:
> (1) whether the level of cover is sufficient for the risks that the customer wishes to insure;
> (2) the cost of the contract, where this is relevant to the customer's demands and needs; and
> (3) the relevance of any exclusions, excesses, limitations or conditions in the contract."

7.35 In respect of commercial customers if the intermediary makes a "personal recommendation" and in respect of retail customers in all cases, rule 4.4.1 requires the intermediary to provide the customer with a statement which, amongst other things, sets out the customer's demands and needs and, if a personal recommendation has been made, the reasons for personally recommending a particular insurance contract.

7.36 Chapter 5 of ICOB relates to product disclosure. Amongst other requirements, chapter 5 requires retail customers or commercial customers taking out group policies for non-investment insurance to be provided with a policy summary or key features document which must give information about the type of insurance and cover, significant features and benefits, significant exclusions or limitations and unusual exclusions or limitations which are not normally found in comparable contracts.[41] Commercial customers are to be provided with sufficient information to make an informed decision about the cover being provided.[42]

41. ICOB rr. 5.3 and 5.5.
42. ICOB r. 5.4.

7.37 To a significant extent these provisions reflect what the common law required of brokers. However, in many cases the obligations are spelled out with greater prescription and in some cases extend further than the duties imposed at common law (for example in respect of a duty to draw attention not only to abnormal terms of the policy).

7.38 In most cases relating to the placing of insurances covering construction projects the provisions of ICOB will be of limited significance in affecting the enforceability of contracts of insurance against insurers—although insurers are "insurance intermediaries" if they sell policies directly. These provisions are of significance in laying down standards of conduct which brokers are expected to maintain.

7.39 In so far as the broker has a role in handling a claim, rule 7.4.3 provides that he must act with due care, skill and diligence and, by rule 7.4.5, must avoid any conflict of interest.

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CHAPTER EIGHT

THE MEANING OF ''DAMAGE'' IN POLICIES RELATING TO CONSTRUCTION PROJECTS

Roger ter Haar

8.1 In Chapter 3 we have discussed the elements that must be established in order to succeed in an action for negligence. In that context the courts draw a sharp distinction between claims relating to physical damage to chattels or real property, and claims for pure economic loss; the latter being regarded on policy grounds with greater caution by the courts than the former. The policy behind this caution is the anxiety about the economic and social effects of exposing potential defendants to extensive liabilities.

8.2 For somewhat similar reasons, insurers are cautious about accepting liability for pure economic loss. That is a statement that needs to be tempered with considerable caution—in the market for professional liability insurance one of the most significant risks underwritten is the risk of the insured being held liable for pure economic loss (for example, an accountant being held liable for negligent tax advice; a planning consultant negligently advising upon the effect of planning policies; an architect negligently designing a building so that it does not achieve the brief given to the architect). However, professional indemnity insurance is expensive, and limits of liability available significantly lower than in respect of other forms of liability insurance.

8.3 Similarly, insurers are cautious about agreeing to insure liabilities voluntarily accepted by an insured under contract, since the insured may accept additional liabilities which it is hard for the insurer to value when assessing the premium.

8.4 These considerations have led to very similar decisions under different forms of policy. It is convenient to consider these decisions in one chapter before going on to consider aspects of the different types of policy.

8.5 The issues have been discussed in a number of contexts, but principally in respect of public liability policies, product liability policies and CAR policies.

CASES IN RESPECT OF PUBLIC LIABILITY POLICIES

8.6 The Allianz policy in Appendix 24.1 to this book provides cover in respect of both public liability and products liability as follows:

> ''The Company will indemnify the Insured against legal liability to pay compensation and claimants costs and expenses in respect of accidental
> . . .
> Property Damage''

Whilst the Gable policy in Appendix 24.2 below, provides public liability in the following terms:

> ''Gable agrees to indemnify the Policy as stated in the Schedule for all sums which the Policyholder becomes legally liable to pay as damages . . . in respect of accidental loss of or damage to tangible property . . . ''

8.7 In *Yorkshire Water Services Ltd* v *Sun Alliance & London Insurance plc*[1] the plaintiff was the sewerage undertaker for Yorkshire under the Water Industry Act 1991. In connection with these functions it inherited the Deighton Sewage Disposal Works and became the operator and owner of a waste tip on the banks of the river Colne. The waste tip was used for sewage sludge. An embankment of the tip failed and a vast quantity of sewage sludge was deposited in the river and in the Deighton Works. The plaintiff carried out on its property urgent flood alleviation works in order to avert further damage to the property of others and to prevent or reduce the possibility of third party claims. The Court of Appeal rejected a claim by the insured to be reimbursed by the liability insurers the costs of these preventative works. First, it was held that ''legally liable to pay'' in the insuring clause ''must obviously involve payment to a third party claimant and not expenses incurred by the insured in carrying out works on his land or paying contractors to do so. And liability must be to pay damages or compensation''.[2] Secondly, it was held that ''loss or damage to property'' is a ''reference to the property of the third party claimant and not that of the insured''.

8.8 It is important to note that in the context of a liability policy, the primary cover is against a liability to indemnify against a claim made by a third party, a liability which will never arise if the remedial works are carried out before damage is caused to third parties. Thus, although the embankment to the tip was defective, that did not of itself trigger an entitlement to indemnity for the cost of remedial works.

8.9 In *James Longley and Company Ltd* v *Forest Giles Ltd*[3] HHJ Humphrey LLoyd QC considered a claim under the public liability section of a policy which also contained an all risks section. Before practical completion, it was discovered that work carried out by the specialist flooring contract, the defendant, was defective: the architect observed a wrinkled and/or rippled effect over the heavy-duty vinyl laid by the defendant. Sections of the flooring were cut, revealing that the adhesive used by the defendant was not adequately cured, because of excessive moisture contained within the screed. The plaintiff (the main contractor) was held liable in an arbitration to the employer and sought the cost of remedial works from the defendant. In somewhat unusual procedural circumstances the issue was debated before the judge as to whether the defendant's public liability insurer was liable to indemnify the defendant in respect of the liability for the cost of remedial works. The cover was in respect of ''all sums for which the Insured shall be liable at law for damages in respect of . . . damage to property''.

8.10 The public liability section contained an exclusion in standard terms in respect of ''liability assumed under agreement unless such liability would have attached in the absence of such agreement''. The judge held, following *Murphy* v *Brentwood District Council*[4] and *Department of the Environment* v *Thomas Bates*,[5] that as any liability which the defendant might have to the plaintiff could not be in negligence, there was no liability in respect of which the policy provided cover. This is significant as it shows the alignment between the approach of the courts to the requirement for ''damage'' as element of the tort of negligence (see the discussion of the ''complex structures theory'' in Chapter 3 above) and the construction by the courts of the word ''damage'' in public liability policies.

8.11 The judge went on to hold that even if there were a potential liability to the main contractor falling within the public liability cover, there was no damage *to* property. At page

1. [1997] 2 Lloyd's Rep 21.
2. *Per* Stuart-Smith LJ at p. 28.
3. (2001) 17 Const LJ 424.
4. [1991] AC 398.
5. [1991] AC 499.

428 he said "no damage has been caused to any property. The damage is in or within the property . . . ". On appeal, the Court of Appeal upheld the judge's second ground for dismissing the claim, without commenting at all on the first line of reasoning.[6] Potter LJ said:[7]

> " . . . it is not the usual intention, in a contractor's public liability insurance, to give cover in respect of defective workmanship which requires rectification but does not cause physical damage to the personal property of a third party or interference with a third party's property rights, as opposed to their purely economic interests . . . It was simply the position that the works performed by Forest Giles were defective and had to be redone . . . "

8.12 In the somewhat unusual case of *Skanska Construction Ltd* v *Egger (Barony) Ltd*,[8] the Employer was required (almost certainly by mistake) to insure "in the joint names of the Employer and the Contractor and his subcontractors, the Works . . . against all loss or damage from whatever cause arising for which the Contractor is responsible under the terms of the Contract . . . ". Mance LJ held:[9]

> "However, physical loss or damage of the kind which must be insured against under Clause 22(2)(a) is in my judgment clearly to be distinguished under this contract from the defects in design, workmanship, materials or goods, for which the contractor is expressly responsible under Clause 2 and 7. All that has happened in the present case is that the floor slab was (allegedly) badly designed and/or constructed, and that the alleged defects in design and/or construction manifested themselves in cracking, curling, spalling and crazing and lifting of parts of the slab under ordinary usage . . . In this contractual scheme, the mere manifestation of a defect under ordinary usage, which the contractor is anyway obliged to make good under the contractual scheme relating to defects, cannot in my judgment constitute loss or damage to the slab for the purposes of the insurance requirements under Clause 22(2) . . .
>
> The insurance requirement remains inapplicable to the making good of manifest defects which the contractor is obliged to make good, even if such defects happen also to lead by some accidental process (such as a fall or collapse) to something which might properly be described as loss or damage to another part of the Works, as opposed to the simple manifestation of a defect which anyway required making good."

8.13 In *Tesco Stores Ltd* v *Constable*,[10] work was being undertaken on behalf of Tesco to enclose a section of railway track by installing concrete tunnel sections over the cutting and then building a supermarket above. The track was owned by Network Rail, and Chiltern Railway Co Ltd had been granted a contractual right by Network Rail to run trains on the track. Tesco had entered into a Deed of Covenant with Chiltern agreeing to compensate Chiltern for all and any costs, losses or expenses arising out of or resulting (directly or indirectly) from the carrying out of the works. A section of the tunnel collapsed onto the railway lines below. The railway line was closed, and Chiltern suffered substantial losses. Tesco sought indemnity under their public liability policy against Chiltern's claim. Field J rejected the claim, accepting insurers' submission that public liability policies are generally regarded as not affording cover against liability in contract for pure economic loss. He emphasised[11] that the cases in which cover had been held to exist "all involved physical damage to the third party claimant's property, which is not the case in Chiltern's claim against Tesco". He also held that

6. [2002] Lloyd's Rep IR 421; [2001] EWCA Civ 1242.
7. At paras 17 and 18.
8. [2002] BLR 236; [2002] EWCA Civ 310.
9. At paras 30 and 31.
10. [2008] Lloyd's Rep IR 302; [2007] EWHC 2088 (Comm)
11. At para 36.

the purpose of public liability policies is to provide an indemnity in respect of certain types of tortious liability[12]—it is possible to argue that this part of his judgment goes too far. Somewhat similar arguments were debated in *Jan de Nul (UK) Ltd* v *Axa Royale Belge SA*,[13] but both the facts giving rise to the claim, and the terms of the policy were unusual.

8.14 It therefore appears clear in respect of claims relating to construction projects that in order to bring a claim within a public liability policy it is necessary to show physical damage to property other than the property which is being constructed. Mere economic loss does not fall within the policy, nor does the cost of making good defects.

PRODUCT LIABILITY POLICIES

8.15 Similar issues arise out of product liability policies. While many of the reported cases do not relate to construction projects, two of the most recent cases do. An important point is that in many cases a product liability policy will provide cover in respect of contractual liability (an essential feature for many manufacturers and suppliers against whom claims are liable to be brought pursuant to the Sales of Goods or other legislation).

8.16 In *A S Screenprint Ltd* v *British Reserve Insurance Co Ltd*,[14] the Court of Appeal considered a claim under an extension to a public liability policy which provided product liability cover in the following terms:

> '' . . . the Company will indemnify the Insured against all sums which the Insured shall become legally liable to pay in respect of . . . loss or damage happening anywhere in the world (except the United States of America and Canada) during the period of insurance and caused by goods (including containers) manufactured, sold, supplied, repaired, altered, serviced, installed or treated in the course of the Business . . . ''

8.17 The plaintiffs, a company which carried on business in the printing industry, received a print order from another company to print 52,000 Malteser gift boxes. The boxes were to be screenprinted in gold and varnished. It was a term of the contract that the plaintiff would ensure the use of ''low odour'' food quality inks and varnish. The boards were printed and returned to the plaintiffs' customer, who made them up into boxes and supplied the boxes to Mars who filled them with Maltesers. The Maltesers were contaminated. Claims were made by Mars against their immediate supplier for £282,000, who in turn claimed reimbursement from the plaintiffs. There was no dispute that that claim fell within the policy. The customer also claimed almost £1 million in lost profits in respect of orders from Mars which were not forthcoming because of the contamination. The issue before the Court of Appeal was whether the product liability insurers were liable to indemnify the plaintiffs in respect of the claim for lost goodwill/loss of profits.

8.18 The Court of Appeal rejected the claim: it was held firstly that the plaintiffs had to show that the goods they had treated (the packaging) had caused damage—the loss of profits could not be described as ''loss or damage'' caused by the goods supplied. Secondly it was held that the loss or damage had to happen physically during the period of the insurance. It was not possible to treat a liability to pay compensation in respect of an economic loss which arose from a loss of goodwill as being in respect of physical loss or damage physically caused.

12. Paragraphs 110 and 111.
13. [2002] 1 Lloyd's Rep 583; [2002] EWCA Civ 209.
14. [1999] Lloyd's Rep IR 430.

8.19 *Rodan International Ltd* v *Commercial Union Assurance Company Ltd*,[15] the insuring clause provided indemnity against

> "All sums which the Insured shall become legally liable to pay for compensation and claimants' costs and expenses in respect of any Occurrence to which this cover applies . . . "

"Occurrence" was defined as employer's liability, public liability and product liability including:

> "Loss of or physical damage to physical property not belonging to the Insured and in the charge or under the control of the Insured . . . "

Special Condition H in the policy contained an exclusion in respect of damage to goods supplied:

> "This Cover shall not apply to liability in respect of recalling removing repairing replacing reinstating or the cost of or reduction in value of any commodity article thing supplied installed or erected by the Insured if such liability arises from any defect therein or the harmful nature or unsuitability thereof."

8.20 The claimants supplied large quantities of soap powder to Newbrite in one-ton bags. It was delivered to a packaging company, Excelsior Packers, who broke down the bulk and packed the powder into 400-gramme and 800-gramme cardboard cartons. The cartons were printed for sale as a Newbrite branded product. Newbrite supplied the cartons of soap powder to the retail trade. After a while Newbrite began to receive complaints from customers, and quantities of cartons of powder were returned to Newbrite. The problem was that the cartons had become stained and the powder in the cartons was becoming caked. The trial judge held that the problem was that liquid constituents of the soap powder had migrated from the powder into the cardboard cartons, causing the cartons to stain. Further, as those constituents were hygroscopic, they attracted moisture from the atmosphere causing it to penetrate into the powder so that it became caked.

8.21 Newbrite brought proceedings against Rodan/Rexodan for breach of contract.

8.22 Newbrite sold the powder on once the defects were discovered at a reduced price and claimed as the first head of claim the difference between the normal and actual prices of the powder, the difference corresponding to the difference between the market values of sound and defective powder. The second head of claim was in respect of additional expenditure which Newbrite had incurred in handling powder rejected by customers and unsold powder.

8.23 The Court of Appeal held that there had been an Occurrence, namely the staining of the cartons, which had led to damage, namely the caking of soap powder. However, the Court of Appeal held that the uncaked soap powder was not damaged—deterioration to the soap powder itself was not damage: the policy required that the commodity caused physical damage to something else. Accordingly it was held that the difference in value fell within the insuring clause, as did the additional expenditure which was a consequential loss arising from the same cause, and indeed appeared to have been an exercise in mitigation of loss. However, these two heads of loss were excluded by Special Condition H which we have set out above.

8.24 Two other heads of loss were claimed. Item 3 related to the cost of a further 300,000 cartons for which Newbrite had paid or was required to pay, into which would have been packed a further 214,000 tons of powder which Rodan/Rexodan had promised to deliver.

15. [1997] Lloyd's Rep IR 495 (the true name of the claimants was Rexodan, not Rodan—in references to this case in some later cases the claimants are correctly named).

Following the delivery of the original consignment of defective powder, Newbrite did not proceed with the further orders of powder. Item 4 related to Newbrite's loss of profits on future sales. The Court of Appeal held that these were not a quantification of the loss which Newbrite suffered as a result of the relevant physical Occurrence and therefore fell outside the insuring clause.

8.25 In *James Budgett Sugars Ltd* v *Norwich Union Insurance*,[16] the claimants were traders and distributors of sugar. The policy in question was a combined commercial policy. It was in short form. The Public and Product Liability section of the policy defined ''damage'' as ''physical damage'' and ''property'' as ''material property''. The insuring clause provided:

> ''Event
> In the Event of accidental . . . .
> Loss of or Damage to Property . . .
> Indemnity
> In respect of such an Event the Company will provide indemnity against
> 1. legal liability for compensation . . . ''

8.26 The claimants/insured sold and delivered to a company (''Kerry'') 200 tons of raw cane granulated sugar which Kerry used in the manufacture of mincemeat. The sugar was contaminated with magnetite and as a result Kerry and its customers took steps to withdraw and replace products containing the mincemeat. Kerry started proceedings against the claimants claiming damages for breach of contract. The claims were for loss of profit. The claimants sought indemnity under the policy against Kerry's claims.

8.27 In his judgment Moore-Bick J emphasised that the distinction between liability for causing physical harm and liability for breach of contract generally was one that had to be borne in mind when dealing with liability insurance.[17] He rejected the claim under the policy on the basis that the losses claimed by Kerry were not losses relating to the physical damage to the mincemeat, but were at best losses relating to the claimants' breach of contract.

8.28 It should be noted that both parties accepted that there had been an Event in the sense of material damage to property, although the insured contended that the damage was the physical contamination of the sugar before it left the claimants' premises, and the insurer suggested that the damage occurred when the contaminated sugar was incorporated into the mincemeat. Without having to decide the point, the judge preferred the latter view, although it is at least well arguable that there never was physical damage at all, merely mincemeat which was not fit for its purpose.

8.29 The cases considered in this section thus far might be thought to present problems somewhat divorced from the problems arising out of construction contracts, but two relatively recent cases have shown their relevance in that context.

8.30 The first was *Pilkington United Kingdom Ltd* v *CGU Insurance plc*.[18] By contracts between Eurostar and various Tarmac companies, the latter undertook construction works at the Eurostar Terminal at Waterloo station. Tarmac placed an order with the claimants for the supply of heat-soaked toughened glass panels. Pilkington duly supplied them and they were then installed in the roof and vertical panelling of the terminal. Various panels in the roof failed: at most 13 out of 13,000. No personal injury was caused; there was no damage to the fabric of the terminal other than fractures in the panels themselves. Eurostar was concerned that passengers or staff might be injured if further breakages occurred—they installed safety

16. [2003] Lloyd's Rep IR 110; [2002] EWHC 968 (Comm).
17. At para 22.
18. [2004] BLR 97; [2004] EWCA Civ 23.

features such as transparent material under the panels and metallic channels to prevent any fractured glass falling into public areas. Eurostar claimed against Tarmac in respect of investigation and management costs relating to various remedial schemes and the cost of the remedial scheme actually adopted, and Tarmac claimed over against Pilkington. Pilkington sought an indemnity under their products liability policy which was for all practical purposes identical to that considered in the *Rodan/Rexodan* case considered above.

8.31 The claim failed. The Court of Appeal[19] held that the insured had to "demonstrate some physical damage caused by the commodity for which purpose a defect or deterioration is not sufficient and that the loss claimed must be a loss resulting from physical loss or damage to physical property of another (or some personal injury". Potter LJ continued by saying:[20]

> " . . . it does not seem to me that, where a product is incorporated into a building and it is so incorporated without damage of any kind and in a condition such that it and other components of the building function effectively, subject only to the possibility of some future failure or malfunction, that is in any ordinary sense an occurrence or event which gives rise to physical damage in these other components or to the building as a whole. At best, it creates the possibility of some fracture or malfunction occurring in the future. To take precautions at that stage is simply to anticipate the occurrence and/or damage covered by the policy and the costs of such measures do not in my view fall within its terms without specific provision which makes that clear".

And, a little later:[21]

> "As already observed, generally speaking, damage requires some altered state, the relevant alteration being harmful in the commercial context. This plainly covers a situation where there is a poisoning or contaminating effect upon the property of a third party as a result of the introduction or intermixture of the product supplied . . . However, it does not extend to a position where the commodity supplied is installed in or juxtaposed with the property of the third party in circumstances where it does no physical harm and the harmful effect of any later defect or deterioration is contained within it."

8.32 The authorities were reviewed by the Court of Appeal in *Horbury Building Systems Ltd* v *Hampden Insurance NV*.[22] In that case the project concerned the construction of a cinema complex. In the auditoria were ceilings suspended from the roof structure by hangers. Very shortly after the cinema had been opened, at a time when the complex was empty, the ceiling in one auditorium collapsed. The complex was closed and remedial works were carried out. The main issue before the court was whether a product liability policy issued to the contractor who had installed the suspended ceilings responded to a claim for loss of income from the auditoria in which the collapse did not occur. At first instance the deputy judge had held that the policy provided indemnity against the claimant's liability for damages in respect of the physical damage done by the collapse of the ceiling and the loss of profits caused by the closure of the auditorium in which the collapse occurred[23] but refused to recognise an obligation for insurers to provide indemnity in respect of the loss of profits arising out of closure of the undamaged auditoria. The Court of Appeal upheld the judge. Mance LJ said:[24]

19. Potter LJ at para 35.
20. At para 49.
21. At para 51.
22. [2004] BLR 431; [2004] EWCA Civ 418.
23. [2003] EWHC 2110 (Comm) at para 70.
24. At para 35.

> ''The insurance was against liability ''in respect of'' loss of or damage to property. Save in respect of Cinema 6, the complex was closed not by virtue of damage, but because of a need for inspection and in some cases remedial work. The damage in cinema 6 was no more than the factor which brought that need to light. The appellants' case would introduce an illogical aspect to the indemnity. If such a need came or was brought to the appellants' notice, for some reason other than damage, ie before any ceiling collapsed, there would be no indemnity against the cost of inspection and making good. There would be no damage at all, and the policy is not against general contractual liability . . . ''

8.33 Finally in this review of authorities relating to product liability policies we refer to *Tioxide Europe Ltd* v *CGU International Insurance plc*.[25] Tioxide manufactured two grades of white titanium oxide pigment, R-TC30 and R-TC4, which were supplied for use in the manufacture of white rigid u-PVC products for outdoor use such as door and window frames. It was alleged by certain claimants against Tioxide that the presence of one or other pigment in the u-PVC products caused discolouration (''pinking'') of the products in use in certain environmental conditions. Proceedings were commenced by five claimants against Tioxide, who settled the claims on confidential terms. One of the claimants was Hydro Polymers, who claimed against Tioxide the cost of settling claims made against Hydro Polymers and loss of goodwill, business and profits. The insuring clause provided cover as follows:

> ''In the event that a claim or claims are first made, in writing, against the insured during the period of this policy underwriters will indemnify the insured for their respective proportion of that amount of [£50M] which the insured shall be obligated to pay by reason of the liability:
> imposed upon the assured by law,
> or
> assumed by the insured under contract or agreement,
> for damages on account of
> . . .
> Property damage,
> . . . ''

''Property Damage'' was defined in the policy as

> ''(a) physical injury to or destruction of tangible property including the loss of use thereof resulting therefrom;
> (b) loss of use of tangible property which has not been physically injured or destroyed.''

8.34 Langley J held[26] that an unwanted change of colour in the manufactured products was a ''physical'' change and, if it impaired the value of the product, it was a ''physical injury''. He held that the insuring clause was sufficiently wide to encompass claims for the cost of repair or replacement of those products which had pinked.[27] On the other hand, claims by parties for damage or loss of business or profits could not be said to be claims for damages ''on account of physical injury'' to the finished product—''the words, I think, require a more direct connection between the loss claimed and an actual physical injury''. The case was appealed on a different aspect of Langley J's judgment.[28]

8.35 The decisions on product liability policies are inevitably highly sensitive to the precise language used in a form of policy which does not have the same degree of standardisation in terms as public liability policies. However the tendency here is for courts to lean against

25. [2005] Lloyd's Rep IR 114; [2004] EWHC 216 (Comm).
26. At para 49.
27. At para 51.
28. [2006] Lloyd's Rep IR 31; [2005] EWCA Civ 928.

construing the policies as applying where all that is shown is that the commodity supplied is defective—what is necessary is that that defect causes some further damage. However, the further damage caused in this context may well not be such as to found a claim for damages in tort, reflecting the commercial context of these policies where a manufacturer faces a claim down a contractual chain of supply.

CONTRACTORS ALL RISKS POLICIES

8.36 As with public liability policies, CAR policies usually start with words such as those in the Gable Policy in Appendix 24.2:

> "Gable agree to indemnify the Policyholder as stated in the Schedule for all physical loss or damage of whatsoever nature . . . "

8.37 The question that then arises is what is meant by "physical loss or damage". This form of policy, unlike those considered thus far, is a property insurance, not a liability insurance. Further, in the context of an insurance intended to insure the contract works during the currency of the project, and to which most or all of the principal parties to the project are likely to be parties, in construing the terms of the policy the concept of goods or commodities being sold on or of third party claims are irrelevant. On the other hand insurers are concerned not to pick up liability for bad workmanship or bad design which are matters in the first instance for the project participants to bear. Insurers are concerned only where the bad workmanship or bad design causes damage to the works. These considerations lead to similar concepts being deployed to those which influence construction of public liability and product liability policies.

8.38 A case to which we refer below is *Cementation Piling and Foundations Ltd* v *Aegon Insurance Co Ltd and Commercial Union Insurance Co plc*.[29] There it was taken as obvious beyond discussion that an insurance in standard all risks terms did not cover work that was simply defective.

8.39 In *Seele Austria GnbH & Co* v *Tokio Marine Europe Insurance Ltd*,[30] Field J considered a case in which windows installed in a new building failed site tests. In consequence, remedial works had to be carried out, which involved removing cladding and opening up internal walls and ceilings. He applied by analogy the decision of the Court of Appeal in *Pilkington United Kingdom Ltd* v *CGU Insurance plc*,[31] stating that:[32]

> "damage means here not a defect in the works but an adverse physical affect on the physical state of the works as a result of the defect . . . there is no damaging within the insuring clause and therefore no cover under an unbespoke Contractors All Risks policy for the cost of rectification where a defect is discovered which has not yet physically affected the insured property but will do so unless it is rectified."

8.40 Accordingly it can be seen that the courts approach construction of CAR policies with a very similar mindset to their approach to construction of public and product liability policies.

29. [1995] 1 Lloyd's Rep 97.
30. [2007] BLR 337; [2007] EWHC 1411 (Comm); see also the Court of Appeal decision in this case: [2008] BLR 337
31. See note 18, *supra*.
32. At para 22.

PROFESSIONAL INDEMNITY POLICIES

8.41 As emphasised at the beginning of this chapter, whereas other policies do not generally give cover in respect of defects not leading to damage, such cover is provided by Contractors' Professional Indemnity policies, which we discuss in Chapter 10 below.

PRODUCT GUARANTEE POLICIES

8.42 There is a very limited market available for ''Product Guarantee'' policies which will provide cover in respect of defects in products even where no ''damage'' has occurred. We say no more about these policies than that they exist, and any party wishing to obtain such coverage is advised to seek assistance from specialist insurance brokers.

PARTIAL EXCLUSION OF CLAIMS

8.43 Even without the application of express terms to that effect, there can be cases where part but not all of a claim will be payable.

8.44 We say ''even without application of express terms to that effect'' because certain express exclusions used particularly in connection with CAR policies contemplate part of a loss falling for indemnity but not other parts—see the discussion in Chapter 11 below of the DE and LEG clauses.

8.45 To give an example: in *Skanska Construction Ltd* v *Egger (Barony) Ltd*,[33] Mance LJ said:[34]

> ''The insurance requirement remains inapplicable to the making good of manifest defects, even if such defects happen also to lead by some accidental process (such as a fall or collapse) to something which might be described as loss or damage to another part of the Works, as opposed to the simple manifestation of a defect which anyway required making good. The only question in such a case would be whether the physical loss or damage of the other part of the Works would be covered by insurance under Clause 22(2). The original defect and its manifestation would still not be.''

8.46 On this basis a court would be entitled to hold that part of a claim relating to the cost of repairing damage was within a policy, but that part relating to the cost of putting right a defect was to be excluded. This is not pursued in detail in the case, but might mean, for example, that if a defect which would cost £100 to put right caused damage which would cost an additional £1,000 to remedy, out of a total expenditure on remedial works of £1,100, the insured would recover £1,000. However, the facts are frequently not simple, not least because in the course of putting right the damage, the defect may inevitably be cured.

8.47 That was the situation considered by the Court of Appeal in *Cementation Piling and Foundations Ltd* v *Aegon Insurance Co Ltd and Commercial Union Insurance Co plc*.[35] In that case the Court of Appeal held that the question was whether the insured was entitled to recover the cost of putting right defects where the cost of putting right the defects was an inevitable part of the cost of putting right damage caused by the defects. On the wording of the policy under

33. See note 8, *supra*.
34. At paragraph 31.
35. See note 29, *supra*.

consideration, particularly an exclusion in the policy, that cost was held to be recoverable. In his judgment Sir Ralph Gibson expressed considerable doubt as to what the position would have been absent the particular exclusion as an aid to construction. He said:[36]

> "There is an obvious distinction between physical damage to works and a defective condition of part of the works which has suffered no separate damage. Even where physical damage cannot be repaired without making good the defective condition, there is, I think, no necessary extension of the obligation to indemnify from the cost of physical damage to the cost of making good defects. The Judge proceeded to his conclusion on section 1 alone by translating the obligation to provide indemnity "in respect of physical damage to the property insured" into an obligation "to pay the cost of repairing the physical damage". In such a case I do not think it is safe to proceed in that way. Although the work of repairing the damage and of making good defects would in all probability be carried out at the same time and by the same contractors, with or without subcontractors, the costs of the several parts of the work would be, as in this case they were, capable of calculation."

8.48 Commenting on the *Cementation* case in *James Longley & Co* v *Forest Giles Ltd*,[37] Potter LJ commented:[38]

> "It is possible also, I think, to regard the cost of rectifying a defect which caused the physical damage, as cost not incurred "in respect of physical damage", even if it is clear that rectification of the defect is necessary for effective repair of the physical damage."

8.49 These authorities suggest, albeit somewhat tentatively, that there may be cases where indemnity will be granted in respect of the cost of repairing physical damage caused by a defect but only in respect of the cost of repairs incurred over and above the cost of remedying the defect. As stated, this view is necessarily tentative. In so far as a third party claims the cost of repairing damage caused to his property, the problem does not arise. However, the problem is liable to arise particularly in respect of CAR policies—but there, as will be seen in Chapter 11 below, the problem will often be addressed by express terms of the policy (which terms tend to bring in their wake their own conundrums!).

36. At [1995] 1 Lloyd's Rep 102.
37. See note 3, *supra*.
38. At para 25.

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CHAPTER NINE

LIABILITY POLICIES

Roger ter Haar

9.1 A number of different types of indemnity policy are liable to be called upon in connection with construction projects. Those most likely to be called into use are:

(1) Public liability;
(2) Employer's liability;
(3) Road traffic liability;
(4) Product liability;
(5) Professional indemnity (see Chapter 10); and
(6) Directors' and officers' liability

9.2 There are also other more esoteric forms of cover such as premises pollution liability and cover against liability for liquidated damages.

9.3 We do not attempt to describe all the aspects of all these different forms of policy: to do so would potentially add hundreds of pages to an already long book. Our aim is to draw attention to some aspects of some of these policies which have proved legally troublesome. For details of what cover is available in the marketplace and upon what terms it is available, the reader is politely advised to refer to the insurance brokers specialising in construction risks.

9.4 Professional indemnity insurance and directors' and officers' liability insurance raise some particular considerations which we refer to in a separate chapter.

PUBLIC LIABILITY

9.5 We have already set out in Chapter 8 above the typical insuring clauses of a public liability policy by reference to the Allianz policy in Appendix 24.1 and the Gable policy in Appendix 24.2. We repeat the clause in the Gable policy here:

> "Gable agrees to indemnify the Policyholder as stated in the Schedule for all sums which the Policyholder becomes legally liable to pay as damages (and claimant/third party costs) up to the Limits of Indemnity . . . in respect of accidental bodily injury to persons other than those in respect of whom indemnity is provided under Section 1 of this policy or accidental loss of or damage to tangible property in connection with the Business of the Policyholder as stated in the Schedule and occurring during the Period of Insurance as stated in the Schedule."

"Becomes legally liable to pay"

9.6 The insurer is under no liability until liability has been established by a legally binding decision (whether a judgment of a court or an award of an arbitrator) or by agreement: *Post Office* v *Norwich Union Fire Insurance Society*;[1] *Bradley* v *Eagle Star Insurance Ltd*.[2]

1. [1967] 2 QB 363.
2. [1989] AC 957; [1989] 1 Lloyd's Rep 465.

9.7 A recent first instance decision suggests that the cover in a public liability policy is to provide an indemnity in respect of certain types of tortious liability: see *per* Field J in *Tesco Stores Ltd* v *Constable*.[3] That proposition is respectfully doubted: however, in practice the same result is achieved by the inclusion in the policy of an exclusion in a form similar to exclusion 7 to the Gable policy in Appendix 24.2 to this book—

> "For contractually assumed liabilities which but for such contractual arrangements the Policyholder would not otherwise be liable unless such indemnity is requested of and is granted by Gable by issuance of a written endorsement to the policy to that effect."

9.8 In *M/S Aswan Engineering Establishment Co Ltd* v *Iron Trades Mutual Insurance Co Ltd*,[4] Hobhouse J referred to such a clause considered in two Canadian cases[5] and commented "the cases demonstrate how an insurance company can word its policies if it wishes to exclude contractual liabilities, as indeed is commonplace in public liability policies".

9.9 In construing such an exclusion the right approach is to ask whether, if there had been no contract, the third party claimant pursuing a claim against the insured could have recovered damages for the insured's tortious act. The fact that the insured would never have been on site or would never have been carrying out the activities giving rise to the liability is nothing to the point, nor is it to the point that the tortious act might give rise to liability in contract.[6]

9.10 The expression "legally liable to pay" involves a liability to make payment to a third party claimant: it does not encompass expenses incurred by an insured in carrying out works on the insured's land or paying contractors to do so.[7]

"As damages"

9.11 The word "damages" does not encompass a claim for a statutory debt: see for example *Hall Brothers Steamship Co Ltd* v *Young*.[8] In *Bartoline Ltd* v *Royal & Sun Alliance Insurance plc*,[9] HHJ Hegarty QC held that the expression "damages" was not apt to cover a liability on the part of an insured to make payments pursuant to the Water Resources Act 1981 to the Environment Agency for emergency works necessitated by pollution caused by a fire.

9.12 Sometimes the insuring clause will be in respect of "damages or compensation", which might provide somewhat wider cover in some circumstances. For example the Allianz policy in Appendix 24.1 to this book refers to "compensation" rather than "damages". However, in most cases which can be envisaged the extent of cover will be the same whether the word "damages" or the word "compensation" is used.

9.13 "Damages" or "compensation" can include a claim for exemplary damages: see *Lancashire County Council* v *Municipal Mutual Insurance Ltd*,[10] but as such damages will

3. [2008] Lloyd's Rep IR 302; [2007] EWHC 2088 (Comm).
4. [1989] 1 Lloyd's Rep 289 at p. 293.
5. Including a Supreme Court of Canada decision—*Dominion Bridge Co Ltd* v *Toronto General Insurance Co* [1964] 1 Lloyd's Rep 194.
6. See in this context para 17 of the judgment of Schiemann LJ in *Jan de Nul (UK) Ltd* v *Axa Royale Belge SA* [2002] 1 Lloyd's Rep 583; [2002] EWCA Civ 209. See also in this context *A S Screenprint Ltd* v *British Reserve Insurance Co Ltd* [1999] Lloyd's Rep IR 430 at p. 435.
7. *Yorkshire Water Services Ltd* v *Sun Alliance & London Insurance plc* [1997] 2 Lloyd's Rep 21.
8. (1939) 63 Ll L Rep 143.
9. [2007] Lloyd's Rep IR 423.
10. [1997] QB 897.

seldom arise out of an "accident" the circumstances in which a public liability policy is called upon to respond to a liability for exemplary damages are likely to be few and far between.[11]

"In respect of accidental bodily injury to persons"

9.14 Accordingly claims arising out of assault and other intentional acts causing injury are not within cover.

"Or accidental loss of or damage to tangible property"

9.15 The meaning of "damage to property" is dealt with at length in Chapter 8 above. The loss or damage must be "accidental". In *Fenton* v *J Thorley & Co*,[12] Lord Lindley said that an "accident" was not a technical term with a clearly defined meaning. He went on:

> "Speaking generally . . . an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended or unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident."

"Occurring during the period of Insurance"

9.16 These words reflect an important classification between different types of policy, i.e. those written on a "claims made" basis and those written of a "claims occurring" basis. Public liability policies are commonly written on a claims occurring basis. Under such policies the insured loss occurs when the events occur which cause the injury, loss or damage. We consider the position in respect of claims made policies in Chapter 10 below.

Exclusion

9.17 Attention has already been drawn to the contractual liability exclusion commonly to be found in public liability policies. Other commonly found exclusions are there to differentiate different classes of liability insurance—thus public liability cover generally will not pick up employer's liability risks, road traffic risks, product liability risks or professional indemnity risks. The exclusions reflect the fact that a particular insurer may not wish to write such business at all, will want to write those risks at particular premium rates or subject to specific conditions, or may need to keep separate books of business for reinsurance purposes.

Cross liability and waiver of subrogation clauses

9.18 It is common for policies relating to construction projects to insure the interests of a number of parties. Such policies are generally composite policies, insuring each insured for his separate interests. A cross liability clause provides that the insurer will indemnify one insured against a claim brought by another insured against it. A waiver of subrogation clause provides

11. Note that both the Allianz and the Gable policies in Appendices 24.1 and 24.2 to this book, in common with very many policies, have express exclusions in respect of aggravated or exemplary damages.

12. [1903] AC 443 at p. 453, cited by Lord Scott in *Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 Lloyd's Rep 231; [2005] UKHL 72 at para 13.

that insurers will not exercise rights of subrogation in the name of one insured against another. These matters are discussed further in Chapter 13 below.

Limits of liability/excesses

9.19 Public liability policies (and most other policies where this is not prohibited by statute) will usually contain a requirement that the insured recovers indemnity only in respect of claims in excess of a certain sum (that sum being the "excess" of the "deductible") and limiting the amount of indemnity payable to a particular sum of money. In the case of a simple accident causing loss to only one claimant, this causes no problems.

9.20 However, very often one accident will cause loss to more than one claimant—for example if a crane falls over and strikes two houses outside a building site owned by two different householders—the question will then arise as to whether two excesses are applicable or whether the insured can call upon the policy to cover two claims up to the limit of indemnity. Whether one solution or the other is more favourable to the insured or insurer will depend upon the factual situation.

9.21 Similar considerations matter when working out different layers of insurance where an insurance programme is arranged in tiers, with primary insurers, first layer excess insurers (insuring liability over a certain sum insured by the primary insurers) and further layers of insurance above; and also for purposes of reinsurance.

9.22 In consequence public liability policies (and other policies) contain aggregation wording either in the provision for the excess/deductible, in the limit of indemnity provision or elsewhere. Over the years many different forms of wording have been used. Not only do the wordings used vary, but the factual situations considered by the courts vary considerably. Our attempt is to draw attention to some of the cases in order to illustrate some of the wordings and factual situations considered by the courts. As was said in *Lloyds TSB General Insurance Holdings* v *Lloyds Bank Group Insurance Co Ltd*,[13] the purpose of an aggregation clause is

> " . . . to enable two or more separate losses covered by the policy to be treated as a single loss for deductible or other purposes when they are linked by a unifying factor of some kind".

In each case the search is to identify a "unifying factor" intended by the contract and to be discerned in the factual situation under consideration by the court.

9.23 In *Australia & New Zealand Bank Ltd* v *Colonial & Eagle Wharves Ltd*,[14] defendant wharfingers had a policy which was described as an all risks policy but was in reality a liability policy. Over a period of two years a number of bales of wool were misdelivered as a result of dishonesty on the part of one of the insured's staff. The insured sought indemnity. The policy contained an excess clause:

> "Only to pay the excess of £100 each and every claim"

9.24 The question arose as to how many excesses applied. There had been 30 mis-deliveries—insurers claimed that there were therefore 30 excesses to be applied. The insured contended that there was just one claim, alternatively one claim in respect of each of nine shipments. McNair J upheld insurers' contention that there were 30 excesses to be applied. He said:[15]

13. *Per* Moore-Bick J at first instance: [2001] Lloyd's Rep IR 237 at p. 245, approved by Lord Hoffmann at [2003] Lloyd's Rep IR 623; [2003] UKHL 48, para 14.
14. [1960] 2 Lloyd's Rep 241.
15. At p. 255.

> "On the whole I have come to the conclusion that, in this clause, "Claim" means the occurrence of a state of facts which justifies a claim on underwriters . . . "

9.25 In *Trollope & Colls Ltd* v *Haydon*,[16] the policy contained an excess clause that the insured would bear "the first £25 of each and every claim". The insured had agreed with Harlow Development Corporation to build 481 houses with garages. Very many of the buildings built were found to be defective in a large number of respects. The Court of Appeal decided in effect that all defects in one building gave rise to one "claim". Cairns LJ said:[17]

> "If there were several defects at the same time in the same dwelling each contributing to rendering that dwelling unweathertight, I think it would be absurd to treat them as giving rise to several claims rather than to one. At the other extreme, I think it would be absurd to treat all the failures and defects in all the buildings as giving rise to only one claim. Nor can I see that there is any justification for grouping together all the defects of a particular kind (such as leaking sills) in all the buildings and regarding them as giving rise to only one claim."

Shaw LJ said:[18]

> "Where there is a series of failures of weathertightness in the same individual unit it is a question of fact whether they give rise to a single comprehensive claim or to a number of separate claims. If they are sufficiently closely related in causation and in time, they may properly be regarded as a single episode of failure of weathertightness. If they are divided by substantial intervals of time and are due to building defects of different kinds, they may well constitute separate claims to each of which the £25 franchise would apply. This is a matter to be decided on all the surrounding circumstances of the case."

9.26 In *Kier Construction Ltd* v *Royal Insurance (UK) Ltd*,[19] a cofferdam failed because of defective piles. The excess was stated to be the first £500 of each and every occurrence. HH Judge Bowsher QC had to decide between the insurers' contention that there was an applicable excess of £500 for each pile damaged, and the insured's contention that there was an excess of £500 for each cofferdam that failed. He accepted neither proposition. His decision was specific to the facts as he found them, but he expressed the general principle as follows:[20]

> "I must do my best to give to this clause a meaning which the parties as sensible business people must have intended. Following that approach, I hold that in the context of the policy as a whole, the 'excess clause' or 'retained liability clause' means in the context of this case the plaintiffs are unable to recover from the defendants the first £500 in respect of each state of affairs known to the plaintiffs in consequence of which a claim is to be made or may be made, and the words 'may be made' import a reference to 'a state of affairs which justifies a claim on insurers' whether or not the plaintiffs (with knowledge of the state of affairs) had decided to make a claim."

9.27 In *Caudle* v *Sharp*,[21] the Court of Appeal considered a reinsurance dispute arising out of the extensive Outhwaite litigation arising out of a flood of claims onto the London insurance market arising out of liability for asbestosis. An underwriter, Mr Outhwaite, had accumulated for his syndicates a massive exposure to asbestosis risks. The question was the extent to which these had been successfully reinsured. Under the relevant reinsurance treaty being considered by the Court of Appeal it was agreed:

16. [1977] 1 Lloyd's Rep 244.
17. At p. 249.
18. At p. 252.
19. (1992) 30 Con LR 45.
20. At p. 93.
21. [1995] 4 Re LR 389.

> "For the purpose of this reinsurance the term 'each and every loss' shall be understood to mean each and every loss and/or occurrence and/or catastrophe and/or disaster and/or calamity and/or series of losses and/or occurrences and/or catastrophes and/or disasters and/or calamities arising out of one event."

9.28 The critical issue, for present purposes, was what was meant by "arising out of one event". It was argued by reinsurers that there had been "one event", namely the underwriter's failure to conduct the necessary research and investigation into the basic underlying problem of asbestosis. Evans LJ said:[22]

> "There is no difficulty in identifying 'the Outhwaite incident' as an event in the history of Lloyd's. From the historical perspective, the 'distinct and new phenomenon,' leading as it did to major litigation and the Outhwaite settlement, was as much an event as were the examples suggested by the respondents in argument. The Second World War, the One Hundred Years War and even the Ice Age were all "events". But it is not suggested that the phenomenon was a relevant 'event', for the simple reason that it cannot realistically be said that that was the kind of event which is referred to in these contracts. The losses or series of losses by the clause must have 'arisen out of' one event, which in this context straightaway implies some causative element and some degree of remoteness, or lack of remoteness, which must be established in the circumstances of the particular case.
>
> In my judgment, the three requirements of a relevant event are that there was a common factor which can properly be described as an event, which satisfied the test of causation and which was not too remote for the purposes of the clause."

Nourse LJ,[23] agreeing with Evans LJ, said that "an event must be something out of which a loss or series of losses arises". Thus it was necessary for a causal link related to the loss to be identified—a linked failure to underwrite competently did not provide that causal link.

9.29 It is convenient at this point to consider two cases together. In the first, *Cox* v *Bankside Members Agency Ltd*[24] the wording under consideration was as follows:

> "Notwithstanding anything contained in the foregoing paragraph it is agreed that the insurers' total liability under this policy in respect of any claim or claims arising from one originating cause, or series of events of occurrences attributable to one originating cause [or related causes] shall in no event exceed . . . "

Commenting on that decision, in *Axa Reinsurance (UK) plc* v *Field*[25] Lord Mustill drew a distinction between the phrases "arising out of one event" and "attributable to one originating cause":

> "The contrast is between 'originating' coupled with 'cause' in *Cox* v *Bankside Members Agency Ltd* . . . , and 'event' in the present case. In my opinion these expressions are not at all the same, for two reasons. In ordinary speech, an event is something which happens at a particular time, at a particular place, in a particular way. I believe that that is how the Court of Appeal understood the word. A cause is to my mind something altogether less constricted. It can be a continuing state of affairs; it can be the absence of something happening. Equally, the word 'originating' was in my view consciously chosen to open up the widest possible search for a unifying factor in the history of losses which it is sought to aggregate. To my mind the one expression has a much wider connotation than the other."

22. At p. 394.
23. At p. 398.
24. [1995] 2 Lloyd's Rep 437.
25. [1996] 1 WLR 1026 at p. 1035.

9.30 In *Municipal Mutual Insurance Ltd* v *Sea Insurance Company*,[26] the Court of Appeal applied Lord Mustill's reasoning in the above passage, holding that a clause using the words "in respect of any one occurrence or series of occurrences consequent on or attributable to one source or original cause" was effective to achieve aggregation in facultative reinsurance contracts which might not have been achieved if the phrase used had referred to "any one event".

9.31 Thus wording relating to "any one cause" or similar expressions has the effect of gathering together claims more effectively than the use of words relating to "any one event".

9.32 We have referred above to the search for "a unifying factor of some kind". This concept has been described by Rix LJ as the "unities" test. In *Scott* v *Copenhagen Reinsurance Co (UK) Ltd*,[27] having said that in his view there was no difference between "one occurrence" and "one event", referred to what he had said in a previous case:

> " . . . the losses' circumstances must be scrutinised to see whether they involve such a degree of unity as to justify their being described as, or as arising out of, one occurrence."

A little later he continued:[28]

> "These 'unities' were again considered in *Mann* v *Lexington Insurance Co.*[29] A retrocession contained a limit of $5 million per occurrence and applied a deductible 'each location any one occurence', against the background of a reinsurance which spoke of 'each and every loss, each and every location'. The losses were at 67 supermarket stores each in different locations, which had been damaged over the course of two days by rioters in Indonesia. The retrocessionaires' case, that the total riot damage constituted one occurrence, was based on the allegation that all the rioting was deliberately orchestrated by the government then in power. This court, however, held that in its context an 'occurrence' had to occur at a particular location and therefore the losses could not be aggregated. Of particular importance for the present case, however, was the way in which this court went on to deal, in what is probably an *obiter* passage, with the 'unities'. Since the losses occurred at different locations over a wide area, at different times over two days, therefore there was no unity of time or place. The only unifying factor relied on was that of central orchestration, but that did not suffice . . . "

9.33 It is not easy from these authorities to draw out consistent strands which can be used in all cases, but the following propositions can be ventured:

(1) In the simplest case referring to "each and every claim", the number of claims to which deductibles are applied, and the number of times a limit of indemnity will be engaged is at its greatest. Such a formula does not attempt to link a number of loss-causing situations back to one originating event or cause. Each situation generating a loss which the insurer can be called upon to indemnify is liable to be regarded as a separate claim;
(2) The words "occurrence" and "event" are interchangeable, meaning something which has happened or occurred at a definable point in time;
(3) Where the expression used refers to matters arising out of "one cause" or "one originating cause" more "claims" are liable to be aggregated than if the linking expression in the aggregation cause refers to an "occurrence" or an "event";

26. [1998] Lloyd's Rep IR 421.
27. [2003] Lloyd's Rep IR 696; [2003] EWCA Civ 688 at para 56.
28. At para 66.
29. [2001] 1 Lloyd's Rep 1.

(4) However, whether the words "occurrence", "event" or "cause" are used the courts will look to see a common connection between the matter(s) causing loss which is sufficiently causally connected to each of those matters so as not to be too remote;
(5) When considering aggregation clauses, the search is to identify "unities", although what will satisfy the unities test in respect of claims by an individual insured under a primary policy may be very different from what will satisfy the unities test in respect of claims under a reinsurance treaty where the nature of the insurance is to pass aggregated risks from a primary insurer to the reinsurance market.

Claims notification

9.34 Unless the policy is unusually ineptly drafted, any public liability policy will contain a claims notification clause. These clauses are discussed in Chapter 32 below.

Claims control

9.35 Liability policies commonly contain clauses prohibiting the insured from settling a claim without the consent of insurers. In the Gable policy in Appendix 24.2 to this work, such a clause is at page 18: General Condition 2(iii).

9.36 A problem that arises from time to time is where the insurer refuses to accept that the claim made by a third party, if successful, will fall within the policy. In *Diab* v *Regent Insurance Co Ltd*,[30] the Privy Council held that an insurer's denial of liability under a policy did not relieve the insured of an obligation to comply with a condition precedent as to claims notification. However, it would be harsh if the insurer could require the insured to have to endure court proceedings leading to judgment because of the insurer's refusal to give consent to a settlement in circumstances where the insurer has indicated that it will not indemnify the insured against such liability in any event—and the courts do not afford such latitude to insurers. The usual view is that even if the insurer does not invite the insured to act as "prudent uninsured" (as reputable insurers will usually do), the insured is free to settle without the insurer's consent.

9.37 Nevertheless, that is not the end of the matter. As set out above, a liability policy indemnifies an insured against a sum which the insured is legally liable to pay, and a liability voluntarily accepted by a compromise does not, without more, bring the insured within such an insuring clause. In *Skandia International Corporation* v *NRG Victory Reinsurance Ltd*,[31] the trial judge had held that it was sufficient in order to establish liability under the original insurance for the plaintiffs to show that they would have been held liable, rightly or wrongly, by the court in which the action had been commenced (in that case a court in Texas). The Court of Appeal disagreed. It held that although, subject to certain provisos, the judgment of a court of competent jurisdiction, whether right or wrong, would be sufficient to establish legal liability for the purposes of the original cover, if the claim were settled it was necessary to show that the insured was in fact liable on a correct view of the law.

9.38 Relying upon that (and other) authorities, Moore-Bick J in *Structural Polymer Systems Ltd* v *Brown*[32] held that what the insured who had settled had to show was:

(1) that it was under a legal liability to one or more of the claimants;

30. [2007] 1 WLR 797.
31. [1998] Lloyd's Rep IR 439.
32. [2000] Lloyd's Rep IR 64.

(2) that the liability was covered by the policy; and
(3) that the settlement of its liability was reasonable.

9.39 Thus the insurer who has wrongly refused to accept that it is on risk to indemnify a claim if successful (for example because the insurer wrongly takes a point as to claim notification not related to the merits of the third party's claim) may not be able to take a point on refusal of consent to settle, but will be able to say that a settlement entered into was misconceived on the basis that there was no liability to the third party. However, if the insurer sits back and does nothing to investigate, it should not be surprised if in later proceedings it finds a court unwilling to grant much procedural room to manoeuvre.[33]

9.40 A further problem which occurs from time to time is where the insured settles pursuant to one basis of liability falling within the policy, whereas on an alternative basis of liability to the third party the claim would fall outside the policy. This can happen in professional negligence cases where an insured may be willing to settle with the third party on the basis of a liability in negligence (falling within the policy) but the insurer says that the real cause of the liability was fraud or dishonesty on the part of the insured. *McDonnell Information Systems Ltd* v *Swinbank*[34] was such a case. Mance J said:[35]

> "In a case compromised short of judgment, it is necessary and appropriate to ascertain the real basis on which the case was compromised. That depends not upon what the third party may have alleged, although that is of course an important consideration when seeking to understand the overall position. A defendant who, confident of success on the allegations made, nonetheless settles before discovery knowing that, if he continues, documents will reach the other side which will enable different allegations to be made to which he will or may have no answer, cannot on this basis ground his claim against his insurers solely and artificially on the allegations which happen to be made against him. He must address the real basis of such liability as is established by the compromise which he makes."

9.41 A further problem that can arise is where there are in issue between the insured and a third party claimant a number of issues, some falling for indemnity under the policy and others not: for example in a construction case the sum of the final account may be in dispute because of disagreements as to the value of work done, whilst the employer may have separate claims against the contractor, some perhaps falling within a policy (e.g. damage caused by the contractor's negligence) and some not falling within the policy (e.g. liquidated damages for delay). If the parties reach a global settlement, what is the effect so far as regards the insurance policy? In a decision which surprised many practitioners, Colman J held in *Lumbermen Mutual Casualty Co* v *Bovis Lend Lease Ltd*[36] that the insured could not introduce evidence to show which parts of the settlement fell for indemnification under the policy and which did not. Two other judges of the Commercial Court have since disagreed: Aikens J in *Enterprise Oil Ltd* v *Strand Insurance Co Ltd*,[37] and Morison J in *AIG Europe (Ireland) Ltd* v *Faraday Capital Ltd*.[38] We would suggest that the latter decisions are more likely to be followed in future.

9.42 Accordingly, although an insured whose insurer has refused to grant indemnity may be free to settle without the insurer's consent, the problems of establishing that the sum paid pursuant falls for indemnity under the policy may not be a straightforward matter.

33. See in this regard *Structural Polymer Systems Ltd* v *Brown* (note 32, *supra*).
34. [1999] Lloyd's Rep IR 98.
35. At p. 103.
36. [2005] Lloyd's Rep IR 74; [2004] EWHC 2197 (Comm).
37. [2006] 1 Lloyd's Rep 500; [2006] EWHC 58 (Comm).
38. [2007] Lloyd's Rep IR 267; [2006] EWHC 2707 (Comm).

Reasonable precautions

9.43 Any competently drafted policy will contain a clause requiring the insured to take "reasonable precautions to prevent loss [damage/accidents etc]" or similar words.

9.44 The meaning of such a clause in the context of liability policies was considered by Diplock LJ in *Fraser* v *BN Furman (Productions) Ltd*,[39] in which he said:[40]

> " 'Reasonable' does not mean reasonable as between the employer and the employee. It means reasonable as between the insured and the insurer having regard to the commercial purpose of the contract, which is inter alia to indemnify the insured against liability for his (the insured's) personal negligence.
>
> . . . Obviously, the condition cannot mean that the insured must take measures to avert dangers which he does not himself foresee, although the hypothetical reasonably careful employer would foresee them. That would be repugnant to the commercial purpose of the contract, for failure to foresee dangers is one of the commonest grounds of liability in negligence. What, in my view, is 'reasonable' as between the insured and the insurer, without being repugnant to the commercial object of the contract, is that the insured should not deliberately court a danger, the existence of which he recognises, by refraining from taking any measures to avert it . . . In other words, it is not enough that the employer's omission to take any particular precautions to avoid accidents should be negligent; it must be at least reckless, that is to say, made with actual recognition by the insured himself that a danger exists, and not caring whether or not it is averted. The purpose of the condition is to ensure that the insured will not, because he is covered against loss by the policy, refrain from taking precautions which he knows ought to be taken."

9.45 This decision has been cited and followed in very many cases.[41] One case which has received little attention is *Amey Properties Ltd* v *Cornhill Insurance plc*,[42] in which Tucker J held that it was not necessary for an insurer to prove recklessness in order to establish breach of a condition requiring the insured to "take all reasonable precautions to safeguard the vehicle from loss or damage and to maintain it in an efficient and roadworthy condition". This suggests that there may be exceptions to the general principle that to establish breach of "reasonable precautions" clauses the insurer must establish recklessness. It is suggested that the question in each case is, what precautions are reasonable having regard to the terms and purpose of the policy?

Other insurance clauses

9.46 It is often the case that a policy will contain a clause excluding liability if other insurance is in place. The effect of such clauses is discussed in Chapter 2 above.

Fraudulent claims

9.47 Often a clause will be included saying that all claims will be forfeited if fraudulent claims are made or fraudulent devices used. Such a clause reflects the common law discussed in Chapter 2 above.

39. [1967] 1 WLR 898; [1967] 2 Lloyd's Rep 1.
40. At [1967] 1 WLR 905–906; [1967] 2 Lloyd's Rep 12.
41. *W & J Lane* v *Spratt* [1969] 2 Lloyd's Rep 229; *M/S Aswan Engineering Establishment Co Ltd* v *Iron Trades Mutual Insurance Co Ltd* (note 4, *supra*); *Sofi* v *Prudential Assurance Co Ltd* [1993] 2 Lloyd's Rep 559; *Tioxide Europe Ltd* v *CGU International Insurance plc* [2005] Lloyd's Rep 114; [2004] EWHC 216 (Comm); *The Board of Trustees of the Tate Gallery* v *Duffy Construction Ltd (No. 2)* [2008] Lloyd's Rep IR 159; [2007] EWHC 912 (TCC).
42. [1996] LRLR 259.

The position of company directors

9.48 There are restrictions which relate to insurance of liability of directors which are discussed in the section relating to directors' and officers' liability insurance in Chapter 10 below.

Hot work warranties

9.49 Because of the frequency with which these clauses cause problems, we would draw attention to "hot work warranties" which insurers often impose upon contractors carrying out such works as welding or grinding or using equipment such as blow torches. These works carry an obvious and substantial fire risk, against which insurers attempt to protect themselves. A typical clause is that considered by the Court of Appeal in *Cornhill Insurance plc* v *D E Stamp Felt Roofing Contractors Ltd*:[43]

> "It is a condition precedent to any liability of [Insurers] that the insured shall have arranged for the following precautions to be taken whenever carrying out any work involving the application of heat:
>
> (a) When blow torches, blow lamps or electric oxy-acetylene or other welding or flame cutting equipment are to be used:
>
> (i) a thorough examination of the immediate vicinity of the work (including the area on the other side of any wall or partition) shall be made to see whether any combustible material (other than the material to be worked on) is in danger of ignition either directly or by conduction of heat;
>
> (ii) all moveable and/or combustible materials shall be removed from the immediate vicinity of the work (to a distance of not less than 15 metres from the point of application of heat when welding or flame cutting equipment is used);
>
> (iii) all combustible materials which cannot be moved shall be covered and fully protected by overlapping sheets or screens of non-combustible material;
>
> (b) For one hour after completion of each period of work involving the application of heat the site shall not be left unattended and a thorough inspection of the area surrounding the work (including that described in paragraph (a)(i) above) shall be made at frequent intervals up to the end of the period of one hour to ensure that nothing is smouldering and that there is no risk of fire."

9.50 The "Catch 22" of this form of warranty is that the precautions which it is warranted will be taken are often the very precautions that a careless subcontractor or employees omits to take resulting in a fire and a claim in negligence. Experience shows that this presents very real problems, particularly in the insurance of small firms of contractors.

EMPLOYERS' LIABILITY

9.51 Such insurance is compulsory under the Employers' Liability (Compulsory Insurance) Act 1969 as amended *inter alia* by the Employers' Liability (Compulsory Insurance) Regulations 1998 (SI 1998 No. 2573). The details of these legislative provisions are outside the scope of this work.

43. [2002] Lloyd's Rep IR 648; [2002] EWCA Civ 395.

ROAD TRAFFIC LIABILITY

9.52 Such insurance is required by the Road Traffic Act 1988 as amended by the Motor Vehicle (Compulsory Insurance) Regulations 1991 (SI 1992 No. 3036). This is a complex subject and again outside the scope of this work.

PRODUCT LIABILITY

9.53 In Chapter 8 we have discussed certain cases deciding what is meant by "damage" for the purpose of such policies. Most of the principles applicable to public liability policies apply also to product liability policies, but this is a specialist area going beyond the scope of this book.[44]

PROFESSIONAL INDEMNITY AND DIRECTORS' AND OFFICERS' LIABILITY

9.54 These important subjects are dealt with in Chapter 10 below.

44. For a discussion of the law relating to such policies, see *Product Liability, Law and Insurance*, Ed. Mark Mildred, Chapter 5.

CHAPTER TEN

PROFESSIONAL INDEMNITY INSURANCE AND DIRECTORS' AND OFFICERS' LIABILITY INSURANCE

Roger ter Haar

10.1 In the previous chapter we have discussed some of the principal considerations applying to liability policies, particularly public liability policies. In this chapter we discuss aspects peculiar to professional indemnity policies, and a particular variant of such policies providing cover for the liability of company directors and the officers of companies.

10.2 The feature of such policies is that they are intended to include indemnity against the risk of professional persons being held liable for economic losses whether or not those losses are in any way connected with the occurrence of physical damage—in contrast to public liability policies which are intended to cover liability for physical property damage (in addition to indemnity in respect of liability for physical injury or death) and CAR policies which are triggered by physical damage (see Chapter 8 above).

10.3 The persons likely to take out professional indemnity policies in connection with construction projects include architects, engineers, quantity surveyors, surveyors and project managers (as well as many others). Generally we do not seek to distinguish between the terms of policies for different professionals, concentrating on the uniting features commonly found in such policies. An exception to that is the position in respect of contractors' professional indemnity policies which raise some particular considerations.

10.4 Further, we do not seek to repeat here general considerations applicable to professional indemnity policies as to other liability policies and discussed in the previous chapters, such as the authorities relating to aggregation or the principles applying to settlements reached without the consent of the insurer.

PROFESSIONAL INDEMNITY COVER[1]

10.5 Whilst the precise form of insuring clause will vary from policy to policy, in its simplest form the insuring clause will usually provide that:

> "Insurers will indemnify the Assured against any claim first made against them during the Period of Insurance in any respect of any civil liability"

Or possibly that

> "Insurers will indemnify the insured for any sum which the Insured may become legally liable to pay arising from any claim or claims first made against them during the Period of Insurance."

1. The editors would like to acknowledge with gratitude the enormous assistance they have received from Andrew Harrison-Sleap of Jardine Lloyd Thompson Ltd, who has been generous with his assistance based upon extensive practical broking experience of the Construction Professional Indemnity market.

10.6 Cover is usually provided in respect of legal costs and expenses incurred with insurers' consent in defence of a claim.

10.7 As with public liability policies, the insurer does not become liable under the policy until the liability of the insured has been established by judgment, arbitration award or agreement: in the context of a professional indemnity policy, see *West Wake Price & Co* v *Ching*.[2]

10.8 Professional indemnity policies are commonly written on a "claims made" basis, unlike public liability policies which are usually written on an occurrence basis. That is to say the policy will grant indemnity in respect of legal liability for claims first made during the period of the policy in question. This protection is important to the professional insured against whom a claim may emerge many years after the event allegedly giving rise to the liability.

10.9 What is meant by a "claim"? Devlin J addressed this question in *West Wake Price & Co* v *Ching*:[3]

> "I think that the primary meaning of the word 'claim'—whether used in a popular sense or in a strict legal sense—is such as to attach it to the object that is claimed; and that is not the same thing as the cause of action by which the claim may be supported or as the grounds on which it may be based. In the Oxford Dictionary 'claim' is defined as: first 'A demand for something as due; an assertion of a right to something'; secondly, 'Right of claiming; right or title (to something or to have, be or do something; also on, upon the person, etc., that the thing is claimed from).' All the examples given under these two heads are examples of claims made to an object or upon a person . . . "

And then a little later:[4]

> "If the word is to be used with any precision, it must be defined in relation to the object claimed. The grounds for the claim or the causes of action which support it can give it colour and character, but cannot give it entity. If you say of a claim against a defendant that it is for £100, you have said all that is necessary to identify it as a claim; but if you say of it that it is for fraud or negligence, you have not distinguished it from a charge or allegation. In particular, if you identify a claim as something that has to be paid . . . it must be something that is capable of separate payment: you cannot pay a cause of action. It follows, I think, that if there is only one object claimed by one person, then there is only one claim, however many may be the grounds or the causes of action which can be raised in support of it: likewise where several claims are each dependent on the same cause of action (as, for example, where one cause of action leads to alternative claims for an injunction, damages or an account or other different forms of relief), there remains only one cause of action, however many claims it may give rise to."

10.10 Before returning to this subject, it is convenient to state something about notification.

Notification

10.11 It is a common experience of professional people that information may be received that a client is displeased or concerned. There may be a complaint about the quality of service provided or the result achieved. Sometimes the terms of the complaint will make it obvious that legal proceedings will follow immediately, or that proceedings will be inevitable at some

2. [1957] 1 WLR 45.
3. *Ibid*, at p. 55.
4. *Ibid*, at p. 57.

stage in the future. More often it will be uncertain whether the complaint will ever come to anything.

10.12 As stated, the normal professional indemnity insuring clause refers to claims made during the period of insurance—but the complaint may not yet have matured into something which would amount to a "claim" within Devlin J's definition, for example it may not be entirely clear what the complaint is about, and no demand may yet have been made.

10.13 If the policy year in which the complaint falling short of a claim is made expires, the insured will know that there is some as yet ill-defined problem in the offing which may or may not come to anything. When a proposal is put forward for the following year's insurance the proposer would have to reveal the existence of the complaint, upon which the following year insurer is likely to offer terms excluding any cover for any claim which may emerge out of the complaint. Unless something is done, the insured has the risk of falling between two stools—between the first year insurer who could say that no "claim" has been made during his period on risk and the second year insurer who would refuse to accept any liability arising out of the subject matter of the complaint.

10.14 This conundrum is solved by including machinery in the first year policy whereby the insured can notify matters which may give rise to a claim, and the first year insurer agrees to provide indemnity in respect of matters notified during his period on risk as "attaching" to his year on risk. The machinery by which this is done varies—thus in *Thorman* v *New Hampshire Insurance Co (UK) Ltd*,[5] there was a clause in an architects' negligence policy as follows:

> "If during the currency of the Policy the Insured shall become aware of any occurrence which may be likely to give rise to a claim falling within Section 1 or 2 and shall during the period of this insurance give written notice to the Company of such occurrence any claim which may subsequently be made against the Insured arising out of the occurrence of which notification has been given shall be deemed to be a claim arising during the period of this Policy whenever such claim may actually be made."

Other policies achieve the same result by integrating the notification provision into the insuring clause:

> "Insurers agree to indemnify the Insured . . . for any sum which the Insured may become legally liable to pay arising from any claim or claims made against them and/or first notified during the period . . . "

10.15 Whatever the wording, the notification provisions can throw up problems—is the complaint such as to require notification or entitle the insured to notify? From the insurer's point of view, it might very well not want the potential claim to attach to his year on risk, but would prefer it to attach to another insurer coming on risk in the following year or even later. This problem was considered by Rix J in *J Rothschild Assurance plc* v *Collyear*,[6] in a case where the policy required notification "of any circumstances of which the assured shall become aware which may give rise to a claim or loss against them . . . ". It was further provided that if notification had been given a claim made later would be deemed to have been made during the subsistence of the policy in the year in which notification was given. The case arose out of pension mis-selling and was factually remote from a construction case, but Rix J gave helpful guidance as follows:[7]

5. [1988] 1 Lloyd's Rep 7.
6. [1999] Lloyd's Rep IR 6.
7. *Ibid*, at p. 22.

> "Whilst it is true that GC2 gives to an insured a significant extension of cover, a 'claims made' policy could hardly work on any other basis. Otherwise, by the time that a claim came to be made, it is quite likely that it would have become impossible to obtain cover for it, either at all, or on any but prohibitive terms. Therefore as or more significant than the extension of cover itself are the factors, first, that the test of materiality for notice is a weak one—'which *may* give rise to a claim' not which *is likely to* give rise to a claim; and secondly, that the price of the extension of cover is notification of such circumstances, which is a condition precedent to be indemnified. The latter is important, for, together with the additional requirement that the assured shall give underwriters 'as soon as possible full details in writing of the circumstances which may give rise to a claim', it enables underwriters to adopt or require such immediate steps as they think appropriate to minimise or avert any potential loss. I do not think, therefore, that there is any justification for demanding too much of the test that the notified circumstances 'may' give rise to a claim."

A similar analysis can be found in the decision of Gloster J in *HLB Kidsons* v *Lloyd's Underwriters Subscribing to Policy 621/PKID00101*.[8]

Interrelationship between claims and notification

10.16 The *Rothschild* and *Kidsons* cases illustrate the interrelationship between claims and notification. Other problems frequently occur.

10.17 One problem which is familiar to practitioners is where things just keep coming out of the woodwork. It is a depressingly frequent occurrence to discover that an insured against whom one complaint or claim is made later faces other complaints or claims. It may be very important to determine what the effect of a first notification is when later matters emerge. That was the problem faced by the insured in *Thorman* v *New Hampshire Insurance Co (UK) Ltd*.[9] In August and September 1976, certain complaints were made regarding cracking of the brickwork and a site meeting took place in September 1976. Certificates of completion were issued between November 1976 and February 1977. The owners took possession of the houses constituting the development between November 1976 and November 1977. In 1978 and 1979 the owners informed the plaintiffs that they required remedial work to be carried out to the brickwork. The plaintiffs informed their then insurers (New Hampshire) of a claim for the cost of remedial works. By November 1979 New Hampshire had filed their papers.

10.18 In May 1982 the insured were advised of further problems which had arisen in connection with the development. By now they had new insurers, the Home. The question was whether the new matters fell within the New Hampshire policy as having been notified by the original notification (at which time the insured knew nothing of these further matters). Stocker LJ said:[10]

> "For a 'claim' to be substantiated against a defendant, whether expressed in contract or in tort, it obviously must be proved in every case (1) that a duty was owed, (2) that there was a breach of that duty and (3) damage resulted from that breach. As a matter of formal procedure they can be pleaded as an assertion of a general duty, an allegation of its breach and causative proof of damage for that breach. In a case where substantial building works are concerned there may be a variety of heads of damage, and a variety of breaches of duty arising out of different aspects of the general duty owed. Thus, for example, in one claim there may be allegations of a breach of the duty to design, with defects and damage resulting from that breach; a breach

8. [2008] Lloyd's Rep IR 237 paras 21 to 23. Followed and applied by Akenhead J in *Kajima UK Engineering Ltd* v *The Underwriter Insurance Co Ltd* [2008] Lloyd's Rep IR 391.
9. See note 5, *supra*.
10. *Ibid*, at pp. 15 and 16.

> of the duty to supervise, with different and distinct resultant damage; and a breach of the duty to specify, again with its own separate consequential damage. These may all be brought in one action, particularised by the various distinct breaches of duty and consequential damage. They may, however, be brought as separate actions provided neither the breaches of duty nor the damage claimed in the first action embrace the breaches and damage claimed in the second . . . Thus, in such a context the word 'claim' is apt to embrace both the general claim, subsequently particularised as a series of temperate breaches and damage, or can apply to each of a series of separate and distinct claims, all arising from the negligence of the architect in the course of performing a single contract. In the former case there would, in my view, be only one 'claim'; in the latter, several claims. Which is appropriate will depend upon the facts of each case and the circumstances in which the word 'claim' falls to be considered and construed."

10.19 Accordingly a number of factors will be relevant in deciding whether a new complaint constitutes a new claim distinct from a previous claim. Those factors may include:

- what is demanded;
- how specific the earlier or the new demand is;
- whether the demand is made by the same claimant or different claimants (if a different claimant is involved, then it is likely that the new matter will constitute a separate claim);
- whether the new claim relates to the same project as an earlier claim—or to the same part of the same project or to a different part;
- whether the alleged negligence is clearly distinguishable from the allegation previously made;
- whether the new claim is made or could properly be made in separate proceedings.

10.20 An illustration of the court reasoning as to whether there was more than one claim is *Mabey & Johnson Ltd* v *Ecclesiastical Insurance Office plc*.[11] The insured in that case was an engineering company whose activities included the design, fabrication and supply, worldwide, of steel bridges. A steelwork structure supplied by the insured which had been erected in Ethiopia became unstable and partially collapsed. In consequence the insured had to review the designs and construction of a number of their bridges, including steel bridges which had been erected or were to be erected in Ghana. In particular two bridges constructed in Ghana required remedial work. The question was whether there was one claim or two. Morison J held that there were two claims in respect of the Ghana bridges. The most important factor in the judge's reasoning was that there were two separate and distinct contracts for the design, manufacture and supply of the bridges. The insured were under separate contractual obligations to design two separate parts of one priority bridge programme. Although the design work was common for both contracts, it was not identical. Further, part of the insured's obligation was to ensure that each bridge was fit for its purpose.

QC clauses

10.21 As in other liability policies, it is usually a condition of a professional indemnity policy that the insured shall not settle any claim without the consent of the insurers. However, because contesting a professional negligence claim may affect the reputation of the insured professional, professional indemnity policies often contain a "QC clause" whereby any difference between insurer and insured as to whether a claim should be contested can be

11. [2004] Lloyd's Rep IR 10; [2003] EWHC 1523 (Comm).

referred to a QC or other party to decide whether the insured should be required to contest proceedings;[12] usually this will involve a QC of long standing with substantial experience of the legal issues relevant to the subject matter of the dispute.

Innocent non-disclosure clauses

10.22 Professional indemnity policies very frequently contain a clause whereby insurers agree not to exercise any right they might have to avoid the policy for non-disclosure or misrepresentation so long as the non-disclosure or misrepresentation was innocent and free of any fraudulent conduct or intent to deceive.

Collateral warranties

10.23 It is very often the case that a professional person such as an engineer or architect is asked to provide a deed of warranty to a third party such as a bank financing a project or to a prospective purchaser or occupier of a building. Insurers will normally wish to know of such arrangements. It is important from the point of view of all parties, insured, insurer and potential beneficiary of such a warranty, that any commitment given by the professional does not invalidate the insurance cover or fall outside the cover. For example a financier may often ask for a warranty that the building is fit for its purpose: such a warranty on its face goes beyond the obligation on the part of the professional to exercise reasonable care and will almost certainly fall outside the insurance cover. Similarly, it is important that the professional understands the financial limits under the policy and how they relate to liabilities undertaken.

Contractor's professional indemnity policies

10.24 A form of insurance quite frequently encountered is a contractor's professional indemnity policy effected in order to protect the liability of a contractor in respect of professional activities carried out. The simplest example of where such a policy is desirable is where the contractor carries out work on a design and build basis. It will be seen in Chapter 11, in which we discuss property insurance, that to a greater or lesser degree Contractors All Risks policies commonly exclude cover in respect of defective design. In a traditional contracting arrangement where the employer engaged the architect or engineer who maintained professional indemnity cover, the contractor who experienced difficulties as a result of negligent design would usually have a route to recompense against the employer, who could claim against his professional adviser who would have protection through professional indemnity insurance.

10.25 However, where the contractor is engaged on a design and build basis, the design risk rests with the contractor who will often wish to protect himself against that risk through insurance. This is but one example of the situation where the contractor will wish to avail himself of such cover.

10.26 In the case of policies insuring architects, engineers and quantity surveyors (to take some examples) the form of policy will usually be tailored for the particular profession, and the nature of the insured's occupation will generally demonstrate of itself that the work being

12. In *West Wake Price & Co* v *Ching* (note 2, *supra*) it was the application of such a clause that was in issue.

carried out by the insured is of a professional nature. It is not always easy to define in general terms who is a "professional" but hallmarks are usually a university degree or diploma and membership of a body of professionals (for example the RIBA or ICE).

10.27 Whilst insurers are willing to underwrite contractors' professional indemnity risks, they are unwilling to take on the contractors' commercial and non-professional risks, such as the consequences of poor workmanship. Accordingly the policy will usually define the professional activities and duties which the insurers are willing to cover. The definition will vary from policy to policy. The sort of activities covered will be likely to include a wide variety of activities such as feasibility studies, surveying (including quantity surveying), procurement, design or specification, project and/or construction management, supervision and/or inspection of construction. The policy may define the professionals by whom these activities are to be carried out (e.g. architects, engineers, surveyors, construction and project managers).

10.28 Insurers will usually include two other safeguards. First, it is usually required that the professional activities and duties shall be undertaken by or under the direction of architects, engineers, surveyors, project and contract managers or any persons engaged by the insured and who in the opinion of the insured are competent to undertake or direct the professional activities and duties specified. Secondly, because of insurers' concern not to take on the workmanship risk, there will usually be a term in the following or similar terms:

> "For the avoidance of doubt Professional Activities and Duties do not include supervision by the Insured of its own or its subcontractors work where such supervision is undertaken in their capacity as a building or engineering contractor."

10.29 The cover is a professional indemnity cover: it is necessary for the insured contractor to establish that the claim arises out of professional negligence, that is to say the failure by a professional person to carry out a professional task with due skill and care.

10.30 We emphasise in Chapter 8 that generally insurance policies relating to construction projects only respond where there has been personal injury or physical damage to property. To that general principle contractors' professional indemnity policies are an important exception. Such policies usually provide defects coverage—i.e. they will provide indemnity in respect of professional negligence claims even if no physical damage has occurred. Thus if the claim arises out of errors in quantity surveying exercises a loss may well be suffered in the absence of any physical damage. Moreover, there are many cases in which it is discovered that a building or other structure contains a defect even though no damage has occurred—consider the example of the two bridges in *Mabey & Johnson Ltd* v *Ecclesiastical Insurance Office plc*.[13]

10.31 The way in which the policy provides defects cover differs from policy to policy: one method is to include a provision in the insuring clause that the insurers will indemnify the insured

> "For loss or expense incurred by the Insured with the prior consent of the Insurers in respect of any action taken to remedy defects in the Works, whether permanent or temporary, in order to mitigate a potential loss that would otherwise be the subject of a claim under this Policy."

To give an example: assume that a steel beam designed of inadequate dimensions has been built into a building. If the beam is allowed to remain as a means of supporting part of the structure, there is a risk that the building might collapse, in which event the building owner would have a claim against the contractor for the damage caused by the contractor's negligence in the design and specification of the beam. The policy does not require the contractor to wait for

13. See note 11, *supra*.

disaster to happen. Subject to obtaining insurers' consent before carrying out the works, the contractor will be reimbursed by insurers for the cost of replacing the inadequate beam with a beam of appropriate dimensions. This is in contrast to the position under a CAR policy under which, because there had been no physical damage, no claim would be sustainable.

10.32 Further, unlike a CAR policy, a professional indemnity policy potentially provides cover for liability for consequential losses.

DIRECTORS' AND OFFICERS' LIABILITY[14]

10.33 Recent court cases have shown an increasing trend for proceedings to be brought against company directors, both executive and non-executive: see *Williams* v *Natural Life Health Products Ltd*;[15] *Standard Chartered Bank* v *Pakistan National Shipping Corporation*;[16] *The Equitable Life Assurance Society* v *Bowley*.[17] In the context of construction projects, attention might be drawn particularly to *Merrett* v *Babb*,[18] where the Court of Appeal held that a valuer employed by a one-man firm had assumed a personal duty. Company directors also face claims under statute, for example in respect of inaccurate statements in a prospectus under section 90 of the Financial Services and Markets Act 2000, or for breach of the duty to exercise reasonable care, skill and diligence under section 174 of the Companies Act 2006.

10.34 These developments have underlined the desirability of directors and officers of companies having insurance protection, a need catered for by the development of Directors' and Officers' Liability policies.

Structure of a D & O policy

10.35 Typically a D & O policy will provide some or all of the following coverages:

(1) liability of a director (to the extent that he has not been indemnified by the company);
(2) reimbursement of the company (to the extent that it has indemnified the director);
(3) liability of the company for securities claims.

The first, sometimes described as "Side A", is an indemnity of the director's liability, but only to the extent that he has not already been indemnified by the company. The second, sometimes described as "Side B", is complementary to the first; it provides a reimbursement of sums paid by the company by way of indemnity of the director. It does not, however, provide any indemnity against the company's own liability to third parties. Finally, the third coverage will provide an indemnity to the company in respect of securities claims (for example claims from investors relating to the issue of shares), and thus the liability of both the company and the director will be covered in respect of securities claims.

10.36 Section 232 of the Companies Act 2006 (reflecting statutory provisions going back to 1929) restricts the ability of companies to indemnify their directors. Subsections (1) and (2) provide:

14. The editors would like to express their gratitude to Michael Harvey QC whose assistance in respect of this part of this work has been invaluable and upon whose analysis of the legal position this section is substantially based.
15. [1998] 1 WLR 830.
16. [2003] 1 AC 959; [2002] UKHL 43.
17. [2007] Lloyd's Rep PN 14; [2003] EWHC 2263 (Comm).
18. [2001] QB 1174; [2001] EWCA Civ 214.

"(i) Any provision that purports to exempt a director of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void.

(ii) Any provision by which a company directly or indirectly provides an indemnity (to any extent) for a director of a company, or of an associated company, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is a director is void, except as permitted by

1. section 233 (provision of insurance);
2. section 234 (qualifying third party indemnity provision), or
3. section 235 (qualifying pension scheme indemnity provision)."

10.37 There had been doubt as to whether a company could purchase and maintain for its directors insurance against the liabilities mentioned in section 232(1). That doubt was first removed by section 137 of the Companies Act 1989 and then further relaxation was introduced by the Companies (Audit, Investigations and Community Enterprise) Act 2004. The position is now controlled by sections 233 and 234 of the 2006 Act. The principal relaxation is to permit companies to make Qualifying Third Party Indemnity Provisions ("QTPIPs").

10.38 To be a QTPIP the provision must satisfy three conditions, namely

(1) It must *not* provide an indemnity against the director's liability to the company (or an associated company);

(2) It must *not* provide an indemnity against fines in criminal proceedings or penalties payable to regulatory authorities;

(3) It must *not* provide an indemnity against the director's own costs,

- In defending criminal proceedings in which he is convicted;
- In defending civil proceedings by the company (or an associated company) which he loses;
- In applying to the court under sections 661 or 1157, where the court refuses to grant relief.

10.39 The Act permits a company to fund defence costs before it is known whether the director will be successful (if the proceedings are civil) or acquitted (if the proceedings are criminal). If the director is unsuccessful or is convicted, he must repay the funded money, but whether he will be able to do so may be another matter.

10.40 These relaxations were introduced so as to give directors some protection against third party claims. The sharp rise in the number of class actions in the United States has made this a particular concern for directors of British companies which have a US listing. The probable consequences of the changes introduced by the 2004 Act include:

(1) More liability will fall under the second coverage (company reimbursement) and less under the first. It is to be noted that the deductibles for the two coverages are frequently different.

(2) The insured seeking indemnity will, in a greater proportion of cases, be the company. This may have consequences if insurers are seeking grounds to avoid the contract of insurance or claim to be discharged from liability. Put briefly it may be easier to establish non-disclosure or breach of warranty by the company rather than by the particular director against whom a claim has been made.

10.41 It should be noted that there are no restrictions on a company's ability to grant an indemnity to the company secretary against his liability for negligence, default, breach of duty or breach of trust in relation to the company.

Composite policies

10.42 The consequences of a policy being a composite policy are discussed in Chapters 2 and 5 above. A standard D & O policy is a composite policy whereby there is a separate contract of insurance with each director or officer, and there is also a separate contract of insurance with each company.

Non-disclosure: knowledge of the company

10.43 The following points should be noted:

(1) Attribution of knowledge to a company:
- The knowledge to be attributed to a company depends upon rules of attribution;
- The primary rules, which are generally found in the company's articles of association or are implied by common law, usually provide that the decisions of the Board of Directors shall be the decisions of the company: see *Meridian Global Funds Management Asia Ltd* v *Securities Commission*;[19]
- In the case of a composite policy, only such primary rules will generally be applied. This is because other rules (based upon agency or vicarious liability) are generally inconsistent with the intention that each insured should be separately insured, and not adversely affected by the knowledge of other insureds: see *Arab Bank plc* v *Zurich Insurance Co*;[20]
- Consequently the knowledge of one or two directors (as distinct from the whole, or effectively the whole, board) will not generally be imputed to the company. The position may be different in respect of "one man companies";
- But special rules of attribution may be contained in the policy itself, for example a provision stipulating that the knowledge of the Chief Executive Officer and/or Chief Financial Officer shall be imputed to the company.

(2) Deemed knowledge of a company:
- The insured is "deemed to know every circumstance which, in the ordinary course of business, ought to be known by him".[21] This can enlarge the knowledge which can be attributed to the insured;
- However, the knowledge of an agent (for example a director of the company) will not be attributed to the principal (i.e. the company) if it is conduct by the agent which was a fraud on the principal. This is because it is unrealistic to expect such a person to disclose his own wrongdoing, and therefore it is not knowledge which "in the ordinary course of business ought to be known by the insured": *PCW Syndicates* v *PCW Reinsurers.*[22]

(3) Knowledge of directors:
- The principles are much simpler: there are no rules of attribution to be concerned about;

19. [1995] 2 AC 500.
20. [1999] 1 Lloyd's Rep 262 at p. 279. But see by contrast the *Kidsons* case (*supra*) at paras 80 to 87: knowledge of the Partnership Secretary of a firm of accountants attributed to the partners.
21. Section 18 of the Marine Insurance Act 1906.
22. [1996] 1 WLR 1136 at p. 1143. See also *Re Hampshire Land* [1896] 2 Ch 743. The principle may extend to cover conduct which is a serious breach of duty: *Arab Bank plc* v *Zurich Insurance Co* (note 20, *supra*) at p. 282; *Group Josi Re* v *Walbrook Insurance Co Ltd* [1996] 1 Lloyd's Rep 345 at p. 367.

- Deemed knowledge, whilst theoretically possible, is much less likely to be applicable;
- There may, however, be provisions in the policy purporting to attribute the knowledge of the CFO or CEO to individual directors. If so, these raise particular problems because they may be seen as inconsistent with other provisions indicating that it is the intention of the parties that there be separate contracts of insurance;
- For an insurer to establish a right to avoid for non-disclosure, inducement must be shown, i.e. that an insurer would have acted differently (in a way which affects the separate contract of insurance) if the material fact had been disclosed. This may present difficulties for the insurer if the material fact affects only one or a few directors and is not overly serious;
- Many D & O policies contain innocent non-disclosure clauses.

Breach of warranty

10.44 The separate persons of company and its directors make it necessary to consider with care the terms of any warranty given on a proposal form, it being common for a warranty about the truthfulness of the answers given to be provided to insurers.

10.45 If each insured has warranted the truth of the statements in the proposal form, and they are false, then each will be in breach of warranty even though he was personally unaware of the untrue statement. A case in which innocent partners were held unable to recover because another partner was aware of a circumstance which should have been but was not disclosed, was considered by the High Court of Australia in *Yorkville Nominees Pty Ltd* v *Lissenden*.[23] The courts will attempt to avoid such a harsh result by construing any warranty given favourably to the insured.[24]

10.46 In this context it is important to note the recent decision of Gloster J in the *Kidsons* case[25] where the knowledge of the Partnership Secretary of a firm of chartered accountants was attributed to all the partners in the firm.

Policy exclusions

10.47 Most policies will have an exclusion for dishonesty etc., such as:

> "This policy does not provide an indemnity . . . against any claim . . . brought about by . . . the dishonest, fraudulent or malicious act or omission . . . of such director or officer."

Often the rigour of such a provision is tempered by a proviso as follows:

> "However, this exclusion shall only apply to the extent that the subject conduct has been established by a judgment of other final adjudication adverse to the director or officer."

Allocation of defence costs

10.48 Problems of allocation can arise where the claim by a third party is made between insured and uninsured persons. For example, the claim may be made against various directors

23. (1985) 63 ALR 611.
24. See for example *Arab Bank plc* v *Zurich Insurance Co* (note 20, *supra*) at p. 283.
25. See note 8, *supra* at paras 80 to 87.

(who are insured) as well as against the company (which is not insured in respect of its own liability to the third party, but only in respect of sums it has paid by way of indemnifying directors).

10.49 Such a problem arose in relation to defence costs in *New Zealand Forest Products Ltd* v *New Zealand Insurance Co Ltd*.[26] Proceedings were brought in California against NZ Forest Products (and some of its associated companies who were also insured companies) based on five causes of action. In respect of one of the causes of action a director, Mr Taylor, was also joined as a defendant. The allegation against him was one of fraudulent misrepresentation. The claim was settled for US$3.3 million but defence costs amounted to about US$8 million. Under the policy insurers agreed to reimburse the company sums which it paid to its directors by way of indemnifying them against defence costs. The precise terms of this provision were as follows:

> " . . . the company agrees to pay . . . all [defence costs] for which the insured organisation grants indemnification to any officer . . . which such officer has become legally obligated to pay on account of any claim made against him . . . "

10.50 The costs fell into three categories, namely:

(1) costs solely and exclusively related to the director's defence;
(2) costs solely and exclusively related to the defence of other persons (not covered by the policy);
(3) costs related to the director's defence (but also related to the defence of other persons not covered by the policy).

10.51 There was no dispute that insurers had to pay category (1), and that they did not have to pay category (2), but what about category (3)? The Privy Council, disagreeing with the Court of Appeal in New Zealand, held that the answer depended upon the proper construction of the clause of the policy. Defence costs which reasonably related to the defence of the claim against Mr Taylor were covered by the language of the clause even though they related to the defence of some other person who was not insured.

10.52 This decision led D & O insurers to tighten their wording, and it is now common to find a clause specifying the method of allocation. A typical clause is:

> "The company and the [director] and the insurer agree to use their best efforts to determine a fair and proper allocation of amount as between the company and the [director] and the insurer, taking into account the relative legal and financial exposures of and the relative benefits obtained by the [director] and the company."

26. [1997] 1 WLR 1237.

CHAPTER ELEVEN

PROPERTY DAMAGE POLICIES

Roger ter Haar

11.1 Chapter 15 deals with the application of insurance obligations in property and construction documentation. However, this chapter deals more with the types and content of property damage policies.

11.2 For a very large percentage of construction projects there will be in place a project insurance policy gathering under one policy the property interests of a number of participants to the project. Such a policy is often described as a "Project Insurance", sometimes as a "Contractors All Risks Insurance", sometimes as an "Erection All Risks Insurance". Other descriptions can be found. The expression "Erection All Risks Insurance" tends to be used for insurance taken out in connection with process plant projects (e.g. an oil refinery or a chemical processing plant).

11.3 Whatever the description, what this chapter considers first are policies under which the material damage risks of a project are brought under the umbrella of one insurer. We take as the paradigm case Contractors All Risks Insurance. We then consider some of the principal risks which an insurer is typically required to insure under the JCT standard forms of contract.

CONTRACTORS ALL RISKS INSURANCE

11.4 Standard "All Risks" insurance will have an insuring clause in the following or very similar terms:[1]

> "The insurer will, subject to the terms contained herein or endorsed hereon, indemnify the Insured in respect of loss of or damage to the Insured Property whilst at the Insured Location in connection with the Business of the Principal Insured occurring during the Period of Insurance arising from any cause whatsoever except as hereinafter provided."

11.5 Of course no insurer takes on "all risks". If he did he might find that he has a very full book of business, but might not be in business for very long. So any "all risks" insurance policy contains a raft of exclusions. However, the concept of this type of insurance is important. If damage occurs, then the insurer provides an indemnity unless the insurer can establish that an exclusion applies.

11.6 The cover provided is in respect of "loss of or damage to the Insured Property". We discuss in Chapter 8 what is meant by "damage" in a policy of this nature; in short there must be physical damage to property. That requirement is made explicit in some standard policy wordings considered in this chapter.

1. The example given is taken from *Amec Civil Engineering Ltd* v *Norwich Union Fire Insurance Ltd* [2003] EWHC 1341 (TCC).

Insured property

11.7 The policy should define the "Insured Property"—the following is a typical wording:[2]

> "The Insured Property being property belonging to the Insured or for which the Insured is responsible or is required or has agreed to insure is defined as follows:
> Item A the permanent and/or temporary works, materials, including free issue materials, goods, property, machinery, supplies and spares intended for use in connection with a contract . . . "

11.8 Thus, the policy will typically cover the following:

(1) the permanent works (e.g. the building or other structure which it is the aim of the project to construct or erect whilst it is being constructed or erected);
(2) temporary works (e.g. scaffolding or, in large projects, such engineering works as a coffer dam);
(3) materials intended for incorporation into the project;
(4) tools, machinery and other equipment.

11.9 The cover will usually specify that it covers these items "at the insured location", i.e. at the construction site. Transit risks, particularly marine risks, are not usually covered by a project all risks insurance, and will usually be excluded in two ways: firstly by not falling within the insuring clause; and secondly, by express exclusion. As an exception to this general principle, cover is often expressly provided for materials intended for use on the project but being stored or worked on off-site.

The insured

11.10 The policy will define who the insured parties are. It is very often the case that the contract of insurance is taken out on behalf of the employer and the main contractor. Subcontractors' interests are also commonly insured under the project policy. This gives rise to legal complications as to the extent to which parties co-insured under such a policy can sue each other. These complications are discussed in Chapter 13.

Period of insurance

11.11 The period of insurance is an important consideration. Generally the period of cover is up to practical (or substantial) completion. The period may well include a period of testing and commissioning, particularly in projects relating to process plants and power stations, which give rise to particular underwriting considerations because of the enhanced risks involved. (In two recent first instance cases it has been suspected that cover under a CAR policy ceases when construction activity ceases: see *Swiss Reinsurance Co* v *United India Insurance Co Ltd*[3] and *Mopani Copper Mines plc* v *Millennium Underwriting Ltd*[4]) These risks may be reflected in particular terms of the policy.

2. Again taken from *Amec Civil Engineering Ltd* v *Norwich Union Fire Insurance Ltd* [2003] EWHC 1341 (TCC).
3. [2005] EWHC 237 (Comm).
4. [2008] EWHC 1331 (Comm).

11.12 Many contract forms contain provision for a defects liability period typically of a year or two years, during which the contractor is obliged to return to site to carry out remedial works—the contractor may also have achieved practical completion or substantial completion but with "snagging" items or "punch list" items remaining outstanding. For these reasons the contractor may still be on site after practical completion or may have to return to site. The contractor needs to be sure that the policy covers him against resultant liabilities. The extent of cover that an underwriter is willing to give after the contractor has left site is, naturally, a matter of underwriting judgment. The following is the sort of cover which is often granted:

> " . . . The Company will indemnify the Insured for any damage to the permanent works or any part thereof during any maintenance or defects liability period not exceeding . . . months duration or as specified in the Schedule but only in respect of damage for which the insured is liable arising from a cause occurring prior to the commencement of the maintenance period or for damage to work actually being undertaken during such maintenance period solely in connection with the insured's obligations under the Contract to remedy a defect or complete any snagging list."

11.13 Save as covered by such an extension under the project policy, the risks of damage to the project property after practical or substantial completion will usually be covered by the employer's normal property insurance or by a latent defects policy (see Chapter 12).

Need for fortuity

11.14 In *C A Blackwell (Contracts) Ltd* v *Gerling General Insurance Co* at first instance,[5] HHJ Mackie QC cited and approved the following:

> "Under a policy insuring specified risks it is the duty of the insured to prove that his loss was caused by an insured risk, failing which he will not be able to recover. An all risks policy, by contrast, removes from the insured the need to demonstrate the precise cause of his loss, even though such a policy does not literally cover all risks and will normally contain exceptions. However, the loss must be fortuitous. The effect of an all risks policy is, therefore, to place upon the insured the burden of proving that some loss or damage has occurred during the period covered by the policy and that such a loss is, *prima facie*, the result of an accident or other fortuity. It is then for the insurer to prove either that the loss was not fortuitous or that the loss was caused by an excepted peril."

11.15 The learned judge also referred to the following passage from the speech of Viscount Finlay in *British and Foreign Marine Insurance Co Ltd* v *Gaunt*:[6]

> "Of course, no one would contend that a policy of this kind would cover ordinary wear and tear or deterioration incidental to the transit of goods. There must be something in the nature of an accident to bring the policy into play. But I can find no justification for the contention which the appellants put forward at the bar of your Lordships' House that in order to recover upon such a policy for damage resulting in the goods getting wet by rain it would be necessary to establish that there was an extraordinary or unusually heavy fall of rain. It would be quite enough if owing to some accidental circumstances the goods were left uncovered when rain was falling. This might happen by some want of care on the part of the men whose duty it was to keep the goods covered with tarpaulins which were provided for the purpose. If, from any of

5. [2007] Lloyd's Rep IR 511; [2007] EWHC 94 (Comm)—we refer to the Court of Appeal decision in this case in a different context below.
6. [1921] 2 AC 41.

the accidental circumstances which are incident to a journey, the goods are damaged by a risk covered by a policy, the element of casualty or accident is supplied."

Accordingly, an act of negligence may make it inevitable that damage will occur, but that does not prevent the damage being caused by a fortuity. By contrast, in *Seele Austria GmbH & Co* v *Tokio Marine Europe Insurance Ltd*,[7] it was held at first instance that damage caused deliberately in order to gain access to defective windows was not fortuitous.

Wear and tear and gradual deterioration

11.16 All risks policies usually contain an exclusion in respect of damage caused by "wear, tear or gradual deterioration". Such an exclusion reinforces the requirement that the loss be fortuitous. In *Amec Civil Engineering Ltd* v *Norwich Union Fire Insurance Society Ltd*,[8] reinforced concrete blocks had insufficient concrete cover over the steel reinforcement. HHJ Seymour QC held that the inevitable deterioration that would occur as water attacked the steel would cause "gradual deterioration".

Design and workmanship exclusions

11.17 Among the risks which project insurers will wish to exclude are those arising out of defective workmanship and defective design. These are considered to be commercial risks falling outside the remit of insurance cover. However, insurers are willing to accept some such risks depending upon their assessment of the risks attaching to a particular project and/or a particular insured. There are two significant sets of contractual exclusions in common use in the London insurance market.

11.18 The first are described as the "DE" clauses. A committee of leading building and civil engineering underwriters first drew up standard clauses in 1985, which were then revised in 1995. There are five clauses of reducing levels of restriction upon the scope of cover:[9]

"DE 1: Outright defect exclusion

This policy excludes loss of or damage to the Property insured due to defective design plan specification materials or workmanship.

DE 2: Extended defective condition exclusion

This policy excludes loss of or damage to and the cost necessary to replace repair or rectify:

(1) Property insured which is in a defective condition due to a defect in design plan specification materials or workmanship of such Property insured or any part thereof;
(2) Property insured which relies for its support or stability on (1) above;
(3) Property insured lost or damaged to enable the replacement repair or rectification of Property insured excluded by (1) and (2) above.

Exclusions (1) and (2) above shall not apply to other Property insured which is free of the defective condition but is damaged in consequence thereof.

7. [2007] BLR 337; [2007] EWHC 1411 (Comm); see also the Court of Appeal decision in this case: [2008] BLR 337.
8. See note 2, *supra*.
9. The wordings set out are the 1995 wordings.

For the purpose of this Policy and not merely this Exclusion the Property insured shall not be regarded as lost or damaged solely by virtue of the existence of any defect in design plan specification materials or workmanship in the property insured or any part thereof.

DE 3: Limited defective condition exclusion

This policy excludes loss of or damage to and the cost necessary to replace repair or rectify:

(1) Property insured which is in a defective condition due to a defect in design plan specification materials or workmanship of such property insured or any part thereof;
(2) Property insured lost or damaged to enable the replacement repair or rectification of Property insured which is free of the defective condition but is damaged in consequence thereof.

Exclusion (1) above shall not apply to other Property insured which is free of the defective condition but is damaged in consequence thereof.

For the purpose of the Policy and not merely this Exclusion the Property insured shall not be regarded as lost or damaged solely by virtue of the existence of any defect in design plan specification materials or workmanship in the Property insured or any part thereof.

DE 4: Defective part exclusion

This policy excludes loss of or damage to and the cost necessary to replace, repair or rectify:

(1) Any component part or individual item of the Property insured which is defective in design plan specification materials or workmanship;
(2) Property insured lost or damaged to enable the replacement repair rectification of Property insured excluded by (1) above.

Exclusion (1) above shall not apply to other parts or items of Property insured which are free from defect but are damaged in consequence thereof.

For the purpose of the Policy and not merely this Exclusion the Property insured shall not be regarded as lost or damaged solely by virtue of the existence of any defect in design plan specification materials or workmanship in the Property insured or any part thereof.

DE 5: Design improvement exclusion

This policy excludes:

(1) The cost necessary to replace repair or rectify any Property insured which is defective in design plan specification materials or workmanship;
(2) Loss or damage to the Property insured caused to enable replacement, repair or rectification of such defective Property insured.

But should such damage to the Property insured (other than damage as defined in (2) above) result from such a defect, this Exclusion shall be limited to the costs of additional work arising from and the additional cost of improvement to the original design plan specification materials or workmanship.

For the purpose of the Policy and not merely this Exclusion the Property insured shall not be regarded as lost or damaged solely by virtue of the existence of any defect in design plan specification materials or workmanship in the Property insured or any part thereof."

11.19 Summarising the effects of these exclusions:

- Under DE 1 there is a total exclusion of all loss or damage arising out of defective design etc.
- Under DE 2 property which is defective as a result of defective design etc. is excluded, as is property which relies for its support on property which is defective, but cover is given for other insured property which is free of defect.
- Under DE 3 property which is defective as a result of defective design etc. is excluded, but cover is given for other property which is free of defect and is damaged by defective property.
- DE 4 is similar to DE 5 but the exclusion is restricted to any "component part or individual item" which is defective. DE 4 is generally intended for machinery erection risks where an individual component could be identified in a machine as defective and the consequent damage to the rest of the machine could be very serious and expensive.
- DE 5 provides full cover for both defective and non-defective property provided there is actual damage (even if only to the defective part). Cover is not given for the existence of defects and the costs of redesign are excluded.
- What are sometimes described as "access costs" are excluded by DE 2, DE 3, DE 4 and DE 5. These access costs include deliberate damage caused in order to access the defective property that is excluded. In a recent decision on a slightly different wording, Field J excluded such access costs, but he was overruled by the Court of Appeal.[10]

11.20 A different group of underwriters specialising in erection risks, the London Engineering Group,[11] have put forward a different set of exclusions as follows:

> "LEG 1/96: model 'outright' defects exclusion
>
> The Insurer(s) shall not be liable for Loss or Damage due to defects of material workmanship design plan or specification.
>
> LEG 2/96: model 'consequences' defects exclusion
>
> The Insurer(s) shall not be liable in respect of:
>
> All costs rendered necessary by defects of material workmanship design plan or specification and should damage occur to any of the Insured Property (Contract Works) containing any of the said defects the cost of replacement or rectification which is hereby excluded is that cost which would have been incurred if replacement or rectification had been put in hand immediately prior to the said damage.
>
> For the purpose of this policy and not merely this exclusion it is understood and agreed that any portion of the Insured Property (Contract Works) shall not be regarded as damaged solely by virtue of the existence of any defect of material workmanship design plan or specification.
>
> LEG 3/96: model 'improvements' defects exclusion
>
> The Insurer(s) shall not be liable in respect of:

10. *Seele Austria GmbH & Co* v *Tokio Marine Europe Insurance Ltd* (note 5, *supra*); [2008] BLR 337.

11. The editors would like to acknowledge with gratitude the considerable assistance which they have received from those associated with the London Engineering Group, including Mr Peter Hamilton of Chaucer Syndicates Ltd and Mr Geoff Lord of Kennedys. Any views expressed in this book as to the effect of the clauses are those of the author of this chapter and are not to be taken necessarily as representing the views of the London Engineering Group or its members.

All costs rendered necessary by defects of material workmanship design plan or specification and should damage occur to any portion of the Insured Property (Contract Works) containing any of the said defects the cost of replacement or rectification which is hereby excluded is that cost incurred to improve the original material workmanship design plan or specification.

For the purpose of this policy and not merely this exclusion it is understood and agreed that any portion of the Insured Property (Contract Works) shall not be regarded as damaged solely by virtue of the existence of any defect of material workmanship design plan or specification."

In 2006 LEG 3/06 was produced—the words added or amended are shown in bold below:

"*The Insurer(s) shall not be liable for*

All costs rendered necessary by defects of material workmanship design plan or specification and should damage ***(which for the purposes of this exclusion shall include any patent detrimental change in the physical condition of the Insured Property)*** occur to any portion of the Insured Property containing any of the said defects the cost of replacement or rectification which is hereby excluded is that cost incurred to improve the original material workmanship design plan or specification.

For the purpose of the policy and not merely this exclusion it is understood and agreed that any portion of the Insured Property shall not be regarded as damaged solely by virtue of the existence of any defect of material workmanship design plan or specification."

In general terms, LEG 1/96 is equivalent to DE 1, LEG2/96 equivalent to DE 3 and LEG3/96 to DE 5—by this we do not mean that they have the same effect, but that they are the engineering counterparts of those DE clauses. The amendment to LEG 3 was introduced by reason of some doubts felt by some in the market as to the effect of what the Court of Appeal (in particular Mance LJ) said in *Skanska Construction Ltd* v *Egger (Barony) Ltd*.[12] It may be doubted whether the alteration was strictly necessary.

"Defects in design" or "defectively designed"

11.21 Interpreting the intent of policy exclusions in respect of defective materials and defective workmanship does not appear to have troubled the courts much. However, there is a body of authority relating to exclusions in respect of defective design or allied expressions.

11.22 A preliminary question is whether in order for the exclusions to bite, it is necessary for the insurer to establish negligence on the part of the designer. This issue came before the High Court of Australia in *Queensland Government Railways* v *Manufacturers' Mutual Assurance Ltd*.[13] That case concerned a railway bridge (built to accepted engineering standards) which was washed away during exceptionally heavy rains. The policy under consideration included an exclusion clause which provided that:

"This insurance shall not apply to or include:

. . . loss or damage arising from faulty design and liabilities resulting therefrom."

The High Court of Australia held that the bridge was of "faulty design" because it was unable to withstand the severe weather, even though it had been designed and constructed without

12. [2003] Lloyd's Rep IR 479; [2002] EWCA Civ 310.
13. [1969] 1 Lloyd's Rep 214.

negligence. The words were held to be concerned with the objective attributes or quality of the bridge as designed and constructed, not the manner in which it was designed and constructed. Windeyer J said:

> "Here we are not concerned with the word 'fault' or 'faulty' as an attribute, importing blame, or a person, or a personified thing. We are concerned with the word 'faulty' as descriptive of an inanimate thing . . . [Fault or faulty] designate an objective quality of a thing . . . "

By way of contrast, the expression "faulty workmanship" was concerned with the manner in which the work in question was carried out.[14]

11.23 The distinction is akin to the difference in a product liability case between being able to rely upon a breach of the implied term as to satisfactory quality or fitness for purpose on the one hand, and being forced to establish negligence in the design or construction of the product on the other. The manner in which the product was designed or constructed is immaterial to the breach of the implied term (the only thing that matters is whether or not it is, as a matter of fact, of satisfactory quality or fit for purpose), whereas it is the essential part of the investigation in relation to the establishment of negligence.

11.24 The distinction is neatly illustrated by the wording of the relevant provision in the policy considered by the Court of Appeal in *Hitchins (Hatfield)* v *Prudential Assurance*.[15] In that case the policy included the following terms:

> "The Insurer will indemnify the Insured in respect of All Risks of loss and/or damage of whatsoever nature to . . . the Works . . .
>
> The insurance provided by . . . this Policy includes:
>
> Loss, destruction or damage to the property insured or any part thereof arising out of any *defect error or omission in design* plan specification material or workmanship subject to the following provisos:
>
> . . .
>
> no amount shall be admitted in respect of any increased costs due to redesigning the property insured or any part thereof which is *defectively designed* . . . "

11.25 In contrast to the expression "defect in design" which was used in the exclusion, the use of different parts of the verb—"redesigning", "defectively designed" in the proviso—indicated that the proviso was concerned with personal activity or conduct, and as a result there was some reason to believe that its intention was to exclude increased costs in relation to design that was negligent. It follows that it is likely that, where the exclusion is expressed by reference to the noun "design" (as in "defective in design" or "defect of design") rather than by reference to part of the corresponding verb (as in "defectively designed") then the exclusion will bite even in the absence of negligence: it will be sufficient to show that the building as designed was not capable of doing what it was supposed to do (i.e. it was not fit for its purpose).

14. The *Queensland* decision has been cited with approval in *Pentagon Construction (1969) Co Ltd* v *United States Fidelity & Guarantee Co* [1978] 1 Lloyd's Rep 93 (British Columbia); *BC Rail* v *American Home Assurance Co* (1991) 79 DLR (4th) 729 (British Columbia); *Canadian Pacific Ltd* v *American Home Assurance Co* (2001) 105 ACWS (3d) 151 (Quebec); *Barnaby* v *South British Insurance Co Ltd* (1980) 1 ANZ Insurance cases paras 60–401 (New Zealand); *New Zealand Municipalities Co-operative Insurance Co Ltd* v *Mount Albert City Council* [1983] NZLR 200 (New Zealand); *Hitchins (Hatfield) Ltd* v *Prudential Assurance Co Ltd* [1991] 2 Lloyd's Rep 580 (England).

15. [1991] 2 Lloyd's Rep 580.

Other parts or portions of the property insured

11.26 Reference to the DE and LEG clauses set out above shows that in the case of DE 2 and DE 3 there is a proviso in respect of "other Property insured which is free of the defective condition", in DE 4 a proviso in respect of "other parts or items of Property insured which are free from defect", and in LEG 2/96 and LEG 3/96 reference to "should damage occur to any portion of the Insured Property . . . containing any of the said defects".

11.27 This type of wording and other wording seeking to achieve similar results cause problems of interpretation in applying the policy wording to particular factual situations.

11.28 DE 1 and LEG 1/96 simply exclude all the consequence of defects of workmanship, design, etc. However, because of the harshness of such wording underwriters are often willing to grant the wider cover provided by the other clauses.

11.29 In a simple case these wordings cause no problems: a building on the site falls over because of defective construction causing damage to another building next door to it on the site, the second building being properly constructed. There is no difficulty under any of the wordings other than DE 1 and LEG 1/96 in recovering the cost of repairing the second building.

11.30 However, in other cases there are complications—assume that the building has been properly designed and built in all respects except for the foundations which are defective. So long as no works of improvement are carried out, both DE 5 and LEG 3/96 would provide a complete indemnity in respect of the cost of rebuilding the defective building, whilst DE 2 in such a situation would not provide indemnity because the rest of the building relied upon the integrity of the foundations for stability.

11.31 In some respects the conceptual problems faced are similar to those facing the courts when deciding whether a duty of care is owed in respect of damage to property as a result of defects in other property (the complex structure cases): see the discussion in Chapter 3 of such cases as *Jacobs* v *Morton*.[16]

11.32 The problems, which frequently face lawyers asked to advise upon such policies, have not been much discussed in the English Courts. There are, however, some Australian cases upon somewhat different wording.

11.33 In *Charnway Ltd* v *Iron Trades Mutual Insurance Company Ltd*,[17] the relevant exclusion provided:

> "The company shall not be liable for the cost of repairing, replacing or rectifying property which is defective in design material or workmanship but not excluding damage to other property hereby insured resulting therefrom."

11.34 The facts were that Charnway was the waterproofing subcontractor on a contract relating to the construction of the M25. The joints of the concrete tunnels along the motorway required waterproofing. The correct method of waterproofing the joints was to bond to the concrete a rubber product known as DF6, and thereafter apply a layer of a laminate known as Famguard, followed by a steel plate, followed by a further layer of Famguard. Charnway did not bind the DF6 to the concrete, and as a result the joints leaked. The top two layers of the Famguard membrane had to be removed and the deck flashing had to be replaced and properly bonded. Charnway made a claim under its policy for the cost of removing and replacing the two layers of Famguard.

16. [1995] 72 BLR 92.
17. Unreported: Michael Davies J, Queen's Bench Division, 19 April 1988.

11.35 Michael Davies J held that it was proper to separate the work which was badly done, or the property upon which work was badly done, or was not done at all as regards bonding, from the remainder of that which comprised the joint. Accordingly he held that there was a three-layer system and the claim succeeded—each layer was "other property" for the purpose of the policy.

11.36 Recently another motorway case has come before the courts: *C A Blackwell (Contractors) Ltd* v *Gerling Allegemeine Versicherungs AG*.[18] The claimant insured was engaged to carry out earthworks in respect of the construction of the M60 near Manchester. The head contractor was Balfour Beatty. Blackwell was required to carry out: first-stage bulk earthworks; trimming and rolling subformation/formation; laying of capping material; laying of imported stone piled raft; and stabilising capping material. The works were to be constructed in layers after the initial earthworks creating the basic cuttings or embankments along which the motorway was to run: subformation, which involved compacting the material in situ; formation, which was the level created by the spreading of imported material (capping); sub-base, which was a level created by the spreading of the imported material of a different specification to the capping, brought in, spread and profiled by Balfour Beatty; and three asphalt layers which were the responsibility of Balfour Beatty. In two incidents rain caused damage to the capping layer and an area of subformation. The policy included an exclusion in the form of the 1995 DE 3 clause set out above.

11.37 The insurers' case was that temporary drainage provided to protect the earthworks was defective. The Court of Appeal held that the temporary drainage was "not of itself property. It is a series of measures combining items like tankers with methods of doing things which include changes, such as cutting and channelling, to the capping which is part of the Insured Property". The "material property" was the capping and the damaged sub-formation, neither of which was "defective". Alternatively, if the drainage was "property", it was not the same property as the capping and sub-formation. Commenting on the DE 3 wording, Tuckey LJ said:[19]

> " . . . I think it is important to construe the exclusion clause without regard to its application to the facts of this case. Its purpose is clear. It prevents the insurer from having to pay for the replacement, repair or rectification of property which was already in a defective condition at the time the fortuity covered by the policy occurred. If the defect is one of design, plan, specification, materials or workmanship the property would have to be repaired, etc., by the contractor or others in any event."
>
> What is important is to note that the exclusion is not of loss or damage *caused* by a defect in workmanship, etc. The cause of the loss or damage is irrelevant. Provided the insurer can show that the property was in a defective condition the exclusion applies."

11.38 The decision on its facts has its critics—what it illustrates is the difficulty in many cases in defining what is the property that is defective and what is "other property".

11.39 There are Australian cases concerned with slightly different wording. In *Walker Civil Engineering pty Ltd* v *Sun Alliance and London Insurance plc*,[20] the exclusion under consideration was:

> "This insurance does not cover loss or damage directly caused by defective workmanship, construction or wear or tear or mechanical breakdown or normal upkeep or normal making good but this exclusion shall be limited to the part which is defective and shall not apply to any other part or parts lost or damaged in consequence thereof."

18. [2008] Lloyd's Rep IR Plus 18; [2007] EWCA Civ 1450.
19. At paras 16 and 17.
20. (1999) 10 ANZ Ins Cas 74–81.

11.40 The contract was for the construction of three sewerage pumping stations. Once the construction was almost complete, the sewerage tanks (which were made of fibreglass) began to leak and accordingly were defective. The contractor insured had to demolish the fibreglass tanks and reconstruct them with concrete. During the rectification of the tanks, some of the machinery and components of the tanks (and in particular the pumps) which were not defective had to be removed and replaced. The court held that the reference to "the part which is defective" was a reference to the part of the works which, being defective, had suffered loss or damage. The various components installed in the tanks (including the pumps) did not belong to a different part of the works from the tanks. On the contrary, they were installed in that part of the works (the sewerage stations) which were defective. Accordingly the exclusion applied. It might be thought that if the expression used had been "other property" an English court might have reached a different conclusion, more favourable to the insured, on those facts. Commenting on this case in *C A Blackwell (Contractors) Ltd* v *Gerling Allegemeine Versicherungs AG*,[21] Tuckey LJ explained that in the Australian case the word "part" did not refer to a part such as a tank but referred to the part of the work being carried out by the contractor.[22]

INSURANCE REQUIRED BY JCT FORMS OF CONTRACT

11.41 As will be seen elsewhere in this work, the JCT standard forms of contract often require all risks insurance to be taken out. In standard form the contract requires that terms at least as generous as the DE 2 form of wording be used—the DE 1 wording would be non-compliant.

11.42 A point for the Employer to note is that if the only insurance which is to be effected is an insurance taken out by the contractor to indemnify him against his liability under the standard indemnity clause, the employer may find that he is without cover if damage to adjacent property is caused without negligence on the part of the contractor (for example if there is withdrawal of support). See *Gold* v *Patman & Fotheringham Ltd*.[23] In practice this appears seldom to cause problems.

11.43 The JCT forms define "Specified Perils". These include "fire, lightning, explosion, storm, flood, escape of water from any water tank, apparatus or pipes, earthquake, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion".

11.44 Some of these expressions have been considered by the courts.

Fire

11.45 Unsurprisingly, it is seldom a matter for debate as to whether there has been a "fire". A full review of the older authorities can be found in Atkinson J's judgment in *Harris* v *Poland*.[24] In *Everett* v *London Assurance*,[25] Byles J said:

21. See note 18, *supra*.
22. Other Australian cases dealing with similar clauses include *Chalmers Leask Underwriting Agencies* v *Mayne Nickless Ltd* (1983) 155 CLR 279; *Prentice Builders Pty Ltd* v *Carlingford Australia General Insurance Ltd* (1990) 6 ANZ Ins Cases 60–951; and *Graham Evans and Co (Queensland) Pty Ltd* v *Vanguard Insurance Co Ltd* (1984) 4 ANZ Ins Cas 60–689.
23. [1958] 1 WLR 697.
24. [1941] 1 KB 462.
25. (1865) 19 CB (NS) 126 at p. 133.

> "The words "loss or explosion occasioned by fire" are to be construed as ordinary people would construe them. They mean loss or damage either by ignition of the article consumed, or by ignition of part of the premises where the article is: in the one case there is a loss, in the other a damage occasioned by fire."

Explosion

11.46 In *Commonwealth Smelting Ltd* v *Guardian Royal Exchange Assurance Ltd*,[26] a smelting complex included within it a "blower house" which was a small building containing machinery designed to provide a supply of air to be blown into a furnace. The blower consisted of a large and heavy impeller contained within a cast-iron casing. In an incident the impeller and casing were broken into a large number of pieces and there were holes in the cavity walls of the blower house where metal fragments had struck and broken through the inner brick layer. Both at first instance and on appeal it was held that there was no "explosion". Staughton J at first instance held that there was no explosion but rather centrifugal disintegration. He adopted the following definition of "explosion":

> "An event that is violent, noisy and caused by a very rapid chemical or nuclear reaction, or the bursting out of gas or vapour under pressure."

Without attempting a definition, the Court of Appeal upheld his decision.

Storm

11.47 In *Oddy* v *Phoenix Assurance Company Ltd*,[27] Veale J said that

> " 'Storm' means storm, and to me it connotes some sort of violent wind usually accompanied by rain or hail or snow. Storm does not mean persistent bad weather, nor does it mean heavy rain or persistent rain by itself."

Accordingly, where the collapse of a wall was not in any way caused by violent wind a claim upon a policy failed.

11.48 In *Anderson* v *Norwich Union Fire Insurance Society Ltd*,[28] the Court of Appeal left open the issue as to whether *Oddy* was rightly decided, the plaintiff in *Anderson* having pointed to a dictionary definition of "storm" as including "a heavy fall of rain unaccompanied by wind".

11.49 In *S & M Hotels Ltd* v *Legal and General Assurance Society Ltd*,[29] a hotel collapsed on a windy night. Thesiger J held that wind had not been shown to be a concurrent or contributing or proximate cause of the collapse. He went on to say:[30]

> "Now, if I am wrong in that there remains the question as to whether the damage was due, not merely to wind but to 'storm'. In my judgment a storm must be something more prolonged and widespread than a gust of wind. One swallow does not make a summer and one may have a gust without a storm although during a storm there will almost certainly be gusts."

11.50 In *Young* v *Sun Alliance & London Insurance Ltd*,[31] in the course of his judgment Shaw LJ said that "storm meant rain accompanied by strong wind". Strictly, this part of his

26. [1986] 1 Lloyd's Rep 121.
27. [1966] 1 Lloyd's Rep 134.
28. [1977] 1 Lloyd's Rep 253.
29. [1972] 1 Lloyd's Rep 157.
30. *Ibid*, at p. 181.
31. [1976] 2 Lloyd's Rep 189.

judgment was *obiter* and therefore not strictly binding. Thus the doubt raised in *Anderson* v *Norwich Union Fire Insurance Society Ltd*[32] theoretically still remains.

Flood

11.51 In *Young* v *Sun Alliance & London Insurance Ltd*,[33] the trial judge said:

> "A flood is something large, sudden and temporary, not naturally there, such as a river overflowing its banks."

Accordingly damage to a lower lavatory on the ground floor by the seepage of water from an underground water course was not damage by flood. The Court of Appeal upheld this decision. Shaw LJ said:

> " . . . flood was not something which came about by seepage or by trickling or dripping from some large natural source, but involved a 'large movement, an irruption of water', as one of the definitions in the Oxford Dictionary puts it. The slow movement of water, which can often be detected so that the loss threatened can be limited, is very different from the sudden onset of water where nothing effective can be done to prevent the loss, for it happens too quickly.
>
> It is because the word 'flood' occurs in the context it does, that I have to come back to the conclusion that one must go back to first impressions, namely that it is used there in the limited rather than the wider sense; that it means something which is a natural phenomenon which has some element of violence, suddenness or largeness about it."

11.52 *Young* was followed by the Court of Appeal in *Computer & Systems Engineering plc* v *John Lelliott (Ilford) Ltd*,[34] in which Beldam LJ said:[35]

> " . . . flood, in my view, imports the invasion of the property, which is at the employer's risk, by a large volume of water caused by a rapid accumulation or sudden release of water from an external source, usually but not necessarily confined to the result of a natural phenomenon such as a storm, tempest or downpour."

Accordingly, where a workman let slip a purlin which fell and sheared off part of an existing fire protection system, the resulting discharge of water was held not to be a flood.

11.53 By contrast with these decisions, in *Rohan Investments Ltd* v *Cunningham*[36] the Court of Appeal held that there was a "flood". In that case, whilst the plaintiff was abroad heavy rain fell and accumulated on the roof of his house. That water made its way into the house and caused damage. Both at first instance and on appeal the claim succeeded.

11.54 In *The Board of Trustees of the Tate Gallery* v *Duffy Construction Ltd*,[37] Jackson J said:[38]

> "In determining whether the unwelcome arrival of water upon property constitutes a 'flood', it is relevant to consider (a) whether the source of the water was natural; (b) whether the source of the water was external or internal; (c) the quantity of water; (d) the manner of its arrival; (e) the area and the character of the property upon which the water was deposited; (f) whether the arrival of that water was an abnormal event. Ultimately, it is a question of degree whether any given accumulation of water constitutes a flood."

32. See note 28, *supra*.
33. See note 31, *supra*.
34. (1990) 54 BLR 1.
35. *Ibid*, at p. 10.
36. [1999] Lloyd's Rep IR 190.
37. [2007] Lloyd's Rep IR 758; [2007] EWHC 361 (TCC).
38. At para 37.

Escape of water from any water tank, apparatus or pipes

Bursting of pipes

11.55 Older forms of the JCT forms of contract included as a specified peril "Bursting of pipes". In *Computer & Systems Engineering plc* v *John Lelliott (Ilford) Ltd*,[39] it was held the breaking of a pipe by a purlin dropping onto it was not the bursting of a pipe, Beldam LJ saying:

> " . . . I have no doubt that in this context the bursting of tanks, apparatus or pipes is confined to the rupture of tanks, apparatus or pipe from within, typically caused by the exertion of forces, such as expansion or pressure within the pipe itself . . . "

11.56 In *MW Wilson (Lace) Ltd* v *Eagle Star Insurance Co Ltd*,[40] it was held that where steam built up in a heating system causing a bung which had been left at the open end of a pipe to blow off, there was no "bursting or overflowing of water pipes, water apparatus or water tanks". What escaped there was steam which condensed and dropped onto machinery causing water damage. Lord Ross, the Lord Justice Clerk, also doubted whether steam rather than water in its liquid phase fell within the wording.

11.57 In *The Board of Trustees of the Tate Gallery* v *Duffy Construction Ltd*,[41] Jackson J considered the authorities and said:

> "In determining whether a pipe or apparatus 'burst' it is relevant to consider (a) whether the incident occurred because of internal pressure rather than external intervention; (b) whether the integrity of the pipe or apparatus was broken; (c) whether the incident was sudden and violent."

11.57 The more recent wording, referring to "escape of water from any water tank, apparatus or pipes" is likely to avoid many of the disputes which troubled the courts on the previous wording.

39. See note 34, *supra*.
40. 1993 SLT 938.
41. See note 37, *supra*.

CHAPTER TWELVE

LATENT DEFECTS INSURANCE

Neil White

INTRODUCTION

12.1 Latent defects insurance provides cover against defects which appear in a building after it has been completed and which are not discoverable at the time of its completion. The policies operate on the basis that if such a defect appears, the policy will meet the cost of remedying it, without regard to who may have been responsible for the defect in the first place. In theory, therefore, latent defects policies provide the building owners and occupiers with a much simpler method of meeting the costs of putting defects right than enforcing the terms of building contracts, professional appointments and collateral warranties. In practice, because such policies are hedged around with exclusions and limitations, recovering the cost of repairs is not as straightforward as it might first appear.

12.2 There are, essentially, two types of policy, one of which has been around for a very long time and the other is a more recent development. The first are the homeowners insurance policies issued by organisations such as the NHBC (National House-Building Council, which has existed since 1936) and Zurich, which are of a generic nature, issued in a standard form to all those entitled to such a policy and the second are commercial latent defect insurance policies issued by a relatively small number of underwriters in terms which, although based on the insurer's standard form, are usually specific to the development in respect of which they are issued. Such policies are issued only in respect of commercial premises.

THE PURPOSE OF LATENT DEFECTS INSURANCE

12.3 As indicated above, latent defects insurance enables the insured to recover the costs of making good defects in the building that appear after it has been completed. It is important to emphasise that if the defect existed and was discoverable at the time the building was completed, then it will not be covered by the policy. If it existed but could not be discovered at the time of completion, then it will be covered by the policy.

12.4 The main benefit of such a policy is that, unlike trying to enforce a building contract or professional appointment, there is no need for the insured to have to prove that anyone else is at fault in order to recover his costs of repair. As long as he can demonstrate that there is a defect in the building then the policy, subject to its limitations, will meet that cost. That said, it does not necessarily mean that those who were actually responsible for defects will avoid liability. It is often the case that, particularly with commercial policies, the underwriters will retain rights of subrogation so that once they have paid the insured's claim under the policy, they are subrogated to any claims that the insured might have had against a contractor, the designers or others involved in the project who were responsible for the defects in the first place. However, this is not always the case, and it is important always to read carefully the terms of the particular policy.

12.5 In practice, of course, there can be different disputes over whether a particular defect is covered by the policy or not and there are procedural requirements, particularly under the

homeowner's policies mentioned above, which can create as much difficulty as having to prove fault on the part of those who caused the defect. It will be evident, from what has been said before in this section, that latent defects policies do not always live up to their promise.

HOMEOWNER INSURANCE

12.6 There are a number of companies and organisations which provide such insurance today but the two largest are the National House-Building Council ("NHBC") and Zurich Insurance who, between them, provide the great majority of this type of insurance. Their schemes (and most others in the marketplace) display many similarities but are not identical.

12.7 First, they issue policies specifically aimed at private homes (whether houses or flats), social housing and self-build. The topic of self-build is too wide for this publication but the principles applying to other types of insurance are similar.

12.8 Generally, the schemes require that the providers of the homes are registered. The NHBC registers developers and builders and either can be the "builder" for the purposes of the policy. If one is registered, it is not necessary for the other to be registered as well. Zurich, on the other hand, requires developers to be registered and that developers should employ a builder which is registered with Zurich. In some cases, of course, the two may be the same organisation. Under the Zurich scheme, it is the developer who is liable rather than the builder, but this distinction does not arise under the NHBC scheme.

12.9 The schemes require that developers and builders demonstrate both their financial credentials and their technical ability. These having been demonstrated, developers and builders must maintain the required standards otherwise they will be de-registered and no longer be allowed to develop or construct properties that benefit from homeowner insurance. The fact that the schemes investigate the financial standing of those registered with them explains the first part of the cover available under these policies set out below.

12.10 The policies usually provide cover in three sections, namely, the period up to completion of the home, the first two years after completion of the home and the period from two to ten years after completion of the home. The cover available in each period is different:

(1) If the home is not completed because of the builder's insolvency or fraud, the insurer will either pay the losses which the insured has suffered as a result or pay to complete the home. As can be seen, this is not latent defects insurance at all and is an incidental part of these schemes.

(2) For the two-year period after completion of the home, where the insured has asked the builder to put right a defect in the home but the builder has failed to do so, the insurer will meet the cost of repairing it. Not all defects are covered and, in very general terms, the policy applies to the structure of the building, its waterproof envelope and the various utility systems in it. There are, nevertheless, distinctions between the schemes which could be important. For example, the NHBC scheme expressly includes retaining walls constructed as part of the development but the Zurich scheme excludes retaining walls unless they form part of or provide support to the building. Similarly, the NHBC scheme covers heating systems but the Zurich scheme covers heat producing appliances. The latter would therefore include cookers but the former would not. There are many other distinctions and these are merely two examples.

(3) Presumably on the assumption that most defects are likely to appear in the first two years, limited cover only is available from the third year to the tenth year. However, the

extent of cover provided by the two main schemes is significantly different. The NHBC provides cover for specific elements of the building if they are damaged by a defect. An obvious omission is that if a defect is discovered that has yet to cause damage, the cost of repairing the defect will not be covered by the policy.

12.11 The NHBC also provides additional cover where it carries out the building control function during construction of the home and will meet the cost of putting right any non-compliance with Building Regulations. The Zurich scheme is limited to damage to structural elements and non-compliance with Building Regulations. Both schemes cover claims arising from the removal of contamination from the site of the home but the Zurich scheme will only remove contamination which should have been removed as part of the original development whereas the NHBC scheme will remove any contamination which could lead to the home-owner being required to remove the contamination under current legislation.

12.12 It should also be noted that schemes have financial limits to the amount that they will pay out and, again, there are significant differences.

12.13 Typically, once the site has been registered with the insurer, the insurer will arrange to inspect the development from time to time during the course of the work. Provided that those inspections show that the insurer's requirements are being complied with, the developer will be provided with a homeowner's pack for each home, which will include the relevant insurance documents, which will be handed over to the homeowner when the purchase is completed. Once that has happened, it is up to the homeowner to identify and pursue claims against the developer or builder and the insurer will become involved only if the developer or builder fails to meet its obligations under the scheme. At that point, the homeowner may be expected to carry out any necessary repairs with the insurer simply reimbursing the cost or the insurer may arrange for the necessary repairs itself.

12.14 The terms of the policies set out above are those current at the time of writing and the current policy terms should always be carefully checked.

LATENT DEFECTS INSURANCE POLICIES

12.15 These operate differently from homeowner's policies as there are no standard schemes and latent defects insurance policies are issued by a relatively small number of underwriters. The insurance is only designed to deal with latent defects, i.e. those which existed at the date of practical completion of the development but which were then undiscovered (and, under some policies, were undiscoverable). There is therefore no cover available before completion of the development, unlike homeowner's policies, as most commercial policies do not provide any cover until the end of the defects liability period under the relevant building contract, on the basis that the contractor is liable to make good any defects that appear during that period.

12.16 Commercial latent defects policies have been around for a couple of decades but have never become widely used. The perception, rightly or wrongly, is that they provide a limited level of cover and, for the cover provided, they are expensive. The judgement as to whether a policy is expensive or not is made in the context of the provision of collateral warranties to those who have an interest in the development, which will be discussed later.

12.17 It is certainly true that the original policies provided limited cover and this was usually confined to the structure of the building and its waterproof envelope. Cover was simply not available for other elements of the building. The position has changed over the intervening years and most policies now provide a wider range of cover. However, some elements of cover

that many would regard as essential are available only as optional extras at additional cost. This is particularly true for mechanical and electrical installations which, for a long time, were excluded from latent defects policies and while some policies now include them as a matter of course, others require payment of an additional premium if these elements are to be included.

12.18 Cost affects those who are insured under the policy. Typically, a latent defects policy would provide cover for the developer, any subsequent owner or occupier of the building and (where applicable) the bank that provides funding to enable the development to be constructed. There are those in the industry who argue that latent defects policies should operate, in a sense, as "no fault" insurance, providing cover for everybody involved in the development, including the contractor, the designers, other professionals involved and subcontractors.

12.19 Under a policy which provides cover only to those who have a direct financial interest in the development, the underwriters will usually obtain rights of subrogation so that, if a claim is paid under the policy, the insurers can pursue the contractor, the designers and/or the subcontractors, to the extent that they were responsible for the defect the insurer has had to put right.

12.20 If all of these parties are included as insureds under the policy, so that the insurers have no right of subrogation and cannot recover their losses from anybody, it is self-evident that the cost of the policy is going to be substantially higher. On the other hand, if latent defects insurance policies become more popular for commercial developments so that the market grows, it is likely that the cost of such policies will come down and the "no fault" approach may become an economic possibility.

LATENT DEFECTS POLICIES IN PRACTICE

12.21 If it is decided that a latent defects policy is appropriate for a particular development, underwriters will be approached to quote an indicative premium. This premium will be made up of two parts. The first is known as the deposit premium and is a fixed amount. The second part is an indication of what a premium is likely to be if the policy is ultimately issued, on the basis that the facts provided to the insurers all turn out to be accurate. This indicative premium will be based on the limited information provided at that stage and without any detailed technical appraisal of the development.

12.22 If the developer decides that he wishes to proceed, he must then pay the deposit premium. This is usually non-refundable in any circumstances and is intended to meet the cost of the insurers' technical advisers reviewing the drawings and specifications of the development in order to satisfy the insurer that the development presents no unusual or serious technical risks.

12.23 Clearly, if any such risks are identified, the indicative premium for the policy quoted previously will go up and it may be that the developer will decide not to proceed. If so, the insurer keeps the deposit premium and the developer has nothing. However, assuming that, following the technical appraisal, the premium quoted by the underwriter is acceptable to the developer, the development proceeds. During the course of the development, the insurer's technical advisers will inspect the building as it goes up and will identify any potential shortcomings in the way that it has been designed or constructed. The technical advisers normally have the right to require that any defects or omissions be put right and, if the developer and his team fail to comply, the policy will not be issued. Assuming that any

requirements of the technical advisers are properly complied with then once practical completion of the development has been achieved, the policy will be issued. As indicated above, the policy will not usually be effective until the end of the defects liability period, which will normally be 12 months later.

12.24 Most policies provide cover for a period of 10 or 12 years from practical completion and operate on the basis that the insured simply has to demonstrate that there is a defect in the development which is covered by the terms of the policy. As with homeowner policies, the insurer then has the right either to reimburse the cost of putting the defect right or to arrange to carry out the necessary work itself. However, because of the exclusions of cover under the policy, disputes may arise as to whether a particular defect or damage is covered. For example, internal non-structural elements are usually not covered and external decorative elements are often not covered if they do not perform part of the waterproof envelope. In addition, issues may arise as to who is liable for the cost of repairing elements of the building which are not covered by the policy but which have been damaged by a defect in an element which is covered by the policy. As with homeowner policies, these types of issue mean that policies are not as simple to operate in practice as might appear at first sight.

LATENT DEFECTS POLICIES IN THE CONTEXT OF COLLATERAL WARRANTIES

12.25 In most commercial developments, the Contractor, the design team (and often other professional consultants) and subcontractors with a design responsibility are required to enter into collateral warranties. These are separate contractual obligations entered into, usually under seal, in favour of third parties who have an interest in the development. These will typically include the first purchaser, the first tenant, any bank providing finance for the development and other interested parties such as the freeholder if the developer is a tenant. Increasingly, such warranties have written into them express limits on liability but, at least at the time of writing, they do not exclude specific elements of the development. Thus if the beneficiary of a warranty suffers loss because of a defect in the development then, up to the amount of any financial limit in the warranty, he can recover that loss from the party responsible for it, provided, of course, that he has a warranty from that party.

12.26 The major disadvantage is, inevitably, that fault has to be proved as these are simply contracts and in order to recover loss a breach of contract has to be established. The need to prove fault can lead to substantial disputes, particularly where more than one party has contributed to a particular defect. However, despite this shortcoming, the development market generally regards collateral warranties as a preferable solution to the question of latent defects as they are viewed as providing more comprehensive cover at a lesser cost.

12.27 As has been indicated, the cover provided by collateral warranties is not necessarily more comprehensive, given the need to prove fault and the fact that it may not be possible to prove that any particular party was at fault. Similarly, the concept that collateral warranties are available at a lesser cost is not necessarily correct. Simply because the developer or other beneficiary does not have to pay a premium for the provision of warranties does not mean that a cost does not exist. The additional risks that a contractor, consultant or subcontractor takes on under collateral warranties are reflected in the price charged for the task they undertake and there is also a significant cost involved in negotiating the terms of warranties which can take a very long time. However, as the cost of collateral warranties does not form a separate line

item in most development budgets, they continue to be perceived as a no cost or low cost option.

12.28 There are many who press the case of latent defects insurance policies as an alternative to collateral warranties and argue that, if properly assessed, they are cheaper and more effective. They point to the example of the French decennial insurance scheme. However, this ignores a number of factors, the first being that the French scheme is a statutory requirement for all developments and this statutory requirement has created the market for such insurance policies in France. As long as the market in the UK remains voluntary, it is unlikely to develop as it has done in France. Secondly, the extent of cover available under French decennial policies is restricted and many areas which the developers would regard as essential are optional extras at additional cost. Third, insurers under the French decennial scheme retain rights of subrogation and are therefore entitled to seek to recover their losses from those responsible for them. This being the case, from the point of view of a contractor, consultant or subcontractor, the position is no better than it would be had they entered into a collateral warranty. They and their professional indemnity insurance policies remain exposed. Finally, the experience of decennial policies in France has not been good and the number of insurers providing such policies is very limited. As a result, the cost tends to be high and many of those involved in the development market in France regard them as a necessary evil, rather than a positive benefit.

WAY FORWARD

12.29 The sentiment in the development market is currently against the commercial latent defects policy but clearly in favour of the homeowner's policy. This is largely because the latter is treated as a marketing device by residential developers and builders, whereas the former is more concerned with cost. As a result, the market for commercial policies is relatively immature and cost and coverage will remain issues until it expands. Once it does to a sufficient extent, it may well be that latent defects policies will replace collateral warranties, once such policies are issued on a "no-fault" basis without rights of subrogation as a matter of course. This is an issue for the insurance industry and its ability to convince the development market of the benefits of latent defects policies.

For a typical type of Latent Defects Insurance arrangement see Appendix 25.

CHAPTER THIRTEEN

INSURANCE ARRANGEMENTS AND PARTIES' ABILITY TO SUE AND BE SUED

Roger ter Haar

INTRODUCTION

13.1 In the previous and in the subsequent chapters of this book there are numerous references to the effect of insurance arrangements (and contractual arrangements as insurance) upon the ability of parties to sue and be sued. There are numerous cases, many decided in the Court of Appeal and not a few in the House of Lords, upon this topic. The decisions often appear inconsistent and therefore hard to reconcile.

13.2 The claims considered generally arise in circumstances where there has been damage by fire either of new contract works or of existing buildings in which or adjacent to which building works are being carried out. Generally the fire causing damage started through a negligent act or omission. In such circumstances, as explained in Chapter 3, the contractor or subcontractor responsible for the works in the course of which the fire broke out is likely to be held liable at common law even if the fire was caused by the acts or omissions of an independent subcontractor. It is also a well recognised principle of construction contracts (also discussed in Chapter 3) that in the absence of clear and unambiguous language a party's liability for negligence will not be limited, still less totally excluded. These principles, which are all well established, lead to courts striving to fix negligent contractors with the consequence of their carelessness.

13.3 On the other hand, it is often the case under standard form contracts and other ad hoc (one-off) contracts that provision is made for one party alone to be responsible for obtaining insurance—very often the employer has this obligation. It is undesirable commercially for the cost of insurance to be splintered between a number of parties to a construction project—more sensible, it is said, for all risks of such perils as fire to be insured through one insurance policy. In order to make commercial sense, it is undesirable for one insurer acting pursuant to subrogated rights in the name of one party to the project, to sue another participant who will doubtless require his liability insurers to step in to defend such a claim. Far better for there to be an insurance fund to be available to pay for damage caused by fire and other perils, and to avoid time-consuming and time-wasting disputes between the different parties to a project.

13.4 As there are a number of decisions which are difficult to reconcile, we consider:

(1) the cases under standard forms of building contract or contracts the terms of which are clearly influenced by the standard forms of building contract;
(2) briefly the waiver of subrogation and cross-liability clauses;
(3) a group of cases which have in common discussion of the detailed interrelationship of insurance arrangements and contractual liability;

(4) in a little detail the most recent Court of Appeal decision on the subject *Tyco Fire & Integrated Solutions (UK) Ltd* v *Rolls-Royce Motor Cars Ltd*;[1] and
(5) the general principles from the authorities considered.

CASES ON STANDARD FORMS OF BUILDING CONTRACT

13.5 (1) *James Archdale & Co Ltd* v *Comservices Ltd*[2] is the first in the series of cases to be considered. In that case the Court of Appeal considered two clauses in the 1952 RIBA standard form of contract. The first clause was clause 14(b):

> "The contractor shall be liable for and shall indemnify the employer against and . . . shall insure against any liability, loss, claim or proceedings in respect of any injury or damage whatsoever to any property, real or personal, in so far as such injury or damage arises out of or in the course of or by reason of the execution of the works, and provided always that the same is due to any negligence, omission or default of the contractor, his servants or agents or of any subcontractor or to any circumstances within the contractor's control; and subject also as regards loss or damage by fire to the provisions contained in clause 15 of these conditions."

13.6 Clause 14(b) at first glance firmly imposed upon the contractor liability for his or his subcontractor's negligence. However the last phrase ("and subject also . . . " etc.) is to be noted. The second clause was clause 15(b):

> "The existing structures and the works and unfixed materials (except plant, tools and equipment) shall be at the sole risk of the employer as regards loss or damage by fire and the employer shall maintain a proper policy of insurance against that risk, which policy and the receipt for the last paid premium he shall upon request produce for inspection by the contractor and, if any loss or damage affecting the works is so occasioned by fire, the employer shall pay to the contractor the full value of all work and materials then executed and delivered calculated as provided by clause 9 of these conditions."

13.7 Thus the existing structures, the works and unfixed materials were to be "at the sole risk" of the employer.

13.8 In the Court of Appeal the plaintiffs' argument was simple—there was no express exclusion of liability on the part of the contractors for the consequence of their negligence. Accordingly on well-established principles of construction the defendants were liable for damage resulting from a fire caused by the contractors' negligence. The Court of Appeal rejected that argument, holding that on a true construction of the contract the clause 14(b) indemnity was made subject to clause 15(b) which provided that the risk of fire was the sole risk of the defendants whether caused by negligence or otherwise. It was regarded as significant that the employer was obliged to take out insurance, so that the contractual intention that the cost of putting right fire damage would come out of policy proceeds.

13.9 (2) The next case to be considered is *Buckinghamshire County Council* v *Y.J. Lovell & Son Ltd.*[3] This case is only very shortly reported—it is a decision of Sellers J at first instance. In this case the contractor was held liable for the consequences of a negligently started fire. The two clauses considered were very similar to those considered in *James Archdale & Co* v *Comservices Ltd*, but were materially shorter. Clause 18 provided that the contractors were to

1. [2008] EWCA Civ 286.
2. [1954] 1 WLR 459.
3. [1956] JPL 196.

insure with some responsible firm and to indemnify the employer [the plaintiffs] against any loss, liability or claim arising out of the works being carried out, "provided always that such damage is caused by the negligence . . . of the contractor, his servants . . . or any circumstances within the contractor's control". Crucially, it appears that the indemnity clause did not contain any words similar to the last words in clause 14(b) referred to in paragraph 13.6 above.

13.10 Clause 19 was in the following terms:

> "The existing structures and the works and unfixed materials (except plant, tools and equipment) shall be at the sole risk of the employer as regards loss or damage by fire and if any loss or damage is caused to the works by fire the employer shall pay the contractor for any materials lost or damaged by the fire and for all works satisfactorily carried out."

13.11 The judge held that these provisions could be distinguished from those considered in *James Archdale & Co* v *Comservices Ltd* seemingly upon the basis that clause 19 was not connected with the preceding clause and accordingly that the classic principle of construction applied, namely that clause 19 should not be construed as applying to fire caused by the negligence of the contractors. It might be thought that this was a very narrow distinction but similar thinking can be found in some (but by no means all) of the later cases.

13.12 (3) There followed the decision of Lawson J in *Coleman Street Properties Ltd* v *Denco Miller Ltd*.[4] This was another fire claim. It was argued that the 1963 edition of the JCT form had been incorporated into the contract between the parties. The judge rejected that suggestion, but went on to consider what the position would have been if he had decided otherwise. In the 1963 version of the standard terms the indemnity clause was in clause 18(2) which had as introductory words the provision: "except for such loss or damage as is at the risk of the Employer under Clause 20(C) of these Conditions . . . the Contractor shall be liable for and indemnify the Employer . . . ". As in clause 15(b) of the previous version, clause 20(C) required the Employer to insure the existing premises but did not contain any provision that a fire risk attributable to the contractors' negligence would be at the sole risk of the employer. Nevertheless, Lawson J held that he would have been bound by the decision in *James Archdale & Co Ltd* v *Comservices Ltd* to hold that the Contractor would not be liable.

13.13 The position therefore appeared to be clearly established by authority, at least so long as the wording of the standard forms was followed, incorporating a link between indemnity clause and insuring clause, showing that the former was to be read subject to the latter. However, doubt was then caused by a decision of the Court of Session in Scotland upon the 1963 October Edition of the standard terms in which the court refused to follow *James Archdale & Co Ltd* v *Comservices Ltd*. The contractors appealed to the House of Lords who upheld the appeal and held that the English decision was correct: *Scottish Special Housing Association* v *Wimpey Construction UK Ltd*.[5] In the leading speech of Lord Keith of Kinkel again the opening words of clause 18(2) were emphasised as establishing the link with the insuring clause. Lord Keith said that

> "In substance, the question at issue comes to be one as to which party had the obligation to insure against damage to existing structures due to fire caused by the negligence of the contractors or of subcontractors."

13.14 (4) It was clear that under the 1963 edition a contractor could not be sued by the employer for damage to existing structures which the employer was required to insure. Next the courts had to consider the position of subcontractors. In *Welsh Health Technical Services*

4. (1986) 31 BLR 32.
5. [1986] 1 WLR 995.

Organisation v *Haden Young*,[6] the main contractor was not sued, it being conceded by the plaintiffs that clauses 18 to 20 of the 1963 edition prevented any action between the employer and main contractor. However the employer sued the subcontractor whose negligence it was alleged had started the fire which caused the damage.

13.15 Macpherson J tried a preliminary issue to determine whether the subcontractor owed any duty of care to the employer.

13.16 It is important to note that the subcontractor was a nominated subcontractor who had submitted a tender to the employer with a view to the employer nominating it as mechanical services subcontractor. The invitation to tender stated that "the main contractor or the building owner shall bear the sole risk of loss or damage by fire etc. as defined under clause 20 of the main contract . . . " The judge held that absent the contractual arrangements the subcontractor would have owed a duty of care to the employer (a proposition not necessarily evident today following later development of the law). However, the judge also held that the contractual arrangements excluded any liability on the part of the subcontractor to the employer for negligence. Whilst the decision appears clearly right and just, the judge's analysis based upon a contractual nexus between the subcontractor and the employer is not easy to justify.

13.17 (5) A more satisfactory analysis for holding a subcontractor not to be liable to an employer emerged in a Court of Appeal decision in the following year. In *Norwich City Council* v *Harvey*,[7] the contract under consideration was again the 1963 JCT edition. The main contractor subcontracted roofing works to the second defendant on terms which bound the latter "to the same terms and conditions as those of the main contract". Unlike in *WHTSO* v *Haden Young*,[8] there was no suggestion of any contractual relationship between employer and subcontractor. The employer sued the subcontractor. The trial judge (Garland J) dismissed the claim upon the basis that any duty of care which would otherwise have been owed by the subcontractor to the employer had been qualified by the terms of the respective contracts between the parties, whereby the employer accepted the risk of damage by fire (and other perils) to their property and that consequently it would not be just and reasonable to hold that the subcontractor owed any duty to the employer to take reasonable care to avoid such damage. The Court of Appeal upheld the trial judge's reasoning. May LJ said in terms that he did not regard it as necessary to consider the insurance position and subrogation rights as between the parties and their respective insurers.

13.18 Thus the authorities were clear that as regards the 1963 edition of the JCT form, the employer required to insure against the risk of fire would not be able to sue a main contractor in contract or to sue in tort a subcontractor who had subcontracted on back-to-back conditions.

13.19 (6) Nevertheless, thereafter a series of decisions on somewhat different contractual terms upheld claims by employers. The first was *Dorset County Council* v *Southern Felt Roofing Co Ltd*.[9] In that case the employer sued the main contractor under a contract clearly inspired by the standard forms of contract but in different and somewhat terse terms. The indemnity clause provided:

> "The Contractor shall . . . indemnify the Council against any liability, loss, claim or proceedings in respect of injury or death to persons or damage to property and shall, without prejudice

6. (1987) 37 BLR 130.
7. [1989] 1 WLR 828.
8. (1987) 37 BLR 135.
9. (1990) 48 BLR 96.

to his liability to indemnify the Council, or cause any subcontractor to insure against the above risks . . . ''

Clause 2.1 provided:

''The Council shall . . . bear the risk of loss or damage in respect of the Works and (where appropriate) the existing structure and contents thereof . . . by fire, lightning, explosion, aircraft and other aerial devices or articles dropped therefrom.''

13.20 The indemnity clause was held by the Court of Appeal to be directed exclusively to claims by third parties but (on the assumption that the contractor had been negligent) it was held that the contractor was liable to the employer in negligence at common law. Clause 2.1 was held to be ineffective to protect the contractor against liability for negligence since there were risks other than the risk of loss or damage by fire caused by negligence which were neither fanciful nor remote. Accordingly, applying well-known rules of construction in respect of exclusion clauses, the contractor was held not to have excluded liability for its own negligence.

13.21 (7) In *Surrey Heath Borough Council* v *Lovell Construction Ltd*,[10] the Court of Appeal considered the JCT Standard Form with Contractors Design 1981 edition. An important feature of this case was that the parties had agreed to adopt clause 22A of the contract which provided: ''the Contractor shall in the joint names of the Employer and the Contractor, insure against loss or damage by the clause 22 perils''. Thus, unlike the cases (other than the *Dorset County Council* case) there was no obligation on the employer to insure. Such an obligation would have been imposed had the parties adopted clause 22B or 22C. The opening words of the indemnity clause in this form read ''except for such loss and damage at the sole risk of the Employer under Clause 22B or Clause 22C (if applicable) the Contractor shall be liable for, and shall indemnify the Employer against . . . ''.

13.22 The Court of Appeal held that the indemnity clause applied to property owned by the employer, even where such property was to be insured by the main contractor under clause 22A of the contract. They reached this conclusion by a strict and very traditionalist approach to construction of the words of the agreement. The effect was the somewhat strange result—strange commercially—that the contractor not only paid for the cost of insuring against fire risks but also was held liable for negligently caused fires (which would be covered by a property insurance against fire in any event). As the main contractor was held liable, the subcontractor who was alleged to have caused the fire was also held to have no defence to a claim in tort.

13.23 Another issue was also considered by the court. It was argued on behalf of the main contractor that where a policy of insurance is effected for the benefit of two persons jointly, neither can sue the other in respect of any matter within the policy even if there is a collateral contractual term between them entitling the one to sue. This argument was based upon two cases which we consider below: *Petrofina (UK) Ltd* v *Magnaload Ltd*[11] and *Mark Rowlands Ltd* v *Berni Inns Ltd*.[12] The Court of Appeal distinguished those cases upon the basis that the claim before them was not a subrogated claim (it is far from clear upon what basis they so held) and that in any event the effect of the contractual agreement must always be a matter of construction.

13.24 (8) Whereas most of the cases considered arose out of fires, *Computer & Systems Engineering plc* v *John Lelliott (Ilford) Ltd*[13] concerned an allegation that damage was caused

10. (1990) 48 BLR 108.
11. [1984] QB 127.
12. [1986] QB 211.
13. (1991) 54 BLR 1.

by a specified peril, namely flood. The case concerned the JCT Private Edition 1980 form. The Court of Appeal rejected the suggestion on the facts of that case that there had been a "flood". However, in the course of his judgment Beldam LJ rejected the suggestion that clauses 22 and 20(2) of that form of contract only applied to loss or damage caused by the perils referred to which was not caused by the fault of the contractor or subcontractor.

13.25 (9) An exception to this trend of holding main contractors liable was the decision of HHJ Fox-Andrews QC in *Ossory Road (Skelmersdale) Ltd* v *Balfour Beatty Building Ltd*.[14] He considered a contract on the JCT standard form, 1980 Private with Approximate Quantities as amended in 1984, 1987, and 1988 (twice). Under that agreement by clause 22.C.1, the employer was required to take out and maintain a joint names policy in respect of existing structures and under clause 22.C.2 in respect of new work to be carried out. A fire broke out which caused damage to the new buildings—and the fact of damage to the new works affected the use of the existing structures. The judge held that on the true construction of the contract the main contractor was not liable to the employer for any loss arising out of the fire. On the contrary, the contractor was entitled to be paid reinstatement costs and to an extension of time. The subcontractor who was also sued was held not to owe the employer a duty of care in tort, following *Norwich City Council* v *Harvey*.[15]

13.26 (10) In *Kruger Tissue (Industrial) Ltd* v *Frank Galliers Ltd*[16] HHJ Hicks QC considered a claim made in a case where the contract was on JCT 1980 terms. The question before him was what losses the employer could recover. It was held that the employer could not recover damages in respect of damage to premises, damage to stock or damage to machinery, but in principle could recover loss of profit and increased cost of working. This was again a case in which the Employer was obliged to take out a joint names policy in respect of the "existing structures . . . together with the contents thereof owned by him or for which he is responsible". It was held that as the contract did not require the employer to insure against the consequential losses, the employer was free to pursue that part of its claim, but not the claims in respect of physical damage to the existing structure and its contents. The decision is not easy to reconcile with some of the wider dicta of HHJ Fox-Andrews QC in the *Ossory Road* case, but has the benefit of logic and justice.

13.27 (11) Next in the series of cases were two cases based upon different versions of the JCT Minor Works form. The first was *The National Trust for Places of Historic Interest or Natural Beauty* v *Haden Young Ltd*.[17] In this case the main contractor was carrying out works of repair at Uppark House in West Sussex. The main contract was upon the JCT Minor Building Works Agreement 1980 form. A subcontractor, Haden Young, was engaged to carry out lead work to the roof. As a result of the negligence of Haden Young's employees a fire broke out damaging the house and its contents. The National Trust, the employer, sued Haden Young. As in previous cases, the subcontractor argued that it owed no duty of care in tort to the employer following *Norwich City Council* v *Harvey* on the basis that the main contractor would not have been liable for the damage caused by the fire by reason of the terms of the main contract. At first instance and on appeal this contention was rejected albeit on slightly different bases.

13.28 Clause 1.6 of the contract (specific to this contract and not part of the JCT form) provided:

14. [1993] CILL 882.
15. See note 7, *supra*.
16. (1988) 57 Con LR 1.
17. (1995) 72 BLR 1.

"The Contractor is to be solely responsible for all structural and decorative damage to property and for injury caused by the works or workmen to persons, animals or things, and is to indemnify the Employer against any claims, loss or proceedings whatsoever arising in connection therewith under any Statute or at Common Law, unless due to any act or neglect of the Employer, or of any person for whom he is responsible.

The Contractor is to take out sufficient policies of insurance to cover the risks referred to and is to produce to the Architect the relevant policy or policies and premium receipts on the signing of the contract."

13.29 This provision substantially duplicated Clause 6.2 of the standard form, also incorporated into the contract, which provided:

"The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any injury or damage whatsoever to any property real or personal (other than injury or damage to the Works) insofar as such injury or damage arises out of or in the course of or by reason of the carrying out of the Works and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Contractor, his servants or agents, or of any person employed or engaged by the Contractor upon or in connection with the Works or any part thereof, his servants or agents, or of any person employed or engaged by the Contractor upon or in connection with the Works or any part thereof, his servants or agents. Without prejudice to his obligation to indemnify the Employer the Contractor shall take out and maintain and shall cause any subcontractor to take out and maintain insurance in respect of the liability referred to above in respect of injury or damage to any property real or personal other than the Works which shall be for an amount not less than the sum stated below for any occurrence or series of occurrences arising out of one event: insurance cover referred to above to be not less than: £10,000.00."

13.30 Clauses 6.3A and 6.3B provided alternatives: under 6.3A the obligation to insure new works was placed upon the Contractor. Under clause 6.3B the obligation to insure existing works was placed upon the employer. Clause 6.3B was selected, this provided:

"The Employer shall in the joint names of Employer and Contractor insure against loss or damage to the existing structures (together with the contents owned by him or for which he is responsible) and to the Works and all unfixed materials and goods intended for, delivered to, placed on or adjacent to the Works and intended therefore by fire, lightning, explosion, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, earthquake, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion. If any loss or damage as referred to in this clause occurs then the Architect/Supervising Officer shall issue instructions for the reinstatement and making good of such loss or damage in accordance with clause 3.5 hereof and such instructions shall be valued under clause 3.6 hereof."

13.31 The judge at first instance solved the problem of the interrelationship between the two clauses by holding that clause 6.3B did not require the employer to take out insurance covering damage by fire caused by the negligence of the contractor or subcontractor. The Court of Appeal rejected this approach. Nourse LJ who gave the only full judgment in the case held simply that the terms of clause 6.2 were sufficiently wide to impose liability upon the main contractor for the fire, and nothing in clause 6.3B expressly or implicitly limited the main contractor's liability. Again, *James Archdale & Co Ltd* v *Comservices Ltd* and *Scottish Special Housing Association* v *Wimpey Construction UK Ltd* were distinguished because of the lack of any words linking the two clauses.

13.32 In his judgment Nourse LJ suggested that "the parties must have contemplated a potential overlap between the two provisions, with the employer's recoverable damages under clause 6.2 being liable to be reduced by the amount recoverable under the insurance or vice versa."

13.33 (12) The Court of Appeal again considered the Minor Works form, on this occasion the October 1988 revision, in *London Borough of Barking & Dagenham* v *Stamford Asphalt Co Ltd*.[18] There was no material difference between the terms of the 1980 and 1988 editions. Again this was a case in which the employer had agreed to insure the existing structures. A twist here was that the employer had failed to do so, but the court proceeded upon the basis of what the position would have been had the employer complied with its obligations.[19]

13.34 Auld LJ pointed out that there was no overlap between clauses 6.2 and 6.3B in the following respects:

(1) where the damage does not result from one of the specified perils in clause 6.3B;
(2) the works—the contractor is liable for them under clause 6.2, but the employer is not required to insure them under clause 6.3B;
(3) as to consequential damages—the contractor is liable for them under clause 6.2, but the employer is not required to insure them under clause 6.3B.

13.35 Auld LJ held, contrary to what had been held by the Court of Appeal in the *National Trust* case, that Otton J had been right in that case to hold that the obligation to insure under clause 6.3B did not require insurance to be effected to cover the risk of damage caused by the negligence of the contractor. He held that it followed that if the employer had effected a clause 6.3B insurance it could properly, and consistently with clause 6.2, have excluded from cover any loss or damage caused by the contractor's negligence.

13.36 An argument was presented to the court that had the employer complied with its obligation to insure, the contractor and employer would have been co-insured and accordingly applying *Petrofina (UK) Ltd* v *Magnaload Ltd* and *Mark Rowlands Ltd* v *Berni Inns Ltd* that the clause 6.3B insurers would have had no right of subrogation to sue the contractor in the name of the employer. This argument was rejected on two grounds: firstly that "it cannot sensibly have been the intention of the draftsman, or of the parties when entering into the agreement, that the employer's condition 6.3B insurance would enure for the benefit of the contractor so as to enable him to escape liability for his own negligence imposed by condition 6.2 (and at common law)" and secondly, that the contractor had no insurable interest in respect of reinstatement of the employer's building and of the building's contents.

13.37 It will be discerned that this series of decisions emphasised the court's view that it was improbable that the parties intended that the contractor would be relieved of liability for his own negligence and that result would only be achieved if the contract used clear language achieving that result. We would suggest that the courts failed to recognise that what the clauses do is to allocate the risks between different parts of the insurance market—i.e. between liability insurers and property insurers. Given that property insurers habitually insure the risk of fires caused by negligence, the suggestion that the employer would wish to seek out insurance excluding cover for fires caused by negligence is a little improbable, particularly if, as Auld LJ said, the intention was that there should be a fund available for the employer to reinstate the existing building—on Auld LJ's reasoning the employer might only have a fund available once it had been determined whether or not the contractor had been negligent, which might not always be obvious.

18. (1997) 82 BLR 25.
19. The same had been true in the *National Trust* case although there was another existing policy in place, but the Court of Appeal declined to consider the point saying that if it had been canvassed at trial the employer might well have been able to show that the contractor had agreed to its substitute for the clause 6.3B insurance.

13.38 A further difficulty is that there were now two inconsistent decisions of the same appellate court as to whether insurance proceeds from a clause 6.3B policy were to be brought into account in reduction of damages payable under clause 6.2. These complications were particularly unfortunate in respect of a Minor Works contract likely to be used by small builders and ordinary householders.

13.39 (13) In *British Telecommunications plc* v *James Thomson & Sons (Engineers) Ltd*,[20] the House of Lords considered a case in which the employer pursued a claim against a domestic subcontractor. The main contract was upon the JCT Standard Form of Building Contract, Local Authorities Edition with Quantities, 1980 edition as amended by amendment 2. Clause 22C.1 of the main contract as modified by a provision in the bill of quantities provided:

> "The employer shall take out and maintain a policy in respect of the existing structures (which shall include from the relevant date any relevant part to which clause 18.1.3 refers) together with the contents thereof owned by him or for which he is responsible, for the full cost of reinstatement, repair or replacement of loss or damage due to one or more of the specified perils up to and including the date of issue of the certificate of practical completion . . . The contractor, for himself and for all nominated subcontractors who are, pursuant to clause 22.3.1, recognised as an insured under the policy referred to in clause 22C.1 or clause 22C.3 shall authorise the insurers to pay all monies from such insurance in respect of loss or damage to the employer."

Clause 22.3 of the main contract included the following:

> "The contractor where clause 22A applies, and the employer where either clause 22B or clause 22C applies shall ensure that the joint names policy referred to in clause 22A.1 or clause 22A.3 or the policies referred to in clause 22B.1 or in clause 22C.1 and clause 22C.2 shall either provide for a recognition of each subcontractor nominated by the architect as an insured under the relevant joint names policy or include a waiver by the relevant insurers of any right of subrogation they may have against any such nominated subcontractor in respect of loss or damage by the specified perils to the works and site materials where clause 22A or clause 22B or clause 22C.2 applies and, where clause 22C.1 applies, in respect of loss or damage by the specified perils to the existing structures (which shall include from the relevant date any relevant part to which clause 18.1.3 refers) together with the contents thereof owned by the employer or for which he is responsible."

13.40 The House of Lords held that on the terms of this contract the insurance to be effected by the employer would provide cover whether or not the loss or damage arose due to an act or omission of the main contractor or a subcontractor (including a domestic subcontractor). The decision of the Court of Appeal in the *London Borough of Barking* case was not cited to the House, and the reasoning of their Lordships might be thought to be potentially difficult to reconcile with that case. Nevertheless, given that the contract required the policy to be effected to have a waiver of subrogation clause in respect of nominated subcontractors but not in respect of domestic subcontractors, there was no reason why the employer's insurers should not be free to pursue a subrogated claim in the employer's name against the negligent domestic subcontractor. Having reached this conclusion, the House of Lords had little difficulty in reaching the conclusion that the subcontractor owed a duty of care to the employer. Lord Mackay of Clashfern emphasised that the terms of the contract under consideration differed materially from those under consideration in *Scottish Special Housing Association* v *Wimpey Construction UK Ltd* and *Norwich City Council* v *Harvey*. Lord Mackay drew attention to the likelihood that "in considering the nature of the risk undertaken by the

20. [1999] 1 WLR 9.

insurer the fact that the insurer will have a right of subrogation against a domestic subcontractor such as Thomson will legitimately affect the question of premium".

13.41 (14) In *Casson* v *Ostley PJ Ltd*,[21] the Court of Appeal considered a contract for the execution of works at a firm. The material terms of the contract were as follows:

> "Clause 6: MATERIALS—the property in unfixed materials shall not pass until all materials shall have been paid for in full. All materials on the site fixed or unfixed are at the sole risk of the client and in the event of any of the same being damaged, destroyed or stolen, we shall be entitled to full payment therefore, and also for any work damaged, destroyed or lost, and the cost of replacing and of reinstating or restoring such work shall be charged as an extra, provided that the client shall not be responsible for any loss occasioned solely by the negligence of our employees.
>
> Clause 15: . . . works covered by this estimate, existing structures in which we shall be working, and infixed materials shall be at the sole risk of the client as regards loss or damage by fire and the client shall maintain a proper policy of insurance against that risk in an adequate sum. If any loss or damage affecting the works is so occasioned by fire, the client shall pay to us the full value of all work and materials then executed and delivered.
>
> Clause 16: The client shall indemnify us against all liability, loss, costs, claims or demands in respect of injury to persons and/or damage to property arising from any cause other than our negligence or that of our employees."

13.42 These conditions, particularly clause 15, appear to have been inspired by the standard forms of contract. At first instance it was held that the contract was effective to exclude liability on the part of the contractor for damage caused by a fire assumed to have arisen out of the contractor's negligence. The Court of Appeal reversed that decision. The Court of Appeal applied the principles of construction of exclusion clauses referred to above. Schiemann LJ at paragraph 21 said

> "It is inherently improbable that a private person engaging a builder would wish to exempt him from his own negligence, although I would accept that, if the private person is obliged under the contract to take out a contract of insurance, this can sometimes diminish the force of this point. It is for the negligent person who is seeking to rely on the contract to excuse himself from the consequence of his own negligence. If he wishes to do this he must do it clearly so that the point is brought to the attention of the other contracting party."

13.43 (15) The House of Lords were asked to consider a JCT standard form of contract for a third time in *Co-operative Retail Services Ltd* v *Taylor Young Partnership Ltd*.[22] The facts of this case were a little complex. The employer entered into a contract on the JCT Standard Form of Building Contract 1980 Edition, Private with Quantities, incorporating amendments 1–2 and 4–11. The contract was for the construction of new office premises. The main contract included the following provisions:

> "Clause 20.2: The contractor shall, subject to clause 20.3 and, where applicable, clause 22C.1, be liable for, and shall indemnify the employer against, any expense, liability, loss, claim or proceedings in respect of any injury or damage whatsoever to any property real or personal in so far as such injury or damage arises out of or in the course of or by reason of the carrying out of the works, and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the contractor . . .
>
> Clause 20.3: . . . the reference in clause 20.2 to 'property real or personal' does not include the works, works executed and/or site materials up to and including the date of issue of the certificate of practical completion . . .

21. [2001] EWCA Civ 1013.
22. [2002] 1 WLR 1419; [2002] UKHL 17.

Clause 21 required the contractor to take out insurance in respect of its clause 20.2 liability.

Clause 22A.1: The contractor shall take out and maintain a joint names policy for all risks insurance for cover no less than that defined in clause 22.2 for the full reinstatement value of the works (plus the percentage, if any, to cover professional fees stated in the Appendix) and shall . . . maintain such joint names policy up to and including the date of issue of the certificate of practical completion or up to and including the date of determination of the employment of the contractor . . . whichever is the earlier.

Clause 22.2 defined 'all risks insurance' as insurance which provides cover against any physical loss or damage to work executed and site materials, subject to certain exceptions.

Clause 22.3 provided that nominated and domestic subcontractors were to have the benefit of the Clause 22A joint names policy in respect of loss or damage by the specified perils to the works and site materials.

Clause 1.3 provided that 'specified perils' included fire.

Clause 22A.4 provided machinery whereby if (*inter alia*) a fire occurred, the insurance monies would go to restore work damaged, and the restoration work would be carried out by the contractor.

Clause 25.4.3 provided that if loss or damage was occasioned by one or more of the specified perils, the contractor could obtain an extension of time."

13.44 A fire occurred causing extensive damage to the new works. The employer (or the insurers) recognised that no claim could be brought against the main contractor or sub-contractors who were alleged to have caused the (seemingly inevitable) fire. Instead the employer brought proceedings against the architects and engineers involved in the project. These professional parties believed that the real culprits were the main contractor and some subcontractors.

13.45 As the employer had declined to sue the main contractor and subcontractors, the professional parties (i.e. the architect and engineer) decided to pursue a claim in contribution. In other words they contended that if they were found negligent or in breach of contract, the main contractor and subcontractor were persons "liable in respect of the same damage". For the architect and engineer to succeed they had to establish that if the employer had sued the main contractor and the subcontractor, those parties would have been found liable. Accordingly, the House of Lords had to consider whether the contractors would have been found liable, and, if so, upon what basis.

13.46 For these purposes an important conceptual distinction was whether on its true construction the effect of the main contract was (a) to exclude the main contractor's liability to the employer for loss and damage caused by the fire in so far as it was caused by the main contractor's breach of contract; or (b) that the main contractor was liable to pay compensation to the employer for the loss and damage which it sustained in the fire except to the extent to which the amount of such loss and damage was recoverable from the insurers under the joint names policy.

13.47 The House of Lords held that the Court of Appeal had correctly decided that the right answer was (a). They approved the following passage from the judgment of Brooke LJ in the court below:

"To put it quite simply, [the main contractor and subcontractor], like [the employer], had entered into contractual arrangements which meant that if a fire occurred, they should look to the joint insurance policy to provide the fund for the cost of restoring and repairing the fire damage (and for paying any consequential professional fees) and that they would bear other

losses themselves (or cover them by their own separate insurance) rather than indulge in litigation with each other."

13.48 The House of Lords decided that under this form of contract, the contractor was under no liability at all to the employer for the consequences of a fire even if that fire was caused by the contractor's negligence, save for an obligation to restore the damaged works, being paid for doing so out of the proceeds of the joint names policy.

13.49 Their Lordships also considered the effect of *Petrofina (UK) Ltd* v *Magnaload Ltd* and *Mark Rowlands Ltd* v *Berni Inns Ltd*. We consider this part of the decision below.

13.50 (16) Following the *Co-operative Retail Services* decision, the Court of Appeal considered yet another standard form in *Scottish & Newcastle plc* v *GD Construction (St Albans) Ltd*.[23] The contract in this case was upon the Intermediate Form of Contract, 1984 Edition ("IFC 84"). There were also significant ad hoc clauses, of which the following as recited by the court were the most significant:

"Among the clauses in the Preliminaries was this: The Contractor must take all necessary precautions to avoid the outbreak of fire and prevent personal injury, death and damage to work or other property from fire, particularly in work involving the use of naked flames. Before any works of maintenance, adaptation or extension to existing buildings or services are carried out or connections to services within existing buildings are made, the Contractor must discuss his proposals with the Contract Administrator to ensure that the extent of any fire hazards in the Works are known fully to both the Contractor and the Employer. The Contractor must comply with the Joint Code of Practice "Fire Prevention on Construction Sites" 1992 published by BEC. The Contractor must [draw] the attention of all his workmen and those of SubContractors to the dangers involved in the careless disposal of matches, cigarettes, tobacco ash etc. Smoking must not be permitted in ceiling spaces or crawlways . . .

Clause 6.1.2 of IFC 84 provided: The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal in so far as such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Works and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Contractor, his servants or agents or of any person employed upon or engaged upon or in connection with the Works or any part thereof, his servants or agents, other than the Employer or any person employed, engaged or authorised by him or any local authority or statutory undertaker executing works solely in pursuance of its statutory rights or obligations. This liability and indemnity is subject to clause 6.1.3 and, where clause 6.3C.1 is applicable, excludes loss or damage to any property required to be insured thereunder caused by a Specified Peril.

Clause 6.1.3 of IFC 84 provided: The reference in clause 6.1.2 to 'property real or personal' does not include the Works, work executed and/or Site Materials up to and including the date of issue of the certificate of Practical Completion or up to and including the date of determination of the employment of the Contractor . . .

Clause 6.3.2 of IFC 84 provided: 'Joint Names Policy' means a policy of insurance which includes the Employer and the Contractor as the insured and under which the insurers have no right of recourse against any person named as an insured, or, pursuant to clause 6.3.3 recognised as an insured thereunder.

Clause 6.3C.1 of IFC 84 provided: The Employer shall take out and maintain a Joint Names Policy in respect of the existing structure together with the contents thereof owned by him or

23. [2003] Lloyd's Rep IR 809; [2003] EWCA Civ 16 (note that unusually the case is reported in the Neutral Citator as *GD Construction (St Albans) Ltd* v *Scottish & Newcastle plc* rather than the other way round as is more usual).

> for which he is responsible, for the full cost of reinstatement, repair or replacement of loss or damage due to one or more of the Specified Perils up to and including the date of Practical Completion or up to and including the date of the determination of the employment of the Contractor . . . The Contractor, for himself and for all other subcontractors referred to in clause 3.3 who are, pursuant to clause 6.3.3, recognised as an insured under the Joint Names Policy referred to in clause 6.3C.1 or clause 6.3C.3, shall authorise the insurers to pay all monies from such insurance in respect of loss or damage to the Employer."

13.51 The contract was for the refurbishment of an existing public house. Fire was a "specified peril". Although the employer should have taken out a joint names policy, it failed to do so. It was assumed that a fire which caused damage to the existing building was caused by a subcontractor's negligence. The employer sued the main contractor. One issue that had to be considered was the meaning of the word "fire": did it include fire caused by negligence? As set out above, in the *National Trust* case, the Court of Appeal disagreed with the first instance judge who had held that the policy which had to be effected did not have to cover a fire caused by the negligence of a contractor or subcontractor. On the other hand, in the *London Borough of Barking* case the Court of Appeal had agreed with the first instance judge in the *National Trust* case. In *Scottish & Newcastle plc* v *GD Construction (St Albans) Ltd*, the Court of Appeal sided on this issue with the Court of Appeal in the *National Trust* case. Aikens J at paragraph 26 dealt with the issue as follows:

> "What is meant by 'fire' in the 'Specified Perils' clause? The clause listing the 'Specified Perils' identifies the particular perils to be covered by an insurance policy that has to be taken out by the Employer. To my mind the parties must have intended that the words or phrases identified as 'Specified Perils' be given the meaning that is normally given to them when they are used to identify a peril covered by an insurance policy. If the parties had intended otherwise, then I think that they would have said so. For nearly two hundred years when the word 'fire' has been used in an insurance policy to describe one of the perils covered by the policy, the meaning of the word 'fire' has been clear. Unless qualified by other words or a warranty in the policy, the peril 'fire' covers loss proximately caused by a fire, whether the fire was started by accident, was caused by the negligence of the assured or any third party or was caused by the deliberate act of a third party. (See e.g. *Busk* v *Royal Exchange* (1818) 2 B & Ald 73; *Shaw* v *Robberds* (1837) 6 Ad & E 75; *Mark Rowlands Ltd* v *Berni Inns* [1984] 1 QB 211 at 232G *per* Kerr LJ and 234F *per* Glidewell LJ). If 'fire' is an insured peril in the policy, then a loss that is proximately caused by 'fire' is covered by the policy. It is irrelevant that the fire was itself caused by negligence or even the deliberate act of a third party. But, in the absence of express words in the policy, the parties would not have intended to cover losses by fire when that fire was caused by the deliberate act of the insured itself."

13.52 At paragraph 39 of his judgment, Aikens J doubted the correctness of Auld LJ's judgment in the *London Borough of Barking* case, and suggested that it was inconsistent with the decision of the House of Lords in *Co-operative Retail Stores.*

13.53 Longmore LJ agreed with Aikens J on the interpretation of the word "fire", and both held that the effect of the contractual arrangement was to exclude liability on the part of the contractor. At paragraph 60, Longmore LJ said:

> "But whatever the position in general might be, if a building contract exempts one of the parties from liability for loss or damage caused by specified perils which it then requires should be insured by a joint policy without right of subrogation between co-insured, it makes no sense for the contract to be construed to permit loss or damage caused by the specified perils to be recoverable by one of the parties in cases where the peril occurs as a result of the negligence of the other party or those for whom he is responsible."

13.54 (17) Finally, in this review of the authorities in relation to the standard forms of contract, a recent decision of HHJ Coulson QC has considered the effect of the JCT Standard Form of Main Contractor with Contractor's Design 1998 Edition: *John F. Hunt Demolition Ltd* v *ASME Engineering Ltd*.[24] The case also involved consideration of the JCT Domestic Sub-Contract DOM/2 1981 Edition with Amendments 1 to 8. The main contract required the employer to take out a joint names policy against specified perils (including fire) in respect of existing structures. A subcontract with a demolition subcontractor required the main contractor to ensure that the employer's joint names policy was so issued and endorsed that in respect of loss or damage by the specified perils the subcontractor was recognised as an insured.

13.55 The defendant in the proceedings was a sub-subcontractor sued by the subcontractor who had settled with the main contractor and employer (who were related companies). The subcontractor sought reimbursement from the sub-subcontractor for the amounts paid out by way of settlement with those higher up the contractual chain arising out of a fire said to have been caused by the negligence of the sub-subcontractor. It was conceded before the judge that under the main contract the main contractor had had no liability to the employer. This concession was said by the judge to have been "proper". The judge held that the main contractor was entitled to recover its own losses from the subcontractor. He further held that the subcontractor owed no duty of care in tort to the employer, following *Norwich City Council* v *Harvey*. In reaching that conclusion the judge said this:[25]

> "The general reason for rejecting [a submission that the subcontractor owed a duty of care to the employer] is based on a consideration of the JCT contractual provisions as a whole, both main contract and subcontract, which adopts the same approach as that taken by the Court of Appeal in *Norwich City Council*. In this case, I consider that the key provision was clause 20.2 of the main contract. That provided an extensive indemnity to the employer, Whitehall, in respect of negligence on the part of Build and any subcontractor (Hunt) or sub-subcontractor (ASME) who happened to be on site. But that wide indemnity went on, in the proviso, expressly to exclude loss and damage to the existing structures caused by fire. In other words, the parties to the main contract and any subcontract would have known that, if there was fire which caused damage to the retained facades, that damage would be insured under the Joint Names Policy, and that Whitehall, as employer, would look to the insurers to pay for the cost of reinstatement of those existing structures. It would be inconsistent with that overall regime for any party to seek to sidestep the allocation of risk and responsibility set out in these lengthy forms of contract, by trying to investigate possible causes of action against the subcontractor in negligence."

WAIVER OF SUBROGATION AND CROSS-LIABILITY CLAUSES

13.56 There are a number of cases in which the courts have considered the effects upon the rights of one party to sue another of the fact that the parties are co-insured.

13.57 Before considering those cases we draw attention to two common types of clause found in insurance policies:

(1) a waiver of subrogation clause (to which a number of the standard forms of contract mentioned above refer). By such a clause the insurer may agree not to pursue rights of subrogation against particular named parties (even if not parties to the insurance)

24. [2008] BLR 115; [2007] EWHC 1507 (TCC).
25. Paragraph 38.

or against persons insured under the policy. Such a clause would generally be enforceable pursuant to the Contracts (Rights of Third Parties) Act 1999.[26] Accordingly where the insurer agrees not to exercise rights of subrogation against another party, that party if sued in the name of a fellow insured, even if otherwise liable to the person insured under the policy containing such a waiver of subrogation, would be able as a matter of contract to require the insurer to discontinue subrogated proceedings. Such clauses are frequently found in property insurances, especially contractors all risks project insurances.

(2) Where the policy is a liability policy, there will often be a cross-liability clause (see for example the Gable insurance policy which contains a cross-liability clause in the following terms):

> "It is hereby declared and agreed that where more than one party is named in the Schedule as the Policyholder, cover shall apply as though individual insurances have been issued to each party provided always that Gable's total liability shall not exceed the sums stated in the Schedule as the Limits of Liability."

A clause in those terms in a liability policy has two effects:

(1) It confirms that if one insured pursues a claim against another insured the insured sued will be entitled to indemnity under the policy, subject of course to all other policy terms; and
(2) It makes it pointless for the insurer under the policy to bring subrogated claims against another insured, since the insurer would find itself indemnifying the insured against whom the subrogated claim is brought.

13.58 In some cases cross-liability and waiver of subrogation clauses are brought together into one clause—for example:

> "Each of the parties comprising the Insured shall for the purposes of this Section be considered as a separate and distinct party and the words 'the Insured' shall be considered as applying to each party in the same manner as if a separate policy had been issued to each of the said parties and the Insurer hereby agrees to waive all rights of subrogation or action which they may have or acquire against any of the aforesaid parties arising out of any occurrence in respect of which any claim is made hereunder provided nevertheless that nothing in this Particular Condition shall be deemed to increase the Limit of Indemnity in respect of any one occurrence or series of occurrences as stated in the Schedule."

CASES CONCERNING THE EFFECT OF CO-INSURANCE

13.59 It is very common that all parties to a construction project are named as insured under a project insurance. As we have identified when considering the cases on standard form contracts, many contracts expressly refer to the effects of such an arrangement, particularly where the contract requires a joint names policy to be taken out. Problems not infrequently arise where the parties do not spell out the consequences of such a policy being taken out. Sometimes the authorities treat the solution as being driven by analysis of the terms of the construction contract, in other cases the answer is sought in an analysis of insurance law.

26. There is also Australian authority that lack of privity of contract is not a problem—see *Woodside Petroleum Development Pty Ltd* v *H & R—E & W Pty Ltd* [1999] WASCA 1024.

13.60 (1) The first case in which these problems were addressed was not a construction case. In *The Yasin*,[27] the claim arose out of a contract for the carriage of a cargo of urea from England to Africa. The charterparty gave the ship owners the option to use a vessel 15 years or more old on condition that if they did so they procured an insurance policy in respect of loss or damage to the cargo. They exercised this option, obtaining such a policy in which both the receivers of the cargo and the ship owners were named as insured. The ship carrying the cargo sank: the receivers were paid out under the policy, and the cargo underwriters sued the ship owners.

13.61 The first defence put forward by the ship owners was that the plaintiffs had suffered no loss because they had been paid by the underwriters. The judge, Lloyd J, rejected that argument upon the basis of the authorities affirmed in *Parry* v *Cleaver*.[28]

13.62 The second way in which the defence was put was that the defendant ship owners were co-assured under the policy of insurance and that there is a fundamental principle that insurers cannot exercise a right of subrogation in the name of one assured against a co-assured under the same policy. The primary basis upon which the judge rejected this argument was that although the ship owners were named as insured under the policy, they were named as agents and did not themselves have any insurable interest in the cargo. Accordingly they were not truly co-assured under the policy.

13.63 The judge further commented:

> "It is said to be a fundamental rule in the case of joint insurance that the insurer cannot exercise a right of subrogation against one of the co-assured in the name of the other. I am not satisfied that there is any such fundamental principle. In my judgment, the reason why an insurer cannot normally exercise a right of subrogation against a co-assured rests not on any fundamental principle relating to insurance, but on ordinary rules about circuity."

(This suggestion has since been rejected by the House of Lords in *Co-operative Retail Stores Ltd* v *Taylor Young Partnership Ltd*.[29])

13.64 In addition, the judge rejected a suggestion that it was an implied term of the insurance policy that the underwriters would not assert rights of subrogation against the ship owners.

13.65 (2) In *Petrofina (UK) Ltd* v *Magnaload*, to which a short reference has already been made, Lloyd J returned to the subject.[30] This was a case concerning a construction project. The main contractor for the construction of an extension at an oil refinery took out a contractors all risks insurance policy under which the insured was defined as including the main contractors, subcontractors, and the lessees, owners and managers of the refinery. During the course of the project an accident occurred causing substantial damage to the works in progress. The lessees of the refinery made a claim under the policy which was paid. The insurers then brought subrogated proceedings against two of the subcontractors.

13.66 The judge held that the subcontractors were insured under the policy. The subcontractors denied that insurers were entitled to exercise any right of subrogation against the defendants, since they were fully insured under the same policy in respect of the same property.

13.67 In answer to that argument the plaintiffs argued first that the policy insured each assured only to the extent of its own interest, it being a composite policy of insurance. In

27. [1979] 2 Lloyd's Rep 45.
28. [1970] AC 1.
29. See note 22, *supra*.
30. [1984] QB 127.

answer to that the defendants called evidence as to commercial convenience. The judge said:

> "In the case of a building or engineering contract, where numerous different subcontractors may be engaged, there can be no doubt about the convenience from everybody's point of view, including, I would think, the insurers, of allowing the head contractor to take out a single policy covering the whole risk, that is to say covering all contractors and subcontractors in respect of loss of or damage to the entire contract works. Otherwise each subcontractor would be compelled to take out his own separate policy. This would mean, at the very least, extra paperwork; at worst it could lead to overlapping claims and cross-claims in the event of an accident. Furthermore, as Mr. Wignall pointed out in the course of his evidence, the cost of insuring his liability might, in the case of a small subcontractor, be uneconomic. The premium might be out of all proportion to the value of the subcontract. If the subcontractor had to insure his liability in respect of the entire works, he might well have to decline the contract."

13.68 The judge held that the subcontractor was entitled to insure the whole value of the project, and had done so in this case. He went on to hold that in the case of contractors and subcontractors engaged upon a common enterprise under a building or engineering contract, the insurer could not exercise a right of subrogation in the name of one insured against another insured. He expressed the view that "I am still inclined to think that the reason is circuity". His decision was substantially based upon a Canadian case, *Commonwealth Construction Co Ltd* v *Imperial Oil Ltd*.[31] In reaching his decision Lloyd J based himself entirely upon the consequences of the parties being co-insured rather than analysis of some contractual relationship directly between those parties. Although an argument based upon that relationship was addressed to the court, it was not necessary for the judge to reach a decision upon the point. It is to be noted that there appears to have been no direct contractual nexus between the subcontractors and the plaintiffs, and no argument of the type which later succeeded a decade later in *Norwich City Council* v *Harvey*,[32] to the effect that the subcontractors owed no duty of care to the plaintiffs was addressed to the court.

13.69 (3) In *Mark Rowlands Ltd* v *Berni Inns Ltd*,[33] the Court of Appeal considered the effect of an insuring clause in a lease. The plaintiff was the freehold owner of a building, the basement of which was let to the defendant who ran a restaurant there. Under the lease the tenant was obliged to pay an insurance rent and the landlord was obliged to keep the whole building insured and to lay out any moneys received under the insurance in rebuilding and reinstating the basement. A fire broke out allegedly caused by the negligence of the defendant's staff.

13.70 In the Court of Appeal it was conceded that the tenant was not a co-insured under the policy effected by the landlord but the Court of Appeal held that the policy was effected for the benefit of the tenant as well as the landlord. It was argued on behalf of the landlord's insurers that the tenant had no insurable interest in the continued existence of the building. That argument was firmly rejected. Kerr LJ said:[34]

> "An essential feature of insurance against fire is that it covers fires caused by accident as well as by negligence. This was what the plaintiff agreed to provide in consideration of, inter alia, the insurance rent paid by the defendant. The intention of the parties, sensibly construed, must therefore have been that in the event of damage by fire, whether due to accident or

31. (1977) 69 DLR (3d) 558.
32. See note 7, *supra*.
33. [1986] QB 211.
34. *Ibid*, at p. 232.

> negligence, the landlord's loss was to be recouped from the insurance monies and that in that event they were to have no further claim against the tenant for damages in negligence."

13.71 As an alternative ground of decision, the Court of Appeal held that by way of exception to the general rule in *Parry* v *Cleaver*,[35] because of the arrangements between the parties, the tenant was able to say that the landlord had suffered no loss because he had been indemnified by the insurers.

13.72 (4) In *Stone Vickers Ltd* v *Appledore Ferguson Shipbuilders Ltd*,[36] Mr. Anthony Colman QC sitting as a Deputy Judge of the High Court considered *Commonwealth Construction Co Ltd* v *Imperial Oil Ltd*[37] and *Petrofina (UK) Ltd* v *Magnaload Ltd*[38] and said:[39]

> "The approach which, in my judgment, accurately reflects the reasoning in the *Commonwealth Construction case and Petrofina* v *Magnaload* is to ask whether the supplier of a part to be installed into the vessel or contract works under construction might be materially affected by loss of or damage to the vessel or other works by reason of the incidence of any of the perils insured against by the policy in question. If the answer to that question is in the affirmative there is no reason in principle why such a subcontractor should not also have sufficient interest in the whole contract works to be included as co-assured under the protection of the head contractor's policy. The yardstick can best be identified by asking whether such a supplier would have had sufficient interest to have taken out a policy in his own name on the whole of the vessel or contract works."

And, a little later:[40]

> "Where a policy is effected on a vessel to be constructed and it is expressed to be for the benefit of subcontractors as co-assured, if a particular subcontractor negligently causes loss of or damage to the whole or part of the vessel which has been insured under the policy and the subcontractor has an insurable interest in the vessel, it is not open to underwriters who have settled the insured shipbuilders' claim to exercise rights of subrogation in respect of the same loss and damage against the co-assured subcontractor. To do so would be completely inconsistent with the insurer's obligation to the co-assured under the policy. The insurer would in effect be causing the assured with whom he had settled to pursue proceedings which if successful would at once cause the co-assured to sustain a loss arising from loss or damage to the very subject matter of the insurance in which that co-assured has an insurable interest and a right of indemnity under the policy. In my judgment so inconsistent with the insurer's obligation to the co-assured would be the exercise of rights in such a case that there must be implied into the contract of insurance a term to give it business efficacy that an insurer will not in such circumstances use rights of subrogation in order to recoup from a co-assured the indemnity which he has paid to the assured."

He continued that breach of such an implied term could be raised as a defence by the co-assured in the subrogated proceedings brought by the insurers in the name of the co-assured.

13.73 Upon appeal, the Court of Appeal[41] held that the trial judge had been wrong to decide that the subcontractor was a co-assured under the relevant policy. Accordingly they did not consider the wider issues of principle.

35. See note 28, *supra*.
36. [1991] 2 Lloyd's Rep 288.
37. See note 31, *supra*.
38. See note 11, *supra*.
39. At p. 301.
40. At p. 302.
41. [1992] 2 Lloyd's Rep 578.

13.74 (5) Colman J (as he had by then become) returned to the subject in *National Oilwell (UK) Ltd* v *Davy Offshore Ltd*.[42] The case arose out of an agreement whereby NOW agreed to supply to DOL a subsea wellhead completion system to be used as part of a floating oil production facility which DOL were constructing for use on a North Sea oilfield. DOL was insured under a Builders' All Risks policy which covered subcontractors as co-assured. Issues arose as to the extent to which NOW could claim the benefit of the policy—it was held that NOW was insured under the policy but only to the extent that in the contract between DOL and NOW, DOL was obliged to effect insurance on NOW's behalf—that was to "insure on an All Risks basis the Work and materials in the course of manufacture until the time of delivery . . . ". Thus NOW was held not to be insured in respect of matters arising after the time of delivery of NOW's elements of the project, nor to have any insurable interest beyond that. It was also held that a waiver of contribution clause in the policy would be held to be similarly limited so that NOW could not rely upon the policy terms to defeat a claim based upon losses arising in relation to particular items of equipment after delivery to DOL of that equipment.

13.75 Although holding that the interest of the subcontractor NOW in the relevant policy was limited, and that the impact of the waiver of contribution clause was similarly limited, Colman J took the opportunity to affirm the views expressed by him in *Stone Vickers Ltd* v *Appledore Ferguson Shipbuilders Ltd*,[43] as set out above. He said:[44]

> "For these reasons I am firmly of the view that the conclusion arrived at by Mr. Justice Lloyd in *Petrofina* was right: an insurer cannot exercise rights of subrogation against a co-assured under an insurance on property in which the co-assured has the benefit of cover which protects him against the very loss or damage to the insured property which forms the basis of the claim which the underwriters seek to pursue by way of subrogation. The reason why the insurer cannot pursue such a claim is that to do so would be in breach of an implied term in the policy and to that extent the principles of circuity operate to exclude the claim."

13.76 One further point arising out of this case was that one of the insurers who underwrote the policy had gone into liquidation. Colman J held that in so far as the claim included that insurer's portion, it was not a subrogated claim and NOW could not raise against that portion the subrogation defence or any other defence based on the existence of the policy.

13.77 (6) In *State of Netherlands* v *Youell*,[45] Rix J had to consider the effect of the above authorities in a somewhat different context. In that case the issue was whether a policy of insurance was a joint policy, in which case misconduct by one insured would prevent another insured recovering under the policy, or a composite policy in which case the misconduct of one insured would not prevent an innocent insured recovering. He accepted the analysis in the other cases that under a policy such as a contractors all risks policy all the co-assureds could have such a pervasive interest that there is no right of subrogation by one co-assured against another, but held that the existence of those pervasive interests did not compel the result that such a policy was a joint rather than a composite policy. His decision was affirmed on appeal but the insurable interest point was not discussed further.[46]

42. [1993] 2 Lloyd's Rep 582. Colman J's analysis of the requirements of insurable interest in these two cases was considered and seemingly accepted by the Court of Appeal in *Glengate-KG Properties Ltd* v *Norwich Union Fire Insurance Society Ltd* [1996] 1 Lloyd's Rep 614.
43. See note 36, *supra*.
44. At p. 614.
45. [1997] 2 Lloyd's Rep 440.
46. [1998] 1 Lloyd's Rep 236.

13.78 (7) We have already referred to the Court of Appeal decision in *London Borough of Barking & Dagenham* v *Stamford Asphalt Co Ltd*,[47] in which Auld LJ dismissed a defence based upon *Petrofina (UK) Ltd* v *Magnaload Ltd* and *Mark Rowlands Ltd* v *Berni Inns Ltd inter alia* upon the basis that the contractor had no insurable interest in respect of the reinstatement of the employer's building. This decision is not entirely easy to reconcile with the authorities thus far discussed in this section, or with certain later authorities.

13.79 (8) In *Hopewell Project Management Ltd* v *Ewbank Preece*,[48] the case arose out of a project to construct a power station in the Philippines. A CAR policy covered the main contractor and subcontractors. During commissioning damage occurred to two gas turbines. This damage was alleged to have been caused by the negligence of the defendants who had provided engineering services. The defendants argued that they were insured under the CAR policy and that the claim (which was a subrogated claim brought by the CAR insurers) could not be brought against them. Mr Recorder Jackson QC held that the engineers were not subcontractors and therefore were not insured under the CAR policy. However he did hold that:[49]

> "In my judgment, the fact that the defendants were carrying out the professional services on site, and the fact that the defendants might incur legal liability for negligently causing damage to the contract works, gave the defendants an insurable interest in the contract works."

13.80 (9) *Deepak Fertilisers and Petrochemical Corporation* v *Davy McKee (London) Ltd*[50] was a case governed by Indian law but decided upon the basis that there was no distinction between the law of India and that of England. A methanol plant was erected in India between 1988 and 1991. The plant exploded on 30 October 1992. There was substantial damage and the plant had to be rebuilt. The plant owner, Deepak, sued Davy, who had sold Deepak a process licence, design and know-how in relation to the proposed design, construction, operation and maintenance of the plant, for breach of contract and negligence. The technology was ICI's who were sued in negligence and for breach of collateral warranty.

13.81 An important issue for consideration by the Court of Appeal was whether Davy had any continuing insurable interest in the project. Viewing things broadly, Davy had ceased to be involved long before the explosion happened—so why was Davy to be relieved of liability because during the construction phase of the project there was an obligation upon Deepak to include it on the project CAR policy? Stuart-Smith LJ's answer was as follows:[51]

> "In our judgment Davy undoubtedly had an insurable interest in the plant under construction and on which they were working because they might lose the opportunity to do the work and to be remunerated for it if the property or structure was damaged or destroyed by any of the 'all risks', such as fire or flood. Thereafter Davy could only suffer disadvantage if the damage to or destruction of the property or structure was the result of their breach of contract or duty of care. In order to protect the contractor and subcontractors against the risk of disadvantage by reason of damage or destruction of the property or structure resulting from their breach of contract or duty they would, in accordance with normal practice, take out liability insurance or, in the case of architects, professional indemnity insurance . . . what they cannot do is persist in maintaining an insurance of the property or structure itself. Two dates are critical. The commissioning of Deepak's plant was completed on 31 January 1992. Davy continued to work on the plant thereafter to rectify construction defects but, by 10 August 1992, all known

47. (1997) 82 BLR 25.
48. [1998] 1 Lloyd's Rep 448.
49. At p. 456.
50. [1999] BLR 41.
51. At p. 53.

construction defects had been rectified and rectification work had been inspected. At the latest the construction of the plant was complete by 11 August. Thereafter, with effect from 11 August 1992, Deepak transferred the insurance of the plant from the Marine-cum-Erection Policy (under which Davy and 'other Contractors and Sub-Contractors appointed from time to time' had been named as co-assured) to the conventional property insurance policy under which the existing ammonia plant was already insured (i.e. the 'Fire Policy'). Davy was not named as a co-insured under this policy. Thus by the time the insurance of the plant was switched to the 'Fire Policy', Davy was no longer bound to be prejudiced if the plant was damaged or destroyed by an insured peril."

13.82 In this passage Stuart-Smith LJ draws the distinction between an insurable interest in the property of the structure, which would subsist for as long as the contractor had a financial interest in the continuing existence of the structure, and an insurable interest represented by the potential liability for causing damage to the structure. The court held that the latter did not constitute a sufficient insurable interest for the purposes of a fire policy, being an insurance on property only, after the work was completed. However, the validity of this distinction was doubted by Dyson LJ in *Feasey* v *Sun Life Assurance Corporation of Canada*[52] (at page 663, in the passage quoted below), although Waller LJ expressed himself in rather more cautious terms (at pages 658–9). But what is clear from the judgments in *Feasey* is that the existence of a potential pecuniary loss arising from damage to or the destruction of a structure being worked on is sufficient to found an insurable interest.

13.83 (10) In *Co-operative Retail Services Ltd* v *Taylor Young Partnership Ltd*,[53] to which reference has already been made, the first argument for contending that the main contractor and subcontractor had never been liable to the employer was based upon the terms of the contract. This has already been discussed. A second argument was based upon the insurance arrangements. Lord Bingham of Cornhill said:[54]

> "Under the contract and Wimpey (the main contractor's) all risks insurance policy, CRS (the employer) would be effectively indemnified by the insurers' provision of a fund enabling it to pay Wimpey for repairing the fire damage. The insurers could not then make a subrogated claim against Wimpey because Wimpey was a party co-insured (with CRS) under the policy, and the insurers would be obliged to indemnify Wimpey against any liability which might be established, an obvious absurdity. The rationale of this rule may be a matter of some controversy . . . but the rule itself is not in doubt."

Lord Hope of Craighead also referred to this point:[55]

> "There is considerable scope for debate as to the true basis for the rule which was applied by Lloyd J in the *Petrofina* case that the insurers can never sue one co-insured in the name of another . . .
>
> Although your Lordships do not need to resolve the issue in this case, it seems to me that there is much force in the point that the rules about circuity of action do not provide the explanation. I would prefer to say that the true basis of the rule is to be found in the contract between the parties. In *Hopewell Project Management Ltd* v *Ewbank Preece Ltd* Mr Recorder Jackson QC said that in his view it would be nonsensical if those parties who were jointly insured under a contractors' all risks policy could make claims against one another in respect of damage to the contract works, that such a result could not possibly have been intended by those parties and that had it been necessary for him to do so he would have held that there was an implied term to that effect. I would be content to accept that as a satisfactory basis for the

52. [2003] Lloyd's Rep IR 637, at 663.
53. [2002] 1 WLR 1419; [2002] UKHL 17.
54. At para 7.
55. The extracts cited are from paras 63 and 65.

rule on which, had it been necessary for them to do so, Wimpey and Hall would have been entitled to resist the claim."

13.84 (11) In *Feasey* v *Sun Life Assurance Corporation of Canada*,[56] the argument before the Court of Appeal turned upon whether those reinsured under a Lloyd's line slip had sufficient insurable interest to prevent the policy being a gaming contract. In the course of their judgments both Waller and Dyson LJJ found it necessary to review the authorities cited above. Waller LJ summarised the principles emerging from the authorities as follows:[57]

> "The principles which I would suggest one gets from the authorities are as follows: (1) It is from the terms of the policy that the subject of the insurance must be ascertained; (2) It is from all the surrounding circumstances that the nature of an insured's insurable interest must be discovered; (3) There is no hard and fast rule that because the nature of an insurable interest relates to a liability to compensate for loss, that insurable interest could only be covered by a liability policy rather than a policy insuring property or life or indeed properties or lives; (4) The question whether a policy embraces the insurable interest intended to be recovered is a question of construction. The subject or terms of the policy may be so specific as to force a court to hold that the policy has failed to cover the insurable interest, but a court would be reluctant so to hold. (5) It is not a requirement of property insurance that the insured must have a 'legal or equitable' interest in the property as those terms might normally be understood. It is sufficient for a subcontractor to have a contract that relates to the property and a potential liability for damage to the property to have an insurable interest in the policy . . . "

13.85 Dyson LJ had this to say in the context of construction projects:[58]

> "No reason has been advanced to justify the proposition that, as a matter of law, an insurable interest may not be sufficiently based on the existence of potential liability in the insured for the contingency which is the subject of the insurance. Decisions such as *NOW* v *DOL* are criticised at paragraphs 1–156 to 1–159 of *MacGillvray on Insurance Law* 10th edition on two principal grounds. First, it is said that they are difficult to reconcile with established principles which *inter alia* require that the subcontractors in question be able to demonstrate that they possessed a legal or equitable interest in relation to the contract works. Secondly, it is said that they confuse the distinction between insurances on property on the one hand, and product liability insurance on the other.
>
> As regards the first point, none of the authorities which were cited to us states in terms that potential liability for damage to the property insured can only be covered by liability insurance. It is true that in *Deepak*, this court said that, after construction and commissioning of the plant had been completed, even if Davy had been named in the subsequent fire policy, they would not have been covered in respect of their breach of contract or duty under that policy, because they would have had no insurable interest in the plant. But as against that, no doubt was expressed as to the correctness of any of the decisions mentioned by Waller LJ at paragraph 94 of his judgment, or more particularly the reasoning on which they are based. The existence of a legal or equitable interest in relation to the contract works forms no part of that reasoning.
>
> As for the 'confusion' between the two types of insurance, I refer to the fallacy that I mention [in the previous paragraph]. Although the two types of insurance are different in character, it does not follow that an insurable interest that is sufficient for the purposes of one may not also be sufficient for the purposes of the other. The so-called 'confusion' is not, in my view, a reason for holding that the potential liability for damage to property may not give an insured a sufficient insurable interest in the property itself.

56. [2003] Lloyd's Rep IR 637; [2003] EWCA Civ 885.
57. At para 92.
58. Paragraphs 113 to 117.

> It is difficult to reconcile all the authorities . . .
>
> This general approach is not furthered by drawing subtle distinctions which serve no useful purpose. I can see no useful purpose in holding that a contractor has an insurable interest in plant (of which he supplies only a small component) up to the time of completion and commissioning, but not thereafter. On the facts of a case like *Deepak*, the subcontractor's commercial interest in the plant as a whole during the construction and commissioning stages lies as much in his potential liability for damage caused to the plant by his breach of contract and duty as in his interest in not losing the opportunity to do the work and be remunerated for it if the plant is damaged or destroyed by any of the risks covered by an all risks policy."

13.86 (12) In *O'Kane* v *Jones (The "Martin P")*,[59] Mr Richard Siberry QC, sitting as a Deputy High Court Judge, carefully reviewed the cases as to what constitutes an insurable interest, including most of the cases referred to in this section, and at paragraph 154 concluded (*inter alia*) that "commercial convenience can be a relevant factor in determining the existence of an insurable interest" and that

> "A person exposed to liability in respect of the custody or care of property may, as an alternative to taking out liability insurance to protect his exposure, insure the property itself, and in the event of loss or damage thereto by a peril insured against may recover in respect thereof up to the full amount for which he is liable, even if that exceeds the amount for which he is liable and even if the loss or damage has occurred without any actionable fault on his part. If and to the extent that he has suffered no personal loss he will be liable to account to the owner of the goods who has suffered the loss."

and that

> "A person may also have an insurable interest in property if loss of or damage to that property would deprive him of the opportunity of carrying out work in relation to that property and being remunerated for that work . . . "

13.87 (13) Finally, in this part of the review of authority we refer to the decision of Jackson J in *The Board of Trustees of the Tate Gallery* v *Duffy Construction Ltd*.[60] Having reviewed the authorities, he concluded[61] that "it is an implied term in contracts such as the present that one party will not sue the other in respect of loss or damage for which they are both co-insured". However, he continued with the important caveats "that implied term does not extend to a situation in which the defendant's breach of policy has (a) caused the policy to be avoided vis-à-vis himself, or (b) made it impermissible for the defendant to claim under the policy in respect of the loss which is in issue".

THE CASE OF *TYCO FIRE & INTEGRATED SOLUTIONS (UK) LTD* V *ROLLS-ROYCE MOTOR CARS LTD*

13.88 We now turn to the most recent authority in this area: *Tyco Fire & Integrated Solutions (UK) Ltd* v *Rolls-Royce Motor Cars Limited*,[62] a decision of the Court of Appeal. The case concerned Rolls-Royce's new manufacturing plant near Goodwood in West Sussex. Tyco was one of the contractors at the site, providing fire protection services including a sprinkler

59. [2005] Lloyd's Rep IR 174; [2003] EWHC 2158 (Comm).
60. [2007] Lloyd's Rep IR 758; [2007] EWHC 361 (TCC).
61. At para 62.
62. [2008] EWCA Civ 286.

system. One of the main supply pipes burst, causing an escape of water which damaged the new works and parts of the existing structures.

13.89 The relevant clauses of the contract between the parties included the following:

> "Clause 2.3: The Contractor shall . . . indemnify the Employer against any damage, expense, or loss whatsoever suffered by the Employer or incurred to any third party to the extent that the same arises out of or in connection with any breach of this Contract or any negligence or breach of statutory duty on the part of the Contractor or any subcontractor or supplier of his or any tier.
>
> Clause 3.3: Notwithstanding any other provision of this contract the Contractor shall no[t] be entitled to any increase in the Contract Price and/or to a change in the Completion Date to the extent that any Instruction for Variation results from or is necessary in order to overcome the adverse effects of any lack of performance or error or omission or negligent act or default or breach of contract on the part of the Contractor or any supplier of his or any tier.
>
> Clause 13.5: The Employer shall maintain, in the joint names of the Employer, the Construction Manager and others including, but not limited to, contractors, insurance of existing structures . . . against the risks covered by the Employer's insurance policy referred to in Schedule 2 (i.e. the Specified Perils) subject to the terms, conditions, exclusions and excesses (uninsured amounts) of the said policy.
>
> Clause 18: The rights and liabilities conferred upon the Employer by this Deed are in addition to any other rights and remedies it may have against the Contractor including without prejudice to the generality of the foregoing any remedies in negligence."

13.90 The "Specified Perils" included bursting or overflowing of water tanks, apparatus or pipes. It was also an obligation upon Tyco under the contract to take out and maintain public liability insurance in respect of Tyco's clause 2.3 liability. Rolls-Royce did not take out the joint names insurance required by clause 13.5.

13.91 Rix LJ gave the principal judgment of the court. The appeal was allowed on the narrow point that the expression "contractors" in clause 13.5 did not include Tyco, so that there was no obligation on Rolls-Royce to take out joint names insurance in respect of the existing structures. However, Rix LJ went on to make a number of observations about joint names insurance. He referred to the decisions of the Court of Appeal in *Surrey Heath Borough Council* v *Lovell Construction Ltd* and *London Borough of Barking & Dagenham* v *Stamford Asphalt Co Ltd*, both of which have been discussed earlier in this chapter. He followed their reasoning in holding that in the absence of clear words the mere obligation upon an employer to take out and maintain a joint names policy of insurance would not displace an express indemnity clause. He distinguished *Scottish and Newcastle plc* v *GD Construction (St Albans) Ltd*, which has also been discussed earlier in this chapter.

13.92 In his analysis of the construction of the contract, Rix LJ at paragraph 63 relied in part upon Tyco's lack of insurable interest in the existing buildings (in possible contrast to the new works) casting doubt upon whether Tyco had any such interest—it is respectfully submitted that for the reasons explored in a number of the authorities including *Stone Vickers Ltd* v *Appledore Ferguson Shipbuilders Ltd*, *Deepak Fertilisers and Petrochemical Corporation* v *Davy McKee*, *Hopewell Project Management Ltd* v *Ewbank Preece*, *Feasey* v *Sun Life Assurance Corporation of Canada*, and *O'Kane* v *Jones*, all referred to above, *Tyco* would have had sufficient interest both in respect of its pecuniary interest in the continuing existence of the buildings on which it was working and in respect of its potential liability in respect of damage caused thereto (the loss occurred prior to completion of the works), to be able to establish an insurable interest.

13.93 Rix LJ also returned at paragraph 72 of the judgment to the view of Auld LJ in the *London Borough of Barking* case that the joint names policy which the employer was required to take out would not necessarily have to cover damage caused by the negligence of a subcontractor. It has already been noted above that in *Scottish and Newcastle plc* v *GD Construction (St Albans) Ltd*, Aikens J doubted the correctness of this part of Auld LJ's judgment. There would now appear to be inconsistent decisions of the Court of Appeal on this point.

13.94 Finally, Rix LJ considered whether the provision for joint names insurance had an overriding effect. It has been seen above that in *Co-operative Retail Stores* both Lord Bingham and Lord Hope referred to a "rule" that an insurer could not bring a subrogated claim in the name of one co-assured against another. He held that any such "rule" must give way to the express words of the contract between the parties saying at paragraph 77:

> "I can well see that a provision for joint names insurance may influence, perhaps even strongly, the construction of the contract in which it appears. It may lead to the carving out of an exception from the underlying regime so far as specified perils are concerned. But an implied term cannot withstand express language to the contrary. Moreover, if the underlying contract envisages that one co-assured may be liable to another for negligence even within the sphere of the cover provided by the policy, I am inclined to think that there is nothing in the doctrine of subrogation to prevent the insurer suing in the name of the employer to recover the insurance proceeds which the insurer has paid in the absence of any express ouster of the right of subrogation, either generally or at least in cases where the joint names insurance is really a bundle of composite policies which insure each insured for his respective interest."

13.95 It is respectfully suggested that this part of Rix LJ's reasoning is not easy to reconcile with the authorities referred to at length above. In particular, it is hard to see why a contractor who is entitled by the contract to the benefit of a policy of insurance in which he is a named insured should be deprived of that benefit by the means of a subrogated claim at the suit of the very insurer who was supposed to provide that benefit. It should be noted that Rix LJ was not considering a case where the joint names policy had been effected as required by the contract, still less a case where the policy effected contained a waiver of subrogation clause. It is likely that future cases will have to work out the various ramifications of Rix LJ's judgment in this as in other respects.

SUMMARY

13.96 We have set out the authorities because the two streams of authority are not easy to reconcile with each other, nor are the authorities within each stream always easy to reconcile. It is respectfully submitted that the most recent decision of *Tyco Fire & Integrated Solutions (UK) Ltd* v *Rolls-Royce Motor Cars Limited* has not made matters any easier.

The principles arising from the authorities

13.97 In so far as it is possible to set out principles, the following seem to emerge from the authorities:

(1) If the claimant and the defendant are in contractual relationship the dominant factor is the terms of the contract between them, which is a matter of construction;
(2) The courts are slow to construe a contract as relieving a party from liability for his own, or a subcontractor's negligence;

(3) If there is an indemnity clause expressly made subject to an insuring clause which provides that some peril is at the sole risk of an employer with the obligation to insure, that will be effective to relieve the contractor for liability for negligence in respect of damage covered by that policy;[63]
(4) In that relatively simple form of contract, even if liability for damage covered by the policy is excluded, the contractor remains liable for losses outside the policy such as consequential losses;[64]
(5) In the simple form of contract, the contractor will not be relieved of liability in the absence of words making the indemnity clause subject to the insuring clause;[65]
(6) Under some forms of JCT contract, the obligation to take out a joint names policy may not include an obligation to effect insurance against damage caused by the negligence or breach of contract of a contractor or subcontractor;[66]
(7) It is possible that even if the existence of an insuring clause does not relieve a contractor of liability, credit may have to be given for the proceeds of the insurance policy;[67]
(8) Where the contract is in the more modern forms of JCT standard form whereby provision is made for the policy of insurance not only to be in joint names but also for the policy to contain a waiver of subrogation clause and where insurance monies to be laid out in reinstatement of the works coupled with an obligation on the part of the contractor to carry out the restoration works, the contractor will be under no liability at all to the employer.[68]

13.98 Turning to the position of parties not in a contractual relationship with each other: if the main contractor is not liable to the employer by reason of the terms and structure of the main contract, then that may negate any duty of care which might otherwise have been owed by a subcontractor to the employer.[69] However, if the clear intention is that protection should be afforded only to the main contractor and nominated subcontractors, then a domestic subcontractor may be liable in tort.[70]

13.99 We return some conclusions as to the effect of insurance policies upon rights to sue and be sued:

(1) If the co-insureds are properly regarded as joint insureds (very rare in the context of a construction project) no right of subrogation arises to permit a subrogated action to be brought in the name of one insured against another insured;

63. *James Archdale & Co Ltd* v *Comservices Ltd* (see note 2, *supra*); *Coleman Street Properties Ltd* v *Denco Miller Ltd* (see note 4, *supra*); *Scottish Special Housing Association* v *Wimpey Construction UK Ltd* (see note 5, *supra*).
64. *Kruger Tissue (Industrial) Ltd* v *Frank Galliers Ltd* (see note 16, *supra*); *London Borough of Barking & Dagenham* v *Stamford Asphalt Co Ltd* (see note 18, *supra*).
65. *Buckinghamshire County Council* v *Y J Lovell & Son Ltd* (see note 3, *supra*); *Dorset County Council* v *Southern Felt Roofing Co Ltd* (see note 9, *supra*); *Casson* v *Ostley PJ Ltd* (see note 21, *supra*).
66. *London Borough of Barking & Dagenham* v *Stamford Asphalt Co Ltd* (see note 18, *supra*); *Tyco Fire & Integrated Solutions (UK) Ltd* v *Rolls-Royce Motor Cars Ltd* (see note 62, *supra*); but query whether these cases can stand with *Scottish & Newcastle plc* v *GD Construction (St Albans) Ltd* (see note 23, *supra*).
67. *Per* Nourse LJ in *The National Trust for Places of Historic Interest or Natural Beauty* v *Haden Young Ltd* (see note 17, *supra*); but it is doubtful if this suggestion survives Rix LJ's analysis in *Tyco Fire & Integrated Solutions (UK) Ltd* v *Rolls-Royce Motor Cars Ltd* (see note 62, *supra*).
68. *Ossory Road (Skelmersdale) Ltd* v *Balfour Beatty Building Ltd* (see note 14, *supra*); *Co-operative Retail Services Ltd* v *Taylor Young Partnership Ltd* (see note 22, *supra*).
69. *Norwich City Council* v *Harvey* (see note 32, *supra*).
70. *British Telecommunications plc* v *James Thomson & Sons (Engineers) Ltd* (see note 20, *supra*).

(2) If there is a waiver of subrogation clause that can be enforced by one co-insured to prevent a subrogated claim being brought in the name of another insured.[71] The effect of a waiver of subrogation clause may be governed by the terms of a contractual term requiring the policy to protect the party seeking to claim the benefit of the waiver of subrogation clause;[72]

(3) If the negligent party has contributed to the cost of the insurance, that may make it just to bring the insurance monies into account as an exception to the rule in *Parry* v *Cleaver*, or to hold that such an arrangement excludes any liability in respect of the matters covered by the policy,[73] but the court will not necessarily come to this conclusion.[74]

(4) If the insurance is effected by a party simply as agent, the fact that that party is named as co-insured under the policy will not exclude liability.[75]

(5) A subcontractor carrying out part only of a construction project has sufficient interest to insure the whole of the works and any structures on which he is working, at least until the date of completion of his work.[76] In some cases even though a party is named as a co-insured it is possible on analysis that the party is not in fact a co-insured.[77]

(6) It is possibly the case that there is a rule that a subrogated action in the name of one co-assured cannot be brought against another co-assured,[78] but the jurisprudential basis of the rule has not been defined by the courts and the very existence of the rule has been doubted by the Court of Appeal.[79]

(7) If the person seeking to rely upon the "rule" has been guilty of misconduct in breach of policy conditions, then he may not be able to claim protection as a co-insured.[80]

71. Section 1 of the Contracts (Rights of Third Parties) Act 1999; *Woodside Petroleum Development Pty Ltd* v *H & R—E & W Pty Ltd* (see note 26, *supra*).

72. *National Oilwell (UK) Ltd* v *Davy Offshore Ltd* (see note 42, *supra*); *GPS Power Pty Ltd* v *Gardiner Willis & Associates Pty Ltd* [2000] QCA 495 (Supreme Court of Queensland).

73. *Mark Rowlands Ltd* v *Berni Inns Ltd* (see note 12, *supra*).

74. *Surrey Heath Borough Council* v *Lovell Construction Ltd* (see note 10, *supra*).

75. *The Yasin* (see note 27, *supra*).

76. *Petrofina (UK) Ltd* v *Magnaload Ltd*; *Stone Vickers Ltd* v *Appledore Ferguson Shipbuilders Ltd* (see note 30, *supra*).

77. *Stone Vickers Ltd* v *Appledore Ferguson Shipbuilders Ltd* on appeal: [1992] 2 Lloyd's Rep 578; *National Oilwell (UK) Ltd* v *Davy Offshore Ltd* (see note 42, *supra*).

78. *Co-operative Retail Services Ltd* v *Taylor Young Partnership Ltd* (see note 22, *supra*) and the other cases discussed above.

79. *Tyco Fire & Integrated Solutions (UK) Ltd* v *Rolls-Royce Motor Cars Ltd* (see note 62, *supra*).

80. *Tate Gallery* v *Duffy Construction Ltd* (see note 60, *supra*).

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CHAPTER FOURTEEN

BONDS AND INSURANCE

Neil White

INTRODUCTION

14.1 The reason for including a chapter on bonds in this book is that bonds have some superficial similarity to insurance contracts, mainly in the way that they are provided (some insurers will issue bonds) and because they provide a form of financial recourse in the event of risks occurring.

14.2 In construction, bonds are typically used as security for performance of the contractor but increasingly are provided as an alternative to a retention and also security for the employer's performance. Where used as security for the contractor's performance, they are often employed as an alternative to a guarantee from the parent company of the contractor's group (for example where the contractor is itself the holding company of the group) and are often treated as an alternative to a parent company guarantee when, in fact, it is nothing of the sort. However, contractors are usually reluctant to offer both a parent company guarantee and a performance bond since both represent a cost to the contractor.

THE NATURE OF A BOND

14.3 Originally, a bond was issued as security for performance and simply imposed on the provider of the bond (the "surety") a penalty if the obligation was not performed. Frequently, the surety was not required to check whether the relevant obligation had been performed or not but simply had to take the beneficiary's word that the performer of the obligation (the "principal") had failed to perform. Unlike most contracts, a bond is one form of contract where it is possible to require payment of a sum greater than the loss suffered because a bond such as this (known as a "single" bond) is not contractually connected to the underlying obligation.

14.4 There has developed a different type of bond known as a "double" bond, which adds to the pure obligation to pay on default conditions governing such payment. Typically, such conditions might require the beneficiary to prove or provide evidence of the principal's failure to perform and might also require the beneficiary to establish the amount of loss suffered.

14.5 A bond is closer in nature to a guarantee than it is to a contract of insurance, as a bond provides security for performance, similar to a guarantee and the contract of insurance provides indemnity against certain risks occurring. In addition, insurance contracts depend on two principles:

(1) They are contracts of the "utmost good faith". This means, in effect, that the insured and the insurer must always act reasonably to each other in a wholly open and honourable manner. This is a continuing obligation during the subsistence of the policy (*Orakpo* v *Barclays Insurance Services Limited*)[1] and is a mutual obligation of

1. [1995] LRLR 443.

insurer and insured (*Banque Financière de la Cité SA* v *Westgate Insurance Co Limited*).[2]

(2) The insured must make full disclosure of all material facts and must not misrepresent material facts. Non-disclosure or misrepresentation potentially entitle the insurer to avoid the policy.

14.6 Whilst a bond may be vitiated by fraud or be terminable owing to misrepresentation on the part of the beneficiary, this does not go as far as a duty of utmost good faith and there is no continuing obligation once the bond is entered into. Once issued, a performance bond has to be honoured, in the absence of fraud, although with a conditional bond, this principle may be substantially diluted.

THE MODERN USAGE

14.7 Until comparatively recently, bonds were written in archaic language which reflected the history that a bond was an instrument which imposed a penalty on the surety on the happening of an event. This language came in for severe criticism in *Trafalgar House Construction (Regions) Limited* v *General Surety and the Guarantee Co Limited*,[3] in which Lord Jauncey of Tullichettle said that he found:

> "great difficulty in understanding the desire of commercial men to embody so simple an obligation in a document which is quite unnecessarily lengthy, which obfuscates its true purpose and which is likely to give rise to unnecessary arguments and litigation as to its meaning".

14.8 As a result, modern bonds look and behave much more like commercial contracts, the only distinction being that the beneficiary gives no consideration for the surety's promise, which is the reason why all performance bonds are executed as deeds. In this regard, they become very similar to collateral warranties.

CONDITIONAL AND ON-DEMAND BONDS

14.9 Many modern bonds and, in particular, performance bonds in respect of construction contracts are what have become known as "conditional" bonds, which are similar to the old "double" bond. Such a bond will be demanded by the Employers as a condition of entering into a building contract with the Contractor but it will usually be a secondary obligation. In other words, the surety will have to perform the Contractor's obligation or make payment in lieu only if the Contractor fails to do so. Many guarantees (and this will often apply to a parent company guarantee) create a primary obligation, so that the guarantor is equally liable with the Contractor and the beneficiary of the guarantee may look to either for performance of the primary obligation.

2. [1991] 2 AC 249.
3. [1996] AC 199.

14.10 The bond will provide that, before the surety is liable, the beneficiary must demonstrate both that the Contractor has failed to comply with the relevant obligations (usually the due performance of its obligations under the Building Contract) and that the beneficiary has suffered loss as a result. Many bonds require that it must be demonstrated "under and in accordance with" the terms of the Building Contract. The effect of this is that the beneficiary will require either an admission of liability from the Contractor and his acceptance of the amount of the loss or an award of an adjudicator or arbitrator covering these two factors or a judgment. In the absence of such evidence, the surety would be entitled to refuse to perform or pay.

14.11 The contractor's failure to perform through insolvency can give rise to difficulties following *Perar BV* v *General Surety*,[4] which held that where the contractor's right to continue the work had been terminated in accordance with the terms of the contract, his failure to complete the work could not amount to a repudiation of the contract. Thus, where the Contractor's employment under the contract is terminated because of his insolvency, his subsequent failure to complete the works would not amount to repudiation. As the insolvency itself is not a breach of contract (in the absence of an express provision to that effect, which most contracts do not contain) there has been, therefore, no failure to comply with its obligation by the Contractor and no call under the bond can be made. This situation would not arise where termination has occurred as a result of a previous breach, as that previous breach itself would enable a call under the bond to be made.

14.12 As most forms of contract provide for termination of the contract or the Contractor's employment under it in the event of insolvency, without making insolvency itself a breach, this problem must be addressed expressly in the bond.

14.13 On demand bonds are similar to the old single bond and typically do not require proof by the beneficiary that the event giving rise to liability under the bond has occurred, nor the amount of the beneficiary's loss.

14.14 Many modern bonds, which are described as on demand bonds, actually contain conditions, but are treated as on demand bonds because the conditions are so easy to satisfy. For example, the beneficiary may be required to give notice of demand in a particular form or to provide a specified amount of detail concerning his claim. Equally, an on demand bond may enable the beneficiary simply to call the full amount payable on the specified event occurring, regardless of the beneficiary's actual loss. However, even though the beneficiary may not have to prove that the relevant event has occurred or the amount of its loss, any demand must still be made in good faith.

14.15 On demand bonds are not popular in the UK construction industry, mainly because, once the demand has been made and paid, the Contractor (or whoever has provided the bond) is then faced with the problem of recovering the payment if he is able to establish that the payment should not have been made or too much was paid. If the beneficiary has become insolvent in the meantime, that is the Contractor's loss. However, there are a number of circumstances where an on demand bond is appropriate and some of these are dealt with in the section on the types of bond below. Subject to those specific exceptions, however, sureties generally favour conditional bonds because conditions sometimes enable them to avoid liability on technical grounds—see for example *Oval (717) Limited* v *Aegon Insurance*.[5]

4. (1994) 66 BLR 27.
5. (1997) 85 BLR 97.

CATEGORIES OF BOND

14.16 There are a number of different types of bonds which are commonly used in the construction industry and these include the following.

Performance bond

14.17 This is probably the commonest type of bond in the construction industry and contractors will be expected to provide performance bonds on the majority of larger projects, particularly if a parent company guarantee is not available. Performance bonds are also common on international projects, sometimes in preference to a parent company guarantee; they are perceived as being easier to enforce, as they are often provided by the local subsidiary of the surety and because a bank or insurance company is perceived as carrying less risk than the parent of a trading company.

14.18 A performance bond will usually be for an amount equal to 10 per cent of the sum payable to the Contractor under the building contract and will apply to claims notified to the surety prior to practical completion of the project or prior to expiry of the defects liability period (usually one year after practical completion). It is possible to negotiate extended liability periods, but as the extensions usually come at significant additional cost which will be added to the price by the Contractor, many Employers do not regard the extension as beneficial.

14.19 A performance bond for a construction project will need to be related to a breach of the Contractor's obligations under the building contract. However, this may not be the only criterion. For example, where the project comprises a construction of some form of plant, there may well be performance tests to be carried out on completion to demonstrate that the plant is performing properly and the Contractor may be required to provide a bond which can be called if the performance tests are not passed by a particular date. Many PFI/PPP contractors will require the Contractor to operate the building or structure constructed as part of the project to specified levels of service and to provide a bond which can be called if those service levels are not achieved.

14.20 The Association of British Insurers published a revised form of performance bond following the decision in *Perar* (see above). Unfortunately, this form of bond is often not acceptable to banks providing finance for construction projects, or, indeed, to sophisticated developers. The principal objections to it are:

(1) The bond does not deal sufficiently with the consequences of the decision in *Perar* and there is therefore a risk that the bond may not be called on the Contractor's insolvency, or, at least, until completion of the project.
(2) Apart from this, the bond only requires the surety to "satisfy and discharge the damages sustained by the Employer" and it may well not be possible to calculate such damages until completion of the project.
(3) The standard form prohibits any assignment of the benefit of the bond. Banks providing finance for construction projects will normally expect to take an assignment by way of security or a charge over the bond.

14.21 The result is that bespoke forms of performance bond are frequently used or the ABI form is substantially amended.

14.22 The ICE 7th Edition also contains a standard form of performance bond which is in modern terms and is a conditional bond, in that payment will only be made following production of a certificate issued by the Engineer under clause 65(5) of the contract. As such,

it is not a full performance bond which will answer in the event of any breach by the Contractor of the contract as payment will be made only in the event of "default" as defined in clause 65. following which the contract has been terminated.

Retention bond

14.23 Under most forms of construction contract the Contractor is not entitled to payment of the full value of the work by way of interim or stage payments during the course of the work but only a specified percentage (usually 95 per cent or 97 per cent). The balance is known as the "retention" and the Employer is usually entitled to use the retention to satisfy any claims that he may have against the Contractor under the building contract. Typically, half of the retention is released to the Contractor at completion and the balance at the end of the defects liability period.

14.24 As retentions have an impact upon the Contractor's cash flow, more and more Contractors now offer a retention bond. As such a bond would replace a cash sum which would otherwise be available to the Employer, it is vital, if it is to be of equal value to the Employer, that the bond contains no, or very simple, conditions which are easily satisfied. In other words, the bond must be, or must be very close to, an on demand bond. Unfortunately, although many Employers are willing to accept retention bonds, it is often the case that the sureties are not prepared to issue bonds which are either unconditional or have very limited conditions.

14.25 There is a further objection to the acceptance of retention bonds. Where a project is being financed by a bank, the Employer will not usually have to draw the amount of the retention from the loan and the amount of the retention will be retained by the bank. The Employer does not therefore borrow the amount of the retention and does not have to pay interest or other charges on it. Therefore, if a retention bond is accepted, the Employer has to borrow the amount of the retention in order to pay the Contractor and will therefore be incurring additional interest and charges.

Advance payment bond

14.26 Occasionally, it is appropriate that payment in advance is made to the Contractor as part of the amount payable under the building contract before any work is done. This may happen, for example, where there are tax advantages to the Employer in paying in advance (perhaps because there is a change in the tax regime which would occur during the course of the project which would remove tax benefits for the Employer if payment had not already been made). It can also happen when a small contractor has been employed on a project because of its particular skill, but it does not have sufficient resources of its own to enable it to acquire all of the materials and plant needed to start the project. In these circumstances, because the Employer will have paid something (sometimes a substantial sum) for nothing, it needs to ensure that if, for whatever reason, the Contractor does not complete the job before the advance payment has been fully earned, the Employer can recover its money. Clearly, insolvency is the major risk here.

14.27 Advance payment bonds take a number of different forms. Sometimes they are on demand bonds or have very limited conditions, and in other cases they are much closer to conditional bonds. Which is appropriate will depend on the circumstances of the project, the amount of the payment and the resources of the Contractor. If the bond is an on demand bond or close to it, then the bond need provide a principal amount of no more than the original

advance payment, as there will be little delay between the Contractor's failure to perform and the Employer receiving its money under the bond. On the other hand, the longer that period is likely to be, the more the Employer is likely to incur by way of financing costs and loss of revenue and consideration should, therefore, be given to requiring that the principal amount payable under the bond should be for a greater amount than the advance payment alone.

14.28 There is a standard form of advance payment bond incorporated into the 2005 JCT main contract forms which is in a generally acceptable format.

Bid bond

14.29 These bonds are supplied by Contractors bidding for large-scale projects and are designed to protect the prospective Employer from loss because the Contractor, having tendered and possibly even won the tender, withdraws before signing the contract causing delay to the project and causing the Employer to incur the costs of having to re-tender.

14.30 Bid bonds are less common than they were, partly because the lead time on procuring large-scale projects, particularly those procured on a PFI/PPP basis, is so great and the tendering costs of a Contractor are so large that the additional cost is simply not acceptable.

Goods and materials bond

14.31 These bonds have become more common because of the frequency with which subcontractors and suppliers include retention of title clauses in their conditions of supply. It is usually impossible for an Employer to ensure that, having paid the Contractor, the Contractor will pay the subcontractor or supplier or that such payment will be effective to release the retention of title clause. If the Contractor becomes insolvent before passing on the payment, the Employer may find himself having to pay twice for the same materials. Many Employers and banks are therefore unwilling to pay for materials until they are incorporated into the building but this can cause cash-flow difficulties and bonds can now be obtained to protect Employers from the risk of having to pay twice in these circumstances and the 2005 JCT main contract forms have a standard form of such a bond annexed.

Maintenance bond

14.32 As the Contractor is usually paid the majority of the price on completion of the works, it is often felt that the balance of the retention alone is not sufficient security to ensure that it performs its obligations with regard to commissioning and testing and remedying defects during the defects liability period. A maintenance bond is provided for security for these obligations.

CHAPTER FIFTEEN

PROPERTY INSURANCE (UNDER HIGHER TIER PROPERTY DOCUMENTS)

Marshall Levine

GENERAL

15.1 Above the relationship between client and its builder/contractor and design team are the relationships which allow the development projects to be commissioned and funded. The general contractual relationship between a developer, a funding institution, a tenant and the developer's design team and main contractor can be seen diagramatically in Appendix 3. Although this diagram may initially seem complicated, the relationships reflect normal "day-to-day" contractual relationships between the main players, and in reality they only reflect the network of contractual duties and liabilities owed in a typical UK building project, involving a funding institution, typically a bank or consortium of banks, or pension fund, insurance fund, equity fund, a property developer, and a tenant or tenants.

15.2 Each of the agreements between these parties will usually contain principal contractual and indemnity clauses; first, in relation to the liability for the carrying out and completion of the works; and secondly, liabilities to third parties, and thirdly a possible loss of rent incurred by the landlord if the tenant fails to pay, whether under a lease or an agreement for lease.

15.3 In addition, the reader should not be confused by a reference to the possibility of the agreement for lease involving the client/developer, the fund and the tenant. The structure is best explained using the diagram in Appendix 3. In normal circumstances the lease would be granted pursuant to an agreement for lease, under which the tenant is promised his lease at or immediately after practical completion of the development, when the building becomes available. This may therefore require a tripartite agreement between the developer who is building the property as new, or refurbishing existing property, e.g. converting a shell (often described as a refurbishment, or renovation project), secondly the fund which is proceeding to forward purchase it at or after practical completion and which eventually becomes the landlord, and thirdly, the tenant or tenants. Such agreements may be signed on a pre-letting basis, or possibly signed after the main development agreement between the developer and fund is signed, in which case it is possible that the developer will have signed agreements for lease with a tenant or tenants before the fund has come onto the scene.

15.4 The contractual lines beneath the developer, with the design team on the one hand and the contractors on the other, are merely reflective of the traditional contract method, which is described in Chapter 1, whereas the dotted warranty lines reflect separate collateral obligations owed between the design team and the fund or tenant, as appropriate on the one hand, and the contractors on the other hand, owed again to the fund or tenant as appropriate. The shaded but phased warranty lines are described as "hopeful" because in normal circumstances (though there may be exceptions) subcontractors would not give collateral warranties directly to tenants and funds, because within a complex contractual framework this would be too cumbersome to administer. Possibly what would happen would be that the warranties owed

by subcontractors and even suppliers to the developer, would be passed on in favour of perhaps the fund or tenant by way of a declaration of trust by the developer in favour of the beneficiary of whatever warranties it has received. Alternatively there could be an agreement to enforce such rights for and on behalf of the beneficiaries of warranties, if such rights have a prospect of success in the courts, but not beyond such obligation.

DEVELOPMENT AGREEMENT BETWEEN THE DEVELOPER AND THE FUND

15.5 The development agreement between the developer and the fund will usually include the following obligations for the developer:

- to covenant to build the development in a good and workmanlike manner, in accordance with good building practice and, depending upon the extent of the obligations, to secure that such building works are fit for the purposes intended;
- to insure such works until practical completion under the building contract, which is the date when the architect certifies, under normal building contracts, that the building works are practically complete, save any snagging works.

15.6 After practical completion under the building contract, the funding institution, as ultimate landlord of the building, will usually assume the comprehensive insurance obligations through direct obligations back to the developer. The insurance obligations include the following features:

- That the insurance is in the joint names of the funding institution, the developer and the contractor. (See *Mark Rowlands Ltd* v *Berni Inns Ltd*,[1] and see Chapter 13.)

15.7 Alternatively, although not advisable from the point of view of the funding institution, the funding institution's interest may be merely noted on the policy effected by the developer or the contractor. Noting usually used to have three key effects: (a) it preserved the legality of the policy under section 2 of the Life Assurance Act 1774, which requires all interested parties to be identified; (b) it prevented the exercise of subrogation rights by the insurer (see *Mark Rowlands*); and (c) it allowed the party whose interest was noted to effect an application under section 83 of the Fires Prevention (Metropolis) Act 1774.

15.8 Following the *Mark Rowlands* decision it is now clear that the Life Assurance Act 1774 does not apply to policies on buildings, and the insurers have no subrogation rights, irrespective of noting, in the case where it is a tenant's interest that is noted on a landlord's policy. The same principle should apply to any party having an interest in the premises, just being noted on the policy in any event.

- Occasionally the developer agrees with the funding institution that the CAR insurance policy, taken out by the contractor in the joint names of the funding institution, the developer and contractor, is sufficient for the purposes of compliance with the developer's immediate insurance obligations to insure the works directly.
- It is important that the risks itemised in the insurance obligations correspond with the contractor's risks under the building contract.

1. [1986] QB 211.

- The insured is under an obligation to apply the insurance proceeds in the event of a risk event occurring, with all possible speed in the full cost of reinstatement of the building (see the meaning given to "reinstatement" in *Camden Theatre Ltd* v *London Scottish Properties Ltd*;[2] and *Vural Ltd* v *Security Archives Ltd*[3]) (very rarely are these policies valued policies). The full cost of reinstatement would be construed as covering the cost that might properly be expected to be incurred at the time when reinstatement takes place, as opposed to the date on which each annual insurance premium was paid (see *Gleniffer Finance Corporation Ltd* v *Bamar Wood and Products Ltd*).[4] The reinstatement obligations usually deal with reinstatement in accordance with "the development documents", being the documents relating to the original development. However, strict compliance with such obligations may not be possible.
- A provision is included confirming that the insurance monies paid out in advance of reinstatement should be held in a separate account in the funding institution's name for reinstatement purposes. This is to avoid a developer's receiver or liquidator taking the insurance proceeds and claiming a proportion of it, in the event of the developer's receivership or liquidation.
- There is usually an indemnity in favour of the funding institution given by the developer in relation to any claims and demands arising from the development's construction, accident or injury caused thereby to third parties, or in relation to any other similar claims whatsoever.

15.9 There are several important points to note:

- First, there should be no conflict between the development agreement and the building contract (between the developer and the contractor), because in reality the contractor's insurance policy will cover the insurance of the works.
- Secondly, if the contractor's insurance policy is the relevant policy, a note of the fund's interest should be endorsed on the policy as a matter of priority and an acknowledgement that this has been done should be given by the developer, before the development agreement is signed up.
- Thirdly, the contractor's policy should be generally reviewed, when acting for the funding institution, and should be provided by the developer, in readiness for a request by the fund's advisers to review the policy. The fund's advisers should not rely on general front sheet information produced by the developer or the contractor but should look to investigate any special exclusions, special endorsements and the ambit of the cover. In addition they should perhaps require the developer or the contractor, depending upon who carries the insurance responsibility, to procure from the insurer a statement that at the date of the development agreement no events have taken place of which the insurer is aware, which could render the policy to be declared void for nondisclosure or in breach of normal insurance rules.

15.10 If the developer, in a building contract between the developer and the contractor, agrees to insure the works in the joint names of the contractor and the developer, and later covenants in the development agreement to insure in the joint names of the funding institution, the developer and the contractor, this will be in conflict and give to the funding institution a good discharge for the insurance monies and it would partially have control over

2. Unreported, 30 November 1984.
3. (1990) 60 P & CR 258.
4. [1978] 2 Lloyd's Rep 49.

them (see *Penniall* v *Harborne*[5]). If he does this under the funding agreement, then clearly the contractor must consent to such an arrangement.

AGREEMENTS FOR LEASE

15.11 As with the development agreement, similar obligations exist under the agreement for lease between the developer or the funding institution as landlord (where the funding institution is granting the lease and the developer carrying out development obligations, in the agreement for lease between the developer, the fund/landlord and the tenant).

15.12 Important features worth noting:

- the developer's obligations to carry insurance up to practical completion and the fund's obligation to carry such insurance beyond that date, as if the lease with the tenants had been granted, and thereafter fulfil the obligations of the landlord under the lease;
- the tenant's interest as prospective lessee of the building or part of the building, should be acknowledged by whoever carries the insurance responsibility, whether the funding institution as landlord, or the developer or contractor.

15.13 It should be noted that usually there is no general obligation imposed upon a landlord under a lease, unless there is a provision to this effect, obliging a landlord to use the insurance monies received from the insurers to reinstate the premises.

15.14 Section 83 of the Fires Prevention (Metropolis) Act 1774 provides that where a loss is incurred by a fire which is covered by insurance (and covers only fire insurance, see *Vural Ltd* v *Security Archives Ltd*[6]), any person or persons interested in such building, the occupier, owner of the property, or indeed the mortgagees (see *Sinnott* v *Bowden*[7]), as the case may be, can call upon the insurer to apply the insurance monies to the extent possible in rebuilding the premises, instead of paying them directly to the insured. This Act applies to properties in England and Wales and is not limited to the metropolitan area, and applies only to buildings. However, the application to the insurer must be made *before* the insurer pays out sums involved to the insured.

15.15 The tenant should not rely on the Act but should obtain a direct covenant by the landlord to reinstate the property, including the cost of removal of debris and demolition and obtaining planning permission, as well as full compliance with building or other regulations. This will secure the rebuilding, because otherwise the landlord may simply be obliged to apply the insurance monies towards reinstatement, in which case the landlord would not be obliged to top up any difference between what is required and what is received from the insurance company (see *Mumford Hotels* v *Wheeler*[8]).

15.16 It is possible to contract out of the provisions of the Act if it suited, say, a bank under a mortgage not to make available the rights under the Act to a borrower. However, it could clearly not defeat other interested persons.

15.17 Also, the tenant is interested in knowing that the insured is under an obligation under the agreement for lease to actually reinstate the premises or such part of it as is

5. (1848) 11 QB 368.
6. (1990) 60 P & CR 258.
7. [1912] 2 Ch 414.
8. [1963] 1 All ER 250.

damaged, and not simply to use the insurance proceeds for the purposes of reinstatement, except to the extent that this is impracticable or impossible.

15.18 Furthermore, in relation to impracticability or impossibility the courts would have to decide what is impracticable or impossible, and if acting for a landlord it is important to qualify such expression as far as possible, with the words "in accordance with the views of the landlord or their advisers".

15.19 There are problems relating to the ownership of insurance monies if reinstatement is impossible or prevented (see *Re King*[9] and *Beacon Carpets Ltd* v *Kirby*[10]) and therefore it is still common to expect a landlord to require a right to break a lease if reinstatement is impossible or prevented within a number of years from the date of the event of damage or destruction.

15.20 Under an agreement for lease, usually the prospective landlord shall, until the grant of the lease, arrange insurance cover for the prospective tenant under its buildings insurance, but if the landlord is carrying out works then, in addition, the landlord will keep insured or arrange to keep insured (in the joint names of both) itself, tenant, any developer (if the landlord is not carrying out the development itself), the contractor and the Landlords Works (sometimes called shell and core works) at not less than the full reinstatement rebuilding and/or replacement cost against loss or damage by the risks covered under a comprehensive CAR policy.

15.21 Full reinstatement or rebuilding cost in the circumstances means the full cost which might properly be expected to be incurred at the time of reinstatement.

15.22 In essence the landlord uses the policy under the building contract, taken out either by itself or by the contractor, as its way of fulfilling the insurance obligations to the tenant under the agreement for lease.

15.23 If the tenant is also carrying out Tenants Works (often called Fitting Out Works), the landlord will wish to have these works covered and integrated into its CAR policy (taken out for the landlord's works) or that they be subject to a separate obligation (for the tenant to arrange cover either itself or through its contractor in the joint names as abovementioned).

15.24 With both Landlords Works and Tenants Works proceeding in parallel, the insurance position can be tenuous and complicated, and therefore it is best for the Insurance brokers of Landlord, Tenant, Developer and insurance representatives of the Contractor to communicate and plan the insurance arrangements as early as possible. Of course, when the Landlords Works are finished, and practical completion or equivalent stage has been reached, then the Lease is usually granted and the building owner's building insurances (probably the Landlord himself) come into effect. The Landlords Works become integrated into the fabric of the building or structure being insured. Equally, after the Tenants Works are completed, either pursuant to the Agreement for lease or a Licence to Alter, these works will be integrated into the fabric of the building or structure and the main buildings insurance policy will take over. Hopefully the Lease and the buildings insurance policy will be integrated and use common parlance and adopt the same description of risk cover.

LEASE

15.25 After the lease is granted to the tenant, pursuant to the terms of the agreement for lease, the terms and covenants in the lease will dictate:

9. [1963] 1 All ER 781.
10. [1984] 2 All ER 726.

(1) whether the landlord or tenant assumes the basic property insurance, third party liability insurance, and the loss of rent insurance;
(2) which party therefore assumes the obligation to reinstate the premises;
(3) the responsibility of the tenant to pay premiums; and
(4) the availability of the policy or a copy or details thereof, to the party not assuming the prime insurance obligations.

15.26 The Lease, whether Headlease or Underlease, as abovementioned, will be granted only when all preconditions under the Agreement for Headlease or Underlease is granted, including any building works being completed.

15.27 The landlord will usually keep the buildings or structures (other than plate glass —where a waiver will be sometimes granted) insured against loss or damage by insured risks in the full reinstatement cost (taking into account building costs inflation). The insurance obligations are subject to the agreed exclusions, limitations, etc. and insurance being available in the relevant insurance market—London, Europe, the world—on reasonable terms acceptable to the landlord.

15.28 The landlord will usually be paid by the tenant the insurance rent and insurance valuation costs (every so often but usually not more often than once a year) less deductions or excess sums.

15.29 In addition there are usually covenants by the tenant:

- to give notice of material information or matters;
- not to make void the policy of insurance;
- to comply with insurer requirements;
- to give notice of damage or loss relating to the property;
- not to effect other insurances, but if the tenant receives proceeds of other insurances they must pay the proceeds to the landlord;
- to pay the landlord an amount equal to the amounts that the insurer refuses to pay out because of an act or omission of the tenant.

15.30 There is also an obligation by the landlord to reinstate using the monies received from the insurers, and if there is any deficiency in monies the landlord pays the difference. This risk arises because the landlord nominates, if he insures, the amount of the insured sum. If the insured sum is not enough, then he must suffer the financial consequences. The tenant should bear this point in mind.

15.31 Also, if an insured event happens, then the rent, insured rent and service charges under the lease are suspended for a period of time (from two to five years but commonly three years), pro rata to the amount of damage or destruction caused. Usually the landlord will have taken out alongside his buildings insurance or integrated into it a Loss of Rent policy which covers for the loss of rent etc. during this period.

15.32 Also, if it proves impossible or impractical to reinstate the building or structure, the landlord is commonly given a right under the lease to terminate it on short notice (keeping any proceeds of insurance, and without prejudice to rights and remedies available to the landlord against the tenant). The right to terminate a lease is also often given to a tenant if the property has not been reinstated by the landlord within a reasonable period, e.g. two years after damage or destruction.

15.33 If in doubt as to what is included as "Insured Risks", insured risks will include fire, explosion, lightning, earthquake, storm, terrorism, flood, bursting and overflowing of water

tanks, apparatus, or pipes, impact by aircraft, and articles dropped from them, impact by vehicles, riot, civil commotion, and any other risks which the landlord insures against.

LOAN DOCUMENTS

15.34 The banks lending money to commercial property development will require that all policies taken out by the developer or by a commercial landlord will be taken out in joint names of the bank or fund, and the property owner. The insurances should be in full force and effect, in the full reinstatement value and the lenders will seek a warranty that there has not been nor will there be any omission to disclose a fact which would entitle any insurer to avoid or otherwise reduce its liability under or in respect of any such insurance to less than the amount provided in the relevant policy. Also the banker will require a warranty that there are no other insurances in effect under which the borrower is insured or has any rights except for the insurance taken out. The detailed requirements for the contents of the insurance are usually summarised in a schedule to the loan or credit agreement, and will comprise a summary of the policy, any exceptions, and any important detailed provisions.

REFURBISHMENTS

15.35 Complications can arise under the development agreement and the building contract when one is dealing with refurbishments. In relation to the majority of standard JCT building contracts there may be clear reasons why the developer or, in the case of a building owner who is also funding the refurbishment, developer/landlord wishes to retain overall responsibility throughout the building works for insurance.

15.36 The situation usually arises because of the problems of having more than one policy covering the building and the contractor's works. In the event of a claim, which affects both policies, e.g. if the refurbishment works include improvements to an existing envelope of a building, there could be a chance that if there were two policies in existence, one with the landlord covering the external envelope, and the other with the contractor covering the work, both insurers under the separate policies might claim under the "contribution" rules that they are entitled not to pay out the full amount of the insurance proceeds. Thus the sum total of the insurance proceeds under both policies would not cover adequately the monies required to reinstate fully. This is sometimes the reason why tenants' fitting out works are required to be covered by the landlord under the landlord's insurance policy.

COLLATERAL WARRANTIES

15.37 The diagram in Appendix 3 includes reference to a network of collateral warranties. Increasingly throughout UK building projects, collateral contracts became the norm under which the tenants, funding institutions and purchasers of buildings expect to receive direct contracts from the professional consultants and the contractors engaged on the project. This practice arose relatively recently because of inherent difficulties in establishing direct relationships in the law of tort between funds and tenants, the members of the design team and/or contractors engaged by a developer on a project. Following the decision by the House of Lords

in *D & F Estates* v *Church Commissioners*[11] collateral warranties have become much more widely used. This case has radically curtailed negligence claims in the construction industry and *Caparo Industries plc* v *Dickman*[12] (which related to auditors' advice) confirms that professionals are in the same position and is generally accepted as creating a precedent for professionals' liability in the construction industry. Chapter 3 above summarises the principles of the law of tort so far as relevant for present purposes.

15.38 The various decisions at the highest level discussed in Chapter 3 establish that there is now a severe limitation upon the tortious remedies available to those with an interest in buildings (e.g. funders, purchasers, tenants, etc.). Accordingly such interested parties would be ill advised to rely on their remedies in tort but should rely instead on contractual remedies, hence the growth in use of collateral warranties.

15.39 Collateral contracts, commonly described as collateral warranties or duty of care agreements, are merely expressed as contracts collateral to the main appointments of the design team and the building contractors, under which such members of the design team and contractors enter into direct duty of care obligations to the beneficiaries of the warranties, e.g. funds, purchasers or tenants, and acknowledge their duty of care to such persons.

15.40 It is intended that such collateral contracts are assignable by the beneficiaries to future purchasers of the building, as well as to assignees of the leasehold interests acquired under the lease by the tenants (albeit that professional consultants and contractors try and resist attempts to allow such warranties to be assignable). The most common clauses in collateral warranties include:

- obligations to owe a duty of care to the beneficiaries of the warranties;
- obligations to maintain professional indemnity insurance for a given number of years, usually reflective of the period of liability of the consultant under the collateral warranty (6, 12 or 15 years);
- a licence granted to the beneficiaries of the warranties allowing them to reproduce documents for the project and throughout the life of the project;
- step-in, or novation rights, entitling the funding institution, say, to step in and take over the engagement of the professional consultant or contractor, if the developer becomes insolvent or there is an event of default under, say, a loan agreement or a funding agreement.

15.41 From the insurance perspective, there are various ways in which the collateral warranties affect insurance liabilities. They are as follows:

(1) In relation to the collateral warranties coming from the design team, it is common for there to be a duty on behalf of the consultant owed not only to the developer under the original appointment, but also to the third party beneficiary, to maintain professional indemnity insurance, or at least to use best or reasonable endeavours to maintain such insurance. Safeguards are usually introduced into the warranty to ensure that this obligation proceeds only so far as such insurance is commercially available in the insurance market. This obligation therefore prevents a professional consultant from failing to continue his professional indemnity insurance by not paying his premiums, because this would be tantamount to risking the duty of care liability under the collateral warranty. PI cover is renewed annually and therefore the warranty should be covered on such renewal. PI cover operates on a "claims made" basis (see Chapter 10)

11. [1989] AC 177.
12. [1990] 2 AC 605.

and therefore it is crucial that the warranty be covered by insurance through its duration. The warranty may be uninsured if the policy wording is amended or restricted during the term of the warranty.

15.42 It should be acknowledged that the value of a professional consultant's duty of care is only as good as the professional indemnity insurance he has, because there is a significant risk that the underlying partners of a professional practice these days, or worse still, a limited liability company set up by a professional firm for the purposes of engaging in their work, would not be able to meet the liabilities incurred if contractual negligence or negligence generally is established against a particular practice in relation to a project. The professional consultant will therefore be guided by the terms of its PI cover, because otherwise his own position, and the position of those seeking to rely on the warranty, may be adversely affected.

(2) In relation to contractors' collateral warranties, the duty is usually to the third party to maintain the CAR policy in force, in either the joint names of the existing contractor, and possibly the developer, as well as the third party tenant or fund. These may present problems with the contractor's own insurers, particularly where the contractor has a company-wide policy covering all its projects and whereby insurers will try and resist a third party name being inserted on the policy. However, mortgagee protection clauses will commonly be included in the policies in any event and sometimes funders will acknowledge that a note of their interest on the policy will be sufficient for their purposes, rather than full joint names. There are clearly dangers in allowing the third party to engage upon carrying insurance itself, to the extent that it feels that the contractor has not taken out a sufficient policy and it may well be the case that third parties are unlikely to have a proprietary interest in the property until, for example, practical completion in any event and therefore the problem may not arise. They will, however, have a contractual interest and it may serve their purposes to advise the contractor's insurers in writing of their contractual interest under the relevant agreement for lease or the funding agreement as appropriate.

15.43 The warranty should require the insurance to be maintained for the duration of the warranty. To ensure that the warranty is covered by insurance, approval from the insurers to the collateral warranty in question should be obtained.

(3) If the collateral warranty does not contain an obligation on the part of the consultant to carry PI insurance, this may allow the consultant and its PI insurers to settle or compromise claims made against the consultant without first obtaining the permission of the beneficiary of the warranty thus putting in jeopardy the claim and value of the consultant's obligations under the collateral warranty (see *Normid Housing Association Limited* v *R John Ralphs and Others*[13]).

CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

15.44 These days, the collateral contracts have gradually been replaced (but not entirely) by rights under the Contracts (Rights of Third Parties) Act 1999 under which rights are defined and established under the original contracts with the construction and design teams. The JCT 2005 (now 2007 reprint) regime offers this as an option to collateral warranties.

13. (1990) 43 BLR 18.

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CHAPTER SIXTEEN

HEALTH AND SAFETY AND CONSTRUCTION (DESIGN AND MANAGEMENT) REGULATIONS 2007

Charles Pimlott

INTRODUCTION

16.1 Health and safety considerations are playing an ever-increasing role in all activities in society. In some instances it is a (rightly) derided role. The Corporation of London's decision to ban unattended swimming in the ponds of Hampstead Heath is a recent example of the overzealous implementation of health and safety policy.[1] Health and safety in the construction context is quite a different matter. Accidents with serious consequences occur too frequently in the construction sector for health and safety considerations to be neglected.

16.2 The construction sector accounts for roughly 10 per cent of Britain's GDP, around £90bn.[2] The industry employs roughly two million people or about six per cent of the working population.[3] Even allowing for that activity and the number of employees, the construction industry accounts for a disproportionately high number of fatalities or injuries. Around 25 per cent of fatal injuries and 15 per cent of major accidents each year occur in the construction sector.[4] The Health and Safety Executive ("HSE") believed that the cost to the construction industry of RIDDOR accidents alone (i.e. only those reported) was as much as £5.4bn to £5.5bn between 1996 and 2003.[5] The statistics suggest that the construction industry is one of the more dangerous environments to work in.

16.3 The risk of injury and death in the construction sector has led to specific legislation being effected to ensure that health and safety considerations are central in any construction project. It is believed that by making health and safety considerations integral to all stages (from commissioning by the client and design onwards) of a construction project then both the construction and the completed building will be safer. It is a noble aim, but difficult to achieve. The legislation initially intended to achieve that aim was the Construction (Design and Management) Regulations 1994 ("the 1994 Regulations") and the Construction (Health,

1. A decision deprecated by Stanley Burnton J in *Hampstead Heath Winter Swimming Club* v *The Corporation of London* [2005] EWHC 713 (Admin); [2005] 1 WLR 2930. For other judicial comments against an excess of health and safety zeal see, for example, the comments of the House of Lords in *Tomlinson* v *Congleton Borough Council* [2003] UKHL 47; [2004] 1 AC 46, especially Lord Hoffmann at paras 27 and 46 and Lord Scott at para 94. Section 1, Compensation Act 2006 represents an attempt by parliament to avoid the risk of liability preventing worthwhile activities taking place.

2. Construction Statistics Annual 2006 published by the Department for Trade and Industry, or see para 64 p. 145 of the HSC consultation document "Revision of the Construction (Design and Management) (CDM) Regulations 1994, Construction (Health Safety and Welfare) (CHSW) Regulations 1996, Approved Code of Practice (ACoP) and Guidance" CD200, published in March 2005.

3. Construction Statistics Annual 2006, published by the Department for Trade and Industry.

4. See tables on pp. 130 to 131 of HSC consultation document CD200, published in March 2005.

5. See para 6 p. 132 of HSC consultation document CD200, published in March 2005.

Safety and Welfare) Regulations 1996 ("the 1996 Regulations"). The 1994 and 1996 Regulations were not totally successful in achieving their aims. As a result both have recently been amended and consolidated in the Construction (Design and Management) Regulations 2007 ("the CDM Regulations").

16.4 The CDM Regulations impose duties on all parties to a construction project. The CDM Regulations, discussed below, aim to make health and safety integral to any construction project from the very outset of the project, even before the design stage. In addition to the CDM Regulations, there are numerous other statutes and regulations which may apply to construction projects. These are also outlined in this chapter.

16.5 A breach of the duties imposed by the CDM Regulations or the other statutes and regulations applicable to construction sites may result in the Health and Safety Executive and/or the police bringing a prosecution either of the relevant company in breach or possibly the directors of that company. A comprehensive treatment of health and safety prosecutions is outside the scope of this work but such prosecutions are increasingly common and they are briefly discussed in this chapter. Various insurance issues tend to be raised in the course of such prosecutions. Those issues are also discussed in this chapter.

16.6 Although breaches of the CDM Regulations may result in criminal penalties, a breach of certain of the duties imposed by the CDM Regulations may also lead to civil liability. That aspect is also discussed below.

16.7 Given the central importance of health and safety in construction matters, many insurers are adopting a more active approach to their insureds' health and safety regimes. Besides any laudable wish to reduce accidents in themselves, insurers are adopting that approach on the pragmatic basis that prevention tends to be less costly than the cure. Reducing the numbers of claims allows the insurer to increase profitability, without increasing the premiums paid by the insured and while reducing fatalities and injuries.

16.8 Gable Underwriting ("Gable") is an example of an insurer working with its insureds to improve the insureds' health and safety. Gable insures many small and medium subcontractors who may have less well resourced health and safety departments than larger contractors. Gable provides a digital library of health and safety videos accredited by the Royal Society for the Prevention of Accidents ("RoSPA"). Some videos are aimed at managers, for example on how to conduct a risk assessment, while others are aimed at site workers, for example on manual handling. Each employee of the insured is provided with a password to log on to the system. The insured's employees log in and watch relevant videos. As an employee watches the video he is asked appropriate questions. These must be correctly answered for the video to continue and the individual to pass. Provided the employee passes, a RoSPA approved certificate is issued. The system keeps a record of all the certificates.

16.9 Gable, its insured contractors and their employees benefit from fewer accidents. Premiums are reduced in proportion to the number of employees who have undergone training and the extent of that training. Further, the insured contractors benefit from off-the-shelf health and safety training. Gable benefits from fewer claims. Gable is also better able to defend such claims as are made as they retain the detailed training records. Problems with the insured's record keeping are therefore avoided.

16.10 It is expected that the trend for insurers to take a more active approach is likely to grow in the future.

CONSTRUCTION (DESIGN AND MANAGEMENT) REGULATIONS 2007

Introduction

16.11 The CDM Regulations, which came into force on 6 April 2007,[6] are intended to:

(1) "improve the management of risk",[7]
(2) "simplify and clarify what duty holders need to do",[8]
(3) "recognise the influence of clients on the whole process",[9] and
(4) "achieve effective planning and management, with the minimum of bureaucracy".[10]

16.12 The overarching principle is the integration of health and safety into the fabric of the project. Safety starts by, for example, ensuring that the client allows enough time for the project to be undertaken safely: a rushed project is likely to be ill-planned and less safe. By considering safety in all aspects of the design the building can be designed to make its construction safer and the final building safer for the users. Finally, the construction should be planned and phased appropriately to maximise safety.

16.13 The Health and Safety Commission ("HSC") was concerned to reduce the amount of paperwork, so that the CDM Regulations would not simply generate paper but would actually be effective in promoting health and safety. There is therefore an emphasis on the reduction of paperwork.[11] However, this is almost certainly wishful thinking. A breach of the CDM Regulations results in criminal penalties. A reduction in paperwork is never likely: nobody wants to find themselves the subject of a criminal investigation without an adequate audit trail.

16.14 The CDM Regulations consolidated and simplified the 1994 Regulations and the 1996 Regulations, both of which were passed to implement the Temporary or Mobile Construction Sites Directive.[12] The CDM Regulations are intended to be a single set of regulations governing almost all safety aspects of construction sites.

16.15 To support the CDM Regulations and their implementation an Approved Code of Practice ("ACoP") has been issued by the HSC titled "Managing Health and Safety in Construction".[13] The ACoP has a special legal status, which is summarised opposite its contents page:

> "If you are prosecuted for breach of health and safety law, and it is proved that you did not follow the relevant provisions of the Code, you will need to show that you have complied with the law in some other way or a Court will find you at fault."[14]

16.16 If the provisions of the ACoP are not followed then the burden of proof shifts onto the defendant. It is submitted that a defendant will have difficulty maintaining a defence to a

6. Note the transitional provisions contained in Reg 47, in respect of projects which began before 6 April 2007.
7. Para 2 p. 2 of HSC consultation document CD200, published in March 2005.
8. Para 3 p. 2 of HSC consultation document CD200, published in March 2005.
9. Para 6 p. 2 of HSC consultation document CD200, published in March 2005.
10. Para 10 p. 3 of HSC consultation document CD200, published in March 2005.
11. See e.g. para 27 p. 6 of HSC consultation document CD200, published in March 2005.
12. 1992/57/EEC.
13. HSC, 2007. ISBN 978 0 7176 6223 4.
14. ACoP, p. ii.

civil action or health and safety prosecution where he has failed substantially to comply with the relevant provisions of the ACoP.[15]

16.17 It should be noted that the CDM Regulations and the ACoP will be the subject of a review in about 2009.

APPLICATION OF THE CDM REGULATIONS AND NOTIFIABLE PROJECTS

Construction work

16.18 The CDM regulations apply only to construction work. Construction work is widely defined[16] as "the carrying out of any building, civil engineering or engineering construction work" and includes:

(1) The construction, alteration, conversion, fitting out, commissioning, renovation, repair, upkeep, redecoration or other maintenance, decommissioning, demolition or dismantling of a structure;
(2) The preparation of an intended structure, including site clearance, exploration, investigation, excavation and laying the foundations of a structure;
(3) The assembly of prefabricated elements to form a structure, or the dismantling of such a structure;
(4) The removal of a structure or part of a structure or of any product or waste resulting from the demolition or dismantling of a structure or from disassembly of prefabricated elements which had formed a structure;
(5) The installation, commissioning, maintenance, repair or removal of mechanical, electrical, gas, compressed air, hydraulic, telecommunications, computer or similar devices which are normally fixed within or to a structure.

16.19 The definition of "structure"[17] is also very wide, and includes any buildings, structures comprised of metal and/or concrete, tunnels, shafts, gas holders, roads, sewers, masts, towers and pylons, as well as formwork, falsework, scaffolding and certain types of fixed plant. The wide definition of "construction work" means that care should be taken before deciding whether a particular item of work falls outside the ambit of the CDM Regulations.[18]

16.20 Construction work as defined does not include the exploration for or extraction of mineral resources or activities preparatory thereto carried out at a place where such exploration or extraction is carried out. Nor does construction work include the construction of offshore installations, work to or on ships or, in certain circumstances, the general maintenance

15. See, by analogy: *Kaliszewska* v *John Clague & Partners* (1984) 5 Con LR 62 (architect's failure to comply with codes of practice current at the time of the design held to be *prima facie* evidence of negligence); also *Bevan Investments Ltd* v *Blackhall & Struthers (No. 2)* [1973] 2 NZLR 45.
16. CDM Regulations, Reg 2(1).
17. Defined in Reg 2(1) of the CDM Regulations.
18. See, for example, *Dawe* v *Carski*, 7 September 2004, Unreported, where it was held in the context of the identical definition of "construction work" in the 1996 Regulations, that a funeral pyre constructed to cremate cattle infected during the foot and mouth disease epidemic was a "structure" such that work building it using heavy plant and machinery was construction work within the meaning of the 1996 Regulations.

of fixed plant.[19] Arguably, low grade internal domestic cleaning and decoration will not be covered by the CDM Regulations.[20]

16.21 Where a construction project includes operations which are not themselves construction work, the overlap between the construction and non-construction work should be addressed in the management arrangements and the construction phase plan.[21]

Notifiable projects

16.22 Part 3 of the CDM Regulations imposes additional duties on clients, designers and contractors (regulations 14 to 19) where the project is notifiable, defined[22] as likely to last for more than 30 working days or involve more than 500 person days of construction work.[23] These include the duty of the client to appoint a CDM coordinator[24] and a principal contractor,[25] whose particular duties are then set out in regulations 20 to 24. Part 3 also sets out additional duties required of designers[26] and contractors[27] in relation to notifiable projects.

16.23 Schedule 1 of the CDM Regulations sets out the information which must be supplied to the HSE on notification. Where a small project that is not notifiable requires a short extension, or short-term increase in the number of people, there is no need to notify the HSE. However, if the work or the scope changes significantly so that it becomes notifiable, HSE should be informed.[28]

Client/client's agent

16.24 A client is a person who in the course or furtherance of a business or other undertaking: (a) seeks or accepts the services of another which may be used in the carrying out of a project for him; or (b) carries out a project himself.[29] A client may be an organisation or an individual and can include local authorities, school governors, charities and project originators on Private Finance Initiative (PFI) projects.

Domestic clients[30]

16.25 Where work is carried out pursuant to an insurance policy, a difficulty may arise as to who is the client for the purposes of the CDM Regulations. It seems that, if the insurance

19. See: ACoP, para 13 for a full list of work not intended to be characterised as "construction work".
20. See, for example, *O'Brien* v *Udec Ltd* (1968) 5 KIR 449, CA, and *Matthews* v *Glasgow City Council* [2004] HLR 136 (domestic redecoration work not within the scope of the 1996 Regulations).
21. ACoP, para 14.
22. Regulation 2(1).
23. For example, 50 people working for 10 days. All days on which construction work takes place count towards the period of construction work. Holidays and weekends do not count if no construction work takes place on these days: see ACoP, para 16.
24. Regulation 14(1).
25. Regulation 14(2).
26. Regulation 18.
27. Regulation 19.
28. ACoP para 17.
29. Regulation 2(1).
30. See ACoP para 29: domestic clients are people who have work done on their own home or the home of a family member, that does not relate to a trade or business, whether for profit or not.

company arranges (whether by itself or through an agent) for the construction work to be carried out, or specifies designers or contractors for certain aspects of the work, then it will be the client for the purposes of the CDM Regulations.[31] However, if the insured arranges the work and the insurance company simply reimburses them, the insured will arguably be the client for the purposes of the CDM Regulations.

16.26 Where remedial work is carried out under a home warranty scheme, such as the National House-Building Council ("NHBC") Scheme, it is the provider of the warranty, for example NHBC, who is the client for the purposes of the CDM Regulations.[32]

16.27 It is important to identify the client at the earliest stage possible. If there is doubt, then all possible clients should appoint one of them as the only client for the purposes of the CDM Regulations,[33] as if not they run the risk that all will be considered to carry the client's duties under the CDM Regulations.

16.28 Regulations 9 and 10 contain specific matters in relation to the client's duties for all construction projects. The key duties, which apply to all construction projects are: to check the competence of all those whom he appoints;[34] to ensure that there are sufficient management arrangements in place for the project (including ensuring that there are sufficient welfare facilities as required by Schedule 2);[35] allowing sufficient time and resources for all stages of the project;[36] providing pre-construction information[37] to designers and contractors.[38]

16.29 Regulations 14 to 17 impose additional duties on the client where the project is notifiable. The key duties are: to appoint a competent, adequately resourced CDM coordinator;[39] to appoint a principal contractor;[40] to ensure that the construction phase does not start unless there is in place a construction phase plan and suitable welfare facilities;[41] to provide the CDM coordinator with all necessary pre-construction information[42] and all health and safety information in the client's possession;[43] to ensure that a health and safety file is prepared, reviewed and updated ready for handover at the end of the construction work.

16.30 The ACoP[44] provides helpful guidance in relation to the client's duties in relation to notifiable and non-notifiable projects as set out in the CDM Regulations. Because many clients know little about health and safety, clients are not expected to plan or manage projects themselves, nor do they have to develop substantial expertise in construction health and safety.

31. ACoP para 33.
32. ACoP para 36.
33. Regulation 8.
34. Regulation 4.
35. Regulation 9.
36. For example, ensuring that those with duties under the regulations have sufficient time and resources to comply with their duties, and ensuring that the contractor then has sufficient time to mobilise to site and allocate sufficient staff to allow the work to proceed safely and without risk to health.
37. Pre-construction information means all the project-specific health and safety information needed to identify hazards and risks associated with the design and construction work: an example would be ensuring that the contractor is provided with plans showing the existence and location of electrical and gas services passing underneath the site.
38. Regulation 10(1).
39. Regulation 14(1).
40. Regulation 14(2).
41. Regulation 16.
42. Regulation 15.
43. Regulation 17.
44. At paras 43 to 83.

Thus the duties imposed on clients by the CDM Regulations are aimed at the client arranging for the various things regarding health and safety to be done, rather than requiring clients to do those things themselves.[45]

Designer

16.31 A designer means any person (including a client, contractor or other person referred to in these Regulations) who in the course or furtherance of a business: (a) prepares or modifies a design, or (b) arranges for or instructs any person under his control to do so, relating to a structure or part of a structure.[46] Importantly, and in contrast to definition the 1994 Regulations,[47] a person is "deemed to prepare a design where a design is prepared by a person under his control". It is submitted that the defence previously open to designers that they did not "prepare" the design[48] will be difficult to maintain in light of the new definition.

16.32 Regulation 11 imposes specific duties on designers in respect of all construction work. The standard is one of reasonable practicability, thus designers are not expected to address or consider risks which cannot reasonably be foreseen. The key duties on the designer are: to prepare designs which eliminate hazards and reduce the risks from any hazards that cannot reasonably be eliminated;[49] to provide with his design sufficient information so as to allow other members of the project team to identify and manage the remaining risks, particularly those risks which are not obvious;[50] to cooperate with the client, other designers and the contractor.[51] It is suggested that compliance with regulation 11 of the CDM Regulations will usually be sufficient for a designer to achieve compliance with his duties under regulations 3(1), (2) and (6) of the Management of Health and Safety at Work Regulations 1999.

16.33 Regulation 18 imposes additional duties on designers where the project is notifiable. These are: (a) to ensure that the client has appointed a CDM coordinator at the earliest stage possible; (b) not to commence any design work other than initial design work until a CDM coordinator has been appointed; (c) to cooperate with the CDM coordinator, principal contractor and with any other designers or contractors necessary for each of them to comply with their duties.[52]

16.34 Paragraph 143 of ACoP provides a list of things that designers do not have to do, notably: specify construction methods (except where the design otherwise provides and/or a competent contractor might need such information); exercise health and safety management

45. For example, the client is not expected to visit the site to check or supervise construction work standards, or to specify how work must be done: see ACoP para 83.

46. Regulation 2(1).

47. Which provided, as amended by SI 2000/2380: "designer means any person who carries on a trade, business, or other undertaking in connection with which he prepares a design".

48. See, in the context of Reg 13(2)(a) of the 1994 Regulations, the decision of the Court of Appeal in *R* v *Paul Wurth* (2000) ICR 860.

49. Examples would be to design out things like fragile roofing materials; eliminating roof lights from areas where roof access is needed; providing permanent safe access for work at height.

50. For example, a specific or unusual fall risk.

51. For example, resolving any incompatibilities between designs and ensuring that the right information is provided in the pre-construction information.

52. This includes providing any information needed for the pre-construction information or the health and safety file.

function over contractors or others; design for possible future uses of structures which cannot reasonably be anticipated at the design stage.[53]

CDM coordinator

16.35 The role of the CDM coordinator is to provide the client with a key project advisor in respect of construction health and safety risk management matters. The CDM coordinator is responsible for assisting and advising the client on the appointment of competent contractors and the adequacy of management arrangements, ensuring the proper coordination of the health and safety aspects of the design process, and facilitating good communication and cooperation between project team members.

16.36 The CDM coordinator is central to achieving perhaps the most important aim of the CDM Regulations: cooperation. Without it, good working relationships, clear communication and sharing of information will not happen. It follows that choosing and assessing the competence of individual CDM coordinators is very important. Paragraphs 193 to 240 of the ACoP provide detailed and helpful guidance in choosing the right CDM coordinator. Generally speaking, the skills and knowledge of the CDM coordinator should reflect the complexity of the project and the specialist knowledge necessary to ensure that risks are properly controlled.

16.37 The appointment of a CDM coordinator is mandatory only when the project is notifiable under regulation 14. Regulation 20 imposes specific duties on CDM coordinators in respect of notifiable projects. The key duties are: to notify the project to the HSE as soon as practicable after his appointment;[54] to ensure that the client understands his duties under the CDM Regulations;[55] to coordinate design work, planning and other preparation for construction where relevant to health and safety; to coordinate and manage the flow of health and safety information between clients, designers and contractors;[56] identify and collect the pre-construction information and advise the client if surveys need to be commissioned to fill significant gaps; prepare a health and safety file for future use at the end of the construction phase.[57]

16.38 The CDM coordinator's legal responsibility in respect of design work does not extend beyond the health and safety aspects of the design—but he must check that the requirements of regulation 11 have been addressed and that the different design elements of work can be carried out together without causing danger. If the CDM coordinator identifies a health and safety issue that has not been addressed by the designer in the design he must notify the designer.[58] The CDM coordinator's duties in this regard continue throughout the construction phase and so particular attention should be drawn to late changes in design, for

53. ACoP para 143.
54. Regulation 21.
55. Regulation 20(1)(a).
56. In order to achieve cooperation, the CDM coordinator should make sure that any issues are addressed at routine project meetings, but he may need to convene special meetings if he is not satisfied that there is sufficient cooperation between designers and other team members, or if adequate regard is not being given to health and safety.
57. Regulation 20(2)(e). The scope and content of the health and safety file should be agreed between the client and the CDM coordinator at the start of the project. It should contain the information needed to allow the future construction work, including cleaning, maintenance, alterations, refurbishment and demolition to be carried out safely (see: ACoP, para 256).
58. ACoP para 102.

example revisions brought about by architect's instructions, which might have health and safety implications.

16.39 The CDM coordinator does not have to supervise or monitor construction work or the implementation of the construction phase plan, as that is the responsibility of the principal contractor.

Principal contractor

16.40 A principal contractor must be appointed in all notifiable projects as soon as is practicable after the client knows enough about the project to be able to select a suitable person for such appointment.[59] In many projects, the principal contractor may well be the main or managing contractor. This allows the management of health and safety to be incorporated into the management of project delivery. Paragraphs 193 to 240 of the ACoP give detailed guidance on the selection and appointment of a competent principal contractor.

16.41 The role of the principal contractor is to plan, manage and coordinate work during the construction phase in order to ensure that the risks to health and safety are properly controlled. As such, the principal contractor is responsible for ensuring the health and safety of everyone involved on site during the construction phase. Everyone on site (including the client, anyone working for the client and workers of utility companies) must cooperate with the principal contractor to enable him to comply with his duties. Regulations 22 to 24 of the CDM Regulations impose specific duties on principal contractors. As with the CDM coordinator, the principal contractor fulfils a central role in achieving cooperation between the client, contractors, designers, and other members of the project team.

16.42 The key duties of the principal contractor are: to check that the client has complied with his duties under the CDM Regulations; to liaise with the CDM coordinator;[60] to prepare and implement a construction phase plan which ensures that the construction phase is planned, managed and monitored in a way which enables the work to be started and carried out without risk to health and safety;[61] to ensure that every worker has been given a suitable site induction, including training and information needed for the particular work to be carried out.[62]

16.43 The principal contractor's role continues throughout the construction phase. The principal contractor must monitor and implement the construction phase plan as the works progress. Additions or alterations to the construction phase plan might be required as a result of changes in the design or unforeseen ground conditions. If a contractor does not work safely or fails to comply with the construction phase plan, the principal contractor must take action. In such circumstances, the principal contractor might give such directions to the errant contractor as are necessary to ensure that the principal contractor can comply with the duties imposed on him by the CDM Regulations.[63]

59. Regulation 14(2).

60. Regulation 22(1)(b)—in particular the principal contractor should assist the CDM coordinator in ensuring cooperation between designers and the principal contractor in relation to any changes in design during the construction phase, pursuant to Reg 20(2)(d).

61. Regulation 23. The construction phase plan should be in writing and may contain risk assessments, method statements and records on how decisions were reached, if necessary by reference to photographs or sketches (ACoP para 160).

62. Regulation 22(2).

63. Regulation 22(1)(e).

16.44 The principal contractor is also responsible for controlling access to the construction site.[64] This will involve physically defining the boundaries of the site, determining any rights of way over or underneath the site and taking reasonable steps to prevent unauthorised access to the site.[65]

Contractors and the self-employed

16.45 A contractor means any person (including a client, principal contractor, or other person referred to in the CDM Regulations) who, in the course or furtherance of a business, carries out or manages construction work.[66] This includes anyone who directly employs or engages construction workers or manages construction work.[67] As those actually doing the work and thereby most at risk of injury, contractors have a key role to play in planning and managing the work so as to ensure that risks to health and safety are properly controlled.

16.46 Regulation 13 imposes duties on contractors in relation to all construction projects. The key duties are: to ensure that the client is aware of his duties under the CDM regulations before starting work;[68] to ensure that his subcontractors are informed of the minimum amount of time which will be allowed to each subcontractor for planning and preparation before work begins;[69] to ensure that every worker under his control has been given a suitable site induction, including training and information needed for the particular work to be carried out;[70] to control access to the construction site;[71] to comply with the specific duties imposed on him by Part 4 (Regulations 26 to 44) of the CDM Regulations.

16.47 Particular care should be taken by contractors who undertake any design work. The definition of design is wide,[72] and includes drawings, design details, specification and bill of quantities (including specification of articles or substances) relating to a structure, and calculations prepared for the purpose of a design. A contractor who carries out design work within the meaning of the CDM Regulations must ensure that the design complies with regulation 11.[73]

16.48 In addition, when planning high risk work,[74] the contractor must be alive to the need to obtain specialist advice before carrying out such work.[75]

16.49 Regulation 19 imposes additional duties on contractors where the project is notifiable. The key to the performance of those additional duties is cooperation with the principal contractor and CDM coordinator. Thus the contractor should tell the principal contractor about any risks created by his work and inform the principal contractor of any finding that requires the alteration of the construction phase plan.[76] The principal contractor should

64. Regulation 22(1)(l).
65. It is submitted that compliance with Reg 22(1)(l) would be sufficient to discharge the duty of care owed to trespassers for the purposes of s. 1(4) of the Occupiers Liability Act 1984.
66. Regulation 2(1).
67. ACoP para 178.
68. Regulation 13(1).
69. Regulation 13(3).
70. Regulation 13(4).
71. Regulation 13(6)—the duty to secure the site overlaps with that of the principal contractor, as to which see above at para 8.2.7.
72. Regulation 2(1).
73. ACoP para 179(f).
74. Examples would be alterations that could result in structural collapse or work on contaminated land.
75. ACoP para 179(j).
76. Regulation 19(3)(c).

provide a site induction,[77] but the contractor must cooperate with the principal contractor so as to ensure that an adequate site induction is provided.[78]

Duties relating to health and safety on construction sites

16.50 Part 4 of the CDM Regulations (Regulations 26 to 44) sets out duties applicable to all contractors or to others controlling the way in which construction work is carried out[79] in respect of measures to be taken to ensure specified aspects of health and safety and to prevent danger from a number of specified hazards.

16.51 Part 4 re-enacts, with modifications, the 1996 Regulations. Part 4 gives effect to provisions similar to various aspects of the Management of Health and Safety at Work Regulations 1999 and the Workplace (Health, Safety and Welfare) Regulations 1992, but is adapted to the particular problems posed by work on construction sites.[80]

Civil liability for breach of the CDM

16.52 Civil liability under the CDM Regulations is now restricted only in respect of the duties under Part 2 and 3. A breach of duty imposed by Parts 2 and 3 can lead to civil liability only if that duty applies for the protection of an employee of the person on whom the duty is placed, unless:

(1) the breach is a failure by the client,[81] contractor[82] or principal contractor[83] to ensure that sufficient welfare facilities are provided in accordance with Schedule 2;
(2) the breach is a failure by the contractor[84] or the principal contractor[85] to take reasonable steps to prevent unauthorised access to the site;
(3) the breach is a failure by the client to ensure that the construction phase does not start unless the principal contractor has prepared a construction phase plan.[86]

In such cases liability is unrestricted.[87]

16.53 In respect of breaches of the duties imposed by Part 4 (Regulations 26 to 44) of the CDM Regulations, civil liability is unrestricted.

16.54 Where civil liability lies for a breach of the CDM Regulations, a prior conviction in criminal proceedings for breach of the CDM Regulations will be admissible in the civil proceedings as evidence that the offence was committed, where to do so would be relevant to any issue in the civil proceedings.[88] The conviction must be pleaded.[89] Once the conviction has

77. Regulation 22(2).
78. ACoP para 192.
79. Regulation 25(1) and (2).
80. For example: stability of structures (Reg 28); explosives (Reg 30); excavations (Reg 31); cofferdams and caissons (Reg 32). For an examination of the duties under the 1996 Regulations, see: *Munkman on Employers Liability*, 14th edn, chapter 19.
81. Regulation 9(1)(b).
82. Regulation 13(7).
83. Regulation 22(1)(c).
84. Regulation 13(6).
85. Regulation 22(1)(l).
86. Regulation 16(a).
87. Regulation 45.
88. Civil Evidence Act 1968, s. 11(1).
89. Civil Procedure Rules, r. 16 Practice Direction, para 8.1.

been proved,[90] the defendant will face the uphill task of persuading the court of the contrary of a verdict beyond reasonable doubt.[91]

OTHER STATUTES AND REGULATIONS

Regulations of general application

16.55 In addition to the construction-specific duties imposed by the regulations in Part 3 of the CDM Regulations, contractors and others who control the way in which construction work is carried out will be subject to a number of other regulations of more general application, notably:

(1) Provision and Use of Work Equipment Regulations 1998;
(2) Personal Protective Equipment at Work Regulations 1992;
(3) Work At Height Regulations 2005;
(4) Manual Handling Operations Regulations 1992;
(5) Workplace (Health, Safety and Welfare) Regulations 1992;
(6) Management of Health and Safety at Work Regulations 1999.

Occupiers Liability Act 1957

16.56 All those involved in the project (including the client, contractors, utilities companies, and designers) may owe to lawful visitors to the construction site a common duty of care under section 2 of the Occupiers Liability Act 1957 if they retain a sufficient degree of possession or control over all or part of the site.[92] Occupiers of the site will also, in certain circumstances, owe a duty of care to trespassers by virtue of the Occupiers Liability Act 1984. However, it is submitted that compliance by the contractor and (where applicable) the principal contractor with the duties imposed by the CDM Regulations in respect of securing the site,[93] will be sufficient to discharge the duty of care owed to trespassers for the purposes of section 1(4) of the Occupiers Liability Act 1984.

Building Act 1984 and the Building Regulations 2000

16.57 Regard must also be had to the provisions of the Building Act 1984 and the Building Regulations 2000. The Building Regulations themselves impose a wide range of requirements, ranging from regulations pertaining to the building structure and fire safety, to ventilation and conservation of fuel and power.

16.58 A person contravening the building regulations is liable on summary conviction to a fine not exceeding level 5 on the standard scale (currently £5,000) and to a further fine not exceeding £50 for each day on which the default continues.[94] Contravention occurs when the builder purports to complete the work in question and is proved to have no intention to

90. As to proving the conviction, see Civil Evidence Act 1968, s. 11(2).
91. See the comments of Lord Denning in *Stupple* v *Royal Insurance Co Ltd* [1971] 1 QB 50.
92. For the liability of occupiers generally, see Chapter 3.
93. Namely, Reg 13(6) in relation to contractors and Reg 22(1)(l) in relation to principal contractors.
94. Building Act 1984, s. 35 and the Criminal Justice Act 1991 s. 17(1).

complete the works in accordance with the regulations. The local authority may by notice require the removal or alteration of offending work.[95]

16.59 Section 38(1) of the Building Act 1984 provides that a breach of the Building Regulations which causes damage[96] is actionable except in so far as the regulations provide otherwise.[97] However, section 38(1) is not yet in force for that purpose and it remains to be seen as to what extent contractors will be exposed to potential statutory civil liability under the subsection.

Defective Premises Act 1972

16.60 The Defective Premises Act 1972 imposes duties on persons taking on work for or in connection with the provision of a dwelling.[98] The term "dwelling" is not defined but it presumably applies only to buildings which are used or capable of being used as a residence. The essence of the duty is to ensure that the dwelling is fit for habitation when it is completed.[99] Fitness for habitation is a relatively high threshold for claimants to overcome. Defects giving rise to, for example, structural instability, dampness which is prejudicial to health, and inadequate lighting, power supply, drainage, sanitation and water supply[100] are likely to be sufficient to render the dwelling unfit for habitation for the purposes of the Act.

16.61 The duties under the Defective Premises Act are additional to the duties otherwise owed[101] and cannot be excluded or restricted.[102] The measure of damages for breach of duty under the Act will arguably include all reasonably foreseeable losses that are the natural consequence of the breach.[103]

HEALTH AND SAFETY PROSECUTIONS

Outline

16.62 The following section provides an outline of the stages of a health and safety prosecution.

16.63 It is worth noting that in health and safety criminal prosecutions, once charges are brought, there is (anecdotally) a 95 per cent conviction rate. However, roughly 90 per cent of charges result in guilty pleas. Of the 10 per cent of prosecutions that proceed to trial, the conviction rate after trial is only roughly 50 per cent.

95. Building Act 1984, s. 36.

96. Defined as including the death of, or injury to, any person (including any disease and any impairment of a person's physical or mental condition): Building Act 1984, s. 38(4).

97. There is provision for the regulations to provide prescribed defences.

98. This will ordinarily include the main contractor and any professional person, such as an architect, engineer or quantity surveyor specifically employed in connection with the provision of a dwelling. Arguably, the definition is wide enough to catch a supplier who makes up a component specifically for use in the dwelling.

99. Defective Premises Act 1972, s. 1(1).

100. *Nottingham Community Housing Association Ltd* v *Powerminster Ltd* [2000] BLR 759.

101. Defective Premises Act 1972, s. 6(2).

102. Defective Premises Act 1972, s. 6(3).

103. See: *Bayoumi* v *Protim Services Ltd* [1996] EGCS 187, CA (award of general damages for loss of use consequent on a breach of s. 1(1) of the Act; cf. *Bella Casa Ltd* v *Vinestone* [2006] BLR 72 (general damages for loss of use of capital whilst the dwelling is uninhabited held not recoverable).

Pre-trial: the investigations

16.64 The enforcement authority's investigation provides much of the evidence for any subsequent prosecution and the basis for determining whether there should be any such prosecution. The various enforcement authorities have different statutory powers of investigation. In simple terms, responsibility for enforcement of regulations in respect of construction sites lies with the HSE, whereas local authorities are responsible for enforcing health and safety legislation in non-industrial (e.g. retail) premises. The following are the most commonly relevant investigatory powers.

(1) Most enforcement authorities have powers[104] to interview employees. However, such interviews should be conducted under caution as the right to a fair trial includes the right not to be compelled to incriminate oneself.[105] The right not to incriminate oneself does not prevent an enforcement agency obtaining one employee's evidence to use against the company, its directors or another employee. There are few grounds to intervene in such questioning. Worse, if such intervention prevents investigation such that the intervention amounts to an obstruction, that in itself is an offence;[106]
(2) The inspector appointed by the enforcement authority may have the right to enter and inspect premises at any reasonable time for the purposes of carrying into effect any of the statutory provisions within the responsibility of the enforcement authority that appointed him;[107]
(3) The enforcement authority has the right to inspect documentation;[108] and
(4) The enforcement authority may have the right to conduct testing, sampling or other examination of equipment or substances, but this should be carried out within the presence of the person responsible for that equipment or substance.[109]

16.65 Each enforcement authority has a policy which provides guidance for the exercise of their discretion as to prosecute. Local authorities do not usually have a code but tend to adopt the Code for Crown Prosecutors[110] ("the Code"). Most enforcement authority policies are similar to the Code. Under the Code prosecutors should consider two tests, the first as to evidence and the second as to the public interest. The evidential test is "Is there enough evidence against the defendant?"[111] This comes down to whether there is enough reliable admissible evidence to provide a realistic prospect of conviction.

16.66 The public interest test is "Is it in the public interest for the CPS to bring the case to court?"[112] If there is sufficient evidence, then normally there will be a prosecution unless the public interest against prosecution clearly outweighs that in favour of prosecution. Factors against prosecution include: (1) the likely prospect of only a nominal penalty; (2) that the offence was committed as a result of a genuine mistake or misunderstanding; (3) where minor harm results from an isolated misjudgement; (4) where a defendant has put right the loss or

104. See, for example, s. 20 Health and Safety at Work Act 1974.
105. *Saunders* v *UK* (1997) 23 EHRR 313. See for an example of a statutory example of that right, s. 20(7) Health and Safety at Work Act 1974.
106. See e.g. s. 33 of the Health and Safety at Work Act 1974.
107. Health and Safety at Work Act 1974, s. 20(2)(a).
108. See e.g. *Walkers Snack Foods Ltd* v *Coventry City Council* [1998] 3 All ER 163.
109. See e.g. s. 20 of the Health and Safety at Work Act 1974 and *DPP* v *British Telecommunications plc*, *The Times*, 26 November 1990.
110. Fifth edn (2004). This is available online at www.cps.gov.uk/publications/docs/code2004english.pdf.
111. The Code, s. 5.1.
112. The Code, s. 5.6.

harm caused; and (5) long delay unless the offence is serious or the delay caused by the defendant was only recently discovered or the offence was so complicated that a long investigation was inevitable.

16.67 As with any matter, it is sensible for the defendant to conduct an adequate investigation early in order to have the best prospect of defending matters. However, there is a particular incentive to identify any failing early and take appropriate remedial action. This may actually help to avoid any prosecution or, if a prosecution is brought, it allows an early informed decision in respect of any guilty plea. That allows for maximum mitigating effect both for the early plea (if made) and having taken appropriate action swiftly.

16.68 Enforcement authorities may issue formal cautions and the Home Office has issued guidance on when such cautions should be used.[113] Swift investigation and implementation of remedial measures combined with positive cooperation with the enforcement authority's investigation can lead to a caution instead of a prosecution.

Pre-trial: abuse of process

16.69 For the sake of completeness it is mentioned here that before trial itself an application may be made for the prosecution to be stayed as an abuse of process. However, this is an exceptional course for the court to take.[114] Usually it is appropriate for any sentiment that the prosecution should not have been brought to be reflected in the sentence rather than preventing the prosecution altogether.[115] To constitute an abuse of process something must be "Something so unfair and wrong that the court should not allow a prosecutor to proceed with what is, in all other respects a regular proceeding."[116] That requires either that the defendant cannot receive a fair trial or that there is some unfairness inherent in putting that defendant on trial for that offence. Such fairness may result if the offence was committed partly as the result of poor inspection or advice from that regulatory body itself or where multiple agencies seek to prosecute for the same offence.[117]

Trial

16.70 Trial may take place in either the magistrates' court or crown court. In favour of the magistrates' court are the lower sentencing powers and on occasion their local knowledge of the area and its companies. In favour of the crown court is the perceived impartiality of juries (particularly where local pre-trial publicity may require a neutral venue to be selected) and the statistically higher prospect of acquittal.

16.71 It is likely in many construction-related health and safety prosecutions that expert evidence will be required. The nature and extent of the expert evidence will depend on the duties that are alleged to have been breached. For example, a defendant to a prosecution brought under Part 4 of the CDM Regulations will most likely have to adduce expert evidence commenting on the suitability and sufficiency of the risk assessments in order to convey to a

113. See Home Office Circular 30/2005 (replacing Home Office Circular 18/1994).
114. *R* v *Horseferry Road Magistrate's Court, ex parte Bennett* [1994] 1 AC 42 Lord Lowry at 74H.
115. *Environment Agency* v *Stanford* [1998] Env LR 286.
116. *Hui Chi-Ming* v *The Queen* [1992] 1 AC 34, PC, at 57.
117. See *R* v *Beedie* [1997] 2 Cr App Rep 167.

lay bench or a judge the realities of construction industry practice and the reasonably limited nature of most risk assessments.

Sentencing

16.72 As with any sentence of an individual, the court will first consider what nature of sentence best accords with the gravity of the offence and then go on to address the personal mitigation of the defendant. In the case of financial penalties, such mitigation will include the defendant's ability to pay the fine. The same principles apply to the sentencing of corporations.[118] The court will ordinarily apply a two-stage test, namely: (1) what financial penalty does the offence merit? (2) What financial penalty can the company reasonably be ordered to meet and over what time-span?

16.73 Aggravating features, which will result in a fine towards the higher end of the scale, include: the danger created by the offence; whether the offence resulted in the unnecessary loss of life; failure to heed warnings; where the defendant deliberately profited financially from a failure to take the necessary health and safety steps or specifically ran the risk in order to save money.[119]

Corporate manslaughter

16.74 The Corporate Manslaughter and Corporate Homicide Act 2007, which came into force on 6 April 2008, abolished the common law offence of manslaughter by gross negligence (as it applied to corporations) and created a statutory offence in respect of corporations who manage their activities in such a way as to cause a person's death where such activities amount to a gross breach of the relevant duty of care owed by the corporation to the deceased.[120] The relevant duty of care includes statutory and common law duties owed by a corporation in carrying out construction or maintenance operations.[121]

16.75 It will fall to the jury to determine whether or not there has been a gross breach of the relevant duty of care. In doing so, the jury must consider the seriousness of the failure and how much of a risk of death it posed, but may also consider any health and safety guidance that relates to the failure. This will include the ACoP and any other regulatory guidance issued by the HSE.[122] It is important to remember that a corporation will be guilty of the offence only if the way in which its activities are managed by its senior management[123] is a substantial element in the breach of the relevant duty of care.[124]

16.76 An organisation that is found guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment to a fine.[125] The offence of corporate homicide is indictable only in the High Court.[126]

118. As confirmed by the Court of Appeal in *R* v *Rollco Screw & Rivet Co Ltd & Others* [1999] IRLR 439, CA.

119. See the guidance given by the Court of Appeal in *R* v *Howe & Son (Engineers) Ltd* [1999] 2 All ER 249.

120. Corporate Manslaughter and Corporate Homicide Act 2007, s. 1.

121. Corporate Manslaughter and Corporate Homicide Act 2007, s. 2(1)(c): construction and maintenance operations are widely defined: see s. 2(7).

122. Corporate Manslaughter and Corporate Homicide Act 2007, s. 8.

123. As defined by s. 1(4)(c).

124. Corporate Manslaughter and Corporate Homicide Act 2007, s. 1(3).

125. Corporate Manslaughter and Corporate Homicide Act 2007, s. 1(6).

126. Corporate Manslaughter and Corporate Homicide Act 2007, s. 1(7).

INSURANCE IMPLICATIONS OF HEALTH AND SAFETY PROSECUTIONS

Funding defence costs

16.77 Insurers may pay the legal costs of defending a health and safety prosecution. Insurers pay such costs for one of two reasons. First, it may be in the insurer's interest to defend any criminal proceedings in order to defend anticipated or parallel civil proceedings. It is more difficult to resist findings of negligence where criminal liability for fault has previously been found.[127] Second, the insured may be entitled to an indemnity against such costs either under a specific legal expenses insurance policy or where such an indemnity is provided as an extension to another policy. Such an extension is common in contractors' all risks or public liability or professional indemnity policies.

16.78 Care should be taken to check whether the policy contains such an extension so as to avoid the potential problem of double insurance; for example, by reason of the existence of a separate legal expenses policy covering the same interest and against the same risk. In such circumstances the policy may prohibit claims on the indemnity or restrict the liability of the insurer to paying the assured their rateable proportion of the loss. It is therefore important to check carefully the express terms of the policy before taking out a separate legal expenses insurance policy.

16.79 Where insurance cover is provided there is usually an express term in the policy that such cover is provided only where the insured's defence is reasonable. Alternatively, it may be that such a term is implied. It is submitted that the requirement that the defence is reasonable is more easily satisfied in criminal proceedings. Because the implications of a finding of guilt may include moral opprobrium as well as a potential financial penalty, prospects of success at a level where a settlement would be anticipated in civil litigation may entitle an insured to an indemnity to fund its defence.

Insurance Companies (Legal Expenses Insurance) Regulations 1990

16.80 Where cover in respect of defence costs is provided either under a specific legal expenses insurance policy or under an extension to another policy, the Insurance Companies (Legal Expenses Insurance) Regulations 1990 ("the IC(LEI)R 1990") apply.[128] The important provision which often arises in the context of health and safety prosecutions is that the insured must have the right under the policy to select its own lawyers[129] (even if some of the fees may then have to be borne by the insured). That right should be expressly recognised in the policy.[130]

16.81 The IC(LEI)R 1990 do not apply where legal representation is provided to the insured by the insurer where such representation is provided in the insurer's own interest.[131]

127. See s. 8.2.8, above.
128. Regulation 3 IC(LEI)R 1990.
129. Regulations 6(1) and 6(2) IC(LEI)R 1990.
130. Regulation 6(3) IC(LEI)R 1990.
131. Regulation 3(3) IC(LEI)R 1990.

Fines

16.82 Insurance cannot be taken out for an indemnity against a court-ordered fine.[132] A fine for a breach of health and safety legislation is a criminal sentence. It is contrary to public policy for insurance to be provided against such a fine.[133] This rule is not rested on an implied exception in the policy of insurance. It is based on the broad rule of public policy that no person can claim indemnity or reparation for his own wilful and culpable crime.[134]

Prosecution costs

16.83 An order to pay prosecution costs is part of the sentence for a breach of health and safety legislation.[135] Prosecution costs and the fine are considered collectively by the court in determining the sentence. The same considerations as apply to any purported indemnity in respect of a fine also therefore apply to any purported indemnity against an order to pay prosecution costs. Such an indemnity would be illegal and unenforceable.

Disclosure of previous convictions

16.84 Most insurers will require disclosure of a company's health and safety record before providing insurance. Such disclosure usually takes the form of specific questions on the insurance proposal form. Insurers regularly ask for details of any health and safety convictions or prosecutions and/or for details of the number of accidents in a specified period which were "reportable"[136] under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995.[137]

132. *Gray* v *Barr* [1971] 2 QB 554, CA (where it was held that it would be contrary to public policy to allow the defendant to recover an indemnity for the consequences of his own act in threatening the deceased with a loaded shotgun, which amounted to manslaughter).

133. *Beresford* v *Royal Insurance Co Ltd* [1938] AC 586 *per* Lord Atkin at 596–9, especially at 598–9.

134. *Hardy* v *Motor Insurers' Bureau* [1964] 1 QB 745 *per* Lord Denning MR at 760.

135. See, e.g. *R* v *Howe and Son (Engineers) Ltd* [1999] 2 All ER 249.

136. Useful information on reporting accidents may be found on the HSC's website at www.HSC.gov.uk/riddor/.

137. Regulation 3 Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995.

CHAPTER SEVENTEEN

MINOR WORKS CONTRACT

Matthew E Smith and Edward Banyard Smith

GENERAL

17.1 The Minor Works Building Contract 2005 Edition ("MW") is a traditional base building contract, intended for works of limited value. It was included in the 2005 suite of contracts as a like-for-like replacement for the very popular JCT Agreement for Minor Building Works 1998 Edition.

17.2 The key feature of MW 05 is that it is short in comparison to other contracts in the JCT suite, but despite that, the same structure and many of the same provisions are repeated, albeit in an abbreviated form. As a result, the apportionment of risk between the parties is not very different from, for example, the Standard Building Contract (SBC) 2005 Edition.

17.3 Perhaps in response to the increasing use of the Agreement for Minor Building Works (1998 Edition) as a low value design and build contract, a purpose for which it was never intended, the JCT introduced a new contract in the 2005 suite, the Minor Works Building Contract With Contractor's Design (MWD). This is a low value contract in a very similar form to MW, but including a Contractor's Designed Portion comprising only part of the works. MWD 05 contains identical insurance provisions to MW, so the comments below apply equally to MWD 05. Unlike the Intermediate Building Contract with Contractor's Design 2005 Edition (ICD), MWD 05 does not include an option to require professional indemnity insurance in respect of the Contractor's Design Portion, but as the JCT has only recently embraced contractual requirements for professional indemnity insurance, the omission is hardly surprising.

RELEVANT PROVISIONS

17.4 The key insurance provisions are contained in section 5. They are:

"Clause 5.1: The contractor indemnifies the employer against claims in respect of death and personal injury arising from the carrying out of the works, except to the extent that the employer is at fault.

Clause 5.2: The contractor indemnifies the employer against property damage arising from the carrying out of the works, but only to the extent that the damage is due to the contractor's negligence.

Clause 5.3: The contractor is required to take out insurance to cover his liabilities under clauses 5.1 and 5.2.

Clause 5.4: There are three options for insurance of the works and, where relevant, the existing structures:

- A: The contractor insures the works in the joint names of the employer and the contractor.
- B: The employer insures the works and existing structures in the joint names of the employer and the contractor.
- C: The employer insures the existing structure only. Unlike options A and B, this option provides for insurance in the name of the employer only.

Clause 5.5: The contractor and the employer are both required to produce evidence of their respective insurance policies as required by clause 5. There is an exception for employers who are Local Authorities."

17.5 At a basic level, these provisions are a simplified version of the equivalent provisions in the SBC 05 contracts, which are considered in Chapter 19. There are, however, a few provisions in the SBC 05 contracts which have been excluded from the MW 05 forms:

- Insurance for non-negligent loss of support—MW 05 does not have an option for the client to obtain insurance for "non-negligent" damage to neighbouring property owners.
- Insurance for loss of liquidated damages—there is no option to obtain insurance against completion being delayed by a Specified Peril.
- Joint Fire Code—neither party is expressly required to comply with the Joint Fire Code.

17.6 Obviously, the employer will need to discuss these risks with its advisers when selecting whether the MW 05 contract is appropriate to use for each project.

PUBLIC LIABILITY AND EMPLOYERS' LIABILITY INSURANCE

"Clause 5.1: The contractor indemnifies the employer against claims in respect of death and personal injury arising from the carrying out of the works, except to the extent that the employer is at fault.

Clause 5.2: The contractor indemnifies the employer against property damage arising from the carrying out of the works, but only to the extent that the damage is due to the contractor's negligence."

17.7 These indemnities are undoubtedly broad—any "expense, liability, loss, claim or proceedings whatsoever" encapsulates all types of loss, including consequential losses—and the use of an indemnity means that the cause of action (and hence the start of the limitation period) arises when the employer suffers a loss. This means the contractor's liability could extend beyond the limitation period that would apply, for example, to a breach of an ordinary term of the contract.[1]

17.8 In construing these clauses, the general rules of interpretation of indemnities and exceptions apply.[2] If he wishes to rely on the indemnity, the employer will need to show that the indemnity wording covers the relevant event, whereas to avoid being liable the contractor will need to show that an exception applies. In addition, the court considers it to be inherently unlikely that a party will wish to absolve the other of its negligence,[3] although if clear words are used in the exemption, effect will be given to them. The exemption will not apply if the claim can also be based on matters outside the exemption.[4]

17.9 A distinction is drawn between losses caused by injuries or death to persons, and damage to property. In relation to the former, the contractor is strictly liable to indemnify the employer irrespective of whether or not he has been negligent, whereas in relation to the latter, the contractor will be liable only if the loss was due to his "negligence, breach of statutory

1. *R & H Green* v *BRB* (1980) 17 BLR 94.
2. *City of Manchester* v *Fram Gerrard* (1977) 6 BLR 70.
3. *Gillespie Brothers & Co Ltd* v *Roy Bowles Transport Ltd* [1973] QB 400.
4. *Canada Steamship* v *R* [1952] AC 192.

duty, omission or default". In *Scottish & Newcastle plc* v *GD Construction (St Albans) Ltd*,[5] Aikens J (sitting in the Court of Appeal) opined that these four concepts, when used in the JCT Intermediate Form of Building Contract 1984 Edition, all implied some form of negligence or another, because "omission or default" referred to a failure of the contractor's obligation to take care. As such, it appears the contractor will need to be at fault to trigger the indemnity relating to property damage.

17.10 Both clauses 5.1 and 5.2 use the phrase "to the extent that", which suggests that there should be an apportionment of loss where its causes are mixed. For example, the contractor will only be able to evade liability under clause 5.1 if he can show that the loss was caused entirely by the employer's default. There is little authority on how this apportionment should be undertaken, but in practice it seems likely that the courts will be guided by what is just and equitable in all the circumstances.

17.11 In relation to clause 5.2, the works themselves and the site materials are excluded from the contractor's indemnity. Where the works are being insured by the employer under clause 5.4B, damage caused by "specified perils" (as defined in clause 1.1) to the existing structures and their contents owned by the employer is also excluded from the indemnity and the contractor will not be liable for this risk.

17.12 Clause 5.3 requires the contractor to take out and maintain insurance to cover his obligations under clauses 5.1 and 5.2. The obligation to insure against personal injury or death of the contractor's own employees must comply with the "relevant legislation", which is a reference to the Employer's Liability (Compulsory Insurance) Act 1969 and the Employers' Liability (Compulsory Insurance) Regulations 1998. In effect, the contractor's obligation to take out these insurances will usually be satisfied by taking out appropriate employer's liability and public liability insurance.

INSURANCE OF THE WORKS

17.13 As with the JCT's other contracts, MW offers alternative provisions for insurance of the works. Clause 5.4A applies where the contractor takes out the insurance policy, which will ordinarily be the case when the project is a "new build" project (as opposed to a refurbishment).

CLAUSE 5.4A—CONTRACTOR INSURES THE WORKS

17.14 Clause 5.4A provides:

> "The contractor insures the works in the joint names of the employer and the contractor."

17.15 Clause 5.4A will usually be the appropriate option for "new build" projects (i.e. projects that do not involve working on or around existing structures). The underlying scheme of clause 5.4A is that the contractor takes out joint names insurance for the works. The insurance effectively covers the risk of damage to the ongoing works during construction. If any damage does occur to the works, then insurance monies are paid to the employer. The employer must then use the insurance proceeds to pay the contractor to reinstate the works.

5. [2003] Lloyd's Rep IR 809; [2003] EWCA Civ 96.

17.16 The clause requires the contractor to take out "All Risks Insurance"[6] for the Works. This is a change from clause 6.3A of the Agreement for Minor Building Works (1998 Edition), which only required insurance of "Specified Perils".[7]

17.17 The policy should cover the full reinstatement value of the works, plus a pre-agreed percentage stated in the Contract Particulars to cover professional fees.

17.18 The policy must be a "Joint Names Policy".[8] Of course, this could mean that either party could claim the insurance proceeds, so the contractor is required to authorise the insurance proceeds to be paid to the employer only. The employer is entitled to retain the amount allocated towards professional fees. The contractor is not entitled to any payment beyond the insurance proceeds for the restoration of the insured damage, so the contractor will bear the cost of any shortfall. This perhaps reflects the fact that it is the contractor's responsibility to take out sufficient insurance.

17.19 The requirement for joint insurance has a significant effect on the contractor's liabilities to the employer. Following the decisions in *Petrofina (UK) Ltd* v *Magnaload*[9] and *Co-Operative Retail Stores Ltd* v *Taylor Young Partnership Ltd*[10] (which was made in relation to materially similar provisions in the Standard Form of Building Contract 1980 Edition), it appeared that the contractor would not be liable to the employer for risks that were required to be joint insured between them. Recently, it had been held at first instance that this type of provision implies a term that one party will not be liable to another for a risk which is joint insured between them.[11] However, the decision of the Court of Appeal in *Tyco Fire & Integrated Solutions (UK) Ltd* v *Rolls Royce Motor Cars Ltd*[12] has introduced some areas of uncertainty. These matters are discussed in Chapter 13 above.

CLAUSE 5.4B—EMPLOYER INSURES THE WORKS AND EXISTING STRUCTURE

17.20 Clause 5.4B should be used on projects involving works in or around existing structures, where the employer is able to take out the insurance policy:

> "B: The employer insures the works and existing structures in the joint names of the employer and the contractor."

17.21 Clause 5.4B includes similar provisions to clause 5.4A in respect of insurance and damage to the works. The employer is required to take out a joint names policy for All Risks

6. 'All Risks Insurance" is defined in clause 1.1 of MW as cover against "any physical loss or damage" to work and site materials (including the cost of removing debris and propping up the works) but subject to various exclusions, known as "Excepted Risks". The Excepted Risks include various uninsurable events, such as sonic booms and nuclear accidents.

7. 'Specified Perils" are defined in clause 1.1 of MW to include many of the risks commonly associated with construction, including fire, lightning, floods, etc. As with All Risks Insurance, Excepted Risks are excluded. See Chapter 11 for discussion as to the meaning of some of the "Specified Perils".

8. "Joint names policy" is defined in clause 1.1 as an insurance policy naming the employer and the contractor as joint insured. Notably, subcontractors are not required to be named as joint insured and this is considered further below.

9. [1984] 1 QB 127.

10. [2002] 1 WLR 1419.

11. *Board of Trustees of the Tate Gallery* v *Duffy Construction Ltd and Anor* [2007] Lloyd's Rep IR 758; [2007] EWHC 361 (TCC).

12. [2008] EWCA Civ 286.

Insurance for the full reinstatement value of the Works, plus an agreed percentage for professional fees. If damage occurs, this is paid to the employer who is obliged to use the funds to reinstate the works.

17.22 In addition, there is an obligation on the employer to take out a joint names policy for the existing structures. In this case, however, the policy only covers Specified Perils, rather than All Risks Insurance.

17.23 If damage occurs to the works, then the Architect/Contract Administrator must issue such instructions "as are reasonable, for the reinstatement and making good of such loss or damage". Although it makes no difference in most cases, it is not clear whether the reference to "reasonable" takes precedence over "making good". In any event, whatever he instructs, it will be valued as a variation. This means that, in this case, the employer bears the cost of any insurance shortfall.

17.24 Again, the relationship between this clause and the indemnity in clause 5.2 has caused significant debate. In *National Trust* v *Haden Young Ltd*,[13] the Court of Appeal held that in spite of an obligation on the employer to take out joint names insurance policy for the relevant loss, the contractor remained liable under an indemnity to the employer. However, that decision related to the 1987 revision of the JCT Standard Form of Contract for Minor Building Works, and in later versions of the agreement, damage caused by Specified Perils has been specifically excluded from the contractor's indemnity. It now seems that this specific exclusion is sufficiently clear to negative the usual presumption that a party will not wish to absolve the other party of liability for negligence. In *Scottish & Newcastle plc* v *GD Construction (St Albans) Ltd*,[14] the Court of Appeal applied the *Taylor Young* decision to similar wording in the IFC 84[15] form of contract. As such, it now seems that the contractor's liability for damage to the existing structures caused by Specified Perils will be excluded, and the *Haden Young* decision probably no longer applies.

17.25 There is no equivalent obligation to reinstate if damage is caused to the existing structures under clause 5.4B. If the damage to the existing structure is so severe that the works are prevented from proceeding for more than a month, it may be possible for either party to determine the building contract under clause 6.10.1.3.

CLAUSE 5.4C—EMPLOYER INSURES EXISTING STRUCTURES

17.26 Finally, the JCT offers clause 5.4C, which provides for the employer to insure the existing structure only. In the footnote to the Contract Particulars, the JCT recommends this option for residential projects where the employer is unable to obtain insurance of the works. This option is a particular feature of the Minor Works Contract and is included in recognition of the fact that it is difficult for residential occupiers to obtain joint names insurance for their home and contents. Importantly, this clause must be used in conjunction with clause 5.4A, so that the works are also insured.

> "C: The employer insures the existing structure only. Unlike options A and B, this option provides for insurance in the name of the employer only."

13. (1994) 72 BLR 1.
14. See note 5, *supra*.
15. In particular, and as with clause 5.2 of MW, the indemnity in clause 6.1.2 of IFC 84 contained an exclusion of liability for damage caused by Specified Perils which were required to be insured by the employer.

17.27 Unlike clause 5.4B, the policy is not required to be taken out in the joint names of the employer and the contractor, and equally, the "Specified Perils" exclusion in clause 5.2 does not apply. There is also no obligation on the employer to ensure that the insurance policy includes a waiver of subrogation rights against the contractor. This all suggests a deliberate scheme to provide that the contractor will be liable under the indemnity to both the employer (and/or his insurers under subrogation rights). The contractor will need to bear these issues in mind before accepting an insurance scheme based on clause 5.4C.

POSITION OF SUBCONTRACTORS

17.28 In contrast to other JCT contracts such as SBC 05 and IC 05, there is no requirement in MW 05 either that subcontractors are named as joint insured or that subrogation rights against them are waived.

17.29 This has significant consequences for subcontractors who are not protected by the joint names policy. In particular, the employer's insurers may be able to exercise rights of subrogation to enforce the employer's rights to recover damages from the subcontractor, provided the subcontractor is liable to the employer. The subcontractor might be liable to the employer either in contract (for example if there is a collateral warranty between the subcontractor and the employer), or if the subcontractor owes a tortious duty of care to the employer.[16]

17.30 Other parties (such as the employer's consultants) may also be able to claim a contribution[17] from the subcontractor in the event that they are jointly liable with the subcontractor for the damage suffered by the employer.

16. Although there is no direct authority on subcontractors' tortious liability to the employer, it seems most likely that the courts will follow the reasoning in *British Telecommunications plc* v *James Thomson & Sons Engineering Ltd* [1999] 1 WLR 9, where it was held that a domestic subcontractor outside of a contractual joint insurance scheme could in principle be liable in tort to the employer.

17. Section 1, Civil Liability (Contribution) Act 1978.

CHAPTER EIGHTEEN

INTERMEDIATE BUILDING CONTRACT

Matthew E Smith and Edward Banyard Smith

GENERAL

18.1 As its name suggests, the JCT Intermediate Building Contract (IC 05) is designed to sit between the lengthy Standard Building Contract (SBC 05) and the relatively brief Minor Works Building Contract (MW 05). The JCT's guidance notes for the contract confirm it is intended to be a like-for-like replacement for the JCT 1998 Intermediate Form of Building Contract. As such, it is a "traditional" building contract where the contractor carries out works of a relatively simple nature to a design provided by the employer.

18.2 At the same time as publishing IC 05, the JCT has also published a new contract, the Intermediate Building Contract with Contractor's Design (ICD). This is, in summary, the IC with a Contractor's Designed Portion included. As such, it is suitable where the employer is generally responsible for the design of the works, but where the contractor is required to design discrete sections of the works. That being the case, it is not appropriate for use as a "design and build" contract. The insurance provisions in IC 05 and ICD 05 are generally similar, so the remarks below apply to both contracts except as stated.

RELEVANT PROVISIONS

18.3 The insurance provisions in IC 05 are set out in section 6 and Schedule 1 of the contract as follows:

"Clause 6.1:	The contractor indemnifies the employer against death or personal injury of persons arising out of the carrying out of the works.
Clause 6.2/6.3:	The contractor indemnifies the employer against damage to property (other than the works themselves and site materials) arising out of the carrying out of the works.
Clause 6.4:	The contractor takes out insurance to cover his liabilities under clauses 6.1 and 6.2.
Clause 6.5:	If required, the contractor will take out and maintain joint names insurance for non-negligent withdrawal of support to neighbouring properties.
Clause 6.6:	Notwithstanding clauses 6.1 and 6.2, the contractor is not liable to indemnify the employer for Excepted Risks.
Clause 6.7/6.8	There are three alternatives, set out in Schedule 1, for the insurance of the works and where appropriate, existing structures: Option A: The contractor takes out 'All Risks' insurance in the joint names of the employer and the contractor, for the full reinstatement value of the works. This is appropriate for new buildings. Option B: The employer takes out 'All Risks' insurance in the joint names of the employer and the contractor, for the full reinstatement value of the works. This is also appropriate for new buildings.

Option C: The employer takes out:
- 'All Risks' insurance in the joint names of the employer and the contractor, for the full reinstatement value of the works; and
- insurance of existing structures against 'Specified Perils' in the joint names of the employer and the contractor.

Clause 6.9: The insurance policies for the works (under Option A, B or C above) must either provide for all subcontractors to be joint insured, or include a waiver of subrogation rights against the subcontractors, but only in respect of Specified Perils.

Clause 6.10: Where insurance against terrorism becomes available, the employer must choose whether to proceed with the works regardless, or to terminate the contractor's employment.

Clauses 6.11–6.14: Both parties are required to comply with the Joint Fire Code."

18.4 In addition, ICD contains additional clauses 6.15 and 6.16 requiring the contractor to take out professional indemnity insurance. As a general comment, these provisions are generally very similar to the SBC 05 provisions considered in Chapter 19, and many of the comments made there apply equally here.

PUBLIC LIABILITY AND EMPLOYER'S LIABILITY INSURANCE

"Clause 6.1: The contractor indemnifies the employer against death or personal injury of persons arising out of the carrying out of the works.

Clause 6.2/6.3: The contractor indemnifies the employer against damage to property (other than the works themselves and site materials) arising out of the carrying out of the works."

18.5 As with all of the JCT contracts, IC 05 starts by setting out the contractor's liabilities in broad terms. The use of an indemnity means that the limitation period runs from the time when the employer suffers the loss,[1] which could mean that the contractor's liability extends beyond what would usually be the limitation period for a claim based on a breach of contract.

18.6 The general rules of interpretation of indemnities apply to these clauses,[2] and the terms of the indemnities will be interpreted strictly. The one caveat to this is that the court considers it to be inherently unlikely that a party will wish to absolve the other of its negligence[3] although effect will be given to clear words in any exemption. The exemption will not apply if the claim can also be based on matters outside of the exemption's ambit.[4]

18.7 As with other JCT contracts, IC 05 distinguishes between the employer's liabilities caused by death and personal injury, and liabilities caused by property damage. In relation to the former, clause 6.1 provides that the contractor is strictly liable irrespective of whether or not he has been negligent. The contractor can only evade liability by showing that the liability is caused solely by an "act or neglect" of the employer himself, or any of the "Employer's Persons". The omission of a reference to breach of statutory duty by the employer (in contrast

1. *R & H Green* v *BRB* (1980) 17 BLR 94.
2. *City of Manchester* v *Fram Gerrard* (1977) 6 BLR 70.
3. *Gillespie Brothers & Co Ltd* v *Roy Bowles Transport Ltd* [1973] QB 400.
4. *Canada Steamship* v *R* [1952] AC 192.

to clause 6.2) probably means the contractor will need to show negligence to be able to rely on the exception.[5] On the other hand, the negligence does not necessarily need to be the employer's. "Employer's Persons" is defined widely as "all persons employed, engaged or authorised by the Employer", subject to a few exceptions, and it is submitted that this includes the Architect/Contract Administrator and any other consultants employed by the employer.

18.8 Clause 6.2 provides that in relation to liability for property damage, the contractor will be liable only if the loss was due to his "negligence, breach of statutory duty, omission or default". Following *Scottish & Newcastle plc* v *GD Construction (St Albans) Ltd*,[6] it seems likely that these all amount to negligence. As such, it appears that either the contractor or one of the "Contractor's Persons" will need to be at fault for this indemnity to apply. It is again worth adding that "Contractor's Persons" is defined widely in the contract, including (subject to various exceptions) all of the contractor's employees and agents. This seems to encompass subcontractors and subconsultants at all levels.

18.9 The indemnity in clause 6.2 covers liability for damage to "any property real or personal", but this very broad definition does need to be read in the light of the final sentence of clause 6.2, and the whole of clause 6.3 generally. Clause 6.3 provides that the damage to the works and site materials themselves are excluded from the indemnity, save where sectional completion or practical completion has occurred or partial possession of the works in question has been taken. The final sentence of clause 6.2 provides that where Option C of Schedule 1 applies, damage to the Existing Structures caused by Specified Perils are excluded from the indemnity to the extent that they were required to be insured by the employer, irrespective of whether or not they were actually so insured, and irrespective of whether the Specified Peril was a product of the contractor's negligence.

18.10 Clauses 6.1 and 6.2, as with many other JCT contracts, use the phrase "to the extent that" to apportion losses where the causes of the damage include both "Employer risks" and "Contractor risks". However, as has been pointed out elsewhere in this work, there is no guidance in the contract about how this apportionment should be undertaken, although in practice the courts are likely to do what is just and equitable in all the circumstances.

18.11 Clause 6.4 requires the contractor to take out and maintain insurance to cover his obligations under clauses 6.1 to 6.3.

18.12 The insurance policy against personal injury or death of the contractor's own employees must comply with the "relevant legislation", which is a reference to the Employer's Liability (Compulsory Insurance) Act 1969 and The Employers' Liability (Compulsory Insurance) Regulations 1998.

18.13 All of the contractor's other risks under clauses 6.1 to 6.3 are required to be insured in joint names with the employer, up to a pre-agreed maximum which is stated in the Contract Particulars. The Architect/Contract Administrator is entitled to call for evidence of this insurance, and if the contractor defaults in taking it out, the employer may himself take out insurance and recover the cost from the contractor. It is worth pointing out that such a replacement policy should only cover "any liability or expense which he may incur as a result of [the Contractor's] default" and may not be a like-for-like replacement of the joint names policy which should have been taken out by the contractor.

5. *Murfin* v *United Steel Companies* [1957] 1 WLR 104 (CA); *Callaghan & Welton* v *Hewgate* (1995) 75 BLR 11.

6. [2003] Lloyd's Rep IR 809; [2003] EWCA Civ 96.

INSURANCE FOR NON-NEGLIGENT WITHDRAWAL OF SUPPORT

18.14 Clause 6.5 of IC 05 is an optional provision designed to cover the mischief of *Gold* v *Patman & Fotheringham Ltd*.[7] In that case, the carrying out of the works caused damage to adjoining property, for which the employer had strict liability in nuisance but there was no negligence on the part of the contractor, and so the contractor's indemnity for property damage caused by negligence did not apply.

18.15 The clause is activated only if it is required by the Contract Particulars and instructed by the Architect/Contract Administrator.

18.16 It should be noted that even if this policy is taken out, its ambit is very limited, because of a series of limitations in clauses 6.5.1.1 to .9. The insurance policy is required to be in the joint names of the employer and the contractor, and covers both against non-negligent liability for damage to property other than the works caused by collapse, subsidence, heave, vibration, weakening or removal of support or lowering of ground water.

INSURANCE OF THE WORKS

18.17 IC offers alternative provisions for insurance of the works. Clause 6.7 provides that the insurance option set out in the Contract Particulars applies to the works. Generally, the provisions for insurance of the works are very similar to those found in SBC 05, and all of the comments found in Chapter 19 apply equally here.

OPTION A—CONTRACTOR INSURES THE WORKS

18.18 This is the option applicable to new buildings, where the contractor is required to insure the works. Option A provides:

> "Option A: The contractor takes out 'All Risks' insurance in the joint names of the employer and the contractor, for the full reinstatement value of the works. This is appropriate for new buildings."

18.19 The underlying scheme of Option A is that the contractor takes out joint names insurance for the works. If any damage does occur to the works, then insurance monies are paid to the employer. The employer must then use the insurance proceeds to pay the contractor to reinstate the works.

18.20 If the contractor fails to maintain the insurance in accordance with his obligation to do so, the employer may take out a joint names policy in respect of any risk which has not been insured by the contractor.

18.21 Option A requires the contractor to take out "All Risks Insurance" for the works. This is defined extensively in clause 6.8 as cover against all physical loss or damage to work and site materials (including the cost of removing debris and propping up the works) but subject to various exclusions, such as property damage from wear and tear, damage to materials arising from an innate defect, and war and nuclear accidents. With a lack of standardised practice

7. [1958] 1 WLR 697.

amongst the insurance industry, this definition needs to be checked against the relevant policy whenever it is used.

18.22 The policy should cover the full reinstatement value of the works, plus a pre-agreed percentage stated in the Contract Particulars to cover professional fees.

18.23 The policy must be a "joint names policy", which is defined in clause 6.8 as an insurance policy naming the employer and the contractor as joint insured. Of course, joint insurance (properly so called) also provides that either party could claim the insurance proceeds, so the contract requires the contractor to authorise the insurance proceeds to be paid to the employer only.

18.24 The contract provides that in the event of any damage, the contractor must notify the Architect/Contract Administrator of the details, presumably so that the employer can notify the insurers himself, even if the contractor fails to do so. After the insurer has inspected the damaged works, the contractor is required to reinstate the works. The employer is entitled to retain the amount allocated towards professional fees. The contractor is not entitled to any payment beyond the insurance proceeds for the restoration of the insured damage, so the contractor will bear the cost of any shortfall, because it is the contractor's responsibility to take out sufficient insurance.

18.25 The House of Lords considered materially identical provisions in the *Taylor Young* case.[8] It was held that the contractual insurance scheme provided an exhaustive package of remedies for both parties, so that neither party could claim damages from the other for losses covered by the clause. On the one hand, the employer could only insist that the contractor carried out reinstatement works, whereas on the other hand the contractor could only claim payment from the insurance proceeds. The contractor would be entitled to an extension of time, under clause 2.20.9. Recently, it had been held at first instance that this type of provision implies a term that one party will not be liable to another for a risk which is joint insured between them.[9] However, the decision of the Court of Appeal in *Tyco Fire & Integrated Solutions (UK) Ltd* v *Rolls Royce Motor Cars Ltd*[10] has introduced some areas of uncertainty. These matters are discussed in Chapter 13 above.

OPTION B—EMPLOYER INSURES THE WORKS

18.26 Option B provides:

> "Option B: The employer takes out 'All Risks' insurance in the joint names of the employer and the contractor, for the full reinstatement value of the works. This is also appropriate for new buildings."

18.27 This option can also be used with new buildings. Under this option, the employer is required to take out Joint Names Insurance for All Risks Insurance. In the event of damage to the works, a similar system to Option A applies. The key difference is that the restoration of the damage is treated as a variation. This effectively transfers the risk of a shortfall in the insurance proceeds to the employer.

8. *Ibid*.
9. *Board of Trustees of the Tate Gallery* v *Duffy Construction Ltd and Anor* [2007] Lloyd's Rep IR 758; [2007] EWHC 361 (TCC).
10. [2008] EWCA Civ 286.

OPTION C—EMPLOYER INSURES THE WORKS AND EXISTING STRUCTURE

18.28 Option C should be used on works to existing structures, where the employer is able to take out the insurance policy:

> "Option C: The employer takes out:
> - 'All Risks' insurance in the joint names of the employer and the contractor, for the full reinstatement value of the works; and
> - insurance of existing structures against 'Specified Perils' in the joint names of the employer and the contractor."

18.29 Option C includes similar provisions to Option B in respect of insurance and damage to the works. The employer is required to take out a joint names policy for All Risks Insurance for the full reinstatement value of the works, plus an agreed percentage for professional fees.

18.30 A slightly different procedure applies if damage occurs. The Architect/Contract Administrator is notified of the damage, and the contractor and his subcontractors authorise the insurer to pay out insurance proceeds to the employer.

18.31 However, if it is "just and equitable", either party may then terminate the contract within 28 days of the damage occurring. The other party then has a period of seven days, from receipt of the termination notice, in which to invoke the dispute resolution procedures to decide whether such termination was, in fact, just and equitable. In the absence of any guidance in the contract, it is submitted that what is "just and equitable" will be largely a matter for the discretion of the courts in all the circumstances.

18.32 If the contract is not terminated, then (as with Option B), the works will be reinstated as a variation to the contract. As such, the risk of any insurance shortfall lies with the employer.

18.33 In addition to the obligation to insure the works, there is an obligation on the employer to take out a joint names policy for the existing structure. In this case, however, the policy only covers Specified Perils (as opposed to All Risks Insurance).

18.34 There is no obligation under Option C to re-instate if damage is caused to the existing structure. In practice, if the damage is minor it may be restored as a variation to the contract. If it is more significant, the contract may well be frustrated or capable of termination for force majeure.

18.35 Historically, the relationship between this clause and the indemnity in clause 6.2 has caused much judicial ink to be spilt. However, the express inclusion in clause 6.2 of the proviso referring to Option C seems to have resolved any doubt. In *Scottish & Newcastle plc* v *GD Construction (St Albans) Ltd*,[11] where the Court of Appeal applied the *Taylor Young* reasoning to similar wording in the IFC 84, it was held that the contractor's liability for damage to the existing structures caused by Specified Perils was excluded.

POSITION OF SUBCONTRACTORS

18.36 Clause 6.9 provides that whichever party takes out insurance of the works must ensure either that each subcontractor is recognised as joint insured, or subrogation rights against the subcontractors are waived.

11. See note 6, *supra*.

18.37 This has two significant effects on the subcontractors' respective liability for damage caused to the works. First, if the insurance policy properly implements the requirements of this provision, then the insurers may well not be able to exercise subrogation rights to bring claims against the subcontractors.[12] But, furthermore, the subcontractors will probably not be liable to other joint insured parties for the risks which the contract required to be covered by the policy.[13] As well as restricting the recovery of damages from subcontractors by either the employer or the contractor, this means that other parties outside of the joint insurance scheme will not be able to claim a contribution under the Civil Liability (Contributions) Act 1978. However, it should be noted that clause 6.9 only applies to "Specified Perils", and accordingly, if a subcontractor causes damage to the existing structures in any other way, there is no reason why he should not be liable under the ordinary principles of law.

18.38 Where Insurance Option C applies, Clause 6.9.3 of IC also provides that the insurance policy for the existing structures should either name the "Named Sub-Contractors" as joint insured, or include a waiver of subrogation rights against them. As a result, it is likely that the Named Sub-Contractors will not be liable to either the employer or the contractor for risks which should have been covered by the joint names policy.[14] However, the express reference to Named Sub-Contractors in clause 6.9.3[15] means that any other subcontractors may potentially be liable to the employer under the ordinary principles of law, as the *Taylor Young* decision does not apply to them. Such a subcontractor could be liable for breach of a collateral warranty to the employer, but even if that is not the case, they may be liable in tort as a result of *British Telecommunications plc* v *James Thomson & Sons Engineers Ltd*.[16]

INTERMEDIATE BUILDING CONTRACT WITH CONTRACTOR'S DESIGN (ICD)—REQUIREMENT FOR PROFESSIONAL INDEMNITY INSURANCE

18.39 In ICD, there is an additional requirement on the contractor to take out professional indemnity insurance. The financial limit on the policy should not be less than the minimum requirement set out in the Contract Particulars. The contractor is required to maintain the insurance policy for an agreed period of time (also set out in the Contract Particulars), provided that it remains available at commercially reasonable rates.[17] If insurance becomes unavailable at reasonable rates, the contractor must notify the employer in order that they can discuss the means of protecting their respective positions.[18]

12. Where a person is named as joint insured under a "loss insurance" policy, the insurer may not be able to exercise subrogation rights to bring an action against him: *Petrofina (UK) Ltd* v *Magnaload Ltd* [1984] QB 127 although the position is not clear following the decision of the Court of Appeal in *Tyco* (see Chapter 13 above).

13. Again, see Chapter 13 above.

14. *Scottish & Newcastle plc* v *GD Construction Limited (St Albans) Ltd* (2003) BLR 131, applying the decision in *Taylor Young*, subject to the reservations expressed in Chapter 13 above.

15. Clause 6.9.3 refers specifically to "Named Sub-Contractors", whereas the remainder of Clause 6.9 refers only to "subcontractors".

16. [1999] 1 WLR 9.

17. The requirement commonly seen in consultants' appointments that the policy should be available on reasonable "terms" (as well as reasonable "rates") has not been included.

18. In the absence of any express provisions, it is unlikely that the obligation to discuss potential solutions includes an obligation to take any action as a result of such discussions.

18.40 This clause does not include a provision enabling the employer to recover the cost of a replacement policy in the event that the contractor fails to take out any insurance without justification. This means that the employer is not likely to have any effective remedy in those circumstances. Accordingly, the employer will suffer a loss only in the event of an uninsured loss, and in such circumstances the contractor is unlikely to be able to make a damages payment. As a result, it is always important for the employer's representatives to regularly check that the policy is being maintained.

CHAPTER NINETEEN

CONTRACT INSURANCE UNDER SBC: THE STANDARD FORM OF BUILDING CONTRACT

Antony Edwards-Stuart

GENERAL

19.1 The new Standard Form of Building Contract, SBC, was introduced by the Joint Contracts Tribunal during 2005. It comes in three forms, with quantities (SBC/Q), with approximate quantities (SBC/AQ) and without quantities (SBC/XQ). There have been minor updates and corrections which have been included in the June 2007 revision, together with an Attestation Update in February 2008.[1]

19.2 Like its predecessor, JCT 1998, it sets out a comprehensive package of obligations on the main contractor to carry out works in accordance with the contract documents and in accordance with all relevant building regulations and consents and planning permissions, and by a completion date or series of dates. The contract can additionally require the main contractor to build the development in phases or sections.

19.3 The insurance provisions of SBC 05 have their origin in the JCT 1963 form of contract which became, with slight modification, the provisions of JCT 1980. In 1986 the provisions were reviewed and substantially altered insurance clauses came into operation on 1 January 1987, with further minor amendments in 1996. Subsequently these changes were consolidated and incorporated without material change into JCT 1998. SBC 05 substantially incorporates these provisions and, although there are various changes to the wording and layout, there are no material differences between the provisions of SBC 05 and those of JCT 1998. Thus the case law on JCT 1998 (and its immediate predecessors) remains relevant. However, much of the case law on JCT 1963 and the original wording of JCT 1980 is no longer applicable to the provisions of SBC 05 and must be viewed with some caution.

19.4 The insurance provisions of the new Intermediate Building Contract 2005 (IC 05) are materially in the same terms to those of SBC 05.

RELEVANT PROVISIONS IN THE CONTRACT

19.5 The main provisions in SBC 05 (which have not been altered) relevant to insurance are as follows:

> "Clause 6.1: the contractor is to indemnify the employer against claims in respect of death or personal injury arising out of the works, except to the extent that the employer is itself at fault.

1. This was introduced to facilitate an additional method of execution as a deed by one director in accordance with s. 44(2)(b) of the Companies Act 2006.

Clause 6.2: a similar indemnity is to be provided by the contractor to the employer in respect of property damage, other than damage to the works and to site materials, but only insofar as it results from the fault of the contractor.

Clause 6.4.1: the liability of the contractor in respect of the above indemnities is to be insured by the contractor; in addition, by clause 6.5.1, the employer may insist upon insurance in the joint names of the employer and contractor being procured by the contractor in respect of loss of or damage to property not caused by the fault of the contractor.''

19.6 Insurance Options (replacing clauses 22A–C in JCT 1998):

''A and B: in the case of new buildings, insurance of the works is to be effected either by the contractor (Option A), or by the employer (Option B), under an All Risks policy in the joint names of the employer and contractor, which leave the residual risk of any under insurance with the contractor and the employer, respectively.

C: where there are existing buildings, insurance is to be effected by the employer in the joint names of the employer and contractor of the existing structures against Specified Perils and of the Works, against All Risks.''

19.7 The potential requirement on the Contractor to insure against the Employer's possible loss of liquidated damages (clause 22D of JCT 1998) has not been retained.

19.8 Before considering the specific clauses in turn, a number of general points should be made:

- The scheme in SBC 05 preserves the distinction between the insurance of the works and of new buildings, on the one hand, and the insurance of existing structures, on the other. The former have to be insured against All Risks, whereas the latter have to be insured only against Special Perils (fire, etc). Under Option A, where the insurance for new buildings has to be taken out by the Contractor, the Contractor's only source of remuneration for restoring the damage to the works is the insurance money. Thus the Contractor bears the risk if there is a shortfall. By contrast, under Option B, the work of restoring the damage is treated as a variation so that the Employer bears the risk of any shortfall in the insurance money. Interestingly, there can be no entitlement to an extension of time under Option A if the damage is not caused by a Special Peril, because damage by other perils covered by an All Risks policy is not a Relevant Event. However, it is arguable that the Contractor is entitled to an extension of time under Option B because the obligation to restore the work is *treated* as a variation.
- As the indemnity under clause 6.2 excludes loss or damage to any property required to be insured caused by Special Peril and is expressly stated to be subject to clause 6.3, which excludes loss or damage to the Works, and because the Employer and the Contractor are jointly insured against the same risk, there can be no right of subrogation as between Employer and Contractor, even if the damage insured against is caused by the negligence of the Contractor: *Co-Operative Retail Services Ltd* v *Taylor Young Partnership Ltd*.[2] It should be noted that the reference to ''any property required to be insured'' suggests that the exclusion applies whether or not the required insurance is in place under Option C.

2. [2002] 1 WLR 1419 (HL), where it was held that architects and engineers sued by the employer in respect of losses caused in a fire could not recover contribution from either the main contractor or a subcontractor who were insured under the joint names policy.

- Clauses 6.1 and 6.2 each exclude or impose liability to the extent that the Employer or Contractor is at fault, but are silent as to the method by which liability is to be apportioned. The Employer therefore needs to have liability insurance to cover liability for death or personal injury caused by his fault.[3]

SPECIFIC CLAUSES

Section 6—clauses 6.1 to 6.3

"Injury to Persons and Property

Liability of Contractor—personal injury or death

6.1 The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings whatsoever in respect of personal injury to or the death of any person arising out of or in the course of or caused by the carrying out of the Works, except to the extent that the same is due to any act or neglect of the Employer or of any of the Employer's Persons.

Liability of Contractor—Injury or damage to property

6.2 The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal in so far as such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Works and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Contractor or of any of the Contractor's Persons. This liability and indemnity is subject to clause 6.3 and, where Insurance Option C (Schedule 3, paragraph C.1) applies, excludes loss or damage to any property required to be insured thereunder caused by a Specified Peril.

Injury or damage to property—Works and Site Materials excluded

6.3.1 Subject to clauses 6.3.2 and 6.3.3, the reference in clause 6.2 to 'property real or personal' does not include the Works, work executed and/or Site Materials up to and including whichever is the earlier of:

.1 the date of issue of the Practical Completion Certificate; or

.2 the date of termination of the Contractor's employment.

.2 Where a Section Completion Certificate is issued in respect of a Section, that Section shall not after the date of issue of that certificate be regarded as 'the Works' or 'work executed' for the purpose of clause 6.3.1.

.3 If clause 2.33 has been operated, then, after the Relevant date, the Relevant Part shall not be regarded as 'the Works' or 'work executed' for the purpose of clause 6.3.1."

19.9 So far as death or personal injury is concerned, the contractor's indemnity extends to any expense, liability, loss, claim or proceedings whatsoever "in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or by reason of the carrying out of the Works". It has been held that it is the personal injury or death which must

3. Property and liability policies generally cover the insured against the consequences of his own negligence: see *Fraser* v *Furman (Productions) Ltd* [1967] 1 WLR 898, CA, in which the court's approach to the meaning of reasonable precautions clauses now represents the law. For a case in which such a clause was successfully invoked, see *M/S Aswan Engineering Establishment Co Ltd* v *Iron Trades Mutual Insurance Co Ltd* [1989] 1 Lloyd's Rep 289. See also the other authorities referred to in Chapter 9 above.

have arisen out of the carrying out of the Works, not the claim or the proceedings: see *Richardson* v *Buckinghamshire CC*.[4] Thus the costs of an unsuccessful claim for injury which was alleged to have been caused by the works do not fall within the indemnity.

19.10 The indemnity does not apply to the extent that the same is due to any act or neglect of the Employer or of any person employed, engaged or authorised by the Employer,[5] which permits the court to apportion liability where the injury is caused partly by the Employer's fault. However, the clause does not indicate the basis on which liability is to be apportioned (for instance, by reference to causative potency, blameworthiness, or a combination of both).[6] It is submitted that on both clauses 6.1 and 6.2 the apportionment should be such as is just and equitable. The extent to which the employer will be held responsible for the acts of others present on the site will depend on the circumstances. However, an employer will not usually be liable for the acts of independent consultants, such as engineers and architects (see *Clayton* v *Woodman & Sons (Builders) Ltd*,[7] overruled on appeal but not on this point). However, it must be remembered that when performing certain duties (such as instructing a variation), the architect does act as the employer's agent.

19.11 There is no definition of "act or neglect", but the expression has been given a restricted meaning so that it does not apply where the employer's liability is for non-negligent breach of statutory duty.[8] This is to be contrasted with the expression in clause 6.2 "any negligence, breach of statutory duty, omission or default of the Contractor", which is clearly wider. Although a "default" can obviously include a non-negligent breach of contract, it is unclear what, if anything in the context of the phrase as a whole, is added by the word "omission".

19.12 The right to indemnity does not arise until the liability is established, so that a claim for indemnity may be made years after the primary claim has become statute barred. See, in particular, *R & H Green and Silley Weir* v *BRB*.[9]

19.13 The words "arising under any statute or at common law" in clause 20.1 of JCT 1998 have been omitted from clause 6.1. This is unlikely to make any difference.

19.14 In contrast with clause 6.1, clause 6.2 imposes an obligation to indemnify only where there has been negligence, breach of statutory duty, omission or default of the

4. (1971) 6 BLR 62, CA.

5. The term "Employer's Persons" is defined in clause 1.1. It excludes the Contractor, the Contractor's Persons, the Architect/Contract Administrator, the Quantity Surveyor and any Statutory Undertaker, but includes any third party brought in by the Employer to inspect any antiquities.

6. In a decision given under article 18 of the International Convention on Salvage 1989, which provides for apportionment in rather similar terms, *The "Maridive VII" & Others* [2004] EWHC 2227, David Steel J held that it was necessary to assess the relative causative potency and blameworthiness of each party's faults. (Article 18 provides: "A salvor may be deprived of the whole or part of the payment due under this Convention *to the extent that* the salvage operations have become necessary or more difficult because of fault or neglect on his part . . . " (emphasis added).

7. [1961] 3 WLR 987.

8. See *Hosking* v *De Havilland Aircraft Co Ltd* [1949] 1 All ER 540, where an employee of the employer was injured on site owing to the negligent provision by the contractor of a rotten plank as a temporary bridge over an excavation, and succeeded in a claim against the employer for breach of statutory duty under the factories or health and safety legislation. It was held that the employer was entitled to indemnity from the contractor under a similarly worded clause (although the reasoning in the judgment is not very clear). See also *Murfin* v *United Steel Companies Ltd* [1957] 1 WLR 104, CA, where the relevant exception was simply for negligence and it was held that this did not include a non-negligent breach of statutory duty.

9. [1985] 1 All ER 237.

Contractor, or of any of the Contractor's Persons. This wording appears to limit the duty to indemnify to those situations where the contractor has been at fault, so that liability imposed in the absence of fault, as in certain types of claim in nuisance[10] or under the rule in *Rylands* v *Fletcher*, may be outside the scope of the indemnity. However, a difficulty may arise where there has been a non-culpable omission.

19.15 The last sentence of clause 6.2 expressly refers to Insurance Option C, which requires the employer to take out a joint names policy in respect of the existing structures against damage caused by the Specified Perils. It is to be noted that the exclusion from the indemnity refers to "property required to be insured", whether it is actually insured or not. The effect of this is to remove that risk from the scope of the indemnity: see *CRS* v *Taylor Young*.[11] The wording of clause 6.2 as a whole suggests that the insurance of the existing structures against the Specified Perils must extend to cover against losses caused by negligently caused Specified Perils.[12]

Section 6—clauses 6.4.1 to 6.6

"Insurance against Personal Injury and Property Damage

Contractor's insurance against his liability

6.4.1 Without prejudice to his obligation to indemnify the Employer under clauses 6.1 and 6.2, the Contractor shall take out and maintain[13] insurance in respect of claims arising out of his liability referred to in clauses 6.1 and 6.2 which:

.1 in respect of claims for personal injury to or the death of any employee of the Contractor arising out of and in the course of such person's employment, shall comply with all relevant legislation; and

.2 for all other claims to which clause 6.4.1 applies shall indemnify the Employer in like manner to the Contractor (but only to the extent that the Contractor may be liable to indemnify the Employer under the terms of this Contract) and shall be in a sum not less than that stated in the Contract Particulars for any one occurrence or series of occurrences arising out of one event.

6.4.2 As and when reasonably required to do so by the Employer, the Contractor shall send to the Architect/Contract Administrator for inspection by the Employer documentary evidence that the insurances required by clause 6.4.1 have been taken out and are being maintained, and at any time the Employer may (but not unreasonably or vexatiously) require that the relevant policy or policies and related premium receipts be sent to the Architect/Contract Administrator for such inspection.

6.4.3 If the Contractor defaults in taking out or in maintaining insurance in accordance with clause 6.4.1 the Employer may himself insure against any liability or expense which he may incur arising out of such default and the amount paid or payable by him in respect

10. The topic of strict liability in nuisance is, fortunately, outside the scope of this work.

11. [2002] 1 WLR 1419.

12. It was suggested by Rix LJ in *Tyco Fire & Integrated Solutions* v *Rolls-Royce Motor Cars Ltd* [2008] EWCA Civ 286 that on some forms of contractual wording the obligation to insure in joint names against Specified Perils would only extend so far as loss by the Specified Perils has not been caused by negligence. He distinguished the decision of the Court of Appeal in *Scottish & Newcastle* v *GD Construction (St Albans) Ltd* [2003] Lloyd's Rep IR 809, which held the peril of fire covered loss by fire of any kind. The unreal and wholly uncommercial construction adopted in *Tyco* is likely to create far more problems than it solves.

13. See the discussion of the meaning of this expression below.

of premiums therefor may be deducted from any monies due or to become due to the Contractor under this Contract or shall be recoverable from the Contractor as a debt.

Contractor's insurance of liability to Employer

6.5.1 If the Contract Particulars state that the insurance under clause 6.5.1 may be required, the Contractor shall, if so instructed by the Architect/Contract Administrator, take out a policy of insurance in the names of the Employer and the Contractor for the amount of indemnity there stated in respect of any expense, liability, loss, claim or proceedings which the Employer may incur or sustain by reason of injury or damage to any property caused by collapse, subsidence, heave, vibration, weakening or removal of support or lowering of ground water arising out of or in the course of or by reason of the carrying out of the Works, excluding injury or damage:

.1 for which the Contractor is liable under clause 6.2; or

.2 which is attributable to errors or omissions in the designing of the Works; or

.3 which can reasonably be seen to be inevitable having regard to the nature of the work to be executed and the manner of its execution; or

.4 (if Insurance Option C applies) which it is the responsibility of the Employer to insure under paragraph C.1 of Schedule 3; or

.5 to the Works and Site Materials brought on to the site of the Contract for the purpose of its execution except where the Practical Completion Certificate has been issued or in so far as any Section is the subject of a Section Completion Certificate; or

.6 which arises from any consequence of war, invasion, act of foreign enemy, hostilities (whether war is declared or not), civil war, rebellion or revolution, insurrection or military or usurped power; or

.7 which is directly or indirectly caused by or contributed to by or arises from the Excepted Risks; or

.8 which is directly or indirectly caused by or arises out of pollution or contamination of the buildings or other structures or of water or land or the atmosphere happening during the period of insurance, save that this exception shall not apply in respect of pollution or contamination caused by a sudden identifiable, unintended and unexpected incident which takes place in its entirety at a specific moment in time and place during the period of insurance (all pollution or contamination which arises out of one incident being considered for the purpose of this insurance to have occurred at the time such incident takes place); or

.9 which results in any costs or expenses being incurred by the Employer or any other sums being payable by the Employer in respect of damages for breach of contract, except to the extent that such costs and expenses or damages would have attached in the absence of any contract.

6.5.2 Any insurance under clause 6.5.1 shall be placed with insurers approved by the Employer, and the Contractor shall send to the Architect/Contract Administrator for deposit with the Employer policy or policies and related premium receipts.

6.5.3 The amounts expended by the Contractor to take out and maintain the insurance referred to in clause 6.5.1 shall be added to the Contract Sum.

Excepted Risks

6.6 Notwithstanding clauses 6.1, 6.2 and 6.4.1, the Contractor shall not be liable either to indemnify the Employer or to insure against any personal injury to or the death of any person or any damage, loss or injury caused to the Works or Site Materials, work executed, the site, or any other property, by the effect of an Excepted Risk.''

19.16 The obligation on the contractor under clause 6.4.1 is to take out and maintain insurance. It is unclear whether the employer would have a remedy against the contractor

where the insurer avoids the policy for non-disclosure or misrepresentation, or refuses to pay a claim because notice was not submitted in accordance with the notice provisions of the policy. It can hardly be said that the contractor has failed to *maintain* the insurance in these situations, as they are all acts of the insurer, and the employer's remedy against a contractor whose policy has ceased to operate in any of these ways could at the highest be based on an implied term. The position is different when the insurer is discharged from further liability following a breach of a promissory warranty since it could be argued that the contractor's failure to comply with the warranty constitutes a failure to maintain the insurance.[14] It may be that the employer would have to show that the contractor knew or ought to have known that he was in breach of the warranty.

19.17 Thus it might be said that the contractor is in breach of his insuring obligations only if: (1) he fails to take out a compliant policy; (2) he cancels the policy; (3) he fails to pay the premium; or (4) he fails to comply with a promissory warranty when he knew or ought to have known of the facts constituting the breach. If a loss has occurred and the contractor is found to be uninsured for any of these reasons, an action by the employer against the contractor for breach of the insuring obligation may prove to be unproductive since the cause of the contractor's breach may well be financial difficulties. The provisions in clause 6.14, which in contracts to which it applies (usually those above a certain value) require both the employer and the contractor to comply with the Joint Fire Code, may result in withdrawal or cancellation of the cover if any requirements notified by the insurers are not complied with. If a failure by the contractor to comply with such requirements invalidates the cover, he may in principle be liable for breach of the duty to maintain insurance.

19.18 Clause 6.4.1 does not require the contractor to take out joint names insurance in respect of his liability to indemnify the employer under clauses 6.1 and 6.2. However, by clause 6.4.1.2 the insurance must indemnify the employer in circumstances where he is entitled to be indemnified by the contractor. Unless there is a term in the contractor's liability policy to this effect, the employer would not be able to avail himself of the rights conferred by the Contracts (Rights of Third Parties) Act 1999 and make a claim under the policy in his own name. However, since the insurance is required to be in such terms by the building contract, it is submitted that the contractor can be said to have taken out the insurance not only for himself but also as agent for the employer. In Australia a claim by a contractor who was entitled to the benefit of an indemnity under a liability policy to which he was not a party succeeded: see *Trident General Insurance Co* v *McNiece Bros Pty Ltd*.[15]

19.19 Absent the right to make a direct claim, the only rights which the employer may have against the contractor's insurer would be those that arise in the event of the contractor's liquidation or bankruptcy, or on the making of an administration order against the contractor, in accordance with the terms of the Third Parties (Rights Against Insurers) Act 1930. But, whichever route is open, the employer would not be entitled to be put in any better position against the insurer than the contractor. Thus, if the policy contains strict notice provisions, these must be complied with by the contractor if a claim by the employer is to succeed: by the nature of things, this requirement will frequently defeat an action under the 1930 Act. Further, an employer can bring an action against the contractor's liability insurer only where the

14. This is because the breach of a promissory warranty will generally discharge the insurer from further performance as from the date of the breach without the insurer having to give notice.

15. (1988) 62 ALJ 508; (1987) 8 NSWLR 270, CA.

contractor's liability to the employer has been established and quantified by decision, arbitration award or settlement,[16] so that if the contractor is a company which has been put into liquidation and removed from the register of companies before its liability has been established, the insurer is immune under the Third Parties (Rights Against Insurers) Act 1930.[17]

19.20 Clause 6.5.1, unlike clause 6.4.1, is concerned with damage to property which occurs without fault on the part of the contractor. This goes some way towards meeting the lacuna of clause 6.2 and the insurance will pick up the liability for some torts of strict liability, such as under the rule in *Rylands* v *Fletcher*[18] and certain types of nuisance. However, there is a wide body of exclusions, of which the two most relevant are probably clauses 6.5.1.2 (errors and omissions in the design) and 6.5.1.3 (inevitable result of carrying out the works[19]). The period of insurance should extend to the end of the Rectification Period.[20] Clause 6.5.1, particularly footnote [52] to it, suggests that the insurance should be written so as to respond to "any expense, liability, loss, claim or proceedings which the Employer may incur or sustain" which occurs during the period of insurance from the specified causes. However, any such policy would be of limited value, since damage caused by perils such as subsidence or heave may well not manifest itself until some time after the event that caused it.[21] It is submitted that the joint names policy required by the clause should cover the employer and contractor against liability or loss from the events listed which occur during the period of insurance, notwithstanding the fact that the actual loss may well not be sustained until after the expiry of the period of insurance. In any event, the contractor would be well advised to take out the insurance on this basis.

19.21 The expression "directly or indirectly caused by . . . " in clauses 6.5.1.7 and 6.5.1.8 is intended and effective to displace the doctrine of proximate cause.[22]

19.22 A policy effected in accordance with clause 6.4.1 will not comply with the requirements of the contract if it is limited to an indemnity against liability of the Contractor for the Employer's liability *for damages*. For example, a liability policy that covers liability for damages

16. *Post Office* v *Norwich Union Fire Insurance Society* [1967] 2 QB 363, CA. Where the contractor is liable to the employer in respect of losses, only some of which are covered by the insurance, problems can arise if the liability is compromised by a global settlement: see *Lumbermens Mutual Casualty Co* v *Bovis Lend Lease Ltd* [2005] 1 Lloyd's Rep 494. This decision has been widely criticised and was considered to be wrong, in some compelling but *obiter* reasoning, by Aikens J in *Enterprise Oil* v *Strand Insurance Co* [2006] 1 Lloyd's Rep 500; and also by Morison J in *AIG* v *Faraday* [2006] EWHC 2707.

17. *Bradley* v *Eagle Star Insurance Co Ltd* [1989] 1 AC 957, HL. This is subject to the possible restoration of the company to the register, under the Companies Act 1985, s. 651 (as amended, in respect of actions including death or personal injury, by the Companies Act 1989). For the restoration procedure in personal injury cases, see *Re Workvale Ltd (No. 2)* [1992] 2 All ER 627.

18. (1868) LR 3 HL 330.

19. Difficult questions may arise as to whether or not a loss can reasonably be foreseen to be inevitable if its occurrence is foreseen as inevitable but its timing cannot be foreseen. In this situation, the occurrence of the (inevitable) loss during the period of insurance is still a matter of chance. On the uninsurability of inevitabilities and inherent vice generally, see *Soya GmbH Mainz Kommanditgesellschaft* v *White* [1983] 1 Lloyd's Rep 122, HL; *F W Berk & Co* v *Style* [1955] 3 All ER 625, CA; *Noten (TM) BV* v *Harding* [1989] 2 Lloyd's Rep 527; *Promet Engineering* v *Sturge (The Nukila)* [1997] 2 Lloyd's Rep 146. In the last of these cases, Hobhouse LJ pointed out (at 151) that one aspect of a fortuity is whether or not damage will be caused during a given period of time.

20. See footnote 52 to the standard form.

21. For an example of this, see *Kelly* v *Norwich Union* [1989] 2 All ER 888, CA.

22. See *Coxe* v *Employers' Liability Assurance* [1916] 2 KB 629.

will not respond to a liability as a polluter for clean-up costs pursuant to statutory provisions such as sections 161 and 161A of the Water Resources Act 1991.[23]

Section 6—clauses 6.7 to 6.10

> **"Insurance of the Works**
>
> **Insurance Options**
> 6.7 Insurance Options A, B and C are set out in Schedule 3. The Insurance Option that applies to this Contract is that stated in the Contract Particulars."

19.23 The Insurance Options correspond to the options provided in clauses 22A to 22C of JCT 1998. These are dealt with below.

19.24 Clause 6.8 contains definitions of All Risks Insurance, Excepted Risks, Joint Names Policy, Specified Perils (namely fire, lightning, explosion, storm, flood, etc.) and Terrorism Cover. The contractor or employer must take care to ensure that the cover afforded by any proposed policy matches the defined risks.

19.25 Clause 6.9.1 provides that all subcontractors are to be recognised as an insured under the relevant joint names policy under Insurance Options A, B or C, in respect of loss or damage to the Works, work executed and Site Materials by Specified Perils and that the policies must include a waiver by the insurers of subrogation rights against subcontractors. This is discussed in more detail below.

19.26 Clause 6.10.1 deals with the non-availability of terrorism cover: the employer may opt either to continue or to terminate the contract. If he opts to continue and the work is damaged by terrorism, the contractor must restore the damage and the work of restoration is treated as a variation (with no reduction even if the loss or damage was contributed to by the negligence of the contractor). It is suggested that the words "treated as a Variation" probably entitle the contractor to an extension of time as well as to money.[24]

Section 6—clauses 6.11 to 6.16

19.27 Clause 6.11 requires the contractor to take out professional indemnity insurance where there is a Contractor's Design Portion.[25] Reference should also be made to Chapter 20 below where we emphasise the need to ensure that all parties have a full understanding of where risks lie both under the building contract and under any relevant contractor's professional indemnity policy.

19.28 Clause 6.12 requires the contractor to notify the employer if the insurance is no longer available at reasonable rates so that employer and contractor can discuss the means of best protecting their respective positions.

19.29 Clause 6.14 deals with compliance with and breaches of the Joint Fire Code. Where compliance with the code is required by the Contract Particulars, this clause requires both the employer and the management contractor (and their respective "Persons") to comply with the

23. See *Bartoline* v *Royal & Sun Alliance* [2007] Lloyd's Rep IR 423.

24. See the discussion on this point in para 19.8 above.

25. Many contractors will carry such insurance in any event. Such policies almost invariably exclude liability for defective workmanship. It is respectfully submitted that the observations to the contrary by Rix LJ in *Tyco Fire & Integrated Solutions* v *Rolls-Royce Motor Cars Ltd* [2008] EWCA Civ 286 are not correct (even in the context of the contract under consideration in that case).

Joint Fire Code, and it provides a machinery for the implementation of any remedial measures required by the Joint Names insurers in the event of a breach of the code by either party.

THE INSURANCE OPTIONS

Schedule 3—Option A

19.30 Option A (which is unamended) replaces clause 22A in JCT 1998 in relation to the insurance of new buildings by the Contractor and is in the following terms:

> "A.1 The Contractor shall take out and maintain[26] with insurers approved by the Employer a Joint Names Policy for All Risks Insurance with cover no less than that specified in clause 6.8 for the full reinstatement value of the Works or (where applicable) Sections (plus the percentage, if any, stated in the Contract Particulars to cover professional fees) and (subject to clause 2.36[27]) shall maintain such Joint Names Policy up to and including the date of issue of the Practical Completion Certificate or, if earlier, the date of termination of the Contractor's employment (whether or not the validity of that termination is contested).
>
> The obligation to maintain the Joint Names Policy shall not apply in relation to a Section after the date of issue of the Section Completion Certificate for that Section."

19.31 Clause A.2 provides for the provision to the architect or contract administrator by the contractor of the joint names policy, premium receipts and so on, and for the employer himself to take out the policy if the contractor fails to do so.

19.32 Clause A.3 provides for the use in the alternative of the contractor's own policy if it provides cover against the same risks and is in joint names, and for provision by the contractor of documentary evidence that the policy is in place and is being maintained.

19.33 Clause A.4 provides that on the occurrence or later discovery of any loss or damage to executed work or Site Materials resulting from an insured peril, notice of its extent, nature and location must be given forthwith by the contractor to the employer or architect.[28] This provision enables the employer to submit a claim in the event that the contractor fails to do so or gives the impression that he will not do so within the time allowed by the policy. The occurrence of the loss or damage is to be disregarded in computing any amounts payable to the contractor under the contract, but the contractor is to restore the damaged property after any inspection required by the insurers.[29]

19.34 The contractor (for himself and any insured subcontractors) is to authorise the payment of the policy monies to the employer, who must then pay them to the contractor by interim instalments (less any amounts properly incurred by the employer in respect of professional fees up to the amounts paid by insurers). The contractor is not entitled to any payment other than the proceeds of the policy.[30]

19.35 Thus it is the duty of the contractor to reinstate. Since the only sums available to the contractor from the employer to effect reinstatement are the policy monies, it follows that if the insurance monies are inadequate, the shortfall will be borne by the contractor. This is understandable, as under clause A.1 it is the contractor's duty to insure for the full reinstatement value, so that the burden of any breach of duty falls upon the contractor.

26. See the discussion on this point in paras 19.27 to 19.29 above.
27. This concerns the situation where the Employer takes early possession of a part of the Works.
28. Clause A.4.1.
29. Clauses A.4.2 and A.4.3.
30. Clauses A.4.4 to A.4.6.

19.36 There are no material differences between the wording of clauses A.1 and A.4 and that of clause 22A and 22A.4 of JCT 1998 although the concluding words in parenthesis of clause A.1 will add clarity in the case of a disputed termination.

19.37 As the House of Lords held in *Co-Operative Retail Services* v *Taylor Young*,[31] the effect of clauses A.1 and A.4, when read in conjunction with clauses 6.2 and 6.3, is that the ordinary rules for the payment of compensation for negligence and breach of contract have been eliminated where damage to the Works is caused by an insured peril. They have been replaced by the insurance provisions with the result that the contractor, and any insured subcontractors, will not be liable in contract or tort for losses caused to the works by an insured peril.

19.38 It is to be noted that the House of Lords in *CRS* v *Taylor Young* did not overrule the decision of the Court of Appeal in *Surrey Heath Borough Council* v *Lovell Construction Ltd*,[32] in which it was held that clause 22A(1) (of JCT 1981) did not operate as an exclusion clause. In reaching this conclusion, the Court of Appeal rejected the argument that the existence of a joint names policy will always prevent one assured from suing the other with respect to a risk insured under the policy, although the court held that the employer could not recover from the contractor any sum that he had recovered under the policy. The position was altered by the removal from clause 20.2, by the 1986 amendments to the JCT, of the contractor's indemnity in respect of the Works in line with the present position in SBC 2005.

19.39 The question of the circumstances in which one party to a building contract may sue another party is dealt with in detail in Chapter 13.

Schedule 3—Option B

19.40 Option B (which is unamended) replaces clause 22B in JCT 1998 in relation to the insurance of new buildings by the Employer and is in the following terms:

> "B.1 The Employer shall take out and maintain a Joint Names Policy for All Risks Insurance with cover no less than that specified in clause 6.8 for the full reinstatement value of the Works or (where applicable) Sections (plus the percentage, if any, stated in the Contract Particulars to cover professional fees) and (subject to clause 2.36) shall maintain such Joint Names Policy up to and including the date of issue of the Practical Completion Certificate or, if earlier, the date of termination of the Contractor's employment (whether or not the validity of that termination is contested).
>
> The obligation to maintain the Joint Names Policy shall not apply in relation to a Section after the date of issue of the Section Completion Certificate for that Section."

19.41 Except where the employer is a Local Authority, clause B.2 provides for the provision to the contractor of documentary evidence that the joint names policy has been taken out, and for the contractor himself to take out the policy if the Employer fails to do so and for the premium to be added to the Contract Sum. Local authorities are required to provide evidence that Terrorism Cover is being provided under the relevant policy.

31. [2002] 1 WLR 1419.

32. (1990) 48 BLR 108. This decision was followed in *Yarm Road Ltd* v *Hewden Tower Cranes Ltd* [2002] EWHC 2265, by HHJ Richard Seymour QC in the TCC, in which he held that the existence of project insurance did not override the terms of the contract between the main contractor and the supplier of a tower crane (the case went to appeal, but not on this point: see (2004) 20 Con LJ 137). The *Surrey Heath* case was considered in *Tyco Fire & Integrated Solutions* v *Rolls-Royce Motor Cars Ltd* [2008] EWCA Civ 286.

19.42 Clause B3 provides that on the occurrence or later discovery of any loss or damage to executed work or Site Materials resulting from an insured peril, notice of its extent, nature and location must be given forthwith by the contractor to the employer and the architect/contract administrator. As with clause A.4, the occurrence of the loss or damage is to be disregarded in computing any amounts payable to the contractor under the contract, but the contractor is to restore the damaged property after any inspection required by the insurers.

19.43 The contractor (for himself and any insured subcontractors) is to authorise the payment of the policy monies to the employer, and the restoration of the loss and damage is to be treated as a Variation.[33]

Schedule 3—Option C

19.44 Option C (which is unamended) replaces clause 22C in JCT 1998 in relation to the insurance of existing structures and works or extensions to them by the Employer and is in the following terms:

> **"Existing structures and contents—Joint Names Policy for Specified Perils**
> C.1 The Employer shall take out and maintain a Joint Names Policy in respect of the existing structures (which from the Relevant Date shall include any Relevant Part to which clause 2.33 refers) together with the contents thereof owned by him or for which he is responsible, for the full cost of reinstatement, repair or replacement of loss or damage due to any of the Specified Perils up to and including the date of issue of the Practical Completion Certificate or, if earlier, the date of termination of the Contractor's employment (whether or not the validity of that termination is contested). The Contractor shall authorise the insurers to pay all monies from such insurance to the Employer.
>
> **The Works—Joint Names Policy for All Risks**
> C.2 The Employer shall take out and maintain a Joint Names Policy for All Risks Insurance with cover no less than that specified in clause 6.8 for the full reinstatement value of the Works or (where applicable) Sections (plus the percentage, if any, stated in the Contract Particulars to cover professional fees) and (subject to clause 2.36) shall maintain such Joint Names Policy up to and including the date of issue of the Practical Completion Certificate or, if earlier, the date of termination of the Contractor's employment (whether or not the validity of that termination is contested).
>
> The obligation to maintain the Joint Names Policy under this paragraph C.2 shall not apply in relation to a Section after the date of issue of the Section Completion Certificate for that Section."

19.45 Except where the employer is a Local Authority, clause C.3 provides for the provision to the contractor of documentary evidence that the Joint Names Policy has been taken out, and for the contractor himself to take out the policy if the employer fails to do so (with a right of entry and inspection in the case of insurance under clause C.1) and for the premium to be added to the Contract Sum. Local Authorities are required to provide evidence that Terrorism Cover is being provided under the relevant policies.

19.46 Clause C.4 provides that on the occurrence or later discovery of any loss or damage to executed work or Site Materials resulting from a peril insured under clause C.2, notice of its extent, nature and location must be given forthwith by the contractor to the employer and the architect/contract administrator. Subject to clauses C.4.5.2 and 6.10.4.2, the occurrence of the loss or damage is to be disregarded in computing any amounts payable to the contractor

33. Clauses B.3.4 and B.3.5.

under the contract, but the contractor is to restore the damaged property after any inspection required by the insurers.

19.47 The contractor (for himself and any insured subcontractors) is to authorise the payment of the policy monies to the employer.[34]

19.48 Clause C.4.4 provides that if it is just and equitable, the contractor's employment may, within 28 days of the occurrence of the loss and damage, be terminated at the option of either party (with subsequent reference to the contractual dispute resolution procedures) and, if contract is not terminated (or the termination is disputed and not upheld), the contractor is to restore the damaged work and this work is to be treated as a Variation.[35]

19.49 For the reason given in paragraphs 19.10 to 19.15, above it is suggested that the insurance of the existing structures against the Specified Perils must extend to cover against losses caused by negligently caused Specified Perils.

SUBCONTRACTORS

Liability of the subcontractor to the employer and contractor

19.50 Where the contract works are insured by the contractor in the joint names of the employer and contractor, the practice was (and for the most part remains) for the policy to name the subcontractors as co-insureds. It was held by Lloyd J in *Petrofina (UK)* v *Magnaload Ltd*[36] that the insurer, having indemnified the contractor under the policy for a loss caused by the negligence of the subcontractor, was unable to exercise subrogation rights against the subcontractor, on the basis that the subcontractor as a co-assured was to be treated as at one with the named insured so that any attempt to exercise subrogation rights would be tantamount to depriving the assured himself of a remedy.[37] A similar result was reached under the original wordings of clauses 22B and 22C in the JCT forms, the effect of which was to put new and existing buildings at the employer's sole risk and to require the employer to insure them and this prevented the employer from suing the contractor, as the words "sole risk" were held to cast the risk of negligence by the contractor on the employer.[38]

19.51 Clause 6.9.1 provides that the contractor or the employer, as the case may be, is to ensure that the relevant joint names policy under Insurance Options A, B or C must, in respect of loss or damage to the Works, work executed and Site Materials by Specified Perils, either provide for recognition of each subcontractor as an insured under the policy or include a waiver by the relevant insurers of any right subrogation which they might have against any such subcontractor. It is important to note the subcontractor's protection is limited to

34. Clause C.4.3.

35. Clause C.4.5. See footnote 29 above.

36. [1984] QB 127, [1983] 3 All ER 35, following the decision of the Supreme Court of Canada in *Commonwealth Construction Co Ltd* v *Imperial Oil Ltd* (1976) 69 DLR (3d) 558, [1976] 6 WWR 219.

37. It was established by the House of Lords in *Simpson* v *Thompson* (1877) 3 App Cas 279 that an insurer cannot exercise subrogation rights against its own assured. The parties to a joint names policy may, however, be covered for different risks, so that subrogation might be available against a co-assured whose cover does not extend to the risk in question: *National Oilwell (UK) Ltd* v *Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582.

38. It was subsequently held by the Court of Appeal in *Norwich City Council* v *Harvey* [1989] 1 WLR 828, that the negligent subcontractor was similarly protected and did not owe a duty of care to the employer. The Court of Appeal, while recognising that the subcontractor was not a party to the agreement between the employer and contractor, held that the subcontractor's agreement with the contractor was on a like basis and, further, that the fact that the works were at the employer's sole risk was conclusive evidence that the subcontractors were not to be liable.

Specified Perils and is therefore narrower than the cover provided by the All Risks policy. This recognition or waiver is to apply until the subcontractor's work is practically complete[39] or, if earlier, the date of termination of his employment.

19.52 In *Co-Operative Retail Services Ltd* v *Taylor Young*,[40] the loss was one covered by a joint names policy taken out for the benefit of both contractor and subcontractors. The relevant conditions of the subcontract effectively mirrored those of the main contract, with the result that the subcontractors owed no duty to the employer. It is open to question whether this decision resolves the general question of whether the existence of co-insurance prevents all claims between the co-insureds, or only claims to the extent that the loss is or should have been covered by the insurance. The reasoning in *CRS* v *Taylor Young* was based firmly on the nature of the contractual structure in that case and allocation of risk, rather than the terms of the policy or scope of the cover, so the approach that is likely to be adopted in future cases will be to infer the presumed intention of the parties from the contractual framework.[41] See the detailed discussion of this topic in Chapter 13.

19.53 The question of whether engineers can be "subcontractors" within the meaning of a contractor's All Risks policy was considered in *Hopewell Project Management* v *Ewbank Preece*.[42] Sitting as a deputy High Court Judge, Rupert Jackson QC held that it would be most unusual for a professional firm to bring itself within the definition of subcontractor.

Liability of a subcontractor to third parties

19.54 Where a third party has an interest in the existing buildings covered by the joint names policy effected pursuant to clause C.1, the subcontractor's position may depend on whether he has been recognised as an insured under the policy (under clause 6.9.1) or merely has the benefit of a waiver of rights of subrogation (under clause 6.9.2).

19.55 In the former situation, as an insured the subcontractor must be entitled to look to the policy to pay for the damage. However, in the latter situation the position is less clear: the fact that the subcontractor has not been recognised as an insured would indicate that he should not have a claim under the policy in his own right. It may be that the problem is academic since the situations in which anything may turn on this are likely to be rare because both contractor and employer have a strong interest in ensuring that there is a full recovery under the joint names policy.

19.56 However, in the Scottish case of *Aberdeen Harbour Board* v *Heating Enterprises (Aberdeen) Ltd*[43] the employer was a tenant of part of a building owned by the pursuer which

39. This effectively reflects the decision in *National Oilwell (UK) Ltd* v *Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582.

40. [2002] 1 WLR 1419, HL.

41. In *Scottish & Newcastle* v *G D Construction* [2003] BLR 131, the Court of Appeal held, on the wording of clauses 6.1.2 and 6.3C.1 of JCT IFC84, that the employer could not sue the contractor for damage to the existing structure caused by the contractor's negligence in the light of the insurance arrangements (overruling HHJ Richard Seymour QC, who followed the decision of the Court of Appeal in *London Borough of Barking & Dagenham* v *Stamford Asphalt Co Ltd* (1997) 82 BLR 25). However, there was no appeal against the judge's finding that the contractor was liable for consequential loss not covered by the policy, and it is to be doubted whether the judge's decision was correct on this. *Barking & Dagenham* was a decision under an earlier 1986 wording, which did not include the express exclusion from the indemnity of loss or damage caused by a Specified Peril. In the *Scottish & Newcastle* case, Aikens J (who gave the leading judgment in the Court of Appeal) doubted the conclusion of Auld LJ in *Barking & Dagenham* that the employer would have fulfilled its contractual duties if it had obtained a policy that did not cover negligently caused fire.

42. [1998] 1 Lloyd's Rep 448.

43. 1988 SLT 762.

was damaged by the alleged negligence of the defendant subcontractor. The court ruled that the subcontractor was not entitled to indemnity under the policy in the event of being found liable to the pursuer since he was not an insured, although he was protected against the exercise of rights of subrogation (because the building was at the "sole risk" of the employer).

The nature of the insurable interest

19.57 The decision of the Court of Appeal in *Tyco Fire & Integrated Solutions* v *Rolls-Royce Motor Cars Ltd* [2008] EWCA Civ 286 raises questions about the nature of the insurable interest that is required by a contractor in order to benefit from any joint names insurance on property in which he is a named insured. In *Tyco* it was suggested by Rix LJ (citing *Deepak Fertilisers and Petrochemical Corporation* v *Davy McKee (London) Ltd*[44]) that a contractor has an interest in the existing structures only in respect of liability. With respect, this observation is not only based on a misreading of *Deepak* (as understood in other cases, such as *Feasey* v *Sun Life Assurance Corporation of Canada*,[45] *O'Kane* v *Jones*[46]), but is contrary to common sense. A contractor, such as Tyco, installing a fire protection system in a building cannot do his work if the building is destroyed. In that event he will either lose the work altogether (if it is not repaired) or he will be delayed, the costs of which may not be recoverable, or not recoverable in full, under his contract. It is clear that in these circumstances he has a financial interest in the continued existence of the building until his work is complete.

44. [1999] 1 Lloyd's Rep 387.
45. [2003] Lloyd's Rep IR 637; [2003] EWCA Civ 885.
46. [2005] Lloyd's Rep IR 174, at 207.

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CHAPTER TWENTY

CONTRACT INSURANCE UNDER DB: THE DESIGN AND BUILD CONTRACT

Antony Edwards-Stuart

GENERAL

20.1 The new Design and Build Contract, DB, was introduced by the Joint Contracts Tribunal during 2005 as part of the new suite of contract forms.

20.2 As its name suggests, DB 05 is intended for use where the contractor is not only to carry out the physical work and supply of materials necessary to complete a building project but also to carry out the whole of the design. The liability of the contractor as designer is limited to a "like liability to the Employer, whether under statute or otherwise, as would an architect or, as the case may be, other appropriate professional designer holding himself out as competent to take on work for such design who, acting independently under a separate contract with the Employer, has supplied such design for or in connection with works to be carried out and completed by a building contractor who is not the supplier of the design" (section 2.17.1).

20.3 This obligation is potentially less onerous upon the contractor than that at common law: there is some authority for the proposition that a contractor who contracts to design and build a project takes on responsibility to ensure that the design of the building will render it fit for its purpose.[1] If the obligation taken on is merely to use the reasonable skill and care of an architect or engineer, then there is a possibility that the contractor would not be liable where he has exercised the care which it would be reasonable for an architect or engineer to exercise but the resultant design is not fit for its purpose.

20.4 This has implications both for the drafting of the design and build contract and for the placing of insurance. From an employer's perspective it would be desirable either to include a term whereby the contractor expressly warranted that the building as designed and constructed would be fit for its purpose, but a contractor would probably be unwilling to depart from the standard terms of DB 05, or to omit section 2.17.1 and rely upon the common law, but in doing so undesirable uncertainty would be introduced into the contract. In practical terms the employer will generally have to accept that a designer exercising due skill and care should in most cases produce a design that was fit for its purpose. On the other hand, if the contractor were persuaded to give such an express warranty, it is likely that the contractor's professional indemnity insurers would refuse to provide cover against liability under such a clause greater than that which would have applied in the absence of such a clause. By contrast, underwriters are generally willing to take on the risk of any warranty as to fitness for purpose which would be implied at common law.

20.5 These considerations make it essential that the parties to any design and build contract must give careful attention to where risks lie—what is the contractor warranting, and how far is any such warranty covered by professional indemnity insurance?

1. *IBA* v *EMI and BICC* (1980) 14 BLR 1; *Greaves & Co (Contractors) Ltd* v *Baynham Meikle & Partners* [1975] 1 WLR 1095.

20.6 The insurance provisions of DB 05 are almost identical to those in SBC, and the differences are attributable solely to the different nature of the two forms of contract. Like SBC, therefore, the case law on JCT 1998 (and its immediate predecessors) remains relevant, but much of the case law on JCT 1963 and the original wording of JCT 1980 is similarly no longer applicable to the provisions of DB 05.

RELEVANT PROVISIONS IN THE CONTRACT

20.7 As with SBC 05, the main provisions in DB 05 relevant to insurance are as follows:

"Clause 6.1: the contractor is to indemnify the employer against claims in respect of death or personal injury arising out of the works, except to the extent that the employer is itself at fault.

Clause 6.2: a similar indemnity is to be provided by the contractor to the employer in respect of property damage, other than damage to the works and to site materials, but only insofar as it results from the fault of the contractor.

Clause 6.4.1: the liability of the contractor in respect of the above indemnities is to be insured by the contractor; in addition, by clause 6.5.1, the employer may insist upon insurance in the joint names of the employer and contractor being procured by the contractor in respect of loss of or damage to property not caused by the fault of the contractor."

Insurance Options (replacing clauses 22A–C in JCT 1998):

"A and B: in the case of new buildings, insurance of the works is to be effected either by the contractor (Option A), or by the employer (Option B), under an All Risks policy in the joint names of the employer and contractor, which leave the residual risk of any under insurance with the contractor and the employer, respectively.

C: where there are existing buildings, insurance is to be effected by the employer in the joint names of the employer and contractor of the existing structures against Specified Perils and of the Works, against All Risks."

20.8 The potential requirement on the Contractor to insure against the Employer's possible loss of liquidated damages (clause 22D of JCT 1998) has not been retained.

20.9 The same general points apply in relation to DB 05 as were made in the previous chapter in relation to SBC 05.

SPECIFIC CLAUSES

Section 6—clauses 6.1 to 6.3

Injury to persons and property

20.10 Apart from references to the Practical Completion Statement instead of the Practical Completion Certificate, clauses 6.1 to 6.3 of DB 05 are identical to those of SBC 05.

Section 6—clauses 6.4.1 to 6.6

Insurance against personal injury and property damage

20.11 Apart from references to the Architect/Contract Administrator being replaced by references to the Employer, clause 6.4 of DB 05 is identical to clause 6.4 of SBC 05.

20.12 In clause 6.5 of DB 05, the contractor's insurance against his liability is required if the Employer's Requirements so state. Apart from that, clause 6.5 of DB 05 is identical to clause 6.4 of SBC 05.

Section 6—clauses 6.7 to 6.10

Insurance of the works

20.13 The Insurance Options of DB 05 are identical to those of SBC 05 and therefore correspond to the options provided in clauses 22A to 22C of JCT 1998.

20.14 Clauses 6.8 to 6.10 are identical to those of SBC 05.

Section 6—clauses 6.11 to 6.16

20.15 Clauses 6.11 to 6.14 are identical to those of SBC 05.

20.16 Clause 6.15 of DB 05 differs slightly from clause 6.15 of SBC 05 in that the Contractor is required to carry out the required Remedial Measures consequent upon a breach of the Joint Fire Code in any event (the obligation is not dependent on any possible need for a change instruction).

20.17 Clause 6.16 is identical to clause 6.16 of SBC 05.

THE INSURANCE OPTIONS

Schedule 3—Option A

20.18 As in SBC 05, Option A replaces clause 22A in JCT 1998 in relation to the insurance of new buildings by the Contractor and is in materially identical terms to Option A of SBC 05.

20.19 Save for the reference to the Architect or Contract Administrator being replaced by references to the Employer, clauses A.2 and A.3 are in materially identical terms to clauses A.2 and A.3 of SBC 05.

20.20 Again, save for the reference to the Architect or Contract Administrator being replaced by references to the Employer, clause A.4 is in materially identical terms to clause A.4 of SBC 05.

20.21 Clause A.5 is in identical terms to its counterparts in SBC 05.

Schedule 3—Option B

20.22 As in SBC 05, Option B replaces clause 22B in JCT 1998 in relation to the insurance of new buildings by the Employer and is in materially identical terms to Option B of SBC 05.

20.23 Clauses B.2 and B.3 are in materially identical terms to their counterparts in SBC 05.

Schedule 3—Option C

20.24 As in SBC 05, Option C replaces clause 22C in JCT 1998 in relation to the insurance of existing structures and works or extensions to them by the Employer and is in materially identical terms to Option C of SBC 05.

SUBCONTRACTORS

20.25 The provisions of DB 05 in relation to subcontractors are in materially identical terms to those of SBC 05. As already noted, the subcontractor's protection is limited to Specified Perils and is therefore narrower than the cover provided by the All Risks policy.

CHAPTER TWENTY-ONE

CONTRACT INSURANCE UNDER THE MAJOR PROJECT CONSTRUCTION CONTRACT

Anna Laney

GENERAL

21.1 The Major Project Form (MPF) was introduced by the Joint Contracts Tribunal in June 2003. It is the first "new" form of contract launched by the JCT since the introduction of the Intermediate Form of Contract in 1984. The MPF was a sea change in approach from the standard form contracts that had gone before. It is aimed at Employers who have their own in-house contractual procedures and at the Contractors with whom they work. In other words, this contract is to be used by experienced employers and contractors who are used to executing major projects and who understand the commercial and practical risks inherent in such developments. As a result, the MPF provides a framework within which the parties define their obligations, as opposed to the historic approach of parties heavily amending one of the other standard form contracts.

21.2 In 2005 the MPF was updated and renamed the Major Project Construction Contract (MP05). The contract wording remains largely the same; the practical differences between MPF and MP05 are:

- clause 26 Indemnities (MPF) becomes clause 32 (MP05);
- clause 27 Insurances (MPF) becomes clause 33 (MP05);
- the Appendix (MPF) is renamed "Contract Particulars".

21.3 Recognising that large and complex projects often require bespoke insurance arrangements, MPF and MP05 do not attempt to define the scope or terms of the insurances that are to be provided. Their role is limited to ensuring that the insurances remain in force for the benefit of the project and that the parties comply with the terms. To this end, MP05 makes provision for certain indemnities between the parties (clause 32) and by clause 33 makes provision for the parties to record their bespoke insurance obligations in the Contract Particulars. Clause 34, which has to be specifically incorporated, addresses professional indemnity insurance.

21.4 The Guidance that accompanies MP05 expressly states that the employer should consult insurance advisors prior to the issue of tender documents, with insurance representatives of both parties jointly reviewing the insurance provisions before the contract is executed.

21.5 Finally, it should be noted that—perhaps unsurprisingly, given its recent introduction—there have been no reported cases, at the time of writing, dealing with either MPF or MP05.

RELEVANT PROVISIONS IN THE CONTRACT

21.6 The provisions in MP05 relevant to insurance are as follows:

"Clause 32.1: the contractor is to indemnify the employer against claims in respect of personal injury to or the death of any person, and against loss, injury or

damage to property arising out of the project, except to the extent that the employer or any person for whom the employer is responsible is at fault.

Clause 32.2: this mirrors clause 32.1, and provides for the employer to indemnify the contractor in respect of the same matters where the employer or any person for whom the employer is responsible is at fault.

Clause 33.1: requires the parties to provide and maintain the policies of insurance recorded in the Contract Particulars, and where applicable to comply with the joint fire code. The remainder of this clause deals with the operation of the policies set out in the Contract Particulars.

Clause 34: provides that the contractor shall take out and maintain Professional Indemnity Insurance until the expiry of twelve years from Practical Completion. This clause only applies when stated in the Contract Particulars.''

SPECIFIC PROVISIONS

Indemnities

''32.1 The Contractor shall be liable for and shall indemnify the Employer against any expense, liability, loss, claim or proceedings arising under statute or at common law in respect of:

.1 the personal injury to or the death of any person; and

.2 the loss, injury or damage to any property real or personal,

to the extent that such expense, liability, loss, claim or proceedings arise out of or in the course of carrying out of the Project and not as a consequence of some act or neglect on the part of the Employer or any person for whom the Employer is responsible (excluding the Contractor but including Others on the Site) but excluding any amount recoverable (or which but for any default by the Employer, excess or insurer's insolvency would have been recoverable) by the Employer under any policy required by clause 33.

.2 The Employer shall be liable for and shall indemnify the Contractor against any expense, liability, loss, claim or proceedings arising under statute or at common law in respect of:

.1 the personal injury to or the death of any person; and

.2 the loss, injury or damage to any property real or personal,

to the extent that such expense, liability, loss, claim or proceedings arise out of or in the course of carrying out of the Project as a consequence of some act or neglect on the part of the Employer or any person for whom the Employer is responsible (excluding the Contractor but including Others on the Site) but excluding any amount recoverable (or which but for any default by the Contractor, excess or insurer's insolvency would have been recoverable) by the Contractor under any policy required by clause 33.''

21.7 Traditionally a distinction was drawn between the indemnity to be provided in relation to personal injury or death, and that provided for loss, injury or damage to property (see, for example, clauses 6.1 and 6.2 of SBC 05). In MP05 the indemnity to be provided is simplified in terms of drafting, but the effect is to widen potential liability significantly as the limitations that previously existed—particularly regarding the definition of ''property real and personal''—have been removed (see clause 6.3 of SBC05).

21.8 The effect is that by clause 32.1 the contractor is responsible for damage even when the same occurs without fault on his part. As the claim may arise as a matter of common law a contractor would be liable to indemnify in respect of torts of Strict Liability and in Nuisance, save where the same is due to the fault of the employer or any person for whom the employer is liable.

21.9 The reference to "others on site" in clause 32.2 reflects the fact that under MP05 the contractor never has exclusive possession of the site. The employer retains possession, with the contractor permitted such access as may be "reasonably necessary for the contractor to execute and complete the project" (clause 15.1). Therefore it is expressly contemplated that the employer may require others to undertake works concurrently with the contractor; and hence the employer must provide an indemnity to the contractor should the employer engage "others" who work alongside the contractor.

21.10 In practice, both employers and contractors will ensure that they are fully insured in relation to the indemnity required by clause 32; but note needs to be taken of the wider definition. However, in common with the other standard forms, the indemnity extends only to claims that arise out of or in the course of carrying out the project rather than the costs of claims or proceedings that arise during the project.[1]

21.11 Liability must be established before the right to an indemnity arises, such that a claim may be made after the primary claim has become statute barred.[2]

21.12 One possible complication arises out of clause 24. MP05 contemplates that an employer will prepare detailed Employer's Requirements with the assistance of various consultants with a view to those consultants being novated to the Contractor. Before the employer's contracts with the "Pre-Appointed Consultants" are novated, the employer is clearly responsible for them and required to provide an indemnity to the contractor, should a claim arise out of their actions within the provisions of clause 32.2. Post novation, the contractor is responsible for the acts and omissions of the Pre-Appointed Contractors.

21.13 Whilst clause 11 provides that the Contractor shall not be responsible for the contents of the design or the adequacy of the design contained within the Employer's Requirements, issues may arise as to whether the employer or contractor was responsible for the pre-appointed consultant; and causation issues, particularly regarding timing, may prove a fertile ground for claim and counterclaim.

21.14 Again, it is for the parties to ensure that sufficient insurance is in place regarding this issue, as a party's potential recovery under clause 32 will exclude any amount recoverable (or which, but for any default by the Contractor, excess or insurer's insolvency, would have been recoverable) by the Contractor under any policy required by clause 33.

Insurances

"33.1 Policies of insurance shall be provided and maintained in the manner indicated by the Contract Particulars and each Party shall comply with the terms and conditions of those policies to which it is a party including, where applicable, compliance with the Joint Fire Code. Where either Party is notified of any remedial measures considered necessary by an insurer as a consequence of non-compliance with the Joint Fire Code, the other Party shall be notified and the Contractor shall implement the remedial measures without delay and this shall not be treated as giving rise to a Change.

.2 Where a Party is required by the Contract to provide and maintain a policy of insurance, the other Party may request the production of documentary evidence that the policy has been taken out and remains in force and, apart from any policy required

1. *Richardson* v *Buckinghamshire CC* (1971) 6 BLR 62, CA. Although this claim related to the ICE conditions, the principle that there must be a causal link between the circumstances and subject matter of the claim to the project works being undertaken, rather than a merely temporal association applies equally.

2. *R&H Green and Silley Weir* v *BRB* (1980) 17 BLR 94.

by clause 34 (*Professional Indemnity*), may also request a copy of the policy document.

.3 Where a party fails to provide the documentary evidence referred to by clause 33.2 within 7 days of a request being made, the other Party may assume that there has been a failure to insure. Where there has been a failure to insure by one Party the other Party may insure against any risk to which it is exposed as a consequence and the party that has failed to insure will be liable to pay the other any costs incurred in taking out and maintaining that insurance.

.4 Upon the occurrence of an event giving rise to a claim under any policy of insurance required to be provided by this Contract the Party intending to make the claim shall notify the other Party.

.5 The occurrence of an event giving rise to a claim shall be disregarded in the computation of the amount due to the Contractor in accordance with the Contract and, subject to clauses 32 (*Indemnities*) and 33.6, neither the Employer nor the Contractor shall be entitled to receive any payment from the other in respect of the event giving rise to the claim.

.6 Where any policy of insurance required to be provided by the Contract contains an excess, the Party making a claim under the policy shall pay or bear the excess stated in the Contract Particulars.

.7 Where any part of the Terrorism Cover ceases to be available the party responsible for providing and maintaining the relevant policy shall immediately notify the other.

.8 From the later of the date of the cessation of such Terrorism Cover or the date of any required notification to the Employer by the Contractor under clause 33.7 the risk of any loss that would otherwise have been covered by a policy of insurance required by the Contract shall rest with the Employer. Any additional works necessary to complete the Project as a consequence of a loss due to terrorism that would otherwise have been covered by a policy of insurance required by the Contract shall be treated as a Change."

21.15 The particular risks that need to be insured against will differ from project to project. The format of MP05 forces the parties to step back and consider, and then make appropriate provision for, the specific risks that pertain to a particular project. Clause 33 provides a framework within which parties can identify the insurances appropriate to the project, and then regulates the provision and operation of those policies. The parties are responsible for defining the insurance obligations that fall within the contract; however, the parties are not limited to the policies identified in the Contract Particulars. For example, one of the policies required by clause 33 may provide for a substantial policy excess. There would be nothing to stop either party taking out separate cover in respect of this otherwise uninsured layer of risk. Clause 33 addresses the contractual allocation of risk and operation of insurances for the project as between the employer and contractor. The contractor must also be mindful of his obligations to third parties (Purchasers, Tenants and Funders) as defined by clause 36 and the Third Party Rights Schedule, and the need to implement cover in respect of the same.

21.16 Clause 33.1 requires the parties to take out and maintain the policies of insurance identified in the contract particulars. Moreover, the parties are required to comply with the terms and conditions of the policies. Whilst this provision is directed towards compliance with the joint fire code (the costs of which lie with the contractor and which will not give rise to a Change), the practical ramifications are wider. For example, if a contractor notified a claim outside the defined time limits, this would constitute a failure to comply with the terms and conditions of a policy. Arguably, should an insurer avoid on that basis, an employer could claim that the lack of cover was due to the contractor's breach of clause 33.1. This is picked up by clause 32, where sums that would otherwise be recoverable but for such default are not recoverable.

21.17 In addition to public liability and insurance of the works (i.e. cover to address the obligations defined by clause 32), the MP05 Guidance highlights insurance of existing structures, contractor(s) plant and materials, consequential losses suffered as a result of delay caused by an insured event, claims in relation to environmental impact and inherent defects in the project ("decennial"/latent damage insurance) as potential cover issues. The wisdom of involving insurers at an early stage to consider and investigate policy cover cannot be emphasised enough. It will be a key factor for an employer in determining the viability of a project; and for the contractor it will impact upon identifying a commercially realistic contract sum.

21.18 The Contract Particulars require the parties to identify:

- type of insurance;
- details of cover (to be provided within documents annexed to the contract, which may be the policy itself);
- the party responsible for providing and maintaining the insurance;
- the policy excess, if required by clause 33.6.

21.19 By clause 33.2 either party can request the production of documentary evidence that appropriate insurance has been put in place, including (other than insurance under clause 34) production of the policy itself. If a party fails to produce the evidence and/or policy within seven days of a request, it is deemed that cover has not been taken out; and the requesting party may insure against the risk to which he is exposed and claim back "any costs incurred in taking out and maintaining that insurance" (clause 33.2). Default under clause 33.1 may have significant costs implications and should operate as a deterrent; but it remains to be seen whether parties will actively pursue their rights under these clauses.

21.20 Prevention of double recovery is dealt with by clause 33.5, where events giving rise to a claim are to be disregarded in the computation of sums due to the contractor under the contract; and subject to the operation of clauses 32 and 33.6 (liability for policy excess), neither party is entitled to recover payment from the other in respect of insured events. Accordingly the usual rules of compensation for breach of contract or negligence are displaced by the insurance provisions, with the result that neither party will be liable to the other in contract or tort for losses caused by an insured peril.[3] For obvious practical reasons, clause 33.4 requires the parties to notify each other if they intend to make a claim under the policy, thereby preventing the operation of clause 33.5 being frustrated.

21.21 Liability for payment of excess is dealt with by clause 33.6, and the person making the claim bears responsibility for the excess. However, by clause 33.5 it would appear that if (say) an employer made a claim in respect of the contractor's default under a joint names policy, he would be entitled to recover the excess paid from the contractor.

21.22 Clauses 33.7 and .8 deal with terrorism cover and in particular the effect of such cover ceasing to be available. In summary, if cover ceases to be available then, subject to notification, the risk passes to the employer; and if additional costs are incurred due to an act of terrorism, those additional costs shall be treated as a change entitling the contractor to further payment. Whilst MPF defined terrorism by reference to the Terrorism Act 2000, MP05 does not define the term; and as such it will be given its natural meaning within the insurance industry. There is an apparent conflict between the Guidance and clause 23.8, in that the Guidance suggests that where clauses 33.7 and .8 are operated an employer is entitled to terminate the contractor's employment under the contract. This appears to be an error in

3. *Co-operative Retail Services* v *Taylor Young* [2002] 1 WLR 1419.

the Guidance, as neither clause 33 nor clause 26 (change) gives rise to an entitlement for the employer to determine.

Professional indemnity

"34.1 The provisions of this clause only apply when so stated in the Appendix.

.2 The Contractor shall take out and maintain professional indemnity insurance for not less than the amount stated in the Appendix. Provided that it remains generally available at commercially reasonable rates, such insurance shall be maintained until the expiry of 12 years from the date of Practical Completion of the Project.

.3 Where the Contractor considers that any insurance required by clause 34.2 is no longer generally available at commercially reasonable rates it shall notify the Employer and cooperate with the Employer in seeking means by which the Contractor can be protected against professional liability claims arising out of the Project."

21.23 In contrast to the other standard forms, absent express agreement the contractor is not obliged to take out and maintain professional indemnity insurance. Clearly the parties could agree that Professional Indemnity cover was required by listing the same in the Contract Particulars. However, if the policy was required by virtue of the incorporation of clause 34, rather than by specifying cover in the Contract Particulars, the employer would not be entitled to disclosure of the policy document pursuant to clause 33.2.

21.24 Whilst the employer has the benefit of insurance ostensibly being maintained for 12 years from the date of practical completion, it may prove to be the case that this clause has no teeth. The contractor is obliged to maintain cover only whilst it is available at "commercially reasonable rates". However, this phrase is not defined; and myriad circumstances could arise that would result in a contractor arguing that rates of cover were no longer commercially reasonable. In such a situation, the employer has no means by which he can compel the contractor to maintain cover, and the contractor is merely obliged to "cooperate". Nevertheless, for obvious commercial reasons, the contractor would be prudent to maintain cover.

21.25 Further pursuant to clause 36 and the Third Party Rights Schedules, a contractor that agrees to the incorporation of clause 34 is bound if so requested to provide to Purchasers, Tenants and Funders (where identified in the Contract Particulars) particulars of insurance that has been taken out and maintained and any notification under that policy.

CHAPTER TWENTY-TWO

CONTRACT INSURANCE UNDER JCT 1998 AND JCT 2008 MANAGEMENT CONTRACTS

Anna Laney and Antony Edwards-Stuart

GENERAL

22.1 The insurance arrangements under the JCT 1998 Edition Management Contract ("JCT 1998 Management") follow fairly closely those of JCT 1998, and hence SBC 05, and so much of the commentary in Chapter 19 is equally relevant to this form of contract.

RELEVANT PROVISIONS IN THE CONTRACT

22.2 The main provisions in JCT 1998 Management relevant to insurance are as follows:

"Clause 6.4.1.1: the management contractor is to take out and maintain a Joint Names Policy for All Risks cover for the full reinstatement value of the project to the date of issue of the certificate of Practical Completion (or termination of the employment of the management contractor, if earlier).

Clause 6.4B: the employer is to take out and maintain a Joint Names Policy for All Risks cover for the full reinstatement value of the project to the date of issue of the certificate of Practical Completion (or termination of the employment of the management contractor, if earlier).

Clause 6.5.2: where the project comprises alterations or extensions to existing structures, the employer is to take out and maintain a Joint Names Policy against Specified Perils for the existing structures and contents to the date of issue of the Certificate of Practical Completion (or termination of the employment of the management contractor, if earlier).

Clause 6.6.1: provides for insurance against the employer's loss of liquidated damages.

Clause 6.7: the management contractor is to indemnify the employer against claims in respect of death or personal injury arising out of the project, except to the extent that the employer is itself at fault.

Clause 6.8: a similar indemnity is to be provided by the management contractor to the employer in respect of property damage, other than damage to the works and to site materials, but only insofar as it results from the fault of the management contractor or of anyone employed or engaged upon the project (excluding employees or agents of the employer).

Clause 6.10.1.1: the liability of the management contractor in respect of the above indemnities is to be insured by the management contractor and, in addition, he is to cause any works contractor to take out and maintain appropriate insurance in respect of such liabilities.

Clause 6.11.1: the employer may insist upon insurance in the names of the employer and the management contractor being procured by the contractor in respect of loss of or damage to property not caused by the fault of the management contractor."

22.3 In relation to these clauses, the same general points can be made as were made in relation to SBC 05. Clauses 6.4 and 6.4B are alternatives, and one or other will apply whether or not clause 6.5 also applies (which is where there are existing structures).

22.4 The Management Building Contract was updated and re-published in January 2008 ("JCT Management 2008"). In terms of insurance, JCT Management 2008 adopts the full version of the Works Insurance Provisions (Insurance Options A, B and C) that appears in the 2005 suite of JCT contracts. The provisions of the insuring obligations within JCT Management 2008 are identical to SBC 05, save for the substitution of "Management Contractor" in JCT Management 2008 for contractor in SBC 05; and "Works Contractor" for "Sub Contractor". Accordingly, reference should be had to Chapter 19 for commentary on those terms.

THE INSURANCE REQUIREMENTS FOR THE PROJECT

Clause 6.4

22.5 Clause 6.4 concerns the insurance of new buildings by the Management Contractor, in substance reflecting clause 22A in JCT 1998 and Option A in SBC 05, and is in the following terms:

> "6.4.1.1 The Management Contractor shall, prior to the commencement of any work on site for the Project, take out a Joint Names Policy for All Risks Insurance cover no less than that defined in clause 6.2 (or for such other definition of cover as the Employer may instruct) for the full reinstatement value of the Project (plus the percentage, if any, to cover professional fees stated in the Appendix) and shall (subject to clause 2.8.3) maintain such Joint Names Policy up to and including the date of issue of the certificate of Practical Completion or, where the Project does not comprise alterations of or extensions to existing structures, up to and including the date of determination of the employment of the Management Contractor (whether or not the validity of that determination is contested) under clauses 7.1 to 7.23 or, where the Project comprises alterations of or extensions to existing structures, under clause 6.4.8 or clauses 7.1 to 7.23, whichever is the earlier . . . [The final sentence of this clause concerns VAT]."

22.6 Clause 6.4.1.2 provides for notification by the management contractor before taking out the policy of the amounts of any excess in respect of each risk insured.

22.7 Clause 6.4.2 provides for the provision to the architect or the contract administrator by the management contractor of the joint names policy, premium receipts and so on, and for the employer himself to take out the policy if the management contractor fails to do so.

22.8 Clause 6.4.3 provides for the use in the alternative of the management contractor's own policy if it provides cover against the same risks and is in joint names, and for provision by the management contractor of documentary evidence that the policy is in place and is being maintained.

22.9 Clause 6.4.4 provides that on the occurrence or later discovery of any loss or damage to work executed or Site Materials resulting from an insured peril, notice of its extent, nature and location must be given forthwith by the management contractor to the employer or architect.[1] This provision enables the employer to submit a claim in the event that the

1. Clause 6.4.4.

management contractor fails to do so or gives the impression that he will not do so within the time allowed by the policy. The occurrence of the loss or damage is to be disregarded in computing any amounts payable to the management contractor under the contract, but the management contractor is to secure the restoration of the damaged property after any inspection required by the insurers.[2]

22.10 The management contractor (for himself and all works contractors who are insured by the policy) is to authorise the payment of the policy monies to the employer, who must then pay them to the management contractor by interim instalments (less any amounts properly incurred by the employer in respect of professional fees up to the amounts paid by insurers).

22.11 Where the restoration of the damage is carried out by a works contractor already engaged on the project, the restoration etc. is to be treated as if it was the subject of a Works Contract Variation required by an instruction under clause 3.4.[3] Otherwise the management contractor is to appoint a new works contractor to carry out the restoration.[4] Either way, the management contractor will be entitled to recover through the management contract the sums properly payable to the works contractor for the restoration work.

22.12 Where the Project comprises alterations of or extensions to existing structures, upon the occurrence of loss or damage caused by an insured risk either party may determine the contract if it is just and equitable to do so.[5]

22.13 Thus it is the duty of the management contractor to secure reinstatement by a works contractor who will then be paid through the contractual machinery. It follows that if the insurance monies are inadequate, the shortfall will be borne by the Employer. However, since it is the management contractor's duty to insure for the full reinstatement value, the Employer may well have a claim against the management contractor for breach of this duty if the sum insured proves to be insufficient.

22.14 As the House of Lords held in *Co-Operative Retail Services* v *Taylor Young*,[6] in the context of the JCT 1998 provisions, the effect of clauses such as clause 6.4 or, alternatively, 6.4B, when read in conjunction with clauses 6.3, 6.5[7] and 6.8, is that the ordinary rules for the payment of compensation for negligence and breach of contract have been eliminated where damage to the project is caused by an insured peril. They have been replaced by the insurance provisions with the result that the management contractor, and any insured works contractors, will not be liable in contract or tort for losses caused to the project by an insured peril. See Chapter 13 for a detailed discussion of this topic.

Clause 6.4B

22.15 Clause 6.4B provides for the alternative situation where the joint names policy for All Risks cover for the Project is to be taken out and maintained by the Employer. Clause 6.4B is

2. Clauses 6.4.5 and 6.4.6.
3. Clause 6.4.9.1.
4. Clause 6.4.9.2.
5. Clause 6.4.8.
6. [2002] 1 WLR 1419.
7. This clause deals with the arrangement of the insurance for existing structures and their contents by the employer and is dealt with in the following section.

in very similar terms to clause 6.4 (apart from the alternative of using any existing policy held by the management contractor). There are similar provisions for the application of the insurance monies and the restoration of any loss or damage, the effect of which is that the risk of any shortfall in the proceeds of the insurance will be borne by the Employer.

Clause 6.5

22.16 Clause 6.5 concerns the insurance of existing structures and contents and applies only where the Project comprises alterations of or extensions to existing structures (in addition to either clause 6.4 or clause 6.4B). The relevant clause, 6.5.2, is in the following terms:

> "6.5.2.1 The Employer shall, prior to the commencement of any work on site for the Project, take out a Joint Names Policy in respect of the existing structures . . . together with the contents thereof owned by the Employer or for which he is responsible, for the full cost of reinstatement, repair or replacement of loss or damage due to one or more of the Specified Perils and maintain such insurance up to and including the date of issue of the certificate of Practical Completion or up to and including the date of determination of the employment of the Management Contractor . . . whichever is the earlier. The Management Contractor, for himself and all Works Contractors who are, pursuant to clause 6.3, recognised as an insured under the Joint Names Policy referred to in clause 6.5.2 shall authorise the insurers to pay all monies from such insurance in respect of loss or damage to the Employer. [The last sentence concerns VAT]."

22.17 The effect of this is to leave the responsibility for insuring the existing structures and their contents with the employer, who will therefore take the risk of any under-insurance.

22.18 Except where the employer is a local authority, clause 6.5.3 provides for the provision to the management contractor of documentary evidence that the joint names policy has been taken out and maintained, and for the management contractor himself to take out the policy if the Employer fails to do so (and to have appropriate rights of entry and inspection to enable him to do so).

22.19 Clause 6.5.4 concerns terrorism cover and what is to happen if it is not available.

Other provisions

22.20 Clause 6.2 contains the definitions, including those for All Risks Insurance, joint names policy and terrorism cover. The management contractor must take care to ensure that the cover afforded by any proposed policy matches the defined risks.

22.21 Clause 6.3 provides that the management contractor or the employer, as the case may be, is to ensure that, in respect of loss of or damage to the Project and Site Materials by Specified Perils, the relevant joint names policy must either provide for recognition of each works contractor as an insured under the policy or include a waiver by the relevant insurers of any right subrogation which they might have against any such works contractor. As already noted, this protection is therefore narrower than the cover provided by the All Risks policy. This recognition or waiver is to apply until the relevant works are practically complete or, if earlier, the date of termination of his employment. This effectively mirrors the provisions in relation to subcontractors of clause 6.9 of SBC 05 and so the comments made in relation to that clause apply here also.

CLAUSES RELATING TO INDEMNITIES

Clauses 6.7 to 6.9

"Injury to persons and property and indemnity to Employer

Liability of Management Contractor—personal injury or death—indemnity to Employer

6.7 The Management Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or caused by the carrying out of the Project, except to the extent that the same is due to any act or neglect of the Employer or of any person for whom the Employer is responsible including the persons employed or otherwise engaged by the Employer to whom clauses 3.23 to 3.25 refer.

Liability of Management Contractor—Injury or damage to property—indemnity to Employer

6.8 The Management Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal in so far as such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Project and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Management Contractor, his servants or agents or of any other person who may properly be on the site upon or in connection with the Project or any part thereof, his servants or agents, other than the Employer or any person employed, engaged or authorised by him or by any local authority or statutory undertaker executing work solely in pursuance of its statutory rights or obligations. This liability and indemnity is subject to clause 6.9 and, where clause 6.5 is applicable, excludes loss or damage to any property required to be insured thereunder caused by a Specified Peril.

Injury or damage to property—exclusion of the Project and Site Materials

6.9.1 Subject to clause 6.9.2, the reference in clause 6.8 to 'property real or personal' does not include the Project, work executed and/or Site Materials up to and including the date of issue of the certificate of Practical Completion or up to and including the date of determination of the employment of the Management Contractor (whether or not the validity of the determination is disputed) under clauses 7.1 to 7.2.3 or, where clause 6.4.8 applies, under clause 6.4.8 or, where clause 6.4B applies, under clause 6.4B, whichever is the earlier."

22.22 Since these clauses are in materially the same terms as the corresponding provisions of SBC 05 (clauses 6.1 to 6.3), the comments made in relation to those clauses apply equally to the above clauses.

Clauses 6.10 and 6.11

"Insurance against injury to persons or property

Management Contractor's and Works Contractors' insurance—personal injury or damage to property

6.10.1.1 Without prejudice to his obligation to indemnify the Employer under clauses 6.7 and 6.8, the Management Contractor shall take out and maintain[8] and shall cause any Works Contractor to take out and maintain insurance which shall comply with clauses

8. See the discussion of the meaning of this expression in Chapter 19.

6.10.1.2 in respect of claims arising out of his liability referred to in clauses 6.7 and 6.8.

6.10.1.2 The insurance in respect of claims for personal injury to, or the death of any person under a contract of service or apprenticeship with the management contractor, and arising out of and in the course of such persons' employment shall comply with all relevant legislation. For all other claims to which clause 6.10.1.1 applies the insurance cover:

shall indemnify the Employer in like manner to the Contractor but only to the extent that the Contractor may be liable to indemnify the Employer under the terms of this Contract; and

shall be not less than the relevant sums stated in the Appendix for any one occurrence or series of occurrences arising out of one event.

6.10.2 As and when reasonably required to do so by the Employer, the Management Contractor shall send and shall cause any Works Contractor to send to the Architect/the Contract Administrator for inspection by the Employer documentary evidence that the insurances required by clause 6.10.1.1 have been taken out and are being maintained, and at any time the Employer may (but not unreasonably or vexatiously) require to have sent to the Architect/the Contract Administrator for inspection by the Employer the relevant policy or policies and premium receipts therefore.

6.10.3 If the Management Contractor defaults in taking out or in maintaining, or in causing any Works Contractor to take out and maintain, insurance as provided in clause 6.10.1.1 the Employer may himself insure against any liability or expense which he may incur arising out of such default and a sum or sums equivalent to the amount paid or payable by him in respect of premiums therefor may be deducted by him from any monies due or to become due to the Management Contractor under this Contract or shall be recoverable from the Management Contractor as a debt.

Insurance—liability etc. of Employer

6.11.1 Where it is stated in the Appendix that the insurance to which clause 6.11.1 refers may be required by the Employer, the Management Contractor shall, if so instructed by the Architect/the Contract Administrator, take out a policy of insurance in the names of the Employer and the Contractor for such amount of indemnity as is stated in the Appendix in respect of any expense, liability, loss, claim or proceedings which the Employer may incur or sustain by reason of injury or damage to any property caused by collapse, subsidence, heave, vibration, weakening or removal of support or lowering of ground water arising out of or in the course of or by reason of the carrying out of the Project, excepting injury or damage:

6.11.1.1 for which the Management Contractor is liable under clause 6.8;

6.11.1.2 attributable to errors or omissions in the designing of the Project;

6.11.1.3 which can reasonably be seen to be inevitable having regard to the nature of the work to be executed and the manner of its execution;

6.11.1.4 which is the responsibility of the Employer to insure under clause 6.5.2 (if applicable);

6.11.1.5 to the Project and Site Materials brought on to the site of the Project for the purpose of its execution except in so far as any part or parts thereof are the subject of a certificate of Practical Completion;

6.11.1.6 arising from any consequence of war, invasion, act of foreign enemy, hostilities (whether war is declared or not), civil war, rebellion or revolution, insurrection or military or usurped power;

6.11.1.7 directly or indirectly caused by or contributed to by or arising from the Excepted Risks;

6.11.1.8 directly or indirectly caused by or arising out of pollution or contamination of buildings or other structure or of water or land or the atmosphere happening during the period of insurance; save that this exception shall not apply in respect of pollution or contamination caused by a sudden identifiable, unintended and unexpected incident which takes place in its entirety at a specific moment in time and place during the period

of insurance provided that all pollution or contamination which arises out of one incident shall be considered for the purpose of this insurance to have occurred at the time such incident takes place;

6.11.1.9 which results in any costs or expenses being incurred by the Employer or any other sums being payable by the Employer in respect of damages for breach of contract, except to the extent that such costs and expenses or damages would have attached in the absence of any contract.

6.11.2 Any such insurance as is referred to in clause 6.11.1 shall be placed with insurers approved by the Employer, and the Management Contractor shall send to the Architect/the Contract Administrator for deposit with the Employer the policy or policies and the premium receipts therefor.

6.11.3 If the Management Contractor defaults in taking out or in maintaining the Joint Names Policy as provided in clause 6.11.1 the Employer may himself insure against any risk in respect of which the default shall have occurred.

Excepted Risks

6.12 Notwithstanding the provisions of clauses 6.7, 6.8 and 6.10.1, the Management Contractor shall not be liable either to indemnify the Employer or to insure against any personal injury to or the death of any person or any damage, loss or injury caused to the Project or Site Materials, work executed, the site, or any property, by the effect of an Excepted Risk.''

22.23 These provisions are in terms very similar to those considered in SBC 05, and the comments made in relation to those provisions apply here. The obligation on the management contractor and any works contractor under these provisions to take out and maintain insurance is discussed in Chapter 19 above. For the reasons given there it might be said that the management or works contractor is in breach of his insuring obligations only if: (1) he fails to take out a compliant policy; (2) he cancels the policy; (3) he fails to pay the premium; or (4) he fails to comply with a promissory warranty when he knew or ought to have known of the facts constituting the breach.

OTHER PROVISIONS

Clause 6.6—Insurance for loss of liquidated damages

22.24 Where there is appropriate provision in the Appendix, this clause enables the employer to require the management contractor to obtain a quotation on an agreed value basis to provide for the payment of a sum equivalent to the amount of liquidated damages lost as a result of an extension of time being given following loss or damage caused by a Specified Peril. If the Employer wishes to accept the quotation, then he may instruct the management contractor to take out and maintain the relevant insurance. In line with SBC 05, JCT Management 2008 omits the provision for Insurance for the Employer's loss of liquidated damages on the grounds of limited use, prospective non-availability and the increased sophistication of the wider Delay in Completion insurance market.

Clause 6FC—Compliance with the Joint Fire Code

22.25 Where there is appropriate provision in the Appendix, this clause requires both the employer and the management contractor to comply with the Joint Fire Code, and it provides a machinery for the implementation of any remedial measures required by the Joint Names insurers in the event of a breach of the code by either party. In JCT Management 2008 this provision appears under Clauses 6.13 and 6.14. It remains for the parties to expressly incorporate this term by making provision in the Contract Particulars.

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CHAPTER TWENTY-THREE

CONSTRUCTION MANAGEMENT

Matthew E Smith and Edward Banyard Smith

GENERAL

23.1 When construction management is used to procure works, the client appoints a team of consultants to prepare the design. The client also appoints a specialist construction manager, whose principal role is to manage the construction of the works by a team of specialist trade contractors. Each trade contractor carries out individual packages of works. The key characteristic of this type of procurement is that there is no single contractor with responsibility for the coordination of the works. Instead, the coordination of the construction phase is the responsibility of the construction manager.

23.2 Construction management should not be confused with "Management Contracting". In the case of Management Contracting, the client enters into a single contract for the carrying out of the works. The management contractor then subcontracts the works to individual works contractors and is paid the prime cost of those works contractors together with a management fee.

23.3 In 2002, the JCT published standard form construction management procurement documents for the first time. The following documents were included in the package:

- Agreement (C/CM)—a standard form agreement between a client and his construction manager;
- Trade Contract (TC/C)—a standard form trade contract;
- Fluctuations provisions—optional fluctuations provisions which could be included in the Trade Contract (TC/C);
- Invitation to Tender (TC/T Part 1)—a standard form tender package to be issued by a client to trade contractors;
- Tender by Trade Contractor (TC/T Part 2)—a standard form tender by a trade contractor;
- Warranty from a Trade Contractor to a Purchaser/Tenant (TCWa/P&T);
- Warranty from a Trade Contractor to a Funder (TCWa/F); and
- Guide.

23.4 This chapter focuses on the first two documents, which contain the relevant insurance provisions for this type of procurement strategy. In preparing these documents, the JCT have sought to ensure that the provisions of each individual contract are consistent with the equivalent provisions in the other contracts. With this in mind, we have tried to draw the provisions together to comment on how the insurance "system" works, rather than looking at each individual contract in isolation.

23.5 The JCT has indicated that it intends to publish an updated suite of contracts to cater for construction management. These are expected to be published in September 2008. In the meantime, the 2002 Construction Management Agreements have not been updated to reflect changes in legislation (for example, there are no updates to cater for the Construction (Design

and Management) Regulations 2007). Despite this, they remain a popular contract form for clients wishing to procure work on a construction management basis.

KEY PROVISIONS

Agreement (C/CM)

23.6 The provisions dealing with insurance and indemnities are all in the Second Schedule to the Agreement. They are:

"Paragraph 1:	The client takes out a "Joint Names Policy" in respect of the project itself and, where the project comprises alterations or extensions to existing structures, the existing structures and contents thereof.
Paragraph 2:	The Joint Names Policies should provide for each trade contractor to be named as joint insured in respect of damage to the works or the existing structures, as appropriate.
Paragraph 3:	The client should provide evidence that the insurance has been taken out. If he defaults in taking out the insurance, the construction manager may take out his own policy of insurance.
Paragraph 4:	If damage occurs to the project itself, then the construction manager shall give written notification to the client.
Paragraph 5:	The occurrence of any damage to the project itself is disregarded in calculating the payments due to the construction manager.
Paragraph 6:	The construction manager should authorise the insurers to pay any insurance proceeds to the client.
Paragraphs 7–12:	If either party discovers insurance cover for terrorism has become unavailable, that party should give notice to the other of the non-availability. The client then has the option to terminate the contract.
Paragraphs 13–15:	The construction manager indemnifies the client in respect of claims arising from death, personal injury or property damage (other than damage to the project itself and site materials) due to the construction manager's negligence, breach of statutory duty, omission or default. The indemnity in respect of claims for death and personal injury is limited to the amount of insurance the construction manager is required to take out under paragraph 17.
Paragraph 16:	The client gives a cross-indemnity to the construction manager in almost identical terms to the indemnity provided by the construction manager, in respect of claims arising from death, personal injury or property damage (other than damage to the project itself and site materials) due to the client's own negligence, breach of statutory duty, omission or default or that of his servants or agents. This reference would obviously include the client's own employees, but would also include the trade contractors (who are in direct contract with the client). This indemnity only applies insofar as the loss, injury, death or damage arises from the default of the client or any of his servants or agents (other than the construction manager himself).
Paragraph 17:	The construction manager is required to take out insurance to cover his liabilities under the indemnity in paragraph 13. This is effectively third party or public liability insurance.
Paragraph 18:	The client is also required to take out liability insurance to cover his own indemnity in paragraph 16."

Trade Contract (TC/C)

23.7 The insurance provisions in TC/C are contained in Part 6:

"Clause 6.1: The trade contractor indemnifies the client against claims arising from death or personal injury arising from the carrying out of the works, except to the extent that the client is at fault.

Clauses 6.2–6.3: The trade contractor indemnifies the client against property damage arising from the carrying out of the works, but only insofar as the damage arises from the carrying out of the works, and only to the extent that the damage is due to the contractor's negligence.

Clause 6.4: The trade contractor is required to take out insurance which covers his liabilities under clauses 6.1 and 6.2.

Clauses 6.5–6.6: The trade contractor must provide evidence of the insurance required under clause 6.4. If he defaults in taking it out, the client may take out it out and recover the cost from the trade contractor.

Clause 6.7: 'Excepted Risks' are excluded both from the trade contractor's indemnities under clauses 6.1 and 6.2, and from his obligation to insure."

23.8 There are optional provisions dealing with insurance of the works:

"Clause 6A: This clause is for use on the erection of new buildings. The client takes out an 'all risks' joint names insurance policy covering the client, the trade contractor and his subcontractors against damage to the works themselves. There are also provisions dealing with the client's failure to insure, a procedure in the event that damage to the works occurs and terrorism cover.

Clause 6B: This clause is for use where works are carried out on or around existing structures. The client takes out a joint names policy in respect of damage caused to the existing structures. Again, there are provisions dealing with the client's failure to insure, a procedure in the event that damage to the works occurs and terrorism cover."

23.9 Finally, there is an optional Clause 6FC.1 which requires both parties to comply with the Joint Fire Code.

PUBLIC LIABILITY AND EMPLOYER'S LIABILITY INSURANCE

23.10 As the provisions for this type of insurance are similar but subtly different, we consider the different provisions in tandem in this section.

Losses arising from personal injury and/or death—indemnity to client

23.11 C/CM contains an indemnity from the construction manager to the client in respect of both personal injury and/or death and property damage. This is contained at paragraph 13 and qualified in paragraphs 14 and 15, although only paragraph 15 is relevant to death and/or personal injury:

"Paragraphs 13-15:

13. The Construction Manager shall be liable for and shall indemnify the Client against any expense, liability, loss, claim or proceedings whatsoever arising under statute or at common law in respect of
    .1 personal injury to or the death or any person whomsoever, and
    .2 any loss, injury or damage whatsoever to any property real or personal

insofar as such loss, injury, death or damage arises out of or in the course of or by reason of the carrying out by the Construction Manager of his obligations under this Agreement and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Construction Manager, his servants or agents.

15. The liability of the Construction Manager to indemnify the Client in respect of the death, loss, injury or damage referred to in paragraph 13 shall be limited to the sum of the insurance cover stated in the Appendix pursuant to paragraph 17.2 to be taken out for any one occurrence or series of occurrences arising out of any one event."

23.12 TC/C contains separate indemnities in respect of death and personal injury, and property damage, respectively. The indemnity in respect of personal injury is set out in clause 6.1:

"6.1 The Trade Contractor shall be liable for, and shall indemnify the Client against, any expense, liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or caused by the carrying out of the Works, except to the extent that the same is due to any act or neglect of the Client or of any person for whom the Client is responsible including any other persons engaged by the Client on or in connection with the Project."

23.13 The use of an indemnity means that the cause of action does not arise (and therefore, the relevant limitation period does not start to run) until the client suffers a loss. This effectively means that the construction manager or trade contractor could remain liable under the indemnity long after the expiry of the usual limitation periods applicable to the contract.[1] In practice, however, the duration of the liability will probably be limited by the requirement that the client's loss arises during the carrying out of the works.

23.14 In general terms, the rules of interpretation of indemnities and exceptions apply to these clauses.[2] Thus, the employer will need to demonstrate that the wording of the indemnity covers the relevant loss. If he wishes to avoid liability the construction manager or trade contractor would need to demonstrate that an exception applies, and even if he can do so, he may still be liable if the employer can show that the claim can be based on matters outside the exception.[3] Furthermore, the courts will usually assume that it is unlikely that either party will wish to absolve the other party of his negligence,[4] although effect will be given to clear words to the contrary.

23.15 Both of these indemnities provide that the employer will be indemnified for any "expense, liability, loss, claim or proceedings" in respect of either the personal injury or death of any person, or any damage to any property. These categories of damages are broad and probably include consequential losses.

23.16 The indemnity in clause 6.1 of TC/C is excluded "to the extent" that the damage has been caused by the client's default. This is a similar formulation to the JCT 2005 contracts. It is submitted that this means that if the damage is caused in part by the client's default, and in part by other factors, an apportionment of the loss should be carried out.

23.17 On the other hand, the words used in the final paragraph of paragraph 13 of C/CM adopt a slightly different formulation: the indemnity only applies "insofar as" the damage is caused by the construction manager's services on the project, and crucially, only "to the extent that" the damage is due to the default of the construction manager. Although it is not entirely

1. *R & H Green* v *BRB* (1980) 17 BLR 94.
2. *R & H Green* v *BRB*, supra.
3. *Canada Steamship* v *R* [1952] AC 192.
4. *Gillespie Brothers & Co Ltd* v *Roy Bowles Transport Ltd* [1973] QB 400.

without doubt, it is submitted that the contrasting uses of "insofar as" and "to the extent that" provide that no apportionment needs to be carried out even if the damage is only partially caused by the construction manager's services, whereas if the damage is only partially caused by the construction manager's default, an apportionment will be required. Despite the use of "omission or default", it appears the client will need to show that the construction manager was at fault, following *Scottish & Newcastle plc* v *GD Construction (St Albans) Ltd*.[5]

23.18 Another important distinction arises as a result of the inclusion of paragraph 15 in C/CM. This provision, which is not repeated in TC/C, limits the construction manager's liability to the agreed level of insurance cover set out in the Appendix. The paragraph does not expressly state whether the financial limitation should apply "for any one occurrence" or "in the aggregate" in the event of multiple claims. However, since paragraph 17.2 requires the construction manager to take out insurance for "any one occurrence or series of occurrences arising from one event", it seems certain that paragraph 15 will be treated in the same way. On the other hand, the express language of the paragraph suggests that the amount stated in the Appendix will limit all claims connected with personal injury and/or death, even though paragraph 17.2 draws a distinction between claims relating to members of the public and claims relating to the construction manager's own employees and apprentices.

23.19 Clause 6.7 in TC/C excludes "Excepted Risks"[6] from the trade contractor's indemnity. No similar exclusion is incorporated into C/CM.

23.20 Whilst there are subtle differences between the respective indemnities, this will presumably hold only limited significance, because the party giving the indemnity should have taken out appropriate insurance under the provisions below.

Losses arising from property damage—indemnity to client

23.21 As stated above, paragraph 13 of C/CM contains a separate indemnity from the construction manager to the client in respect of losses arising from personal injury and death, and damage to property. This is qualified in paragraph 14 in relation to property only.

> "14. The reference in paragraph 13.2 to 'property real or personal' does not include the Project, work executed, Site Materials and Site Facilities up to and including the date of issue of the Interim Project Completion Certificate or up to and including the date of the termination of the engagement of the Construction Manager under clause 7, or the date of any abandonment of the Project whichever is the earlier. If clause 1.7 has been operated then, in respect of the relevant part, and as from the relevant date, such relevant part shall not be regarded as 'the Project' or 'work executed' for the purpose of paragraph 14."

23.22 On the other hand, TC/C contains an indemnity in respect of property damage at Clause 6.2, which is qualified in Clause 6.3:

> "6.2 The Trade Contractor shall be liable for, and shall indemnify the Client against, any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal in so far as such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Works, and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Trade Contractor, his servants or agents or of any person who may properly be on the site upon or in connection with the Works or any part thereof his servants or agents

5. [2003] Lloyd's Rep IR 809; [2003] EWCA Civ 96.
6. "Excepted Risks" is defined in clause 1.3 to include various uninsurable events, such as sonic booms and nuclear accidents.

other than the Client or any person employed, engaged or authorised by him or by any local authority or statutory undertaker executing work solely in pursuance of its statutory rights and obligations. This liability and indemnity is subject to clause 6.3 and, where clause 6B.1 is applicable, excludes loss or damage to any property required to be insured thereunder caused by a Specified Peril.

6.3.1 Subject to clause 6.3.2 the reference in clause 6.2 to 'property real or personal' does not include the Works, work executed and/or Site Materials up to and including the date of issue of the certificate of practical completion of the Works or up to and including the date of determination of the employment of the Trade Contractor (whether or not the validity of that determination is disputed) under Part 7 of the Conditions or, where clause 6B applies, under Part 7 of clause 6B.4.3, whichever is the earlier.

6.3.2 If clause 2.21 has been operated then, in respect of the relevant part and as from the relevant date, such relevant part shall not be regarded as 'the Works', or 'work executed' for the purpose of clause 6.3.1."

23.23 Although they are set out in a different format, these two indemnities are generally very similar in content. Both indemnities refer to "any expense, liability, loss or proceedings" and both refer to approximately the same property: in both cases, the works themselves and site materials are excluded from the indemnity,[7] and the indemnity falls away when the employment of the party giving the indemnity is determined or when the project is completed or abandoned.

23.24 In both cases, the party giving the indemnity will only be liable "to the extent" that the damage has been caused by his own default, or that of his servants and agents. In TC/C, the trade contractor is additionally responsible for "any person who may properly be on the site upon or in connection with the Works or any part thereof his servants or agents other than the Client or any person employed, engaged or authorised by him or by any local authority or statutory undertaker executing work solely in pursuance of its statutory rights and obligations". It appears likely that the trade contractor's own subcontractors would be covered by this. There is one further distinction: in the case of TC/C, "Excepted Risks" are excluded, and where the existing structures are to be insured by the client pursuant to clause 6B, "Specified Perils" are also excluded from the indemnity. Both "Excepted Risks" and "Specified Perils" are defined in TC/C.

Insurance for employer's liability and public liability

23.25 In C/CM, the obligation on the construction manager to take out insurance against the claims being brought against the construction manager under the indemnity is set out in paragraph 17.

"17.1 Without prejudice to his obligation to indemnify the Client under paragraph 13 the Construction Manager shall take out and maintain until the date of issue of the Final Project Completion Certificate insurance which shall comply with paragraph 17.2 in respect of his liability referred to in paragraph 13.

17.2 The insurance in respect of claims for personal injury to or the death of any person under a contract of service or apprenticeship with the Construction Manager, and arising out of any in the course of such person's employment, shall comply with all relevant legislation. For all other claims to which paragraph 17.2 applies the insurance cover to be taken out and maintained by the Construction Manager shall be not less than

7. In the case of the C/CM indemnity, site facilities are also excluded. It is not very clear why there is a difference between the two agreements on this point.

the sum stated in the Appendix for any one occurrence or series of occurrences arising out of one event."

23.26 Clause 6.4 of TC/C requires the trade contractor to take out insurance:

"6.4.1 Without prejudice to his obligation to indemnify the Client under clauses 6.1 and 6.2 the Trade Contractor shall take out and maintain insurance which shall comply with clause 6.4.2 in respect of claims arising out of his liability referred to in clauses 6.1 and 6.2.

6.4.2 The insurance in respect of claims for personal injury to or the death of any person under a contract of service or apprenticeship with the Trade Contractor, and arising out of and in the course of such person's employment, shall comply with all relevant legislation. For all other claims to which clause 6.4.1 applies the insurance cover:

– shall indemnify the Client in like manner to the Trade Contractor but only to the extent that the Trade Contractor may be liable to indemnify the Client under the terms of this Trade Contract; and

– shall be not less than the sum stated in the Appendix for any one occurrence or series of occurrences arising out of one event."

23.27 In both cases, the obligation to insure in respect of claims connected with the personal injury and/or death of the staff of the trade contractor or construction manager is limited to "relevant legislation". This is a reference to the Employer's Liability (Compulsory Insurance) Act 1969 and the Employers' Liability (Compulsory Insurance) Regulations 1998.

Indemnity from client to construction manager

23.28 Finally, C/CM includes an indemnity from the client to the construction manager at paragraph 16:

"16. The Client shall be liable for and shall indemnify the Construction Manager against any expense, liability, loss, claim or proceedings whatsoever arising under statute or at common law in respect of

.1 personal injury to or the death of any person whomsoever; and

.2 any loss, injury or damage whatsoever to any property real or personal

to the extent that any such loss, injury, death or damage is due to any negligence, breach of statutory duty, omission or default of the Client, his servants or agents (other than the Construction Manager as agent for the Client under any Trade Contract)."

23.29 This provides that the client indemnifies the construction manager in respect of claims for personal injury, death and property damage, to the extent that the claims are due to the default of the client, his servants or agents. The reference to the client's "servants or agents" expressly excludes the construction manager's defaults as agent under a trade contract (to avoid potential circularity) but as we have said, this reference would include the client's trade contractors.

23.30 It is interesting that the client's liability under this indemnity is not limited by provisions equivalent to paragraphs 14 and 15. Indeed, the indemnity is not even limited to losses connected with the project itself.

23.31 Paragraph 18 requires the client to take out insurance to cover his potential liabilities under the indemnity. The client should also take the benefit of indemnities from the trade contractors, but he will bear the cost of any shortfall if the counter-indemnities and the insurance cover are not sufficient.

INSURANCE OF THE WORKS AND THE EXISTING STRUCTURES

General comments

23.32 As with many of the JCT 2005 contracts, C/CM and TC/C provide alternative insurance schemes, depending on whether the project comprises a "new build" development, or alterations to an existing structure. The key difference between these agreements and the JCT 2005 contracts is that in these agreements there is no option for the contractor to provide the insurance of the works, and in every case it is the responsibility of the client to take out and maintain insurance. This reflects the fact that it would be impracticable for each separate trade contractor to procure separate insurance policies in respect of his own works package.

Insurance of the works

General comments

23.33 In C/CM, the client's obligation to take out (or procure the taking out of) All Risks insurance for the project is found in paragraph 1 of the Second Schedule. This is a "universal" provision, which applies whether the works comprise a new development or alterations to an existing structure.

> "1. From the commencement of any work on site for the Project or the provision of any of the site facilities or services referred to in the Sixth Schedule are provided whichever first occurs, the Client shall take out or shall procure the taking out of:
> .1 a Joint Names Policy for All Risks Insurance for the full reinstatement value of the Project and the replacement value of the Site Facilities (plus the percentage, if any, stated in the Appendix to cover professional fees, including those of the Construction Manager); and
> .2 where the Project comprises alterations of or extensions to existing structures, a Joint Names Policy in respect of the existing structures (which shall include from the relevant date any relevant part to which clause 1.7 refers) together with the contents thereof owned by the Client or for which he is responsible for the full cost of reinstatement, repair or replacement of loss or damage due to one or more of the Specified Perils;
> and the Client shall maintain such Joint Names Policy or Policies up to and including the date of issue of the Interim Project Completion Certificate or up to and including the date of the termination of the Construction Manager's engagement under clause 7, or the date of any abandonment of the Project whichever is the earlier; and in the case of the All Risks cover continue the limited defect liability protection afforded to Trade Contractors until the issue of the Certificate of Completion of Making Good Projects Defects."

23.34 TC/C provides two alternative clauses for the insurance required to be taken out by the client. Clause 6A applies to "new build" developments, and clause 6B applies to alterations or extensions on or around existing structures. The client's obligation to insure the works is found in clauses 6A.1 and 6B.2 respectively[8]:

> "6A.1 The Client shall take out and maintain a Joint Names Policy for All Risks Insurance for cover no less than that defined in clause 6.8 for the full reinstatement value of the Project and the replacement value of the Site Facilities. The Client (subject to clause 2.22.2) shall maintain the interest of the Trade Contractor in the policy as Joint Insured for the

8. There is no provision in the Appendix for the user to specify which insurance option applies. Accordingly, the user should delete either clause 6A or 6B in manuscript.

period from the Date of Commencement until the date of issue of the certificate of practical completion of the Works; and thereafter in respect of physical loss or damage to the Works which occurs prior to the issue of the Certificate of Completion of Making Good Defects due to a cause which occurs prior to practical completion of the Trade Contract and to any physical loss or damage occasioned by the Trade Contractor in the course of any operations carried out by him whilst making good defects; or up to and including the date of determination of the employment of the Trade Contractor under Part 7 of the Conditions (whether or not the validity of that determination is contested) whichever is the earlier. Where the Client's status for VAT purposes is exempt or partially exempt the full reinstatement value to which this clause refers shall be inclusive of any VAT on the supply of the work and materials referred to in clause 6A.3.3 for which the Contractor is chargeable by the Commissioners.

6B.2 The Client shall take out and maintain a Joint Names Policy for All Risks Insurance for cover no less than that defined in clause 6.8 for the full reinstatement value of the Project and the replacement value of the Site Facilities. The Client (subject to clause 2.22.2) shall maintain the interest of the Trade Contractor in the policy as Joint Insured for the period from the Date of Commencement until the date of issue of the certificate of practical completion of the Works; and thereafter in respect of physical loss or damage to the Works which occurs prior to the issue of the Certificate of Completion of Making Good Defects due to a cause which occurs prior to practical completion of the Trade Contract and to any physical loss or damage occasioned by the Trade Contractor in the course of any operations carried out by him whilst making good defects; or up to and including the date of determination of the employment of the Trade Contractor under clause 6B.4.3 or Part 7 of the Conditions (whether or not the validity of that determination is contested), whichever is the earlier. Where the Client's status for VAT purposes is exempt or partially exempt the full reinstatement value to which this clause refers shall be inclusive of any VAT on the supply of the work and materials referred to in clause 6B.4.4.1 for which the Contractor is chargeable by the Commissioners."

23.35 Both contracts require the client to take out a "Joint Names Policy" for the full reinstatement value of the works and the replacement value of site facilities. In the case of C/CM, the contract also provides that the joint names policy will cover an agreed additional percentage to cover professional fees.

23.36 Both contracts provide that unless the engagement of the construction manager or trade contractor is determined earlier, the insurance will need to remain in place until the completion of the respective trade contract (or in the case of C/CM, the completion of the final trade contract). Furthermore, both contracts provide that the insurance should remain in place to cover damage to the works caused by each specific trade contractor in making good defects until the certificate of making good defects for the respective trade contract concerned has been issued.

23.37 The definition of "Joint Names Policy" in TC/C requires the client and the respective trade contractors to be joint named as insured; whereas in the definition in C/CM, there is also an additional obligation to ensure that the Construction Manager is joint named as insured. Clearly, a client can satisfy the requirements of both definitions by taking out a single policy which effectively insures himself, the construction manager and each of the trade contractors. The provisions for joint insurance also means that the client will probably be unable to recover damages from either the construction manager or the trade contractors where the risk should have been covered by the client's insurance policy.[9]

9. *Petrofina (UK) Ltd* v *Magnaload Ltd* [1984] QB 127; *Co-operative Retail Services Ltd* v *Taylor Young Partnership Ltd and others* (2002) 1 WLR 1419, however see in this context the discussion of *Tyco Fire & Integrated Solutions (UK) Ltd* v *Rolls-Royce Motor Cars Ltd* [2008] EWCA Civ 286 in Chapter 13 above.

23.38 There are similar provisions dealing with terrorism cover in each contract. Both contacts provide that if terrorism cover becomes unavailable,[10] the client can choose whether to proceed without terrorism insurance or whether to discontinue with the project. If he chooses to proceed, then he does so at his own risk.

Procedure on damage to the works

23.39 Both agreements have similar provisions regarding damage to the works. In each case, the respective trade contractor or the construction manager is required to notify the client of the damage, which is disregarded for the purposes of valuations of the amounts due to the trade contractor or the construction manager. The insurers are authorised to pay the insurance proceeds directly to the client.

23.40 Where the works comprise the alteration or extension of an existing structure, and those works are damaged, clause 6B.4.3 of TC/C provides that either party has the option to terminate the trade contract, provided it is "just and equitable" to do so. This provision may reflect the fact that if the works are damaged, the existing structure may also have been damaged, which may render it impossible to proceed. However, it does give rise to a difficult question about whether a termination is "just and equitable" and how this should be assessed. It is submitted that this will need to be considered at the date of the determination, and in the light of all of the surrounding circumstances.

23.41 If the trade contractor's employment is not determined, TC/C expressly provides that any reinstatement works will be treated as a variation to the trade contract. In C/CM, paragraph 14.3 of the Fourth Schedule provides that services in connection with reinstatement works will be regarded as "Additional Services", so the construction manager's fee will be adjusted accordingly under clause 5.8. In effect, this means that the client bears the risk of any shortfall in the insurance proceeds, which reflects the fact that it is his responsibility to procure sufficient insurance.

Insurance of existing structures

23.42 In C/CM, the obligation to take out insurance of the existing structures is found in paragraph 1 of the Second Schedule, set out in paragraph 23.33 above. In TC/C, the obligation is set out in clause 6B.1:

> "6B.1 The Client shall take out and maintain a Joint Names Policy in respect of the existing structures (which shall include from the relevant date any relevant part to which clause 2.22.2 refers) together with the contents thereof owned by him or for which he is responsible, for the full cost of reinstatement, repair or replacement of loss or damage due to one or more of the Specified Perils up to and including the date of issue of the certificate of practical completion of the Works or up to and including the date of determination of the employment of the Trade Contractor under clause 6B.4.3 or Part 7 of the Conditions (whether or not the validity of that determination is contested), whichever is the earlier. The Trade Contractor shall authorise the insurers to pay all monies from such insurance in respect of loss or damage to the Client. Where the

10. It should be noted that whereas clause 6A.4 refers to "paragraph 1.1 of the Client/Construction Manager Agreement" (i.e. the provision for insurance of the works) clause 6B.5 refers to "paragraph 1.2 of the Second Schedule to the Client/Construction Manager Agreement" (i.e. insurance of the existing structures). In either case, the client should clarify with its brokers what contractual terrorism provisions are required in the insurance market conditions prevailing at the time.

> Client's status for VAT purposes is exempt or partially exempt the full cost of reinstatement, repair or replacement of loss or damage to which this clause refers shall be inclusive of any VAT chargeable on the supply of such reinstatement, repair or replacement."

23.43 Both contracts contain similar provisions. The client is required to take out an insurance policy in respect of existing structures, which include any areas of partial possession taken by the client. The policy should also include any contents of the existing structures which are owned by the client, or for which the client is responsible for reinstatement, repair or replacement.

23.44 Again, the insurance policy should be a "Joint Names Policy", and the comments made above in relation to this definition apply equally here. In this case, however, the trade contractors are required to be joint insured only up until the date of practical completion of the works (or the termination of their employment, if earlier) and the trade contractors will not be joint insured in respect of damage to existing structures during the rectification of defects.

23.45 Unlike the insurance of the works, which should be covered by an "All Risks" policy,[11] the insurance of the existing structures needs only to be against "Specified Perils".[12] Finally, it is worth commenting on the relationship between the provisions for joint insurance and the indemnities in respect of property damage. In relation to other forms of contract, this issue has caused significant debate in the past, but the express exclusion of joint insured risks in the indemnities probably now means that the contractor will not be liable to the employer for "Specified Perils", as the parties intend that this risk should be covered by the joint insurance policy.[13]

Subcontractors

23.46 Both contracts provide that the policy of insurance for the works should either name subcontractors as joint insured, or include a waiver of subrogation rights against them. In both cases, it should be noted that this protection is limited to "Specified Perils" only and not "All Risks Insurance".

23.47 This provision has significant consequences upon the subcontractor's liability in respect of damage to the works. The first and most obvious effect is that, assuming the requirement has been correctly implemented in the insurance policy, the insurers may be unable to exercise rights of subrogation against the subcontractors in respect of the Specified Perils.[14] But beyond that, it is unlikely the subcontractors will even owe any contractual liability or duty of care to the employer in respect of this risk, following the decisions in *Taylor*

11. The definitions of "All Risks Insurance" are generally identical in both agreements, and both require insurance against all physical loss or damage to the works and site materials, including the cost of removing debris and propping up the works) but subject to various exclusions, including "Excepted Risks". There is one inconsistency between the two definitions: the definition in C/CM contains an additional exclusion relating to damage to site facilities due to its own defective design. In practice, this is probably not problematic, as even if a policy of insurance is taken out which does not include this exclusion (and which therefore matches precisely the requirements of TC/C), it will still satisfy the minimum requirements of C/CM.

12. 'Specified Perils" are defined in clause 1.3 of both agreements, and include a narrower band of insurable events than "All Risks Insurance". As with the definition of "All Risks Insurance", "Excepted Risks" are excluded.

13. *Scottish & Newcastle plc* v *GD Construction (St Albans) Ltd*, see note 5, *supra*.

14. *Petrofina (UK) Ltd* v *Magnaload Ltd*, see note 9, *supra*; *ibid*.

Young[15] and *Norwich City Council* v *Harvey.*[16] In turn, this means that neither the construction manager nor any other party will be able to recover a contribution from any of the trade contractor's subcontractors in respect of this type of damage. However, this is a complicated area of the law into which the decision of the Court of Appeal in *Tyco Fire & Integrated Solutions (UK) Ltd* v *Rolls-Royce Motor Cars Ltd*[17] has injected some uncertainty—see Chapter 13 above.

23.48 In relation to insurance of the existing structures, it should be noted that (in contrast to the insurance policy for the works) there is no obligation to procure that the insurance policy names the subcontractors as joint insured, or that the insurers waive rights of subrogation against the subcontractors. The effect of this has not been fully considered by the courts, but it is submitted that the failure to include these provisions probably means that the courts will follow the decision in *British Telecommunications plc* v *James Thomson & Sons Engineers Ltd*[18] where it was held that a subcontractor could owe a duty of care to the employer where he was excluded from provisions for joint insurance enjoyed by others. If this is the case, the decision in *Taylor Young* would not apply, and there is no reason why other parties could not claim a contribution from subcontractors.

15. *Ibid*.
16. [1989] 1 WLR 828.
17. See note 9, *supra*.
18. [1999] 1 WLR 9.

CHAPTER TWENTY-FOUR

ICE CONDITIONS OF CONTRACT (SEVENTH EDITION)

Neil White

INTRODUCTION

24.1 The ICE (7th Edition) adopts a similar approach to risk and insurance as the 2005 editions of the JCT forms. It sets out the Contractor's risks in clauses 20 and 22 and the relevant insurance provisions in clauses 21 and 23. Clauses 20 and 21 deal with insurance of the Works and clauses 22 and 23 with insurance against injury to people and property. Clause 24 deals with liability in respect of injury to employees. See Appendix 12 for the terms of the insurance provisions of this contract. For completeness, see Appendices 13 and 14, equivalent terms of insurance for ICE Design and Construct (2nd Edition) and ICE Minor Works (3rd Edition).

CLAUSE 20—CARE OF THE WORK

24.2 Clause 20(i) imposes on the Contractor responsibility for the Works including materials, plant and equipment, from the Works Commencement Date until the date of issue of a Certificate of Substantial Completion (the equivalent of a Certificate of Practical Completion under the JCT forms). It is worth noting that it is the date of issue of the Certificate, not the date on which Substantial Completion is achieved, that terminates the Contractor's obligation. As for the JCT forms, there is provision for partial release of the Contractor if Substantial Completion of a Section or part of the Works is certified but, unlike the JCT forms, the Contractor continues to be responsible in respect of any outstanding work and related materials, plant and equipment where he undertakes to finish that work during the Defects Correction Period, until that work is completed.

24.3 Sub-clause (2) sets out the Excepted Risks for which insurance is not required (because it will usually be unobtainable), which are:

> "(d) Use or occupation of the Works by the Employer, its agents, servants or contractors;
> (e) Any fault defect error or omission in the design of the Works (other than design provided by the Contractor);
> (f) Riot, war, invasion, act of foreign enemies or hostilities;
> (g) Civil war, rebellion, revolution, insurrection or military or usurped power (note that terrorism is not excluded);
> (h) Radiation or contamination by radioactivity;
> (i) Pressure waves caused by aircraft or other aerial devices travelling at sonic or super sonic speeds."

As might be expected, these exclusions are fairly standard.

24.4 Sub-clause (3) imposes an express obligation on the Contractor to make good any loss and damage to the Works at his own expense, unless the loss or damage arises from an Excepted Risk, in which case he has to rectify the loss and damage at the expense of the Employer. This is the reverse of the policy under the JCT forms, where rectification of damage caused by Insured Risks is treated as a variation. The Contractor's obligation extends to work carried out by the Contractor during the Defects Correction Period to complete any work which was outstanding at the time of the issue of the Certificate of Substantial Completion, a provision which is not found in the JCT forms.

24.5 Sub-clause (3)(c) provides for apportionment of the cost of remedying loss and damage where the cause of the loss and damage is both an Excepted Risk and one for which the Contractor is responsible. Whilst the policy behind the clause is clear and is fair and reasonable, it is difficult, in practice, to envisage circumstances in which loss and damage might be caused both by a risk for which the Contractor is responsible and by one for which he is not.

CLAUSE 21—INSURANCE OF WORKS

24.6 The Contractor is required to insure the Works in their full reinstatement for cost with an additional 10 per cent to cover further costs such as professional fees, costs of demolition and removal of debris. This addition may prove to be insufficient. Under the JCT forms, 10 per cent or 15 per cent is frequently added simply to cover professional fees, let alone the other additional costs referred to. In addition, insurance is often obtained to cover the increased costs of completing the project arising from inflation occurring during the period between the original commencement of the Works and beginning the remedial work.

24.7 The risks against which the Contractor is required to insure are all those other than the Excepted Risks but it is expressly stated that the Contractor's obligation to insure is without prejudice to his obligations under clause 20. However, as with his obligations under clause 20, his obligation to insure runs from the Works Commencement Date until the date of issue of the relevant Certificate of Substantial Completion.

24.8 To reflect the Contractor's obligations under clause 20(3), the insurance has to cover loss or damage arising from work carried out by the Contractor during the Defect Correction Period and loss or damage arising from a cause which occurred prior to the issue of the Certificate of Substantial Completion (clause 21(2)(b)).

24.9 The Contractor is expressly relieved of the obligation to insure against the costs of repairing work constructed with materials or workmanship which are not in accordance with the requirements of the Contract by clause 21(2)(c), unless the Bill of Quantities otherwise requires. Any amounts uninsured or not recovered under the insurance are, by clause 21(2)(d) to be borne by the Contractor or the Employer in accordance with their respective responsibilities under clause 20 (i.e. the Employer bears the risk of Excepted Risks) and to reflect this, the Contractor is required to maintain insurance in the joint names of the Contractor and the Employer.

24.10 In general terms, this clause is fairly simple and does not contain many of the complex provisions found in other forms of contract. There is, however, no need for such provisions, as the Contractor is expressly liable to reinstate the Work at his own cost (except where damage arises from the Excepted Risks) and it is therefore in his interest that he should insure.

CLAUSE 22—DAMAGE TO PERSONS AND PROPERTY

24.11 The general obligation to insure against injury to people and damage to property is imposed on the Contractor "except if and so far as the Contract provides otherwise". The obligation extends not only to risks arising from the execution of the Works but also from the remedying of any defects in the Works and "all claims, demands, proceedings, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto". Express exclusions are set out in sub-clause (2) which are:

"(a) damage to crops;
(b) use or occupation of the land by the Works or for the purpose of executing and maintaining the Works, including any interference with any right of way, light, air or water or other easements which are an unavoidable result of the Works;
(c) right of the Employer to construct the Works;
(d) damage which is the unavoidable result of the construction of the Works;
(e) death or injury to persons or loss of or damage to property arising from any act, neglect or breach of statutory duty by the Employer, his agents, servants or other contractors."

24.12 The Employer is required to indemnify the Contractor against the exceptions set out in sub-clause (2) but sub-clause (4) makes provision for circumstances where the Employer, his agents, servants or contract have caused or contributed to injury to people or loss or damage to property for which the Contractor is responsible or where the Contractor or his subcontractors have contributed to injury to people or loss or damage to property for which the Employer is responsible. In each case there is a pro-rata reduction in the indemnity provided.

CLAUSE 23—THIRD PARTY INSURANCE

24.13 The Contractor is required to insure against the risks set out in clause 22 in joint names of himself and the Employer, although there is no obligation on the Employer to insure against the exceptions set out in clause 22(2), despite his indemnity to the Contractor. The Contractor's insurance is required to apply to the Contractor and the Employer as separate insureds (clause 23(2)) and there is provision for the amount of such insurance to be stated in the Appendix (clause 23(3)).

CLAUSE 24—ACCIDENT OR INJURY TO OPERATIVES

24.14 The Employer is expressly relieved of liability for any damage or compensation payable to any employee of the Contractor or his subcontractors save to the extent that the accident or injury in question is caused or contributed to by any act or default of the Employer, his agents or servants. Subject to that exception, the Contractor is required to indemnify the Employer against all such claims but in this case, there is no corresponding obligation on the Contractor to insure, presumably on the basis that all employers are required by statute to insure their employees against such risks.

CLAUSE 25—EVIDENCE OF TERMS OF INSURANCE AND REMEDY ON FAILURE TO INSURE

24.15 The Contractor is required to provide evidence to the Employer before the Works Commencement Date that the various insurances referred to above have been effected and is required to produce the policies for inspection under clause 25(1). This is, in current practice, unusual as insurance is normally established by provision of a broker's letter.

24.16 It is also provided that the terms of such insurance should be subject to the approval of the Employer (not to be unreasonably withheld) and this requirement may prove difficult, given that most Contractors All Risks insurance policies are block policies written on an annual basis (i.e. a single policy covering all projects the Contractor is required to insure) so that it may be difficult and/or expensive to alter the terms of the policy for a specific project.

24.17 In practice, most Employers may find that they have to accept what the Contractor has on offer or insure themselves. The Contractor is required to state the amount of any excess on the policies (clause 25(2)).

24.18 If the Contractor fails to provide evidence to the Employer that the policies are in force then clause 25(3) gives the Employer the right to take out such insurance himself and deduct the cost of doing so from any monies due to the Contractor or recover the cost from the Contractor as a debt. As one might expect, clause 25(4) requires both the Employer and the Contractor to comply with the terms of any insurance but, somewhat unusually, there is an express indemnity to the other against all losses and claims arising if one of them fails to comply.

CHAPTER TWENTY-FIVE

CONTRACT INSURANCE UNDER NEC 3 (2005)

Richard Anderson

GENERAL

25.1 It was during a period of dissatisfaction with UK construction procurement that the ICE Legal Affairs Committee recommended "a fundamental review of alternative contract strategies". That recommendation was accepted by the ICE, who put the matter out to various consultants.

CONTENTS OF NEC 3

25.2 The NEC family of contracts was actually published back in 1994 by the Institution of Civil Engineers and other bodies. It was updated into its second edition to form the Engineering and Construction Contract (ECC) and was issued into its third edition in late 2005. Currently, the NEC/ECC family of contracts comprises:

- the Engineering and Construction Contract;
- the Engineering and Construction Sub-contract;
- the Professional Services Contract;
- the Adjudicator's Contract;
- the Engineering and Construction Short Contract; and
- the Term Service Contract.

25.3 The philosophy of the NEC/ECC is based on two principles:

(1) the NEC/ECC is intended to be used as a non-legalistic project management tool, used as an equivalent to standardised contracts. Its form and content are therefore difficult to amend; and
(2) the NEC/ECC should not be used by the uninitiated as there are various appendices and forms of procurement contracts with six initial options for procurement with appropriate pricing provisions from "lump sum" to "cost plus".

25.4 Most users of the contract system of NEC/ECC are either initial enthusiasts or promoters, but in the early years of the NEC/ECC it is fair to comment that it had limited use, and when used it has been the subject of considerable amendment. In addition, there are still some serious issues as to clarity of expression and legal definitions which have worried commentators. The authors of the NEC/ECC have not yet properly produced amendments required by the Housing Grants Construction and Regeneration Act 1996 and some commentators have analysed the underlying principles of good faith and cooperation under the NEC.[1]

1. See Arthur McInnis, "NEC: Relational Contracting, Good Faith and Cooperation" (2003) CLR 289.

NEC/ECC CONTRACT STRUCTURE AND THEIR PROVISIONS

25.5 Each NEC/ECC contract is uniquely arranged to meet the employer's needs by assembling clauses from the option structure.

The option structure

25.6 The employer:

(1) makes a selection from the six main options as to which type of pricing mechanism is to apply;
(2) includes in the contract the nine sections of core clauses;
(3) includes in the contract such selection (if any) from the 14 detailed secondary option clauses as it thinks fit;
(4) includes in the contract under the 15th secondary option any additional clauses required by it or as agreed with the contractor.

The main options

25.7 The main options comprise six types of payment mechanism:

Option A: priced contract with activity schedule
Option B: priced contract with bill of quantities
Option C: target contract with activity schedule
Option D: target contract with bill of quantities
Option E: cost reimbursable contract
Option F: management contract

25.8 Each of the main options is published in a separate book which includes the relevant core clauses for the particular option. There is no main option for construction management and none specifically for design and build.

25.9 The core clauses are grouped into various sections as follows:

- general;
- the contractor's main responsibilities;
- time;
- testing and defects;
- payment;
- compensation events;
- title;
- risks and insurance;
- disputes and termination.

25.10 For each section there is a common set of core clauses and for some of the main options there are additional core clauses.

25.11 There are also 15 secondary options clauses, which are labelled G to Z, and included within them are some matters such as retention and liquidated damages for late completion, which most traditional contracts regard as an essential ingredient of the contract.

25.12 The NEC/ECC does not define the "contract". Clearly the schedules of cost components which are printed in with the contract are incorporated by reference if not by the

fact of their location. Similarly, the contract data sheets which allow the employer and the contractor to state particulars relating to the contract must have contractual effect.

25.13 Two further key documents, or sets of documents, which are fundamental to the NEC/ECC but which are wholly particular to each contract data sheet are the "works information" and the "site information". Provided these are properly identified in the contract, however, they become contract documents by reference. The position is similar in respect of activity schedules and bills to quantities.

25.14 The Government of Hong Kong became in 2005 the first overseas government to consider running a pilot project using NEC. At the moment there are several other NEC-procured projects in Hong Kong—airport engineering design contracts based on NEC professional services contract and NEC subcontracts—without changes; and some UK water projects, and airports using the NEC contract with changes.

INSURANCE CLAUSES UNDER NEC 3

25.15 Clause 8 of the NEC 3 deals with both risk and insurance together. Clearly, the intention is that the insurance taken out will be matched to the risks adopted. In a reverse of the normal approach adopted in the more traditional standard form contracts, clause 80 lists and defines the Employer's risks and clause 81 then provides that from the Starting Date to the issue of the Defects Certificate, the risks which are not carried by the Employer are carried by the Contractor.

25.16 The NEC 3 contains an express obligation (87.1) upon the Employer to insure against the risks specified in the contract (presumably those defined therein as the Employer's risk or as adjusted in the Contract Data). There is also an obligation upon the Project Manager (87.1) to exhibit *both* Policies and Certificates for Insurance.

25.17 This is to be done initially *before* the Starting Date or afterwards at any time when the Contractor so instructs. It is provided that the Contractor accepts the Policies and Certificates if they comply with the contract (87.1) and therefore, presumably, by implication, the only reason that the Contractor is not entitled to accept them is if they do not "comply with the contract". Clearly, any terms inserted in the Contract Data will be of importance there. It would appear that the waiver (except for fraud) by the Insurers of subrogation rights against Directors and other Employees is to apply equally to Policies of Insurance taken out by the Employers. A failure to do so could have potentially serious consequences as such policies often carry little or nothing in the way of "days of grace" so that Contractors would immediately be entitled to take out their own cover (87.3) and to charge the cost of that against the Employer. The Contract Data provide two additional options sections entitled "If the Employer is to provide any of the insurances stated in the Insurance Table" (see Appendix 15) and "If additional insurances are to be provided [by the Employer]".

25.18 Clearly, if those optional sections were completed at the time when the NEC 3 contract was taken out then the Employer would be under an express obligation to take out those insurances, and presumably under the same obligation to exhibit proof of these to Contractors on demand.

25.19 Other than that, the Contractor is clearly under an express obligation to take out what is in effect default insurance for everything else in the joint names of the Parties (Clause 84).

25.20 The insurance and cover/indemnity required is handily set out in an insurance table (itself heavily dependant upon the amounts of insurance cover required as inserted by the

Parties in the Contract Data at the time of contracting). The insurance required is stated to be the *minimum* level and is set at "replacement cost" (not "new for old") and it is clearly open to the Parties or their Insurers to exceed these provisions if they so agree.

25.21 There is an express obligation upon the Contractor to exhibit to the Project Manager for formal acceptance at least a Certificate signed by the Insurer or Broker (not apparently the Policies themselves) to the effect that the insurance required by the contract is in force. The obligation to do so runs from before the Starting Date *and* on each renewal and runs until the Defects Date.

25.22 Again, a failure to do so could have potentially serious consequences (if double insurance and extra cost are to be avoided while cover is maintained) as such policies often carry little or nothing in the way of "days of grace" so that Employers would immediately be entitled to take out their own cover (85.1) and to charge the cost of that against the Contractor.

25.23 NEC 3 expressly provides that the *only* reason for the Project Manager not to accept those Certificates is that they do not reflect the insurance cover required under the contract per the Insurance Table and the Contract Data (85.1). Any attempt to adjust these after the contract has been signed would presumably be a Compensation Event under NEC 3 (Clause 60) under which the Contractor could recover the cost of complying.

25.24 The Contract Data do, however, also provide an optional section which allows Contractors to provide for additional insurance and, again, if those optional sections were completed at the time when the NEC 3 contract was taken out then the Contractor would be under an express obligation to take out those insurances and presumably under the same obligation to exhibit proof of the policies to the Project Manager before the Starting Date and on renewal.

Clause 84—Insurance cover

25.25 Clause 84(1) Insurance Cover is as follows:

> "The *Contractor* provides the insurances stated in the Insurance Table except any insurance which the *Employer* is to provide as stated in the Contract Data. The *Contractor* provides additional insurances as stated in the Contract Data."

And (84.2):

> "The insurances are in the joint names of the Parties and provide cover for events which are at the *Contractor's* risk from the Starting Date until the Defects Certificate or a Termination Certificate has been issued."[2]

25.26 This clause sets out the basic obligation (a default insurance against everything except those risks which the Employer has expressly adopted and undertaken to insure) upon the Contractor in relation to insurance. The insurances are expressly to be in joint names (something that the Courts will not imply).

25.27 A question could arise about liability for damage to the Works caused by the negligence of the Employer because, although in joint names, this insurance is aimed at covering only the negligence of the Contractor, presumably, and reliance in that respect would require to be recovered under any insurance that the Employer might have (which the

2. The use in the NEC of italics for terms such as *Project Manager*, *Employer* and *Contractor* makes these defined terms under the contract.

Contractor now has an express right to have sight of on demand, failing which an express right to insure against that and recover the cost thereof (87)).

25.28 There is to be cross liability so that the insurance applies to the Parties separately. There is also to be a waiver of subrogation rights (except for fraud, of course) against Directors and other Employees and the precise amounts of insurance involved are supposed to be entered by the Parties in the Contract Data at the time of contracting.

25.29 This is something that will presumably be checked by the Project Manager on acceptance but the position later in the event of a failure to properly complete the Contract Data is not entirely clear. Presumably, any attempt by the Project Manager to subsequently demand, after completion of the contract, an increased level of insurance as a condition of acceptance would be a Compensation Event.

Clause 85—Insurance policies

25.30 This clause (intended to be a "tightening-up" of the requirements that existed in previous editions of this contract) sets out the obligations of the Parties in relation to the insurance policies. These Certificates are now required to be presented not just at the outset but upon each annual renewal date as well (85.1):

> "Before the Starting Date and on each renewal of the insurance policy until the Defects Date, the *Contractor* submits to the *Project Manager* for acceptance Certificates which state that the insurance required by this contract is in force. The certificates are signed by the Contractor's Insurer or Insurance Broker. A reason for not accepting the Certificates is that they do not comply with this contract".

25.31 A failure to "comply with this contract" is the only express reason allowed for refusal of acceptance by the Project Manager so that any attempt by the Project Manager to adjust the terms of the Insurance after the contract has been signed (perhaps with the Contract Data inadequately completed) would presumably be a Compensation Event under which the Contractor could recover the additional cost of doing so.

25.32 Further, clause 85.2 provides:

> "Insurance policies include a waiver by the Insurers of their subrogation rights against Directors and other Employees of every Insured, except where there is fraud."

25.33 There is also in clause 85.3 an express obligation that "The Parties comply with the terms and conditions of the insurance policies".

25.34 And in clause 85.4 that "Any amount not recovered from an Insurer is borne by the *Employer* for events which are at risk and by the *Contractor* for events which are at his risk". Both clauses 85.3 and 85.4 deal with an apportionment of risk between the Employer and Contractor; a lot will depend on "compliance with the policy terms".[3]

Clause 86—If the contractor does not insure

25.35 In the event of a *Contractor* failing to insure or at least submit the required Certificates, there is provision for the Employer to insure and to recover from the Contractor the cost of doing so. The Clause reads as follows: (86.1) "The *Employer* may insure a risk which this contract requires the *Contractor* to insure if the Contractor does not submit a required Certificate. The cost of this insurance to the *Employer* is paid by the *Contractor*."

3. See *Tyco Fire & Integrated Solutions (UK) Ltd* v *Rolls-Royce Motor Cars Ltd* [2008] EWCA Civ 286.

Clause 87—Employer's insurance

25.36 This clause now introduces matching obligations upon the Employer in relation to the provision, submission and acceptance of policies and the failure to do so. Clause 87.1 reads as follows: "The *Project Manager* submits Policies and Certificates for insurance provided by the *Employer* to the *Contractor* for acceptance before the Starting Date and afterwards as the *Contractor* instructs. The Contractor accepts the Policies and Certificates if they comply with this contract."

Clause 87.2

25.37 "The *Contractor's* acceptance of an Insurance Policy or Certificate provided by the *Employer* does not change the responsibility of the *Employer* to provide the insurances stated in the Contract Data."

Clause 87.3

25.38 "The *Contractor* may insure a risk which this contract requires the *Employer* to insure if the Employer does not submit a required Policy or Certificate. The cost of this insurance to the *Contractor* is paid by the *Employer*."

25.39 There is a practical problem in trying to enforce clause 87.3 if the Contractor tries to insure a risk, if the employer does not provide evidence that it has insured that risk. Either the Contractor might find it difficult to insure such a "risk" or difficult to prove the employer could not properly insure. There is also no real "timing" to this obligation.

CONCLUSION

25.40 Insurance is a complex subject upon which specialist advice should always be taken. Although the NEC 3 makes a reasonable attempt at setting out the respective insurance obligations of the parties, once the allocation of risk between the parties has been agreed by them, there may be advantage in a joint approach to insurers for single joint cover because not only will this reduce the risk of insurance policy conflicts but it may also offer the prospect of better cover or reduced costs or both.

CHAPTER TWENTY-SIX

CONTRACT INSURANCE UNDER GC/WORKS/1 AND 2 (1998)

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GENERAL

26.1 GC/Works/1 (1998) comprises three standard government forms of contract for major UK building and civil engineering works. It is published in four volumes:

- GC/Works/1 With Quantities (1998);
- GC/Works/1 Without Quantities (1998);
- GC/Works/1 Single Stage Design & Build (1998); and
- GC/Works/1 Model Forms & Commentary (1998).

26.2 This chapter deals with GC/Works/1 With Quantities (1998). However, the risk and insurance provisions of GC/Works/1 Without Quantities (1998) and GC/Works/1 Single Stage Design & Build (1998) are practically identical.

26.3 GC/Works/2 (1998) is a standard government form of contract for minor UK building and civil engineering works, and for demolition works of any size. It is published in two volumes:

- GC/Works/2 General Conditions (1998); and
- GC/Works/2 Model Forms & Commentary (1998).

26.4 The government agency responsible for these documents was the Property Advisers to the Civil Estate ("PACE"), now part of the Office of Government Commerce. The development of the documents was directed by a sub-group of the then PACE Joint Users' Group, consisting of representatives of many government departments. The author of this chapter acted as principal legal adviser.

26.5 GC/Works/1 and 2 (1998) are part of a series of government construction contracts, including:

- GC/Works/3 (1998), for mechanical and electrical engineering works;
- GC/Works/4 (1998), for building, civil engineering, mechanical and electrical small works;
- GC/Works/1 With Quantities Construction Management Trade Contract (1999);
- GC/Works/1 Without Quantities Construction Management Trade Contract (1999); and
- GC/Works/1 Two Stage Design & Build (1999).

All the GC/Works forms are published by the Stationery Office.

GC/WORKS/1 WITH QUANTITIES (1998) INSURANCE PROVISIONS

26.6 Appendix 16.1 consists of:

- An extract from Condition 1(1), which shows all the definitions required to understand the substantive risk and insurance provisions.
- Condition 7, dealing with Unforeseeable Ground Conditions, referred to in Condition 19.
- Condition 8, which deals with employer's liability, construction all risks ("CAR") and public liability insurance.
- Condition 8A, which is an optional Condition, applicable only if so stated in the Abstract of Particulars included in the Contract, and deals with Contractor's professional indemnity insurance in respect of his design of part of the Works.
- Condition 19, which apportions between the Employer and the Contractor the relevant risks of loss or damage, and which is referred to in Condition 8.

26.7 Appendix 16.2 is the GC/Works/1 With Quantities, Without Quantities and Single Stage Design & Build (1998) Summary of Essential Insurance Requirements.

Condition 8

26.8 This Condition is intended to be suitable whether or not the Crown is the Employer, and so to operate appropriately if, for example, the Crown Employer (as it is entitled to do under Condition 61) assigns the benefit of the Contract to a non-Crown Employer during the course of the Contract.

Condition 8(1)

26.9 Paragraph (1) defines a party required under Condition 8 to effect or maintain insurance as "the insuring party". Under paragraph (3)(a) (Alternative C), the Crown, while continuing as Employer, will not be "the insuring party": but, under paragraph (3)(b) (Alternative C), a non-Crown assignee of the original Crown Employer may be "the insuring party".

Condition 8(2)

26.10 Paragraph (2) requires the Contractor to effect and maintain an appropriate level of employer's liability insurance in respect of his employees.

26.11 The employer's liability insurance is to be maintained from the time the Contractor takes possession of the Site, or any part of the Site, or from the time he commences the execution of the Works (if earlier), to the expiration of the last Maintenance Period. Maintenance Periods, during which the Contractor has the duty, and also the right, himself to correct defects in the Works, are often set at six or 12 months from the completion of the Works, or of each Section of the Works.

Condition 8(3) (Alternative A)

26.12 Paragraph (3) is given in three different forms, depending on which of three alternatives in respect of CAR and public liability insurance is selected by entry in the Abstract of Particulars.

26.13 Under Alternative A, the Contractor is required to effect and maintain, for the period stated above:

- Under subparagraph (a), CAR insurance in the joint names only of the Employer and the Contractor (and not of subcontractors) against loss or damage to the Works and Things for which the Contractor is responsible under the terms of the Contract, in each case for their full reinstatement value (including transit and off-Site risks); plus 15 per cent (or such other percentage as may be stated in the Abstract of Particulars) for professional fees.

The expression "full reinstatement value" is important. This value will obviously increase as the Works proceed, and in the Contractor's interests the cover must be adequate. The sum insured must reflect the actual cost both of reinstatement and/or the cost of replacing any lost or damaged materials, without making allowance for wear and tear or depreciation. It should also include the cost of removing debris.

- Under subparagraph (b), public liability insurance against legal liability for personal injury to any persons, and loss or damage to property, arising from or in connection with the Works, which is not covered by the Contractor's employer's liability insurance required under paragraph (2), or by the Contractor's CAR insurance required under paragraph (3)(a), for the minimum amount stated in the Abstract of Particulars, such public liability insurance to include a provision for indemnity to the Employer in respect of the Contractor's liability under Condition 19.

26.14 Under Condition 19(2) and (3), the Contractor is effectively responsible for loss and damage, as very widely defined in Condition 19(1) and (6). Therefore, Condition 19 imposes an onerous liability and indemnity on the Contractor.

26.15 Condition 19(5) creates major exceptions in favour of the Contractor, but the burden of proof will be on him, because he will be trying to establish an exception. The proviso to paragraph (5)(c) provides that the subparagraph will not apply to "loss or damage to the Works or to any Things on the Site", which will be dealt with (*inter alia*) under Condition 8.

26.16 Condition 8(3) (Alternative A) concludes with a proviso that the CAR and public liability insurance, which the Contractor is required to effect and maintain under that paragraph, need not cover loss or damage caused by any Accepted Risk. Such risks are effectively accepted or borne by the Employer.

26.17 GC/Works/1 Model Forms & Commentary (1998) states that the use of Alternative A:

> "is envisaged when the project has the following characteristics:
>
> i. The Site is a clear 'green field'.
> ii. The Site is surrounded by a low-risk environment.
> iii. The Works are of a simple nature.
> iv. The Works have a contract value not exceeding £3,000,000 at 1997 prices.
>
> This alternative will be suitable where the Contractor's existing annual policies are to be used."

Condition 8(3) (Alternative B)

26.18 Alternative B simply provides that the Contractor shall effect and maintain CAR and public liability insurance in accordance with the Summary of Essential Insurance Requirements attached to the Abstract of Particulars. The Summary is fairly self-explanatory.

26.19 In accordance with Condition 19, the Contractor will continue to be responsible for any amounts in excess of amounts insured, or any retained liability, or risks not insured or excluded by the application of the terms, exceptions or conditions of the insurance required by the Summary.

Condition 8(3) (Alternative C)

26.20 Alternative C is divided into subparagraph (a) (which deals with insurance while there is a Crown Employer) and (b) (which deals with insurance if there is a non-Crown assignee Employer).

26.21 Taking subparagraph (b) first, this provides that, whilst the Employer is not a Minister of the Crown, a government department or other Crown agency or authority, the Employer shall effect and maintain insurance in accordance with the Summary of Essential Insurance Requirements. This mirrors the Contractor's insurance responsibility under Alternative B. However, subparagraph (b) goes on to provide that the Employer shall not be responsible for any amounts in excess of amounts insured, or any retained liability, or risks not insured or excluded by the application of the terms, exceptions or conditions or any such insurance. Therefore, the risk in respect of these uninsured amounts remains with the Contractor, as under Alternative B.

26.22 Subparagraph (a) provides that, while the Employer is a Minister of the Crown, a government department or other Crown agency or authority, the Employer shall not be required to effect or maintain any insurance. However, subparagraph (a) goes on to provide that the Employer shall assume the risks of loss or damage which should have been insured if Alternative C paragraph (3)(b) applied, and, in the event of loss or damage arising, shall be responsible as if Alternative C paragraph 3(b) applied and the Employer had failed to effect and maintain insurance as described therein. Therefore, the Crown Employer self-insures the risks which should have been insured under the Summary of Essential Insurance Requirements. Subparagraph (a) concludes, similarly to subparagraph (b), that the Employer shall not be responsible for any amounts in excess of amounts which should have been insured, or any liability authorised to be retained, or risks which would not have been insured or would have been excluded by the application of the terms, exceptions or conditions of any such insurance. Therefore, the risk in respect of these uninsured amounts remains with the Contractor, as under Alternative B.

26.23 GC/Works/1 Model Forms & Commentary (1998) states that the:

> "use of Alternatives B or C is envisaged when the project has any of the following characteristics:
>
> - The Site itself is a high-risk area.
> - The Site is surrounded by a high-risk environment.
> - The Works are of a complex or sensitive nature.
> - The Works have a contract value exceeding £3,000,000 at 1997 prices.
> - The project involves multiple direct contracts between the Employer and various contractors."

Condition 8(4)

26.24 Paragraph (4) requires the production of evidence of insurance.

Condition 8(5)

26.25 Paragraph (5) is intended to protect the non-insuring party by requiring that the insurances shall be with reputable insurers operating in the UK, and therefore complying with UK insurance regulatory legislation; and that the insurances shall not contain, e.g., very wide exclusions or large excesses or deductibles.

26.26 Paragraph (5) also has the purpose of preserving the rights of third parties against insurers pursuant to the Third Parties (Rights Against Insurers) Act 1930, which is intended to ensure that insurance proceeds will be paid directly to claimants against an insolvent insured, and will not be distributed amongst all the various creditors of the insolvent insured, as would otherwise happen under insolvency legislation. Case law shows that the Act may be frustrated by policy terms to the effect that the insolvent insured must have paid the claim before being entitled to recover from insurers.[1]

Condition 8(6)

26.27 Paragraph (6)(a) provides that the CAR and public liability insurance to be effected and maintained in accordance with the Summary of Essential Insurance Requirements shall be in the joint names of the Employer, such other persons as the Employer may reasonably require (such as the Employer's consultants, lenders, purchasers and tenants), the Contractor and all subcontractors, in contrast to Alternative A.

26.28 Paragraph (6)(b) provides that such insurance shall extend to cover remedial works—that is, loss or damage which the Contractor is responsible for making good under Condition 21 (Defects in Maintenance Periods), or which occurs while the Contractor is making good defects in the Works under that Condition.

Condition 8(7)

26.29 Paragraph (7) provides for the non-insuring party to insure, if the insuring party defaults in doing so.

Condition 8(8)

26.30 Paragraph (8) imposes the specified risks on the Employer in respect of existing structures and completed parts of the Works. The Employer may take out commercial property insurance in order to protect his interests.

Condition 8(9)

26.31 Paragraph (9) makes it clear that nothing in Condition 8 shall relieve the Contractor from any of his obligations and liabilities under the Contract (such as, e.g., under Condition 19).

1. *Firma C-Trade SA* v *Newcastle Protection and Indemnity Insurance Association (The Fanti) and Socony Mobil Oil Co Inc* v *West of England Ship Owners Mutual Insurance Association (London) Limited (The Padre Island)* [1991] 2 AC 1.

Condition 8A

26.32 This optional Condition deals with the situation where the Contractor assumes responsibility for the design of part of the Works. In that case, Condition 10 (Design) provides two alternative levels of Contractor's design liability in respect of his design.

26.33 Under Alternative A, the "Contractor's liability to the Employer in respect of any defect or insufficiency in any design undertaken by the Contractor himself or by means of any employee, agent, subcontractor or supplier shall be the same as would have applied to an architect or other appropriate professional designer who had held himself out as competent to take on work for such design and who had acted independently under a separate contract with the Employer and supplied such design for, or in connection with, works to be carried out and completed by a contractor not being the supplier of the design". Therefore, the Contractor's responsibility will be one of reasonable professional skill and care, just like that of an architect, engineer, or other design consultant engaged by the Employer.

26.34 Under Alternative B, the "Contractor warrants to the Employer that any Works designed by the Contractor, or by any employee, agent, subcontractor or supplier of his, will be fit for their purposes, as made known to the Contractor by the Contract". This strict warranty of fitness for purpose goes well beyond reasonable professional skill and care, and therefore beyond normal professional indemnity insurance coverage.

26.35 Whichever Alternative is used, the Employer will usually wish the Contractor to have professional indemnity insurance, so that funds will be available to meet possible future Employer's claims against the Contractor in respect of negligence in the Contractor's design.

26.36 The amount of professional indemnity insurance required in accordance with Condition 8A(1) should be enough to cover the Employer's prospective loss, e.g., remedial works, further consultants' fees, loss of rent and the cost of other premises, plus inflation. The insurance required is per occurrence, without an aggregate limit, but in practice such policies often include such a limit. The insurance is normally to be maintained for 12 years after completion of the Works or determination of the Contract, which is the limitation period for claims under English law, if the Contract is entered into as a Deed. If the Contract is not entered into as a Deed, the limitation period is six years: therefore, all except very minor Contracts should be entered into as Deeds, in the interests of the Employer. It is recognised that the insurance may well become unavailable at commercially reasonable rates.

26.37 The remainder of paragraph (1) contains protective measures from the Employer's point of view. The penultimate sentence is to much the same effect as the last sentence of Condition 8(5).

26.38 It should be appreciated by Employers that professional indemnity insurance is almost invariably taken out on an annual basis, and is "claims made" insurance (i.e., against claims first made against the insured during the relevant year of insurance, no matter when the work was done). Therefore, any professional indemnity insurance clause, however well-drafted, may well be defeated by the insured's insolvency—if he becomes insolvent, say, on 1 June 2008, having professional indemnity insurance for the calendar year 2008, claims first made against him after 31 December 2008 will be uninsured—because the insolvent insured will be rather unlikely to be renewing his insurance for 2009!

26.39 The last sentence of paragraph (1) is intended to prevent the insured settling claims with insurers on disadvantageous terms, which he might otherwise be free to do.[2]

2. See *Normid Housing Association Ltd* v *Ralphs* (1988) 43 BLR 19.

26.40 Paragraphs (2)–(5) are reasonably self-explanatory.

26.41 If the Contractor is a joint venture or consortium of two or more entities, the professional indemnity insurance should cover them all, for all of their work.

26.42 As professional indemnity insurance clauses can never be completely watertight, the Employer should consider commercial latent defects insurance, usually available for 10 years from completion of the Works.

GC/WORKS/2 GENERAL CONDITIONS (1998) INSURANCE PROVISIONS

26.43 Appendix 17 consists of:

- A Note explaining that certain GC/Works/2 provisions are to the same effect as those of GC/Works/1, set out in Appendix 16.1.
- Condition 4, dealing with Unforeseeable Ground Conditions, referred to in Condition 8.
- Condition 5, which deals with employer's liability, CAR and public liability insurance. There is no provision for Contractor's professional indemnity insurance in respect of his design, because such Contractor's design is not contemplated by GC/Works/2.

Condition 5

26.44 Condition 5 is a simplified version of GC/Works/1 Condition 8.

Condition 5(1)

26.45 Paragraph (1) is to much the same effect as GC/Works/1 Condition 8(2).

Condition 5(2)

26.46 Paragraph (2) is to much the same effect as GC/Works/1 Condition 8(3) (Alternative A). There is no GC/Works/2 equivalent of GC/Works/1 Alternatives B or C, and therefore no GC/Works/2 Summary of Essential Insurance Requirements.

Condition 5(3), (4) and (5)

26.47 Paragraphs (3), (4) and (5) are to much the same effect as GC/Works/1 Condition 8(4), (5) and (7).

Condition 5(6)

26.48 Paragraph (6) is to much the same effect as GC/Works/1 Condition 8(8), but there is no reference to "a completed part", as there is no such concept in GC/Works/2.

Condition 5(7)

26.49 Paragraph (7) is identical to GC/Works/1 Condition 8(9).

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CHAPTER TWENTY-SEVEN

FIDIC CONDITIONS OF CONTRACT

Neil White

INTRODUCTION

27.1 Since the last edition of this book, the structure of the FIDIC contracts has been changed and there are now three main forms of contract for construction projects, together with a short form of contract and a form of consultants' appointment. The three main forms of construction contract are:

- Conditions of Contract for Construction;
- Conditions of Contract for Plant and Design-build;
- Conditions of Contract for EPC/Turnkey Projects.

27.2 The construction contracts operate in the same way and include:

- the General Conditions;
- the Particular Conditions, which are provided by the parties to complete details required for the General Conditions to operate, or to supplement or vary the General Conditions; and
- the Tender, which sets out many of the project specific details.

27.3 The Short Form is similar but has an appendix which includes many of the details which would appear in the Particular Conditions in the main forms, including insurance details.

27.4 Although the main FIDIC Conditions of Contract were originally based on ICE Conditions, the two have moved apart and there are now substantial differences.

THE FIDIC CONDITIONS OF CONTRACT FOR CONSTRUCTION, PLANT AND DESIGN-BUILD AND EPC/TURNKEY PROJECTS

27.5 Fortunately, the insurance provisions in these three forms of contract are identical, save in one respect and are covered by clauses 17 and 18. The one difference is that the Conditions of Contract for EPC/Turnkey Projects allocates fewer risks to the Employer than the other two, as set out below. This affects the extent of the insurance which is required to be maintained under clause 18.

Clause 17—Risk and responsibility

27.6 Clauses 17.1 to 17.4 are relevant to insurance issues but clauses 17.5 and 17.6 are not directly relevant, as they relate to risks in respect of intellectual property rights and limitations on liability.

Clause 17.1—Indemnities

27.7 This requires the Contractor to indemnify the Employer against all claims, damages, losses and expenses in respect of bodily injury, sickness, disease or death of any person:

(1) arising out of the Contractor's design or the execution and completion of the Works, and remedying of any defects in the Works unless attributable to the negligence, wilful act or breach of the Employer and those for whom the Employer is responsible; and
(2) in respect of damage to or loss of any property arising out of the Contractor's design, the execution and completion of the Works and remedying of any defects in the Works provided that it is attributable to the negligence, unlawful act or breach of contract by the Contractor and those for whom he is responsible.

27.8 There is a reciprocal indemnity from the Employer to the Contractor in respect of bodily injury, sickness, disease or death attributable to the negligence, wilful act or breach of contract by the Employer or those for whom he is responsible and in respect of matters which may be excluded from insurances maintained under clause 18.3(d) (see below).

Clause 17.2—Contractor's care of the works

27.9 This clause imposes on the Contractor full responsibility for the care of the Works, plant, equipment and materials used for or intended to be incorporated in the Works, as well as any temporary works until the Taking Over Certificate is issued. As with the ICE forms, the Contractor continues to be liable, even though the Works may be complete, until the Certificate is issued. However, in line with the ICE forms, the Contractor remains responsible for any work outstanding at the date stated in the Taking Over Certificate until that work is completed.

27.10 If there was any loss or damage to the Works, plant, equipment or materials or any temporary works, the Contractor must rectify the loss or damage at the Contractor's risk and cost. The Contractor is also liable for any loss or damage caused by his actions after the Taking Over Certificate has been issued and for loss or damage occurring after the Taking Over Certificates have been issued which arose from a cause before it was issued for which the Contractor was liable. As will be apparent, these provisions are not dissimilar to the ICE forms.

Clause 17.3—Employer's risks

27.11 Clause 17.3 is a most important clause, as it controls the extent of insurance to be maintained under clause 18. This clause sets out the Employer's Risks which are:

(a) war, hostilities, invasion or act of foreign enemies;
(b) rebellion, terrorism, revolution, insurrection, military or usurped power or civil war in the country where the Works are being carried out (and it should be noted that terrorism is excluded here, unlike the ICE forms);
(c) riot, commotion or disorder in the country where the Works are being carried out;
(d) munitions of war, explosive materials, nuclear radiation or contamination by radioactivity;
(e) pressure waves caused by aircraft or other aerial devices;
(f) use or occupation by the Employer of any part of the Permanent Works, unless specified in the Contract;

(g) design of any part of the Works by those for whom the Employer is responsible; and
(h) any operation of the forces of nature which is Unforeseeable against which an experienced contractor could not reasonably have provided. "Unforeseeable" means anything which is not reasonably foreseeable by an experienced contractor and the date for submission of the tender.

27.12 As mentioned above, this is where the distinctions between three forms of contract arise. All of the above risks are Employer's Risks under the Conditions of Contract for Construction and the Conditions of Contract for Plant and Design-Build but the Conditions of Contract for EPC/Turnkey Projects include only paragraphs (a) to (e) above. The concept of the Employer using any part of the Permanent Works before they are completed or designing any part of those Works is inconsistent with the concept of a turnkey project and the operation of the forces of nature is a risk which a Contractor would normally bear in relation to such a project.

27.13 Although the Employer bears the risks set out in clause 17.3, clause 17.4 imposes some obligations on the Contractor, in particular to notify the Employer promptly after loss or damage occurring as a result of those risks. The Contractor is also required to rectify that loss or damage but is entitled to an extension of time and payment of additional costs as a consequence of rectifying the loss and damage.

Clause 18—Insurance

27.14 Clause 18.1 contains general requirements that apply to an "Insuring Party" which may vary for each type of insurance. However, where the Contractor is to insure, he must obtain approval of the insurers and the terms of insurance from the Employer, whereas the Employer must insure with the insurers and on the terms consistent with details set out in the Particular Conditions.

27.15 In theory, the Particular Conditions should be sent out with the invitation to tender and are therefore fixed before the Contractor submits his tender but, in practice, the Particular Conditions are frequently extensively negotiated after tenders have been received. Even where the Particular Conditions are completed, it is unclear how much information should be included. For example, there is a debate on whether a copy of the policy should be included or only the principal risks covered and the limits of indemnity.

27.16 Where joint insurance is required, each insured is to be treated as though a separate policy had been issued. Payments under the policy must be made and the currency is required to rectify the loss or damage, which is a reflection of the fact that the FIDIC forms are intended for international use. It is also provided by clause 18 that payments received from the insurer shall be used for rectification of the loss or damage. In practice, this requirement may need to be varied to reflect the requirements of banks providing funding for international projects.

27.17 As might be expected, clause 18.1 also requires the Insuring Party to provide evidence that the insurances required by the clause have been effected and to provide copies of the policies, as well as evidence that the relevant premiums have been paid. The Engineer (being the Contract Administrator) is entitled to receive copies of this information.

27.18 The policies effected under clause 18.1 may not be altered by one Party without the consent of the other and if one party receives notice from an insurer of a change in the condition of the policy, it must promptly give notice to the other. However, if the Insuring Party fails to keep in force the relevant insurances, the other Party may effect relevant

insurance. If the Employer effects insurances under this provision, the Contract Price would be reduced to enable the Employer to recover the cost, but if it is the Contractor, the Contract Price will be increased.

27.19 In the event of a failure to insure where any other party does not take out insurance itself, the Insuring Party is liable for all the losses that would have been recoverable had the insurance been taken out.

Clause 18.2—Insurance for works and contractor's equipment

27.20 This clause covers insurance for the Works, plant and materials used for or to be incorporated in the Works which are to be insured in their full reinstatement cost including the cost of demolition, removal of debris, professional fee and profit. It should be noted that, unlike the JCT and ICE forms, this insurance does not deal with items outside the reinstatement cost by providing for a percentage uplift of the reinstatement cost but requires that items outside the reinstatement cost should fall within the financial limit under the policy requested. This is an important distinction, as sums not directly part of the reinstatement cost can add substantially to it and, unless care is taken, can be overlooked. There is no express requirement to insure against the risk of inflation which, in some jurisdictions, can be substantial and it is suggested that the Particular Conditions should be amended to include such insurance. It may also be sensible to follow the practice under other forms of contract and provide for a lump sum limit of indemnity to cover the cost of removal of debris and reinstatement with a percentage uplift to cover other elements.

27.21 The insurance must be maintained beyond the issue of the Taking Over Certificate until the issue of the Performance Certificate (when defects in the Works have been made good) for loss or damage arising from a cause for which the Contractor is liable occurring prior to the issue of the Taking Over Certificate or caused by the Contractor after that Certificate is issued until the issue of the Performance Certificate. This differs from the JCT forms but follows the ICE forms in insurance while defects are being remedied. The Contractor's equipment is treated separately from the Works and is required to be insured for its full reinstatement value, including delivery to the site. The reason is that Contractor's equipment may well have been transported from a foreign country for use in the Works and shipping costs may well be significant. The insurance therefore has to be effective whilst the equipment is being shipped to the site.

27.22 Unless otherwise specified in the Particular Conditions, the Contractor has to take out the insurance under clause 18.2 in the joint names of the Contractor and the Employer, who are jointly entitled to receive any payments under the insurance. The insurance is required to cover all risks other than those set out in clause 17.3 (i.e. the Employer's Risks) as well as loss or damage to a part of the Works caused by the use and occupation by the Employer of another part of the Works. Having excluded Employer's Risks, the clause then adds back loss or damage arising from the risks set out in sub-paragraphs (c), (g) and (h) of clause 17.3 (sub-paragraph (c) only in the case of the EPC/Turnkey form, which does not contain sub-paragraphs (g) and (h)), but subject to excesses specified in the Particular Conditions.

27.23 In addition to the risks excluded under clause 17.3, the insurance may also exclude cover for any part of the Works which is defective due to a defect in design, materials or workmanship but must cover:

(a) damage to other parts of the Works as a direct result of that defective condition;
(b) damage to the Works arising from the reinstatement of any part of the works which is subject to a defect in design, materials or workmanship;

(c) loss or damage to any part of the Works taken over by the Employer except to the extent that the Contractor has caused loss or damage; and
(d) plant, equipment and materials which are not in the country where the Works have been carried out (i.e. those ordered from abroad for the Works but still in transit).

Clause 18.3—Insurance against interested persons and damage to property

27.24 As for clause 18.2, the Contractor is required to insure against these risks in the joint names of the Contractor and the Employer to include loss of or damage to the Employer's property arising out of the Contractor's performance of the contract, unless the Particular Conditions states otherwise. The risks to be covered are loss, damage, death or bodily injury to any physical property (except that insured under clause 18.2) or to any person (except those insured under clause 18.4) arising out of the Contractor's performance of the Contract prior to the issue of the Performance Certificate. It should be noted that the insurance must provide full cover even after the issue of the Taking Over Certificate and thus provides cover for any time when the Contractor is remedying defects in the Works.

27.25 The insurance may exclude loss or damage arising from:

(1) the Employer's right to have the Works executed on, over, under, in or through any land and to occupy this land for the Work;
(2) damage which is the unavoidable result of the execution of the Works and making good defects; and
(3) any cause listed in clause 17.3, except if cover is available for those risks at commercially reasonable terms.

Clause 18.4—Insurance for contractor's personnel

27.26 This clause requires the Contractor to maintain insurance to cover losses arising from injury, sickness, disease or death of any person employed by the Contractor or the Contractor's Personnel (which can include employees of subcontractors). The clause provides that the relevant insurance can be effected by a subcontractor but the Contractor remains responsible for compliance with the clause. The clause requires that the Employer "shall also be indemnified under the policy of insurance" but does not say in terms that the Employer is to be a joint insured. In addition, the Employer's indemnity under the policy does not have to extend to losses and claims arising from any act or neglect of the Employer or the Employer's personnel. Confusingly, this policy remains in force during the whole time that "these personnel are assisting in the execution of the Works". Given that the insurance is not limited to causes arising from the execution or design of the Works, this makes the obligation somewhat open-ended.

FIDIC SHORT FORM OF CONTRACT

27.27 Clause 6 deals with the Employer's Liabilities. This list includes all of the Employer's Risks under the main forms (see paragraph 18.6 above) as well as:

(a) force majeure, physical obstructions or conditions other than climactic conditions; and

(b) damage which is the unavoidable result of the Contractor's obligation to execute the Works.

27.28 There are other Employer's Liabilities, but the concept of Employer's Liabilities is used in other contexts in the contract as well as for insurance purposes. As a result, a number of the Employer's Liabilities have no real relevance to insurance matters.

27.29 The insurance obligations under the Short Form of Contract are covered by clauses 13, which addresses risk and responsibility, and 14, which covers insurance.

27.30 Clause 13.1 imposes on the Contractor full responsibility for the care of the works until the Employer takes over the Works. Unlike the main forms of FIDIC contract, the Contractor therefore has no obligation to insure whilst defects are being made good. The Contractor indemnifies the Employer against all risks of loss or damage to the Works and claims arising out of the Works caused by a breach of contract, negligence or other fault on the part of the Contractor and those for whom he is responsible. The clause also excludes from the Contractor's obligation to insure loss or damage happening as a result of an Employer's Liability, but it is difficult to see how any Employer's Liability could result from a breach of contract, negligence or other default by the Contractor.

27.31 Clause 13.2 deals with Force Majeure and is not relevant here.

27.32 The insurance to be taken out is covered by clause 14 and this obligation is imposed squarely on the Contractor. The risks to be covered are:

(1) loss and damage to the Works, materials, plant and Contractor's equipment;
(2) liabilities of the parties for loss, damage, death or injury to third parties or their property arising out of the performance of the contract (doing damage to the Employer's property other than the Works); and
(3) a liability for death or injury to the Contractor's personnel except where caused by the negligence of the Employer or anyone for whom he is responsible.

27.33 Details of the insurances to be obtained are supposed to be set out in the Appendix, but again it is unclear how much detail is required. However, it is provided that the Employer has to approve the terms of any insurance policies and is to be provided with evidence that the policy is in force and premium paid. Payments made under the policy are held jointly by the parties and are to be used for repairing the loss or damage to which they relate. Again, this provision may need amendment to reflect the requirements of any funding institution.

27.34 As with the main forms, if the Contractor fails to insure, the Employer has the right to do so and to recover the cost of doing so "as a deduction from any other monies due to the Contractor". This gives rise to the question that if insufficient amounts are due to the Contractor to cover the cost of the policy, can the Employer then recover the amount he has paid as a debt? For the avoidance of doubt, this provision should be amended to make this clear.

FIDIC CONSULTANT'S APPOINTMENT

27.35 Insurance is covered by clauses 19 and 20 of the Consultant's Appointment. Clause 19 adopts a very unusual approach in that insurance is required only if requested by the Client and then it is to be provided at the Client's Cost. Further, the Consultant has only to make "reasonable efforts" to take out any insurance requested. It is likely that most Clients will wish to amend this clause to require the Consultant to take out relevant insurances at its own cost.

Clause 19 lists a number of different types of insurance but, as it also includes the right for the Client to request "other insurances", so any type of insurance can be covered by the clause.

27.36 Clause 20 covers loss or damage to property provided by the Client for the purposes of the services performed under the appointment and liabilities arising out of the use of such property. This insurance is to be provided unless otherwise requested by the Client but again is to be provided at the expense of the Client.

27.37 By modern standards (the Consultant's Appointment is over nine years old and due for an overhaul) these provisions are simplistic in the extreme and do not provide the cover that most funding institutions would require. If this form of contract is to be used, the insurance provisions should be substantially redrafted.

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CHAPTER TWENTY-EIGHT

CONTRACT INSURANCE UNDER I MECH E/IEE MF/1 (REV 4)/2000

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GENERAL

28.1 MF/1 (rev 4)/2000 comprises a Model Form of General Conditions of Contract for use in connection with home (UK) or overseas contracts for the supply of electrical, electronic or mechanical plant, with erection, recommended by the Institution of Electrical Engineers ("IEE"), the Institution of Mechanical Engineers ("IMechE") and the Association of Consulting Engineers ("ACE"). It is published for the Joint IMechE/IEE Committee on Model Forms of General Conditions of Contract by the IEE. Since publication, the IEE has changed its name to the Institution of Engineering and Technology; and the ACE has changed its name to the Association for Consultancy and Engineering.

28.2 The employer under MF/1 is called the Purchaser, and his main representative the Engineer. Very often, the Engineer will be a member of one of MF/1's sponsoring institutions.

MF/1 (REV 4)/2000 INSURANCE PROVISIONS

28.3 Appendix 21 consists of:

- An extract from sub-clause 1.1, which shows all the definitions required to understand the substantive risk and insurance provisions.
- An extract from clause 13.1, which states the Contractor's general obligations, including design.
- Sub-clause 13.3, dealing with the Contractor's responsibility for the detailed design of the Plant and the Works, including responsibility for detailed design provided by the Purchaser or the Engineer which the Contractor does not disclaim within a reasonable time. The Contractor will be responsible for such design "in accordance with the requirements of the Specification". The last sentence of sub-clause 13.3 excludes a Contractor's warranty of fitness for purpose. It states that, unless otherwise provided in the Contract, the Contractor does not warrant either that the Works as described in the Specification, or the incorporation of the Works within some larger project, will satisfy the Purchaser's requirements. Therefore, the Contractor's responsibility is limited to detailed design in accordance with the requirements of the Specification, and he will not be bound by any further or other Purchaser's requirements, not stated in the Specification.

In electrical, electronic or mechanical projects, the Contractor will very often be responsible for the design of the whole or part of the Plant and the Works. The Contractor's responsibility

under MF/1 in respect of that design will be at least that of reasonable professional skill and care, just like that of a consulting engineer or other design consultant engaged by the Purchaser.

Nevertheless, MF/1 contains no requirement for the Contractor to maintain professional indemnity insurance in respect of defects or insufficiency in design for which the Contractor is responsible. MF/1 also contains severe limitations on the Contractor's liability—see, e.g., sub-clauses 36.9 (Limitation of liability for defects) and 36.10 (Latent defects), discussion of which is outside the scope of this book. The Purchaser should seriously consider both these matters.

- An extract from clause 29, which provides for the issue of a Taking-Over Certificate or Certificates, referred to in clause 47, and for risk to pass from the Contractor to the Purchaser upon taking over.
- An extract from clause 36, dealing with defects and Defects Liability Periods, also referred to in clause 47.
- Clause 43, which apportions between the Purchaser and the Contractor the relevant risks of accidents and damage, also referred to in clause 47.
- Clause 45, which defines Purchaser's Risks, also referred to in clause 47.
- Clause 46, which defines Force Majeure, one of the Purchaser's Risks.
- Clauses 47 and 48, which deal with construction all risks ("CAR"), public liability and employer's liability insurance.

Clause 47

28.4 This clause provides for the Contractor to effect and maintain the relevant insurances. There is no option for the Purchaser to effect and maintain CAR and public liability insurance.

Sub-clause 47.1

28.5 Sub-clause 47.1 provides that the Contractor shall, in the joint names of the Contractor and the Purchaser, insure the Works and Contractor's Equipment for their full replacement value against all risks, other than the Purchaser's Risks. The expression "full reinstatement value", indistinguishable for all practical purposes from "full replacement value", has been explained in relation to GC/Works/1 (1998). The insurance is to cover the period from the date of the Letter of Acceptance until 14 days after taking over (see sub-clause 29.2), or 14 days after the termination of the Contract (see sub-clause 43.1).

Sub-clause 47.2

28.6 Sub-clause 47.2 provides that the Contractor shall, so far as reasonably possible, extend the CAR insurance under sub-clause 47.1 to cover the Contractor's subsequent activities in relation to remedying defects; carrying out the Tests on Completion during the Defects Liability Period; supervising the carrying out of the Performance Tests; completing outstanding work; and completing work pursuant to sub-clause 43.5.

Sub-clause 47.3

28.7 Sub-clause 47.3 provides that all monies received under the CAR insurance is to be used for reinstatement and repair, but that this provision shall not affect the Contractor's

liabilities under the Contract, e.g., under sub-clause 43.2. Under that sub-clause, the Contractor effectively assumes all risks of loss or damage to the Works before taking over, except Purchaser's Risks.

Sub-clause 47.4

28.8 Sub-clause 47.4 provides that the Contractor shall, prior to the commencement of work on Site, insure in an amount at least that prescribed by the Special Conditions against his liability for:

- damage or death or personal injury occurring before taking over of all of the Works;
- to any person (including any employee of the Purchaser); or
- to any property (other than the Works themselves);

due to or arising out of the execution of the Works.

28.9 This public liability insurance is to indemnify the Purchaser, as well as the Contractor, although the Contractor will be the sole insured.

Sub-clause 47.5

28.10 Sub-clause 47.5 provides that the Contractor shall insure against his liability under sub-clause 43.6, i.e., employer's liability insurance in respect of his and his Sub-Contractors' employees. This insurance is also to indemnify the Purchaser, as under sub-clause 47.4. In respect of Sub-Contractors' employees, the Contractor may arrange for the Sub-Contractors to insure, producing suitable evidence of such insurance.

Sub-clause 47.6

28.11 Sub-clause 47.6 requires the Purchaser's approval of the Contractor's (and Sub-Contractors') insurers and of the terms of the relevant insurances. This is the Purchaser's opportunity to object to the Contractor insuring on unacceptable terms with fragile insurers operating in unreliable jurisdictions—cf., e.g., GC/Works/1 Condition 8(5). Production of suitable evidence of insurance is required, and notification to the Purchaser of any relevant insurance alterations.

Sub-clause 47.7

28.12 Sub-clause 47.7 provides that the Contractor's (and Sub-Contractors') insurances under clause 47 may exclude cover for a number of matters, such as Purchaser's Risks (including force majeure, except as mentioned in sub-clause 45.1, last paragraph) and risks which should be covered by compulsory motor insurance.

Sub-clause 48.1

28.13 Sub-clause 48.1 provides for the Purchaser to insure, if the Contractor defaults in doing so. This is the only provision enabling the Purchaser, rather than the Contractor, to insure.

Sub-clause 48.2

28.14 Sub-clause 48.2 provides that, wherever insurance is arranged in the joint names of the Purchaser and the Contractor, or on terms containing provisions for indemnity to principals (i.e., the Purchaser), the party effecting the insurance (the Contractor under sub-clauses 47.1 or 47.4; or the Contractor or Sub-Contractors under sub-clause 47.5; or the Purchaser under sub-clause 48.1) shall procure that:

(1) the insurers' subrogation rights against the other party to the Contract are waived; and that
(2) the insurance shall permit either the co-insured, or the other party to the Contract, to be joined in relevant insurance negotiations, disputes or claims.

CHAPTER TWENTY-NINE

CONTRACT INSURANCE UNDER I CHEM E LUMP SUM (RED BOOK) AND REIMBURSABLE (GREEN BOOK) CONTRACTS

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GENERAL

29.1 This chapter deals with two forms of contract published by the Institution of Chemical Engineers ("I Chem E"), namely the:

(1) Form of Contract for Lump Sum Contracts, 4th edition, 2001, as reprinted 2007 (commonly called the "Red Book"); and
(2) Form of Contract for Reimbursable Contracts, 3rd edition, 2002, as reprinted 2007, and as amended by an undated Addendum (commonly called the "Green Book").

29.2 Both forms of contract contain a short formal Agreement, referred to as the "Agreement" in the rest of the document, between the Purchaser (as the employer is called in these forms) and the Contractor. The Agreement first lists all the documents which constitute the "Contract", namely:

- the Agreement;
- the Special Conditions (if any);
- the General Conditions of Contract, being Clauses 1–48 as set out in the Red or Green Books;
- the Specification; and
- numerous Schedules (19 in the Red Book, 20 in the Green Book), to be compiled individually for each Contract.

29.3 The Agreement also states (*inter alia*):

- the Contract Price (in the case of the Red Book—naturally there is no equivalent in the cost-reimbursable Green Book);
- the amount of certain limitations on the Contractor's liability referred to in the General Conditions;
- the identity of the Project Manager, the Purchaser's main representative; and
- the identity of the Contract Manager, the Contractor's main representative.

I CHEM E RED BOOK INSURANCE PROVISIONS

29.4 Appendix 22 consists of:

(1) An extract from Clause 1, which shows all the definitions required to understand the substantive risk and insurance provisions.

(2) Sub-Clause 3.4, which is a Contractor's strict warranty of fitness for purpose in respect of the Plant—cf. GC/Works/1 Condition 10, Alternative B, and MF/1, sub-clause 13.3.

In chemical engineering projects, the Contractor will very often be responsible for the design of the whole or part of the Plant and the Works—see, e.g., the definition of "Works". Nevertheless, the Red Book, like MF/1, contains no requirement for the Contractor to maintain professional indemnity insurance in respect of defects or insufficiency in design for which the Contractor is responsible. The Red Book also contains crucial limitations on the Contractor's liability—see, e.g., sub-clauses 30.7, 37.12 and 38.4, and clause 44, discussion of which is outside the scope of this book. The Purchaser should seriously consider these matters.

- Almost the whole of clause 30, which apportions between the Purchaser and the Contractor the relevant risks of loss or damage, referred to in clause 31.
- Clause 31, which deals with construction all risks ("CAR") and liability insurance by the Contractor, and insurance of his own and his Affiliates' property by the Purchaser.
- An extract from clause 32, which provides for the issue of a Construction Completion Certificate as a pre-condition to taking-over under clause 33.
- An extract from clause 33, which provides for the issue of a Take-Over Certificate or Certificates, and for risk to pass from the Contractor to the Purchaser upon taking-over, as referred to in sub-clause 31.1.
- An extract from clause 37, dealing with Defects and Defects Liability Periods, referred to in clause 38.
- An extract from clause 38, which provides for the issue of a Final Certificate or Certificates, also referred to in clause 31.

Clause 31

29.5 This clause provides for the Contractor to effect and maintain CAR (sub-clause 31.1) and liability insurance (sub-clause 31.3). There is no option for the Purchaser to effect and maintain such insurance. Under sub-clause 31.2, the Purchaser is to insure his own and his Affiliates' property against "all normal risks".

Sub-clause 31.1

29.6 Sub-clause 31.1 provides that the Contractor shall effect and maintain insurance:

- with insurers approved by the Purchaser;
- in the joint names of the Purchaser, Project Manager, Contractor and Subcontractors;
- upon the Materials, Plant and Documentation;
- to the full cost of their replacement, or such other sum as may have been agreed (cf. "full reinstatement value" in GC/Works/1 and "full replacement value" in MF/1—all three forms of contract seem to be practically indistinguishable in this respect);
- for any loss or damage to the Materials, Plant and Documentation resulting from any one incident or event;
- until the Plant (or any specified section) has been taken over by the Purchaser under Clause 33;
- and thereafter until the issue of the Final Certificate for any loss or damage resulting from either any cause prior to taking over or any testing (e.g., performance testing under Clause

35) or other operations (e.g., site clearance under Clause 34 or making good Defects under Clause 37) after taking over carried out or supervised by the Contractor or any Subcontractor for the purpose of complying with the Contract.

29.7 The insurance is to cover "all normally insurable risks" (a rather vague expression for contractual use, presumably intended to refer to all risks normally insurable under a CAR policy, which gives wider cover than commercial property insurance), including loss or damage during transport, but excluding:

- the cost of making good defective designs or specifications and faulty workmanship or materials (but this exclusion does not apply to loss or damage resulting from such matters, e.g., a fire resulting from faulty materials);
- those Purchaser's risks specified in sub-clauses 30.4(d), (e) and (f) (largely uninsurable risks); and
- "other common exclusions"—again, this expression is rather vague for contractual use.

29.8 Although the insurance is to be in the joint names of the Purchaser, the Contractor, and the others mentioned above, the Contractor is to be entitled to represent the Purchaser in all matters relating to the insurance. Therefore, the Contractor will be entitled to make and pursue claims against the insurers. However, the Contractor is not to release or compromise any insurance claim (e.g., settle a claim at less than its full value) affecting the interests of the Purchaser, without the Purchaser's consent.

Sub-clause 31.2

29.9 Sub-clause 31.2 provides that the Purchaser shall insure:

(1) all of his property and that of his Affiliates on or adjacent to the Site (other than the Plant and Materials prior to taking over);
(2) against "all normal risks" (again, a rather vague expression for contractual use, presumably intended to refer to all risks normally insurable under a commercial property insurance policy, as it is followed by a list of such risks).

29.10 The amount of the insurance is not stated. However, it may reasonably be inferred that the insurance is to be for the full cost of replacement, as under sub-clause 31.1. The Purchaser is required to insure his property, which cannot very well mean leaving the property partially uninsured. If there is a deductible, it appears to be at the Purchaser's risk.

29.11 The interest of the Contractor is to be "noted" on the Purchaser's policy (presumably this is meant to indemnify the Contractor if he causes loss or damage to the Purchaser's or his Affiliates' insured property). Otherwise, the Contractor would be liable to indemnify the Purchaser under sub-clause 30.7.

29.12 Unfortunately, however, such noting, although a common practice, has no certain legal consequences.

Sub-clause 31.3

29.13 Sub-clause 31.3 provides that the Contractor shall effect and maintain insurance covering:

"(a) his liability to the Purchaser and his Affiliates in an amount of not less than the limit of such liability referred to in Sub-clause 30.7; and

(b) his legal liability to any third party for such sum as the Contractor considers appropriate, but in any event not less than £5,000,000 (five million pounds).''

29.14 Sub-clause 31.3(a) refers to sub-clause 30.7, under which:

- subject to sub-clauses 30.2, 30.3 and 30.4, the Contractor is to indemnify the Purchaser against loss of or damage to the property of the Purchaser and his Affiliates (other than Materials, Plant or Documentation) from any cause arising out of the performance of the Works;
- up to a limit stated in the Agreement or, if none is stated, £5,000,000, in respect of any one incident or event; and
- the Purchaser is to indemnify the Contractor and all Subcontractors for any sums in excess of the prescribed amount, no doubt using for this purpose the proceeds of the Purchaser's insurance under sub-clause 31.2, if the relevant loss or damage is covered by that insurance.

29.15 If it is not, the Purchaser will nevertheless have to discharge the indemnity.

29.16 Sub-clause 31.3(a) requires the Contractor to insure against his liability under sub-clause 30.7, and possibly more, because sub-clause 31.3(a) is not expressly limited to liability under sub-clause 30.7. Cf. Green Book sub-clause 31.4(a).

29.17 It is difficult to reconcile sub-clauses 30.7, 31.2 and 31.3(a), which seem to result in overlapping and double insurance. The root of the problem is that the Contractor's indemnity under sub-clause 30.7 and the Contractor's insurance under sub-clause 31.3(a) seem to extend to loss or damage which is also to be covered by the Purchaser's insurance under sub-clause 31.2. Cf. JCT Standard Building Contract With Quantities (SBC/Q) Revision 1 2007, clauses 6.2 and 6.4 and Schedule 3, paragraph C.1. Under those provisions:

(1) the Employer insures existing structures in the joint names of the Employer and the Contractor against Specified Perils (a similar list to that given in Red Book sub-clause 31.2);
(2) the Contractor gives an indemnity (to be supported by Contractor's insurance) in respect of property damage similar to the Red Book sub-clause 30.7 indemnity;
(3) but the indemnity excludes loss or damage to existing structures caused by a Specified Peril, thereby avoiding any problem of overlapping and double insurance.

29.18 Red Book Guidance Note K: Insurance, states:

'' . . . double insurance (that is, having the same risk covered by two different policies of insurance) inevitably leads to unnecessary expense, and potentially to conflict and counter-claims between the two insurance companies involved. It is generally in the best interests of both Purchaser and Contractor to arrange matters so that one and only one insurer deals with any particular claim and does not thereafter seek recovery against another party. The General Conditions therefore require the Contractor to provide Construction All Risks (CAR) insurance for the Plant and Materials until taking over, and the Purchaser to provide primary cover for the Plant after taking over and for his other property at all times.''

The principal objectives behind the form of clauses 30 and 31 are to ensure that:

''(a) Loss or damage to the Plant and Materials before taking over, however caused, will be covered by insurance in the joint names of all parties so that when loss or damage occurs it is unnecessary to apportion fault between the parties involved, and recovery can be made without unnecessary delay to the project . . .
(b) Loss or damage to the other property of the Purchaser and his Affiliates (including the Plant after taking over) is covered by the Contractor for his fault up to £5 million or such other sum as may be provided in . . . the Agreement, and the Purchaser is

> required to indemnify the Contractor for sums in excess of this amount. The Contractor can, if he so wishes, offset liability onto Subcontractors in any relevant subcontract . . . ''

29.19 This intention on the part of the I Chem E unfortunately does not seem to be fulfilled in the Red or Green Books. In order to do so, sub-clauses 30.7 (and the supporting sub-clause 31.3(a)) on the one side, and sub-clause 31.2 on the other side, would need to be made mutually exclusive, rather than overlapping.

29.20 Sub-clause 31.3(b) requires the Contractor to insure against (*inter alia*) his liability under sub-clauses 30.5 and 30.8, for an amount the Contractor considers appropriate, not less than £5,000,000.

29.21 Sub-clause 31.3, last paragraph, requires that the Contractor's insurances under that sub-clause shall contain ''an indemnity to principals clause''. Again, this is a rather vague expression for contractual use, presumably intended to indemnify the Purchaser. The paragraph also makes clear the period during which the Contractor's insurances under sub-clause 31.3 are to be maintained, i.e., from the commencement of the Works to the issue of the last Final Certificate.

29.22 Sub-clause 31.4 requires that, before the Contractor starts to work on the Site, each party shall provide the other with details of his insurances. There is no provision for either party to approve the terms of the other's insurances—cf., e.g., GC/Works/1 Condition 8(5) and MF/1 sub-clause 47.6. Each party is also to provide details in a timely manner of any additions or restrictions to the insurances, and to provide evidence of payment of premiums.

29.23 There is no provision for a party to insure if the other defaults in doing so—cf., e.g., GC/Works/1 Condition 8(7) and MF/1 sub-clause 48.1. Therefore, it appears that in those circumstances, the only remedy would be termination of the Contract. For this purpose, the Purchaser could use Clause 43 (Termination for Contractor's default), but the Contractor would apparently have to rely on common law in order to terminate for breach of the Contract.

I CHEM E GREEN BOOK INSURANCE PROVISIONS

29.24 Appendix 23 consists of almost the whole of clause 30, and clause 31. All other relevant provisions are to the same effect as those of the Red Book. Material differences in clauses 30 and 31 of the Green Book from the equivalent clauses of the Red Book are set out below. The most important change is that, under the Green Book, it is the Purchaser, rather than the Contractor, who effects the CAR insurance.

Clause 30

Sub-clause 30.2

29.25 In the first line, after ''Contractor shall'', the words ''at his expense'' are omitted, in view of the fact that the relevant making good will normally be at the Purchaser's expense, financed by the Purchaser's CAR insurance under clause 31.1.

29.26 The last paragraph of sub-clause 30.2 is added. This provides that:

- without prejudice to the Contractor's liability to remedy Defects under clause 37;

- the Contractor's liability under sub-clause 30.2 for the cost of making good loss or damage;
- shall be limited to the amount actually recoverable under the Purchaser's CAR insurance under sub-clauses 31.1 and 31.2 (this should be sufficient for full replacement but, if is not, presumably the Purchaser would need to issue Variation Orders under clause 16 at his expense in respect of any uninsured loss or damage).

29.27 The new paragraph concludes by stating that:

- except in the case of loss or damage arising from the Purchaser's risks;
- the Contractor shall bear the deductible (under the Purchaser's CAR insurance) stated in the Agreement for each and every claim.

Sub-clause 30.3

29.28 As the Green Book is a cost-reimbursable form of contract, sub-clause 30.3 refers to the cost of the relevant loss or damage forming part of the cost-reimbursable Contract Price. This is the total of the sums payable by the Purchaser to the Contractor in accordance with clause 18 (Contract Price) and Schedules 18 (Cost elements, rates and charges) and 19 (Terms of payment).

Sub-clause 30.9

29.29 Sub-clause 30.9 is new. It provides that if loss or damage to Purchaser's property caused by perils insured by the Purchaser under sub-clause 31.2 (this should refer to 31.3) exceeds the amount actually recoverable under the insurance, the Purchaser will bear the uninsured amount. It is doubtful whether this adds anything—it is up to the Purchaser to see that the insurance is adequate—see commentary on Red Book sub-clause 31.2, above. It does not appear that new sub-clause 30.9 helps with the conundrum, referred to above, about overlapping and double insurance.

Clause 31

Sub-clause 31.1

29.30 In the first line, "Purchaser" is substituted for "Contractor".

29.31 In the first and second lines, the words requiring the insurers to be approved by the other party are omitted.

Sub-clause 31.2

29.32 The last two paragraphs of Red Book sub-clause 31.1 have become Green Book sub-clause 31.2, and the subsequent sub-clauses have been re-numbered accordingly.

29.33 The permitted exclusions are divided into (a) and (b). Sub-clause 31.2(b):

- permits the risk specified in sub-clause 30.4(c) to be excluded; and
- refers not to "other common exclusions", but to "such other common exclusions as may be accepted by the Purchaser".

29.34 The next sentence provides for a deductible to be stated in the Agreement. The deductible will be at the Contractor's risk in accordance with sub-clause 30.2.

29.35 The last paragraph of sub-clause 31.2 substitutes the Purchaser for the Contractor as the representative party for insurance purposes, and somewhat rearranges the language of the equivalent last paragraph of Red Book sub-clause 31.1.

Sub-clause 31.3

29.36 Sub-clause 31.3 adds "terrorism" to the insured risks listed in the equivalent Red Book sub-clause 31.2.

Sub-clause 31.4

29.37 Sub-clause 31.4(a) refers to the Purchaser's "liability to the Purchaser and his Affiliates under Sub-clause 30.7", which is clearer than the equivalent Red Book sub-clause 31.3(a).

29.38 Sub-clause 31.4(b), requiring the Contractor to insure the Contractor's Equipment, is new.

29.39 Sub-clause 31.4(c) is equivalent to Red Book sub-clause 31.3(b).

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CHAPTER THIRTY

PFI/PPP PROJECTS IN THE UNITED KINGDOM

Christopher Causer

PRINCIPLES AND STRUCTURES

30.1 The Private Finance Initiative ("PFI") was introduced in 1992 to encourage private sector businesses to tender to local and central government authorities for the provision of public infrastructure and services. Since then, over 600 projects have been completed and a further £22 billion of PFI projects are expected to reach financial close by 2011.

30.2 Many people find the terms PPP and PFI confusing as they are often used interchangeably. Public private partnership or "PPP" is the term used for this type of project in most other countries and we have accordingly used PPP throughout this chapter. PFI can be regarded as the UK "brand" of PPP.

30.3 PPP projects typically involve a contract between a public sector client, such as a central Government department or a local authority, and a private sector partner, usually a company set up for the purposes of the project. In this chapter we have used the term "the Authority" for the former and "Project Co" for the latter.

Reasons for the introduction of PPP

30.4 For many years there had been dissatisfaction with the process for procuring large capital projects by the Government. Cynics had long taken the view that the most profitable way of conducting public sector work was to bid aggressively with a tightly defined specification. The contractor trusted that the client's eventual requirements would differ significantly from those set out in the tender documents and that change orders (issued post-contract, with a lack of competitive pressure) would make the job profitable. As a result, many public sector contracts were fraught with difficulty and overran both financial and time estimates. The need to improve the way in which the public sector worked with private sector contractors was one of the main drivers behind the creation of PPP.

30.5 Furthermore, traditional capital procurement had failed to make provision for the future repair and maintenance costs associated with the new asset. The public sector client could raise the capital for the initial construction but in later years there was never enough funding available in the revenue account to maintain the structure adequately. One of the key aims of PPP was to create a procurement policy that encouraged decisions to be made on the basis of the whole life cost of an asset as opposed to its initial cost. It encourages long-term decisions to be made rather than considering only the current financial year. It also spreads the cost of a major facility over 25 or 30 years.

The PPP procurement process

30.6 In the UK, the procurement procedure for contracts placed by public sector clients is covered by the EU procurement rules, which in most cases require a notice to be published

advertising the project. Following publication of the notice in the Official Journal of the European Union ("OJEU"), the basic stages are:

- prequalification and short-listing of bidders;
- invitation to negotiate or participate in dialogue;
- final offer;
- contract award.

30.7 The procurement process for public sector authorities, which is beyond the scope of this chapter, is regulated by EU Directives[1] and English Regulations.[2] The PPP contract will be awarded to the bidder which offers the procuring authority the most economically advantageous tender. This is not the same as the lowest construction price. PPP contracts are awarded based on the concept of value for money over the full life of the assets.

Funding a PPP project

30.8 The defining characteristic of a PPP project is the fact that it is the private sector partner that is responsible for arranging the funding. In a conventional government capital project, the Authority makes stage payments to the construction contractor, with funding raised through taxation, borrowing or other traditional sources of "government" funds. PPP projects may be funded in a number of different ways: in some cases, mainly in the IT and waste management sectors, using the balance sheet and equity of the main or sole sponsor; more usually, projects are funded through a combination of equity and external borrowing, with the use of a special purpose vehicle or "SPV".

30.9 The structure is recognisable as a conventional limited recourse project financing. The type of assets financed through project finance techniques have traditionally included power plants, infrastructure projects (roads, water and waste plants) and transportation projects. Where a contractor enters into a contract in its own name, the contract is said to be "on balance sheet". The counterparty, in this case the Authority, has full recourse to the contractor (through an action under the contract) in the case of breach or non-performance. Limited recourse structures, on the other hand, involve the sponsors (usually a consortium of two or three companies) forming an SPV to enter into the contract with the Authority.

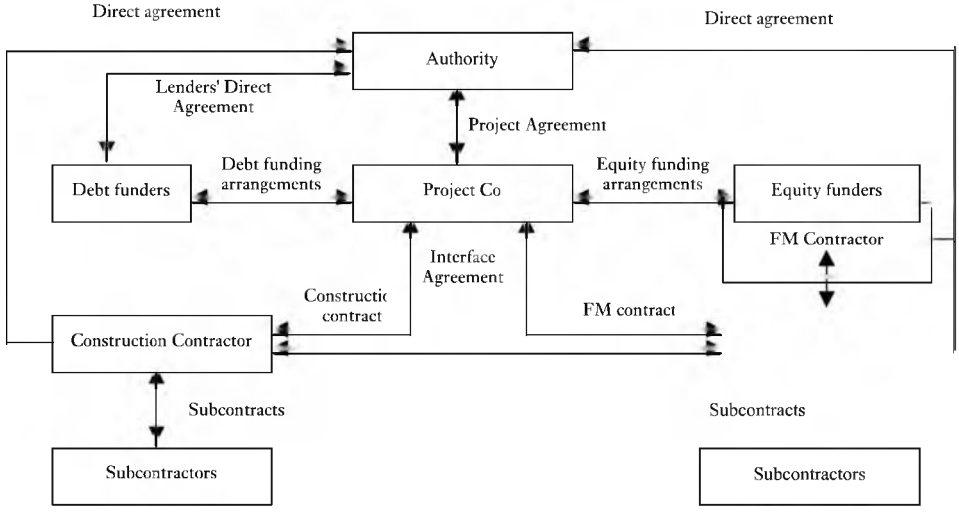
30.10 The Authority has no direct contractual recourse against the individual sponsors, who as shareholders in the SPV are protected by the corporate veil. Similarly the lenders to the SPV have no direct contractual recourse against the shareholders, unless the shareholders have expressly agreed to provide direct support in the event of the SPV getting into financial difficulties. The lenders are advancing the funding against a package of security, with the main collateral for the banks being the regular payments due to Project Co under the project agreement, provided it delivers the services specified under the contract. From this it will be appreciated that the lenders have a strong interest in the insurance arrangements for the project: any delay in completion of the building works, or interruption in the delivery of services, will delay or reduce Project Co's income and (if not compensated for by some type of insurance or claim against a subcontractor) potentially threaten the overall solvency of Project Co.

1. Directive 2004/18/EC.
2. The Public Contracts Regulations 2006.

Contractual structure

30.11 The typical contractual structure of a PPP project is shown in the following diagram:

PPP contractual structure



Types of funding

30.12 The proportion of equity in a PPP scheme is generally 5–15 per cent of the capital costs of the project. The balance of the financing is made up of senior debt, although on some projects there is a combination of mezzanine and senior debt. Senior debt is that which is not subordinated in terms of repayment or acceleration rights. Senior debt ranks above the claims of other lenders.

30.13 Any debt which is not senior debt will rank behind the senior debt and is referred to as subordinated, junior or mezzanine debt. The shareholders in Project Co often make subordinated loans to Project Co since this is more advantageous for Project Co than equity (Project Co's interest payments on loans are deductible against its profits). An intercreditor agreement will set out the terms of the subordination, including provisions covering the entitlement of a lender to accelerate its loan (demand early repayment), take enforcement action against the borrower or share in any recovery following enforcement action.

30.14 As an alternative to bank debt, there has been some growth of funding of projects through the capital markets, i.e. bond issues. Raising funds on the capital markets has opened up a major new source of finance for project companies and often the interest rate obtainable compares favourably with the cost of bank debt. Note that when Project Co borrows from one or more banks the loans are normally provided on a floating rate basis. Project Co executes an interest rate swap at financial close which converts its floating rate liability to a fixed rate liability. This is so that Project Co is not excessively exposed to fluctuations in interest rates. Where bond funding is utilised, the interest rate is fixed at the time of issuing the bonds. Usually it is necessary for Project Co to arrange a guarantee on the bonds from one of the

specialist monoline insurers in this field, such as FGIC or MBIA, since Project Co, being an SPV, has an inadequate credit rating to sell its securities to the public.

SECTORS

30.15 HM Treasury recently stated that there are 620 signed PFI projects in the UK, with a capital value of £57 billion. A further 162 projects with a capital value of £22 billion are expected to be agreed by April 2011. These projects have delivered new public services across a number of sectors, including:

(1) transport—roads, bridges, light rail and underground systems;
(2) health—acute hospitals and primary care units;
(3) education—primary and secondary schools, university accommodation;
(4) water and sewage—treatment plants;
(5) accommodation—offices for government departments and agencies; and
(6) defence—training facilities and accommodation for servicemen and their families.

30.16 The breakdown by sector for the two calendar years 2006 and 2007 is shown in the table below.

SIGNED DEALS BY SECTOR

	2007		2006	
Sector	**No of deals**	**Capital value, £m**	**No of deals**	**Capital value £m**
Education	21	2,414	26	2,433
Health	20	1,910	15	3,020
Housing	5	570	7	1,255
Waste	4	314	5	575
Transport/street lighting	4	497	4	292
Leisure/culture	2	75	2	31
Accommodation	1	46	3	200
Defence	1	1,000	2	1,800
IT/telecoms	1	490	0	0
Local government	1	n/a	0	0
Total	**60**	**7,316**	**64**	**9,606**

30.17 Looking at the market in Europe as a whole, the EIB recently estimated that more than 1,000 PPPs were set up in Europe between 1990 and 2006, with a combined value of €200 billion.

THE PROJECT AGREEMENT

30.18 In this section we consider the main contracts which make up a typical PPP project.

30.19 The project agreement regulates all of the arrangements between the Authority and Project Co. It is essentially a risk allocation document and is the main contractual document in any PPP project. Project agreements are sometimes referred to as concession agreements. In EU procurement Directives a "concession" confers the right on the concessionaire to collect charges from the general public (e.g. to collect cash tolls from road users). Few PPP projects are concessions in this sense, so in this chapter we use the term project agreement.

30.20 Project agreements are lengthy documents, consisting of 200 pages or more of clauses in the "front end" of the agreement, plus over 20 schedules. The contract is lengthy because it needs to contain the arrangements governing a 25- or 30-year project which is divided into several phases. The schedules in particular contain a great deal of technical information, principally relating to the design, construction and maintenance of the physical facility. However a PPP project agreement can broadly be viewed as covering the following areas:

The design and construction phase

30.21 In this section of the agreement, there are clauses imposing the requirement on Project Co to design and build the physical facility (school, hospital or road) which is required to enable Project Co to deliver the specified services. Many of these provisions are therefore similar to the clauses to be found in a design and build contract.

The operational phase

30.22 Once the physical facility has been completed, Project Co is responsible for providing a range of services at the site. These services may include cleaning, catering, grounds maintenance and IT services, together with repair and maintenance obligations. This section of the agreement imposes the necessary requirements and quality standards on Project Co.

Property provisions

30.23 Project Co will be given a licence to enter on to the project site to carry out the necessary construction works. It may be granted a licence for the whole of the project period, or a lease of the project site may be granted to Project Co once the construction period is finished.

Payment provisions

30.24 The project agreement will contain a fairly complex payment mechanism which provides the basis on which the provision of services is monitored, measured and paid for by the Authority on a monthly basis. The monthly payment, or unitary charge, is Project Co's mechanism for recovering the cost of constructing, operating and financing the project. The payment mechanism contains provision for the Authority to make deductions each month for unavailability of spaces (for example, a classroom is unavailable for use because all the windows are broken) or for poor delivery of the services (for example, a hospital meal is cold when it reaches the patient).

Changes

30.25 Over the life of a 25- or 30-year project, there are likely to be changes, both in the law and in the requirements of the Authority. This section of the agreement contains provisions dealing with such changes and providing a mechanism for adjusting the unitary charge when changes take place.

Termination

30.26 In rare cases, the project agreement may terminate prior to its expiry date. Reasons for this might include contractor default or a voluntary termination by the Authority because it no longer requires the facility. This section of the contract therefore deals with the mechanism for terminating the project and for calculating any termination payment to be made by the Authority.

Insurance

30.27 The project agreement will contain certain requirements in relation to insurance for the project. This area is covered in more detail in paragraphs 30.49 to 30.74 below.

SUBCONTRACTS AND DIRECT AGREEMENTS

30.28 Bidding consortia form following publication of the OJEU notice advertising a new project. The initial alliance develops until the parties become investors in Project Co shortly before financial close of the project. Typically, a construction company and an FM (facilities maintenance) company, with perhaps a third arm's-length equity investor, will collaborate on a project and form the bidding consortium. There will often be no formal arrangement, except perhaps a bid agreement, between these parties until shortly before financial close. At financial close, shortly before the signing of the project agreement, the investors in Project Co execute a shareholders' agreement and incorporate the SPV to enter into the project agreement.

The construction contract

30.29 In most PPP projects, there are two principal subcontracts which are executed at the same time as the project agreement (see diagram on page 339). These are the construction contract and the FM contract. The design and construction obligations imposed on Project Co in the project agreement are passed down to the construction contractor. The interests of the construction contractor and Project Co will be very different. The construction contractor will have a short-term interest (it will be interested in the design and build process only), whereas Project Co is responsible for the project for the entire term. Broadly speaking, any risks which Project Co cannot pass down to the construction contractor will need to be passed down to the FM contractor. This is why these subcontracts are difficult for the consortium to negotiate. Frequently, investors in the SPV will be part of the same corporate groups as the construction contractor and the FM contractor. In addition, due to the emphasis on risk transfer in a PPP project, the construction contract will depart from the traditional standard forms of construction contract used in the UK such as the JCT and NEC contracts.

The FM contract

30.30 The obligations of the FM contractor commence when the buildings have been brought to practical completion by the construction contractor. One of the difficult areas in drafting the documentation is always the interface between the construction contractor and the FM contractor during the commissioning and "handover" period. The FM contractor will normally be required to bring in equipment and fit out the buildings after practical completion has been achieved under the construction contract, but before full completion (as defined in the project agreement) has taken place. The FM contractor then has the obligation to provide the FM services for the remaining life of the project, which could be 25 years or so. In practice the FM contractor acts as a lead manager of the services and frequently it will enter into individual subcontracts, of shorter duration, with a variety of service providers in order to procure the FM services such as cleaning, grounds maintenance, buildings maintenance and catering.

30.31 Like the construction contract, the terms of the FM contract are based on the drafting of the equivalent clauses in the project agreement. Relevant obligations are "stepped down" to the FM contractor using exactly the same drafting as the way in which the obligations are imposed on Project Co in the project agreement. Lenders check that the step-down of risk to the FM contractor is complete and that no risks are left with Project Co.

Interface agreement

30.32 This is designed to streamline disputes which may arise between the two main subcontractors, namely the construction contractor and the FM contractor. Sometimes additional subcontractors such as a provider of IT services will be joined as parties. The Authority may during the operational phase make deductions against Project Co for lack of availability of the facilities or for poor performance. The FM contractor may blame the fault on poor design or construction. In the absence of an interface agreement, the FM contractor and the construction contractor are not directly linked in contract, so resolving such a dispute would fall on Project Co. An interface agreement permits the subcontractors to negotiate directly to resolve areas of difference. The two contractors will agree in the interface agreement issues such as cross-indemnities and appropriate caps on liability. Also dealt with will be restrictions on amendments to each party's contract with the Authority and how to deal with liabilities arising from delays to completion of the works.

30.33 Project Co must be a party to the interface agreement, in case there are allegations that Project Co itself is to blame, for example through failure to serve notices. Project Co will wish to have the right to set off any deductions from the unitary charge made by the Authority against the subcontractor that it reasonably thinks is at fault.

Direct agreements

30.34 In addition to the two main subcontracts, there will be several "direct agreements" (as shown in the earlier diagram). One of these (the "Lenders' direct agreement" or "LDA") is between the Authority, Project Co and the senior lenders and allows the lenders to step into the shoes of Project Co if the project runs into trouble. There are also direct agreements between the Authority, Project Co and each of the subcontractors. These allow the Authority to step into the shoes of Project Co in its relationship with the subcontractor should that relationship be at risk (usually because Project Co is not paying the subcontractor). There are

also direct agreements between the subcontractors, Project Co and the lenders, which form part of the lenders' security package.

Lenders' direct agreement

30.35 This is a direct agreement between the Authority, Project Co and the senior lenders. The LDA deals with the relationship between these parties following a termination or threatened termination of the project agreement on the grounds of Project Co default.

30.36 The lenders' concern is that they have financed the project on the basis of projected cashflows from the Authority and if the project agreement (under which the cashflows are paid) is terminated, the lenders will only have rights against Project Co's subcontractors (the construction contractor and the FM contractor) and to amounts in the bank accounts of Project Co as security for their financing.

30.37 In a situation where the project is getting into difficulties, the LDA gives the lenders an opportunity to step in and rescue the project and avoid the disruption that would follow termination of the project agreement. If the project can be restored with minimal disruption to the services and there is no need for the Authority to get involved to ensure that this occurs, then both the Authority and the lenders will benefit.

30.38 During the step-in period, the lenders are incentivised to ensure that a remedial programme is implemented and that no new breaches occur. If there are further breaches of the project agreement then a new right to terminate the project agreement can arise for the Authority. The LDA provides that the step-in will end if the lender steps out or if a novation of the project agreement takes place to a new vehicle set up and controlled by the lenders. If the lenders cannot rectify the original default or save the project then termination of the project agreement will occur and the Authority's claims against Project Co will be set off against any termination payment due to Project Co from the Authority.

Insurance provisions in the LDA

30.39 The LDA will typically contain a number of provisions dealing with insurance.

30.40 The project agreement generally contains a requirement that the proceeds of any claim made under project insurances are paid into the Joint Insurance Account (sometimes known as the Insurance Proceeds Account). This is a bank account held jointly in the names of the Authority and Project Co. The equivalent LDA clause requires that the agent or trustee acting on behalf of the senior lenders must only permit amounts to be released from the Joint Insurance Account in accordance with the requirements of the relevant clause of the project agreement. The agent or trustee undertakes not to exercise any security rights over the amounts contained in the Joint Insurance Account or to take any steps to prevent amounts being released from the Joint Insurance Account in accordance with the relevant clause of the project agreement.

30.41 The parties to the LDA also normally agree to ensure that all insurance proceeds received by Project Co under the project insurances are paid directly into the Joint Insurance Account and applied in accordance with the terms of the project agreement. These provisions are necessary because otherwise the amounts in the Joint Insurance Account would be covered by the banks' security under their security documents and this might prevent the operation of the relevant clause of the project agreement.

COMMODITISATION/STANDARDISATION

30.42 In the first years of the Private Finance Initiative, individual awarding authorities such as NHS trusts and government departments were left to negotiate and document their transactions, assisted by appropriate external advice from financial advisers and lawyers. Inevitably this led to differences of approach from deal to deal, even within the same sector. In addition, because each awarding authority was essentially starting with a clean sheet of paper, transactions took longer to complete than was necessary. Accordingly, the Government decided that efforts should be made to bring an element of standardisation into the process. Various panels and organisations were created to formulate guidance on matters relating to PPP, starting with the Private Finance Panel. This was succeeded by the Treasury Taskforce which in turn was followed by what is now Partnerships UK.

30.43 Although the make up and the membership of the organisations has changed, their raison d'être remains the same, namely to issue guidance to the PPP market on "best practice" in structuring and closing transactions. The guidance issued ranges from memoranda addressing particular difficult issues (e.g. the accounting treatment of PPP transactions for public sector clients), recommended drafting for legal contracts such as project agreements and, increasingly, procurement packs that include not just standard form drafting for the main contract but a range of supplementary documents such as invitations to tender and model output specifications.

30.44 Increasingly the drafting and issuing of guidance have been taken forward on a sectoral level, with each central government department having its own private finance unit responsible for monitoring and guiding new PPP transactions within its field. For PPP projects with local authorities, an organisation called 4ps takes on the same responsibilities and has issued procurement packs covering a number of significant sectors for local authorities, such as street lighting and social care projects.

Programmes not projects

30.45 As a parallel development to the standardisation of contracts, the Government has increasingly moved towards the concept of "programmes not projects". To take a practical example, in the schools sector there was a thriving market for individual schools projects, which were taken forward by one local educational authority (LEA) and covered between one and twenty secondary schools within that LEA's district. The projects generally created new build schools and/or extensive refurbishment of existing schools. These projects did not address the ongoing problem that most LEAs have with their schools estate, namely the need to carry out regular refurbishment and maintenance across the whole estate and the need to place contracts for small building works such as the construction of one or two classrooms, or the replacement of windows in two blocks of a school. That sort of small-scale construction work was not catered for by the typical PPP schools project which concentrated on the delivery of complete new schools.

30.46 Accordingly the Government developed a programme known as Building Schools for the Future (BSF). BSF creates a medium- or long-term partnering relationship between the LEA and a private sector supply chain, with the supply chain being available not just to deliver new schools but also to carry out day-to-day maintenance and perform small construction jobs. Under BSF a strategic partnering agreement is signed between the LEA and the private sector partner, which is known as a Local Education Partnership or LEP. The LEP is then obliged to provide a complete construction and maintenance service to the secondary

school estate during the life of the strategic partnering agreement. Some of the work will be funded externally using a PPP model, whereas other work will be paid for directly by the LEA and will be implemented using the BSF standard documentation for target cost or lump sum contracts (not dissimilar to NEC 3).

30.47 Similarly, in the health sector, a programme known as LIFT has been used for a number of years now to develop primary care facilities. LIFT companies are formed in a particular geographical area and they have the responsibility to design and build primary care facilities which are then leased to groups of doctors and other health professionals for defined periods. The LIFT companies obtain financing from the private sector and effectively have a monopoly within their geographical area to deliver primary care facilities.

30.48 The general thinking behind the creation of such programmes is that it enables private sector procurement efficiencies and the benefit of external private finance to be introduced into small- or medium-sized construction works, whereas traditional one-off PFI projects have only addressed the need for large new hospitals or secondary schools.

INSURANCE ARRANGEMENTS

Responsibility for arranging insurance

30.49 The usual arrangement on a PPP project is for Project Co to be made responsible for putting in place all the insurance policies required to cover the project. This obligation is imposed on Project Co under the project agreement, since the Authority has a clear interest in seeing that the project is adequately insured, during both the construction phase and the operational phase. The lenders to the project will also be concerned to see that adequate insurance arrangements are in place at all times and their technical advisers will review the insurance arrangements to check that this is the case. In practice Project Co appoints an experienced insurance broker with expertise in the PPP market and the broker puts in place a range of insurance policies that satisfy the project agreement and lender requirements and represent value for money for Project Co. Project Co recovers the cost of the insurance through the unitary charge.

30.50 The project insurances name a number of parties as co-insured parties, including Project Co, the Authority, one or more subcontractors and the lenders.

The insurance section in SoPC4

30.51 The current guidance on PPP project agreements, issued by HM Treasury in March 2007, is known as "Standardisation of PFI Contracts Version 4" (usually abbreviated to "SoPC4"). SoPC4 contains a section (section 25: Insurance) which covers the insurance aspects of a PPP project. The section is a helpful discussion of various issues relating to insurance and it also contains recommended drafting for parts of the insurance clause in the project agreement. The section points out that the insurance arrangements under PPP are very different from those that would apply to a project directly procured by the Authority. In most cases UK public authorities self-insure and do not purchase insurance on the commercial insurance market; however, in the case of a project procured through the PPP route, Project Co will be required to purchase insurance on the commercial market. To ensure value for money, the project agreement should incentivise Project Co at all times to:

- ensure full integration between the insurance programme and Project Co's overall risk management strategy;

- make cost-effective trade-offs between lower deductibles and increased insurance premiums (within the constraints specified by the Authority and the lenders);
- procure insurance from good quality and cost-effective suppliers; and
- look only to the Authority for cover in relation to unavailability of insurance (see below) as a last resort.

30.52 The key provisions of the SoPC4 insurance clause are the following:

Required insurances

30.53 Clause 25.2 obliges Project Co to take out and maintain the insurances described in a document known as the "Standard Required Insurance Schedule". This document is in Appendix 27 to this book. Part 1 of the schedule covers insurances required during the construction period and Part 2 deals with insurances required during the operational period.

Design and construction phase

30.54 The insurance clause will require Project Co to procure that certain specified insurance policies are taken out prior to the commencement of the works and are maintained for the whole of the construction phase. The details of the required policies, and the key terms of those policies, are set out in a schedule to the project agreement. The policies required during the construction phase are the following:

- Conntractors' All Risks insurance. This covers all risks of physical loss or damage to the permanent and temporary works, including materials, plant and equipment.
- Delay in Start Up insurance. This policy covers the loss of revenue of Project Co anticipated during the indemnity period arising from delays in completion as a result of physical loss or damage or other peril covered under the Contractors' All Risks insurance referred to above. The purpose is to protect Project Co and the lenders in respect of the financial loss which will be suffered by Project Co as a result of delayed completion. Since under PPP contracts the Authority does not start to pay the unitary charge until the facilities are completed and ready to deliver services, any delay in completion will lead to a loss of revenue for Project Co. Since Project Co is funding itself through external borrowing and has interest payments to make to the lenders, it will be seen that any delay in completion will have serious financial consequences. This is why Delay in Start Up insurance is required.
- Third party liability insurance. This policy covers the insured in respect of all sums that the insured may become legally liable to pay consequent upon death or personal injury to any person, loss or damage to property, or interference with property rights, arising in connection with the project.

Operational phase

30.55 The policies required during the operational phase (Part 2 of the Standard Required Insurance Schedule) are the following:

- Property damage insurance. This covers all risks of physical loss or damage to any property of Project Co or property for which Project Co is responsible under the project agreement.

- Business interruption insurance. This provides an indemnity to Project Co in respect of the loss of revenue anticipated during the indemnity period arising from an interruption or interference in the operation of the project as a result of loss or damage covered under the property damage insurance referred to above.
- Third party public and products liability insurance. This provides an indemnity in respect of all sums that the insured may become legally liable to pay, consequent upon death, personal injury or disease, loss or damage to property or interference with property rights, arising in connection with the project.

30.56 For full details of these different types of policy, including cover features and exclusions, the reader is referred to the Standard Required Insurance Schedule in Appendix 27 to this book.

30.57 Clause 25.4 of the SoPC4 drafting requires that the insurances referred to in Clause 25 are taken out with insurers approved by the Authority, such approval not to be unreasonably withheld or delayed. In practice the lenders will check that the insurance policies are arranged by brokers and placed with insurers approved by the lenders.

Other insurance policies

30.58 The previous section describes the Required Insurances—namely, those policies that Project Co is obliged to maintain pursuant to the terms of the project agreement. In addition, there are various statutory insurance requirements, such as the requirement on a business to maintain employer's liability insurance. Clause 25.2 of the SoPC4 drafting requires Project Co to maintain these statutory insurances as well as the Required Insurances, and they are treated in a similar manner for the purposes of "Uninsurability" (see below). Project Co may take out additional policies that it (or the lenders) consider to be desirable, but these are not covered by the "Uninsurability" provisions referred to below.

Reinstatement of project assets

30.59 One area which is frequently the subject of debate is the question of Project Co's obligations to reinstate the project assets if there is an event which destroys part or all of the facility. Clearly the Authority would generally expect that Project Co would use the proceeds of insurance policies to rebuild and reinstate the project assets, to enable the project to continue. A typical PPP project agreement therefore imposes an obligation on Project Co to apply all insurance proceeds received under physical damage policies (but not third party liability, employers' liability, business interruption and advance loss of profits insurance policies) to repair, reinstate and replace the project assets in respect of which the claim was made. The clause requires that all insurance proceeds received under such physical damage policies should be paid into the Joint Insurance Account (sometimes called the Insurance Proceeds Account).

30.60 Clause 25.5 of the SoPC4 drafting provides that if a claim is made or proceeds of insurance are received under a physical damage policy (for an amount in excess of a specified threshold) Project Co is required to prepare a plan for the carrying out of the reinstatement works. This plan is discussed and approved by the Authority and Project Co is then permitted to withdraw amounts from the Joint Insurance Account to carry out the reinstatement works as specified in the reinstatement plan.

30.61 The lenders may wish to exert a degree of control over the use of insurance proceeds. In some cases they may prefer to take the proceeds of an insurance claim and use the

funds to repay the outstanding debt of Project Co, as opposed to having Project Co use the funds to reinstate the project. In some projects a "project economic test" has been agreed with the Authority. Broadly, this provides that if the project assets are destroyed or substantially destroyed in a single event and the insurance proceeds are equal to or greater than the amount required to repair or reinstate the assets, Project Co is required to calculate the senior debt loan life cover ratio on the assumption that the assets are repaired or reinstated as required by the project agreement. If the calculation shows that the senior debt loan life cover ratio is greater than or equal to a specified level (this is normally the threshold below which Project Co is in default under its financing agreements), then Project Co is required to use the insurance proceeds in reinstatement of the assets. If, on the other hand, the calculation shows that the senior debt loan life cover ratio is lower than the specified threshold (i.e. the lenders' risk has increased) then an amount equal to the lower of the insurance proceeds received and the base senior debt termination amount is released from the Joint Insurance Account to Project Co. In the latter case, the banks will exercise their security rights over the amount received and will apply the amount received as a pre-payment against the senior debt.

30.62 If, following the application of the project economic test, the senior lenders take the insurance proceeds in repayment of outstanding senior debt, Project Co will be unable to comply with its reinstatement obligations under the project agreement (because it has no funding). The Authority is likely to terminate the project agreement for contractor default, in which case the Authority can then choose to rebuild the facility with a new contractor (not necessarily on a PPP basis).

30.63 SoPC4 makes clear that a project economic test should not be conceded by the Authority where there is a low risk of total destruction of the asset (for example where the project is a road or rail project and it is unlikely that any one event would destroy the complete road or rail line; or a project, that has a number of geographically diverse sites, such as a grouped schools PPP project where there may be schools on seven or eight sites over a wide geographical area). A project economic test should only be conceded in limited cases, where there is a single site project and there is a risk that the whole facility could be destroyed in one incident.

Risks that become uninsurable

30.64 Since the project agreement places a contractual obligation on Project Co to maintain certain insurance policies, provisions need to be included which deal with a situation where Project Co is unable to comply. PPP project agreements, therefore, generally include a provision dealing with uninsurability. In this context, "Uninsurable" means in relation to a risk, either that insurance is not available in the worldwide insurance market in respect of that risk or the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the worldwide insurance market by contractors in the UK (see the full definition in SoPC4). A risk for these purposes is an insured peril which is the proximate cause for a loss. For example, lightning causes a fire in school premises and this results in material damage to the school. In this example, the lightning is the proximate cause, not the fire.

30.65 The contract will contain a provision confirming that Project Co is not required to take out insurance in respect of a risk that is Uninsurable (unless the main reason for the risk being Uninsurable is the act or omission of Project Co or its subcontractors).

30.66 If a risk becomes Uninsurable for reasons outside the control of Project Co, then the parties are required to consider alternative approaches to the risk to see if a means can be found

for the risk to be managed or shared. If no agreement is reached, then the Authority will effectively take over as the underwriter in respect of that particular risk. The amount of the insurance premium which was previously paid by Project Co for insuring that particular risk is deducted from the unitary charge because the Authority is now acting as the insurer and should receive the premium.

30.67 If at some future point the risk occurs and causes Project Co loss, the Authority can choose to pay an amount equal to the insurance proceeds that would have been payable, had the required insurance policy been in place (in which case the project agreement continues in force) or alternatively the Authority may choose to terminate the project agreement and pay compensation to Project Co calculated as if the project agreement had been terminated following an event of force majeure.

30.68 Where a risk has become Uninsurable, and the Authority has assumed responsibility for that risk, Project Co is required to test the insurance market at regular intervals so that commercial insurance coverage can be restored as soon as capacity becomes available in the insurance market.

30.69 The Uninsurability provisions apply to both Required Insurances and statutory insurances.

Cost sharing of insurance premiums

30.70 As explained above, it is Project Co which is responsible for arranging and paying for the insurance policies covering the project. The policies include as insured parties all the entities that need insurance cover in connection with the project, so the policies are in the nature of "project policies". Project Co recovers the cost of insurance through the unitary charge payable by the Authority. However, there is a difficulty in relation to insurance premiums, namely that it is difficult to forecast what the cost of insurance will be over the life of the project. Accordingly, there needs to be a basis for determining how future changes in insurance premium costs are allocated between the parties.

30.71 The normal arrangement is for Project Co to include a fixed price for insurance costs for an initial period. This period runs from signature of the project agreement through to a first review date, which might be one year after the date of full service commencement. (Project Co is always required to fix its insurance costs for the design and construction period and in practice the relevant policies are taken out for the duration of the construction period, and not on an annual basis.) If we assume that the construction period is four years, that means that Project Co is fixing its cost recovery in relation to insurance for a five-year period.

30.72 The base costs relating to insurance which have been assumed by Project Co and included in the project's financial model as part of the bidding process are set out in a schedule to the project agreement. For periods after the review date, a comparison is made between the actual insurance costs which are payable by Project Co and the base costs set out in the project agreement. To the extent that there is a substantial variation between Project Co's actual insurance costs and the base costs, there is a sharing. SoPC4 contains an Insurance Premium Risk Sharing Schedule which sets out the sharing mechanism. For example, if the actual insurance costs exceed the base costs by no more than 30 per cent, Project Co is responsible for meeting the full amount of the excess cost.

30.73 If the actual insurance cost is more than 30 per cent in excess of the base cost, then the extra premium cost is shared between Project Co and the Authority, with the Authority paying 85 per cent and Project Co 15 per cent. Conversely, if there are exceptional savings (i.e. the actual insurance costs are lower than the base costs by more than 30 per cent) these will

be shared between Project Co and the Authority, with the Authority receiving 85 per cent of the cost saving. There are subsequent insurance review dates, usually at intervals of two years, throughout the operational period.

30.74 The insurance cost-sharing arrangements summarised above are meant to reflect marketwide movements in insurance costs, so movements in premiums caused by changes in insurance premium tax or in insurance intermediaries' fees, or caused by changes that are related to the specific project, are excluded from consideration.

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CHAPTER THIRTY-ONE

CAPTIVES

Marshall Levine

INTRODUCTION

31.1 An alternative to traditional insurance is available to those involved in the construction industry by captive insurance company ("captive") arrangements.

31.2 There are two categories of captive: first, the wholly-owned subsidiary which only insures and manages all or part of the risks of its parent (known as a "pure" or "classical" captive); and secondly, the captive, which is owned by several unrelated shareholders, for example, a sponsoring organisation, group or association, primarily for the benefit of its parent or sponsor ("partial" captive). It is known as a captive because it is not free to transact business independently. Examples of partial captives include group-owned mutuals and pools. An example of a mutual captive in the construction context is the Wren for major UK design firms and some well-known contractors have a mutual captive.

31.3 Many captives are situated offshore to benefit from ease of establishment and lower rates of taxation. Specialist management companies are usually established in the offshore location to enable the parent company's professional adviser to maintain close contact with its clients. The principal locations of captives include various states in the USA, provinces in Canada, Luxembourg and several offshore locations including the Bahamas, Cayman Islands, Bermuda, Barbados, Guernsey, Dublin and the Isle of Man.

ADVANTAGES OF CAPTIVE FORMATION

Reinsurance

31.4 Reinsurers provide services at a relatively low cost, and this is one of the most important features of the captive operation. The captive concept allows the owner access to this market. The parent can decide how many low-level claims it will retain within its own operation and take out reinsurance cover above this level. Thus the parent can avoid mark-up on many premium payments.

Risk selection

31.5 The parent has the advantage of choosing what type of risk it wishes to retain. This obviously offers many different advantages. The parent can choose to retain all of one type of risk or different risks within a certain class, with the advantage that the less attractive risks are left to the general insurance market. As with all other aspects of the captive, however, the need for careful management cannot be over-emphasised. Parent companies can also select better levels of excess, coverage, limit exclusions and amount of reinsurance, and in what layers, and cover for normally uninsurable risks.

Taxation

31.6 Taxation issues are not dealt with in this book but the reader should be aware that a captive represents a tax-effective way to refund retentions, enabling it to build up reserve funds without the usual tax penalty on internal funds held by corporations. This is achieved by ensuring premium payments from the parent which are tax deductible.

Multinationals

31.7 The captive offers certain advantages to the multinational, including assisting it to obtain greater control of its risk financing on a global scale by gaining a far wider coverage of the insurance expenditure, whilst reducing it as described below. Another way in which the captive aids the insurance company is in centralising the worldwide risk-financing policy, as it can obtain business from all of the company's various subsidiaries, enabling the profits from these various transactions all to accrue to the captive. This centralisation can be improved by developing global insurance policies, which has the added advantage of allowing many local technical difficulties to be effectively side-stepped, for example, local capacity problems, strict regulation of policy wordings and premium control.

Expansion

31.8 If the captive is properly established, well managed and financed, then it should expand and develop its reserves. As this happens the captive can take on new risks, extending the proportion of the company's risks that it controls or moving into new types of risk. At the same time it can reduce the reinsurance protection it needs, provided that its loss experience does not deteriorate by any significant amount. Once the captive has reached its optimum with regard to reinsurance pricing and retention of its own risk, it can then use its financial position to move into other areas of insurance and grow as an important profit centre for the company.

31.9 Taxation incorporating captives offshore with a tax sheltered environment can give rise to lower costs, and significant tax allowance, tax savings from claim reserve funds, and tax deductions.

DISADVANTAGES OF CAPTIVE FORMATION

Cost

31.10 Capitalisation of the captive will be influenced by local requirements, the amount needed to run the business at a satisfactory solvency level and the amount needed to ensure quality business is written. This will be important when reinsurers assess the captive with regard to the amount of coverage they are prepared to grant. The captive will also need to maintain certain minimum solvency levels.

31.11 For many potential captive owners cost may be a prohibitive factor. This is particularly so if the parent combines a narrow portfolio with a low spread of risk. Add to this the potential high level value of the risk and the reinsurance cost may be prohibitive. This leaves the parent an impossible choice between no reinsurance protection or inadequate funding for the captive.

Beating the market

31.12 One common use of the captive is to provide cover for risks which have no cover in the conventional market. Although this can be an advantage initially, the captive may have problems putting together statistics that can justify the premium. It is probably necessary to establish that the premium charged bears some relationship either to the loss history or to a likely market premium, particularly if tax deductibility of the premium is to be allowed by the authorities. The captive must also issue a proper policy document, to emphasise that this is a fully incorporated insurance operation.

Funding low-level losses

31.13 If the captive is being used to fund low-level losses the company may well have to provide its own services, which may prove difficult to provide on an economic basis in relation to the captive's size.

Before forming

31.14 When companies are on the borderline of captive formation they are required to comply with relevant regulations concerning capitalisation requirements or expenses for high-level exposures. Furthermore, there can be initial difficulties in entering the reinsurance market. Cost in this area tends to be experience rated, so it is therefore essential that the company has a sound loss control capability, otherwise it may find itself faced with soaring reinsurance costs.

Business plan

31.15 A business plan will be required to enable a comparison of the captive's projected results with the financial effect of maintaining correct risk management plans. The financial aspects of running a captive will need to be carefully planned in order to establish an appropriate level of capitalisation.

31.16 The business plan should deal with:

(1) premium volume;
(2) estimated maximum loss;
(3) claims;
(4) reinsurance;
(5) investment income;
(6) commission;
(7) management charges.

Market cooperation

31.17 The captive owner obviously needs a number of services, such as engineering and claims facilities. He may find it either impossible or prohibitively expensive to secure these services. This will be a particular problem if he is operating in a difficult insurance market environment. Furthermore, if the captive is taking risks which are uninsurable conveniently he may find the necessary reinsurance cover difficult or impossible to purchase.

Local company legislation

31.18 The integration within the captive's business of insurances from overseas subsidiaries is a complex operation. First, the captive may have to contend with the market attitude to overseas insurers. This may make it impossible to secure the necessary fronting facilities. Furthermore, local legislation may also prohibit the payment of adequate cessions or premium amounts to the captive. It may be that the exercise is not economically worthwhile as the premium available may be insufficient, making the administrative effort counterproductive in relation to premium received and the risk taken.

Attitudes of authorities

31.19 A possible disadvantage for the multinational in captive formation is unfavourable attitudes from the local authorities, who may not like the idea of a substantial proportion of their insurance leaving the country in the form of reinsurance payments.

Government controls and returns

31.20 It is likely that many controls will be imposed—strict solvency requirements, high capitalisation, exchange control restrictions, etc. These are likely to be onerous as most developed countries exercise draconian control over the insurance market. A corollary to this is a potential delay in the formation of the company because there may be a need to supply a considerable amount of information to the authorities prior to establishment on a continuing basis. One possible solution is to establish the captive in an area where it is less difficult to operate.

Management time

31.21 One contingency which the owner may fail to take into account is the potential cost of the services. This is also the case with regard to management time. Many companies employ independent management companies to handle the actual captive activity and the establishment of the insurance company. However, the amount of management time actually used in decision-making can be costly and it must be ensured that this is justified in relation to the sort of return the company can expect from the captive. Overall, it is the importance of commercial prudence which must be reiterated here.

Premium payment

31.22 It is important that the premium payment is appropriate in relation to the market. It is also advantageous for the company to pay premiums offshore and develop the captive as a profit centre.

Loss control

31.23 Throughout this chapter the need for adequate loss control provisions by the company has been emphasised. If this were to deteriorate then the captive would be likely to suffer in the long term.

MANAGING THE CAPTIVE

31.24 Self-management is neither economic nor advisable for traditional captives. In relation to offshore captives, staff need to be located in the domicile, which would increase costs and would be likely to produce the necessary calibre of underwriting and accounting personnel. If parent company staff were used, the taxation benefits of offshore arrangements would be endangered. Usually, a specialist professional management company is appointed under a management agreement approved by the captive's board of directors to work within specified guidelines.

31.25 The management company will provide at least the following:

(1) accountancy services;
(2) underwriting facilities;
(3) arranging for policy issue and endorsements;
(4) claims handling facilities;
(5) reinsurance arrangements;
(6) investment and accounting;
(7) compliance with statutory requirements, for example, in relation to monitoring solvency and liquidity requirements.

Selecting the managers

31.26 There are several ways to manage a captive. The first possibility is to manage it "in-house". This may be by use of an existing organisation within the company, or a separate organisation could be established which will depend very much on the location of the captive. The legislation in some countries forbids the parent company from managing the captive on a direct basis. Severe penalties may be incurred if this is ignored.

31.27 Tax must also be considered. In some areas the residence of a company for tax purposes is related to the location of the management. If this is the situation then the management of the captive should be seen to be separate from the country of the parent company, the parent should not issue any directives to the captive and the board meetings should be held away from the country of the parent. If a separate management company is used it is important that this is based in the location of the captive.

31.28 If an outside manager is to be used, vis-à-vis the "in-house" method, companies offering the relevant services fall into four basic categories:

(1) independent management companies;
(2) underwriting agents including existing insurance companies;
(3) management companies owned by brokers;
(4) others, including lawyers, banks and accountants.

31.29 If a company is to be used it is important to ensure that it has the expertise to fulfil the captive's requirements. The experience of the management company in the captive field will be of vital importance. It must also have a good reputation, particularly within the insurance market. It must be cost effective and it is essential that remuneration is decided on a fee basis rather than on premium turnover.

31.30 Managers also need adequate omissions and errors insurance, as they have considerable responsibility. This is particularly necessary if the manager is involved in the reinsurance aspect where errors can free the reinsurers from certain liabilities.

31.31 The management company needs to be monitored continually to make sure that it is really fulfilling the service required, at the right price.

Management agreements

31.32 For the reasons explained above, it is essential that the management agreement is properly constituted. It needs to contain certain principal agreements laying down the responsibility of the managers and the areas where they operate within agreed board decisions. A typical agreement would include:

(1) the official appointment of the manager;
(2) acceptance that the appointed managers can:
  (a) accept writs on behalf of the captive;
  (b) employ sub-agents to collect premiums;
  (c) pay or settle claims;
  (d) control underwriting;
  (e) issue policies, certificates, endorsements, etc.; and
  (f) maintain bank accounts.

31.33 With the authority of the board the agreement should also lay down that managers should:

(1) render statements of premiums and claims within an agreed timetable;
(2) render final accounts on an annual basis;
(3) submit the appropriate documents to the authorities in compliance with the requirements laid down.

31.34 It should also lay down the position of the following areas:

(1) the overall investment policy of the captive;
(2) the policy on funding for claims and the methods used for reserving on outstanding cases;
(3) the position on errors and omissions of the managers; the position should the managers or the captive or owner become insolvent, are taken over by another company, or decide to close down the captive operation.

31.35 The management agreement also needs to stipulate the basis for the remuneration of the managers and their reinsurance authority.

31.36 The investment policy of the captive will normally be directed by the parent but the management company should give advice on cash flow, etc. The responsibility of the managers will also increase if the captive intends to accept business from outside. It is also essential that the extent of the managers' authority and discretion be carefully outlined.

ESTABLISHING A CAPTIVE

Legal

31.37 Legal advice on company formation in the country in which it is to be based will be required. There will inevitably be detailed local procedures for insurance company formation and detailed requirements so far as directors, company name, authorised capital, names of officers, etc. are concerned. After the captive has been established, local legislative controls will

also need to be monitored in case there are any specific changes. Further complications may include potential overseas legal problems.

Documentation

31.38 As an established insurance company the captive will have to provide evidence of the cover it is supplying in the form of the relevant policies it offers. The production of these documents will also help in tax deductibility. As emphasised throughout this chapter, it is essential that the captive should be a properly constituted insurance company. To this end, the documents provided must be real and properly issued.

Accounting

31.39 Insurance accounting is a particularly specialised area and accounting procedures for the captive would have to be considered in detail.

Taxation

31.40 In some areas tax matters are deal with separately, depending on whether investment income or underwriting income is involved. Thus tax minimisation has to be considered very carefully. Again, there will be marked differences here between insurance and conventional company accounting, particularly with regard to premium taxes.

Underwriting

31.41 The captive must decide on and establish an underwriting policy.

Claims handling

31.42 An efficient method of handling claims needs to be established at the outset. Complications can arise in claims handling due to currency problems, conflicts of interest and reinsurance problems.

Investment

31.43 Two points dealing with investment strategy need to be noted. The first concerns investment of funds for profit. The captive is likely to make a profit for the parent only if funds are properly invested, so an appropriate sensible strategy needs to be designed. Secondly, the captive needs to be able to meet large claims that may arise. This means that care needs to be taken to ensure that adequate funds remain accessible.

Administration

31.44 The likely functions of the administrative team will include:

(1) issuing policy documents;
(2) settling claims, or instructing assessors of claims-handling agents;
(3) keeping financial statements and accounts;
(4) issuing statutory returns required;

(5) setting up and organising ordinary and other meetings that will be necessary in the management of the company.

Loss control

31.45 Good loss control capability will require separate personnel, or the use of consultants and engineers. The strategy for loss control should also provide one of the foundations of the captive's activities and thus should be reflected in other areas, such as reinsurance tactics.

Captive set-up and operating costs

31.46 A typical list of set-up costs for a captive would be:

(1) paid-up capitalisation;
(2) registration fee;
(3) stamp duty on capitalisation;
(4) application fee;
(5) advertising of captive in compliance with regulations;
(6) initial legal fees;
(7) annual legal fees;
(8) directors' fees;
(9) management fee;
(10) annual audit fee.

Consolidation of the captive board

31.47 It is advisable that the majority of the captive board live locally. A typical situation is a board constituted of two directors from the parent company and three local directors. At least one of the latter should have insurance experience and in some areas legislation will demand this. Decisions are generally ratified by:

(1) approval of resident board members; or
(2) through proxies appointed by the parent company; or
(3) resolutions circulated to the directors of the company.

ALTERNATIVE SOLUTIONS

31.48 Whether or not there is an alternative option to creating a captive depends very much on what the company is attempting to achieve. If the chief purpose is to retain more risk within the company's own operation, then a number of alternatives do exist. The alternative self-insurance options include operating a budget, funding mutual captives and participative insurance.

31.49 These options will require careful consideration of the costs associated with this type of management and dealing with claims.

Operating budgets

31.50 With an operating budget, losses will only be paid for as they are incurred, as no premium is available. Although this method does not require capital injection, nor is it

regulated, it is only really practical when risks are of low value and high frequency. Any other type of risk is likely to affect performance of the company.

31.51 Losses can be paid for out of operating budgets. This has a number of advantages. The first is the psychological impact of losses appearing in the budget. This can result in a significant attempt to improve the company's loss control. There is also a financial benefit as losses are paid for as they arise rather than in advance. Profit performance can also be improved as losses that do not occur are not paid for. This can have the added benefit of improving cash flow. If the loss level is satisfactorily low, then losses will remain deductible.

31.52 Problems with this system arise when the losses are of an infrequent and sizeable nature. If the loss is such that it would seriously harm the overall or local management profit performance in that year it could well act negatively in all aspects.

Self-insurance and funding

31.53 Funding involves setting up a separate fund in the company with the objective of earning sufficient investment return to fund losses. The disadvantage is that capital will be tied up and withdrawn from use on other ventures, and in addition, the tax benefits of most offshore captives will not be available.

31.54 If losses are larger than those referred to above, then a similar system can develop funds to pay for losses that would occur beyond a financial year. The same benefits would accrue, but without the disadvantages. The disadvantage is that in most countries it is not possible to develop funds in such a beneficial way because the funds would be reduced at the end of each year by corporation tax payments. Where it is possible to fund without this tax disadvantage, as in the Netherlands, it is a very viable alternative; otherwise the captive solution is preferable.

Mutual captives

31.55 A mutual captive is jointly owned by several organisations with complementary risk profiles. Examples include the Wren, the P&I clubs (Britannia, Steamship, etc.), Griffin (for medium-sized brokers) and SIMIA (for solicitors). This may be appropriate where the methods described above are impractical, e.g. due to the pattern of losses, where it is uneconomic to set up a captive or where risk exposure is high. Another advantage of mutuals is their potential for lower costs because of the ability to spread the burden between a number of owners. This should also encourage lower reinsurance costs owing to the greater spread of risk and premium volume.

31.56 The main disadvantage of a mutual is that different loss profiles of its members may result in those members with better loss records subsidising the others.

Participative insurance

31.57 The methods of participative insurance which provide alternatives to the captive fall into five categories:

(1) deductibles;
(2) co-insurance;
(3) retrospective rating plans;
(4) external risk funding;
(5) credit.

31.58 *Deductibles.* Deductibles or excesses are available from direct insurers in exchange for a discount from the base premium rate. The decision as to whether this provides a viable alternative depends on the discount that the insurance company is willing to give. Another factor that needs to be considered is the accumulation of deductibles when multiple losses arise from one event.

31.59 *Co-insurance.* This is very similar to the deductibles technique except that, instead of the company retaining a specific amount for each loss, it retains a specific percentage for each loss that occurs. This option is seldom chosen as a conscious decision to participate in an insurance programme.

31.60 *Retrospective rating plans.* These are used primarily in the field of liability insurance where the company wishes to have the payable premium related directly to the claims that occur. The basic principle involves, at the beginning of the year, the company paying a deposit premium, plus the basic expenses of the insurance company, and then, perhaps a year later, paying an additional premium once the claims in that year are known or have been estimated. The objectives are to ensure that, as far as possible, premium payment claims are delayed and the appropriate cash flow benefits realised, and that the premium is proportional to the claims figures. Retrospective rating plans can consequently be very complicated in structure. The ultimate objective is to pay the premium only when a claim is settled.

31.61 *External risk funding.* This has developed as a useful alternative to captives in recent years. It requires no capitalisation: the funds are held offshore by an insurance company which provides the mechanism to hold these funds, usually under a separate account, against which it holds premiums, buys reinsurance in relation to the risk retention level agreed and pays claims. The fund accrues interest on the money held pending claims. The surplus at the end of the year can be held as reserves and added to the following year's fund. This provides a real alternative to the captive where the company is interested only in reducing its insurance costs or is unable to establish its own insurance company.

31.62 *Credit.* This is the final alternative—to obtain from bankers a promise of standby credit in the event of a major loss. This method has, however, come into disrepute as many companies used it as a form of last-resort protection. It may sometimes be appropriate.

CHAPTER THIRTY-TWO

CLAIMS AND THE THIRD PARTY RIGHTS AGAINST INSURERS ACT

Roger ter Haar

32.1 The acid test of any insurance policy occurs when the insured needs to make a claim under the policy for the insurer to fulfil its contractual obligations by indemnifying the insured for losses that have occurred. The process of making a claim will necessarily involve consideration of the legal rights and duties between the insurer and insured.

32.2 It is generally believed that the insured is under an implied duty to give the insurer notice of any insured losses which occur. Such a term is probably to be implied so as to give business efficacy to the contract, although an alternative analysis may be that this is an aspect of the insured's duty of good faith.[1] There is no doubt that when notifying a claim, the insured owes a duty of good faith to the insurer, discharged by acting honestly—see *The Star Sea*;[2] *The Mercandian Continent*.[3]

32.3 In most cases the policy is likely to contain an express stipulation that losses be notified to the insurer. The policy will usually stipulate the parties' rights and duties regarding losses, in particular as to making the claim. No claim can be made at all unless the conditions precedent and subsequent to the policy have been duly performed. It is suggested that the insured's duties are:

(1) to give notice of a loss;
(2) to supply particulars of the loss (often within a certain period of time as a condition precedent in the policy);
(3) to supply proof of loss (often within a specified period) as verification of the particulars of claim, for example by documentary proof (which is likely to be a condition precedent to liability) and
(4) to make no fraudulent claim as the claim put forward by the insured must be honestly made in accordance with the insured's duty of good faith. Frequently the policy will be expressed to be void if a fraudulent claim is made—such a provision only reflects the general law that all right to claim is forfeit if the claim made is fraudulently exaggerated or if fraudulent devices are used in support of the claim.[4]

32.4 Provisions as to notification of loss will vary as to their comprehensiveness, for example, some contracts may specify the manner, timing and recipient for notification, other contracts may merely provide that all losses must be notified to the insurer. In the former case

1. This is a matter of some analytical complexity beyond the scope of this book. A useful discussion is in the loose-leaf edition of *Clarke on the Law of Insurance Contracts* at paragraph 26–2A.

2. *Manifest Shipping Co Ltd* v *Uni-Polaris Insurance Co Ltd (The Star Sea)* [2003] 1 AC 469; [2001] UKHL 1.

3. *K/S Merc-Scandia XXXXII* v *Certain Lloyd's Underwriters, Ocean Insurance Co Ltd and others (The Mercandian Continent)* [2001] 1 Lloyd's Rep 802; [2001] EWCA Civ 1575.

4. See *The Star Sea* (note 2, *supra*); *Agapitos* v *Agnew* [2003] QB 556; [2002] EWCA Civ 247; *Direct Line Insurance* v *Khan* [2002] Lloyd's Rep IR 364; *Axa General Insurance Ltd* v *Gottlieb* [2005] 1 Lloyd's Rep 369; [2005] EWCA Civ 112.

the standard to which the insured must comply is clear from the contract, but in the latter case, which is very common, general legal principles need to be considered to establish the relevant standard. The remedies available to the insurer if the insured fails to meet that standard will also need to be considered—the crucial issue will be whether a term as to notification is a condition precedent or not. This is discussed below.

32.5 As a matter of good practice, insurers should clarify whose knowledge in the insured will be sufficient to constitute knowledge of the insured for the purposes of notification, for example any director, managers, company secretarial department etc. should be specified and insurers may require details of the insured's chain of reporting. This will avoid disputes in the event that information is withheld, either intentionally or inadvertently, by someone in the insured's organisation.

INSURERS' DUTY OF GOOD FAITH

32.6 Perhaps unsurprisingly, the bulk of authorities are concerned with the insured's duty of good faith rather than the extent of the insurer's duty. However, in a recent Court of Appeal decision one member of the court emphasised that the Insurer is also under a duty of good faith in settling claims—see *Drake Insurance plc* v *Provident Insurance plc*,[5] in which Pill LJ held that failure by an insurer to make any inquiry of the insured before avoiding a policy was a breach by the insurers of their duty of good faith. In his view, that duty required the insurers at least to tell the insured what they had in mind and to give the insured the opportunity to bring material matters to the insurers' attention. An earlier decision of Colman J similarly suggested that underwriters' right to avoid a policy might be fettered by principles of conscionability—*The Grecia Express*.[6] This is a developing area of the law.[7]

32.7 An interesting recent case decided by the High Court of Australia has held that an aspect of the insurer's duty of good faith is to reach a decision on a claim promptly: *CGU Insurance Ltd* v *AMP Financial Planning Pty Ltd*.[8]

FORM OF NOTIFICATION

32.8 In the absence of express contractual provision, notification need not be in writing: oral notification is sufficient (*Re Solvency Mutual Guarantee Society: Hawthorn's Case*;[9] *Gill* v *Yorkshire*[10]) although what constitutes oral notice will be a question of fact. The House of Lords held in *A/S Rendal* v *Arcos Limited*[11] that the notice required is "such . . . as will enable the party to whom it is given to take steps to meet the claim by preparing and obtaining appropriate evidence for that purpose".

5. [2004] QB 601; [2003] EWCA Civ 1834.
6. *Strive Shipping Corporation* v *Hellenic Mutual War Risks Association (The Grecia Express)* [2002] 2 Lloyd's Rep 88; [2002] EWHC 203 (Comm).
7. *Brotherton* v *Asegurado Colseguros* [2003] Lloyd's Rep IR 762; [2003] EWHC 1741 (Comm) and *Wise (Underwriting Agency) Ltd* v *Grupo Nacional Provincial SA* [2004] 2 Lloyd's Rep 483; [2004] EWCA Civ 962 suggest that the views of the Court of Appeal in *Drake* v *Provident* should be treated with some caution.
8. [2007] HCA 36 paras 179 and 180.
9. (1862) 31 LJ Ch 625.
10. (1913) 24 WLR 389.
11. (1937) 58 Ll L Rep 287; (1937) 43 Com Cas 1.

SOURCE OF NOTIFICATION

32.9 In the absence of express contractual provision, it is immaterial from whom the insurer receives notification, therefore it need not be given by the insured itself; it can come from an agent or another person acting on behalf of the insured. Even if an express term requires notification by the Insured, the courts have been willing to hold that where adequate notification of loss is received by the insurer from another, totally unconnected, source, the insurer is regarded as having waived the requirement that it be notified by the insured.[12] Notification must, however, be received by the insurer and must include all the relevant facts.

RECIPIENT OF NOTIFICATION

32.10 Notification may be validly made to an agent authorised to receive notice on behalf of the insurer (in the absence of express contractual provision). The insured is entitled to assume (in the absence of any contrary information) that the agent through whom the insurance was negotiated by the insurer has authority to receive notification of a loss. In *Marsden* v *City and County Assurance Company*[13] this principle was held to apply even though (unknown to the insured) the agent had ceased to act as the insurer's agent between the conclusion of the contract and the loss.

32.11 Notification will be insufficient if the contract stipulates the insurer's head office and notification is given to a local agent of the insurer (*Patton* v *Employer's Liability Assurance Corp*[14]). Similarly, notification to the agent who acted for the insured in negotiating the contract is insufficient (*Roche* v *Roberts*[15]). In this last instance, if notification is provided to the insured's agent with a request that it be passed to the insurer (or its agent) notification will be effective once the latter party has received the information, but not before.

TIME FOR NOTIFICATION

32.12 If the contract is silent, notification must be made within a reasonable time, which will depend on the circumstances of the claim in question and the insured's reasons for any delay in reporting.

32.13 Usually the insurance contract will require notification to be made "immediately", "forthwith" or "as soon as possible" so that the insurer suffers no prejudice in investigation. The courts have frequently adopted a pragmatic approach when considering the circumstances of each case in deciding whether the requirement has been complied with. The court said in an old licensing case, *R* v *Berkshire Justices*, that:[16]

> "it is impossible to lay down any hard and fast rule as to what is the meaning of the word 'immediately' in all cases. The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time' and imply prompt, vigorous

12. See *Barratt Bros Taxis* v *Davies* [1966] 2 Lloyd's Rep 1.
13. (1865) LR 1 CP 232.
14. (1887) 20 LR Ir 93.
15. (1921) 2 Ll L Rep 59.
16. (1878) LR 4 QBD 469.

action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case."

32.14 In *Verelst's Administratrix* v *Motor Union Insurance Company Limited*,[17] notification was required to be made "as soon as possible" and the court held that, in considering whether the requirement had been satisfied, all existing circumstances must be taken into account. In that case the existing circumstances included the insured's personal representative's available means of knowledge of the existence of the insurance policy and the identity of the insurance company. Notice was given by the adminstratrix as soon as she discovered the existence of the policy, and was held to satisfy the condition.[18]

32.15 By way of further example, *Warne* v *London Guarantee & Accident Company*[19] involved notification made two months after an accident. The court held this was "immediate" if given as soon as serious consequences were apprehended.

32.16 In *Sharpe* v *Williamson and Mitre Insurance association and Bourne, Swann & West*,[20] a case involving a motor insurance policy, the court held that the insurers were entitled to repudiate liability for a claim relating to a road traffic accident which occurred on 7 February but was not notified by the insured until 17 March, for breach of a policy condition requiring notification "immediately after the accident, or as soon as reasonably practicable after the accident".

32.17 It is therefore vital when dealing with insurance claims that an insured takes great care to avoid any unnecessary delay in notifying its insurers of an insured loss, particularly when failure to do so could result in avoidance of the claim.

32.18 In *Fraser* v *B N Furman (Productions) Ltd*,[21] Diplock LJ said that " 'as soon as practicable' is as between assured and insurer having regard to the commercial purpose of the contract". Commenting upon that view, Gloster J in *HLB Kidsons* v *Lloyds Underwriters*[22] said, in the context of a claim notification clause in a professional indemnity policy, "expert evidence showed that the requirement to provide notice as soon as practicable is acknowledged in the market place to admit of a reasonable latitude . . . in practice it would be rare, I suspect, for notice of circumstances given within the policy period to be rejected on the grounds that it had not complied with the requirement to provide notice as soon as possible".

32.19 The courts take the view that where "immediate" notice of any loss is required or the occurrence of any event likely to give rise to a loss, no excuse for delay will be accepted. However, this view is subject to some mitigation, although not all relevant to policies concerned with construction projects:

(1) the possible application to the insurer's conduct of considerations of good faith and conscionability (see above);
(2) the Insurance Conduct of Business Rules (ICOB)[23] discussed below;

17. [1925] 2 KB 137.
18. A similar common sense conclusion was reached by the court in a case concerning a motor liability policy—*Baltic Insurance Association of London* v *Cambrian Coaching & Goods Transport Ltd* (1926) 25 Ll L Rep 195.
19. (1900) 20 CLT 227.
20. [1990] 2 CL 243.
21. [1967] 3 All ER 57 at p. 60.
22. [2008] Lloyd's Rep IR 237 at para 60. See also *Kajina UK Engineering Ltd* v *The Underwriter Insurance Co Ltd* [2008] Lloyd's Rep IR 391.
23. hhtp://fsahandbook.info/FSA/handbook.jsp?doc=handbook/ICOB.

(3) the Employers Liability (Compulsory Insurance) Act 1969 and the Road Traffic Act 1988 both contain provisions prohibiting an insurer from relying upon notice provisions of any kind where the insured in subject to a claim for which insurance is compulsory;
(4) any ambiguous notice provisions will be construed *contra proferentem*. For example, in the Irish case of *Capemel* v *Roger H Lister*,[24] the relevant notice provisions stated:

> "The Assured shall give the Underwriters immediate notice in writing, with full particulars of the happening of any occurrence which could give rise to a claim under the insurance, or the receipt by the Assured of any claim or of the institution of any proceedings against the Assured."

32.20 Costello J held that the clause concerned two different matters: first, immediate notice of the happening of any event which may give rise to a claim against the employer, and, secondly, immediate notice of any claim against the employer. As these two requirements were alternative conditions rather than cumulative, compliance with either was sufficient for the purposes of the policy and as immediate notice had been given when the circumstances of the claim became known (although not the circumstances which had occurred six months earlier) the judge found the insurers liable to pay. It is by no means obvious that an English court would follow this decision, but it is a clear example of the use of principles of construction to favour an insured.

ARE ANY REQUIREMENTS AS TO NOTIFICATION CONDITIONS PRECEDENT OR NOT?

32.21 It is important to consider whether the requirement for notification of losses within a specified time is a condition precedent or merely a collateral agreement, as the consequences of a breach of the requirement for timely notification will vary in either case. This is a question of construction, depending on the parties' intentions. The court held in *Hollister* v *Accident Association of New Zealand*[25] that no express words are necessary to create a condition precedent. However, given that making the terms of a contract of insurance conditions precedent to insurers' liability is inherently likely to favour insurers, a court is generally unlikely to construe a term of a policy as being a condition precedent in the absence of clear evidence that that was the intent of the contracting parties.[26] Even where a clause is expressly stated to be a condition precedent, the courts will not regard that as being conclusive, although obviously it is of great significance in construing a policy.[27]

24. [1989] IR 319.
25. (1986) 5 NZLR (SC) 49.
26. See for example *London Guarantee Co* v *Fearnley* (1880) 5 App Cas 911 at p. 915; *Black King Shipping Corp and Wayang (Panama) SA* v *Massie, The Litsion Pride* [1985] 1 Lloyd's Rep 437 at p. 469.
27. See *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415, where the majority of the Court of Appeal held that a stipulation requiring a proper wages book to be kept by the insured was not a condition precedent, notwithstanding an express declaration that the due observance and fulfillment of the conditions of the policy was to be a condition precedent to any liability of insurers. See also in this context *London Guarantee Co* v *Fearnley* (note 26, *supra*) and *Ellinger & Co* v *Mutual Life Insurance Co of New York* [1905] 1 KB 31.

(1) Condition precedent

32.22 Breach of a condition precedent will result in the insured's inability to enforce the contract, even if non-compliance was due to circumstances beyond the insured's control. Under the common law, the insurer is not required to prove that it has been prejudiced as a result of the failure to comply with the condition (*Pioneer Concrete (UK) Limited* v *National Employers Mutual General Accident Insurance Association Limited*[28]), although the full rigour of this rule has been mitigated to a considerable extent by the Financial Services Ombudsman scheme and by ICOB.

(2) Where the clause is not a condition precedent

32.23 What is the position if an insured is in breach of a claims notification clause which is held not to be a condition precedent to insurers' liability?

32.24 In *Alfred McAlpine Insurance plc* v *BAI (Run-Off) Ltd*[29] the Court of Appeal considered that such a clause might be an "innominate term", breach of which, if sufficiently serious, might entitle the insurer to repudiate any liability under the policy. That proposition was considered by the Court of Appeal in *Friends Provident Life & Pensions Ltd* v *Sirius International Insurance*[30] in which it was held that breach of such a term when it is not a condition precedent will generally only entitle the insurer to such damages as may be shown to flow from breach of the clause.

CONSTRUCTION OF NOTIFICATION CLAUSES

32.25 Because notification clauses are inserted into policies in order to protect insurers' interests and give no benefit to the insured, and because at common law insurers will be entitled to avoid liability for a claim by relying upon breach of a typical clause making notification a condition precedent to liability, even if the insurer suffers no prejudice, the courts will construe such a clause strictly against insurers.

32.26 Two cases in the Court of Appeal illustrate the application of this principle in practice. Notification clauses in liability policies often require notification of events "likely to give rise to a claim". The Court of Appeal has held that this requires the insured to notify only if circumstances arose that there was at least a 50 per cent chance that such a claim would eventuate.[31] Other examples of the courts taking a restrictive approach to claims notification points taken by insurers are *J Rochschild Assurance plc* v *Collyear*[32] and *Hamptons Residential Ltd* v *Field*.[33]

28. [1985] 1 Lloyd's Rep 274, followed for example in *Pilkington United Kingdom Ltd* v *CGU Insurance plc* [2004] BLR 97; [2004] EWCA Civ 23.
29. [2000] 1 Lloyd's Rep 437.
30. [2006] Lloyd's Rep IR 45; [2005] EWCA Civ 601.
31. *Layher Ltd* v *Lowe* [2000] Lloyd's Rep IR 510; *Jacobs* v *Coster (t/a Newington Commercials Service Station)* [2000] Lloyd's Rep IR 506.
32. [1999] Lloyd's Rep IR 6.
33. [1998] 2 Lloyd's Rep 248.

PROCEDURES FOLLOWING NOTIFICATION OF THE CLAIM

32.27 On receipt of notification of a claim, the insurer will:

(1) allocate a claim reference;
(2) check the policy is in force;
(3) prepare particulars of the policy cover, including any endorsements, restrictions or extensions, and
(4) send out a claim form and arrange for a claims inspector to investigate.

32.28 Certain accidents may require notification to the Health and Safety Executive under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995.

32.29 The claim form is designed to elicit all the preliminary information required by the insurer, but where the circumstances of the claim are complex a detailed report may be necessary. Any witnesses involved will have to make a statement. The insurer will obtain engineers' reports, consultants' reports, sketches and photographs.

SETTLEMENT OF THIRD PARTY CLAIMS UNDER LIABILITY POLICIES

32.30 The terms of liability policies will most likely prevent the insured from making any admission of liability, either express or implied, without the insurer's consent as the insurer has the right to take over and conduct, in the name of the insured, all matters relating to the claim.

32.31 Problems can arise where the insured and insurer have differing views as to whether a claim should be settled or contested. Generally an insurer's decision to settle is absolute if the proposed settlement is within the policy limits.

32.32 In the event that the third party prefers to settle within the limits of the policy, but the insurer refuses to negotiate or to settle for the figure which the third party is willing to accept, there is a risk that the third party may subsequently obtain judgment against the insured for a sum in excess of the policy limits. Whilst this may seem to work harshly against the insured, the position is probably that the insured has no right to claim damages against the insurer in respect of its liability in excess of policy limits even if the insurer acts in breach of its duty of good faith—see *Banque Financière de la Cité* v *Westgate Insurance Co*,[34] where the Court of Appeal held that breach of an insurer's duty of good faith was not actionable in damages.[35] Similarly, it seems that the insurer owes no duty in tort to take reasonable care in handling claims.[36] On the other hand, professionals such as solicitors engaged by insurers to defend claims owe a duty of care to the insured as well as to the insurer: see *Groom* v *Crocker*.[37]

32.33 However, if the insurer's refusal to compromise was a decision taken in bad faith or for reasons extraneous to the merits of the claim made by the third party, the insured is

34. [1990] QB 665.
35. The Court of Appeal decision was affirmed by the House of Lords on different grounds: [1991] 2 AC 249 but was supported *obiter* by Lord Templeman at p. 280 and by Lord Jauncey of Tullichettle at p. 281.
36. See *Westgate* (note 34, *supra*) and *HIH Casualty and General Insurance Ltd* v *Chase Manhattan Bank* [2001] 2 Lloyd's Rep 483; [2001] EWCA Civ 1250. The House of Lords were not called upon in *Chase Manhattan* to consider this issue: [2003] 2 Lloyd's Rep 61; [2003] UKHL 6.
37. [1939] 1 KB 194.

probably free to settle the claim without prejudicing its right to indemnity under the policy: *Gan Insurance Company Ltd* v *Tai Ping Insurance Company Ltd (Nos 2 and 3)*.[38]

32.34 Professional indemnity policies usually contain a "QC clause" whereby the reasonableness of an insurer's decision to contest a claim can be referred to a third party for consideration—such clauses are discussed further in Chapter 10 above.

MITIGATION OF LOSS

32.35 An entitlement to make a claim having arisen, the insured should take reasonable steps to mitigate the loss that has occurred,[39] for example, by protecting the remaining property, mitigating its loss where possible, minimising further damage and using the most efficient and inexpensive methods of recovery and repair.

OBLIGATION TO PAY/REINSTATEMENT

32.36 Insurers are under a duty to pay once they have accepted liability, or the insured has succeeded in establishing liability as a result of a court judgment or an arbitration award.

32.37 Generally the insurer's obligation is to pay the claim in money and the insured is entitled to deal with the insurance proceeds as it pleases, but in certain cases the insurer may be required or entitled, either by contract or statute, to reinstate. Frequently policies provide an option for the insurer to make good the loss by reinstatement. Quite apart from any right of reinstatement in the policy, in cases of damage by fire an insurance company may elect to reinstate if it suspects fraud or arson.[40] Nevertheless, the contract remains an agreement to pay a sum of money until the insurers have elected to reinstate, at which time the contract becomes one to reinstate the property or a contract to rebuild.

32.38 The insured cannot insist that the insurer reinstates if the insurer has not so elected, nor can the insured prevent the insurer reinstating if it has so elected. Unless the policy contains a time for election, the election should be made within a reasonable time.

32.39 Insurance companies must reinstate property damaged by fire if so requested by any person interested in or entitled to the property.[41]

32.40 If the subsequent rebuilding amounts to an improvement, the insurer cannot, without prior agreement, compel the insured to contribute.

LOSS PAYEE

32.41 Payment is made to the insured, unless there has been an assignment of the policy, proceeds of the policy have been validly assigned or an alternative loss payee is named in the policy. Payment can also be made to an authorised agent of the insured. In the case of a joint policy, payment can be made to any one of the joint assureds and their receipt will be a

38. [2001] 1 Lloyd's Rep IR 667.

39. See *Yorkshire Water Services Ltd* v *Sun Alliance & London Insurance plc* [1997] 2 Lloyd's Rep 21 and *State of Netherlands* v *Youell* [1998] 1 Lloyd's Rep 236.

40. See the Fire Prevention (Metropolis) Act 1774. This provision does not apply to underwriters at Lloyd's: see *Portavon Cinema Co Ltd* v *Price and Century Insurance Co Ltd* [1939] 4 All ER 601.

41. Fire Prevention (Metropolis) Act 1774.

sufficient discharge. Where several persons have effected a composite policy for their respective rights and interests, policy monies should be paid to each according to the amount of the loss.[42] If one assured receives more than his due proportion, he holds the balance on trust for the benefit of the other parties to the insurance.

SUBROGATION

32.42 Following payment by the insurer (or prior, if express provision is made in the contract) the insurer will be able to exercise its right of subrogation (see Chapter 2 for a fuller discussion of this topic). The insurer will be entitled to the proceeds of any subrogated claim where there has been a full indemnity; however, if a surplus arises this becomes the insured's entitlement, which constitutes an exception to the rule that the insured should not be more than fully indemnified for its loss.[43] Such circumstances may arise due to currency fluctuations.[44]

32.43 Where the subrogated claim produces only a partial indemnity, the courts consider the risks assumed by insurer and insured respectively. Thus if the amount recovered from a third party is less than the total loss suffered by the insured, the insurer will be held to have promised indemnity only in respect of losses greater than the excess under the policy, so that recoveries will be applied to reduce the insurer's outlay ahead of the insured's retained excess: see *Lord Napier & Ettrick* v *Hunter*.[45] Conversely, if the insured has suffered losses in excess of policy limits, the recoveries will be applied to reduce the insured's uninsured losses in excess of policy cover ahead of the amount insured under the policy. This approach has been described by Rix J as the "top-down" approach.[46]

REDUCTION IN RECOVERY OR INDEMNITY

32.44 The amount received by the insured under a policy of insurance relating to a construction project may be less than the amount of the claim for a number of reasons, including the following:

(1) Contribution clause

32.45 Policies often contain clauses stipulating that if at the time of the loss or damage to the insured property there is any other insurance covering any part of the property, the insurer's liability will be limited to the rateable proportion of such loss or damage.[47] Alternatively, the policy may be an "excess policy" whereby the insurer will pay only any balance of loss

42. See *General Accident Fire and Life Assurance Corp Ltd* v *Midland Bank Ltd* [1940] 2 KB 388.
43. The law on this subject was helpfully reviewed by Lightman J in *Lonhro Exports Ltd* v *Export Credit Guarantee Dept* [1999] Ch 158.
44. See, for example *Yorkshire Insurance Co Ltd* v *Nisbet Shipping Co Ltd* [1962] 2 QB 330.
45. [1993] AC 713.
46. *Kuwait Airways Corp* v *Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664 at p. 695. The point was not considered on appeal in that case: [1997] 2 Lloyd's Rep 686 and [1999] 1 Lloyd's Rep 806.
47. E.g. *Gale* v *Motor Union Insurance Co Ltd* [1928] 1 KB 359; *National Employers' Mutual General Insurance Association Ltd* v *Haydon* [1979] 2 Lloyd's Rep 235.

remaining after full recovery from the other policies. This is discussed further in Chapter 2 above.

(2) Excess

32.46 An excess clause will provide that the insured will bear liability up to a specified sum. This principle is sometimes referred to as the insured "being his own insurer" for a specified proportion of the loss, although this description is not strictly correct.

(3) Average

32.47 Policies often contain an "average" clause, the effect of which is that if the sum insured is less than the sum truly at risk the amount payable by insurers falls to be reduced rateably. Average is not required by law, except in the case of marine insurance.[48]

INSURANCE CONDUCT OF BUSINESS RULES

32.48 The common law rules set out above now have to be considered in the context of more recent consumer protection provisions. It should be noted that under the Insurance Conduct of Business Rules ("ICOB"), brought into effect on the 14 January 2005, and having statutory effect under section 138 of the Financial Services and Markets Act 2000, rule 7.3.6 provides:

> "An insurer must not:
> (1) unreasonably reject a claim made by a customer;
> (2) except where there is evidence of fraud, refuse to meet a claim made by a retail customer on the grounds:
> (a) of non-disclosure of a fact material to the risk that the retail customer could not reasonably be expected to have disclosed;
> (b) of misrepresentation of a fact material to the risk, unless the misrepresentation is negligent;
> (c) in the case of a general insurance contract, of breach of warranty or condition, unless the circumstances of the claim are connected with the breach . . . "

32.49 A retail customer is a natural person acting for a purpose outside his or her trade, business or profession. Whilst rule 7.3.6(2) may be of limited application in practice, in respect of insurance of construction projects, rule 7.3.6(1) applies to commercial customers as well as retail customers.

32.50 The effect of rule 7.3.6(1) is that an insurer may well be limited in its ability to refuse a claim upon the basis of late notification of a claim. As pointed out above, at common law it is unnecessary for an insurer wishing to reject a claim upon the basis of a failure to comply with a condition precedent relating to claims notification to prove that any prejudice has been caused by that failure. Refusal of such a claim in such circumstances would now undoubtedly be unreasonable, with the consequence that an eligible complainant would be entitled to recover compensation up to £100,000 through the Financial Services Ombudsman (this is discussed further in the next chapter).

48. Section 81 of the Marine Insurance Act 1906.

32.51 Chapter 7 of ICOB also deals more generally with the handling of claims—they must be handled promptly and fairly (rule 7.3.1). The insurer must give a customer reasonable guidance to help him make a claim (rule 7.3.5). Where the insured is a retail customer, rule 7.5 sets out performance standards for handling claims, which include provisions designed to ensure that the retail customer is fully informed at all stages as to what is happening in respect of his claim, and why. Breach of these handling requirements can also lead either to a monetary award by the Ombudsman or a direction from the Ombudsman that the insurer shall take certain steps which the Ombudsman considers just and appropriate. As pointed out in Chapter 7 above, brokers and other insurance intermediaries have obligations under ICOB in respect of their part in the handling of claims.

THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT 1930

32.52 Where an insured becomes bankrupt or goes into liquidation either before or after incurring an insured liability to a third party, section 1(1) of the Third Parties (Rights Against Insurers) Act 1930 provides that the insured's right to indemnity be transferred to the third party. Such third party may therefore claim directly against the insurer, which is required to satisfy that liability to the extent that it is within the terms of the insurance contract.

32.53 The third party's rights against the insurer are co-extensive with the insured's rights, so if the insurer's liability to the insured is less than the insured's liability to the third party, the latter will need to prove the balance in the insured's insolvency proceedings. If the contract requires payment to the third party prior to any claim against the insurer, the latter will not be liable under the Act, because the insolvency of the insured prevents any transfer of rights to the third party (see *The Fanti*[49]).

32.54 Similarly, the third party will have no rights against the insurer if the insured has repudiated the policy, and further, the insurer may rely upon any of the defences to a claim which would have been available against the insured. This poses particular problems where the insured has failed to give notice in accordance with the notification requirements of a policy[50]—it is a frequent occurrence that a company sliding inexorably into insolvency has a management which regards notification under insurance policies as a low priority in its battle for survival.

32.55 To exercise its rights under the Act the third party must first establish that the insured has incurred a liability to it under the Act. It has been held that such liability must be established by court judgment, arbitration award or agreement (*Post Office* v *Norwich Union Fire Insurance Society Ltd*[51]). The House of Lords in *Bradley* v *Eagle Star Insurance Co Ltd*[52] endorsed this principle in holding that the insured's right of indemnity under a policy against liability to third parties does not arise until the existence and amount of its liability to the third party has been established by action, arbitration or agreement.

32.56 However, although the obligation of liability insurers to pay insurance monies only arises when the liability of their insured is established, under section 1(b) of the Act the rights of the insured against the insurer are transferred to the third party on the making of a winding-

49. *Firma C-Trade SA* v *Newcastle Protection and Indemnity Association* [1991] 2 AC 1.

50. See, for example, *Hassett* v *Legal & General Assurance Society Ltd* (1939) 63 Ll L Rep 278; *The Vainqueur José* [1979] 1 Lloyd's Rep 577; *Horne* v *Prudential Assurance Co Ltd* 1997 SLT 75.

51. [1967] 1 Lloyd's Rep 216.

52. [1989] AC 957.

up order etc. and therefore a statutory transfer of the insured's rights can take place before the obligation of the insurer to pay arises.[53]

32.57 An important consequence of this is that the courts now recognise the entitlement of a potential transferee under the Act to obtain information as to the insurance available to an insured whose rights have been transferred pursuant to the Act.[54]

32.58 Thus the benefits conferred by the Act are far from perfect, but nevertheless substantial.

53. *Centre Re International Ltd* v *Curzon Insurance Ltd* [2004] Lloyd's Rep IR 623; [2004] EWHC 200 (Ch); *Re OT Computers Ltd* [2004] Ch 317; [2004] EWCA Civ 653.

54. *Re OT Computers* (note 53, *supra*). Note by contrast that the Court generally cannot order disclosure of an insurance policy in the case of a solvent defendant: *West London Pipeline and Storage Ltd* v *Total UK (Ltd)* [2008] EWHC 1296 (Comm). The position, of course, would be different in a case where the defendant was an insurer being sued under a policy of insurance.

CHAPTER THIRTY-THREE

DISPUTE RESOLUTION

Richard Anderson and Roger ter Haar

33.1 It is a sad fact that insurers and insured will not always agree as to whether a claim is payable and, if payable, the amount that is payable. When such a dispute arises, there are many methods of dispute resolution. We consider litigation, arbitration, adjudication, alternative dispute resolution, and the role of the Financial Ombudsman Service[1] in this chapter.

LITIGATION

Forum

33.2 The natural forum for disputes, whether as to the application of an insurance policy or otherwise, might be thought to be the courts.

33.3 Smaller claims may be determined in the Small Claims Court or the County Court, and it is undoubtedly the case that for low-value claims these can be sensible places in which to resolve disputes, although other solutions such as reference to the Financial Ombudsman Service may be a better option.

CPR Rules

33.4 For any significant dispute, the court in which it will be determined will be the High Court. Proceedings in the High Court are governed by the Civil Procedure Rules (usually abbreviated to CPR) which lay down a comprehensive code. It is not intended to attempt to describe here in more than a superficial way the CPR and the procedures in the High Court. The purpose of what follows is primarily intended to flag up some material distinctions between litigation and arbitration.

33.5 Major disputes arising out of construction projects and relating to insurance matters if commenced in court in London are likely to be started in or transferred to the Commercial Court or the Technology and Construction Court. If commenced outside London they are likely to be started in the Mercantile Court or the regional parts of the Technology and Construction Court. The Commercial and Mercantile Court judges have generally retained the confidence of litigants, although it may be that some judges have greater directly applicable experience of construction-related insurance disputes than others. There was a period in recent times when the reputation of some of the judges of the Technology and Construction Court led to litigants avoiding that court if possible; however, reforms and new judicial appointments have restored confidence.

1. For a survey of trends in the use of different forms of dispute resolution, see Robert Gaitskell QC's article *Current Trends in Dispute Resolution* (2005) 71 Arbitration 288.

Pre-Action Protocol

33.6 Since the introduction of the CPR, one method used by the courts to encourage settlement of disputes has been to require parties to comply with a Pre-Action Protocol designed to encourage parties to reach a better understanding of each other's case before proceedings are commenced.[2] There is at least a school of thought that this has tended to increase the costs of litigation, particularly in cases where settlement is unlikely.

33.7 Assuming that the Protocol procedure does not lead to settlement or that it is impractical to comply with the Protocol procedure (for example because a statutory limitation period is about to expire, or because the point at issue is a matter of general principle upon which the construction or insurance industry wants a definitive ruling) proceedings are commenced by issue and service of a Claim Form, the form of which will vary depending upon whether it is anticipated that there will be factual disputes requiring witness evidence to be adduced. If no factual disputes are likely to arise, then proceedings can usually proceed without the necessity for procedural steps which generally apply in witness actions, such as disclosure. An example of such a case is where the only point in dispute is a debate as to the application of an insurance policy to an agreed set of facts.

Procedures

33.8 In a case where there are factual disputes the claimants and defendants (whether one or more defendants) will be required to set out their respective cases in the pleadings which may be of greater or lesser complexity.[3]

33.9 Often when the defendant considers its position, it will be regarded as desirable to bring other parties into the proceedings so as to reach a result binding on more than one party—thus, for example, a developer might bring a claim for professional negligence against an engineer or architect, which professional indemnity insurers contend is not covered by their policy. In such circumstances the convenient course is often for the developer's claim against the professional adviser to be heard at the same time as the professional adviser's claim against insurers. The CPR provide a machinery for this to be done ("Part 20 proceedings").

33.10 The courts maintain a close watch over the proceedings through Case Management Conferences and Pre-Trial Reviews at which substantial amounts of information are provided to the relevant court to enable the judge to make management decisions.[4]

33.11 Following close of pleadings, it is normal for the court to order all parties to disclose to one another all relevant documents in their possession, subject to considerations of whether such disclosure is reasonable and proportionate. Particular problems arise out of electronic documents, such as emails, where production of documentation by one party and consideration of that documentation by the other party can be vastly time consuming and therefore both

2. These can be found in section C of Civil Procedure ("the White Book"). The most relevant of the Pre-Action Protocols for present purposes is likely to be that at s. C3 which relates to Construction and Engineering Disputes.

3. On 1 February 2008 procedural changes in the Commercial Court were introduced for a trial period in order to attempt to reduce the length and complexity of pleadings. A check list is available from the Commercial Court Listing Office.

4. The practice in relation to "CMCs" and "PTRs" varies from court to court. It is necessary to consult each Court's Practice Direction to discover what is involved.

disruptive and expensive.[5] Accordingly the courts now require careful consideration to be given to the implications in each case of "e-disclosure".[6]

33.12 One point to note is that generally the court cannot order disclosure of insurance policies simply to find out whether a defendant or other party sued has assets to satisfy a judgment.[7] Obviously if the policy is directly relevant to issues in the case, for example where an insurer is sued under a policy or where an insurance broker is sued for failure to obtain insurance on appropriate terms, it will be disclosable. Once the insured has become insolvent, a court will order disclosure to a party likely to be able to take advantage of the Third Parties (Rights Against Insurers) Act 1930.[8]

33.13 Directions will be given as necessary for service by each party of statements of any witnesses whom a party wishes to call. Consideration will also be given as to whether expert evidence is necessary—if so, there are possibilities of a single joint expert in a particular discipline appointed by the parties, or a court appointed expert, but in the majority of cases each party is likely to retain an independent expert witness to advise them and, if necessary, to give evidence. It is usual for experts of like disciplines to meet to seek to reach such agreement as may be possible and, in so far as agreement is not possible, to identify areas of disagreement. Experts are expected to produce agreed statements of matters upon which they are agreed and upon which they cannot agree. Thereafter, experts will produce reports to be served on the other party or parties which will form the basis of their evidence at trial.

33.14 The courts place very substantial emphasis upon the need for expert witnesses to maintain their independence and to recognise that their prime responsibility is to the court not to the party retaining the expert.[9]

33.15 Absent earlier settlement, the dispute will generally be determined at a hearing at which witnesses are called, experts give their evidence and advocates (or the parties themselves if unrepresented) make written and oral submissions.

33.16 In court proceedings a reasoned judgment is always given either orally or in writing. A dissatisfied litigant does not have an automatic right of appeal: permission to appeal will be refused if the appeal has no realistic prospect of success. Permission to appeal will rarely be granted on a question of fact where the decision is based on the judge's evaluation of oral evidence as to the primary facts or if an appeal would involve an examination of the fine detail of a judge's factual investigation. However, permission to appeal is more likely to be given where what is being challenged is the judge's inference from the primary facts or where the judge has not received any particular benefit from having seen the witness and it is properly arguable that materially different inferences should be drawn from the evidence. Where the question being appealed is one for the discretion of the judge, the Court of Appeal will not interfere unless it is satisfied that the judge was wrong. The burden on the appellant is a heavy one and therefore permission to appeal will rarely be appropriate.

5. For discussions as to the problems posed by e-disclosure (which affect arbitration and litigation with similar intensity, see Tse and Peter, *Confronting the Matrix: Do the IBA Rules Require Amendment to Deal with the Challenges Posed by Electronically Stored Information?* in (2008) 74 Arbitation 28 and Smit and Robinson, *E-Disclosure in International Arbitration* 24 Arbitration International 105.

6. See s. 2A of the CPR Practice Direction to CPR Part 31.

7. *West London Pipeline and Storage Ltd* v *Total UK Ltd* [2008] EWHC 1296 (Comm).

8. *Re OT Computers Ltd* [2004] Ch 317; [2004] EWCA Civ 653.

9. See CPR r. 35.3, the Practice Direction to Part 35 of the CPR and *National Justice Compania Naviera SA* v *Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68.

ARBITRATION

Arbitration clauses

33.17 Arbitration is a process whereby a dispute between two (sometimes more) parties is resolved privately by a third party or by a tribunal of their choice. The arbitrator's decision will be binding between the parties and enforceable by the courts. It is necessary for the parties to agree in writing to arbitration.[10] This may be an agreement to refer existing or future disputes to arbitration.

33.18 The objectives usually include securing efficient, economic and speedy resolution of disputes[11] and the available procedures should be tested against a number of specific criteria including confidentiality and privacy, efficacy, procedure, speed and expense, quality of judgment and enforceability of any award.

33.19 Most commercial insurance policies contain an arbitration clause. A typical clause might provide as follows:

> "If any difference shall arise as to the amount to be paid under this Policy (liability being otherwise admitted) such difference shall be referred to an arbitrator by the parties in accordance with the statutory provisions in that behalf for the time being in force. Where any difference is by this condition to be referred to arbitration the making of an award shall be a condition precedent to any right of action against the Insurers."

33.20 A clause in those terms (which is frequently encountered) requires disputes as to quantum to be referred to arbitration whilst leaving disputes as to whether insurers are liable at all to be resolved by the courts. Other clauses, particularly in respect of projects insured with London-based underwriters, will require all disputes to be resolved through arbitration.

Arbitration Act 1996

33.21 Arbitration in England and Wales is governed by the Arbitration Act 1996. The underlying philosophy of the 1996 Act is to support and promote arbitration in particular by respecting parties' agreement to arbitrate, by upholding arbitral autonomy and by clearly defining the limited role of the courts in supervising arbitral proceedings and enforcing awards.

33.22 Section 9 of the 1996 Act gives effect to agreements to arbitrate. It achieves this objective by imposing upon the court an obligation to stay legal proceedings in respect of any matter which under the agreement is to be referred to arbitration. Although the Act contains a provision in section 86 giving the court a discretion to stay the proceedings in respect of a domestic arbitration agreement, that section has not been brought into force. Accordingly, as the law now stands, the court has no discretion but to stay proceedings unless the party seeking the stay has taken a step in the substantive court proceedings, or the arbitration agreement is null and void, inoperative, or incapable of being performed.

Stays

33.23 If, despite the existence of an agreement to arbitrate, court proceedings are started, the party against whom the proceedings have been brought can acquiesce in the dispute being

10. Section 5(1) of the Arbitration Act 1996.

11. Section 1(1)(a) of the Arbitration Act 1996 states that "the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense".

heard in court by simply deciding not to apply to the court for a stay under section 9. If the party against whom court proceedings have been brought takes a substantive step in the action (for example by serving a defence), then the right to apply for a stay is lost.

33.24 It is, of course, possible for parties to refer disputes to arbitration by ad hoc agreement even in the absence of an arbitration agreement.

33.25 Many arbitrations will appear to the observer to be indistinguishable from High Court proceedings, often involving pleadings, exchanges of witness statements and experts' reports, disclosure, and oral proceedings. In those circumstances, there are advantages and disadvantages in referring disputes to arbitration.

Confidentiality and privacy

33.26 Arbitration is conducted in private, attended only by the parties, their witnesses, experts and advisers. The award will be published only to the parties. Consequently, privacy and confidentiality are thought to be major advantages of arbitration. The Departmental Advisory Committee on Arbitration Law which reported on what became the 1996 Act, recorded that "there is . . . no doubt whatever that users of commercial arbitration in England place much importance on privacy and confidentiality as essential features . . . ".[12]

33.27 However, those interested can usually find out fairly easily the result of an arbitration, particularly where the subject matter is of general commercial interest. The chances of keeping the result of an arbitration secret are particularly slim where there may be numerous Lloyd's underwriters or companies subscribing to a primary policy and where there are excess layers or reinsurances to which numerous Lloyd's underwriters or companies also subscribe.[13]

33.28 There need be no public notification of any arbitration reference. Although it is accepted that arbitration proceedings are private, the jurisprudential basis for this is now uncertain: in the Court of Appeal decision of *Ali Shipping Corporation* v *Shipping Trogir*,[14] Potter LJ characterised the duty of confidentiality as an implied term of an arbitration agreement. This view has since been doubted by the Privy Council[15] but has since been reaffirmed by the Court of Appeal.[16] The jurisprudential debate may be of practical significance as the extent of privacy and confidentiality recognised by the English courts may turn upon the true basis for what is undoubtedly a general principle.

33.29 In *Emmott* v *Michael Wilson & Partners Ltd*[17] the Court of Appeal affirmed that parties to an arbitration are under an obligation of confidentiality to use documents disclosed

12. Paragraphs 10–17 at pp. 8–9 cited by the Court of Appeal in *Department of Economics, Policy and Development of the City of Moscow* v *Bankers Trust Co* [2005] QB 207; [2004] EWCA Civ 314, para 2.

13. See the comments of Thomas LJ in *Emmott* v *Michael Wilson & Partners Ltd* [2008] 1 Lloyd's Rep Plus 32; [2008] EWCA Civ 184 at para 131: "If an insurer which uses a standard form of its own devising with an arbitration clause, arbitrates issues arising on that standard form and has a body of arbitral decisions on that standard form, can a broker who knows of them use them to advise a new client contemplating using that insurer's standard form? In a market where most of the standard forms are considered in arbitrations and participants in the market will as a matter of practice know what they are, should potential entrants to the market have these made available to them so as to provide for greater transparency and competition in a market? If there are a large number of disputes in a market arising out of a common factual substratum, to what extent should materials in the arbitration and awards remain private?".

14. [1999] 1 WLR 314.

15. *Associated Electric and Gas Insurance Services Ltd* v *European Reinsurance Co of Zurich* [2003] 1 WLR 1041; [2003] UKPC 11 at paras 19 and 20.

16. *Emmott* v *Michael Wilson & Partners Ltd* (note 13, *supra*) at para 81.

17. See note 13, *supra*.

or generated in an arbitration only for the purposes of the arbitration even if the documents did not contain anything which was in itself confidential. Such documents can not be disclosed to a third party without the consent of the other party or pursuant to an order of the court. The court does not have a general and unlimited jurisdiction to consider whether an exception to confidentiality exists and applies. The exceptions to the basic rule of confidentiality include compulsion by law, (perhaps) public interest, protection of a party's legal rights and consent.

33.30 Litigation is generally perceived as being more exposed to publicity, primarily because statements of case are (subject to certain restrictions) public documents[18] and hearings in open court frequently attract press interest. Yet, only a small proportion of all cases ever come to trial and media interest in those that do come to trial is generally limited.

33.31 In a tough commercial world, the confidentiality principle serves at least two interests: first, the parties may wish to resolve their dispute without fear of any publicity, no matter how slim the chance of that publicity: if nothing else, the news of a defeat could involve loss of face by the losing party in a small world, particularly if issues of credibility or honesty are involved. Secondly, highly confidential information (such as trade secrets or industrial and commercial know-how) may be involved and arbitration is better suited than litigation to maintain confidentiality.

33.32 Arbitration therefore is likely not to have such an adverse effect on commercial reputation as does litigation. However, it is to be noted that the confidentiality is far from absolute: apart from the difficulties in practice of keeping matters secret, the confidentiality recognised by the law may be lost in some cases if an award in one arbitration can legitimately be deployed in a subsequent arbitration,[19] or an appeal or procedural challenge is brought in respect of an arbitration or the resulting award.[20]

Procedure

33.33 Arbitration has its basis in agreement between the parties to submit to resolution of disputes by a sole arbitrator or an arbitration panel. Accordingly, arbitration affords comparative flexibility, so that, for example, the parties can stipulate the procedure in detail in advance in the arbitration clause. Alternatively, various arbitration institutions, particularly international arbitration institutions such as the International Chamber of Commerce, have their own procedural rules which are often incorporated by reference. Reflecting these principles, section 1(1)(b) of the 1996 Act sets out as one of the principles of arbitration that "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest".

33.34 If the arbitration agreement does not itself deal with procedure, such matters can be dealt with at an initial meeting with the arbitrator. The tribunal has a wide discretion as to the procedures to be adopted, provided that the rules of natural justice are applied to the particular circumstances of the dispute. As already stated, very often the procedures adopted will be

18. See CPR r. 5.4C and *R (Corner House Research)* v *Director of the Serious Fraud Office* [2008] EWHC 246 (Admin).

19. See *AEGIS Ltd* v *European Re* (note 15, *supra*) reaching a different conclusion as to use of an award from the Court of Appeal in different factual circumstances in *Ali Shipping Corp* v *Shipyard Trogir* (note 14, *supra*).

20. Such appeals or challenges, referred to procedurally as "arbitration claims" start "in private" under CPR r. 62.10(3)(b) but are later liable to become public—see *City of Moscow* v *Bankers Trust Co* (note 12, *supra*).

based broadly on High Court procedure. It should be possible to tailor the arbitration to suit the size and complexity of the dispute in question. Furthermore, where both liability and quantum are in dispute it will often be sensible to deal with the issues, thereby saving issues relating to quantum to be debated only if liability is established. In this situation, quantum is often agreed. But the very lack of formal procedure, at least in complicated disputes, can result in further disputes and delay. Where a three-person tribunal has been appointed, it is advisable for the chairman or umpire to have full power to decide interlocutory points, with a reference to the full tribunal only on important points of principle.

33.35 A further advantage of arbitration is that some disputes can be resolved quickly and relatively cheaply with the minimum of evidence: for example, in smaller disputes it may be possible to adopt a "documents only" procedure whereby both parties make written submissions and only adduce written evidence. Alternatives include documents plus written representations, or documents plus site visit, or examination of property in dispute. However, generally the positive cooperation of both parties is required for such procedures to be adopted, because most arbitrators are reluctant to deny a party who has asked for the opportunity to make oral representations.

Joinder

33.36 Nevertheless, arbitration has significant disadvantages compared to litigation where more than one contract is involved. Arbitration has its basis in agreement, and therefore only involves those parties specifically agreeing to the arbitration clause and any contract to which it refers; therefore only parties to a particular contract will be involved. For example, in many cases where an insurer and insured are required to submit their disputes to arbitration, the insured will have an alternative case against its broker. However, generally the broker (or its Errors and Omissions underwriters) will not wish to join in the arbitration, being content to wait and see what happens between insured and insurer. In these circumstances the insured will need to arbitrate first against its insurers and, if unsuccessful, commence proceedings against its broker.

33.37 Unfortunately, the consensual nature of arbitration does not admit of third party proceedings similar to those available in the High Court,[21] with the consequence that the same question may be tried more than once with the attendant risk of different results. For the same arbitral tribunal to decide all the disputes, agreement between the parties is required, and in practice at least one party is likely to find it in its commercial interests to refuse to cooperate.

33.38 Although it is always possible given sufficient foresight to draft the arbitration agreement so that all parties involved in any complex series of contracts can arbitrate at the same time if necessary, this type of back-to-back agreement usually requires the consent of many parties, which will often (perhaps normally) not be forthcoming. Even where such agreement has been forthcoming, it may not be sufficient where legal questions falling outside the scope of the contracts to which they relate are involved. By contrast, litigation procedures enable joinder of all appropriate claims and parties in one single hearing or such other mode of resolution as will best promote a just result in the circumstances.

21. Where, under the CPR, they are referred to as "Part 20" proceedings—see para 33.9 above.

Several proceedings

33.39 Under arbitration, an innocent party may well find itself issuing two or more separate sets of proceedings in two or more different tribunals (because there may be different or incompatible arbitration clauses or no arbitration provision in one relevant contract). Two or more separate sets of procedures will clearly involve the tribunals in a repetition of evidence, increase in costs and, at the worst, inconsistent verdicts could result.

33.40 One solution to these problems is to appoint the same arbitrator or tribunal for all the separate proceedings. This will mitigate the problems (if it can be achieved, which is not always the case) but does not remove them. The arbitrator or tribunal may see issues differently when fresh arguments or evidence not presented in the first proceedings are presented in the later proceedings. Moreover, in "string" arbitrations there are substantial limitations on an arbitrator's ability in later proceedings to make a costs award in respect of the costs of earlier proceedings: see *The Takamine*,[22] although it is sometimes possible for an arbitrator to award damages in a later arbitration to reflect costs incurred in previous proceedings.[23]

Expedition

33.41 Arbitration proceedings can move very rapidly, but for this to be achieved the parties' cooperation is essential. Usually the arbitrator will make herself or himself available to deal with interlocutory matters without undue delay. However, appointing a suitable arbitrator may not be easy as the more popular ones may be booked for a substantial period in advance.

Choice of arbitrator

33.42 The parties to an arbitration agreement are free to agree on a choice of arbitrator, whereas in litigation the parties have no choice and will submit to the jurisdiction of the judge allocated to their case.

33.43 Arbitration is particularly suitable where disputes are technically complex and legally comparatively straightforward, particularly where the arbitrator appointed by the parties has professional qualifications and technical experience. On the other hand, the High Court Judges now assigned to the Technology and Construction Court have particular experience of construction matters and most of the High Court judges now assigned to the Commercial and Mercantile Courts have particular experience of insurance disputes.

33.44 The personalities and skills of the judges of particular courts mean that from time to time the right to choose your tribunal in arbitration can be of greater importance to parties than at other times. Thus, until a few years ago, many practitioners gave firm advice to their clients to avoid the Technology and Construction Court in London, advising that arbitration was a safer option because of the opportunity for the parties to choose their tribunal. That particular court no longer raises such anxieties in the hearts of practitioners in respect of substantial cases likely to be assigned to a High Court judge. Now the concerns may be greater in arbitration if agreement cannot be reached as to the identity of the arbitrator—in which event the decision as to who is to determine the dispute between the parties will be made by

22. *Wilhelmsen* v *Canadian Transport Co* [1980] 2 Lloyd's Rep 204 at pp. 208–209.

23. See *Hammond* v *Bussey* (1880) 20 QBD 79; *Maritime Transport Overseas GmbH* v *Unitramp Salen Rederierna AB (The Antaios)* [1981] 2 Lloyd's Rep 284 at pp. 298 and 299; *The Vates T* [2004] EWHC 1752 (Comm).

one of the appointing bodies such as the International Chamber of Commerce, the London Court of International Arbitration or the Institute of Chartered Arbitrators (there are a significant number of other appointing bodies).

33.45 Although the prospect for parties to have disputes resolved by those engaged in and knowledgeable about the technicalities of the subject under dispute is attractive to commercial organisations, this probably stems from their view that a tribunal of market men will vindicate them. In practice, however, both parties to the dispute are likely to hold this view and they cannot both be right. It is important to retain flexibility in the appointment of arbitrators because if the arbitration clause is too specific, for example requiring the arbitrators to be officers in insurance companies, a major risk may involve a large section of the market and may therefore make it difficult or impossible to appoint independent insurance officers.

33.46 If such persons are not disqualified by interest in the dispute they may well have an ongoing commercial relationship with some of the parties which they will not want to jeopardise. The parties will therefore need to seek other experienced persons, who are likely to be retired, so no longer existing officers and therefore not within the requirements.

33.47 In addition, many disputes involve difficult points of law which professionals, particularly in the light of conflicting submissions by lawyers, will find difficult to resolve. For many disputes, therefore, the most ideal tribunal is one consisting of two professionals and a third lawyer arbitrator who can guide the tribunal on points of law and decide, if necessary, between the conflicting views of the market professionals.

33.48 Many disputes involve determination of whether an experienced contractor could have foreseen at the time of tender the exact nature of the work required. Under most engineering contracts, the contractor is deemed to be experienced and therefore able to understand the information made available to him at the time of tendering, which information may include borehole and test results. If unfavourable conditions are encountered that could not reasonably have been foreseen, such as unfavourable subsoil, generally the contractor is entitled to the extra cost incurred in dealing with them. An experienced civil engineer appointed as arbitrator can clearly decide such a question, but a judge may not be able to do so.

33.49 Similar issues can arise under insurance policies—for example a Contractors All Risks Policy might exclude indemnity in respect of "loss or damage due to foreseeable subsidence". An experienced civil engineer would clearly be well suited to decide whether subsidence was foreseeable, but it is not clear whether a judge could do so, without the assistance of expert evidence.

33.50 Although in litigation a joint expert could be appointed to explain the technical issues, it is generally the case that experts will be appointed by both parties and the judge will have to decide between the conflicting opinions and might in some cases be influenced more by capable presentation than by technical merit.

Complex legalities

33.51 A disadvantage of arbitration is that where complex legal questions are involved an arbitrator without legal qualifications may occasionally get wholly out of his or her depth. Arbitrators are frequently accountants, architects, engineers or underwriters without legal qualifications. Accordingly, an unsatisfactorily tentative approach to legal problems may be adopted, resulting in a position midway between the parties' legal submissions, thereby resulting in a compromise which could easily have been struck by the parties at the beginning of the dispute and rendering the course of preparation for the arbitration wasteful.

Expense

33.52 Arbitrations are inherently more expensive than litigation. An arbitrator charges for the services provided, whilst a judge is a civil servant. There will also be considerable incidental expenses to be met by the parties, particularly the costs of the arbitration venue.

33.53 To a large extent, the cost of the arbitration will depend upon how the parties choose to run it. If the arbitration is conducted as though it were litigation, the preparation will cost much the same amount. However, economies can be achieved, first by reducing dependence upon expert witnesses as a technical arbitrator does not need the technical experts required by a judge. Secondly, the time taken at the hearing is accordingly less as the laborious explanation of technicalities involved in court proceedings is avoided.

33.54 The parties in an arbitration involving a construction dispute will frequently be represented by technically qualified advocates, or possibly by counsel who is both legally qualified and experienced in construction skills. In this case both the arbitrator and the advocates talk in the same technical language.

33.55 A third way of achieving economy is through cooperation between the parties, particularly in a quick and uncomplicated reference. Parties are well advised to choose an appropriate procedure and to be represented appropriately in relation to the size and legal and/or technical complexity of the dispute.

33.56 Whatever may be other relative advantages or disadvantages of arbitration and litigation, it is doubtful whether, once lawyers are involved, either form of dispute resolution has a significant cost advantage over the other.

Challenges to, appeals from and enforceability of awards

33.57 In no area does hindsight affect the perceptions of parties quite so much as the matters to which we now turn.

33.58 We have discussed in this chapter the limitations upon the right to appeal from a judgment in the High Court. The right to challenge an arbitration is very much more limited.

33.59 Section 67 of the 1996 Act gives an aggrieved party a right to challenge an award on the grounds that the arbitrator or tribunal lacked substantive jurisdiction. Section 68 gives an aggrieved party a right to challenge an award on the ground of serious irregularity, which includes a failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties, a failure by the tribunal to deal with all the issues that were put to it, uncertainty or ambiguity as to the effect of the award, that the award was obtained by fraud amongst other grounds. If a party takes part or continues to take part in the proceedings without objection, then the right to challenge is likely to be lost.[24] If the real grumble of the aggrieved party is that the arbitral tribunal is against it on the merits (whether as to fact or law), the right to challenge under section 68 is of limited assistance since the usual remedy is to remit the matter to the arbitral tribunal for reconsideration.[25]

33.60 The decision of the House of Lords in *Lesotho Highlands Development Authority* v *Impregilo SpA*[26] is important as underlining and supporting the autonomy of arbitrators. The

24. See s. 73.
25. See s. 68(3).
26. [2006] 1 AC 221; [2005] UKHL 43.

House of Lords decided that an error of law is not a procedural irregularity engaging a right to challenge an arbitral award without the necessity to obtain the leave of the court. If an attack is to be made upon an award upon the basis of an error of law, it must be made through the appeal provisions of section 69.

33.61 In his speech[27] Lord Steyn pointed out that the requirement of "substantial irregularity" imposes a high threshold and it must be established that the irregularity caused or would cause substantial injustice to the applicant. He said that these requirements were "designed to eliminate technical and unmeritorious challenges". The irregularity must fall within the closed list of categories in section 68(2) and nowhere in that subsection is there any hint that a failure to arrive at the "correct" decision is a ground for challenge under section 68.

33.62 Section 69 provides a route to appeal to the court on a question of law arising out of an award made in the proceedings. An appeal shall not be brought except with the agreement of all other parties to the proceedings or with the leave of the court.[28]

33.63 Leave to appeal is to be given only if the court is satisfied:[29]

(1) that the determination of the question will substantially affect the rights of one or more of the parties;
(2) that the question is one which the tribunal was asked to determine;
(3) that on the basis of the finding of facts in the award—
  (a) the decision of the tribunal on the question is obviously wrong, or
  (b) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
(4) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

33.64 These conditions are substantial restrictions upon the right to appeal. The starting point to bear in mind is that the courts strive to uphold arbitration awards.[30] Section 69 gives no right to appeal against findings of fact in an award, even when based upon no evidence.[31]

33.65 Thus it will only be in unusual cases that construction contract disputes settled by arbitration will be overturned.[32] To many commercial organisations, the finality of arbitral decisions by comparison with the uncertainty, delay and expense attendant upon appeals against court decisions is a substantial attraction.

33.66 By section 66 of the 1996 Act an award may, by the leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

27. [2006] 1 AC 235, paras 28 and 29.
28. See s. 69(2).
29. Section 69(3).
30. *Per* Bingham J in *Zermalt Holdings* v *Nu-Life* [1985] 2 EGLR 14.
31. *Per* Ramsey J in *London Underground Ltd* v *CityLink Telecommunications Ltd* [2007] BLR 391; [2007] EWHC 1749 (TCC), following the decision of Cooke J in *Demco Investments & Commercial SA* v *SE Banken Forsakring Holding Aktiebolag* [2005] 2 Lloyd's Rep 650; [2005] EWHC 1398 (Comm) in preference to the decision of Jackson J in *Surefire Systems Ltd* v *Guardian ECL Ltd* [2005] BLR 534; [2005] EWHC 1860 (TCC).
32. See in this context, Dame Elizabeth Gloster, *Attempts to Thwart the Arbitration Process: Current Examples of How the Court Makes Parties Stick to their Agreement to Arbitrate* 73 Arbitration 407.

Summary

33.67 Having compared the relative merits of litigation and arbitration, certain issues and questions seem to tip the balance in favour of arbitration, although every case will depend on its facts:

(1) Do connected arbitration provisions "interlock" properly?—i.e. do they allow for the joinder at a single reference of related disputes under linked agreements?
(2) Which procedural rules will apply? How much procedural detail should be specified in advance? Should procedure be left entirely to the beginning of the reference?
(3) How many arbitrators are needed? A single arbitrator or a panel of three (or more) including a chairman?
(4) How should the arbitrators be chosen? Should the tribunal consist of technical experts or lawyers or a mixture of both? Should any of them be named in advance? If so, how will this affect the timing of the arbitration?
(5) What limitations should be imposed on the conduct of a reference? What sort of evidence should be permissible? What scope should there be for written submissions and when should these be put forward? What scope should be allowed for evidence and disclosure of documents? Should legal representation be permitted? Should the arbitrator(s) be obliged to give reasons for the award?[33]
(6) Should the arbitrator's award be a condition precedent to the enforcement of any contractual right, therefore barring the claimant's right to litigation?
(7) If a contract has an international element, how should this be allowed to affect the arbitration? Where should the arbitration take place? What should be the proper law of the contract (this should tie in with the proper law of the arbitration agreement and the reference itself)? How will the enforceability of the award be affected by the international element of the contract?

ADJUDICATION

33.68 Since 1998, the resolution of disputes arising out of construction contracts has in most cases been affected by the introduction of statutory provisions in respect of adjudication.

33.69 With effect from 1 May 1998 (1 June 1998 in Northern Ireland) the Housing Grants Construction and Regeneration Act 1996 has introduced provisions relating to payment and adjudication that parties to construction contracts will have to bear in mind.

Background

33.70 Obtaining payment under construction contracts has always been a major consideration. With the shift from payment in a lump sum on completion to periodical payments, some method had to be devised of striking an appropriate balance between Contractors who wished to be paid for work done to date and Employers who wished to be satisfied that the work they

33. Under s. 52(4) of the 1996 Act an award must contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons. Section 70(4) gives the court power to order the tribunal to state its reasons if the award does not contain the tribunal's reasons, or does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider an application or appeal.

were paying for had been satisfactorily completed. The method adopted by most standard forms, supported by the common law, was to require the Employer's Representative (the Architect or Engineer) to "wear two hats" and to act impartially in issuing a Certificate of Interim Payment which fairly reflected that balance.

33.71 That method worked well for many years but, mainly for economic reasons, Employers began to make much greater use of contra accounts (matters contractually outwith the remit of Architects or Engineers) with the result that the chain of payment (memorably described as the "lifeblood" of the construction industry) became constricted.

33.72 An attempt in the case of *Dawnays* v *Minter*[34] to appeal to the common law for a solution resulted, for a very brief time, in the creation by a Court of Appeal led by Lord Denning MR of what became known as "Dawnays' Rule" under which Interim Certificates were to be regarded as being as good as Bills of Exchange under the axiom "Pay Now And Argue Later". That attempt was later struck down by the House of Lords in the case of *Gilbert Ash (Northern) Limited* v *Modern Engineering (Bristol) Limited*[35] as being a step too far for the common law, but in doing so the House of Lords accepted that the common law rights of diminution and set off could competently be varied by contract.

33.73 Contractors (and, in particular, Sub-Contractors) were not slow to take the hint. At the same time, a level of dissatisfaction had arisen in relation to the practice of Architects/Engineers "wearing two hats". A preference arose for any disputes being resolved by an independent person (who became known as an Adjudicator). The doyens of the English Bar got to work and in due course many of the standard forms were amended to provide for the independent adjudication of disputes—originally for set-off disputes only but latterly for any kind of dispute.

33.74 That was the position when Sir Michael Latham was appointed by the Government of the day and the UK Construction Industry to carry out a review of the industry and it was a position which he endorsed. Largely as a result of a change of Government, the Latham Report (which contained a large number of interlocking recommendations) met the same fate as the Reports which had preceded it. However, the prevailing adversarial climate was sufficiently serious for Contractors (and in particular Sub-Contractors) to lobby the new Government and, as a result, provisions relating to payment and adjudication were lifted from the Latham Report and inserted into a passing Bill dealing with Housing Grants and the like, which ultimately received the Royal Assent and became the Housing Grants, Construction and Regeneration Act 1996.

The approach of the Act

33.75 Bearing in mind that it represented something of an interference with the hallowed principle of "freedom to contract", the Act adopted a cautious approach. Essentially territorial in its UK application,[36] the Act adopts a restrictive definition of the type of contract to which it applies and also permits the parties to such contracts to adopt whatever provisions they like provided that those provisions comply with the minimum standards set down in the Act for payment and adjudication.

34. [1971] 1 WLR 1205.
35. [1974] AC 689.
36. Irrespective of the law applicable to the contract—see ss. 104(6) and (7).

Application

33.76 So far as the application of the Act is concerned, section 104(1) defines a "construction contract" as meaning an agreement with a person for any of the following: (a) the carrying out of construction operations; (b) arranging for the carrying out of construction operations by others, whether under subcontract to him or otherwise; and (c) providing his own labour, or the labour of others, for the carrying out of construction operations.

33.77 By section 104(2) references to a "construction contract" include agreements (a) to do architectural, design or surveying work; or (b) to provide advice on building, engineering, interior or external decoration or on the laying-out of landscape.

33.78 "Construction Operations" are defined in the complex provisions of section 105 of the Act. It expressly includes (section 105(1)) matters such as construction, alteration, repair, maintenance, demolition and other works to buildings or structures forming or to form part of the land and installation in any building or structure certain specified systems. It expressly excludes (section 105(2)) a wide variety of works including certain operations relating to water, power or nuclear plant and drilling for oil or natural gas (the lobby of these industries persuaded the government that their payment and dispute resolution procedures were adequate).

33.79 Contracts of employment are expressly excluded by section 104(3); as are construction contracts with residential occupiers (section 106(1)(a)) and any other description of construction contract excluded by order of the Secretary of State. Each of the areas (England and Wales; Scotland and Northern Ireland) then has been the subject of its own Exclusion Order which excluded from the application of the Act such matters as Private Finance Initiatives; Finance Agreements; and Development Agreements. The Act makes express provision for these Orders to be varied in the future (probably now by Regulatory Order). In short, it will be necessary for parties to a contract for construction to have regard to the detailed provisions of the Act to ascertain whether or not Part II of that Act applies to their contract, but in general most forms of general construction contract (except those with residential occupiers[37]) are likely to be caught including contracts with professional advisors.

33.80 Amongst the contracts not caught are insurance contracts relating to construction projects.

33.81 For those "construction contracts" covered by the terms of the Act, provision is made for an entitlement to stage payments (section 109) and for an "adequate mechanism" for dates of payment in a section (section 110) which have proved troublesome in practice. The most significant provision in practice, however, has been section 111 which provides for service of a Notice in order to validly withhold payment. There is also a right to suspend performance for non-payment (section 112) and certain forms of conditional payment provision are prohibited (section 113). As earlier noted, the Parties are free to agree in their contract the amounts of the payments and the intervals at which or the circumstances in which they become due but in the absence of such agreement section 109(3) applies (by implying into the Parties' contract) the relevant payment provisions of a Scheme for Construction Contracts (one of which has been provided by secondary legislation for each of the UK areas[38]).

37. Although there is, of course, no impediment to residential occupiers entering into binding and enforceable agreements to submit disputes to adjudication—see for example *Domsalla* v *Dyason* [2007] BLR 348; [2007] EWHC 1174 (TCC).

38. That for England and Wales is SI 1998/649.

Referrals

33.82 Where agreement cannot be reached as to payment, then a party to a "construction contract" has the right (note that it is not an obligation) to refer a dispute arising under the contract for adjudication. It should be noted that there is no restriction upon the type of dispute which can be referred for adjudication, but in practice virtually every dispute has involved payment in some form or other. The minimum requirements which, in respect of adjudication, must be contained within the Parties' contract is contained within section 108 are as follows. The contract *shall*:

(1) enable a Party to give notice at any time of his intention to refer a dispute to adjudication;
(2) provide a timetable with the object of securing the appointment of the Adjudicator and the referral of the dispute to him within seven days of such notice;
(3) require the Adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
(4) allow the Adjudicator to extend the period of 28 days by up to 14 days, with the consent of the Party by whom the dispute was referred;
(5) impose a duty on the Adjudicator to act impartially;
(6) enable the Adjudicator to take the initiative in ascertaining the facts and the law;
(7) provide that the Decision of the Adjudicator is binding until the dispute is finally determined by agreement, arbitration (if the contract so provides or the Parties agree) or litigation;
(8) Provide that the Adjudicator has immunity.

Scheme

33.83 Provided these minimum requirements are included, the parties are free to agree such other adjudication or other terms as they like. In the absence of such agreement section 108(5) applies (by implying into the Parties' contract) the relevant payment provisions of a Scheme for Construction Contracts (one of which has been provided by secondary legislation for each of the UK areas[39]). Any Decision by an Adjudicator (right or wrong) is, of course, in the absence of a successful jurisdictional challenge, by law temporarily binding upon the parties until the dispute is finally determined by agreement, arbitration (if the parties so agree or the contract so provides) or by litigation.

33.84 There appears to have been no difficulty in practice in securing the appointment of an Adjudicator (although, surprisingly, the government imposed no requirement in relation to the qualifications of Adjudicators) and many fears appear to have been unfounded. The bare bones of the legislation were clothed by Dyson J in the vital first case of *Macob Civil Engineering Ltd* v *Morrison Construction Limited*.[40] Since then, there has been a steady stream of cases in which the courts have resolutely supported the concept of adjudication and also clothed it with the necessity to provide natural justice also.[41]

39. The Scheme for England and Wales is SI 1998/649.
40. [1999] BLR 93.
41. The leading case on the possibility of challenges for bias or breach of natural justice is the Court of Appeal decision of *Amec Capital Projects Ltd* v *Whitefriars City Estates* [2005] BLR 1; [2004] EWCA Civ 1418.

33.85 In *Carillion Construction Ltd* v *Devonport Royal Dockyard Ltd*,[42] the Court of Appeal reviewed the circumstances in which a court would decline to enforce an adjudicator's decision. Chadwick LJ said this:[43]

> "The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It will be only in rare circumstances that the courts will interfere with the decision of an adjudicator."

The decision contains a useful analysis and summary of the law in this area.

Payment provisions

33.86 Since their introduction in 1998, the payment and adjudication provisions appear to have worked reasonably well in practice (it is, perhaps, a measure of that success that only a tiny minority of disputes appear to be being taken forward from adjudication for some form of "final determination"). The important point for readers of this book to appreciate, perhaps, is that where their contract falls within the definition of a "construction contract" then these provisions cannot be avoided. Even if the parties' contract were entirely silent upon the subject of payment and adjudication (an unlikely event) then if it fell within the definition of a "construction contract", these provisions would apply. They cannot validly be avoided by contract.

Application of adjudication for insurance

33.87 In insurance practice, it appears that the Parties have in general been left by insurers to determine their own payment disputes by adjudication. There is no sign of any substantial practice of insurers exercising any subrogation rights they might have so as to take over the conduct of adjudications. However, a case illustrating the potential involvement of insurers in adjudications is the decision of HHJ Thornton QC in *Domsalla* v *Dyason*.[44] In that case insurers initially agreed to deal with the consequences of a fire in a residential building. Insurers agreed to reinstate the property (later insurers avoided the policy *ab initio*). The judge held that a contract entered into by the insured on the direction of the loss adjusters appointed by insurers was entered into by the insured as agent for the insurers. He further held that in that case, although the contract was with a residential occupier (and thus outside the Act by reason of section 106(1)(a)), the parties had agreed to refer disputes to adjudication.

33.88 Contracts of insurance are not themselves within the terms of the Act (although the point does not appear to have been the subject as yet of any reported decision). However, in the event of a serious dispute over the terms of an insurance contract, there would appear to be nothing to prevent the Parties from voluntarily adopting the concept of adjudication which would provide a temporarily binding decision, perhaps allowing some payment to be made and allowing the Works to proceed without precluding a final determination of the issue should some important point of principle be involved. It is likely seldom to be in the interests of insurers to adopt this course.

42. [2006] BLR 15; [2005] EWCA Civ 1358.
43. [2006] BLR 35, para 85.
44. [2007] BLR 348; [2007] EWHC 1174 (TCC).

ALTERNATIVE DISPUTE RESOLUTION

33.89 Alternative Dispute Resolution ("ADR") is a concept that originated in the United States of America. For some time there had been increasing concern in the US that the litigation system had become unwieldy, inefficient and too expensive. By the mid 1970s serious consideration was being given to alternatives. At this time the ADR lobby emerged.

33.90 Some of the main problems with the existing UK (and US) court systems which have prompted consideration of ADR include the following:

(1) the majority of cases settle, although frequently very late in the trial process;[45]
(2) the result of litigation is always uncertain and there is always the possibility of an appeal;
(3) there is a risk as to costs which are likely to be unpredictable in their size;
(4) there is inevitable delay involved;
(5) litigation is a drain on executive time;
(6) the parties lose control of the dispute;
(7) commercial relations between the parties may be affected for the future.

33.91 ADR essentially involves private resolution of disputes without resort to litigation. There are six main types of ADR which have emerged:

(1) mediation;
(2) mini-trial;
(3) dispute boards;
(4) mutual fact finding and
(5) mutual expert.

Of these, the most widely used by far is mediation.

33.92 The main intention behind ADR is to resolve disputes by a consensual rather than an adjudicative method. The parties are required to find the best commercial solution, one advantage of which is that, unlike litigation, the relationship between the parties is less likely to be affected when the proceedings are concluded.

ADR contrasted with litigation and arbitration

33.93 ADR can be contrasted with litigation and arbitration, which essentially take a judgmental view of the dispute. The traditional court system involves reference of a dispute to a judge, or a panel of judges, who hear the arguments of the parties and then deliver a judgment, enforceable in and by the courts, apportioning liability between the parties on the basis of the case before the court. Arbitration offers an alternative to the judicial process in its procedural flexibility and confidentiality, but, particularly where the procedure adopted is analogous to High Court proceedings, is still an adversarial procedure. Thus litigation and arbitration essentially involve apportionment of liability for a dispute, rather than a decision as to how the problem resulting in the dispute can be most readily resolved.

33.94 Under ADR, an independent third party does not usually have a judgmental role but is more of a neutral facilitator and his primary role is to assist the parties to resolve the

45. This is less true than it was when the first edition of this book was written, partly because of the court Pre-Action Protocols to which reference has already been made and partly because of the success of mediation.

dispute themselves rather than impose a decision on the parties.[46] The advantage of ADR procedures is that they are non-binding, flexible and involve management and often a third party facilitator.

33.95 The ADR process will not normally be binding; therefore, should it fail, the parties will still be able to pursue litigation or arbitration for resolution of the dispute. If, however, the ADR procedure is successful, the outcome may be recorded in a legally binding form. Experience has shown that, even where ADR has failed, a settlement has frequently followed within a relatively short time thereafter.

33.96 Frequently, as part of the ADR settlement, a new business arrangement may be included.

Mediation

33.97 By far the most frequently encountered form of ADR is mediation, which has steadily gained in popularity with commercial organisations and lawyers since the first edition of this book. Initially there was widespread scepticism as to what mediation offered that was any significant improvement over settlement discussions between experienced businessmen or their advisers. Experience has shown that skilled mediators can produce surprising results in seemingly wholly intractable disputes.

33.98 Mediation is a private and voluntary process under which the parties, very often with the help of their lawyers, select a neutral party to assist them in reaching an acceptable agreement. The qualifications required of the neutral party will depend on the nature of the dispute.

33.99 Mediation may sometimes take the form of a meeting between the parties and the mediator to decide the issues for resolution including informal presentations in a joint session. A series of meetings between the mediator and the parties follows in which the parties can discuss candidly with the mediator the merits and disadvantages of each party's case in the knowledge that what is revealed to the mediator will not be revealed to any other party without consent. The mediator will judge whether the process will be promoted by bringing the parties face to face at suitable intervals. An important part of the mediator's skill is to persuade the parties to see not only the strengths of their position, but also the weaknesses. This often involves getting each party to gain an understanding of how the other party sees the issues in the case.

33.100 The success of this process will depend very much on the quality of the mediator. It is also essential that those involved with the mediation have sufficient authority to negotiate a settlement. It should be stressed, however, that the process described above, and that described below for the mini-trial is by no means rigid and the parties may well adopt aspects of both procedures for their particular circumstances.

33.101 The advantages of mediation have not been lost on the English judiciary.[47] Seminars on the merits of mediation have been held for the senior judiciary (i.e. those sitting in the High Court and in the Court of Appeal) and a module on mediation is included in the Judicial Studies Board course on civil litigation. It is now standard practice for parties in

46. Sometimes a mediator will be asked to give a non-binding evaluation of the merits of the issues under dispute if the mediation fails to achieve a settlement.

47. See for example the judgment of Ward LJ in *Egan* v *Motor Services (Bath) Ltd* [2007] EWCA Civ 1002 at para 53; and the articles by Sir Brian Neill, *Mediation and its Future Prospects* (2007) 73 Arbitration 2, Sir Gavin Lightman, *Mediation, an Approximation to Justice* (2007) 73 Arbitration 400 and Sir Anthony Colman, *Mediation and ADR: a Judicial Perspective* (2007) 73 Arbitration 403.

Commercial Court and Technology and Construction Court cases to be asked whether they have considered ADR, and for directions given by the court to include provision at an appropriate point in the proceedings for the matter to be stayed for a period with a view to ADR taking place.

33.102 The merits of mediation have recently been recognised by the approval on 23 April 2008 of the European Mediation Directive, which requires provisions as to mediation to be incorporated into domestic procedures of the courts of the Member States.

33.103 If a party unreasonably refuses to engage in ADR, there can be costs consequences.[48]

33.104 Where mediation is successful, a great deal of time and cost is likely to be saved. However, many mediations are themselves expensive (it not being uncommon for tens of thousands of pounds to be spent between the parties), a consideration which means that if settlement can be achieved without the need for mediation, so much the better.

Mini-trial

33.105 The mini-trial is a private, consensual process whereby each party is represented by a lawyer who makes a presentation of their case before a mini-trial panel. Such a panel is likely to consist of one member of management from each party and a third party neutral adviser. Such representatives should not have been directly involved in the dispute and it is essential that they have settlement authority and sufficient seniority to participate in creating a solution. The neutral third party is intended to advise and give objective views on matters of fact and/or law as appropriate.

33.106 Prior to the case, the parties will have provided each other with limited disclosure in order to define issues and consider the strengths and weaknesses of each other's case. Experts and other witnesses may be called as appropriate.

33.107 Following the presentation before the panel, the two representatives of the two parties on the panel will attempt to settle the dispute and will be assisted in this process by the neutral adviser. Clearly the length and timing of the negotiating sessions will depend on the complexity and number of issues under consideration. If settlement is not reached immediately following the presentation to the panel, the parties may request the neutral adviser to provide a non-binding opinion on the probable outcome of litigation. This may well prompt further investigations between the parties.

Dispute boards

33.108 A relatively new method of resolving disputes is the creation of Dispute Boards. Such boards have been in existence for many years, for example such a board was created in connection with the original Channel Tunnel project and a very successful scheme was implemented in respect of the new airport at Chep Lap Kok in Hong Kong. The success of these schemes has encouraged provision for such boards being included in many major contracts, particularly in respect of large infrastructure projects of the type mentioned.[49]

48. *Halsey* v *Milton Keynes General NHS Trust* [2004] 1 WLR 3002; [2004] EWCA Civ 576; *Reed Executive plc* v *Reed Business Information Ltd* [2004] 1 WLR 3026; [2004] EWCA Civ 887.

49. For a detailed treatment of the practice of Dispute Boards, see *Chern on Dispute Boards*, Blackwell, 2007.

33.109 The usual structure of such schemes is to have in place a panel of (usually) three experienced, respected and impartial members who are appointed at the outset of the contract and act throughout its performance, visiting the project on a regular basis and being regularly updated on its progress through written reports submitted by one or both parties.

33.110 The traditional methods of Arbitration or ADR focus on trying to resolve a dispute after it has already arisen. By the time an Arbitrator, Mediator or Conciliator has been brought on board, both sides have generally retained lawyers and costs are beginning to escalate. Frequently ADR is attempted only after litigation or arbitration has already commenced and the parties are seeking a less expensive way to deal with their differences. They will have already expended considerable amounts of time and money (not to mention goodwill) which may have evaporated.

33.111 The major difference between traditional ADR methods and Dispute Boards is that the parties at the very outset of their contractual relationship set up the Dispute Board, when the contract is entered into. The idea behind a standing Dispute Board is that its members accompany the project throughout its duration and can be called upon at any stage to deal with a problem between the parties as soon as it emerges. A Board also visits the site at regular intervals and its members are continually updated on the progress of the implementation of the contract.

33.112 This first-hand information puts the Board in a unique position to make determinations about any dispute that the parties bring before it. Dispute Boards not only resolve disputes brought before them, they also provide the parties with a regular forum for discussion of difficult or contentious matters.

FINANCIAL SERVICES OMBUDSMAN

33.113 In some cases, the Financial Ombudsman Service can provide an effective alternative to other forms of dispute resolution.

33.114 The decision of Lewison J in *Bunney* v *Burns Anderson plc*[50] contains a helpful description of the role of the Financial Services Ombudsman.

33.115 The Financial Services and Markets Act 2000 (the "FSMA") was a major reorganisation of the regulation of financial services. Part of the new regime was the creation of a new Ombudsman scheme. The Ombudsman scheme is established under Part XVI of the FSMA. Section 225 of the FSMA describes the Ombudsman Scheme as one "under which certain disputes may be resolved quickly and with minimum formality by an independent person".

33.116 The Ombudsman's jurisdiction consists of his compulsory jurisdiction (section 226) and his voluntary jurisdiction (section 227).

33.117 The Ombudsman has jurisdiction relevant to insurance matters in respect of insurers, brokers and other insurance intermediaries. We concentrate here upon its application to insurers.

Eligible complainants

33.118 Eligible complainants have a right to refer complaints to the Financial Ombudsman Service. Thus if an insurance company refuses to indemnify an eligible complainant or there

50. [2008] BLR 198; [2007] EWHC 1240 (Ch).

is a dispute as to the amount of indemnity, an eligible complainant can make a complaint to the Financial Ombudsman Service.

(1) An eligible complainant is a complainant who is:
(2) a private individual;
(3) a business, which has a group annual turnover of less than £1 million at the time the complainant refers the complaint to the insurer;
(4) a charity which has an annual income of less than £1 million at the time that the complaint is referred to the insurer; or
(5) a trustee of a trust which has a net asset value of less than £1 million at the time the complaint is referred to the insurer.

33.119 The complaint to the Financial Ombudsman Service must be made within six months of the date of the insurer's final response. If the complaint is made outside that time limit, the Financial Ombudsman Service will generally not deal with the complaint, although it has a discretion to do so if the delay is due to exceptional circumstances.

FSA Handbook

33.120 The rules under which disputes are resolved are to be found in the FSA Handbook *Dispute Resolution: Complaints*. It contains Rules, marked with an R, and Guidance given pursuant to section 157 of the FSMA, marked with a G. Rules are referred to as DISP [rule number] R. The Handbook can be found on-line at www.fsahandbook.info.

33.121 Once the Service receives a complaint, the insurer (or broker) is contacted and given an opportunity to dispute the Service's ability to entertain the complaint—for example on the grounds that the complainant is not eligible. The Service will then give the complainant an opportunity to respond to any jurisdictional objections. Assuming that the Service accepts that it has jurisdiction, it will carry out a detailed investigation. This will include obtaining relevant documentation from both parties and obtaining written representations (or in rare cases, oral representations).

33.122 Section 228(2) of the FSMA provides that:

> "A complaint is to be determined by reference to what is, in the opinion of the Ombudsman, fair and reasonable in all the circumstances of the case."

This means that the Ombudsman, whilst taking into account the relevant law, regulations and particularly any relevant codes of practice, does not have to follow strict legal principles when deciding whether or not to uphold a complaint.[51]

Procedure

33.123 The Ombudsman is required to give his determination in writing, with reasons. He must require the complainant to notify him, within a given period, whether he accepts or rejects the determination. By section 228(5), if the complainant notifies the Ombudsman that he accepts the determination, it is binding on the Respondent (i.e. the insurer or broker) and is final.

33.124 If the complainant fails to notify the Ombudsman within the period allowed, he is deemed to have rejected the determination. This places the complainant in a strong position.

51. See [2008] BLR 203, para 22(i).

If he gets a favourable decision from the Ombudsman, he can accept it and it is binding upon the insurer (subject to limits: see below). However, if he is dissatisfied with that decision, then he can pursue his claim through the courts or arbitration, as appropriate.[52]

33.125 The Ombudsman has power under section 229 to make one of two kinds of award: a money award, that is to say an award against the Respondent of such amount as the Ombudsman considers fair compensation for loss or damage; or a direction that the Respondent shall take such steps in relation to the complainant as the Ombudsman considers just and appropriate (whether or not a court could order those steps to be taken).

33.126 Rule DISP 3.9.5R provides that the maximum monetary award that the Ombudsman may make is £100,000. By rule DISP 3.9.2R the monetary award can include compensation for pain and suffering, damage to reputation or distress and inconvenience.

33.127 Guidance is also given that if the Ombudsman considers that an amount more than the maximum is required as fair compensation, he may in addition recommend that the Respondent pay the balance. Such a recommendation is not binding on the Respondent.[53]

33.128 If the Ombudsman exceeds his jurisdiction, the Respondent has the right to resist enforcement upon that basis.[54]

52. See [2008] BLR 203, para 22(ii).
53. See [2008] BLR 203, para 22(v).
54. See [2008] BLR 210, para 53.

APPENDIX 1

GLOSSARY

The following is a short glossary of some of the more common terms used in insurance as they relate to construction projects.

Adjudication: the adjudication process described in the Housing Grants, Construction and Regeneration Act 1996.

All risks insurance: insurance of property against loss or damage howsoever caused subject to any exceptions or exclusions stated in the policy.

Average clause: a clause in a non-marine insurance policy whereby in the event of under-insurance, the claim paid out by the insurer is restricted to the same proportion of the loss as the sum insured under the policy bears to the total value of the insured item. This is particularly relevant to latent defects insurance.

Betterment: improvement to insured property resulting from its reinstatement or repair under a contract of indemnity.

Bondsman: synonym for the surety (e.g. under the ICE Form of Performance Bond), often a bank or insurance company.

Bordereau: monthly or quarterly accounts providing a detailed list of risks, premiums and/or claims prepared by cedants or coverholders to advise reinsurers.

Burning cost: a method of calculating the premium for reinsurance whereby within certain limits the reinsurance premium payable by a cedant is related to the claims experience. Burning cost clauses are found in excess of loss reinsurances.

Capacity: the maximum premium income which an insurer is permitted to underwrite or considers that it can prudently accept.

Captive: an insurance company set up by large industrial or commercial concerns for the purpose of insuring all or part of the risk exposures of the parent or sponsoring group or organisation. Captives may be set up as a result of dissatisfaction with what the normal insurance market has to offer in terms of rating, service or cover available, or where it is felt that "self-insurance" is beneficial due to the expense of obtaining market cover. They are frequently situated in locations offering tax advantages.

CDM Regulations: the Construction (Design and Management) Regulations 2007.

Cedant: an insurer which transfers business under a reinsurance agreement.

Claims consultant: a quasi-professional person who carries on the business of drafting, negotiating and advising upon claims for the payment of money or extension of time under the building contracts. Usually a quantity surveyor by training.

Claims-made policy: a policy with a condition whereby only claims notified during the policy period are covered.

CM: Construction manager.

Co-insurance: where more than one insurer is in direct contractual relationship with the insured for part of the same risk. Acceptance of a risk by a Lloyd's syndicate represents co-insurance by each member of the syndicate. In American terminology co-insurance means self-insurance of some part of the risk by the insured.

Collective policy: a form of policy under which several co-insurers share the same risk. The policy is issued by the leading insurer in the joint names of all co-insurers and on renewal a collective receipt will be issued for all co-insurers.
Condition precedent: a condition that must be satisfied before the contract, or a particular right under it, comes into existence.
Contribution: the principle governing the manner in which the costs of claims arising on risks covered by more than one policy are to be shared between the relevant insurers.
Contribution clause: provides that if at the time of destruction or damage occurring any other insurance effected by or on behalf of the insured covers any of the destruction or damage, the liability of the insurers involved will be limited to their rateable proportion of such destruction or damage.
Contractors all risks policy (CAR): see *All risks insurance* above.
Consequential loss: loss arising indirectly as a result of another loss.
Cover: the benefit offered under the insurance contract.
Cover note: a document issued to the insured prior to the policy wording confirming details of the insurance contract.
Cut and cover: a method of tunnel construction involving open-air excavation, with piles for support. Once the base, sides and roof are completed, the pit is back-filled and the surface reinstated.
Damage: precise definition depends on the context but it involves a changed physical state resulting in the damaged matter being less valuable than before.
Deductible: see *Excess*, below.
Defects liability period: a guarantee period from practical completion within which the contractor must remedy any defects appearing in the works without charge.
Defects list: see *Snagging list* below.
Direct business: business written either directly with the public or through a broker or agent, as distinct from indirect or reinsurance business where the person accepting the business is a reinsurer.
***Ejusdem generis* rule:** the rule that general words are to be construed within the ambit of preceding particular words. Thus the expression "lions, tigers, pumas and other animals" would not be construed to include ants, notwithstanding that an ant is an animal. The *ejusdem generis* rule was found not to apply to a clause in the original and historical JCT 63 in *Henry Boot Construction Ltd* v. *Central Lancashire Development Corporation.*[1]
Employer's agent: the person or persons responsible for contract administration in a design and build procurement.
Employer's rep: a representative of the employer under a building contract.
Excess: the first portion of a loss or claim which is borne by the insured, sometimes called the "deductible" or the "first loss".
Excess of loss reinsurance: a type of reinsurance whereby an insurer limits his loss for a specific risk (facultative) or class of risk (treaty), beyond and up to specified limits. The lower limit is called the retention. The premium payable is usually a percentage of the underlying premiums accepted by the insurer for the risk or class covered, but it may be a moving percentage. This form of reinsurance may be placed to cover any one loss or each and every loss in which case claims are made on the reinsurer for the aggregate of the amounts by which individual losses paid out exceed the retention. Because of the wide range of cover required, excess of loss reinsurance is usually arranged in layers.

1. (1980) 15 BLR 1.

Exclusion: a term of the insurance contract that limits the scope of the insured perils.
***Ex-gratia* payment:** a payment by the insurer to the insured in respect of losses for which the insurer is not legally liable.
Exposure: a term that can variously be used to describe:

(1) the state of being subject to the possibility of loss;
(2) the measurable extent of risk; and
(3) the possibility of loss to insured property caused by its surroundings.

Facultative obligatory reinsurance: the reinsurance arrangement under which the cedant can choose which risks to cede and the reinsurer must accept all risks so chosen.
Facultative reinsurance: an individual reinsurance negotiated and placed individually.
First loss: see *Excess*, above.
Fit out: the stage of contruction of works after shell and core and usually completed by a tenant of a building or the landlord on the tenant's behalf.
Force majeure: is a continental law concept similar to the principle of frustration. The term is frequently used to describe contract clauses which provide for circumstances where the performance of the contract is impeded through no fault of employer or contractor.
Frustration: occurs whenever the law recognises that through no fault of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken in the contract.
Guarantee: a contract between a creditor, debtor and surety whereby the surety assumes liability for the performance, and the obligation to make good any defect, of the principal debtor.
Incurred claims or losses: the total of paid and outstanding claims arising in a period. The term is also used in the context of claims statistics where for given accident or policy years the incurred claims (sometimes including IBNR) are compared to earned premiums, for each class of insurance, in order to assess the profitability of the underwriting.
Indemnity: the principle whereby the insurer seeks to place the insured in the same position after a loss as he occupied immediately before the loss.
Insurable interest: for a contract of insurance to be valid the prospective policyholder must have a financial interest or an interest in the insured item to the extent that its loss, damage or destruction would cause him loss, known as the insurable interest. In the case of property construction this must exist both at the time the policy is taken out and also at the time of loss.
Insurance broker: an insurance intermediary who advises his clients and arranges their insurances. Although for most purposes he acts as the agent of his client, he is normally remunerated by a commission from the insurer. An insurance broker is a full-time specialist with professional skills in handling insurance business.
Insured: the person whose property is insured or in whose favour the policy is issued.
Insurer: an insurance company or Lloyd's underwriter who, in return for a consideration (a premium), agrees to provide insurance cover in accordance with the terms of the policy for any loss or damage suffered by the person paying the premium, as a result of some accident or occurrence.
Lapse: cancellation of a policy at the renewal date due to non-payment of the renewal premium.
Latent defect: a defect that is hidden; has a special meaning in latent defect policies.

Latent defects insurance policy: a 10-year non-cancellable policy providing insurance against defects in the design, materials or construction of the building not discoverable until after completion, sometimes called Inherent Defects insurance policy.

Layer: a term used in connection with reinsurance or insurance policies on larger risks whereby the risk is placed in sections. For example, the liability on a construction works insured for £50 million might be placed in the first layer up to £5 million, second layer over £5 million up to £15 million, third layer over £15 million up to £20 million and the next layer over £20 million up to £30 million. Different underwriters may be involved with each policy and different premium rates will invariably apply to each layer as the risk varies for each layer.

Leading underwriter: an underwriter (usually a specialist in the field of insurance concerned) who is first to underwrite a share of a risk and quote an appropriate premium. On a large risk the broker will, if possible, select two or three specialists to lead, their reputations being such that other underwriters have confidence in accepting portions of the risk thereby increasing the prospect of the slip being fully subscribed.

Letter of intent: a side letter between an employer and a contractor or subcontractor that predates the building contract or subcontract.

Line: the share of a risk accepted by an insurer. The term also refers to the amount which an insurer has fixed as his maximum exposure for any one risk.

Line slip: an arrangement entered into between underwriters and a broker whereby, for a given type of risk, the broker needs only to approach the leading and second underwriter who will accept or reject each risk on behalf of all the underwriters concerned in their agreed proportions. This is an administrative convenience used when a broker is placing a large number of similar risks with the same group of underwriters.

Lloyd's broker: a broker approved by the Council of Lloyd's and thereby entitled to enter the underwriting room at Lloyd's and place business direct with underwriters. Lloyd's brokers must meet stringent Council of Lloyd's requirements, for example, as to integrity and financial stability. They are required to file an annual return with the Council of Lloyd's.

Lloyd's underwriter: a person who is an underwriting member of Lloyd's subscribing to Lloyd's policies and has satisfied the Council of Lloyd's that he is a fit and proper person to be a member of Lloyd's and has also undergone a stringent enquiry into personal wealth. A substantial Lloyd's deposit will then be made and various trustee arrangements entered into. Throughout the period of membership the whole of a Lloyd's underwriter's personal assets are at risk as his liability is unlimited.

Liability insurance: provides cover against depletion of the insured's assets due to legal liability to third parties.

Loading: an additional factor taken into account in premium rating. This is relevant in project insurance taken out by an employer where the insurer does not know the exact identity of, for example, the professional consultants.

Long tail: a term used to describe insurance business where it is known from experience that notification and settlement of claims will take many years, for example, employer's or public liability.

Loss: another term for a claim or an event giving rise to a claim.

> **Actual total loss:** where the property insured is actually destroyed or so damaged as to cease to be usable.
>
> **Constructive total loss:** where the property insured is reasonably abandoned on account of its actual total loss being inevitable or where its preservation or repair would cost more than its actual value when preserved or repaired.

General average loss: an extraordinary sacrifice or expenditure voluntarily and reasonably made or incurred in time of common peril, for the purpose of preserving all other property imperilled in a common adventure.

Loss adjuster: an independent and highly trained claims expert, who acts as a consultant to insurers in assessing the true extent and value of any loss which has resulted in a claim being made against them. A member of the Chartered Institute of Loss Adjusters is required to act with the claimant's legitimate interests in mind, although his fee is paid by the insurer.

Loss assessor: a person who, in return for a fee (usually a percentage of the amount claimed), acts for the claimant in negotiating the quantum of the claim.

MC: management contractor.

Method statement: a statement by the contractor as to the method he proposes to adopt for the carrying out of the works. The use of method statements is more common in civil engineering contracts than building contracts. For examples of the relevance of method statements see *Yorkshire Water Authority* v *Sir Alfred McAlpine & Son (Northern) Ltd*[2] and *Holland Dredging (UK) Ltd* v *Dredging and Construction Co Ltd.*[3]

Mutual insurance company: an insurance company where the policyholders are entitled, subject to their policy terms, to share distributable profits in proportion to the sums assured.

Premium: the consideration paid for the insurance of cover.

Performance bond: has various meanings. In the building industry it does not usually mean the kind of "on demand" banker's bond which stands on a similar footing to a letter of credit (*Edward Owen Engineering Ltd* v *Barclays Bank International Ltd*[4]). It usually means a guarantee in the ordinary sense of the word by a surety, often a bank or insurance company, that the contractor will perform his obligations under the contract.

Period of risk: the period during which the insurer can incur liability under the terms of the policy.

Piling: a building process whereby a number of columns are sunk below ground level to support the building foundations.

Plant: equipment such as cranes, earthmovers, generators, and other equipment used in the execution of building works and machinery installed in a finished building.

Policy: a document detailing the terms and conditions applicable to an insurance contract and constituting evidence of that contract. It is issued by an underwriter for the first period of risk. On renewal a new policy may well not be issued although the same conditions would apply, and the current wording would be evidenced by the renewal receipt.

Policyholder: the person in whose name the policy is issued. (See also *insured*.)

Preliminaries: work and materials necessary for the execution of buildings. Examples are site huts, scaffolding, site clearance, plant and temporary lighting.

Professional indemnity insurance (PI): insurance taken out by member firms of the team of professional consultants in a construction project to cover their professional liability in relation to the project; now also often taken out by contractors.

Project manager: a person or persons who manage, co-ordinate and monitor a building project.

2. (1985) 32 BLR 114.
3. (1987) 37 BLR 1.
4. [1977] 1 WLR 764.

Proportional reinsurance (pro rata): a term used to classify surplus and quota share reinsurance whereby the original insurer and the reinsurers share losses in the same proportions as they share premiums. Contrast non-proportional reinsurance (e.g. excess of loss) where the sharing of losses is not based on the proportions of premiums originally received.
Proposal form: a form sent by an insurer to a person requiring insurance to obtain sufficient information for the insurer to decide whether or not to accept a risk and what conditions to apply if it is accepted.
Proprietary insurance company: a limited liability company with a subscribed capital whose shareholders have the ultimate right to the profits of the company.
Punch list: see *Snagging list* below.
Pure reinsurer: an insurer authorised only to carry on reinsurance business in the UK.
Quota share reinsurance: a treaty, normally obligatory, whereby for a particular class of business an insurer cedes and a reinsurer accepts an agreed proportion of underlying premiums received by the insurer. Claims are shared between the insurer and reinsurer in the same proportion as premiums, and it is therefore a means whereby one underwriter can participate in the fortunes or misfortunes of another underwriter.
Reinstatement: following a loss the insurer pays for the replacement or repair of the subject matter of the insurance, instead of paying the insured money. It is generally a condition at the insurer's option unless a statutory requirement (see the Fires Prevention (Metropolis) Act 1774). Its purpose is to discourage excessive claims, offer the insurer a more economic option and, particularly in relation to statutory requirements, to discourage arson and fraud.
Reinsurance treaty: reinsurance of a block of business or whole account in accordance with the terms of a contract between cedant and reinsurer.
Return premium: a premium refund payable to the insured as a result of the cancellation or endorsement of a policy.
Schedule: the part of a policy containing information peculiar to that particular risk. The greater part of a policy is likely to be identical for all risks within a class of business covered by the same insurer.
Shell and core: the construction of an envelope stage of a building and to a defined level of finish.
Short tail: a term used to describe business where it is known that claims will usually be notified and settled quickly.
Signed line: the proportion of a risk to which an insurer is liable following any signing down of written lines.
Signing down: the pro rata reduction of written lines applied where a slip has been more than 100 per cent subscribed.
Slip: the document used by a broker to set out details of a risk for presentation to an underwriter. If an underwriter agrees to accept the risk or part of it, the slip is initialled and marked with the proportion of the risk written. The share may ultimately be signed down by the broker, although it cannot be increased without the insurer's agreement.
Snagging list: a list of minor defects and omissions usually prepared when works are nearing completion and carried out within a period after practical or substantial completion, often called the Defects Liability Period. Sometimes called a punch list or defects list.
Step in: the process of a fund or bank stepping into the shoes of a developer or client upon the service of a notice.
Step out: the process of a fund or bank stepping out of the shoes of a developer or client after a period following a Step in.

Stop loss: a reinsurance contract whereby an insurer arranges to limit the overall loss for a whole account or class of business.
Subrogation: the insurer's implied right under contracts of indemnity, on payment of a claim to the insured, to be placed in the position of the insured in relation to all his rights and remedies against third parties.
Surplus treaty: a proportional treaty under which an insurer cedes, in respect of each risk covered by the treaty, the amount surplus to the specified retention. For example, an insurer who fixes a retention of £25,000 and who accepts a risk where the maximum possible liability is £35,000 will, for a strict pro rata share of the premium, reinsure the £10,000 surplus liability under a surplus treaty. Because most surplus treaties have a clause restricting the maximum liability covered by the treaty to a multiple of the cedant's own retention, an insurer will often arrange more than one surplus treaty.
Syndicate: a grouping of Lloyd's underwriters. Each syndicate has an active underwriter who is authorised to accept business on behalf of each underwriting member participating therein. A member of a syndicate is still a principal in his own right and is personally liable for his agreed share of each risk that is accepted by the syndicate. He is not liable for the debts of other syndicate members and thus the liability is several but not joint.
TECBAR: Technology and Construction Barristers Association.
TECSA: Technology and Construction Solicitors Association.
Third party: a person claiming against an insured. In insurance terminology the first party is the insurer and the second party is the insured.
Third party rights: rights claimed by third parties under the Contracts (Rights of Third Parties) Act 1999.
Treaty: see *Reinsurance treaty*, above.
Turnkey contract: an expression sometimes used to describe a design and build contract, where the contractor not only designs and builds the building, but also, on practical completion, only has to turn the key to the front door and start using the building. The term, however, is not a term of art (*Cable (1956) Ltd* v. *Hutcherson Ltd*[5]).
Uberrimae fidei: the duty of utmost good faith whereby both parties to an insurance contract must disclose all material facts relating to the insurance.
Warranty: a term of the insurance contract which, if breached, will entitle the insured to terminate the contract with effect from the time of breach.
Written line: the maximum proportion of a risk which an insurer is prepared to accept and which is recorded on the slip. This may subsequently be signed down.

5. (1969) 43 ALJR 321, High Court of Australia.

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APPENDIX 2

INSURANCE SLIP

TYPE: CONSTRUCTION MATERIAL DAMAGE, ADDITIONAL COSTS OF COMPLETION, CONSEQUENTIAL LOSSES, THIRD PARTY LIABILITY, NON-NEGLIGENT INDEMNITY INSURANCE.

FORM:

THE INSURED: The Principal ( ). Any Contractor appointed by the Principal ( ) and/or Co- or Sub-Contractors [or] any tier and/or servants or agents acting on their behalf.

PERIOD: The whole period of the Project estimated as ( ) until completion to be followed by ( ) months in respect of the Contractor's Defects Liability/Maintenance obligations. Extensions as required covered automatically with an A.P. (not exceeding pro-rata) to be agreed L/U only.

INTEREST: *Section 1—Material Damage*

The Insured The Principal and/or the Contractor for their respective rights and interests.

Item 1 The permanent and temporary works, materials, temporary and/or permanent buildings and/or contents, constructional plant, tools and equipment (other than constructional plant, tools and equipment, surveyor's and other instruments belonging to or the responsibility of the Contractor) and other property used or for use in connection with the Project, whether the Insured's own or that for which he is responsible.

Item 2 Any existing structures, facilities and buildings retained on site during the redevelopment period to be worked upon or demolished.

Section 2—Additional Costs of Completion

The Insured The Principal

Additional costs of completing unbuilt portion of the Project caused solely by delays following loss or damage to built portion of works and/or existing structures etc. which is covered by Section 1 of the Policy.

Section 3—Consequential Losses

The Insured The Principal

Additional costs of financing the Project/loss of interest/loss of anticipated or existing rent/loss of anticipated Gross profits/liquidated

damages following delays in completion as a result of Damage for which a claim is admissible under Section 1 of this Policy.

Section 4—Third Party Liability

The Insured The Principal (and/or the Contractor for their respective rights and interests).

All sums which the Insured shall be legally liable for compensation or damages in respect of:

(a) death of or injury to or disease contracted or illness sustained by any person
(b) damage to property
(c) obstruction, loss of amenities, nuisance, trespass, stoppage of traffic, infringement of light easement or quasieasement

happening within the Geographical Limits during the Period of Insurance and arising out of or in the course of or in connection with the carrying out of the Project.

Section 5—Non-Negligent Indemnity

The Insured The Principal

Any expense, liability, loss, claim or proceedings which the Principal may incur or sustain by reason of damage to property, real or personal, happening during the Period of Insurance arising out of or in the course of or by reason of the carrying out of the Project and caused otherwise than by the negligence, omission or default of the Contractor.

All arising in connection and everything connected with the project for ( ) at ( ).

SUM INSURED:	*Section 1*	Item 1	£( )	
		Item 2	£( )	
	Section 2		£( )	
	Section 3		£( )	
	Section 4		£( )	each Event
	Section 5		£( )	each Event

such amounts payable above the Insured's Retained Liability.

GEOGRAPHICAL LIMITS: Anywhere in the United Kingdom.

CONDITIONS: *Retained Liability*

Section 1	Item 1	The first £( ) of each Event
	Item 2	The first £( ) of each Event
[*Section 2*		]
Section 3	The first ( ) days in all	
Section 4	The first £( ) of each Event of Third Party Property damage	
Section 5	The first £( ) of each Event	

Policy Includes Inter-alia
Section 1/2
Design Plan Specification Materials Workmanship—Exception 4 (or substitute DE1/DE2/DE3/DE4/DE5—excess £)
Testing/Commissioning—period ( )
Automatic Reinstatement Clause
Cost Escalation Clause—( ) per cent
Professional Fees Clause
Debris Removal and Plant Recovery Clause ( )
Interest of Other Parties Clause
Local Authorities Reinstatement Clause
Free Issue Materials Clause
Plans, Specifications ( )
Employees Personal Tools and Effects Clause—£( ) per employee. Excess £( )
Expediting Expenses Clause ( )
Concealed Damage Clause
50/50 Clause
Claim Preparation Costs Clause
Hired-In Plant Expenses Clause (£ /Excess £ /days)
Immobilisation of Plant and Equipment Clause
Minimisation of Loss Expenses Clause
Show Houses/Contents Clause
Maintenance type ( )

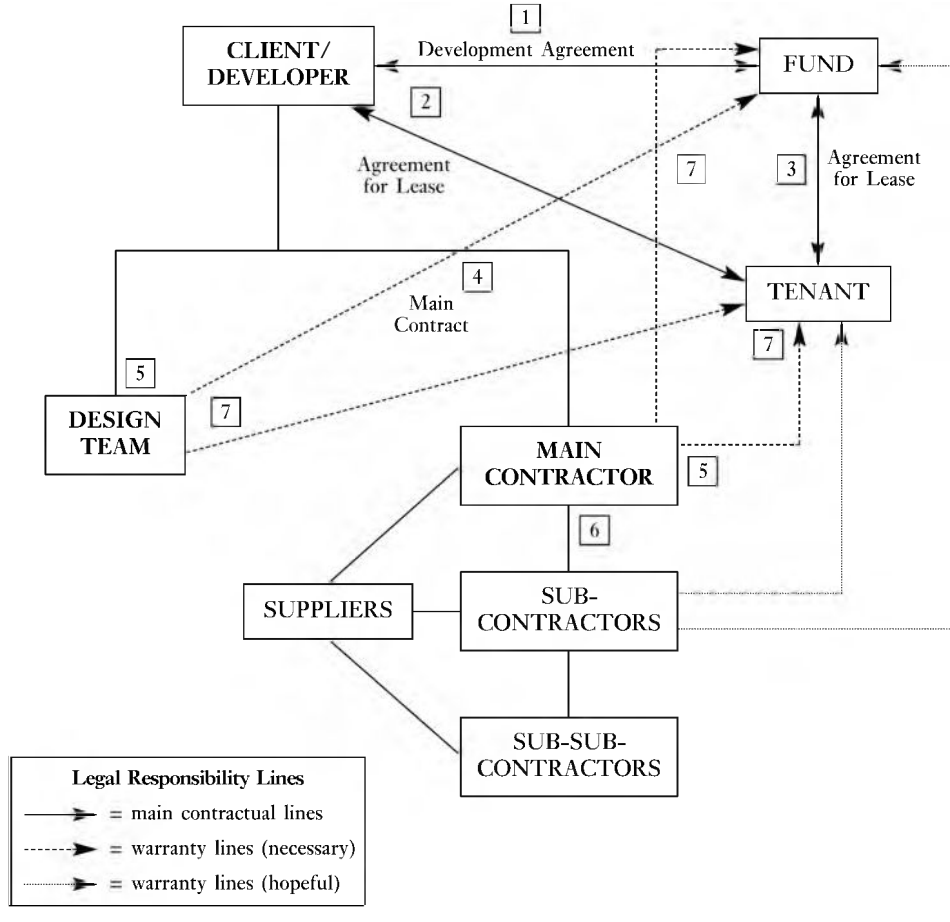
Section 3
Business Description: ( )
Alternative Trading Clause
Professional Accounts Clause
Basis of Settlement Clause
Contractors Plant and Equipment Clause
Average Clause
Liquidation of the Insured Clause
Denial of Access Clause
Extension for Supplier's Premises Clause

Section 4
Costs Clause
Several Liabilities Clause
Directors' Indemnity Clause
Health and Safety at Work Act Extension—£( ) Work for Directors etc. Clause
Officers/Members of Clubs and Organisations, First Aid etc. Clause
Defective Premises Act Clause
Leased or Rented Property Clause
Motor Contingent Liability Clause

MINIMUM/ DEPOSIT/ MINIMUM AND DEPOSIT	£ (	) payable in ( ) instalments of
PREMIUM:	£ (	) on ( ) adjustable on expiry.
	Rates: Section 1	
	Section 1	
	[Section 2]	
	Section 3	
	Section 4	
	Section 5	
BROKERAGE:	( ) per cent	
INFORMATION:	[further information]	

APPENDIX 3

DIAGRAM OF CONTRACTUAL RELATIONSHIPS AND LIABILITIES



Notes

1. The Development Agreement usually contains a full indemnity given by the Developer in favour of the Fund concerning breaches of the Developer's obligations, and insurance provisions obliging the Developer to carry building and all risks insurance for the development until practical completion. Usually the Developer carries no such insurance itself but protects itself until practical completion under back to back finance from the Contractor.

2. Under the Agreement for Lease in a pre-letting situation between a developer (who is also the Landlord), and the Tenant, the Developer/Landlord likewise also carries insurance for the development until practical completion, and usually carries insurance for the competed

buildings after the lease is granted, subject to the reimbursement of premiums by the Tenant.

3. If there is a different developer from the Landlord where, for example, the ultimate owner of the completed building is a Funding Institution, the Developer usually carries insurance of the development until practical completion, and the Landlord and Funding Institution takes over building insurance from that date.

4. Under the main building contract the contractor is usually obliged to carry insurance in the joint names of the employer and contractor (and, by amendment the Funding Institution as well) until practical completion (if the development is to be carried out in sections, until sectional completion as to that part or section of the works and the contractor usually gives the employer certain indemnities).

5. Under the various appointments of the design team the professional consultants are expected to carry, and maintain, professional indemnity insurance for as long as such insurance is commercially available.

6. The sub-contractors are either covered under insurances maintained for the works by the main contractor or usually carry their own insurances.

7. The collateral warranties are direct contracts in favour of funds, purchasers and tenants entered into by either the members of the design team and the main contractor and as appropriately by sub-contractors in favour of funds, purchasers and tenants, contain obligations on the members of the design team to carry and maintain PI insurance for as long as the collateral warranty legally persists, and the main contractor is usually obliged to maintain and effect its insurance obligation under the building contract in so far as it has obligations.

APPENDIX 4

JCT STANDARD BUILDING CONTRACT (SBC/Q) 2007

SECTION 6 INJURY, DAMAGE AND INSURANCE

Injury to Persons and Property

Liability of Contractor—personal injury or death

6.1 The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings whatsoever in respect of personal injury to or the death of any person arising out of or in the course of or caused by the carrying out of the Works, except to the extent that the same is due to any act or neglect of the Employer or of any of the Employer's Persons.

Liability of Contractor—injury or damage to property

6.2 The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal in so far as such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Works and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Contractor or of any of the Contractor's Persons. This liability and indemnity is subject to clause 6.3 and, where Insurance Option C (Schedule 3, paragraph C.1) applies, excludes loss or damage to any property required to be insured thereunder caused by a Specified Peril.

Injury or damage to property—Works and Site Materials excluded

6.3 .1 Subject to clauses 6.3.2 and 6.3.3, the reference in clause 6.2 to "property real or personal" does not include the Works, work executed and/or Site Materials up to and including whichever is the earlier of:

.1 the date of issue of the Practical Completion Certificate; or

.2 the date of termination of the Contractor's employment.

.2 Where a Section Completion Certificate is issued in respect of a Section, that Section shall not after the date of issue of that certificate be regarded as "the Works" or "work executed" for the purpose of clause 6.3.1.

.3 If clause 2.33 has been operated, then, after the Relevant Date, the Relevant Part shall not be regarded as "the Works" or "work executed" for the purpose of clause 6.3.1.

Insurance against Personal Injury and Property Damage

Contractor's insurance of his liability

6.4 .1 Without prejudice to his obligation to indemnify the Employer under clauses 6.1 and 6.2, the Contractor shall take out and maintain insurance in respect of claims arising out of his liability referred to in clauses 6.1 and 6.2 which:

.1 in respect of claims for personal injury to or the death of any employee of the Contractor arising out of and in the course of such person's employment, shall comply with all relevant legislation; and

.2 for all other claims to which clause 6.4.1 applies[51], shall indemnify the Employer in like manner to the Contractor (but only to the extent that the Contractor may be liable to indemnify the Employer under the terms of this Contract) and shall be in a sum not less than that stated in the Contract Particulars for any one occurrence or series of occurrences arising out of one event.[52]

.2 As and when reasonably required to do so by the Employer, the Contractor shall send to the Architect/Contract Administrator for inspection by the Employer documentary evidence that the insurances required by clause 6.4.1 have been taken out and are being maintained, and at any time the Employer may (but shall not unreasonably or vexatiously) require that the relevant policy or policies and related premium receipts be sent to the Architect/Contract Administrator for such inspection.

.3 If the Contractor defaults in taking out or in maintaining insurance in accordance with clause 6.4.1 the Employer may himself insure against any liability or expense which he may incur as a result of such default and the amount paid or payable by him in respect of premiums therefor may be deducted from any monies due or to become due to the Contractor under this Contract or shall be recoverable from the Contractor as a debt.

Contractor's insurance of liability of Employer

6.5 .1 If the Contract Particulars state that insurance under clause 6.5.1 may be required, the Contractor shall, if instructed by the Architect/Contract Administrator, take out a policy of insurance in the names of the Employer and the Contractor[53] for the amount of indemnity there stated in respect of any expense, liability, loss, claim or proceedings which the Employer may incur or sustain by reason of injury or damage to any property caused by collapse, subsidence, heave, vibration, weakening or

[51] It should be noted that the cover granted under public liability policies taken out pursuant to clause 6.4.1 may not be co-extensive with the indemnity given to the Employer in clauses 6.1 and 6.2: for example, each claim may be subject to the excess in the policy and cover may not be available in respect of loss or damage due to gradual pollution.

[52] The Contractor may, if he wishes, insure for a sum greater than that stated in the Contract Particulars.

[53] A policy of insurance taken out for the purposes of clause 6.5 should not have an expiry date earlier than the end of the Rectification Period.

removal of support or lowering of ground water arising out of or in the course of or by reason of the carrying out of the Works, excluding injury or damage:

.1 for which the Contractor is liable under clause 6.2; or

.2 which is attributable to errors or omissions in the designing of the Works; or

.3 which can reasonably be foreseen to be inevitable having regard to the nature of the work to be executed and the manner of its execution; or

.4 (if Insurance Option C applies) which it is the responsibility of the Employer to insure under paragraph C.1 of Schedule 3; or

.5 to the Works and Site Materials brought on to the site of the Contract for the purpose of its execution except where the Practical Completion Certificate has been issued or in so far as any Section is the subject of a Section Completion Certificate; or

.6 which arises from any consequence of war, invasion, act of foreign enemy, hostilities (whether war is declared or not), civil war, rebellion or revolution, insurrection or military or usurped power; or

.7 which is directly or indirectly caused by or contributed to by or arises from the Excepted Risks; or

.8 which is directly or indirectly caused by or arises out of pollution or contamination of buildings or other structures or of water or land or the atmosphere happening during the period of insurance, save that this exception shall not apply in respect of pollution or contamination caused by a sudden identifiable, unintended and unexpected incident which takes place in its entirety at a specific moment in time and place during the period of insurance (all pollution or contamination which arises out of one incident being considered for the purpose of this insurance to have occurred at the time such incident takes place); or

.9 which results in any costs or expenses being incurred by the Employer or in any other sums being payable by the Employer in respect of damages for breach of contract, except to the extent that such costs or expenses or damages would have attached in the absence of any contract.

.2 Any insurance under clause 6.5.1 shall be placed with insurers approved by the Employer, and the Contractor shall send to the Architect/Contract Administrator for deposit with the Employer the policy or policies and related premium receipts.

.3 The amounts expended by the Contractor to take out and maintain the insurance referred to in clause 6.5.1 shall be added to the Contract Sum.

Excepted risks

6.6 Notwithstanding clauses 6.1, 6.2 and 6.4.1, the Contractor shall not be liable either to indemnify the Employer or to insure against any personal injury to or the death of any person or any damage, loss or injury caused to the Works or Site Materials, work executed, the site, or any other property, by the effect of an Excepted Risk.

Insurance of the Works

Insurance options

6.7 Insurance Options A, B and C are set out in Schedule 3. The Insurance Option that applies to this Contract is that stated in the Contract Particulars.[54]

Related definitions

6.8 In Schedule 3 and, so far as relevant, in the clauses of these Conditions the following phrases shall have the meanings given below:

All Risks Insurance[55]: insurance which provides cover against any physical loss or damage to work executed and Site Materials and against the reasonable cost of the removal and disposal of debris and of any shoring and propping of the Works which results from such physical loss or damage but excluding the cost necessary to repair, replace or rectify:

(a) property which is defective due to:
  (i) wear and tear,
  (ii) obsolescence, or
  (iii) deterioration, rust or mildew;
(b) any work executed or any Site Materials lost or damaged as a result of its own defect in design, plan, specification, material or workmanship or any other work executed which is lost or damaged in consequence thereof where such work relied for its support or stability on such work which was defective[56];

[54] **Insurance Option A** is applicable to the erection of new buildings where the **Contractor** is required to take out a Joint Names Policy for All Risks Insurance for the Works and **Insurance Option B** is applicable where the **Employer** has elected to take out such Joint Names Policy. **Insurance Option C** is for use in the case of alterations of or extensions to existing structures; under it the **Employer** is required to take out a Joint Names Policy for All Risks Insurance for the Works and also a Joint Names Policy to insure the existing structures and their contents owned by him or for which he is responsible against loss or damage by the Specified Perils. Some Employers (e.g. tenants and homeowners) may not be able readily to obtain the Joint Names cover, in particular that under paragraph C.1. If so, Option C should not be stated to apply and consequential amendments may be necessary. See the Guide.

[55] The definition of All Risks Insurance in clause 6.8 defines the risks for which insurance is required. Policies issued by insurers are not standardised and the way in which insurance for those risks is expressed varies.

Obtaining Terrorism Cover, which is necessary in order to comply with the requirements of Insurance Option A, B or C, will involve an additional premium and may in certain situations be difficult to effect. Where a difficulty arises discussion should take place between the Parties and their insurance advisers. See the Guide.

[56] In any policy for All Risks Insurance taken out under Insurance Option A or B or paragraph C.2 of Insurance Option C, cover should not be reduced by the terms of any exclusion written in the policy beyond the terms of paragraph (b) in this definition of All Risks Insurance; thus an exclusion of terms "This Policy excludes all loss of or damage to the property insured due to defective design, plan, specification, materials or workmanship" would not be in accordance with the terms of those Insurance Options or of that definition. Wider All Risks cover than that specified may be available to Contractors, though it is not standard.

(c) loss or damage caused by or arising from:
  (i) any consequence of war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, confiscation, commandeering, nationalisation or requisition or loss or destruction of or damage to any property by or under the order of any government *de jure* or *de facto* or public, municipal or local authority.
  (ii) disappearance or shortage if such disappearance or shortage is only revealed when an inventory is made or is not traceable to an identifiable event, or
  (iii) an Excepted Risk.

Excepted Risks: ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof, pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds.

Joint Names Policy: a policy of insurance which includes the Employer and the Contractor as composite insured and under which the insurers have no right of recourse against any person named as an insured, or, pursuant to clause 6.9, recognised as an insured thereunder.

Specified Perils: fire, lightning, explosion, storm, flood, escape of water from any water tank, apparatus or pipe, earthquake, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion, but excluding Excepted Risks.

Terrorism Cover: insurance provided by a Joint Names Policy under Insurance Option A, B or C for physical loss or damage to work executed and Site Materials or to an existing structure and/or its contents caused by terrorism.[57]

Sub-contractors—specified perils cover under Joint Names All Risks Policies

6.9 .1 The Contractor, where Insurance Option A applies, and the Employer, where Insurance Option B or C applies, shall ensure that the Joint Names Policy referred to in paragraph A.1, A.3, B.1 or C.2 of Schedule 3 shall either:

.1 provide for recognition of each sub-contractor as an insured under the relevant Joint Names Policy; or

.2 include a waiver by the relevant insurers of any right of subrogation which they may have against any such sub-contractor

[57] As respects this definition, the extent of Terrorism Cover and possible difficulties in complying with the requirements of Insurance Options A, B and C, see the Guide

in respect of loss or damage by the Specified Perils to the Works or relevant Section, work executed and Site Materials and that this recognition or waiver shall continue up to and including the date of issue of any certificate or other document which states that in relation to the Works, the sub-contractor's works are practically complete or, if earlier, the date of termination of the sub-contractor's employment. Where there are Sections and the sub-contractor's works relate to more than one Section, the recognition or waiver for such sub-contractor shall nevertheless cease in relation to a Section upon the issue of such certificate or other document for his work in that Section.

.2 The provisions of clause 6.9.1 shall apply also in respect of any Joint Names Policy taken out by the Employer under paragraph A.2, or by the Contractor under paragraph B.2.1.2 or C.3.1.2 of Schedule 3.

Terrorism cover—non-availability—Employer's options

6.10 .1 If the insurers named in the Joint Names Policy, or (where Insurance Option C applies) the insurers named in either or both such policies, notify either Party that, with effect from a specified date (the "cessation date"), Terrorism Cover will cease and will no longer be available, the recipient shall immediately inform the other Party.

.2 The Employer, after receipt of such notification but before the cessation date, shall give notice to the Contractor in writing

either

.1 that, notwithstanding the cessation of Terrorism Cover, the Employer requires that the Works continue to be carried out

or

.2 that on the date stated in the Employer's notice (which shall be a date after the date of the insurers' notification but no later than the cessation date) the Contractor's employment under this Contract shall terminate.

.3 If the Employer gives notice of termination under clause 6.10.2.2, then upon and from such termination the provisions of clauses 8.12.2 to 8.12.5 (excluding clause 8.12.3.5) shall apply and the other provisions of this Contract which require any further payment or any release of Retention to the Contractor shall cease to apply.

.4 If the Employer does not give notice of termination under clause 6.10.2.2, then:

.1 if work executed and/or Site Materials suffer physical loss or damage caused by terrorism, the Contractor shall with due diligence restore the damaged work, replace or repair any lost or damaged Site Materials, remove and dispose of any debris and proceed with the carrying out of the Works;

.2 the restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris shall be treated as a Variation, with no reduction in any amount payable to the Contractor pursuant to this clause 6.10.4 by reason of any act or neglect of the Contractor or of any sub-contractor which may have contributed to the physical loss or damage; and

.3 (where Insurance Option C applies) the requirement that the Works continue to be carried out shall not be affected by any loss or damage to the existing structures and/or their contents caused by terrorism but not so as thereby to impose any obligation on the Employer to reinstate the existing structures.

CDP Professional Indemnity Insurance

Obligation to insure

6.11 Where there is a Contractor's Designed Portion, the Contractor shall:

.1 forthwith after this Contract has been entered into, take out (unless he has already done so) a Professional Indemnity insurance policy with a limit of indemnity of the type and in an amount not less than that stated in the Contract Particulars[58];

.2 provided it remains available at commercially reasonable rates, maintain such insurance until the expiry of the period stated in the Contract Particulars from the date of practical completion of the Works; and

.3 as and when reasonably requested to do so by the Employer or the Architect/Contract Administrator, produce for inspection documentary evidence that such insurance has been effected and/or is being maintained.

Increased cost and non-availability

6.12 If the insurance referred to in clause 6.11 ceases to be available at commercially reasonable rates, the Contractor shall immediately give notice to the Employer so that the Contractor and the Employer can discuss the means of best protecting the respective positions of the Employer and the Contractor in the absence of such insurance.

Joint Fire Code—compliance

Application of clauses

6.13 Clauses 6.14 to 6.16 apply where the Contract Particulars state that the Joint Fire Code applies.

Compliance with Joint Fire Code

6.14 The Parties shall comply with the Joint Fire Code; the Employer shall ensure such compliance by all Employer's Persons and the Contractor shall ensure such compliance by all Contractor's Persons.

Breach of Joint Fire Code—remedial measures

6.15 .1 If a breach of the Joint Fire Code occurs and the insurers under the Joint Names Policy in respect of the Works specify by notice to the Employer or the Contractor the remedial measures they require (the "Remedial Measures"), the Party receiving the notice shall send copies of it to the other and to the Architect/Contract Administrator, and then:

.1 subject to clause 6.15.1.2, where the Remedial Measures relate to the obligation of the Contractor to carry out and complete the Works, the Contractor shall

[58] See the Guide.

ensure that the Remedial Measures are carried out by such date as the insurers specify; and

.2 to the extent that the Remedial Measures require a Variation to the Works as described in the Contract Documents or in an Architect/Contract Administrator's instruction, the Architect/Contract Administrator shall issue such instructions as are necessary to enable compliance. If, in any emergency, compliance with the Remedial Measures in whole or in part requires the Contractor to supply materials or execute work before receiving instructions under this clause 6.15.1.2, the Contractor shall supply such limited materials and execute such limited work as are reasonably necessary to secure immediate compliance. The Contractor shall forthwith inform the Architect/Contract Administrator of the emergency and of the steps he is taking under this clause 6.15.1.2. Save to the extent they relate to the Contractor's Designed Portion, such work executed and materials supplied by the Contractor shall be treated as if they had been executed and supplied under an instruction requiring a Variation.

.2 If the Contractor, within 7 days of receipt of a notice specifying Remedial Measures not requiring an Architect/Contract Administrator's instruction under clause 6.15.1.2, does not begin to carry out or thereafter fails without reasonable cause regularly and diligently to proceed with the Remedial Measures, then the Employer may employ and pay other persons to carry out those Remedial Measures. The Contractor shall be liable for all additional costs incurred by the Employer in connection with such employment and an appropriate deduction shall be made from the Contract Sum.

Joint Fire Code—amendments/revisions

6.16 If after the Base Date the Joint Fire Code is amended or revised and the Joint Fire Code as amended or revised is, under the Joint Names Policy, applicable to the Works, the cost, if any, of compliance by the Contractor with any amendment or revision to the Joint Fire Code shall be borne as stated in the Contract Particulars. If it is to be borne by the Employer, it shall be added to the Contract Sum.

SCHEDULE 3 INSURANCE OPTIONS: (CLAUSE 6.7)

Insurance Option A

New Buildings—All Risks Insurance of the Works by the Contractor[63]

Contractor to take out and maintain a Joint Names Policy

A.1 The Contractor shall take out and maintain with insurers approved by the Employer a Joint Names Policy for All Risks Insurance with cover no less than that specified in clause

[63] **Insurance Option A** is applicable to the erection of new buildings where the **Contractor** is required to take out a Joint Names Policy for All Risks Insurance for the Works and **Insurance Option B** is applicable where the **Employer** has elected to take out such Joint Names Policy. **Insurance Option C** is for use in the case of alterations of or extensions to existing structures; under it the **Employer** is required to take out a Joint Names Policy for All Risks Insurance for the Works and also a Joint Names Policy to insure the existing structures and their contents owned by him or for which he is responsible against loss or damage by the Specified Perils. Some Employers (e.g. tenants and homeowners) may not be able readily to obtain the Joint Names cover, in particular that under paragraph C.1. If so, Option C should not be stated to apply and consequential amendments may be necessary. See the Guide.

6.8[64] for the full reinstatement value of the Works or (where applicable) Sections (plus the percentage, if any, stated in the Contract Particulars to cover professional fees)[65] and (subject to clause 2.36) shall maintain such Joint Names Policy up to and including the date of issue of the Practical Completion Certificate or, if earlier, the date of termination of the Contractor's employment (whether or not the validity of that termination is contested).

The obligation to maintain the Joint Names Policy shall not apply in relation to a Section after the date of issue of the Section Completion Certificate for that Section.

Insurance documents—failure by Contractor to insure

A.2 The Contractor shall send to the Architect/Contract Administrator for deposit with the Employer the Joint Names Policy referred to in paragraph A.1, each premium receipt for it and any relevant endorsements of it. If the Contractor defaults in taking out or in maintaining the Joint Names Policy as required by paragraph A.1 (or fails to maintain a policy in accordance with paragraph A.3), the Employer may himself take out and maintain a Joint Names Policy against any risk in respect of which the default has occurred and the amount paid or payable by him in respect of premiums may be deducted by him from any monies due or to become due to the Contractor under this Contract or shall be recoverable from the Contractor as a debt.

Use of Contractor's annual policy—as alternative

A.3 If and so long as the Contractor independently of this Contract maintains an insurance policy which in respect of the Works or Sections:

.1 provides (inter alia) All Risks Insurance with cover and in amounts no less than those specified in paragraph A.1; and

.2 is a Joint Names Policy,

such policy shall satisfy the Contractor's obligations under paragraph A.1. The Employer may at any reasonable time inspect the policy and premium receipts for it or require that they be sent to the Architect/Contract Administrator for such inspection. So long as the Contractor, as and when reasonably required to do so, supplies the documentary evidence that the policy is being so maintained, the Contractor shall not be obliged under paragraph A.2 to deposit the policy and premium receipts with the Employer. The annual renewal date of the policy, as supplied by the Contractor, is stated in the Contract Particulars.

[64] The definition of All Risks Insurance in clause 6.8 specifies the risks for which insurance is required. Policies issued by insurers are not standardised and the way in which the insurance for those risks is expressed varies. **In some cases it may not be possible for insurance to be taken out against certain of the risks covered by the definition of All Risks Insurance and note the potential difficulty with respect to Terrorism Cover mentioned at footnote [55].** These matters should be arranged between the Parties and their insurance advisers **prior to entering into the Contract**. See the Guide.

[65] As to reinstatement value, irrecoverable VAT and other costs, see the Guide. As respects sub-contractors, note also the provisions of clause 6.9.

Loss or damage, insurance claims and Contractor's obligations

A.4 .1 If loss or damage affecting any executed work or Site Materials is occasioned by any risk covered by the Joint Names Policy, then, upon its occurrence or later discovery, the Contractor shall forthwith give notice in writing both to the Architect/Contract Administrator and to the Employer of its extent, nature and location.

.2 Subject to clause 6.10.4.2 and paragraph A.4.4, the occurrence of such loss or damage shall be disregarded in computing any amounts payable to the Contractor under this Contract.

.3 After any inspection required by the insurers in respect of a claim under the Joint Names Policy has been completed, the Contractor shall with due diligence restore the damaged work, replace or repair any lost or damaged Site Materials, remove and dispose of any debris and proceed with the carrying out and completion of the Works.

.4 The Contractor, for himself and for all his sub-contractors who pursuant to clause 6.9 are recognised as an insured under the Joint Names Policy, shall authorise the insurers to pay all monies from such insurance to the Employer. The Employer shall pay all such monies to the Contractor (less only the amount stated in paragraph A.4.5) by instalments under certificates of the Architect/Contract Administrator issued on the dates fixed for the issue of Interim Certificates.

.5 The Employer may retain from the monies paid by the insurers the amount properly incurred by the Employer in respect of professional fees up to an amount which shall not exceed the amount of the additional percentage cover for those fees or (if less) the amount paid by insurers in respect of those fees.

.6 In respect of the restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris, the Contractor shall not be entitled to any payment other than of monies received under the Joint Names Policy.

Terrorism cover—premium rate changes

A.5 .1 If the rate on which the premium is based for Terrorism Cover required under the Joint Names Policy referred to in paragraph A.1 or A.3 is varied at any renewal of the cover, the Contract Sum shall be adjusted by the net amount of the difference between the premium paid by the Contractor and the premium that would have been paid but for the change in the rate.

.2 Where the Employer is a Local Authority, the Employer may, in lieu of any adjustment of the Contract Sum under paragraph A.5.1, instruct the Contractor not to renew the Terrorism Cover under the Joint Names Policy and where he so instructs, the terms of clauses 6.10.4.1 and 6.10.4.2 shall apply from the renewal date if work executed and/or Site Materials suffer physical loss or damage caused by terrorism.

APPENDIX 5

JCT DESIGN & BUILD CONTRACT (DB) 2007

SECTION 6 INJURY, DAMAGE AND INSURANCE

Injury to Persons and Property

Liability of Contractor—personal injury or death

6.1 The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings whatsoever in respect of personal injury to or the death of any person arising out of or in the course of or caused by the carrying out of the Works, except to the extent that the same is due to any act or neglect of the Employer or of any of the Employer's Persons.

Liability of Contractor—injury or damage to property

6.2 The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal in so far as such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Works and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Contractor or of any of the Contractor's Persons. This liability and indemnity is subject to clause 6.3 and, where Insurance Option C (Schedule 3, paragraph C.1) applies, excludes loss or damage to any property required to be insured thereunder caused by a Specified Peril.

Injury or damage to property—Works and Site Materials excluded

6.3 .1 Subject to clauses 6.3.2 and 6.3.3, the reference in clause 6.2 to "property real or personal" does not include the Works, work executed and/or Site Materials up to and including whichever is the earlier of:

.1 the date of issue of the Practical Completion Statement; or

.2 the date of termination of the Contractor's employment.

.2 Where a Section Completion Statement is issued in respect of a Section, that Section shall not after the date of issue of that statement be regarded as "the Works" or "work executed" for the purpose of clause 6.3.1.

.3 If clause 2.30 has been operated, then, after the Relevant Date, the Relevant Part shall not be regarded as "the Works" or "work executed" for the purpose of clause 6.3.1.

Insurance against Personal Injury and Property Damage

Contractor's insurance of his liability

6.4 .1 Without prejudice to his obligation to indemnify the Employer under clauses 6.1 and 6.2, the Contractor shall take out and maintain insurance in respect of claims arising out of his liability referred to in clauses 6.1 and 6.2 which:

.1 in respect of claims for personal injury to or the death of any employee of the Contractor arising out of and in the course of such person's employment, shall comply with all relevant legislation; and

.2 for all other claims to which clause 6.4.1 applies[47], shall indemnify the Employer in like manner to the Contractor (but only to the extent that the Contractor may be liable to indemnify the Employer under the terms of this Contract) and shall be in a sum not less than that stated in the Contract Particulars for any one occurrence or series of occurrences arising out of one event.[48]

.2 As and when reasonably required to do so by the Employer, the Contractor shall send to the Employer documentary evidence that the insurances required by clause 6.4.1 have been taken out and are being maintained, and at any time the Employer may (but shall not unreasonably or vexatiously) require that the relevant policy or policies and related premium receipts be sent to the Employer for such inspection.

.3 If the Contractor defaults in taking out or in maintaining insurance in accordance with clause 6.4.1 the Employer may himself insure against any liability or expense which he may incur as a result of such default and the amount paid or payable by him in respect of premiums therefore may be deducted from any monies due or to become due to the Contractor under this Contract or shall be recoverable from the Contractor as a debt.

Contractor's insurance of liability of Employer

6.5 .1 If the Employer's Requirements state that insurance under clause 6.5.1 is required, the Contractor shall take out and maintain a policy of insurance in the names of the Employer and the Contractor[49] for the amount of indemnity stated in the Contract Particulars in respect of any expense, liability, loss, claim or proceedings which the Employer may incur or sustain by reason of injury or damage to any property caused by collapse, subsidence, heave, vibration, weakening or removal of support or lowering of ground water arising out of or in the course of or by reason of the carrying out of the Works, excluding injury or damage:

.1 for which the Contractor is liable under clause 6.2;

[47] It should be noted that the cover granted under public liability policies taken out pursuant to clause 6.4.1 may not be co-extensive with the indemnity given to the Employer in clauses 6.1 and 6.2: for example, each claim may be subject to the excess in the policy and cover may not be available in respect of loss or damage due to gradual pollution.

[48] The Contractor may, if he wishes, insure for a sum greater than that stated in the Contract Particulars.

[49] A policy of insurance taken out for the purposes of clause 6.5 should not have an expiry date earlier than the end of the Rectification Period.

.2 which is attributable to errors or omissions in the designing of the Works;

.3 which can reasonably be foreseen to be inevitable having regard to the nature of the work to be executed and the manner of its execution;

.4 (if Insurance Option C applies) which it is the responsibility of the Employer to insure under paragraph C.1 of Schedule 3;

.5 to the Works and Site Materials brought on to the site of the Contract for the purpose of its execution except where the Practical Completion Statement has been issued or in so far as any Section is the subject of a Section Completion Statement;

.6 which arises from any consequence of war, invasion, act of foreign enemy, hostilities (whether war is declared or not), civil war, rebellion or revolution, insurrection or military or usurped power;

.7 which is directly or indirectly caused by or contributed to by or arises from the Excepted Risks;

.8 which is directly or indirectly caused by or arises out of pollution or contamination of buildings or other structures or of water or land or the atmosphere happening during the period of insurance, save that this exception shall not apply in respect of pollution or contamination caused by a sudden identifiable, unintended and unexpected incident which takes place in its entirety at a specific moment in time and place during the period of insurance (all pollution or contamination which arises out of one incident being considered for the purpose of this insurance to have occurred at the time such incident takes place); or

.9 which results in any costs or expenses being incurred by the Employer or in any other sums being payable by the Employer in respect of damages for breach of contract, except to the extent that such costs or expenses or damages would have attached in the absence of any contract.

.2 Any insurance under clause 6.5.1 shall be placed with insurers approved by the Employer, and the Contractor shall deposit with the Employer the policy or policies and related premium receipts.

.3 If the Contractor defaults in taking out or in maintaining the Joint Names Policy as provided in clause 6.5.1 the Employer may himself insure against any risk in respect of which the default shall have occurred and may deduct a sum or sums equivalent to the amount paid or payable in respect of premiums from any monies due or to become due to the Contractor or such amount shall be recoverable by the Employer from the Contractor as a debt.

Excepted risks

6.6 Notwithstanding clauses 6.1, 6.2 and 6.4.1, the Contractor shall not be liable either to indemnify the Employer or to insure against any personal injury to or the death of any person or any damage, loss or injury caused to the Works or Site Materials, work executed, the site, or any other property, by the effect of an Excepted Risk.

Insurance of the Works

Insurance options

6.7 Insurance Options A, B and C are set out in Schedule 3. The Insurance Option that applies to this Contract is that stated in the Contract Particulars.[50]

Related definitions

6.8 In Schedule 3 and, so far as relevant, in the clauses of these Conditions the following phrases shall have the meanings given below:

All Risks Insurance[51]: insurance which provides cover against any physical loss or damage to work executed and Site Materials and against the reasonable cost of the removal and disposal of debris and of any shoring and propping of the Works which results from such physical loss or damage but excluding the cost necessary to repair, replace or rectify:

(a) property which is defective due to:
  (i) wear and tear,
  (ii) obsolescence, or
  (iii) deterioration, rust or mildew;
(b) any work executed or any Site Materials lost or damaged as a result of its own defect in design, plan, specification, material or workmanship or any other work executed which is lost or damaged in consequence thereof where such work relied for its support or stability on such work which was defective[52];

[50] **Insurance Option A** is applicable to the erection of new buildings where the **Contractor** is required to take out a Joint Names Policy for All Risks Insurance for the Works and **Insurance Option B** is applicable where the **Employer** has elected to take out such Joint Names Policy. **Insurance Option C** is for use in the case of alterations of or extensions to existing structures; under it the **Employer** is required to take out a Joint Names Policy for All Risks Insurance for the Works and also a Joint Names Policy to insure the existing structures and their contents owned by him or for which he is responsible against loss or damage by the Specified Perils. Some Employers (e.g. tenants and homeowners) may not be able readily to obtain the Joint Names cover, in particular that under paragraph C.1. If so, Option C should not be stated to apply and consequential amendments may be necessary. See the Guide.

[51] The definition of All Risks Insurance in clause 6.8 defines the risks for which insurance is required. Policies issued by insurers are not standardised and the way in which insurance for those risks is expressed varies.

Obtaining Terrorism Cover, which is necessary in order to comply with the requirements of Insurance Option A, B or C, will involve an additional premium and may in certain situations be difficult to effect. Where a difficulty arises discussion should take place between the Parties and their insurance advisers. See the Guide.

[52] In any policy for All Risks Insurance taken out under Insurance Option A or B or paragraph C.2 of Insurance Option C, cover should not be reduced by the terms of any exclusion written in the policy beyond the terms of paragraph (b) in this definition of All Risks Insurance; thus an exclusion of terms "This Policy excludes all loss of or damage to the property insured due to defective design, plan, specification, materials or workmanship" would not be in accordance with the terms of those Insurance Options or of that definition. Wider All Risks cover than that specified may be available to Contractors, though it is not standard.

(c) loss or damage caused by or arising from:
  (i) any consequence of war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, confiscation, commandeering, nationalisation or requisition or loss or destruction of or damage to any property by or under the order of any government *de jure* or *de facto* or public, municipal or local authority.
  (ii) disappearance or shortage if such disappearance or shortage is only revealed when an inventory is made or is not traceable to an identifiable event, or
  (iii) an Excepted Risk.

Excepted Risks: ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof, pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds.

Joint Names Policy: a policy of insurance which includes the Employer and the Contractor as composite insured and under which the insurers have no right of recourse against any person named as an insured, or, pursuant to clause 6.9, recognised as an insured thereunder.

Specified Perils: fire, lightning, explosion, storm, flood, escape of water from any water tank, apparatus or pipe, earthquake, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion, but excluding Excepted Risks.

Terrorism Cover: insurance provided by a Joint Names Policy under Insurance Option A, B or C for physical loss or damage to work executed and Site Materials or to an existing structure and/or its contents caused by terrorism.[53]

Sub-contractors—specified perils cover under Joint Names All Risks Policies

6.9 .1 The Contractor, where Insurance Option A applies, and the Employer, where Insurance Option B or C applies, shall ensure that the Joint Names Policy referred to in paragraph A.1, A.3, B.1 or C.2 of Schedule 3 shall either:

.1 provide for recognition of each sub-contractor as an insured under the relevant Joint Names Policy; or

.2 include a waiver by the relevant insurers of any right of subrogation which they may have against any such sub-contractor

[53] As respects this definition, the extent of Terrorism Cover and possible difficulties in complying with the requirements of Insurance Options A, B and C, see the Guide

in respect of loss or damage by the Specified Perils to the Works or relevant Section, work executed and Site Materials and that this recognition or waiver shall continue up to and including the date of issue of any statement or other document which states that in relation to the Works, the sub-contractor's works are practically complete or, if earlier, the date of termination of the sub-contractor's employment. Where there are Sections and the sub-contractor's works relate to more than one Section, the recognition or waiver for such sub-contractor shall nevertheless cease in relation to a Section upon the issue of such statement or other document for his work in that Section.

.2 The provisions of clause 6.9.1 shall apply also in respect of any Joint Names Policy taken out by the Employer under paragraph A.2, or by the Contractor under paragraph B.2.1.2 or C.3.1.2 of Schedule 3.

Terrorism cover—non-availability—Employer's options

6.10 .1 If the insurers named in the Joint Names Policy, or (where Insurance Option C applies) the insurers named in either or both such policies, notify either Party that, with effect from a specified date (the "cessation date"), Terrorism Cover will cease and will no longer be available, the recipient shall immediately inform the other Party.

.2 The Employer, after receipt of such notification but before the cessation date, shall give notice to the Contractor in writing

either

.1 that, notwithstanding the cessation of Terrorism Cover, the Employer requires that the Works continue to be carried out

or

.2 that on the date stated in the Employer's notice (which shall be a date after the date of the insurers' notification but no later than the cessation date) the Contractor's employment under this Contract shall terminate.

.3 If the Employer gives notice of termination under clause 6.10.2.2, then upon and from such termination the provisions of clauses 8.12.2 to 8.12.5 (excluding clause 8.12.3.5) shall apply and the other provisions of this Contract which require any further payment or any release of Retention to the Contractor shall cease to apply.

.4 If the Employer does not give notice of termination under clause 6.10.2.2, then:

.1 if work executed and/or Site Materials suffer physical loss or damage caused by terrorism, the Contractor shall with due diligence restore the damaged work, replace or repair any lost or damaged Site Materials, remove and dispose of any debris and proceed with the carrying out of the Works;

.2 the restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris shall be treated as a Change, with no reduction in any amount payable to the Contractor pursuant to this clause 6.10.4 by reason of any act or neglect of the Contractor or of any sub-contractor which may have contributed to the physical loss or damage; and

.3 (where Insurance Option C applies) the requirement that the Works continue to be carried out shall not be affected by any loss or damage to the existing structures and/or their contents caused by terrorism but not so as thereby to impose any obligation on the Employer to reinstate the existing structures.

Professional Indemnity Insurance

Obligation to insure

6.11 The Contractor shall:

.1 forthwith after this Contract has been entered into, take out (unless he has already done so) a Professional Indemnity insurance policy with a limit of indemnity of the type and in an amount not less than that stated in the Contract Particulars[54];

.2 provided it remains available at commercially reasonable rates, maintain such insurance until the expiry of the period stated in the Contract Particulars from the date of practical completion of the Works; and

.3 as and when reasonably requested to do so by the Employer, produce for inspection documentary evidence that such insurance has been effected and/or is being maintained.

Increased cost and non-availability

6.12 If the insurance referred to in clause 6.11 ceases to be available at commercially reasonable rates, the Contractor shall immediately give notice to the Employer so that the Contractor and the Employer can discuss the means of best protecting the respective positions of the Employer and the Contractor in the absence of such insurance.

Joint Fire Code—compliance

Application of clauses

6.13 Clauses 6.14 to 6.16 apply where the Contract Particulars state that the Joint Fire Code applies.

Compliance with Joint Fire Code

6.14 The Parties shall comply with the Joint Fire Code; the Employer shall ensure such compliance by all Employer's Persons and the Contractor shall ensure such compliance by all Contractor's Persons.

Breach of Joint Fire Code—Remedial Measures

6.15 .1 If a breach of the Joint Fire Code occurs and the insurers under the Joint Names Policy in respect of the Works specify by notice to the Employer or the Contractor the remedial measures they require (the "Remedial Measures"), the Party receiving

[54] See the Guide.

the notice shall copy it to the other and the Contractor shall ensure that the Remedial Measures are carried out.

.2 If the Contractor, within 7 days of receipt of a notice specifying Remedial Measures, does not begin to carry out or thereafter fails without reasonable cause regularly and diligently to proceed with the Remedial Measures, then the Employer may employ and pay other persons to carry out those Remedial Measures. The Contractor shall be liable for all additional costs incurred by the Employer in connection with such employment and an appropriate deduction shall be made from the Contract Sum.

Joint Fire Code—amendments/revisions

6.16 If after the Base Date the Joint Fire Code is amended or revised and the Joint Fire Code as amended or revised is, under the Joint Names Policy, applicable to the Works, the cost, if any, of compliance by the Contractor with any amendment or revision to the Joint Fire Code shall be borne as stated in the Contract Particulars. If it is to be borne by the Employer, it shall be added to the Contract Sum.

SCHEDULE 3 INSURANCE OPTIONS: (CLAUSE 6.7)

Insurance Option A

New Buildings—All Risks Insurance of the Works by the Contractor[58]

Contractor to take out and maintain a Joint Names Policy

A.1 The Contractor shall take out and maintain with insurers approved by the Employer a Joint Names Policy for All Risks Insurance with cover no less than that specified in clause 6.8[59] for the full reinstatement value of the Works or (where applicable) Sections (plus the percentage, if any, stated in the Contract Particulars to cover professional fees)[60] and (subject to clause 2.33) shall maintain such Joint Names Policy up to and including the date of issue of the Practical Completion Statement or, if earlier, the date of termination of the Contractor's employment (whether or not the validity of that termination is contested).

[58] **Insurance Option A** is applicable to the erection of new buildings where the **Contractor** is required to take out a Joint Names Policy for All Risks Insurance for the Works and **Insurance Option B** is applicable where the **Employer** has elected to take out such Joint Names Policy. **Insurance Option C** is for use in the case of alterations of or extensions to existing structures; under it the **Employer** is required to take out a Joint Names Policy for All Risks Insurance for the Works and also a Joint Names Policy to insure the existing structures and their contents owned by him or for which he is responsible against loss or damage by the Specified Perils. Some Employers (e.g. tenants and homeowners) may not be able readily to obtain the Joint Names cover, in particular that under paragraph C.1. If so, Option C should not be stated to apply and consequential amendments may be necessary. See the Guide.

[59] The definition of All Risks Insurance in clause 6.8 specifies the risks for which insurance is required. Policies issued by insurers are not standardised and the way in which insurance for those risks is expressed varies. **In some cases it may not be possible for insurance to be taken out against certain of the risks covered by the definition of All Risks Insurance and note the potential difficulty with respect to Terrorism Cover mentioned at footnote [51].** These matters should be arranged between the Parties and their insurance advisers prior to entering into the Contract. See the Guide.

[60] As to reinstatement value, irrecoverable VAT and other costs, see the Guide. As respects sub-contractors, note also the provisions of clause 6.9

The obligation to maintain the Joint Names Policy shall not apply in relation to a Section after the date of issue of the Section Completion Statement for that Section.

Insurance documents—failure by Contractor to insure

A.2 The Contractor shall deposit with the Employer the Joint Names Policy referred to in paragraph A.1, each premium receipt for it and any relevant endorsements of it. If the Contractor defaults in taking out or in maintaining the Joint Names Policy as required by paragraph A.1 (or fails to maintain a policy in accordance with paragraph A.3), the Employer may himself take out and maintain a Joint Names Policy against any risk in respect of which the default has occurred and the amount paid or payable by him in respect of premiums may be deducted by him from any monies due or to become due to the Contractor under this Contract or shall be recoverable from the Contractor as a debt.

Use of Contractor's annual policy—as alternative

A.3 If and so long as the Contractor independently of this Contract maintains an insurance policy which in respect of the Works or Sections:

.1 provides (inter alia) All Risks Insurance with cover and in amounts no less than those specified in paragraph A.1; and

.2 is a Joint Names Policy,

such policy shall satisfy the Contractor's obligations under paragraph A.1. The Employer may at any reasonable time inspect the policy and premium receipts for it or require that they be sent to the Employer for such inspection. So long as the Contractor, as and when reasonably required to do so, supplies the documentary evidence that the policy is being so maintained, the Contractor shall not be obliged under paragraph A.2 to deposit the policy and premium receipts with the Employer. The annual renewal date of the policy, as supplied by the Contractor, is stated in the Contract Particulars.

Loss or damage, insurance claims and Contractor's obligations

A.4 .1 If loss or damage affecting any executed work or Site Materials is occasioned by any risk covered by the Joint Names Policy, then, upon its occurrence or later discovery, the Contractor shall forthwith give notice in writing to the Employer of its extent, nature and location.

.2 Subject to clause 6.10.4.2 and paragraph A.4.4, the occurrence of such loss or damage shall be disregarded in computing any amounts payable to the Contractor under this Contract.

.3 After any inspection required by the insurers in respect of a claim under the Joint Names Policy has been completed, the Contractor shall with due diligence restore the damaged work, replace or repair any lost or damaged Site Materials, remove and dispose of any debris and proceed with the carrying out and completion of the Works.

.4 The Contractor, for himself and for all his sub-contractors who pursuant to clause 6.9 are recognised as an insured under the Joint Names Policy, shall authorise the

insurers to pay all monies from such insurance to the Employer. The Employer shall pay all such monies to the Contractor (less only the amount stated in paragraph A.4.5) by instalments in accordance with clause 4.14 Alternative B even if Alternative A is applicable to all other payments under this Contract.

.5 The Employer may retain from the monies paid by the insurers the amount properly incurred by the Employer in respect of professional fees up to an amount which shall not exceed the amount of the additional percentage cover for those fees or (if less) the amount paid by insurers in respect of those fees.

.6 In respect of the restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris, the Contractor shall not be entitled to any payment other than of monies received under the Joint Names Policy.

Terrorism cover—premium rate changes

A.5 .1 If the rate on which the premium is based for Terrorism Cover required under the Joint Names Policy referred to in paragraph A.1 or A.3 is varied at any renewal of the cover, the Contract Sum shall be adjusted by the net amount of the difference between the premium paid by the Contractor and the premium that would have been paid but for the change in the rate.

.2 Where the Employer is a Local Authority, the Employer may, in lieu of any adjustment of the Contract Sum under paragraph A.5.1, instruct the Contractor not to renew the Terrorism Cover under the Joint Names Policy and where he so instructs, the terms of clauses 6.10.4.1 and 6.10.4.2 shall apply from the renewal date if work executed and/or Site Materials suffer physical loss or damage caused by terrorism.

Insurance Option B

New Buildings—All Risks Insurance of the Works by the Employer[58]

Employer to take out and maintain a Joint Names Policy

B.1 The Employer shall take out and maintain a Joint Names Policy for All Risks Insurance with cover no less than that specified in clause 6.8[59] for the full reinstatement value of the Works or (where applicable) Sections (plus the percentage, if any, stated in the Contract Particulars to cover professional fees)[60] and (subject to clause 2.33) shall maintain such Joint Names Policy up to and including the date of issue of the Practical Completion Statement or, if earlier, the date of termination of the Contractor's employment (whether or not the validity of that termination is contested).

The obligation to maintain the Joint Names Policy shall not apply in relation to a Section after the date of issue of the Section Completion Statement for that Section.

Evidence of Insurance

B.2 .1 Except where the Employer is a Local Authority:

.1 the Employer shall, as and when reasonably required by the Contractor, produce documentary evidence and receipts showing that the Joint Names Policy has been taken out and is being maintained; and

.2 if the Employer defaults in taking out or in maintaining the Joint Names Policy, the Contractor may himself take out and maintain a Joint Names Policy against any risk in respect of which the default has occurred and the amount paid or payable by him in respect of the premiums shall be added to the Contract Sum.

.2 Where the Employer is a Local Authority, the Employer shall, as and when reasonably required by the Contractor, produce to the Contractor a copy of the cover certificate issued by the insurer named in the Joint Names Policy certifying that Terrorism Cover is being provided under that Policy.

Loss or damage, insurance claims, Contractor's obligations and payment by Employer

B.3 .1 If loss or damage affecting any executed work or Site Materials is occasioned by any risk covered by the Joint Names Policy, then, upon its occurrence or later discovery, the Contractor shall forthwith give notice in writing to the Employer of its extent, nature and location.

.2 Subject to clause 6.10.4.2 and paragraph B.3.5, the occurrence of such loss or damage shall be disregarded in computing any amounts payable to the Contractor under this Contract.

.3 After any inspection required by the insurers in respect of a claim under the Joint Names Policy has been completed, the Contractor shall with due diligence restore the damaged work, replace or repair any lost or damaged Site Materials, remove and dispose of any debris and proceed with the carrying out and completion of the Works.

.4 The Contractor, for himself and for all his sub-contractors who pursuant to clause 6.9 are recognised as an insured under the Joint Names Policy, shall authorise the insurers to pay all monies from such insurance to the Employer.

.5 The restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris shall be treated as a Change.

Insurance Option C

Insurance by the Employer of Existing Structures and Works in or Extensions to them[58]

Existing structures and contents—Joint Names Policy for Specified Perils

C.1 The Employer shall take out and maintain a Joint Names Policy in respect of the existing structures (which from the Relevant Date shall include any Relevant Part to which clause 2.30 refers) together with the contents thereof owned by him or for which he is responsible, for the full cost of reinstatement[60], repair or replacement of loss or damage due to any of the Specified Perils up to and including the date of issue of the Practical Completion Statement or (if earlier) the date of termination of the Contractor's employment (whether or not the validity of that termination is contested). The Contractor shall authorise the insurers to pay all monies from such insurance to the Employer.

The Works—Joint Names Policy For All Risks

C.2 The Employer shall take out and maintain a Joint Names Policy for All Risks Insurance with cover no less than that specified in clause 6.8[59] for the full reinstatement value of the Works or (where applicable) Sections (plus the percentage, if any, stated in the Contract Particulars to cover professional fees)[60] and (subject to clause 2.33) shall maintain such Joint Names Policy up to and including the date of issue of the Practical Completion Statement or, if earlier, the date of termination of the Contractor's employment (whether or not the validity of that termination is contested).

The obligation to maintain the Joint Names Policy under this paragraph C.2 shall not apply in relation to any Section after the date of issue of the Section Completion Statement for that Section.

Evidence of Insurance

C.3 .1 Except where the Employer is a Local Authority:

.1 the Employer shall, as and when reasonably required by the Contractor, produce documentary evidence and receipts showing that the Joint Names Policies required under paragraphs C.1 and C.2 have been taken out and are being maintained;

.2 if the Employer defaults in taking out or in maintaining either of those Joint Names Policies, the Contractor may himself take out and maintain a Joint Names Policy against any risk in respect of which the default has occurred and for that purpose, in relation to any default under paragraph C.1, shall have such right of entry and inspection as may be required to make a survey and inventory of the existing structures and the relevant contents; and

.3 in the event of any such default, a sum equivalent to the premiums paid or payable by the Contractor pursuant to paragraph C.3.1.2 shall be added to the Contract Sum.

.2 Where the Employer is a Local Authority, the Employer shall, as and when reasonably required by the Contractor, produce to the Contractor copies of the cover certificates issued by the insurers named in the Joint Names Policies under paragraphs C.1 and C.2 which certify that Terrorism Cover is being provided under each policy.

Loss or damage to Works—insurance claims and Contractor's obligations

C.4 .1 If loss or damage affecting any executed work or Site Materials is occasioned by any of the risks covered by the Joint Names Policy referred to in paragraph C.2 then, upon its occurrence or later discovery, the Contractor shall forthwith give notice in writing to the Employer of its extent, nature and location.

.2 Subject to clause 6.10.4.2 and paragraph C.4.5.2, the occurrence of such loss or damage shall be disregarded in computing any amounts payable to the Contractor under this Contract.

.3 The Contractor, for himself and for all his sub-contractors who pursuant to clause 6.9 are recognised as an insured under the Joint Names Policy referred to in

paragraph C.2, shall authorise the insurers to pay all monies from such insurance in respect of the loss or damage to the Employer.

.4 If it is just and equitable, the Contractor's employment under this Contract may within 28 days of the occurrence of such loss or damage be terminated at the option of either Party by notice given to the other by actual delivery or by special or recorded delivery. If such notice is given:

.1 either Party may within 7 days of receiving such a notice (but not thereafter) invoke the dispute resolution procedures that apply under this Contract in order that it may be decided whether the termination is just and equitable; and

.2 upon the giving of such notice of termination or, where those dispute resolution procedures have been invoked, upon any final upholding of the notice of termination, the provisions of clauses 8.12.2 to 8.12.5 (except clause 8.12.3.5) shall apply.

.5 If no notice of termination is served under paragraph C.4.4, or if the notice of termination is disputed and is not upheld, then:

.1 after any inspection required by the insurers under the Joint Names Policy referred to in paragraph C.2 has been completed, the Contractor with due diligence shall restore the damaged work, replace or repair any lost or damaged Site Materials, remove and dispose of any debris and proceed with the carrying out and completion of the Works; and

.2 the restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris shall be treated as a Change.

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APPENDIX 6

JCT INTERMEDIATE BUILDING CONTRACT (IC) 2007

SECTION 6 INJURY, DAMAGE AND INSURANCE

Injury to Persons and Property

Liability of Contractor—personal injury or death

6.1 The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings whatsoever in respect of personal injury to or the death of any person arising out of or in the course of or caused by the carrying out of the Works, except to the extent that the same is due to any act or neglect of the Employer or of any of the Employer's Persons.

Liability of Contractor—injury or damage to property

6.2 The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal in so far as such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Works and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Contractor or of any of the Contractor's Persons. This liability and indemnity is subject to clause 6.3 and, where Insurance Option C (Schedule 1, paragraph C.1) applies, excludes loss or damage to any property required to be insured thereunder caused by a Specified Peril.

Injury or damage to property—Works and Site Materials excluded

6.3 .1 Subject to clauses 6.3.2 and 6.3.3, the reference in clause 6.2 to "property real or personal" does not include the Works, work executed and/or Site Materials up to and including whichever is the earlier of:

.1 the date of issue of the Practical Completion Certificate; or

.2 the date of termination of the Contractor's employment.

.2 Where a Section Completion Certificate is issued in respect of a Section, that Section shall not after the date of issue of that certificate be regarded as "the Works" or "work executed" for the purpose of clause 6.3.1.

.3 If clause 2.25 has been operated, then, after the Relevant Date, the Relevant Part shall not be regarded as "the Works" or "work executed" for the purpose of clause 6.3.1.

Insurance against Personal Injury and Property Damage

Contractor's insurance of his liability

6.4 .1 Without prejudice to his obligation to indemnify the Employer under clauses 6.1 and 6.2, the Contractor shall take out and maintain insurance in respect of claims arising out of his liability referred to in clauses 6.1 and 6.2 which:

.1 in respect of claims for personal injury to or the death of any employee of the Contractor arising out of and in the course of such person's employment, shall comply with all relevant legislation; and

.2 for all other claims to which clause 6.4.1 applies[44], shall indemnify the Employer in like manner to the Contractor (but only to the extent that the Contractor may be liable to indemnify the Employer under the terms of this Contract) and shall be in a sum not less than that stated in the Contract Particulars for any one occurrence or series of occurrences arising out of one event.[45]

.2 As and when reasonably required to do so by the Employer, the Contractor shall send to the Architect/Contract Administrator for inspection by the Employer documentary evidence that the insurances required by clause 6.4.1 have been taken out and are being maintained, and at any time the Employer may (but shall not unreasonably or vexatiously) require that the relevant policy or policies and related premium receipts be sent to the Architect/Contract Administrator for such inspection.

.3 If the Contractor defaults in taking out or in maintaining insurance in accordance with clause 6.4.1 the Employer may himself insure against any liability or expense which he may incur as a result of such default and the amount paid or payable by him in respect of premiums therefor may be deducted from any monies due or to become due to the Contractor under this Contract or shall be recoverable from the Contractor as a debt.

Contractor's insurance of liability of Employer

6.5 .1 If the Contract Particulars state that insurance under clause 6.5.1 may be required, the Contractor shall, if instructed by the Architect/Contract Administrator, take out a policy of insurance in the names of the Employer and the Contractor[46] for the amount of indemnity there stated in respect of any expense, liability, loss, claim or proceedings which the Employer may incur or sustain by reason of injury or damage to any property caused by collapse, subsidence, heave, vibration, weakening or

[44] It should be noted that the cover granted under public liability policies taken out pursuant to clause 6.4.1 may not be co-extensive with the indemnity given to the Employer in clauses 6.1 and 6.2: for example, each claim may be subject to the excess in the policy and cover may not be available in respect of loss or damage due to gradual pollution.

[45] The Contractor may, if he wishes, insure for a sum greater than that stated in the Contract Particulars.

[46] A policy of insurance taken out for the purposes of clause 6.5 should not have an expiry date earlier than the end of the Rectification Period.

removal of support or lowering of ground water arising out of or in the course of or by reason of the carrying out of the Works, excluding injury or damage:

.1 for which the Contractor is liable under clause 6.2; or

.2 which is attributable to errors or omissions in the designing of the Works; or

.3 which can reasonably be foreseen to be inevitable having regard to the nature of the work to be executed and the manner of its execution; or

.4 (if Insurance Option C applies) which it is the responsibility of the Employer to insure under paragraph C.1 of Schedule 1; or

.5 to the Works and Site Materials brought on to the site of the Contract for the purpose of its execution except where the Practical Completion Certificate has been issued or in so far as any Section is the subject of a Section Completion Certificate; or

.6 which arises from any consequence of war, invasion, act of foreign enemy, hostilities (whether war is declared or not), civil war, rebellion or revolution, insurrection or military or usurped power; or

.7 which is directly or indirectly caused by or contributed to by or arises from the Excepted Risks; or

.8 which is directly or indirectly caused by or arises out of pollution or contamination of buildings or other structures or of water or land or the atmosphere happening during the period of insurance, save that this exception shall not apply in respect of pollution or contamination caused by a sudden identifiable, unintended and unexpected incident which takes place in its entirety at a specific moment in time and place during the period of insurance (all pollution or contamination which arises out of one incident being considered for the purpose of this insurance to have occurred at the time such incident takes place); or

.9 which results in any costs or expenses being incurred by the Employer or in any other sums being payable by the Employer in respect of damages for breach of contract, except to the extent that such costs or expenses or damages would have attached in the absence of any contract.

.2 Any insurance under clause 6.5.1 shall be placed with insurers approved by the Employer, and the Contractor shall send to the Architect/Contract Administrator for deposit with the Employer the policy or policies and related premium receipts.

.3 The amounts expended by the Contractor to take out and maintain the insurance referred to in clause 6.5.1 shall be added to the Contract Sum.

Excepted risks

6.6 Notwithstanding clauses 6.1, 6.2 and 6.4.1, the Contractor shall not be liable either to indemnify the Employer or to insure against any personal injury to or the death of any person or any damage, loss or injury caused to the Works or Site Materials, work executed, the site, or any other property, by the effect of an Excepted Risk.

Insurance of the Works

Insurance Options

6.7 Insurance Options A, B and C are set out in Schedule 1. The Insurance Option that applies to this Contract is that stated in the Contract Particulars.[47]

Related definitions

6.8 In Schedule 1 and, so far as relevant, in the clauses of these Conditions the following phrases shall have the meanings given below:

All Risks Insurance[48]: insurance which provides cover against any physical loss or damage to work executed and Site Materials and against the reasonable cost of the removal and disposal of debris and of any shoring and propping of the Works which results from such physical loss or damage but excluding the cost necessary to repair, replace or rectify:

(a) property which is defective due to:
  (i) wear and tear,
  (ii) obsolescence, or
  (iii) deterioration, rust or mildew;

(b) any work executed or any Site Materials lost or damaged as a result of its own defect in design, plan, specification, material or workmanship or any other work executed which is lost or damaged in consequence thereof where such work relied for its support or stability on such work which was defective[49];

[47] **Insurance Option A** is applicable to the erection of new buildings where the **Contractor** is required to take out a Joint Names Policy for All Risks Insurance for the Works and **Insurance Option B** is applicable where the **Employer** has elected to take out such Joint Names Policy. **Insurance Option C** is for use in the case of alterations of or extensions to existing structures; under it the **Employer** is required to take out a Joint Names Policy for All Risks Insurance for the Works and also a Joint Names Policy to insure the existing structures and their contents owned by him or for which he is responsible against loss or damage by the Specified Perils. Some Employers (e.g. tenants and homeowners) may not be able readily to obtain the Joint Names cover, in particular that under paragraph C.1. If so, Option C should not be stated to apply and consequential amendments may be necessary. See the Guide.

[48] The definition of All Risks Insurance in clause 6.8 defines the risks for which insurance is required. Policies issued by insurers are not standardised and the way in which insurance for those risks is expressed varies.

Obtaining Terrorism Cover, which is necessary in order to comply with the requirements of Insurance Option A, B or C, will involve an additional premium and may in certain situations be difficult to effect. Where a difficulty arises discussion should take place between the Parties and their insurance advisers. See the Guide.

[49] In any policy for All Risks Insurance taken out under Insurance Option A or B or paragraph C.2 of Insurance Option C, cover should not be reduced by the terms of any exclusion written in the policy beyond the terms of paragraph (b) in this definition of All Risks Insurance; thus an exclusion of terms 'This Policy excludes all loss of or damage to the property insured due to defective design, plan, specification, materials or workmanship' would not be in accordance with the terms of those Insurance Options or of that definition. Wider All Risks cover than that specified may be available to Contractors, though it is not standard.

(c) loss or damage caused by or arising from:
  (i) any consequence of war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, confiscation, commandeering, nationalisation or requisition or loss or destruction of or damage to any property by or under the order of any government *de jure* or *de facto* or public, municipal or local authority.
  (ii) disappearance or shortage if such disappearance or shortage is only revealed when an inventory is made or is not traceable to an identifiable event, or
  (iii) an Excepted Risk.

Excepted Risks: ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof, pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds.

Joint Names Policy: a policy of insurance which includes the Employer and the Contractor as composite insured and under which the insurers have no right of recourse against any person named as an insured, or, pursuant to clause 6.9, recognised as an insured thereunder.

Specified Perils: fire, lightning, explosion, storm, flood, escape of water from any water tank, apparatus or pipe, earthquake, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion, but excluding Excepted Risks.

Terrorism Cover: insurance provided by a Joint Names Policy under Insurance Option A, B or C for physical loss or damage to work executed and Site Materials or to an existing structure and/or its contents caused by terrorism.[50]

Sub-contractors—specified perils cover under Joint Names All Risks Policies

6.9 .1 The Contractor, where Insurance Option A applies, and the Employer, where Insurance Option B or C applies, shall ensure that the Joint Names Policy referred to in paragraph A.1, A.3, B.1 or C.2 of Schedule 1 shall either:

.1 provide for recognition of each sub-contractor as an insured under the relevant Joint Names Policy; or

.2 include a waiver by the relevant insurers of any right of subrogation which they may have against any such sub-contractor

[50] As respects this definition, the extent of Terrorism Cover and possible difficulties in complying with the requirements of Insurance Options A, B and C, see the Guide.

in respect of loss or damage by the Specified Perils to the Works or relevant Section, work executed and Site Materials and that this recognition or waiver shall continue up to and including the date of issue of any certificate or other document which states that in relation to the Works, the sub-contractor's works are practically complete or, if earlier, the date of termination of the sub-contractor's employment. Where there are Sections and the sub-contractor's works relate to more than one Section, the recognition or waiver for such sub-contractor shall nevertheless cease in relation to a Section upon the issue of such certificate or other document for his work in that Section.

.2 The provisions of clause 6.9.1 shall apply also in respect of any Joint Names Policy taken out by the Employer under paragraph A.2, or by the Contractor under paragraph B.2.1.2 or C.3.1.2 of Schedule 1.

.3 Where Insurance Option C applies, the Employer shall also ensure that the policy of insurance referred to in paragraph C.1 of Schedule 1 shall provide for recognition of any Named Sub-Contractor as an insured under that policy or include a waiver in respect of that Named Sub-Contractor in the terms referred to in clause 6.9.1.2, in either case up to and including the date of issue of such certificate or other document as is referred to in clause 6.9.1 or earlier date of termination of the Named Sub-Contractor's employment.

Terrorism cover—non-availability—Employer's options

6.10 .1 If the insurers named in the Joint Names Policy, or (where Insurance Option C applies) the insurers named in either or both such policies, notify either Party that, with effect from a specified date (the "cessation date"), Terrorism Cover will cease and will no longer be available, the recipient shall immediately inform the other Party.

.2 The Employer, after receipt of such notification but before the cessation date, shall give notice to the Contractor in writing

either

.1 that, notwithstanding the cessation of Terrorism Cover, the Employer requires that the Works continue to be carried out

or

.2 that on the date stated in the Employer's notice (which shall be a date after the date of the insurers' notification but no later than the cessation date) the Contractor's employment under this Contract shall terminate.

.3 If the Employer gives notice of termination under clause 6.10.2.2, then upon and from such termination the provisions of clauses 8.12.2 to 8.12.5 (excluding clause 8.12.3.5) shall apply and the other provisions of this Contract which require any further payment or any release of retention to the Contractor shall cease to apply.

.4 If the Employer does not give notice of termination under clause 6.10.2.2, then:

.1 if work executed and/or Site Materials suffer physical loss or damage caused by terrorism, the Contractor shall with due diligence restore the damaged work,

replace or repair any lost or damaged Site Materials, remove and dispose of any debris and proceed with the carrying out of the Works;

.2 the restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris shall be treated as a Variation, with no reduction in any amount payable to the Contractor pursuant to this clause 6.10.4 by reason of any act or neglect of the Contractor or of any sub-contractor which may have contributed to the physical loss or damage; and

.3 (where Insurance Option C applies) the requirement that the Works continue to be carried out shall not be affected by any loss or damage to the existing structures and/or their contents caused by terrorism but not so as thereby to impose any obligation on the Employer to reinstate the existing structures.

Joint Fire Code—compliance

Application of clauses

6.11 Clauses 6.12 to 6.14 apply where the Contract Particulars state that the Joint Fire Code applies.

Compliance with Joint Fire Code

6.12 The Parties shall comply with the Joint Fire Code; the Employer shall ensure such compliance by all Employer's Persons and the Contractor shall ensure such compliance by all Contractor's Persons.

Breach of Joint Fire Code—Remedial Measures

6.13 .1 If a breach of the Joint Fire Code occurs and the insurers under the Joint Names Policy in respect of the Works specify by notice to the Employer or the Contractor the remedial measures they require (the "Remedial Measures"), the Party receiving the notice shall send copies of it to the other and to the Architect/Contract Administrator, and then:

.1 subject to clause 6.13.1.2, where the Remedial Measures relate to the obligation of the Contractor to carry out and complete the Works, the Contractor shall ensure that the Remedial Measures are carried out by such date as the insurers specify; and

.2 to the extent that the Remedial Measures require a Variation to the Works as described in the Contract Documents or in an Architect/Contract Administrator's instruction, the Architect/Contract Administrator shall issue such instructions as are necessary to enable compliance. If, in any emergency, compliance with the Remedial Measures in whole or in part requires the Contractor to supply materials or execute work before receiving instructions under this clause 6.13.1.2, the Contractor shall supply such limited materials and execute such limited work as are reasonably necessary to secure immediate compliance. The Contractor shall forthwith inform the Architect/Contract Administrator of the emergency and of the steps he is taking under this clause 6.13.1.2. Such work

executed and materials supplied by the Contractor shall be treated as if they had been executed and supplied under an instruction requiring a Variation.

.2 If the Contractor, within 7 days of receipt of a notice specifying Remedial Measures not requiring an Architect/Contract Administrator's instruction under clause 6.13.1.2, does not begin to carry out or thereafter fails without reasonable cause regularly and diligently to proceed with the Remedial Measures, then the Employer may employ and pay other persons to carry out those Remedial Measures. The Contractor shall be liable for all additional costs incurred by the Employer in connection with such employment and an appropriate deduction shall be made from the Contract Sum.

Joint Fire Code—amendments/revisions

6.14 If after the Base Date the Joint Fire Code is amended or revised and the Joint Fire Code as amended or revised is, under the Joint Names Policy, applicable to the Works, the cost, if any, of compliance by the Contractor with any amendment or revision to the Joint Fire Code shall be borne as stated in the Contract Particulars. If it is to be borne by the Employer, it shall be added to the Contract Sum.

APPENDIX 7.1

JCT AGREEMENT (C/CM 2002)

CLIENT AND CONSTRUCTION MANAGER INCORPORATING AMENDMENT 1: 2003

Works in or extensions to existing structures—Client to take out and maintain a Joint Names Policy for All Risks Insurance

6B.2 The Client shall take out and maintain a Joint Names Policy for All Risks Insurance for cover no less than that defined in clause 6.8 for the full reinstatement value of the Project and the replacement value of the Site Facilities. The Client (subject to clause 2.22.2) shall maintain the interest of the Trade Contractor in the policy as Joint Insured for the period from the Date of Commencement until the date of issue of the certificate of practical completion of the Works; and thereafter in respect of physical loss or damage to the Works which occurs prior to the issue of the Certificate of Completion of Making Good Defects due to a cause which occurs prior to practical completion of the Trade Contract and to any physical loss or damage occasioned by the Trade Contractor in the course of any operations carried out by him whilst making good defects; or up to and including the date of determination of the employment of the Trade Contractor under clause 6B.4.3 or Part 7 of the Conditions (whether or not the validity of that determination is contested), whichever is the earlier. Where the Client's status for VAT purposes is exempt or partially exempt the full reinstatement value to which this clause refers shall be inclusive of any VAT on the supply of the work and materials referred to in clause 6B.4.4.1 for which the Contractor is chargeable by the Commissioners.

. . .

Second Schedule

Insurance and Indemnities

1 From the commencement of any work on site for the Project or the provision of any of the site facilities or services referred to in the **Sixth Schedule** are provided whichever first occurs, the Client shall take out or shall procure the taking out of:

.1 a Joint Names Policy for All Risks Insurance for the full reinstatement value of the Project and the replacement value of the Site Facilities (plus the percentage, if any, stated in the Appendix to cover professional fees, including those of the Construction Manager); and

.2 **where the Project comprises alterations of or extensions to existing structures**, a Joint Names Policy in respect of the existing structures (which shall include from the relevant date any relevant part to which clause 1.7 refers) together with the contents thereof owned by the Client or for which he is responsible for the full cost of reinstatement, repair or replacement of loss or damage due to one or more of the Specified Perils;

and the Client shall maintain such Joint Names Policy or Policies up to and including the date of issue of the Interim Project Completion Certificate or up to and including the date of the termination of the Construction Manager's engagement under clause 7, or the date of any abandonment of the Project whichever is the earlier; and in the case of the All Risks cover continue the limited defect liability protection afforded to Trade Contractors until the issue of the Certificate of Completion of Making Good Projects Defects.

. . .

13 The Construction Manager shall be liable for and shall indemnify the Client against any expense, liability, loss, claim or proceedings whatsoever arising under statute or at common law in respect of

.1 personal injury to or the death of any person whomsoever; and

.2 any loss, injury or damage whatsoever to any property real or personal

insofar as such loss, injury, death or damage arises out of or in the course of or by reason of the carrying out by the Construction Manager of his obligations under this Agreement and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Construction Manager, his servants or agents.

14 The reference in paragraph 13.2 to "property real or personal" does not include the Project, work executed, Site Materials and Site Facilities up to and including the date of issue of the Interim Project Completion Certificate or up to and including the date of the termination of the engagement of the Construction Manager under clause 7, or the date of any abandonment of the Project whichever is the earlier. If clause 1.7 has been operated then, in respect of the relevant part, and as from the relevant date, such relevant part shall not be regarded as 'the Project' or 'work executed' for the purpose of paragraph 14.

15 The liability of the Construction Manager to indemnify the Client in respect of the death, loss, injury or damage referred to in paragraph 13 shall be limited to the sum of the insurance cover stated in the Appendix pursuant to paragraph 17.2 to be taken out for any one occurrence or series of occurrences arising out of any one event.

16 The Client shall be liable for and shall indemnify the Construction Manager against any expense, liability, loss, claim or proceedings whatsoever arising under statute or at common law in respect of

.1 personal injury to or the death of any person whomsoever; and

.2 any loss, injury or damage whatsoever to any property real or personal

to the extent that any such loss, injury, death or damage is due to any negligence, breach of statutory duty, omission or default of the Client, his servants or agents (other than the Construction Manager as agent for the Client under any Trade Contract).

17 .1 Without prejudice to his obligation to indemnify the Client under paragraph 13 the Construction Manager shall take out and maintain until the date of issue of the Final Project Completion Certificate insurance which shall comply with paragraph 17.2 in respect of his liability referred to in paragraph 13.

.2 The insurance in respect of claims for personal injury to or the death of any person under a contract of service or apprenticeship with the Construction Manager, and arising out of and in the course of such person's employment, shall comply with all

relevant legislation. For all other claims to which paragraph 17.2 applies the insurance cover to be taken out and maintained by the Construction Manager shall be not less than the sum stated in the Appendix for any one occurrence or series of occurrences arising out of one event.

.3 As and when reasonably required by the Client the Construction Manager shall send to the Client for inspection by him documentary evidence that the insurance required by paragraph 17.2 have been taken out and are being maintained.

.4 If the Construction Manager defaults in taking out or in maintaining insurance as provided in paragraph 17.2 the Client may himself insure against any liability or expense which he may incur arising out of such default and a sum equivalent to the amount paid or payable by him in respect of premiums therefor may be deducted by him from any monies due or to become due to the Construction Manager under this Agreement or such amount may be recoverable by the Client from the Construction Manager as a debt.

APPENDIX 7.2

JCT TRADE CONTRACT (TC/C 2002)

FOR USE WITH THE JCT CLIENT AND CONSTRUCTION MANAGER AGREEMENT INCORPORATING AMENDMENT 1: 2003

Part 6 Injury, damage and insurance

Liability of Trade Contractor—personal injury or death—indemnity to Client

6.1 The Trade Contractor shall be liable for, and shall indemnify the Client against, any expense, liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or caused by the carrying out of the Works, except to the extent that the same is due to any act or neglect of the Client or of any person for whom the Client is responsible including any other persons engaged by the Client on or in connection with the Project.

Liability of Trade Contractor—loss, injury or damage to property—indemnity to Client

6.2 The Trade Contractor shall be liable for, and shall indemnify the Client against, any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal in so far as such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Works, and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Trade Contractor, his servants or agents or of any person who may properly be on the site upon or in connection with the Works or any part thereof his servants or agents other than the Client or any person employed, engaged or authorised by him or by any local authority or statutory undertaker executing work solely in pursuance of its statutory rights and obligations. This liability and indemnity is subject to clause 6.3 and, where clause 6B.1 is applicable, excludes loss or damage to any property required to be insured thereunder caused by a Specified Peril.

Injury or damage to property—exclusion of the Works and Site Materials

6.3 .1 Subject to clause 6.3.2 the reference in clause 6.2 to "property real or personal" does not include the Works, work executed and/or Site Materials up to and including the date of issue of the certificate of practical completion of the Works or up to and including the date of determination of the employment of the Trade Contractor (whether or not the validity of that determination is disputed) under Part 7 of the Conditions or, where clause 6B applies, under Part 7 or clause 6B.4.3, whichever is the earlier.

.2 If clause 2.21 has been operated then, in respect of the relevant part and as from the relevant date, such relevant part shall not be regarded as "the Works", or "work executed" for the purpose of clause 6.3.1.

Trade Contractor's insurance

6.4 .1 Without prejudice to his obligation to indemnify the Client under clauses 6.1 and 6.2 the Trade Contractor shall take out and maintain insurance which shall comply with clause 6.4.2 in respect of claims arising out of his liability referred to in clauses 6.1 and 6.2.

.2 The insurance in respect of claims for personal injury to or the death of any person under a contract of service or apprenticeship with the Trade Contractor, and arising out of and in the course of such person's employment, shall comply with all relevant legislation. For all other claims to which clause 6.4.1 applies the insurance cover:

– shall indemnify the Client in like manner to the Trade Contractor but only to the extent that the Trade Contractor may be liable to indemnify the Client under the terms of this Trade Contract; and

– shall be not less than the sum stated in the Appendix for any one occurrence or series of occurrences arising out of one event.

. . .

Client to take out and maintain a Joint Names Policy for All Risks Insurance

6A.1 The Client shall take out and maintain a Joint Names Policy for All Risks Insurance for cover no less than that defined in clause 6.8 for the full reinstatement value of the Project and the replacement value of the Site Facilities. The Client (subject to clause 2.22.2) shall maintain the interest of the Trade Contractor in the policy as Joint Insured for the period from the Date of Commencement until the date of issue of the certificate of practical completion of the Works; and thereafter in respect of physical loss or damage to the Works which occurs prior to the issue of the Certificate of Completion of Making Good Defects due to a cause which occurs prior to practical completion of the Trade Contract and to any physical loss or damage occasioned by the Trade Contractor in the course of any operations carried out by him whilst making good defects; or up to and including the date of determination of the employment of the Trade Contractor under Part 7 of the Conditions (whether or not the validity of that determination is contested) whichever is the earlier. Where the Client's status for VAT purposes is exempt or partially exempt the full reinstatement value to which this clause refers shall be inclusive of any VAT on the supply of the work and materials referred to in clause 6A.3.3 for which the Contractor is chargeable by the Commissioners.

. . .

Existing structures and contents—Specified Perils—Client to take out and maintain Joint Names Policy

6B.1 The Client shall take out and maintain a Joint Names Policy in respect of the existing structures (which shall include from the relevant date any relevant part to which clause

2.22.2 refers) together with the contents thereof owned by him or for which he is responsible, for the full cost of reinstatement, repair or replacement of loss or damage due to one or more of the Specified Perils up to and including the date of issue of the certificate of practical completion of the Works or up to and including the date of determination of the employment of the Trade Contractor under clause 6B.4.3 or Part 7 of the Conditions (whether or not the validity of that determination is contested), whichever is the earlier. The Trade Contractor shall authorise the insurers to pay all monies from such insurance in respect of loss or damage to the Client. Where the Client's status for VAT purposes is exempt or partially exempt the full cost of reinstatement, repair or replacement of loss or damage to which this clause refers shall be inclusive of any VAT chargeable on the supply of such reinstatement, repair or replacement.

APPENDIX 8

JCT MINOR WORKS CONTRACT (MW) 2007

SECTION 5 INJURY, DAMAGE AND INSURANCE

Liability of Contractor—personal injury or death

5.1 The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings whatsoever in respect of personal injury to or death of any person arising out of or in the course of or caused by the carrying out of the Works, except to the extent that the same is due to any act or neglect of the Employer or of any person for whom the Employer is responsible.

Liability of Contractor—injury or damage to property

5.2 The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal (other than loss, injury or damage to the Works and/or Site Materials or, where clause 5.4B applies, to any property required to be insured thereunder caused by a Specified Peril) in so far as such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Works and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Contractor or any person employed or engaged by the Contractor on or in connection with the Works or any part of them.

Contractor's insurance of his liability

5.3 Without prejudice to his obligation to indemnify the Employer under clauses 5.1 and 5.2, the Contractor shall take out and maintain (and shall cause any sub-contractor similarly to take out and maintain) insurance in respect of claims arising out of his liability referred to in clauses 5.1 and 5.2 which:

.1 in respect of claims for personal injury to or the death of any employee of the Contractor arising out of and in the course of such person's employment, shall comply with all relevant legislation; and

.2 for all other claims to which clause 5.3 applies[29], shall indemnify the Employer in like manner to the Contractor, but only to the extent that the Contractor may be

[29] It should be noted that the cover granted under public liability policies taken out pursuant to clause 5.3 may not be co-extensive with the indemnity given to the Employer in clauses 5.1 and 5.2: for example, each claim may be subject to the excess in the policy and cover may not be available in respect of loss or damage due to gradual pollution.

liable to indemnify the Employer under the terms of this Contract and shall be in a sum not less than that stated in the Contract Particulars for any one occurrence or series of occurrences arising out of one event.

Insurance of the Works by Contractor in Joint Names

5.4A .1 If the Contract Particulars state that clause 5.4A applies[30], the Contractor shall take out and maintain with insurers approved by the Employer a Joint Names Policy for All Risks Insurance for the full reinstatement value of the Works (plus the percentage, if any, stated in the Contract Particulars to cover professional fees) and shall maintain such Joint Names Policy up to and including the date of issue of the practical completion certificate or, if earlier, the date of termination of the Contractor's employment (whether or not the validity of that termination is contested).

.2 .1 After any inspection required by the insurers in respect of a claim under the insurance has been completed, the Contractor shall with due diligence restore the damaged work, replace or repair any lost or damaged Site Materials, remove and dispose of any debris and proceed with the carrying out and completion of the Works.

.2 The Contractor shall authorise the insurers to pay all monies from such insurance to the Employer and the Employer may retain from monies paid by the insurers the amount properly incurred by the Employer in respect of professional fees up to an amount which shall not exceed the amount of the percentage additional cover for those fees or (if less) the amount paid by insurers in respect of those fees.

.3 In respect of restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris, the Contractor shall not be entitled to any payment other than monies received under the insurance referred to in clause 5.4A.1 (less only the amount stated in clause 5.4A.2.2) and such monies shall be paid to the Contractor under certificates of the Architect/Contract Administrator at the periods stated in clause 4.3.

Insurance of existing structures and the Works by Employer in Joint Names

5.4B .1 If the Contract Particulars state that clause 5.4B applies, the Employer shall take out and maintain:

.1 a Joint Names Policy in respect of the existing structures together with the contents of them owned by him or for which he is responsible, for the full cost of reinstatement, repair or replacement of loss or damage due to any of the Specified Perils;

[30] Where the Contractor has in force an All Risks Policy which insures the Works, this Policy may be used to provide the insurance required by clause 5.4A provided the Policy recognises the Employer as a joint insured with the Contractor in respect of the Works and the Policy is maintained. As to full reinstatement value see the Guidance Notes.

.2 a Joint Names Policy for All Risks Insurance for the full reinstatement value of the Works (plus the percentage, if any, stated in the Contract Particulars to cover professional fees)

and shall maintain such Joint Names Policies up to and including the date of issue of the practical completion certificate or, if earlier, the date of termination of the Contractor's employment (whether or not the validity of that termination is contested). The Contractor shall authorise the insurers to pay all monies from such insurance to the Employer.

.2 If any loss or damage as referred to in clause 5.4B.1.2 occurs to the Works or to any Site Materials then the Architect/Contract Administrator shall issue instructions under clause 3.4, as are reasonable, for the reinstatement and making good of such loss or damage and such instructions shall be valued under clause 3.6.

Insurance of existing structures by Employer in own name

5.4C If the Contract Particulars state that clause 5.4C applies, the Employer shall, if he has not already done so, take out and maintain in his own name a policy in respect of the existing structures together with the contents thereof owned by him or for which he is responsible, for the full cost of reinstatement, repair or replacement of loss or damage due to any of the Specified Perils up to and including the date of issue of the practical completion certificate or (if earlier) the date of termination of the Contractor's employment (whether or not the validity of that termination is contested).

Evidence of insurance

5.5 The Contractor shall produce, and shall cause any sub-contractor to produce, such evidence as the Employer may reasonably require that the insurances referred to in clause 5.3 and, where applicable, clause 5.4A have been taken out and are in force at all material times. Where clause 5.4B or 5.4C is applicable and except where the Employer is a Local Authority, the Employer shall, as and when reasonably required by the Contractor, produce documentary evidence showing that the insurance referred to therein has been taken out and is being maintained.

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APPENDIX 9

JCT MAJOR PROJECTS CONSTRUCTION CONTRACT (MP) 2007

INDEMNITIES AND INSURANCE

Indemnities

32 .1 The Contractor shall be liable for and shall indemnify the Employer against any expense, liability, loss, claim or proceedings arising under statue or at common law in respect of:

.1 the personal injury to or the death of any person; and

.2 the loss, injury or damage to any property real or personal,

to the extent that such expense, liability, loss, claim or proceedings arise out of or in the course of carrying out of the Project and is not as a consequence of some act or neglect on the part of the Employer or any person for whom the Employer is responsible (excluding the Contractor but including Others on the Site) but excluding any amount recoverable (or which but for any default by the Employer, policy excess or insurer's insolvency would have been recoverable) by the Employer under any policy required by clause 33.

.2 The Employer shall be liable for and shall indemnify the Contractor against any expense, liability, loss, claim or proceedings arising under statute or at common law in respect of:

.1 the personal injury to or the death of any person; and

.2 the loss, injury or damage to any property real or personal,

to the extent that such expense, liability, loss, claim or proceedings arise out of or in the course of carrying out of the Project as a consequence of some act or neglect on the part of the Employer or any person for whom the Employer is responsible (excluding the Contractor but including Others on the Site) but excluding any amount recoverable (or which but for any default by the Contractor, policy excess or insurer's insolvency would have been recoverable) by the Contractor under any policy required by clause 33.

Insurances

33 .1 Policies of insurance shall be provided and maintained in the manner indicated by the Contract Particulars and each Party shall comply with the terms and conditions of those policies to which he is a party including, where applicable, compliance with the Joint Fire Code. Where either Party is notified of any remedial measures considered necessary by an insurer as a consequence of non-compliance with the Joint Fire

Code, the other Party shall be notified and the Contractor shall implement the remedial measures without delay and this shall not be treated as giving rise to a Change.

.2 Where a Party is required by this Contract to provide and maintain a policy of insurance, the other Party may request the production of documentary evidence that the policy has been taken out and remains in force and, apart from any policy required by clause 34 (*Professional Indemnity*), may also request a copy of the policy document.

.3 If a Party fails to provide the documentary evidence referred to by clause 33.2 within 7 days of a request being made, the other Party may assume that there has been a failure to insure. Where there has been a failure to insure by one Party the other Party may insure against any risk to which he is exposed as a consequence and the Party that has failed to insure will be liable to pay the other any costs incurred in taking out and maintaining that insurance.

.4 Upon the occurrence of an event giving rise to a claim under any policy of insurance required to be provided by this Contract the Party intending to make the claim shall notify the other Party.

.5 The occurrence of an event giving rise to a claim shall be disregarded in the computation of the amount due to the Contractor in accordance with this Contract and, subject to clauses 32 (*Indemnities*) and 33.6, neither the Employer nor the Contractor shall be entitled to receive any payment from the other in respect of the event giving rise to the claim.

.6 Where any policy of insurance required to be provided by this Contract contains a policy excess, the Party making a claim under the policy shall pay or bear the policy excess stated in the Contract Particulars.[4]

.7 Where any part of the Terrorism Cover ceases to be available the Party responsible for providing and maintaining the relevant policy shall immediately notify the other.

.8 From the later of the date of the cessation of such Terrorism Cover or the date of any required notification to the Employer by the Contractor under clause 33.7 the risk of any loss that would otherwise have been covered by a policy of insurance required by this Contract shall rest with the Employer. Any additional works necessary to complete the Project as a consequence of a loss due to terrorism that would otherwise have been covered by a policy of insurance required by this Contract shall be treated as a Change.

Professional Indemnity

34 .1 The provisions of clause 34 only apply when so stated in the Contract Particulars.

.2 The Contractor shall take out and maintain Professional Indemnity insurance for not less than the amount stated in the Contract Particulars. Provided that it remains

[4] See the Guide.

generally available at commercially reasonable rates, such insurance shall be maintained until the expiry of 12 years from the date of Practical Completion of the Project.

.3 Where the Contractor considers that any insurance required by clause 34.2 is no longer generally available at commercially reasonable rates he shall notify the Employer and co-operate with the Employer in seeking means by which the Contractor can be protected against professional liability claims arising out of the Project.

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APPENDIX 10

JCT MANAGEMENT BUILDING CONTRACT (MC) 2008

SECTION 6 INJURY, DAMAGE AND INSURANCE

Injury to Persons and Property

Liability of Management Contractor—personal injury or death

6.1 The Management Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings whatsoever in respect of personal injury to or the death of any person arising out of or in the course of or caused by the carrying out of the Project, except to the extent that the same is due to any act or neglect of the Employer or of any of the Employer's Persons.

Liability of Management Contractor—injury or damage to property

6.2 The Management Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal in so far as such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Project and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Management Contractor or of any of the Management Contractor's Persons. This liability and indemnity is subject to clause 6.3 and, where Insurance Option C (Schedule 3, paragraph C.1) applies, excludes loss or damage to any property required to be insured thereunder caused by a Specified Peril.

Injury or damage to property—Project and Site Materials excluded

6.3 .1 Subject to clauses 6.3.2 and 6.3.3, the reference in clause 6.2 to 'property real or personal' does not include the Project, work executed and/or Site Materials up to and including whichever is the earlier of:

.1 the date of issue of the Practical Completion Certificate; or

.2 the date of termination of the Management Contractor's employment.

.2 Where a Section Completion Certificate is issued in respect of a Section, that Section shall not after the date of issue of that certificate be regarded as 'the Project' or 'work executed' for the purpose of clause 6.3.1.

.3 If clause 2.25 has been operated, then, after the Relevant Date, the Relevant Part shall not be regarded as 'the Project' or 'work executed' for the purpose of clause 6.3.1.

Insurance against Personal Injury and Property Damage

Management Contractor's and Works Contractors' liability insurance

6.4 .1 Without prejudice to his obligation to indemnify the Employer under clauses 6.1 and 6.2, the Management Contractor shall take out and maintain insurance in respect of claims arising out of the liability referred to in clauses 6.1 and 6.2 which:

.1 in respect of claims for personal injury to or the death of any employee arising out of and in the course of such person's employment, shall comply with all relevant legislation; and

.2 for all other claims to which clause 6.4.1 applies[42], shall indemnify the Employer in like manner to the Management Contractor (but only to the extent that the Management Contractor may be liable to indemnify the Employer under the terms of this Contract) and shall be in a sum not less than that stated in the Contract Particulars for any one occurrence or series of occurrences arising out of one event.[43]

.2 The Management Contractor shall ensure that each Works Contractor takes out and maintains insurance in accordance with clause 6.5.1 of the Works Contract Conditions.

.3 As and when reasonably required to do so by the Employer, the Management Contractor shall send, and shall ensure that each Works Contractor sends, to the Architect/Contract Administrator for inspection by the Employer documentary evidence that the insurances required by clause 6.4.1 or 6.4.2 have been taken out and are being maintained, and at any time the Employer may (but shall not unreasonably or vexatiously) require that the relevant policy or policies and related premium receipts be sent to the Architect/Contract Administrator for such inspection.

.4 If the Management Contractor or any Works Contractor defaults in taking out or in maintaining insurance in accordance with clause 6.4.1 or 6.4.2 the Employer may himself insure against any liability or expense which he may incur as a result of such default and the amount paid or payable by him in respect of premiums therefor may be deducted from any monies due or to become due to the Management Contractor under this Contract or shall be recoverable from the Management Contractor as a debt.

Management Contractor's insurance of liability of Employer

6.5 .1 If the Contract Particulars state that insurance under clause 6.5.1 may be required, the Management Contractor shall, if instructed by the Architect/Contract Administrator, take out a policy of insurance in the names of the Employer and the Management Contractor[44] for the amount of indemnity there stated in respect of

[42] It should be noted that the cover granted under public liability policies taken out pursuant to clause 6.4.1 may not be co-extensive with the indemnity given to the Employer in clauses 6.1 and 6.2: for example, each claim may be subject to the excess in the policy and cover may not be available in respect of loss or damage due to gradual pollution.

[43] The Management Contractor may, if he wishes, insure for a sum greater than that stated in the Contract Particulars.

[44] A policy of insurance taken out for the purposes of clause 6.5 should not have an expiry date earlier than the end of the Rectification Period.

any expense, liability, loss, claim or proceedings which the Employer may incur or sustain by reason of injury or damage to any property caused by collapse, subsidence, heave, vibration, weakening or removal of support or lowering of ground water arising out of or in the course of or by reason of the carrying out of the Project, excluding injury or damage:

.1 for which the Management Contractor is liable under clause 6.2; or

.2 which is attributable to errors or omissions in the designing of the Project; or

.3 which can reasonably be foreseen to be inevitable having regard to the nature of the work to be executed and the manner of its execution; or

.4 (if Insurance Option C applies) which it is the responsibility of the Employer to insure under paragraph C.1 of Schedule 3; or

.5 to the Project and Site Materials brought on to the site of the Contract for the purpose of its execution except where the Practical Completion Certificate has been issued or in so far as any Section is the subject of a Section Completion Certificate; or

.6 which arises from any consequence of war, invasion, act of foreign enemy, hostilities (whether war is declared or not), civil war, rebellion or revolution, insurrection or military or usurped power; or

.7 which is directly or indirectly caused by or contributed to by or arises from the Excepted Risks; or

.8 which is directly or indirectly caused by or arises out of pollution or contamination of buildings or other structures or of water or land or the atmosphere happening during the period of insurance, save that this exception shall not apply in respect of pollution or contamination caused by a sudden identifiable, unintended and unexpected incident which takes place in its entirety at a specific moment in time and place during the period of insurance (all pollution or contamination which arises out of one incident being considered for the purpose of this insurance to have occurred at the time such incident takes place); or

.9 which results in any costs or expenses being incurred by the Employer or in any other sums being payable by the Employer in respect of damages for breach of contract, except to the extent that such costs or expenses or damages would have attached in the absence of any contract.

.2 Any insurance under clause 6.5.1 shall be placed with insurers approved by the Employer, and the Management Contractor shall send to the Architect/Contract Administrator for deposit with the Employer the policy or policies and related premium receipts.

.3 The amounts expended by the Management Contractor to take out and maintain the insurance referred to in clause 6.5.1 shall be included in the Prime Cost.

Excepted risks

6.6 Notwithstanding clauses 6.1, 6.2 and 6.4.1, the Management Contractor shall not be liable either to indemnify the Employer or to insure against any personal injury to or the

death of any person or any damage, loss or injury caused to the Project or Site Materials, work executed, the site, or any other property, by the effect of an Excepted Risk.

Insurance of the Project

Insurance options

6.7 Insurance Options A, B and C are set out in Schedule 3. The Insurance Option that applies to this Contract is that stated in the Contract Particulars.[45]

Related definitions

6.8 In Schedule 3 and, so far as relevant, in the clauses of these Conditions the following phrases shall have the meanings given below:

All Risks Insurance[46]: insurance which provides cover against any physical loss or damage to work executed and Site Materials and against the reasonable cost of the removal and disposal of debris and of any shoring and propping of the Project which results from such physical loss or damage but excluding the cost necessary to repair, replace or rectify:

(a) property which is defective due to:
  (i) wear and tear,
  (ii) obsolescence, or
  (iii) deterioration, rust or mildew;

(b) any work executed or any Site Materials lost or damaged as a result of its own defect in design, plan, specification, material or workmanship or any other work executed which is lost or damaged in consequence thereof where such work relied for its support or stability on such work which was defective[47];

[45] **Insurance Option A** is applicable to the erection of new buildings where the **Management Contractor** is required to take out a Joint Names Policy for All Risks Insurance for the Project and **Insurance Option B** is applicable where the **Employer** has elected to take out such Joint Names Policy. **Insurance Option C** is for use in the case of alterations of or extensions to existing structures; under it the **Employer** is required to take out a Joint Names Policy for All Risks Insurance for the Project and also a Joint Names Policy to insure the existing structures and their contents owned by him or for which he is responsible against loss or damage by the Specified Perils. Some Employers (e.g. tenants and homeowners) may not be able readily to obtain the Joint Names cover, in particular that under paragraph C.1. If so, Option C should not be stated to apply and consequential amendments may be necessary. See the Guide.

[46] The definition of All Risks Insurance in clause 6.8 defines the risks for which insurance is required. Policies issued by insurers are not standardised and the way in which insurance for those risks is expressed varies.

Obtaining Terrorism Cover, which is necessary in order to comply with the requirements of Insurance Option A, B or C, will involve an additional premium and may in certain situations be difficult to effect. Where a difficulty arises discussion should take place between the Parties and their insurance advisers. See the Guide.

[47] In any policy for All Risks Insurance taken out under Insurance Option A or B or paragraph C.2 of Insurance Option C, cover should not be reduced by the terms of any exclusion written in the policy beyond the terms of paragraph (b) in this definition of All Risks Insurance; thus an exclusion of terms 'This Policy excludes all loss of or damage to the property insured due to defective design, plan, specification, materials or workmanship' would not be in accordance with the terms of those Insurance Options or of that definition. Wider All Risks cover than that specified may be available to Contractors, though it is not standard.

(c) loss or damage caused by or arising from:
  (i) any consequence of war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, confiscation, commandeering, nationalisation or requisition or loss or destruction of or damage to any property by or under the order of any government *de jure* or *de facto* or public, municipal or local authority.
  (ii) disappearance or shortage if such disappearance or shortage is only revealed when an inventory is made or is not traceable to an identifiable event, or
  (iii) an Excepted Risk.

Excepted Risks: ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof, pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds.

Joint Names Policy: a policy of insurance which includes the Employer and the Management Contractor as composite insured and under which the insurers have no right of recourse against any person named as an insured, or, pursuant to clause 6.9, recognised as an insured thereunder.

Specified Perils: fire, lightning, explosion, storm, flood, escape of water from any water tank, apparatus or pipe, earthquake, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion, but excluding Excepted Risks.

Terrorism Cover: insurance provided by a Joint Names Policy under Insurance Option A, B or C for physical loss or damage to work executed and Site Materials or to an existing structure and/or its contents caused by terrorism.[48]

Works Contractors—Specified Perils cover under Joint Names Policies

6.9 .1 The Management Contractor, where Insurance Option A applies, and the Employer, where Insurance Option B or C applies, shall ensure that the Joint Names Policy or Policies referred to that Option shall either:

.1 provide for recognition of each Works Contractor as an insured under the relevant Joint Names Policy; or

.2 include a waiver by the relevant insurers of any right of subrogation which they may have against any such Works Contractor

[48] As respects this definition, the extent of Terrorism Cover and possible difficulties in complying with the requirements of Insurance Options A, B and C, see the Guide.

in respect of loss or damage by the Specified Perils to the Project or relevant Section, work executed and Site Materials and that this recognition or waiver shall continue up to and including the date of issue of the certificate of practical completion of the Works of that Works Contractor, or, if earlier, the date of termination of his employment. Where there are Sections and the relevant Works relate to more than one Section, the recognition or waiver for such Works Contractor shall nevertheless cease in relation to a Section upon the issue of such certificate or other document for his work in that Section.

.2 The provisions of clause 6.9.1 shall apply also in respect of any Joint Names Policy taken out by the Employer under paragraph A.2, or by the Management Contractor under paragraph B.2.1.2 or C.3.1.2 of Schedule 3.

Terrorism Cover—non-availability—Employer's options

6.10 .1 If the insurers named in the Joint Names Policy, or (where Insurance Option C applies) the insurers named in either or both such policies, notify either Party that, with effect from a specified date (the 'cessation date'), Terrorism Cover will cease and will no longer be available, the recipient shall immediately inform the other Party.

.2 The Employer, after receipt of such notification but before the cessation date, shall give notice to the Management Contractor in writing

either

.1 that, notwithstanding the cessation of Terrorism Cover, the Employer requires that the Project continues to be carried out

or

.2 that on the date stated in the Employer's notice (which shall be a date after the date of the insurers' notification but no later than the cessation date) the Management Contractor's employment under this Contract shall terminate.

.3 If the Employer gives notice of termination under clause 6.10.2.2, then upon and from such termination the provisions of clauses 8.13.2 to 8.13.5 (excluding clause 8.13.3.5) shall apply and the other provisions of this Contract which require any further payment or any release of Retention to the Management Contractor shall cease to apply.

.4 If the Employer does not give notice of termination under clause 6.10.2.2, then:

.1 if work executed and/or Site Materials suffer physical loss or damage caused by terrorism, the Management Contractor shall with due diligence secure the restoration of the damaged work, replacement or repair of any lost or damaged Site Materials, and the removal and disposal of any debris by a Works Contractor and proceed with the carrying out of the Project;

.2 (where Insurance Option C applies) the requirement that the Project continues to be carried out shall not be affected by any loss or damage to the existing structures and/or their contents caused by terrorism but not so as thereby to impose any obligation on the Employer to reinstate the existing structures.

Professional Indemnity Insurance

Obligation to insure

6.11 If the Contract Particulars state that Professional Indemnity insurance is required, the Management Contractor shall:

.1 forthwith after this Contract has been entered into, take out (unless he has already done so) a Professional Indemnity insurance policy with a limit of indemnity of the type and in an amount not less than that stated in the Contract Particulars[49];

.2 provided it remains available at commercially reasonable rates, maintain such insurance until the expiry of the period stated in the Contract Particulars from the date of practical completion of the Project; and

.3 as and when reasonably requested to do so by the Employer or the Architect/Contract Administrator, produce for inspection documentary evidence that such insurance has been effected and/or is being maintained.

Increased cost and non-availability

6.12 If the insurance referred to in clause 6.11 ceases to be available at commercially reasonable rates, the Management Contractor shall immediately give notice to the Employer so that the Management Contractor and the Employer can discuss the means of best protecting the respective positions of the Employer and the Management Contractor in the absence of such insurance.

Joint Fire Code—compliance

Application of clauses

6.13 Clauses 6.14 and 6.15 apply where the Contract Particulars state that the Joint Fire Code applies.

Compliance with Joint Fire Code

6.14 The Parties shall comply with the Joint Fire Code; the Employer shall ensure such compliance by all Employer's Persons and the Management Contractor shall ensure such compliance by all Management Contractor's Persons.

Breach of Joint Fire Code—Remedial Measures

6.15 .1 If a breach of the Joint Fire Code occurs and the insurers under the Joint Names Policy in respect of the Project specify by notice to the Employer or the Management Contractor the remedial measures they require (the 'Remedial Measures'), the Party receiving the notice shall send copies of it to the other and to the Architect/Contract Administrator, and then:

.1 subject to clause 6.15.1.2, where the Remedial Measures relate to the carrying out and completion of the Project, the Management Contractor shall ensure that the Remedial Measures are carried out by such date as the insurers specify; and

[49] See the Guide.

.2 to the extent that the Remedial Measures require a Works Contract Variation and/or a Project Change the Architect/Contract Administrator shall issue such instructions as are necessary to enable compliance. If, in any emergency, compliance with the Remedial Measures in whole or in part requires the supply of materials or execution of work before receiving instructions under this clause 6.15.1.2, the Management Contractor shall ensure the supply of such limited materials and execution of such limited work as are reasonably necessary to secure immediate compliance. The Management Contractor shall forthwith inform the Architect/Contract Administrator of the emergency and of the steps he is taking under this clause 6.15.1.2.

.2 If the Management Contractor, within 7 days of receipt of a notice specifying Remedial Measures not requiring an Architect/Contract Administrator's instruction under clause 6.15.1.2, fails to ensure the commencement of those Remedial Measures or thereafter fails without reasonable cause to ensure that they proceed regularly and diligently, then the Employer may employ and pay other persons to carry out those Remedial Measures. The Management Contractor shall be liable for all additional costs incurred by the Employer in connection with such employment and an appropriate deduction shall be made from the Prime Cost.

SCHEDULE 3 INSURANCE OPTIONS: (CLAUSE 6.7)

Insurance Option A

New Buildings—All Risks Insurance of the Project by the Management Contractor[55]

Management Contractor to take out and maintain a Joint Names Policy

A.1 The Management Contractor shall prior to the commencement of any work for the Project on the site take out and maintain with insurers approved by the Employer a Joint Names Policy for All Risks Insurance with cover no less than that specified in clause 6.8[56] for the full reinstatement value of the Project or (where applicable) Sections (plus the percentage, if any, stated in the Contract Particulars to cover professional fees and an

[55] **Insurance Option A** is applicable to the erection of new buildings where the **Management Contractor** is required to take out a Joint Names Policy for All Risks Insurance for the Project and **Insurance Option B** is applicable where the **Employer** has elected to take out such Joint Names Policy. **Insurance Option C** is for use in the case of alterations of or extensions to existing structures; under it the **Employer** is required to take out a Joint Names Policy for All Risks Insurance for the Project and also a Joint Names Policy to insure the existing structures and their contents owned by him or for which he is responsible against loss or damage by the Specified Perils. Some Employers (e.g. tenants and homeowners) may not be able readily to obtain the Joint Names cover, in particular that under paragraph C.1. If so, Option C should not be stated to apply and consequential amendments may be necessary. See the Guide.

[56] The definition of All Risks Insurance in clause 6.8 specifies the risks for which insurance is required. Policies issued by insurers are not standardised and the way in which insurance for those risks is expressed varies. **In some cases it may not be possible for insurance to be taken out against certain of the risks covered by the definition of All Risks Insurance and note the potential difficulty with respect to Terrorism Cover mentioned at footnote [46].** These matters should be arranged between the Parties and their insurance advisers **prior to entering into the Contract**. See the Guide.

excess no greater than that specified in the Supplemental Particulars)[57] and (subject to clause 2.28) shall maintain such Joint Names Policy up to and including the date of issue of the Practical Completion Certificate or, if earlier, the date of termination of the Management Contractor's employment (whether or not the validity of that termination is contested).

The obligation to maintain the Joint Names Policy shall not apply in relation to a Section after the date of issue of the Section Completion Certificate for that Section.

Insurance documents—failure by Management Contractor to insure

A.2 The Management Contractor shall send to the Architect/Contract Administrator for deposit with the Employer the Joint Names Policy referred to in paragraph A.1, each premium receipt for it and any relevant endorsements of it. If the Management Contractor defaults in taking out or in maintaining the Joint Names Policy as required by paragraph A.1 (or fails to maintain a policy in accordance with paragraph A.3), the Employer may himself take out and maintain a Joint Names Policy against any risk in respect of which the default has occurred and the amount paid or payable by him in respect of premiums may be deducted by him from any monies due or to become due to the Management Contractor under this Contract or shall be recoverable from the Management Contractor as a debt.

Use of Management Contractor's annual policy—as alternative

A.3 If and so long as the Management Contractor independently of this Contract maintains an insurance policy which in respect of the Project or Sections:

.1 provides (inter alia) All Risks Insurance with cover and in amounts no less than those specified in paragraph A.1; and

.2 is a Joint Names Policy,

such policy shall satisfy the Management Contractor's obligations under paragraph A.1. The Employer may at any reasonable time inspect the policy and premium receipts for it or require that they be sent to the Architect/Contract Administrator for such inspection. So long as the Management Contractor, as and when reasonably required to do so, supplies the documentary evidence that the policy is being so maintained, the Management Contractor shall not be obliged under paragraph A.2 to deposit the policy and premium receipts with the Employer. The annual renewal date of the policy, as supplied by the Management Contractor, is stated in the Contract Particulars.

Loss or damage, insurance claims and Management Contractor's obligations

A.4 .1 If loss or damage affecting any executed work or Site Materials is occasioned by any risk covered by the Joint Names Policy, then, upon its occurrence or later discovery, the Management Contractor shall forthwith give notice in writing both to the

[57] As to reinstatement value, irrecoverable VAT and other costs, see the Guide. As respects Works Contractors, note also the provisions of clause 6.9.

Architect/Contract Administrator and to the Employer of its extent, nature and location.

.2 Subject to paragraph A.4.4, the occurrence of such loss or damage shall be disregarded in computing any amounts payable to the Management Contractor under this Contract.

.3 After any inspection required by the insurers in respect of a claim under the Joint Names Policy has been completed, the Management Contractor shall with due diligence secure the restoration of the damaged work, the replacement or repair of any lost or damaged Site Materials and the removal and disposal of any debris, and shall proceed to secure the carrying out and completion of the Project. If carried out by Works Contractors already appointed, such remedial work shall be treated as if it were the subject of a Works Contract Variation required by an instruction under clause 3.13.

.4 The Management Contractor, for himself and for all Works Contractors who pursuant to clause 6.9 are recognised as an insured under the Joint Names Policy, shall authorise the insurers to pay all monies from such insurance to the Employer. The Employer shall pay all such monies to the Management Contractor (less only the amount stated in paragraph A.4.5) by instalments under certificates of the Architect/Contract Administrator issued on the dates fixed for the issue of Interim Certificates.

.5 The Employer may retain from the monies paid by the insurers the amount properly incurred by the Employer in respect of professional fees up to an amount which shall not exceed the amount of the additional percentage cover for those fees or (if less) the amount paid by insurers in respect of those fees.

.6 In respect of the restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris, the Management Contractor shall not be entitled to any payment other than of monies received under the Joint Names Policy.

Terrorism Cover—premium rate changes

A.5 .1 If the rate on which the premium is based for Terrorism Cover required under the Joint Names Policy referred to in paragraph A.1 or A.3 is varied at any renewal of the cover, the net amount of the difference between the premium paid by the Management Contractor and the premium that would have been paid but for the change in the rate shall be included in the Prime Cost.

.2 Where the Employer is a Local Authority, the Employer may, in lieu of any additional premium included in the Prime Cost under paragraph A.5.1, instruct the Management Contractor not to renew the Terrorism Cover under the Joint Names Policy and where he so instructs, the terms of clause 6.10.4.1 shall apply from the renewal date if work executed and/or Site Materials suffer physical loss or damage caused by terrorism.

APPENDIX 11

JCT MANAGEMENT BUILDING CONTRACT (MC) 1998

SECTION 6 INJURY, DAMAGE AND INSURANCE

Insurance of the Project—Definitions—Benefit to Works Contractors (6.1 to 6.3)

Insurance of the Project—insurance of existing structures

6.1 [g] Clause 6.4 or clause 6.4B apply whether or not clause 6.5 (existing structures—insurance) applies.

Definitions

6.2 in clause 6.4 and clause 6.4B and, so far as relevant, in other clauses of the Conditions the following phrases shall have the meaning given below:

[h] *All Risks Insurance*

insurance which provides cover against any physical loss or damage to work executed and Site Materials and against the reasonable cost of the removal and disposal of debris and of any shoring and propping of the Works which results from such physical loss or damage but excluding the cost necessary to repair, replace or rectify

.1 property which is defective due to

.1 wear and tear,

.2 obsolescence,

[g] Clause 6.4 and clause 6.4B are alternative clauses. Both clauses are applicable to Projects whether they consist of the erection of new buildings or comprise alterations of or extensions to existing structures. For either kind of Project either the Management Contractor (clause 6.4) or the Employer (clause 6.4B) takes out a Joint Names Policy for All Risks Insurance for the Project as defined in clause 6.2 (or, where clause 6.4 applies, for such other definition as the Employer may instruct). For Projects which comprise alterations of or extensions to existing structures the Employer takes out a Joint Names Policy to insure the existing structures and their contents owned by the Employer or for which the Employer is responsible against loss or damage thereto by the Specified Perils (clause 6.5). The premiums paid by the Management Contractor for the insurances referred to in clauses 6.4.1, 6.4.3, 6.4B.2 and 6.5.3 are treated as Prime Cost and reimbursed by the Employer (see Second Schedule Part 3B paragraph 11).

[h] The definition of "All Risks Insurance" in clause 6.2 defines the risks for which insurance is required (subject to the right of the Employer in clause 6.4.1.1 or 6.4.3.1 to instruct that a different definition of cover is adopted). Policies issued by insurers are not standardised and there will be some variation in the way insurance for those risks is expressed. See also Practice Note 22 and Guide, Part A.

.3 deterioration, rust or mildew;

[j].2 any work executed or any Site Materials lost or damaged as a result of its own defect in design, plan, specification, material or workmanship or any other work executed which is lost or damaged in consequence thereof where such work relied for its support or stability on such work which was defective;

.3 loss or damage caused by or arising from

.1 any consequence of war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, confiscation, commandeering, nationalisation or requisition or loss or destruction of or damage to any property by or under the order of any government de jure or de facto or public, municipal or local authority;

.2 disappearance or shortage if such disappearance or shortage is only revealed when an inventory is made or is not traceable to an identifiable event;

.3 an Excepted Risk (as defined in clause 1.3);

and if the Contract is carried out in Northern Ireland

.4 civil commotion;

.5 any unlawful, wanton or malicious act committed maliciously by a person or persons acting on behalf of or in connection with an unlawful association; ''unlawful association'' shall mean any organisation which is engaged in terrorism and includes an organisation which at any relevant time is a prescribed organisation within the meaning of the Northern Ireland (Emergency Provisions) Act 1973; ''terrorism'' means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.

Joint Names Policy

A policy of insurance which includes the Employer and the Management Contractor as the insured and under which the insurers have no right of recourse against any person named as an insured or, pursuant to clause 6.3, recognised as an insured thereunder.

Benefit of Joint Names Policies—Specified Perils—Works Contractors

6.3 The Management Contractor, where clause 6.4 is applicable, in respect of the Joint Names Policy referred to in clause 6.4.1.1 and in clause 6.4.3.1 or, where clause 6.4B applies, in clause 6.4B.2 or, where clause 6.5 is applicable, in clause 6.5.3

[j] In any policy for ''All Risks Insurance'' taken out under clause 6.4 or clause 6.4B cover should not be reduced by the terms of any exclusion written in the policy beyond the terms of clause 6.2, paragraph 2, thus an exclusion in terms ''This Policy excludes all loss of or damage to the property insured due to defective design, plan, specification, materials or workmanship' would not be in accordance with the terms of that clause and of the definition of 'All Risks Insurance''. Cover which goes beyond the terms of the exclusion in paragraph 2 may be available though not standard in all policies taken out to meet the obligation in clause 6.4 or clause 6.4B and leading insurers who underwrite ''All Risks'' cover for building work have confirmed that where such improved cover is being given it will not be withdrawn as a consequence of the publication of the terms of the definition in clause 6.2 of ''All Risks Insurance''.

and

the Employer, where clause 6.4B is applicable, in respect of the Joint Names Policy referred to in clause 6.4B.1, or, where clause 6.5 is applicable, in respect of the Joint Names Policy referred to in clause 6.5.2 or where clause 6.4 is applicable in respect of the Joint Names Policy referred to in clause 6.4.2.

shall ensure that such Policies

either

provide for recognition of each Works Contractor as an insured under the relevant Joint Names Policy;

or

include a waiver by the relevant insurers of any right of suborgation which they may have against any such Works Contractor

in respect of loss or damage by the Specified Perils to the Project and Site Materials and, where clause 6.5 applies, in respect of loss or damage by the Specified Perils to the existing structures (which shall include from the relevant date any relevant part to which clause 2.8 refers) together with the contents thereof owned by the Employer or for which he is responsible; and that this recognition or waiver shall continue up to and including the date of issue of the certificate of practical completion of the relevant Works (as referred to in clause 2.14 of the Works Contract Conditions) or, where the Project does not comprise alterations of or extensions to existing structures, the date of determination of the employment of the Management Contractor (whether or not the validity of that determination is contested) under clauses 7.1 to 7.23 or, where the Project comprises alterations of or extensions to existing structures, under clause 6.4.8 or clauses 7.1 to 7.23, whichever is the earlier.

[g] All Risks Insurance of the Project—Management Contractor to take out and maintain Joint Names Policy

Joint Names Policy for All Risks Insurance—excesses

6.4 .1 .1 The Management Contractor shall, prior to the commencement of any work on site for the Project, take out a Joint Names Policy for All Risks Insurance cover no less than that defined in clause 6.2[h][k.1] (or for such other definition of cover as the Employer may instruct) for the full reinstatement value of the Project (plus the percentage, if any, to cover professional fees stated in the Appendix) and shall (subject to clause 2.8.3) maintain such Joint Names Policy up to and including the date of issue of the certificate of Practical Completion or, where the Project does not comprise alterations or extensions to existing structures, up to

[k.1] In some cases it may not be possible for insurance to be taken out against certain of the risks covered by the definition of "All Risks Insurance". This matter should be arranged between the Parties prior to the Architect/the Contract Administrator notifying the Employer under clause 2.1 when it would be practicable to commence the construction of the Project and either the definition of "All Risks Insurance" given in clause 6.2 amended or the risks actually covered should replace the definition; in the latter case clause 6.4 or clause 6.4B and other relevant clauses in which the definition "All Risks Insurance" is used should be amended to include the words used to replace this definition.

and including the date of determination of the employment of the Management Contractor (whether or not the validity of that determination is contested) under clauses 7.1 to 7.23 or, where the Project comprises alterations of or extensions to existing structures, under clause 6.4.8 or clauses 7.1 to 7.23, whichever is the earlier. Where the Employer's status for VAT purposes is exempt or partially exempt the full reinstatement value to which this clause refers shall be inclusive of any VAT on the supply of the work and materials referred to in clause 6.4.6.

.2 The Management Contractor shall, before taking out the Joint Names Policy, notify the Architect/the Contract Administrator who shall thereupon notify the Employer of the amount of any excess (*uninsured amounts*) in respect of each insurance risk stated in the Policy. Subject to any alteration to such amounts of excess which the Employer may require and the insurers agree, the amounts of any excess in respect of each insurance risk insured under the Joint Names Policy shall be set out in the Appendix Part 2.

Premium receipts and Policy endorsements

.2 The Management Contractor shall send to the Architect/the Contract Administrator for deposit with the Employer the Joint Names Policy referred to in clause 6.4.1.1 and the premium receipts therefor and also any relevant endorsement or endorsements thereof as may be required to comply with the obligation to maintain that Policy set out in clause 6.4.1.1 and the premium receipts therefor. If the Management Contractor defaults in taking out or in maintaining the Joint Names Policy as required by clause 6.4.1 the Employer may himself take out and maintain a Joint Names Policy against any risk in respect of which the default shall have occurred and a sum or sums equivalent to the amount paid or payable by him in respect of premiums therefor may be deducted by him from monies due to the Management Contractor under the Contract or such amount may be recoverable by the Employer from the Contractor as a debt.

Use of annual policy maintained by the Management Contractor—alternative to use of clause 6.4.1—excesses

.3 .1 If the Management Contractor independently of his obligations under this Contract maintains a policy of insurance which provides (inter alia) All Risks Insurance for cover no less than that defined in clause 6.2[h][k.1] (or for such other definition of cover as the Employer may instruct) for the full reinstatement value of the Project (plus the percentage, if any, to cover professional fees stated in the Appendix) and the Employer has given to the Management Contractor his written acceptance of the amount of any excess in respect of each insurance risk stated in the policy (which amounts shall be set out in the Appendix Part 2) then the maintenance by the Management Contractor of such policy shall, if the policy is a Joint Names Policy in respect of the aforesaid Project, be a discharge of the Management Contractor's obligation to take out and maintain a Joint Names Policy under clause 6.4.1.1.

.2 If and so long as the Contractor is able to send to the Architect/the Contract Administrator for inspection by the Employer as and when he is reasonably

required to do so by the Employer documentary evidence that such a policy is being maintained then the Management Contractor shall be discharged from his obligation under clause 6.4.2 to deposit the policy and the premium receipts with the Employer but on any occasion the Employer may (but not unreasonably or vexatiously) require to have sent to the Architect/the Contract Administrator for inspection by the Employer the policy to which clause 6.4.3.1 refers and the premium receipts therefor. Where the Employer's status for VAT purposes is exempt or partially exempt the full reinstatement value to which this clause refers shall be inclusive of any VAT on the supply of the work and materials referred to in clause 6.4.6.

.3 The annual renewal date, as supplied by the Management Contractor, of the insurance referred to in clause 6.4.3.1 is stated in the Appendix.

Loss or damage—insurance claims—Management Contractor's obligations—payment by Employer

.4 If any loss or damage affecting work executed or any part thereof or any Site Materials is occasioned by any one or more of the risks covered by the Joint Names Policy referred to in clause 6.4.1.1 or clause 6.4.3.1 then, upon discovering the said loss or damage, the Management Contractor shall forthwith give notice in writing both to the Architect/the Contract Administrator and to the Employer of the extent, nature and location thereof; and the provisions of clause 6.4.5 to clause 6.4.9 shall apply.

.5 The occurrence of such loss or damage referred to in clause 6.4.4 shall be disregarded in computing any amounts payable to the Management Contractor, whether or not in respect of work executed by a Works Contractor, under or by virtue of this Contract.

.6 After any inspection required by the insurers in respect of a claim under the Joint Names Policy referred to in clause 6.4.1.1 or clause 6.4.3.1 has been completed the Management Contractor with due diligence, shall subject to clause 6.4.8 where applicable, secure the restoration of work damaged, the replacement or repair of any Site Materials which have been lost or damaged, the removal and disposal of any debris and proceed with securing the carrying out and completion of the Project.

.7 The Management Contractor, for himself and for all Works Contractors who are, pursuant to clause 6.3, recognised as an insured under the Joint Names Policy referred to in clause 6.4.1.1 or clause 6.4.3.1, shall authorise the insurers to pay all monies from such insurance in respect of the loss or damage referred to in clause 6.4.4 to the Employer. The Employer shall pay all such monies (less only the amount properly incurred by the Employer in respect of professional fees but not exceeding the amount arrived at by applying the percentage to cover professional fees stated in the Appendix to the amount of the monies so paid excluding any amount included therein for professional fees) to the Management Contractor by instalments under certificates of the Architect/Contract Administrator issued at the relevant period of Interim Certificates.

.8 Clause 6.4.8 applies only where the Project comprises alterations of or extensions to existing structures.

.1 If it is just and equitable so to do the employment of the Management Contractor under this Contract may, within 28 days of the occurrence of the loss or damage referred to in clause 6.4.4, be determined at the option of either Party by notice by registered post or recorded delivery from either Party to the other. If either Party disagrees with such notice, within 7 days of receiving such a notice (but not thereafter) either Party may invoke the relevant procedures applicable under the Contract to the resolution of disputes or differences in order that it may be decided whether such determination will be just and equitable;

.2 upon the giving or receiving by the Employer of such a notice of determination or, where the relevant procedures referred to in clause 6.4.8.1 have been invoked and the notice of determination has been upheld, the provisions of clause 7.16 and 7.17 except clause 7.17.5 shall apply.

.9 .1 Where the restoration, replacement or repair of the loss or damage and (when required) the removal and disposal of debris is carried out by a Works Contractor or Works Contractors already engaged upon the Project such restoration, replacement or repair and when required, the removal and disposal of debris shall be treated as if they were the subject of a Works Contract Variation required by an Instruction under clause 3.4.

.2 Where clause 6.4.9.1 is not applicable and where no notice of determination is served under clause 6.4.8.1 or, where the relevant procedures referred to in clause 6.4.8.1 have been invoked and the notice of determination has not been upheld, the Management Contractor shall secure the restoration, replacement or repair of the loss or damage and, when required, the removal and disposal of debris, by a Works Contractor who shall be appointed in accordance with an Instruction under clause 8.2.1 and treated in all respects as a Works Contractor.

[g] All Risks Insurance of the Project—Employer to take out and maintain Joint Names Policy

Joint Names Policy for All Risks Insurance—obligations of Employer

6.4B .1 The Employer shall, prior to the commencement of any work on site for the Project, take out a Joint Names Policy for All Risks Insurance for cover no less than that defined in clause 6.2(h)(k.1) for the full reinstatement value of the Project (plus the percentage, if any, to cover the professional fees stated in the Appendix) and shall (subject to clause 2.8.3) maintain such Joint Names Policy up to and including the date of issue of the certificate of Practical Completion or, where the Project does not comprise alterations of or extensions to existing structures, up to and including the date of determination of the employment of the Management Contractor under clauses 7.1 to 7.23 or, where the Project comprises alterations of or extensions to existing structures, under clause 6.4B.4 or clauses 7.1 to 7.23 whichever is the earlier (whether or not the validity of any such determination is contested). Where the Employer's status for VAT purposes is exempt or partially exempt the full reinstatement value to which this clause refers shall be inclusive of any VAT on the supply of the work and materials referred to in clause 6.4B.3.3.

Failure of Employer to insure—right of Management Contractor

.2 Clause 6.4.B.2 applies except where the Employer is a local authority. The Employer shall, as and when reasonably required to do so by the Management Contractor, produce documentary evidence and premiums receipts showing that the Joint Names Policy required under clause 6.4B.1 has been taken out and is being maintained. If the Employer defaults in taking out or in maintaining the Joint Names Policy required under clause 6.4B.1 then the Management Contractor may himself take out and maintain a Joint Names Policy against any risk in respect of which a default shall have occurred.

Loss or damage—insurance claims—Management Contractor's obligations—payment by Employer

.3 .1 If any loss or damage affecting work executed or any part thereof or any Site Materials is occasioned by any one or more of the risks covered by the Joint Names Policy referred to in clause 6.4B.1 or clause 6.4B.2 then, upon discovering the said loss or damage, the Management Contractor shall forthwith give notice in writing both to the Architect/the Contract Administrator and to the Employer of the extent, nature and location thereof and the provisions of clause 6.4B.3.2 to clause 6.4B.3.4 and clause 6.4B.5 and, where relevant, clause 6.4B.4 shall apply.

,2 The occurrence of such loss or damage referred to in clause 6.4B.3.1 shall be disregarded in computing any amounts payable to the Management Contractor, whether or not in respect of work executed by a Works Contractor, under or by virtue of this Contract.

.3 After any inspection required by the insurers in respect of a claim under the Joint Names Policy referred to in clause 6.4B.1 or clause 6.4B.2 has been completed the Management Contractor with due diligence shall, subject to clause 6.4B.4 where applicable, secure the restoration of such work damaged, the replacement or repair of any such Site Materials which have been lost or damaged, the removal and disposal of any debris and proceed with securing the carrying out and completion of the Project.

.4 The Management Contractor, for himself and for all Works Contractors who are, pursuant to clause 6.3, recognised as an insured under the Joint Names Policy referred to in clause 6.4B.1 or clause 6.4B.2, shall authorise the insurers to pay all monies from such insurance in respect of the loss or damage referred to in clause 6.4B.3.1 to the Employer.

Projects comprising alterations of or extensions to existing structures—loss or damage—determination

.4 Clause 6.4B.4 applies only where the Project comprises alterations of or extensions to existing structures.

.1 If it is just and equitable so to do the employment of the Management Contractor under this Contract may, within 28 days of the occurrence of the loss or damage referred to in clause 6.4B.3.1, be determined at the option of either Party by

notice by actual delivery or by registered post or recorded delivery from either Party to the other. If either Party disagrees with such notice, within 7 days of receiving such a notice (but not thereafter) either Party may invoke the relevant procedures applicable under the Contract to the resolution of disputes or differences in order that it may be decided whether such determination will be just and equitable.

.2 Upon the giving or receiving by the Employer of such a notice of determination or, where the relevant procedures referred to in clause 6.4B.4.1 have been invoked and the notice of determination has been upheld, the provisions of clauses 7.16 and 7.17 except clause 7.17.5 shall apply.

Restoration etc. of loss or damage

.5 .1 Where the restoration, replacement or repair of the loss or damage and (when required) the removal and disposal of debris is carried out by a Works Contractor or Works Contractors already engaged upon the Project such restoration, replacement or repair and, when required, the removal and disposal of debris shall be treated as if they were the subject of a Works Contract Variation required by an Instruction under clause 3.4.

.2 Where clause 6.4B.5.1 is not applicable and where no notice of determination is served under clause 6.4B.4.1 or, where the relevant procedures referred to in clause 6.4B.4.1 have been invoked and the notice of determination has not been upheld, the Management Contractor shall secure the restoration, replacement or repair of the loss or damage and, when required, the removal and disposal of debris, by a Works Contractor who shall be appointed in accordance with an Instruction under clause 8.2.1 and treated in all respects as a Works Contractor.

Specified Perils—insurance of existing structures and contents—Employer to take out and maintain Joint Names Policy

6.5 .1 Clauses 6.5.2 and 6.5.3 apply only where the Project comprises alterations of or extensions to existing structures.

.2 The Employer shall, prior to the commencement of any work on site for the Project, take out a Joint Names Policy in respect of the existing structures (which shall include from the relevant date any relevant part to which clause 2.8 refers) together with the contents thereof owned by the Employer or for which he is responsible, for the full cost of reinstatement, repair or replacement of loss or damage due to one or more of the Specified Perils[k.2] and maintain such insurance up to and including the

[k.2] In some cases it may not be possible for insurance to be taken out against certain of the Specified Perils. This matter should be arranged between the Parties prior to the Architect/the Contract Administrator notifying the Employer under clause 2.1 when it would be practicable to proceed to secure the construction of the Project and either the definition of Specified Perils for the purpose of clause 6.5 amended or the risks actually covered should replace the definition; in the latter case clause 6.5 and other relevant clauses in which the definition "Specified Perils" is used should be amended to include the words used to replace this definition.

date of issue of the certificate of Practical Completion or up to and including the date of determination of the employment of the Management Contractor under clause 6.4.8 or clause 6.4B.4 or clauses 7.1 to 7.23 (whether or not the validity of that determination is contested) whichever is the earlier. The Management Contractor, for himself and for all Works Contractors who are, pursuant to clause 6.3, recognised as an insured under the Joint Names Policy referred to in clause 6.5.2 shall authorise the insurers to pay all monies from such insurance in respect of loss or damage to the Employer. Where the Employer's status for VAT purposes is exempt or partially exempt the full cost of reinstatement, repair or replacement of loss or damage to which this clause refers shall be inclusive of any VAT chargeable on the supply of such reinstatement repair or replacement.

.3 Except where the Employer is a local authority the Employer shall, as and when reasonably required to do so by the Management Contractor, produce documentary evidence and receipts showing that the Joint Names Policy required under clause 6.5, has been taken out and is being maintained. If the Employer defaults in taking out or in maintaining the Joint Names Policy required under clause 6.5.2 the Management Contractor may himself take out and maintain a Joint Names Policy against any risk in respect of which the default shall have occurred and for that purpose shall have such right of entry and inspection as may be required to make a survey and inventory of the existing structures and the relevant contents.

Insurance for Employer's loss of liquidated damages—clause 2.13.2 and Works Contract Conditions clause 2.10.3

6.6 .1 Where it is stated in the Appendix that the insurance to which clause 6.6 refers may be required by the Employer then, not later than the date of the written notice of the Employer under clause 2.1 to the Management Contractor to proceed, the Architect/the Contract Administrator shall either inform the Management Contractor that no such insurance is required or shall instruct the Management Contractor to obtain a quotation for such insurance. This quotation shall be for an insurance on an agreed value basis[1] to be taken out and maintained by the Management Contractor until the date of Practical Completion and which will provide for payment to the Employer of a sum calculated by reference to clause 6.6.3 in the event of loss or damage to the Project, work executed, Site Materials, temporary buildings, plant and equipment for use in connection with and on or adjacent to the Project by any one or more of the Specified Perils and which loss or damage results in the Architect/the Contract Administrator giving an extension of time under clause 2.12.1 in respect of the Relevant Event referred to in clause 2.10.3 of the Works Contract Conditions and clause 2.13.2. The Architect/the Contract Administrator shall obtain from the Employer any further information which the Management Contractor reasonably requires to obtain such quotation. The Management Contractor shall send to the Architect/the Contract Administrator as soon as practicable the quotation which he

[1] The reference to an agreed value is intended to avoid any dispute over the amount of payment due under the insurance once the policy is issued. Insurers on receiving a proposal for the insurance to which clause 6.6 refers will normally reserve the right to be satisfied that the sum referred to in clause 6.6.2 is not more than a genuine pre-estimate of the damages which the Employer considers, at the time he enters into the Management Contract, he will suffer as a result of any delay.

has obtained and the Architect/the Contract Administrator shall thereafter instruct the Management Contractor whether or not the Employer wishes the Management Contractor to accept that quotation and such instruction shall not be unreasonably withheld or delayed. If the Management Contractor is instructed to accept the quotation the Management Contractor shall forthwith take out and maintain the relevant policy and send it to the Architect/the Contract Administrator for deposit with the Employer, together with the premium receipt therefor and also any relevant endorsement or endorsements thereof and the premium receipts therefor.

.2 The sum insured by the relevant policy shall be a sum calculated at the rate stated in the Appendix as liquidated and ascertained damages for the period of time stated in the Appendix.

.3 Payment in respect of this insurance shall be calculated at the rate referred to in clause 6.6.2 (or any revised rate produced by the application of clause 2.8.4) for the period of any extension of time finally given by the Architect/the Contract Administrator as referred to in clause 6.6.1 or for the period of time stated in the Appendix, whichever is the less.

.4 If the Management Contractor defaults in taking out or in maintaining the insurance referred to in clause 6.6.1 the Employer may himself insure against any risk in respect of which the default shall have occurred.

Joint Fire Code—compliance

Application of clause Compliance with Joint Fire Code

6FC .1 Clause 6FC applies where it is stated in the Appendix that the Joint Fire Code applies.

.2 .1 The Employer shall comply with the Joint Fire Code and ensure such compliance by his servants or agents and by any person employed, engaged or authorised by him upon or in connection with the Project or any part thereof other than the Management Contractor and the persons for whom the Management Contractor is responsible pursuant to clause 6FC.2.2.

.2 The Management Contractor shall comply with the Joint Fire Code and ensure such compliance by his servants or agents or by any person employed or engaged by him upon or in connection with the Project or any part thereof their servants or agents or by any other person who may properly be on the site upon or in connection with the Project or any part thereof other than the Employer or any person employed, engaged or authorised by him or by any local authority or statutory undertaker executing work solely in pursuance of its statutory rights or obligations.

Breach of Joint Fire Code—Remedial Measures

.3 .1 If a breach of the Joint Fire Code occurs and the insurer under the Joint Names Policy in respect of the Project specifies by notice the remedial measures he requires ("the Remedial Measures") and the time by which such Remedial Measures are to be completed ("the Remedial Measures Completion Date") the

Management Contractor shall ensure that the Remedial Measures are carried out, where relevant in accordance with the instructions of the Architect/the Contract Administrator, by the Remedial Measures Completion Date.

.2 If the Management Contractor, within 7 days of receipt of a notice specifying the Remedial Measures, does not begin to carry out or thereafter fails without reasonable cause regularly and diligently to proceed with the Remedial Measures then the Employer may employ and pay other persons to carry out the Remedial measures; and, subject to clause 9FC.4, all costs incurred in connection with such employment may be withheld and/or deducted by him from any monies due or to become due to the Management Contractor or may be recoverable from the Management Contractor by the Employer as a debt.

Indemnity

.4 The Management Contractor shall indemnify the Employer and the Employer shall indemnify the Management Contractor in respect of the consequences of a breach of the Joint Fire Code to the extent that these consequences result from a breach by the Management Contractor or by the Employer of their respective obligations under clause 6FC.

Joint Fire Code—amendments

.5 If after the date of this Contract the Joint Fire Code is amended and the Joint Fire Code as amended is, under the Joint Names Policy, applicable to the Project, the net extra cost, if any, of compliance by the Management Contractor with the amended Joint Fire Code shall be added to the amounts due in accordance with section 4.

Injury to persons and property and indemnity to Employer (6.7 to 6.9)

Liability of Management Contractor—personal injury or death—indemnity to Employer

6.7 The Management Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or caused by the carrying out of the Project, except to the extent that the same is due to any act or neglect of the Employer or of any person for whom the Employer is responsible including the persons employed or otherwise engaged by the Employer to whom clauses 3.23 to 3.25 refer.

Liability of Management Contractor—injury or damage to property—indemnity to Employer

6.8 The Management Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal in so far as such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Project and to the extent that the same is due to any negligence, breach of statutory duty,

omission or default of the Management Contractor, his servants or agents or of any person employed or engaged upon or in connection with the Project or any part thereof, his servants or agents or of any other person who may properly be on the site upon or in connection with the Project or any part thereof, his servants or agents, other than the Employer or any person employed, engaged or authorised by him or by any local authority or statutory undertaker executing work solely in pursuance of its statutory rights or obligations. This liability and indemnity is subject to clause 6.9 and, where clause 6.5 is applicable, excludes loss or damage to any property required to be insured thereunder caused by a Specified Peril.

Injury or damage to property—exclusion of the Project and Site Materials

6.9 .1 Subject to clause 6.9.2 the reference in clause 6.8 to "property real or personal" does not include the Project, work executed and or Site Materials up to and including the date of issue of the certificate of Practical Completion or up to and including the date of determination of the employment of the Management Contractor (whether or not the validity of the determination is disputed) under clauses 7.1 to 7.2.3 or, where clause 6.4.8 applies, under clause 6.4.8 or, where clause 6.4B applies, under clause 6.4B.4, whichever is the earlier.

.2 If clause 2.8 has been operated then, in respect of the relevant part and as from the relevant date, such relevant part shall not be regarded as "the Project" or "work executed" for the purpose of clause 6.9.1.

Insurance against injury to persons or property (6.10 to 6.12)

Management Contractor's and Works Contractors' insurance—personal injury or damage to property

6.10 .1 .1 Without prejudice to his obligation to indemnify the Employer under clauses 6.7 and 6.8 the Management Contractor shall take out and maintain and shall cause any Works Contractor to take out and maintain insurance which shall comply with clause 6.10.1.2 in respect of claims arising out of his liability referred to in clauses 6.7 and 6.8.

.2 The insurance in respect of claims for personal injury to, or the death of any person under a contract of service or apprenticeship with the Management Contractor, and arising out of and in the course of such person's employment, shall comply with all relevant legislation. For all other claims to which clause 6.10.1.1 applies the insurance cover[m]:

shall indemnify the Employer in like manner to the Contractor but only to the extent that the Contractor may be liable to to indemnify the Employer under the terms of this Contract; and

[m] It should be noted that the cover granted under public liability policies taken out pursuant to clause 6.10.1 may not be co-extensive with the indemnity given to the Employer in clauses 6.7 and 6.8: for example each claim may be subject to the excess in the policy and cover may not be available in respect of loss or damage due to gradual pollution.

shall be not less than the relevant sums stated in the Appendix for any one occurrence or series of occurrences arising out of one event.[m.1]

.2 As and when he is reasonably required to do so by the Employer the Management Contractor shall send and shall cause any Works Contractor to send to the Architect/the Contract Administrator for inspection by the Employer documentary evidence that the insurances required by clauses 6.10.1.1 have been taken out and are being maintained, but at any time the Employer may (but not unreasonably or vexatiously) require to have sent to the Architect/the Contract Administrator for inspection by the Employer the relevant policy or policies and premium receipts therefor.

[m.1] The Management Contractor or any Works Contractor may, if they so wish, insure for a sum greater than that stated in the Appendix.

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APPENDIX 12

ICE CONDITIONS OF CONTRACT (SEVENTH EDITION)—MEASUREMENT VERSION

CONDITIONS OF CONTRACT AND FORMS OF TENDER, AGREEMENT AND BOND FOR USE IN CONNECTION WITH WORKS OF CIVIL ENGINEERING CONSTRUCTION

Care of the Works

20(1)(a) The Contractor shall save as in paragraph (b) hereof and subject to sub-clause (2) of this Clause takes responsibility for the care of the Works and materials plant and equipment for incorporation therein from the Works Commencement Date until the date of issue of a Certificate of Substantial Completion for the whole of the Works when the responsibility for the said care shall pass to the Employer.

(b) If the Engineer issues a Certificate of Substantial Completion for any Section or part of the Permanent Works the Contractor shall cease to be responsible for the care of that Section or part from the date of issue of that Certificate of Substantial Completion when the responsibility for the care of that Section or part shall pass to the Employer.

(c) The Contractor shall take full responsibility for the care of any work and materials plant and equipment for incorporation therein which he undertakes during the Defects Correction Period until such work has been completed.

Excepted Risks

(2) The Excepted Risks for which the Contractor is not liable are loss or damage to the extent that it is due to

(a) the use or occupation by the Employer his agents servants or other contractors (not being employed by the Contractor) of any part of the Permanent Works

(b) any fault defect error or omission in the design of the Works (other than a design provided by the Contractor pursuant to his obligations under the Contract)

(c) riot war invasion act of foreign enemies or hostilities (whether war be declared or not)

(d) civil war rebellion revolution insurrection or military or usurped power

(e) ionizing radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel radioactive toxic explosive or

other hazardous properties of any explosive nuclear assembly or nuclear component thereof and

(f) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds.

Rectification of loss or damage

(3)(a) In the event of any loss or damage to

(i) the Works or any Section or part thereof or

(ii) materials plant or equipment for incorporation therein

while the Contractor is responsible for the care thereof (except as provided in sub-clause (2) of this Clause) the Contractor shall at his own cost rectify such loss or damage so that the Permanent Works conform in every respect with the provisions of the Contract and the Engineer's instructions. The Contractor shall also be liable for any loss or damage to the Works occasioned by him in the course of any operations carried out by him for the purpose of complying with his obligations under Clauses 49 and 50.

(b) Should any such loss or damage arise from any of the Excepted Risks defined in sub-clause (2) of this Clause the Contractor shall if and to the extent required by the Engineer rectify the loss or damage at the expense of the Employer.

(c) In the event of loss or damage arising from an Excepted Risk and a risk for which the Contractor is responsible under sub-clause (1)(a) of this Clause then the cost of rectification shall be apportioned accordingly.

Insurance of Works etc.

21(1) The Contractor shall without limiting his or the Employer's obligations and responsibilities under Clause 20 insure in the joint names of the Contractor and the Employer the Works together with materials plant and equipment for incorporation therein to the full replacement cost plus an additional 10 per cent to cover any additional costs that may arise incidental to the rectification of any loss or damage including professional fees cost of demolition and removal of debris.

Extent of cover

(2)(a) The insurance required under sub-clause (1) of this Clause shall cover the Employer and the Contractor against all loss or damage from whatsoever cause arising other than the Excepted Risks defined in Clause 20(2) from the Works Commencement Date until the date of issue of the relevant Certificate of Substantial Completion.

(b) The insurance shall extend to cover any loss or damage arising during the Defects Correction Period from a cause occurring prior to the issue of any Certificate of Substantial Completion and any loss or damage occasioned by the Contractor in the course of any operation carried out by him for the purpose of complying with his obligations under Clauses 49, 50 and 51.

(c) Nothing in this Clause shall render the Contractor liable to insure against the necessity for the repair or reconstruction of any work constructed with materials or workmanship not in accordance with the requirements of the Contract.

(d) Any amounts not insured or not recovered from insurers whether as excesses carried under the policy or otherwise shall be borne by the Contractor or the Employer in accordance with their respective responsibilities under Clause 20.

Damage to persons and property

22(1) The Contractor shall except if and so far as the Contract provides otherwise and subject to the exceptions set out in sub-clause (2) of this Clause indemnify and keep indemnified the Employer against all losses and claims in respect of

(a) death of or injury to any person or

(b) loss of or damage to any property (other than the Works)

which may arise out of or in consequence of the construction of the Works and the remedying of any defects therein and against all claims demands proceedings damages costs charges and expenses whatsoever in respect thereof or in relation thereto.

Exceptions

(2) The exceptions referred to in sub-clause (1) of this Clause which are the responsibility of the Employer are

(a) damage to crops being on the Site (save in so far as possession has not been given to the Contractor)

(b) the use or occupation of land provided by the Employer for the purposes of the Contract (including consequent losses of crops) or interference whether temporary or permanent with any right of way light air or water or other easement or quasi-easement which are the unavoidable result of the construction of the Works in accordance with the Contract

(c) the right of the Employer to construct the Works or any part thereof on over under in or through any land

(d) damage which is the unavoidable result of the construction of the Works in accordance with the Contract and

(e) death of or injury to persons or loss of or damage to property resulting from any act neglect or breach of statutory duty done or committed by the Employer his agents servants or other contractors (not being employed by the Contractor) or for or in respect of any claims demands proceedings damages costs charges and expenses in respect thereof or in relation thereto.

Indemnity by Employer

(3) The Employer shall subject to sub-clause (4) of this Clause indemnify the Contractor against all claims demands proceedings damages costs charges and expenses in respect of the matters referred to in the exceptions defined in sub-clause (2) of this Clause.

Shared responsibility

(4)(a) The Contractor's liability to indemnify the Employer under sub-clause (1) of this Clause shall be reduced in proportion to the extent that the act or neglect of the Employer his agents servants or other contractors (not being employed by the Contractor) may have contributed to the said death injury loss or damage.

(b) The Employer's liability to indemnify the Contractor under sub-clause (3) of this Clause in respect of matters referred to in sub-clause (2)(e) of this Clause shall be reduced in proportion to the extent that the act or neglect of the Contractor or his sub-contractors servants or agents may have contributed to the said death injury loss or damage.

Third party insurance

23(1) The Contractor shall without limiting his or the Employer's obligations and responsibilities under Clause 22 insure in the joint names of the Contractor and the Employer against liabilities for death of or injury to any person (other than any operative or other person in the employment of the Contractor or any of his sub-contractors) or loss of or damage to any property (other than the Works) arising out of the performance of the Contract other than those liabilities arising out of the exceptions defined in Clause 22(2)(a) (b) (c) and (d).

Cross liability clause

(2) The insurance policy shall include a cross liability clause such that the insurance shall apply to the Contractor and to the Employer as separate insured.

Amount of insurance

(3) Such insurance shall be for at least the amount stated in the Appendix to the Form of Tender.

Accident or injury to operatives etc.

24 The Employer shall not be liable for or in respect of any damages or compensation payable at law in respect or in consequence of any accident or injury to any operative or other person in the employment of the Contractor or any of his sub-contractors save and except to the extent that such accident or injury results from or is contributed to by any act or default of the Employer his agents or servants and the Contractor shall indemnify and keep indemnified the Employer against all such damages and compensation (save and except as aforesaid) and against all claims demands proceedings costs charges and expenses whatsoever in respect thereof or in relation thereto.

Evidence and terms of insurance

25(1) The Contractor shall provide satisfactory evidence to the Employer prior to the Works Commencement Date that the insurances required under the Contract have been effected and shall if so required produce the insurance policies for inspection. The

terms of all such insurances shall be subject to the approval of the Employer (which approval shall not unreasonably be withheld). The Contractor shall upon request produce to the Employer receipts for the payment of current insurance premiums.

Excesses

(2) Any excesses on the policies of insurance effected under Clauses 21 and 23 shall be no greater than those stated in the Appendix to the Form of Tender.

Remedy on Contractor's failure to insure

(3) If the Contractor shall fail upon request to produce to the Employer satisfactory evidence that there is in force any of the insurances required under the Contract then the Employer may effect and keep in force any such insurance and pay such premium or premiums as may be necessary for that purpose and from time to time deduct the amount so paid from any monies due or which may become due to the Contractor or recover the same as a debt due from the Contractor.

Compliance with policy conditions

(4) Both the Employer and the Contractor shall comply with all conditions laid down in the insurance policies. Should the Contractor or the Employer fail to comply with any condition imposed by the insurance policies effected pursuant to the Contract each shall indemnify the other against all losses and claims arising from such failure.

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APPENDIX 13

ICE DESIGN AND CONSTRUCT—CONDITIONS OF CONTRACT (SECOND EDITION)

CONDITIONS OF CONTRACT AND FORMS OF TENDER, AGREEMENT AND BOND FOR USE IN CONNECTION WITH WORKS OF CIVIL ENGINEERING

Care of the Works

20(1)(a) The Contractor shall save as in paragraph (b) hereof and subject to sub-clause (2) of this Clause take full responsibility for the care of the Works and for materials plant and equipment for incorporation therein from the Commencement Date until the date of issue of a Certificate of Substantial Completion for the whole of the Works when the responsibility for the said care shall pass to the Employer.

(b) If the Employer's Representative issues a Certificate of Substantial Completion for any Section or part of the Permanent Works the Contractor shall cease to be responsible for the care of that Section or part from the date of issue of that Certificate of Substantial Completion when the responsibility for the care of that Section or part shall pass to the Employer. Provided always that the Contractor shall remain responsible for any damage to such completed work caused by or as a result of his other activities on the Site.

(c) The Contractor shall take full responsibility for the care of any outstanding work and materials plant and equipment for incorporation therein which he undertakes to finish during the Defects Correction Period until such outstanding work has been completed.

Excepted risks

(2) The Excepted Risks for which the Contractor is not liable are loss and damage to the extent that it is due to

(a) the use or occupation by the Employer his agents servants or other contractors (not being employed by the Contractor) of any part of the Permanent Works

(b) any fault defect error or omission in the design of the Works for which the Contractor is not responsible under the Contract

(c) riot war invasion act of foreign enemies or hostilities (whether war be declared or not)

(d) civil war rebellion revolution insurrection or military or usurped power

(e) ionizing radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel radioactive toxic explosive or

other hazardous properties of any explosive nuclear assembly or nuclear component thereof and

(f) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds.

Rectification of loss or damage

(3)(a) In the event of any loss or damage to

(i) the Works or any Section or part thereof or

(ii) materials plant or equipment for incorporation therein

while the Contractor is responsible for the care thereof (except as provided in sub-clause (2) of this Clause) the Contractor shall at his own cost rectify such loss or damage so that the Permanent Works conform in every respect with the provisions of the Contract. The Contractor shall also be liable for any loss or damage to the Works occasioned by him in the course of any operations carried out by him for the purpose of complying with his obligations under Clauses 49 and 50.

(b) Should any loss or damage arise from any of the Excepted Risks defined in sub-clause (2) of this Clause the Contractor shall if and to the extent required by the Employer' Representative rectify the loss or damage at the expense of the Employer.

(c) In the event of loss or damage arising from an Excepted Risk and a risk for which the Contractor is responsible under sub-clause (1)(a) of this Clause then the cost of rectification shall be apportioned accordingly.

Insurance of Permanent and Temporary Works etc.

21(1) The Contractor shall without limiting his or the Employer's obligations and responsibilities under Clause 20 insure in the joint names of the Contractor and the Employer the Permanent and Temporary Works together with materials plant and equipment for incorporation therein to the full replacement cost plus an additional 10 per cent to cover any additional costs that may arise incidental to the rectification of any loss or damage including professional fees cost of demolition and removal of debris.

Extent of cover

(2)(a) The insurance required under sub-clause (1) of this Clause shall cover the Employer and the Contractor against all loss or damage from whatsoever cause arising other than the Excepted Risks defined in Clause 20(2) from the Commencement Date until the date of issue of the relevant Certificate of Substantial Completion.

(b) The insurance shall extend to cover any loss or damage arising during the Defects Correction Period from a cause occurring prior to the issue of any Certificate of Substantial Completion and any loss or damage occasioned by the Contractor in the course of any operation carried out by him for the purpose of complying with his obligations under Clauses 49 and 50.

(c) Nothing in this Clause shall render the Contractor liable to insure against the necessity for the repair or reconstruction of any work constructed with materials or

workmanship not in accordance with the requirements of the Contract unless the Contract otherwise requires.

(d) Any amounts not insured or not recovered from insurers whether as excesses carried under the policy or otherwise shall be borne by the Contractor or the Employer in accordance with their respective responsibilities under Clause 20.

Damage to persons or property

22(1) The Contractor shall except if and so far as the Contract provides otherwise and subject to the exceptions set out in sub-clause (2) of this Clause indemnify and keep indemnified the Employer against all losses and claims in respect of

(a) death of or injury to any person or

(b) loss of or damage to any property (other than the Works)

which may arise out of or in consequence of the design and construction of the Works and the remedying of any defects therein and against all claims demands proceedings damages costs charges and expenses whatsoever in respect thereof or in relation thereto.

Exceptions

(2) The exceptions referred to in sub-clause (1) of this Clause which are the responsibility of the Employer are

(a) damage to crops being on the Site (save in so far as possession has not been given to the Contractor)

(b) the use or occupation of land provided by the Employer for the purposes of the Contract (including consequent losses of crops) or interference whether temporary or permanent with any right of way light air or water or other easement or quasi-easement which is the unavoidable result of the construction of the Works in accordance with the Contract

(c) the right of the Employer to construct the Works or any part thereof on over under in or through any land

(d) damage which is the unavoidable result of the construction of the Works in accordance with the Employer's Requirements including any design for which the Contractor is not responsible under the Contract

(e) death of or injury to persons or loss of or damage to property resulting from any act neglect or breach of statutory duty done or committed by the Employer his agents servants or other contractors (not being employed by the Contractor) or for or in respect of any claims demands proceedings damages costs charges and expenses in respect thereof or in relation thereto.

Indemnity by Employer

(3) The Employer shall subject to sub-clause (4) of this Clause indemnify the Contractor against all claims demands proceedings damages costs charges and expenses in respect of the matters referred to in the exceptions defined in sub-clause (2) of this Clause.

Shared responsibility

(4)(a) The Contractor's liability to indemnify the Employer under sub-clause (1) of this Clause shall be reduced in proportion to the extent that the act or neglect of the Employer his agents' servants or other contractors (not being employed by the Contractor) may have contributed to the said death injury loss or damage.

(b) The Employer's liability to indemnify the Contractor under sub-clause (3) of this Clause in respect of matters referred to in sub-clause (2)(e) of this Clause shall be reduced in proportion to the extent that the act or neglect of the Contractor or his sub-contractors servants or agents may have contributed to the said death injury loss or damage.

Third party insurance

23(1) The Contractor shall without limiting his or the Employer's obligations and responsibilities under Clause 22 insure in the joint names of the Contractor and the Employer against liabilities for death of or injury to any person (other than any operative or other person in the employment of the Contractor or any of his sub-contractors) or loss of or damage to any property (other than the Works) arising out of the performance of the Contract other than those liabilities arising out of the exceptions defined in Clause 22 (2)(a)(b)(c) and (d).

(2) The insurance policy shall include a cross liability clause such that the insurance shall apply to the Contractor and to the Employer as separate insured.

(3) Such insurance shall be for at least the amount stated in the Appendix to the Form of Tender.

Accident or injury to operatives etc

24 The Employer shall not be liable for or in respect of any damages or compensation payable at law in respect or in consequence of any accident or injury to any operative or other person in the employment of the Contractor or any of his sub-contractors save and except and to the extent that such accident or injury results from or is contributed to by any act or default of the Employer his agents or servants and the Contractor shall indemnify and keep indemnified the Employer against all such damages and compensation (save and except as aforesaid) and against all claims demands proceedings costs charges and expenses whatsoever in respect thereof or in relation thereto.

Evidence and terms of insurance

25(1) The Contractor shall provide satisfactory evidence to the Employer prior to the Commencement Date that the insurances required under the Contract have been effected and shall if so required produce the insurance policies for inspection. The terms of all such insurances shall be subject to the approval of the Employer (which approval shall not unreasonably be withheld). The Contractor shall upon request produce to the Employer receipts for the payment of current insurance premiums.

Excesses

(2) Any excesses on the policies of insurance effected under Clauses 21 and 23 shall be as stated by the Contractor in the Appendix to the Form of Tender.

Remedy on Contractor's failure to insure

(3) If the Contractor fails upon request to produce to the Employer satisfactory evidence that there is in force any of the insurances required under the Contract then the Employer may effect and keep in force any such insurance and pay such premium or premiums as may be necessary for that purpose and from time to time deduct the amount so paid from any monies due or which may become due to the Contractor or recover the same as a debt due from the Contractor.

Compliance with policy conditions

(4) Both the Employer and the Contractor shall comply with all conditions laid down in the insurance policies. Should the Contractor or the Employer fail to comply with any condition imposed by the insurance policies effected pursuant to the Contract each shall indemnify the other against all losses and claims arising from such failure.

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7.7 The final certificate shall save in the case of fraud or dishonesty relating to or affecting any matter dealt with in the certificate be conclusive evidence as to the sum due to the Contractor under or arising out of the Contract (subject only to Clause 7.11) unless either party has within 28 days after the issue of the final certificate given notice pursuant to Clause 11 or Addendum A.

Interest on overdue payments

7.8 In the event of failure by the Engineer to certify or the Employer to make payment in accordance with the Contract or any decision of an adjudicator or any finding of an arbitrator to such effect the Employer shall pay to the Contractor interest compounded monthly for each day on which any payment is overdue or which should have been certified and paid at a rate equivalent to 2 per cent per annum above the base lending rate of the bank specified in the Appendix.

Certificates and payment notices

7.9 Every certificate issued by the Engineer pursuant to this Clause shall be sent to the Employer and on the Employer's behalf to the Contractor. By this certificate the Employer shall give notice to the Contractor specifying the amount (if any) of the payment proposed to be made and the basis on which it was calculated.

Notice of intention to withhold payment

7.10 Where a payment under Clause 7.3 or 7.6 is to differ from that certified or the Employer is to withhold payment after the final date for payment of a sum due under the Contract the Employer shall notify the Contractor in writing not less than one day before the final date for payment specifying the amount proposed to be withheld and the ground for withholding payment or if there is more than one ground each ground and the amount attributable to it.

Value Added Tax

7.11 (1) The Contractor shall be deemed not to have allowed in his tender for the tax payable by him as a taxable person to the Commissioners of Customs and Excise being tax chargeable on any taxable supplies to the Employer which are to be made under the Contract.

(2) All certificates issued by the Engineer under Clauses 7.3 to 7.7 shall be net of Value Added Tax.

(3) In addition to the payments due under such certificates the Employer shall separately identify and pay to the Contractor any Value Added Tax properly chargeable by the Commissioners of Customs and Excise on the supply to the Employer of any goods and/or services by the Contractor under the Contract.

8 Assignment and Sub-contracting

Assignment

8.1 (1) Neither the Employer nor the Contractor shall assign the Contract or any part thereof or any benefit or interest therein or thereunder without the written consent of the other party which consent shall not unreasonably be withheld.

Third party rights

(2) Nothing in this contract confers or purports to confer on any third party any benefit or any right pursuant to the Contracts (Rights of Third Parties) Act 1999 to enforce any term of the Contract.

No sub-contracting without Engineer's Consent

8.2 The Contractor shall not sub-contract the whole of the Works. The Contractor shall not sub-contract any part of the Works without the consent of the Engineer which consent shall not unreasonably be withheld.

Contractor responsible for sub-contractors

8.3 The Contractor shall be responsible for any acts defaults or neglects of any sub-contractor his agents servants or workmen in the execution of the Works or any part thereof as if they were the acts defaults or neglects of the Contractor.

9 Statutory Obligations

Contractor to comply with statutory requirements

9.1 The Contractor shall subject to Clause 9.3 comply with and give all notices required by any statute statutory instrument rule or order or any regulation or by-law applicable to the construction of the Works (hereinafter called "the statutory requirements") and shall pay all fees and charges which are payable in respect thereof.

Employer to obtain consents

9.2 The Employer shall be responsible for obtaining in due time any consent approval licence or permission but only to the extent that the same may be necessary for the Works in their permanent form.

Contractor's exemption from liability to comply with statutes

9.3 The Contractor shall not be liable for any failure to comply with the statutory requirements where and to the extent that such failure results from the Contractor having carried out the Works in accordance with the Contract or with any instruction of the Engineer.

10 Liabilities and Insurance

Insurance of the Works

10.1 (1) If so stated in the Appendix the Contractor shall maintain insurance in the joint names of the Employer and the Contractor in respect of the Works (including for the purpose of Clause 10 any unfixed materials or other things delivered to the Site for incorporation therein) to their full value against all loss or damage from whatever cause arising (other than the Excepted Risks) for which he is responsible under the terms of the Contract.

(2) Such insurance shall be effected in such a manner that the Employer and Contractor are covered for the period stipulated in Clause 3.2 and are also covered for loss or damage arising during the Defects Correction Period from such cause occurring prior to the commencement of the Defects Correction Period and for any loss or damage occasioned by the Contractor in the course of any operation carried out by him for the purpose of complying with his obligations under Clauses 4.7 and 5.2.

(3) The Contractor shall not be liable to insure against the necessity for the repair or reconstruction of any work constructed with materials or workmanship not in accordance with the requirements of the Contract.

(4) Any amounts not insured or not recovered from insurers whether as excesses carried under the policy or otherwise shall be borne by the Contractor or the Employer in accordance with their respective responsibilities under Clauses 3.2 and 3.3.

Contractor to indemnify the Employer

10.2 The Contractor shall indemnify and keep the Employer indemnified against all losses and claims for injury or damage to any person or property whatsoever (save for the matters for which the Contractor is responsible under Clause 3.2) which may arise out of or in consequence of the Works and against all claims demands proceedings damages costs charges and expenses whatsoever in respect thereof or in relation thereto subject to Clauses 10.3 and 10.4.

10.3 The liability of the Contractor to indemnify the Employer under Clause 10.2 shall be reduced proportionately to the extent that the act or neglect of the Engineer or the Employer his servants his agents or other contractors not employed by the Contractor may have contributed to the said loss injury or damage.

10.4 The Contractor shall not be liable for or in respect of or to indemnify the Employer against any compensation or damage for or with respect to

(a) damage to crops being on the Site (save in so far as possession has not been given to the Contractor)

(b) the use or occupation of land (which has been provided by the Employer) by the Works or any part thereof or for the purpose of constructing completing and maintaining the Works (including consequent loss of crops) or interference whether temporary or permanent with any right of way light air or water or other easement or quasi easement which are the unavoidable result of the construction of the Works in accordance with the Contract

(c) the right of the Employer to construct the Works or any part thereof on over under in or through any land

(d) damage which is the unavoidable result of the construction of the Works in accordance with the Contract

(e) death or injury to persons or loss of or damage to property resulting from any act or neglect or breach of statutory duty done or committed by the Engineer or the Employer his agents servants or other contractors (not being employed by the Contractor) or for or in respect of any claims demands proceedings damages costs charges and expenses in respect thereof or in relation thereto.

Employer to indemnify Contractor

10.5 The Employer shall indemnify and keep indemnified the Contractor from and against all claims demands proceedings damages costs charges and expenses in respect of the matters referred to in Clause 10.4. Provided always that the Employer's liability to indemnify the Contractor under paragraph (e) of Clause 10.4 shall be reduced proportionately to the extent that the act or neglect of the Contractor or his sub-contractors servants or agents may have contributed to the said injury or damage.

Employer to approve insurance

10.6 The Contractor shall throughout the execution of the Works maintain insurance against damage loss or injury for which he is liable under Clause 10.2 subject to the exceptions provided by Clauses 10.3 and 10.4. Such insurance shall be effected with an insurer and in terms approved by the Employer (which approval shall not be unreasonably withheld) for at least the amount stated in the Appendix. The terms of such insurance shall include a provision whereby in the event of any claim in respect of which the Contractor would be entitled to receive indemnity under the policy being brought or made against the Employer the insurer will indemnify the Employer against any such claims and any costs charges and expenses in respect thereof.

Contractor to produce policies of insurance

10.7 Both the Employer and the Contractor shall comply with the terms of any policy issued in connection with the Contract and shall whenever required produce to the Employer the policy or policies of insurance and the receipts for the payment of the current premiums.

11 Disputes

Settlement of disputes

11.1 If any dispute or difference of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works (excluding a dispute under Clause 7.11 but including a dispute as to any act or omission of the Engineer) whether arising during the progress of the Works or after their completion it shall be settled according to the provisions in Addendum A.

12 Application to Scotland and Northern Ireland

Application to Scotland

12.1 If the Works are situated in Scotland (and unless the Contract otherwise provides) the Contract shall in all respects be construed and operate as a Scottish contract and shall be interpreted in accordance with Scots Law and the provisions of sub-clause (2) of this Clause shall apply.

12.2 In the application of these Conditions and in particular Addendum A hereof

(a) any reference to arbitration under this Clause shall be conducted in accordance with the law of Scotland "The Scottish Arbitration Code 1999" prepared by the Scottish Council for International Arbitration, the Chartered Institute of Arbitrators (Scottish Branch) and the Scottish Building Contract Committee together with the ICE Appendix (2001) thereto or any amendment to or modification of the Appendix being in force at the time of appointment of the arbitrator. Such arbitrator shall have full power to open up review and revise any decision, opinion, instruction, direction, certificate or valuation of the Engineer or an adjudicator

(b) for any reference to the "Notice to Refer" there shall be substituted reference to the "Notice of Arbitration"

(c) the existing Addendum Clause A.10 shall be deleted and replaced with the new Addendum Clause A.10 below

"Appointment of arbitrator

A.10 (a) The arbitral tribunal shall be appointed by agreement of the parties.

President or Vice-President to act

(b) Failing agreement of the parties as aforesaid at sub-clause (a) above the following shall apply.

(i) Reference to Articles 3.5 and 3.6 of the Code to the Chairman of the Institute of Arbitrators (Scottish Branch) and to the Chairman of the Scottish Council for International Arbitration shall be deemed to be a reference to the President of the Institution of Civil Engineers as defined as (ii) below.

(ii) "President" means the President for the time being of the Institution of Civil Engineers or any Vice President acting on his behalf or such other person as

may have been nominated in the arbitration agreement to appoint the arbitrator in default of agreement between the parties."

(d) the existing Addendum Clause A.11 shall be deleted and replaced with new Addendum Clause A.11 below

"Arbitration procedure and powers

A.11 (a) Neither party shall be limited in the arbitration to the evidence or arguments put to the Engineer or to any adjudicator pursuant to Addendum Clause A.2 or A.6 respectively.

(b) Unless the parties otherwise agree in writing any reference to arbitration may proceed notwithstanding that the Works are not then complete or alleged to be complete."

(c) notwithstanding any of the other provisions of these Conditions or of the Code (including in particular Articles 22.7 and 22.8) nothing therein shall be construed as excluding recourse to the Court of Sessions under Section 3 of the Administration of Justice of (Scotland) Act 1972

APPENDIX 15

THE NEW ENGINEERING CONTRACT/ECC (THIRD EDITION)

8 RISKS AND INSURANCE

80 *Employer's* risks

80.1 The following are *Employer*'s risks.

- Claims, proceedings, compensation and costs payable which are due to
  - use or occupation of the Site by the *works* or for the purpose of the *works* which is the unavoidable result of the *works*,
  - negligence, breach of statutory duty or interference with any legal right by the *Employer* or by any person employed by or contracted to him except the *Contractor* or
  - a fault of the *Employer* or a fault in his design.
- Loss of or damage to Plant and Materials supplied to the *Contractor* by the *Employer*, or by Others on the *Employer*'s behalf, until the *Contractor* has received and accepted them.
- Loss of or damage to the *works*, Plant and Materials due to
  - war, civil war, rebellion, revolution, insurrection, military or usurped power,
  - strikes, riots and civil commotion not confined to the *Contractor*'s employees or
  - radioactive contamination.
- Loss of or wear or damage to the parts of the *works* taken over by the *Employer*, except loss, wear or damage occurring before the issue of the Defects Certificate which is due to
  - a Defect which existed at take over,
  - an event occurring before take over which was not itself an *Employer*'s risk or
  - the activities of the *Contractor* on the Site after take over.
- Loss of or wear or damage to the *works* and any Equipment, Plant and Materials retained on the Site by the *Employer* after a termination, except loss, wear or damage due to the activities of the *Contractor* on the Site after the termination.
- Additional *Employer*'s risks stated in the Contract Data.

. . .

87 Insurance by the *Employer*

87.1 The *Project Manager* submits policies and certificates for insurances provided by the *Employer* to the *Contractor* for acceptance before the *starting date* and afterwards as the *Contractor* instructs. The *Contractor* accepts the policies and certificates if they comply with this contract.

87.2 The *Contractor*'s acceptance of an insurance policy or certificate provided by the *Employer* does not change the responsibility of the *Employer* to provide the insurances stated in the Contract Data.

87.3 The *Contractor* may insure a risk which this contract requires the *Employer* to insure if the *Employer* does not submit a required policy or certificate. The cost of this insurance to the *Contractor* is paid by the *Employer*

APPENDIX 16.1

GC/WORKS/1 WITH QUANTITIES (1998)

1 Definitions, etc.

(1) In the Contract, unless the context otherwise requires—

"the Accepted Risks" means the risks of—

(a) pressure waves caused by the speed of aircraft or other aerial devices;

(b) ionising radiations or contamination by radioactivity from any nuclear fuel or from nuclear waste from the combustion of nuclear fuel;

(c) the radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly (including any nuclear component); and

(d) war, invasion, act of foreign enemy, hostilities (whether or not war has been declared), civil war, rebellion, insurrection, or military or usurped power; . . .

"Days" means calendar days; . . .

"the Maintenance Period" means the period, or any of the periods, specified in the Abstract of Particulars for the rectification of defects in accordance with Condition 21 (Defects in Maintenance Periods); . . .

"the PM" means the Project Manager who is the person employed in that capacity named in the Abstract of Particulars and appointed by the Employer to act on his behalf in carrying out those duties described in the Contract (subject to the exclusions set out in the Abstract of Particulars), or such other person as may be appointed in that capacity for the time being by the Employer; . . .

"Things" comprise "Things for incorporation', which means goods and materials intended to form part of the completed Works, and "Things not for incorporation" which means goods and materials provided or used to facilitate execution of the Works but not for incorporation in them; . . .

"Unforeseeable Ground Conditions" means ground conditions certified by the PM in accordance with Condition 7 (Conditions affecting Works); . . .

7 Conditions affecting Works

(1) The Contractor shall in relation to the Site be deemed to have satisfied himself as to—

(a) the existing roads, railways and other means of communication with or access to it;

(b) its contours and boundaries;

(c) the risk of damage by reason of any work to any property adjacent to the Works and injury to occupiers of that property;

(d) the nature of the soil and material (whether natural or otherwise) to be excavated;

(e) the conditions under which the Works will have to be carried out, including precautions to prevent nuisance and pollution;

(f) the supply of and conditions affecting labour necessary to carry out the Works;

(g) the facilities for obtaining any Things whether or not for incorporation; and

(h) any other matters or information affecting or likely to affect the execution of, or price tendered for, the Works.

(2) Paragraph (1) shall not apply to any information given or referred to in the Bills of Quantities which is required to be given in accordance with the method of measurement expressed therein.

(3) If, during the execution of the Works, the Contractor becomes aware of ground conditions (excluding those caused by weather but including artificial obstructions) which he did not know of, and which he could not reasonably have foreseen having regard to any information which he had or ought to have ascertained, he shall, as a condition precedent to any right or remedy in respect of such conditions, by notice immediately—

(i) inform the PM of those conditions; and
(ii) state the measures which he proposes to take to deal with them.

(4) If the PM agrees that the ground conditions specified in a notice under paragraph (3) could not reasonably have been foreseen by the Contractor having regard to any information he should have had in accordance with that paragraph and paragraph (1), he shall certify those conditions to be Unforeseeable Ground Conditions . . .

. . .

8 Insurance

(1) A party required under this Condition to effect or maintain insurance is called in this Condition "the insuring party'.

(2) The Contractor shall by such existing or new policies as he sees fit effect and maintain from the time he takes possession of the Site or any part of the Site or from the time he commences the execution of the Works (if earlier) to the expiration of the last Maintenance Period to expire, employer's liability insurance in respect of persons in his employment, appropriate to the nature of the Works. Such insurance shall comply with the Employer's Liability (Compulsory Insurance) Act 1969 (or, if the Works are in Northern Ireland, the Employer's Liability (Defective Equipment and Compulsory Insurance) (Northern Ireland) Order 1972) and any subordinate legislation made thereunder, and shall be for the minimum amount of £10,000,000 (or such other minimum amount as may be stated in the Abstract of Particulars) for any one occurrence or series of occurrences arising out of one event.

Alternative A

(3) The Contractor shall by such existing or new policies as he sees fit effect and maintain for the same period—

(a) construction all risks insurance in the joint names of the Employer and the Contractor against loss or damage to the Works and Things for which the Contractor is

responsible under the terms of the Contract for the full reinstatement value thereof (including transit and off-Site risks) plus 15 per cent (or such other percentage as may be stated in the Abstract of Particulars) for professional fees; and

(b) public liability insurance against legal liability for personal injury to any persons and loss or damage to property arising from or in connection with the Works, which is not covered by employer's liability insurance under paragraph (2) or by insurance against loss or damage to the Works and Things under subparagraph (a), for the minimum amount stated in the Abstract of Particulars, such public liability insurance to include a provision for indemnity to the Employer in respect of the Contractor's liability under Condition 19 (Loss or damage);

provided that the insurance which the Contractor is required to effect and maintain under this paragraph need not cover loss or damage caused by any Accepted Risk.

Alternative B

(3) The Contractor shall effect and maintain insurance in accordance with the Summary of Essential Insurance Requirements attached to the Abstract of Particulars.

Alternative C

(3) (a) While the Employer is a Minister of the Crown, a government department or other Crown agency or authority, the Employer shall not be required to effect or maintain any insurance, but shall assume the risks of loss or damage which should have been insured if paragraph (3)(b) applied, and, in the event of loss or damage arising, shall be responsible as if paragraph 3(b) applied and the Employer had failed to effect and maintain insurance as described therein, but the Employer shall not be responsible for any amounts in excess of amounts which should have been insured, or any liability authorised to be retained, or risks which would not have been insured or would have been excluded by the application of the terms, exceptions or conditions of any such insurance.

(b) While the Employer is not a Minister of the Crown, a government department or other Crown agency or authority, the Employer shall effect and maintain insurance in accordance with the Summary of Essential Insurance Requirements attached to the Abstract of Particulars, but shall not be responsible for any amounts in excess of amounts insured, or any retained liability, or risks not insured or excluded by the application of the terms, exceptions or conditions of any such insurance.

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(4) The other party shall have the right to receive, on request, a copy of insurances required to be effected or maintained by the insuring party under this Condition. The insuring party shall within 21 Days of the acceptance of the tender, and also within 21 Days of any subsequent renewal or expiry date of relevant insurances, send to the other party a certificate in the form attached to the Abstract of Particulars from his insurer or broker attesting that insurance has been effected in accordance with the Contract.

(5) All insurances required to be effected or maintained by the insuring party under this Condition shall be with reputable insurers, to whom the other party has no reasonable objection, lawfully carrying on such insurance business in the United Kingdom, and upon customary and usual terms prevailing for the time being in the insurance market.

The said terms and conditions shall not include any term or condition to the effect that any insured must discharge any liability before being entitled to recover from the insurers, or any other term or condition which might adversely affect the rights of any person to recover from the insurers pursuant to the Third Parties (Rights Against Insurers) Act 1930 or the Third Parties (Rights Against Insurers) Act (Northern Ireland) 1930.

(6) All insurances required to be effected or maintained under paragraph (3) (Alternatives B or C) (if applicable)—

(a) shall be in the joint names of the Employer, such other persons as the Employer may reasonable require (including, without limitation, the Employer's consultants, any persons who have entered or shall enter into an agreement for the provision of finance in connection with the Works, and any persons who have acquired or shall acquire any interest in or over the Works or any part thereof), the Contractor and all subcontractors; and

(b) shall extend to cover loss or damage which the Contractor is responsible for making good under Condition 21 (Defects in Maintenance Periods) or which occurs while the Contractor is making good defects in the Works under that Condition.

(7) If, without the approval of the other party, the insuring party fails to effect and maintain insurance he is required to effect and maintain under this Condition as described, or obtains a different policy of insurance, or fails to provide a copy of insurances or certificates in accordance with this Condition, the other party may, but is not required to, effect and maintain appropriate insurance cover and deduct the cost of doing so from any payment due to the insuring party under the Contract, or recover such sum from the insuring party as a debt.

(8) If—

(a) the Works involve the refurbishment, alteration or extension of existing structures; and/or

(b) "a completed part" within the meaning of Condition 37 (Early possession) is certified by the PM as having been completed in accordance with the Contract;

the Employer shall bear the risks of fire, lightning, explosion, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, earthquake, aircraft or other aerial devices or articles dropped therefrom, riot and civil commotion (including terrorism) in respect of loss or damage to the existing structures and contents for which the Employer is responsible, and in respect of loss or damage to the completed part from the date of its certification, except where Condition 19 (Loss or damage) applies to the relevant loss or damage and to the extent that the Contractor is not entitled to reimbursement under Condition 19(5).

(9) For the avoidance of doubt, it is agreed that nothing in this Condition shall relieve the Contractor from any of his obligations and liabilities under the Contract.

8A Professional indemnity insurance for design (only applicable if stated in Abstract of Particulars)

(1) The Contractor shall maintain professional indemnity insurance covering (inter alia) all liability hereunder in respect of defects or insufficiency in design, upon customary and

usual terms and conditions prevailing for the time being in the insurance market, and with reputable insurers lawfully carrying on such insurance business in the United Kingdom (in an amount not less than that required by the Abstract of Particulars) for any one occurrence or series of occurrences arising out of any one event, for a period beginning now and ending 12 years (or such other period as is required by the Abstract of Particulars) after certification under Condition 39 (Certifying completion) of the completion of the Works or the last Section thereof in respect of which completion is certified, or the determination of the Contract for any reason whatsoever, including (without limitation) breach by the Employer, whichever is the earlier, provided always that such insurance is available at commercially reasonable rates. The said terms and conditions shall not include any term or condition to the effect that the Contractor must discharge any liability before being entitled to recover from the insurers, or any other term or condition which might adversely affect the rights of any person to recover from the insurers pursuant to the Third Parties (Rights Against Insurers) Act 1930 or the Third Parties (Rights Against Insurers) Act (Northern Ireland) 1930. The Contractor shall not, without the prior approval in writing of the Employer, settle or compromise with the insurers any claim which the Contractor may have against the insurers and which relates to a claim by the Employer against the Contractor, or by any act or omission lose or prejudice the Contractor's right to make or proceed with such a claim against the insurers.

(2) The Contractor shall immediately inform the Employer if such insurance ceases to be available at rates that the Contractor considers to be commercially reasonable. Any increased or additional premium required by insurers by reason of the Contractor's own claims record or other acts, omissions, matters or things particular to the Contractor shall be deemed to be within commercially reasonable rates.

(3) The Contractor shall fully co-operate with any measures reasonably required by the Employer, including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above commercially reasonable rates if the Employer undertakes in writing to reimburse the Contractor in respect of the net cost of such insurance to the Contractor above commercially reasonable rates.

(4) As and when reasonably required to do so by the Employer, the Contractor shall produce for inspection documentary evidence (including, if required by the Employer, the originals of the relevant insurance document) that his professional indemnity insurance is being maintained.

(5) The above obligations in respect of professional indemnity insurance shall continue notwithstanding determination of the Contract for any reason whatsoever, including (without limitation) breach by the Employer . . .

. . .

19 Loss or damage

(1) This Condition applies to any loss or damage which arises out of, or is in any way connected with, the execution or purported execution of the Contract.

(2) The Contractor shall without delay at his own cost reinstate, replace or make good to the satisfaction of the Employer or, if the Employer agrees, compensate the Employer for, any loss or damage.

(3) Where a claim is made, or proceedings are brought against the Employer in respect of any loss or damage, the Contractor shall reimburse the Employer any costs or expenses which the Employer may reasonably incur in dealing with, or in settling, that claim or those proceedings.

(4) The Employer shall notify the Contractor as soon as possible of any claim made, or proceedings brought, against the Employer in respect of any loss or damage.

(5) The Employer shall reimburse the Contractor for any costs or expenses which the Contractor incurs in accordance with paragraphs (2) and (3) to the extent that the loss or damage is caused by—

(a) the neglect or default of the Employer or of any other contractor or agent of the Employer;

(b) any Accepted Risk or Unforeseeable Ground Conditions; or

(c) any other circumstances which are outside the control of the Contractor or of any of his subcontractors or suppliers and which could not have been reasonably contemplated under the Contract; provided that this subparagraph shall not apply where the loss or damage is loss or damage falling within subparagraph 6(c).

(6) In this Condition loss or damage includes—

(a) loss or damage to property;

(b) personal injury to, or the sickness or death of any person;

(c) loss or damage to the Works or to any Things on the Site; and

(d) loss of profits or loss of use suffered because of any loss or damage.

APPENDIX 16.2

GC/WORKS/1 WITH QUANTITIES, WITHOUT QUANTITIES AND SINGLE STAGE DESIGN AND BUILD (1998)

SUMMARY OF ESSENTIAL INSURANCE REQUIREMENTS UNDER CONDITION 8(3) (ALTERNATIVES B AND C) OF THE GENERAL CONDITIONS OF CONTRACT FOR BUILDING & CIVIL ENGINEERING MAJOR WORKS GC/WORKS/1 WITH QUANTITIES, WITHOUT QUANTITIES AND SINGLE STAGE DESIGN & BUILD (1998)

Combined Construction "All Risks" and Public Liability Insurance

Insured parties

The parties mentioned in Conditions 8(6)(a) (Insurance), for their respective rights and interests, other than those risks normally covered by professional indemnity insurance.

Period of Insurance

From the time the Contractor takes possession of the Site or any part of the Site or from the time the Contractor commences the execution of the Works (if earlier)—

(a) to the date of certification of the completion of the Works under Condition 39 (Certifying completion); or

(b) in respect of any completed part of the Works within the meaning of Condition 37 (Early possession) to the date of its certification under Condition 37(1);

but extending to cover the loss or damage referred to in Condition 8(6)(b) (Insurance).

Construction "All Risks"

Risks insured

All risks of loss or damage, as normally available for insurance of this nature, but excluding the Accepted Risks.

Property Insured

(a) The Works and Things for incorporation therein, including any free supplied items.

(b) Things not for incorporation in the Works (including, without limitation, any temporary works and Things erected or constructed for the purposes of making possible the erection or installation of the Works and which it is intended shall not pass into the ownership of the Employer).

Amount Insured

The greater of—

(a) the Contract Sum; or

(b) the full reinstatement value of the Works and Things for which the Contractor is responsible under the terms of the Contract (including the cost of transit and off-site risks) plus an allowance of 15% (or such other percentage as may be stated in the Abstract of Particulars included in the Contract) for professional fees and a reasonable allowance for the value of Variation Instructions and of free supplied items.

Territorial Limits of Cover

While on the Site or in transit thereto or therefrom (other than by sea or air), including loss or damage occurring during any deviation therein or storage in the course of transit, temporary off-Site storage or temporary removal from the Site for any purpose whatsoever (including any loading, transit or unloading incidental thereto) or while held for the purpose of the execution of the Works at the premises of the Insured or anywhere in the United Kingdom.

Insureds' Retained Liability

The Insureds' retained liability shall not exceed—

(a) £2,500 each and every occurrence in respect of loss or damage caused by storm, tempest, flooding, water, subsidence, or collapse; or

(b) £1,000 each and every occurrence in respect of any other insured loss or damage.

Public Liability

Risks Insured

All sums which the Insured shall become legally liable to pay (including claimant's costs and expenses) as damages in respect of—

(a) death or bodily injury to, or illness or disease contracted by, any person, not being a person who at the time of suffering such death, bodily injury or disease was in the Insured's employment and where the same arose out of and in the course of such employment; or

(b) loss of or damage to property; or

(c) interference to property or the enjoyment of use thereof by obstruction, trespass, loss of amenities, or nuisance; happening during the Period of Insurance and arising out of or in connection with the Works.

Amount Insured

£5,000,000 (unless otherwise stated in the Abstract of Particulars included in the Contract) for any one occurrence or series of occurrences arising out of one event.

Territorial Limits of Cover

Anywhere in the United Kingdom in connection with the Works and elsewhere in the course of commercial visits by the Insured and/or his employees in connection with the Works.

Insureds' Retained Liability

The Insureds' retained liability shall not exceed £1,000 each and every occurrence in respect of property damage claims only – personal injury claims will be paid in full.

Notes

(1) The insurance should indemnify (inter alia) the Contractor and all subcontractors, whether or not nominated under Condition 63 (Nomination). The Contractor's tender should therefore reflect the likely savings in subcontract prices.

(2) If the policy effected to meet the requirements of Condition 8(3) (Insurance) and the above Summary does not provide cover in respect of loss of, or damage to, temporary buildings, constructional plant (including access scaffolding) and equipment and employees' personal effects and tools, the Contractor should price the risk in respect thereof in the normal way.

(3) No insurance effected or maintained will relieve the Contractor from any of his obligations and liabilities under Condition 19 (Loss or damage) to reinstate, replace or make good to the satisfaction of the Employer or, if the Employer agrees, compensate the Employer for, any loss or damage which arises out of, or is in any way connected with, the execution or purported execution of the Contract, or under any other provision of the Contract.

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APPENDIX 17

GC/WORKS/2 GENERAL CONDITIONS (1998)

[NOTE: The GC/Works/2 definitions of "Accepted Risks", "Days", "Maintenance Period", "PM", "Things" and "Unforeseeable Ground Conditions" are to the same effect as the equivalent GC/Works/1 definitions, and GC/Works/2 Condition 8 (Loss or damge) is to the same effect as GC/Works/1 Condition 19 (Loss or damage)—see Appendix 16.1.]

4 Conditions affecting Works

(1) The Contractor shall in relation to the Site be deemed to have satisfied himself as to all matters and information affecting or likely to affect the execution of, or price tendered for, the Works.

(2) If, during the execution of the Works, the Contractor becomes aware of ground conditions (excluding those caused by weather but including artificial obstructions) which he did not know of, and which he could not reasonably have foreseen having regard to any information which he had or ought reasonably to have ascertained, he shall, as a condition precedent to any right or remedy in respect of such conditions, by notice immediately—

(i) inform the PM of those conditions; and
(ii) state the measures which he proposes to take to deal with them.

(3) If the PM agrees that the ground conditions specified in a notice under paragraph (2) could not reasonably have been foreseen by the Contractor having regard to any information he should have had in accordance with that paragraph and paragraph (1), he shall certify those conditions to be Unforeseeable Ground Conditions . . .

5 Insurance

(1) The Contractor shall by such existing or new policies as he sees fit effect and maintain from the time he enters on the Site or any part of the Site or from the time he commences the execution of the Works (if earlier) to the expiration of the last Maintenance Period to expire, employer's liability insurance in respect of persons in his employment, appropriate to the nature of the Works. Such insurance shall comply with the Employer's Liability (Compulsory Insurance) Act 1969 (or, if the Works are in Northern Ireland, the Employer's Liability (Defective Equipment and Compulsory Insurance) (Northern Ireland) Order 1972) and any subordinate legislation made thereunder, and shall be for the minimum amount of £10,000,000 (or such other minimum amount as may be stated in the Abstract of Particulars) for any one occurrence or series of occurrences arising out of one event.

(2) The Contractor shall by such existing or new policies as he sees fit effect and maintain for the same period—

(a) construction all risks insurance in the joint names of the Employer and the Contractor against loss or damage to the Works and Things for which the Contractor is

responsible under the terms of the Contract for the full reinstatement value thereof (including transit and off-Site risks) plus 15 per cent (or such other percentage as may be stated in the Abstract of Particulars) for professional fees; and

(b) public liability insurance against legal liability for personal injury to any persons and loss or damage to property arising from or in connection with the Works, which is not covered by employer's liability insurance under paragraph (1) or by insurance against loss or damage to the Works and Things under subparagraph (a), for the minimum amount stated in the Abstract of Particulars, such public liability insurance to include a provision for indemnity to the Employer in respect of the Contractor's liability under Condition 8 (Loss or damage);

provided that the insurance which the Contractor is required to effect and maintain under this paragraph need not cover loss or damage caused by any Accepted Risk.

(3) The Employer shall have the right to receive, on request, a copy of insurances required to be effected or maintained under this Condition. The Contractor shall within 21 Days of the acceptance of the tender, and also within 21 Days of any subsequent renewal or expiry date of relevant insurances, send to the Employer a certificate in the form attached to the Abstract of Particulars from his insurer or broker attesting that insurance has been effected in accordance with the Contract.

(4) All insurances required to be effected or maintained under this Condition shall be with reputable insurers, to whom the Employer has no reasonable objection, lawfully carrying on such insurance business in the United Kingdom, and upon customary and usual terms prevailing for the time being in the insurance market. The said terms and conditions shall not include any term or condition to the effect that any insured must discharge any liability before being entitled to recover from the insurers, or any other term or condition which might adversely affect the rights of any person to recover from the insurers pursuant to the Third Parties (Rights Against Insurers) Act 1930 or the Third Parties (Rights Against Insurers) Act (Northern Ireland) 1930.

(5) If, without the approval of the Employer, the Contractor fails to effect and maintain insurance he is required to effect and maintain under this Condition as described, or obtains a different policy of insurance, or fails to provide a copy of insurances or certificates in accordance with this Condition, the Employer may, but is not required to, effect and maintain appropriate insurance cover and deduct the cost of doing so from any payment due to the Contractor under the Contract, or recover such sum from the Contractor as a debt.

(6) If the Works involve the refurbishment, alteration or extension of existing structures, the Employer shall bear the risks of fire, lightning, explosion, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, earthquake, aircraft or other aerial devices or articles dropped therefrom, riot and civil commotion (including terrorism) in respect of loss or damage to the existing structures and contents for which the Employer is responsible, except where Condition 8 (Loss or damage) applies to the relevant loss or damage and to the extent that the Contractor is not entitled to reimbursement under Condition 8(5).

(7) For the avoidance of doubt, it is agreed that nothing in this Condition shall relieve the Contractor from any of his obligations and liabilities under the Contract.

APPENDIX 18

FIDIC CONDITIONS OF CONTRACT FOR CONSTRUCTION (RED BOOK FIRST EDITION 1999)

FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER

17 Risk and Responsibility

17.1 Indemnities

The Contractor shall indemnify and hold harmless the Employer, the Employer's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of:

(a) bodily injury, sickness, disease or death, of any person whatsoever arising out of or in the course of or by reason of the Contractor's design (if any), the execution and completion of the Works and the remedying of any defects, unless attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents, and

(b) damage to or loss of any property, real or personal (other than the Works), to the extent that such damage or loss:

(i) arises out of or in the course of or by reason of the Contractor's design (if any), the execution and completion of the Works and the remedying of any defects, and

(ii) is attributable to any negligence, wilful act or breach of the Contract by the Contractor, the Contractor's Personnel, their respective agents, or anyone directly or indirectly employed by any of them.

The Employer shall indemnify and hold harmless the Contractor, the Contractor's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of (1) bodily injury, sickness, disease or death, which is attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents, and (2) the matters for which liability may be excluded from insurance cover, as described in sub-paragraphs (d)(i), (ii) and (iii) of Sub-Clause 18.3 [*Insurance Against Injury to Persons and Damage to Property*].

17.2 Contractor's Care of the Works

The Contractor shall take full responsibility for the care of the Works and Goods from the Commencement Date until the Taking-Over Certificate is issued (or is deemed to be issued

under Sub-Clause 10.1 [*Taking Over of the Works and Sections*]) for the Works, when responsibility for the care of the Works shall pass to the Employer. If a Taking-Over Certificate is issued (or is so deemed to be issued) for any Section or part of the Works, responsibility for the care of the Section or part shall then pass to the Employer.

After responsibility has accordingly passed to the Employer, the Contractor shall take responsibility for the care of any work which is outstanding on the date stated in a Taking-Over Certificate, until this outstanding work has been completed.

If any loss or damage happens to the Works, Goods or Contractor's Documents during the period when the Contractor is responsible for their care, from any cause not listed in Sub-Clause 17.3 [*Employer's Risks*], the Contractor shall rectify the loss or damage at the Contractor's risk and cost, so that the Works, Goods and Contractor's Documents conform with the Contract.

The Contractor shall be liable for any loss or damage caused by any actions performed by the Contractor after a Taking-Over Certificate has been issued. The Contractor shall also be liable for any loss or damage which occurs after a Taking-Over Certificate has been issued and which arose from a previous event for which the Contractor was liable.

17.3 Employer's Risks

The risks referred to in Sub-Clause 17.4 below are:

(a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,

(b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, within the Country,

(c) riot, commotion or disorder within the Country by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors,

(d) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, within the Country, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity,

(e) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds,

(f) use or occupation by the Employer of any part of the Permanent Works, except as may be specified in the Contract,

(g) design of any part of the Works by the Employer's Personnel or by others for whom the Employer is responsible, and

(h) any operation of the forces of nature which is Unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions.

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18 Insurance

18.1 General Requirements for Insurances

In this Clause, "insuring Party" means, for each type of insurance, the Party responsible for effecting and maintaining the insurance specified in the relevant Sub-Clause.

Wherever the Contractor is the insuring Party, each insurance shall be effected with insurers and in terms approved by the Employer. These terms shall be consistent with any terms agreed by both Parties before the date of the Letter of Acceptance. This agreement of terms shall take precedence over the provisions of this Clause.

Wherever the Employer is the insuring Party, each insurance shall be effected with insurers and in terms consistent with the details annexed to the Particular Conditions.

If a policy is required to indemnify joint insured, the cover shall apply separately to each insured as though a separate policy had been issued for each of the joint insured. If a policy indemnifies additional joint insured, namely in addition to the insured specified in this Clause, (i) the Contractor shall act under the policy on behalf of these additional joint insured except that the Employer shall act for Employer's Personnel, (ii) additional joint insured shall not be entitled to receive payments directly from the insurer or to have any other direct dealings with the insurer, and (iii) the insuring Party shall require all additional joint insured to comply with the conditions stipulated in the policy.

Each policy insuring against loss or damage shall provide for payments to be made in the currencies required to rectify the loss or damage. Payments received from insurers shall be used for the rectification of the loss or damage.

The relevant insuring Party shall, within the respective periods stated in the Appendix to Tender (calculated from the Commencement Date), submit to the other Party:

(a) evidence that the insurances described in this Clause have been effected, and

(b) copies of the policies for the insurances described in Sub-Clause 18.2 [*Insurance for Works and Contractor's Equipment*] and Sub-Clause 18.3 [*Insurance against Injury to Persons and Damage to Property*].

When each premium is paid, the insuring Party shall submit evidence of payment to the other Party. Whenever evidence or policies are submitted, the insuring Party shall also give notice to the Engineer.

Each Party shall comply with the conditions stipulated in each of the insurance policies. The insuring Party shall keep the insurers informed of any relevant changes to the execution of the Works and ensure that insurance is maintained in accordance with this Clause.

Neither Party shall make any material alteration to the terms of any insurance without the prior approval of the other Party. If an insurer makes (or attempts to make) any alteration, the Party first notified by the insurer shall promptly give notice to the other Party.

If the insuring Party fails to effect and keep in force any of the insurances it is required to effect and maintain under the Contract, or fails to provide satisfactory evidence and copies of policies in accordance with this Sub-Clause, the other Party may (at its option and without prejudice to any other right or remedy) effect insurance for the relevant coverage and pay the premiums due. The insuring Party shall pay the amount of these premiums to the other Party, and the Contract Price shall be adjusted accordingly.

Nothing in this Clause limits the obligations, liabilities or responsibilities of the Contractor or the Employer, under the other terms of the Contract or otherwise. Any amounts not insured or not recovered from the insurers shall be borne by the Contractor and/or the Employer in accordance with these obligations, liabilities or responsibilities. However, if the insuring Party fails to effect and keep in force an insurance which is available and which it is required to effect and maintain under the Contract, and the other Party neither approves the omission nor effects insurance for the coverage relevant to this default, any moneys which should have been recoverable under this insurance shall be paid by the insuring Party.

Payments by one Party to the other Party shall be subject to Sub-Clause 2.5 [*Employer's Claims*] or Sub-Clause 20.1 [*Contractor's Claims*], as applicable.

18.2 Insurance for Works and Contractor's Equipment

The insuring Party shall insure the Works, Plant, Materials and Contractor's Documents for not less than the full reinstatement cost including the costs of demolition, removal of debris and professional fees and profit. This insurance shall be effective from the date by which the evidence is to be submitted under sub-paragraph (a) of Sub-Clause 18.1 [*General Requirements for Insurances*], until the date of issue of the Taking-Over Certificate for the Works.

The insuring Party shall maintain this insurance to provide cover until the date of issue of the Performance Certificate, for loss or damage for which the Contractor is liable arising from a cause occurring prior to the issue of the Taking-Over Certificate, and for loss or damage caused by the Contractor in the course of any other operations (including those under Clause 11 [*Defects Liability*]).

The insuring Party shall insure the Contractor's Equipment for not less than the full replacement value, including delivery to Site. For each item of Contractor's Equipment, the insurance shall be effective while it is being transported to the Site and until it is no longer required as Contractor's Equipment.

Unless otherwise stated in the Particular Conditions, insurances under this Sub-Clause:

(a) shall be effected and maintained by the Contractor as insuring Party,

(b) shall be in the joint names of the Parties, who shall be jointly entitled to receive payments from the insurers, payments being held or allocated between the Parties for the sole purpose of rectifying the loss or damage,

(c) shall cover all loss and damage from any cause not listed in Sub-Clause 17.3 [*Employer's Risks*],

(d) shall also cover loss or damage to a part of the Works which is attributable to the use or occupation by the Employer of another part of the Works, and loss or damage from the risks listed in sub-paragraphs (c), (g) and (h) of Sub-Clause 17.3 [*Employer's Risks*], excluding (in each case) risks which are not insurable at commercially reasonable terms, with deductibles per occurrence of not more than the amount stated in the Appendix to Tender (if an amount is not so stated, this sub-paragraph (d) shall not apply), and

(e) may however exclude loss of, damage to, and reinstatement of:

  (i) a part of the Works which is in a defective condition due to a defect in its design, materials or workmanship (but cover shall include any other parts which are lost

or damaged as a direct result of this defective condition and not as described in sub-paragraph (ii) below),

(ii) a part of the Works which is lost or damaged in order to reinstate any other part of the Works if this other part is in a defective condition due to a defect in its design, materials or workmanship,

(iii) a part of the Works which has been taken over by the Employer, except to the extent that the Contractor is liable for the loss or damage, and

(iv) Goods while they are not in the Country, subject to Sub-Clause 14.5 [*Plant and Materials intended for the Works*].

If, more than one year after the Base Date, the cover described in sub-paragraph (d) above ceases to be available at commercially reasonable terms, the Contractor shall (as insuring Party) give notice to the Employer, with supporting particulars. The Employer shall then (i) be entitled subject to Sub-Clause 2.5 [*Employer's Claims*] to payment of an amount equivalent to such commercially reasonable terms as the Contractor should have expected to have paid for such cover, and (ii) be deemed, unless he obtains the cover at commercially reasonable terms, to have approved the omission under Sub-Clause 18.1 [*General Requirements for Insurances*].

18.3 Insurance against Injury to Persons and Damage to Property

The insuring Party shall insure against each Party's liability for any loss, damage, death or bodily injury which may occur to any physical property (except things insured under Sub-Clause 18.2 [*Insurance for Works and Contractor's Equipment*]) or to any person (except persons insured under Sub-Clause 18.4 [*Insurance for Contractor's Personnel*]), which may arise out of the Contractor's performance of the Contract and occurring before the issue of the Performance Certificate.

This insurance shall be for a limit per occurrence of not less than the amount stated in the Appendix to Tender, with no limit on the number of occurrences. If an amount is not stated in the Appendix to Tender, this Sub-Clause shall not apply.

Unless otherwise stated in the Particular Conditions, the insurances specified in this Sub-Clause:

(a) shall be effected and maintained by the Contractor as insuring Party,

(b) shall be in the joint names of the Parties,

(c) shall be extended to cover liability for all loss and damage to the Employer's property (except things insured under Sub-Clause 18.2) arising out of the Contractor's performance of the Contract, and

(d) may however exclude liability to the extent that it arises from:

(i) the Employer's right to have the Permanent Works executed on, over, under, in or through any land, and to occupy this land for the Permanent Works,

(ii) damage which is an unavoidable result of the Contractor's obligations to execute the Works and remedy any defects, and

(iii) a cause listed in Sub-Clause 17.3 [*Employer's Risks*], except to the extent that cover is available at commercially reasonable terms.

18.4 Insurance for Contractor's Personnel

The Contractor shall effect and maintain insurance against liability for claims, damages, losses and expenses (including legal fees and expenses) arising from injury, sickness, disease or death of any person employed by the Contractor or any other of the Contractor's Personnel.

The Employer and the Engineer shall also be indemnified under the policy of insurance, except that this insurance may exclude losses and claims to the extent that they arise from any act or neglect of the Employer or of the Employer's Personnel.

The insurance shall be maintained in full force and effect during the whole time that these personnel are assisting in the execution of the Works. For a Subcontractor's employees, the insurance may be effected by the Subcontractor, but the Contractor shall be responsible for compliance with this Clause.

APPENDIX 19

FIDIC TURNKEY CONTRACT—CONDITIONS OF CONTRACT FOR EPC/TURNKEY PROJECTS (SILVER BOOK FIRST EDITION 1999)

17 Risk and Responsibility

17.1 Indemnities

The Contractor shall indemnify and hold harmless the Employer, the Employer's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of:

(a) bodily injury, sickness, disease or death, of any person whatsoever arising out of or in the course of or by reason of the Contractor's design (if any), the execution and completion of the Works and the remedying of any defects, unless attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents, and

(b) damage to or loss of any property, real or personal (other than the Works), to the extent that such damage or loss:

  (i) arises out of or in the course of or by reason of the Contractor's design (if any), the execution and completion of the Works and the remedying of any defects, and

  (ii) is attributable to any negligence, wilful act or breach of the Contract by the Contractor, the Contractor's Personnel, their respective agents, or anyone directly or indirectly employed by any of them.

The Employer shall indemnify and hold harmless the Contractor, the Contractor's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of (1) bodily injury, sickness, disease or death, which is attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents, and (2) the matters for which liability may be excluded from insurance cover, as described in sub-paragraphs (d)(i), (ii) and (iii) of Sub-Clause 18.3 [*Insurance Against Injury to Persons and Damage to Property*].

17.2 Contractor's Care of the Works

The Contractor shall take full responsibility for the care of the Works and Goods from the Commencement Date until the Taking-Over Certificate is issued (or is deemed to be issued under Sub-Clause 10.1 [*Taking Over of the Works and Sections*]) for the Works, when responsibility for the care of the Works shall pass to the Employer. If a Taking-Over Certificate is issued (or is so deemed to be issued) for any Section or part of the Works, responsibility for the care of the Section or part shall then pass to the Employer.

After responsibility has accordingly passed to the Employer, the Contractor shall take responsibility for the care of any work which is outstanding on the date stated in a Taking-Over Certificate, until this outstanding work has been completed.

If any loss or damage happens to the Works, Goods or Contractor's Documents during the period when the Contractor is responsible for their care, from any cause not listed in Sub-Clause 17.3 [*Employer's Risks*], the Contractor shall rectify the loss or damage at the Contractor's risk and cost, so that the Works, Goods and Contractor's Documents conform with the Contract.

The Contractor shall be liable for any loss or damage caused by any actions performed by the Contractor after a Taking-Over Certificate has been issued. The Contractor shall also be liable for any loss or damage which occurs after a Taking-Over Certificate has been issued and which arose from a previous event for which the Contractor was liable.

17.3 Employer's Risks

The risks referred to in Sub-Clause 17.4 below are:

(a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,

(b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, within the Country,

(c) riot, commotion or disorder within the Country by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors,

(d) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, within the Country, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity,

(e) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds,

. . .

18 Insurance

18.1 General Requirements for Insurances

In this Clause, "insuring Party" means, for each type of insurance, the Party responsible for effecting and maintaining the insurance specified in the relevant Sub-Clause.

Wherever the Contractor is the insuring Party, each insurance shall be effected with insurers and in terms approved by the Employer. These terms shall be consistent with any terms agreed by both Parties before the date of the Letter of Acceptance. This agreement of terms shall take precedence over the provisions of this Clause.

Wherever the Employer is the insuring Party, each insurance shall be effected with insurers and in terms consistent with the details annexed to the Particular Conditions.

If a policy is required to indemnify joint insured, the cover shall apply separately to each insured as though a separate policy had been issued for each of the joint insured. If a policy

indemnifies additional joint insured, namely in addition to the insured specified in this Clause, (i) the Contractor shall act under the policy on behalf of these additional joint insured except that the Employer shall act for Employer's Personnel, (ii) additional joint insured shall not be entitled to receive payments directly from the insurer or to have any other direct dealings with the insurer, and (iii) the insuring Party shall require all additional joint insured to comply with the conditions stipulated in the policy.

Each policy insuring against loss or damage shall provide for payments to be made in the currencies required to rectify the loss or damage. Payments received from insurers shall be used for the rectification of the loss or damage.

The relevant insuring Party shall, within the respective periods stated in the Appendix to Tender (calculated from the Commencement Date), submit to the other Party:

(a) evidence that the insurances described in this Clause have been effected, and

(b) copies of the policies for the insurances described in Sub-Clause 18.2 [*Insurance for Works and Contractor's Equipment*] and Sub-Clause 18.3 [*Insurance against Injury to Persons and Damage to Property*].

When each premium is paid, the insuring Party shall submit evidence of payment to the other Party. Whenever evidence or policies are submitted, the insuring Party shall also give notice to the Engineer.

Each Party shall comply with the conditions stipulated in each of the insurance policies. The insuring Party shall keep the insurers informed of any relevant changes to the execution of the Works and ensure that insurance is maintained in accordance with this Clause.

Neither Party shall make any material alteration to the terms of any insurance without the prior approval of the other Party. If an insurer makes (or attempts to make) any alteration, the Party first notified by the insurer shall promptly give notice to the other Party.

If the insuring Party fails to effect and keep in force any of the insurances it is required to effect and maintain under the Contract, or fails to provide satisfactory evidence and copies of policies in accordance with this Sub-Clause, the other Party may (at its option and without prejudice to any other right or remedy) effect insurance for the relevant coverage and pay the premiums due. The insuring Party shall pay the amount of these premiums to the other Party, and the Contract Price shall be adjusted accordingly.

Nothing in this Clause limits the obligations, liabilities or responsibilities of the Contractor or the Employer, under the other terms of the Contract or otherwise. Any amounts not insured or not recovered from the insurers shall be borne by the Contractor and/or the Employer in accordance with these obligations, liabilities or responsibilities. However, if the insuring Party fails to effect and keep in force an insurance which is available and which it is required to effect and maintain under the Contract, and the other Party neither approves the omission nor effects insurance for the coverage relevant to this default, any moneys which should have been recoverable under this insurance shall be paid by the insuring Party.

Payments by one Party to the other Party shall be subject to Sub-Clause 2.5 [*Employer's Claims*] or Sub-Clause 20.1 [*Contractor's Claims*], as applicable.

18.2 Insurance for Works and Contractor's Equipment

The insuring Party shall insure the Works, Plant, Materials and Contractor's Documents for not less than the full reinstatement cost including the costs of demolition, removal of debris and professional fees and profit. This insurance shall be effective from the date by which the evidence is to be submitted under sub-paragraph (a) of Sub-Clause 18.1 [*General Requirements for Insurances*], until the date of issue of the Taking-Over Certificate for the Works.

The insuring Party shall maintain this insurance to provide cover until the date of issue of the Performance Certificate, for loss or damage for which the Contractor is liable arising from a cause occurring prior to the issue of the Taking-Over Certificate, and for loss or damage caused by the Contractor in the course of any other operations (including those under Clause 11 [*Defects Liability*]).

The insuring Party shall insure the Contractor's Equipment for not less than the full replacement value, including delivery to Site. For each item of Contractor's Equipment, the insurance shall be effective while it is being transported to the Site and until it is no longer required as Contractor's Equipment.

Unless otherwise stated in the Particular Conditions, insurances under this Sub-Clause:

(a) shall be effected and maintained by the Contractor as insuring Party,

(b) shall be in the joint names of the Parties, who shall be jointly entitled to receive payments from the insurers, payments being held or allocated between the Parties for the sole purpose of rectifying the loss or damage,

(c) shall cover all loss and damage from any cause not listed in Sub-Clause 17.3 [*Employer's Risks*],

(d) shall also cover loss or damage to a part of the Works which is attributable to the use or occupation by the Employer of another part of the Works, and loss or damage from the risks listed in sub-paragraphs (c), (g) and (h) of Sub-Clause 17.3 [*Employer's Risks*], excluding (in each case) risks which are not insurable at commercially reasonable terms, with deductibles per occurrence of not more than the amount stated in the Appendix to Tender (if an amount is not so stated, this sub-paragraph (d) shall not apply), and

(e) may however exclude loss of, damage to, and reinstatement of:

  (i) a part of the Works which is in a defective condition due to a defect in its design, materials or workmanship (but cover shall include any other parts which are lost or damaged as a direct result of this defective condition and not as described in sub-paragraph (ii) below),

  (ii) a part of the Works which is lost or damaged in order to reinstate any other part of the Works if this other part is in a defective condition due to a defect in its design, materials or workmanship,

  (iii) a part of the Works which has been taken over by the Employer, except to the extent that the Contractor is liable for the loss or damage, and

  (iv) Goods while they are not in the Country, subject to Sub-Clause 14.5 [*Plant and Materials intended for the Works*].

If, more than one year after the Base Date, the cover described in sub-paragraph (d) above ceases to be available at commercially reasonable terms, the Contractor shall (as insuring Party) give notice to the Employer, with supporting particulars. The Employer shall then (i) be entitled subject to Sub-Clause 2.5 [*Employer's Claims*] to payment of an amount equivalent to such commercially reasonable terms as the Contractor should have expected to have paid for such cover, and (ii) be deemed, unless he obtains the cover at commercially reasonable terms, to have approved the omission under Sub-Clause 18.1 [*General Requirements for Insurances*].

18.3 Insurance against Injury to Persons and Damage to Property

The insuring Party shall insure against each Party's liability for any loss, damage, death or bodily injury which may occur to any physical property (except things insured under Sub-Clause 18.2 [*Insurance for Works and Contractor's Equipment*]) or to any person (except persons insured under Sub-Clause 18.4 [*Insurance for Contractor's Personnel*]), which may arise out of the Contractor's performance of the Contract and occurring before the issue of the Performance Certificate.

This insurance shall be for a limit per occurrence of not less than the amount stated in the Appendix to Tender, with no limit on the number of occurrences. If an amount is not stated in the Appendix to Tender, this Sub-Clause shall not apply.

Unless otherwise stated in the Particular Conditions, the insurances specified in this Sub-Clause:

(a) shall be effected and maintained by the Contractor as insuring Party,

(b) shall be in the joint names of the Parties,

(c) shall be extended to cover liability for all loss and damage to the Employer's property (except things insured under Sub-Clause 18.2) arising out of the Contractor's performance of the Contract, and

(d) may however exclude liability to the extent that it arises from:

  (i) the Employer's right to have the Permanent Works executed on, over, under, in or through any land, and to occupy this land for the Permanent Works,

  (ii) damage which is an unavoidable result of the Contractor's obligations to execute the Works and remedy any defects, and

  (iii) a cause listed in Sub-Clause 17.3 [*Employer's Risks*], except to the extent that cover is available at commercially reasonable terms.

18.4 Insurance for Contractor's Personnel

The Contractor shall effect and maintain insurance against liability for claims, damages, losses and expenses (including legal fees and expenses) arising from injury, sickness, disease or death of any person employed by the Contractor or any other of the Contractor's Personnel.

The Employer and the Engineer shall also be indemnified under the policy of insurance, except that this insurance may exclude losses and claims to the extent that they arise from any act or neglect of the Employer or of the Employer's Personnel.

The insurance shall be maintained in full force and effect during the whole time that these personnel are assisting in the execution of the Works. For a Subcontractor's employees, the insurance may be effected by the Subcontractor, but the Contractor shall be responsible for compliance with this Clause.

APPENDIX 20

FIDIC PLANT AND DESIGN-BUILD CONTRACT (YELLOW BOOK FIRST EDITION 1999)

17 Risk and Responsibility

17.1 Indemnities

The Contractor shall indemnify and hold harmless the Employer, the Employer's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of:

(a) bodily injury, sickness, disease or death, of any person whatsoever arising out of or in the course of or by reason of the design, execution and completion of the Works and the remedying of any defects, unless attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents, and

(b) damage to or loss of any property, real or personal (other than the Works), to the extent that such damage or loss:

  (i) arises out of or in the course of or by reason of the design, execution and completion of the Works and the remedying of any defects, and

  (ii) is attributable to any negligence, wilful act or breach of the Contract by the Contractor, the Contractor's Personnel, their respective agents, or anyone directly or indirectly employed by any of them.

The Employer shall indemnify and hold harmless the Contractor, the Contractor's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of (1) bodily injury, sickness, disease or death, which is attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents, and (2) the matters for which liability may be excluded from insurance cover, as described in sub-paragraphs (d)(i), (ii) and (iii) of Sub-Clause 18.3 [*Insurance Against Injury to Persons and Damage to Property*].

17.2 Contractor's Care of the Works

The Contractor shall take full responsibility for the care of the Works and Goods from the Commencement Date until the Taking-Over Certificate is issued (or is deemed to be issued under Sub-Clause 10.1 [*Taking Over of the Works and Sections*]) for the Works, when responsibility for the care of the Works shall pass to the Employer. If a Taking-Over Certificate is issued (or is so deemed to be issued) for any Section or part of the Works, responsibility for the care of the Section or part shall then pass to the Employer.

After responsibility has accordingly passed to the Employer, the Contractor shall take responsibility for the care of any work which is outstanding on the date stated in a Taking-Over Certificate, until this outstanding work has been completed.

If any loss or damage happens to the Works, Goods or Contractor's Documents during the period when the Contractor is responsible for their care, from any cause not listed in Sub-Clause 17.3 [*Employer's Risks*], the Contractor shall rectify the loss or damage at the Contractor's risk and cost, so that the Works, Goods and Contractor's Documents conform with the Contract.

The Contractor shall be liable for any loss or damage caused by any actions performed by the Contractor after a Taking-Over Certificate has been issued. The Contractor shall also be liable for any loss or damage which occurs after a Taking-Over Certificate has been issued and which arose from a previous event for which the Contractor was liable.

17.3 Employer's Risks

The risks referred to in Sub-Clause 17.4 below are:

(a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,

(b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, within the Country,

(c) riot, commotion or disorder within the Country by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors,

(d) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, within the Country, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity,

(e) pressure waves caused by aircraft or other aerial devices travelling at sonic or super-sonic speeds,

(f) use or occupation by the Employer of any part of the Permanent Works, except as may be specified in the Contract,

(g) design of any part of the Works by the Employer's Personnel or by others for whom the Employer is responsible, if any, and

(h) any operation of the forces of nature which is Unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions.

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18 Insurance

18.1 General Requirements for Insurances

In this Clause, "insuring Party" means, for each type of insurance, the Party responsible for effecting and maintaining the insurance specified in the relevant Sub-Clause.

Wherever the Contractor is the insuring Party, each insurance shall be effected with insurers and in terms approved by the Employer. These terms shall be consistent with any terms agreed by both Parties before the date of the Letter of Acceptance. This agreement of terms shall take precedence over the provisions of this Clause.

Wherever the Employer is the insuring Party, each insurance shall be effected with insurers and in terms consistent with the details annexed to the Particular Conditions.

If a policy is required to indemnify joint insured, the cover shall apply separately to each insured as though a separate policy had been issued for each of the joint insured. If a policy indemnifies additional joint insured, namely in addition to the insured specified in this Clause, (i) the Contractor shall act under the policy on behalf of these additional joint insured except that the Employer shall act for Employer's Personnel, (ii) additional joint insured shall not be entitled to receive payments directly from the insurer or to have any other direct dealings with the insurer, and (iii) the insuring Party shall require all additional joint insured to comply with the conditions stipulated in the policy.

Each policy insuring against loss or damage shall provide for payments to be made in the currencies required to rectify the loss or damage. Payments received from insurers shall be used for the rectification of the loss or damage.

The relevant insuring Party shall, within the respective periods stated in the Appendix to Tender (calculated from the Commencement Date), submit to the other Party:

(a) evidence that the insurances described in this Clause have been effected, and

(b) copies of the policies for the insurances described in Sub-Clause 18.2 [*Insurance for Works and Contractor's Equipment*] and Sub-Clause 18.3 [*Insurance against Injury to Persons and Damage to Property*].

When each premium is paid, the insuring Party shall submit evidence of payment to the other Party. Whenever evidence or policies are submitted, the insuring Party shall also give notice to the Engineer.

Each Party shall comply with the conditions stipulated in each of the insurance policies. The insuring Party shall keep the insurers informed of any relevant changes to the execution of the Works and ensure that insurance is maintained in accordance with this Clause.

Neither Party shall make any material alteration to the terms of any insurance without the prior approval of the other Party. If an insurer makes (or attempts to make) any alteration, the Party first notified by the insurer shall promptly give notice to the other Party.

If the insuring Party fails to effect and keep in force any of the insurances it is required to effect and maintain under the Contract, or fails to provide satisfactory evidence and copies of policies in accordance with this Sub-Clause, the other Party may (at its option and without prejudice to any other right or remedy) effect insurance for the relevant coverage and pay the premiums due. The insuring Party shall pay the amount of these premiums to the other Party, and the Contract Price shall be adjusted accordingly.

Nothing in this Clause limits the obligations, liabilities or responsibilities of the Contractor or the Employer, under the other terms of the Contract or otherwise. Any amounts not insured or not recovered from the insurers shall be borne by the Contractor and/or the Employer in accordance with these obligations, liabilities or responsibilities. However, if the insuring Party fails to effect and keep in force an insurance which is available and which it is required to effect and maintain under the Contract, and the other Party neither approves the omission nor effects insurance for the coverage relevant to this default, any moneys which should have been recoverable under this insurance shall be paid by the insuring Party.

Payments by one Party to the other Party shall be subject to Sub-Clause 2.5 [*Employer's Claims*] or Sub-Clause 20.1 [*Contractor's Claims*], as applicable

18.2 Insurance for Works and Contractor's Equipment

The insuring Party shall insure the Works, Plant, Materials and Contractor's Documents for not less than the full reinstatement cost including the costs of demolition, removal of debris and professional fees and profit. This insurance shall be effective from the date by which the evidence is to be submitted under sub-paragraph (a) of Sub-Clause 18.1 [*General Requirements for Insurances*], until the date of issue of the Taking-Over Certificate for the Works.

The insuring Party shall maintain this insurance to provide cover until the date of issue of the Performance Certificate, for loss or damage for which the Contractor is liable arising from a cause occurring prior to the issue of the Taking-Over Certificate, and for loss or damage caused by the Contractor in the course of any other operations (including those under Clause 11 [*Defects Liability*] and Clause 12 [*Tests after Completion*]).

The insuring Party shall insure the Contractor's Equipment for not less than the full replacement value, including delivery to Site. For each item of Contractor's Equipment, the insurance shall be effective while it is being transported to the Site and until it is no longer required as Contractor's Equipment.

Unless otherwise stated in the Particular Conditions, insurances under this Sub-Clause:

(a) shall be effected and maintained by the Contractor as insuring Party,

(b) shall be in the joint names of the Parties, who shall be jointly entitled to receive payments from the insurers, payments being held or allocated between the Parties for the sole purpose of rectifying the loss or damage,

(c) shall cover all loss and damage from any cause not listed in Sub-Clause 17.3 [*Employer's Risks*],

(d) shall also cover loss or damage to a part of the Works which is attributable to the use or occupation by the Employer of another part of the Works, and loss or damage from the risks listed in sub-paragraphs (c), (g) and (h) of Sub-Clause 17.3 [*Employer's Risks*], excluding (in each case) risks which are not insurable at commercially reasonable terms, with deductibles per occurrence of not more than the amount stated in the Appendix to Tender (if an amount is not so stated, this sub-paragraph (d) shall not apply), and

(e) may however exclude loss of, damage to, and reinstatement of:

  (i) a part of the Works which is in a defective condition due to a defect in its design, materials or workmanship (but cover shall include any other parts which are lost or damaged as a direct result of this defective condition and not as described in sub-paragraph (ii) below),

  (ii) a part of the Works which is lost or damaged in order to reinstate any other part of the Works if this other part is in a defective condition due to a defect in its design, materials or workmanship,

  (iii) a part of the Works which has been taken over by the Employer, except to the extent that the Contractor is liable for the loss or damage, and

(iv) Goods while they are not in the Country, subject to Sub-Clause 14.5 [*Plant and Materials intended for the Works*].

If, more than one year after the Base Date, the cover described in sub-paragraph (d) above ceases to be available at commercially reasonable terms, the Contractor shall (as insuring Party) give notice to the Employer, with supporting particulars. The Employer shall then (i) be entitled subject to Sub-Clause 2.5 [*Employer's Claims*] to payment of an amount equivalent to such commercially reasonable terms as the Contractor should have expected to have paid for such cover, and (ii) be deemed, unless he obtains the cover at commercially reasonable terms, to have approved the omission under Sub-Clause 18.1 [*General Requirements for Insurances*].

. . .

19 Force Majeure

19.1 Definition of Force Majeure

In this Clause, "Force Majeure" means an exceptional event or circumstance:

(a) which is beyond a Party's control,

(b) which such Party could not reasonably have provided against before entering into the Contract,

(c) which, having arisen, such Party could not reasonably have avoided or overcome, and

(d) which is not substantially attributable to the other Party.

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APPENDIX 21

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DEFINITIONS AND INTERPRETATIONS

Definitions

1.1. In construing the Contract the following words and expressions shall have the following meanings hereby assigned to them . . .

1.1.c "Sub-Contractor" means any person (other than the Contractor) named in the Contract for the supply of any part of the Works or any person to whom any part of the Contract has been sub-let with the consent of the Engineer, and the Sub-Contractor's legal successors in title, but not any assignee of the Sub-Contractor.

1.1.d "Engineer" means the person appointed by the Purchaser to act as Engineer for the purposes of the Contract and designated as such in the Special Conditions or, in default of any appointment, the Purchaser . . .

1.1.f "Conditions" means these general conditions and the Special Conditions.

1.1.g "Contract" means the agreement between the Purchaser and the Contractor (howsoever made) for the execution of the Works including the Letter of Acceptance, the Conditions, the Specification and the drawings (if any) annexed thereto and such schedules as are referred to therein and the Tender.

1.1.h "Contract Price" means the sum stated in the Contract as the price payable to the Contractor for the execution of the Work . . .

1.1.l "Letter of Acceptance" means the formal acceptance by the Purchaser of the Tender incorporating any amendments or variations to the Tender agreed by the Purchaser and Contractor . . .

1.1.n "Contractor's Equipment" means all appliances or things of whatsoever nature required for the purposes of the Works but does not include Plant, materials or other things intended to form or forming part of the Works.

1.1.o "Plant" means machinery, computer hardware and software, apparatus, materials, articles and things of all kinds to be provided under the Contract other than Contractor's Equipment.

1.1.p "Works" means all Plant to be provided and work to be done by the Contractor under the Contract.

1.1.q "Section of the Works" or "Section" means the parts into which the Works are divided by the Specification . . .

1.1.t "Special Conditions" means the alterations to these general conditions and such further conditions as may be specified and identified as the Special Conditions in the Contract.

1.1.u "Site" means the actual place or places, provided or made available by the Purchaser, to which Plant is to be delivered or at which work is to be done by the Contractor, together with so much of the area surrounding the same as the Contractor shall with the consent of the Purchaser actually use in connection with the Works otherwise than merely for the purposes of access.

1.1.v "Tests on Completion" means the tests specified in the Contract (or otherwise agreed by the Purchaser and the Contractor) which are to be made by the Contractor upon completion or erection and/or installation before the Works are taken over by the Purchaser.

1.1.w "Performance Tests" means the tests (if any) detailed in the Specification or in a performance tests schedule otherwise agreed between the Purchaser and the Contractor, to be made after the Works have been taken over to demonstrate the performance of the Works . . .

CONTRACTOR'S OBLIGATIONS

Contractor's general obligations

13.1 The Contractor shall, subject to the provisions of the Contract, with due care and diligence, design, manufacture, deliver to Site, erect and test the Plant, execute the Works and carry out the Tests on Completion . . .

Contractor's design

13.3 The Contractor shall be responsible for the detailed design of the Plant and of the Works in accordance with the requirements of the Specification. In so far as the Contractor is required by the Contract or is instructed by the Engineer to comply with any detailed design provided by the Purchaser or the Engineer the Contractor shall be responsible for such design unless within a reasonable time after receipt thereof he shall have given notice to the Engineer disclaiming such responsibility. Unless otherwise provided in the Contract the Contractor does not warrant that the Works as described in the Specification or the incorporation thereof within some larger project will satisfy the Purchaser's requirements . . .

TAKING-OVER

Taking-over by sections

29.1 If the Contract provides for the Works to be taken over by Sections the provisions of this clause shall apply to each such Section as it applies to the Works.

Taking-over certificate

29.2 When the Works have passed the Tests on Completion and are complete (except in minor respects that do not affect their use for the purpose for which they are intended) the Engineer shall issue a certificate to the Contractor and to the Purchaser (herein called a "Taking-Over Certificate"). The Engineer shall in the Taking-Over Certificate certify the date upon which the Works passed the Tests on Completion and were so complete.
The Purchaser shall be deemed to have taken over the Works on the date so certified . . .

Effect of taking-over certificate

29.3 With effect from the date of taking-over as stated in the Taking-Over Certificate, risk of loss or damage to the Works or to the Section to which the Taking-Over Certificate relates (other than any parts thereof excluded by the terms of the Taking-Over Certificate) shall pass to the Purchaser and he shall take possession thereof . . .

DEFECTS LIABILITY

Defects after taking-over

36.1 In the Conditions the expression "Defects Liability Period" means the period stated in the Special Conditions as the Defects Liability Period or, if no such period is stated, 12 months, calculated from the date of taking-over of the Works under clause 29 (Taking-over). Where any Section or part of the Works is taken over separately the Defects Liability Period in relation thereto shall commence on the date of taking-over thereof.

Making good defects

36.2 The Contractor shall be responsible for making good by repair or replacement with all possible speed at his expense any defect in or damage to any part of the Works which may appear or occur during the Defects Liability Period and which arises either:

(a) from any defective materials, workmanship or design, or

(b) from any act or omission of the Contractor done or omitted during the said period.

The Contractor's obligations under this clause shall not apply to any defects in designs furnished or specified by the Purchaser or the Engineer in respect of which the Contractor has disclaimed responsibility in accordance with sub-clause 13.3 (Contractor's design), nor to any damage to any part of the Works in consequence thereof.

Notice of defects

36.3 If any such defect shall appear or damage occur the Purchaser or the Engineer shall forthwith inform the Contractor thereof stating in writing the nature of the defect or

damage. The provisions of this clause shall apply to all repairs or replacements carried out by the Contractor to remedy defects and damage as if the said repairs or replacements had been taken over on the date they were completed; however the Defects Liability Period in respect thereof shall not extend beyond two years from the date of taking-over or such other period as may be stated in the Special Conditions.

Extension of defects liability

36.4 The Defects Liability Period shall be extended by a period equal to the period during which the Works (or that part thereof in which the defect or damage to which this clause applies has appeared or occurred) cannot be used by reason of that defect or damage . . .

ACCIDENTS AND DAMAGE

Care of the works

43.1 The Contractor shall be responsible for the care of the Works or any Section thereof until the date of taking-over as stated in the Taking-Over Certificate applicable thereto. The Contractor shall also be responsible for the care of any outstanding work which he has undertaken to carry out during the Defects Liability Period until such outstanding work is complete. In the event of termination of the Contract in accordance with the Conditions, responsibility for the care of the Works shall pass to the Purchaser upon expiry of the notice of termination, whether given by the Purchaser or by the Contractor.

Making good loss or damage to the works

43.2 In the event that any part of the Works shall suffer loss or damage whilst the Contractor has responsibility for the care thereof, the same shall be made good by the Contractor at his own expense except to the extent that such loss or damage shall be caused by the Purchaser's Risks. The Contractor shall also at his own expense make good any loss or damage to the Works occasioned by him in the course of operations carried out by him for the purpose of completing any outstanding work or of complying with his obligations under clause 36 (Defects liability).

Damage to works caused by purchaser's risks

43.3 In the event that any part of the Works shall suffer loss or damage whilst the Contractor has responsibility for the care thereof which is caused by any of the Purchaser's Risks the same shall, if required by the Purchaser within six months after the happening of the event giving rise to loss or damage, be made good by the Contractor. Such making good shall be at the expense of the Purchaser at a price to be agreed between the Contractor and the Purchaser. In default of agreement such sum as is in all the circumstances reasonable shall be determined by arbitration under clause 52 (Disputes and arbitration). The price or sum so agreed or determined shall be added to the Contract Price.

Injury to persons or damage to property whilst contractor has responsibility for care of the works

43.4 Except as hereinafter mentioned the Contractor shall be liable for and shall indemnify the Purchaser against all claims in respect of personal injury or death or in respect of loss of or damage to any property (other than property forming part of the Works not yet taken over) which arises out of or in consequence of the execution of the Works whilst the Contractor has responsibility for the care thereof and against all demands, costs, charges and expenses arising in connection therewith. The Contractor shall not be liable under this sub-clause for, and the Purchaser shall indemnify him from and against, any claims in relation to death or personal injury or loss of or damage to property to the extent that the same is caused by any of the Purchaser's Risks and in the case of damage to property to the further extent that the damage is an inevitable consequence of the execution of the Works.

Injury to persons or damage to property after responsibility for care of the works passes to purchaser

43.5 If there shall occur any death or injury to any person or loss of or damage to any property (other than the Works) after the responsibility for the care of the Works shall have passed to the Purchaser the Contractor shall be liable for and shall indemnify the Purchaser against all such claims and all actions, demands, costs, charges and expenses arising in connection therewith to the extent that such death or personal injury or loss of or damage to property was caused by the negligence or breach of statutory duty of the Contractor, his Sub-Contractors, servants or agents or by defective design [other than a design for which the Contractor has disclaimed responsibility in accordance with sub-clause 13.3 (Contractor's design)], materials or workmanship but not otherwise. The Contractor's liability for any loss or damage to the Works shall be limited to the fulfilment of his obligations in relation thereto under clause 36 (Defects liability).

Accidents or injury to workmen

43.6 The Contractor shall indemnify the Purchaser against all actions, suits, claims, demands, costs, charges and expenses arising in connection with the death of or injury to any person employed by the Contractor or his Sub-Contractors for the purposes of the Works. This indemnity shall not apply to the extent that any death or injury results from any act or default of the Purchaser, his servants, agents or other contractors for whom he is responsible. The Purchaser shall indemnify the Contractor against all claims, damages, costs, charges and expenses to such extent.

Claims in respect of injury to persons or damage to property

43.7 In the event of any claim being made against the Purchaser arising out of the matters referred to in this clause and in respect of which it appears that the Contractor may be liable under this clause the Contractor shall be promptly notified thereof and may at his own expense conduct all negotiations for the settlement of the same and any litigation that may arise in relation thereto. The Purchaser shall not, unless and until the Contractor shall have failed to take over the conduct of the negotiations or litigation, make any admission which might be prejudicial thereto. The conduct by the Contractor of such negotiations or litigation shall be conditional upon the Contractor having first given to the Purchaser such reasonable security

as shall from time to time be required by him to cover the amount ascertained or agreed or estimated, as the case may be, of any compensation, damages, costs, charges and expenses for which the Purchaser may become liable. The Purchaser shall, at the request of the Contractor, afford all available assistance for any such purpose and shall be repaid all expenses reasonably incurred in so doing.

. . .

PURCHASER'S RISKS

45.1 The "Purchaser's Risks" are:

- fault, error, defect or omission in designs furnished or specified by the Purchaser or the Engineer responsibility for which has been disclaimed by the Contractor in the manner provided for by sub-clause 13.3 (Contractor's design);
- the use or occupation of the Site by the Works, or for the purposes of the Contract; interference, whether temporary or permanent with any right of way, light, air, or water or with any easement, wayleave or right of a similar nature which is the inevitable result of the construction of the Works in accordance with the Contract;
- damage (other than that resulting from the Contractor's method of construction) which is the inevitable result of the construction of the Works in accordance with the Contract;
- use of the Works or any part thereof by the Purchaser;
- the act, neglect or omission or breach of contract or of statutory duty of the Engineer or the Purchaser, his agents, servants or other contractors for whom the Purchaser is responsible;
- Force Majeure except to the extent insured under the insurance policies to be effected by the Contractor in accordance with clause 47 (Insurance).

FORCE MAJEURE

46.1 "Force Majeure" means:

- war, hostilities (whether war be declared or not), invasion, act of foreign enemies;
- ionising radiations, or contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;
- pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;

– rebellion, revolution, insurrection, military or usurped power or civil war;

– riot, civil commotion or disorder;

– any circumstances beyond the reasonable control of either of the parties . . .

INSURANCE

Insurance of works

47.1 The Contractor shall, in the joint names of the Contractor and the Purchaser, insure the Works and Contractor's Equipment and keep each part thereof insured for its full replacement value against all loss or damage from whatever cause arising, other than the Purchaser's Risks. Such insurance shall be effected from the date of the Letter of Acceptance, until 14 days after the date of issue of a Taking-Over Certificate in respect of the Works or any Section thereof, or if earlier, 14 days after the date when responsibility for the care of the Works passes to the Purchaser in accordance with the provisions of sub-clause 43.1 (Care of the works) upon expiry of notice of termination.

Extension of works insurance

47.2 The Contractor shall so far as reasonably possible extend the insurance under sub-clause 47.1 (Insurance of works) to cover damage which the Contractor is responsible for making good pursuant to clause 36 (Defects liability) or which occurs whilst the Contractor is on Site for the purpose of making good a defect or carrying out the Tests on Completion during the Defects Liability Period or supervising the carrying out of the Performance Tests or completing any outstanding work or which arises during the Defects Liability Period from a cause occurring prior to taking-over and for which the Contractor is liable under sub-clause 43.5 (Injury to persons or damage to property after responsibility for care of the works passes to purchaser).

Application of insurance monies

47.3 All monies received under any such policy shall be applied in or towards the replacement and repair of the part of the Works lost, damaged or destroyed but this provision shall not affect the Contractor's liabilities under the Contract.

Third party insurance

47.4 The Contractor shall, prior to the commencement of any work on the Site by the Contractor pursuant to the Contract, insure in an amount not being less than the amount stated in the Special Conditions against his liability for damage or death or personal injury occurring before all the Works have been taken over to any person (including any employee of the Purchaser) or to any property (other than property forming part of the Works) due to or arising out of the execution of the Works. The terms of the policy shall include a provision whereby, in the event of any claim being made against the Purchaser in respect of which the

Contractor would be entitled to indemnity under the policy, the insurers will indemnify the Purchaser against such claims and any costs, charges and expenses in respect thereof.

Insurance against accident, etc. to workmen

47.5 The Contractor shall insure and shall maintain insurance against his liability under sub-clause 43.6 (Accidents or injury to workmen). The terms of any such policy shall also include the provision to indemnify the Purchaser mentioned in sub-clause 47.4 (Third party insurance) provided always that in respect of any persons employed by any Sub-Contractor, the Contractor's obligation under this sub-clause shall be satisfied if the Sub-Contractor shall have insured against the liability in respect of such persons in such manner that the Purchaser is indemnified under the policy, but the Contractor shall require such Sub-Contractor to produce to the Engineer when required the policy, the receipts for the premiums or other satisfactory evidence of insurance cover.

General insurance requirements

47.6 All insurances shall be effected with an insurer and in terms to be approved by the Purchaser (such approval not to be unreasonably withheld) and the Contractor shall from time to time, when so required by the Engineer, produce the policy and receipts for the premiums or other satisfactory evidence of insurance cover. The Contractor shall promptly notify the Purchaser of any alteration to the terms of the policy or in the amounts for which insurance is provided.

Exclusions from insurance cover

47.7 The insurance policy may exclude cover for any of the following:

(a) the cost of making good or repairing any Plant which is defective or work which is not in accordance with the Contract;

(b) the Purchaser's Risks;

(c) indirect or consequential loss or damage including any deductions from the Contract Price for delay;

(d) fair wear and tear; shortages and pilferages;

(e) risks related to mechanically propelled vehicles for which third party or other insurance is required by law.

Remedy on failure to insure

48.1 If the Contractor shall fail to effect and keep in force the insurances referred to in the Conditions the Purchaser may effect and keep in force any such insurance and pay such premiums as may be necessary for that purpose and from time to time deduct the amount so paid by the Purchaser from any monies due or which may become due to the Contractor under the Contract or recover the same as a debt from the Contractor.

Joint insurances

48.2 Wherever insurance is arranged under the Conditions in the joint names of the parties, or on terms containing provisions for indemnity to principals, the party effecting such insurance shall procure that the subrogation rights of the insurers against the other party are waived and that such policy shall permit either:

(a) the co-insured, or

(b) the other party to the Contract

to be joined to and be a party to any negotiations, litigation or arbitration upon the terms of the policy or any claim thereunder.

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APPENDIX 22

INSTITUTION OF CHEMICAL ENGINEERS LUMP SUM (RED BOOK) CONTRACT

1. Definition of terms

In the **Contract**, unless the context otherwise requires, the following expressions shall have the meanings hereby assigned to them . . .

"Affiliate" means any company which is either directly or indirectly controlled by a party hereto or its ultimate parent where control is signified either by having effective control of the appointment of a majority of a company's board of directors or by the beneficial ownership of more than half of the nominal value of its equity share capital . . .

"Contractor's Equipment" means all equipment, construction plant, vehicles, temporary facilities, materials, tools or things brought on to the **Site** by or on behalf of the **Contractor** for carrying out the **Works** but not for permanent incorporation in the **Plant** . . .

"Documentation" means any relevant documents in paper or electronic form, including drawings, technical software, images, designs, manuals or records . . .

"Materials" means machinery, plant and other items of equipment and materials intended to form part of the **Plant** and other things needed for its operation, to be supplied by the **Contractor**

"Plant" means the plant as described in the **Specification** to be constructed at the **Site** . . .

"Site" means the area within which the **Plant** is to be constructed, together with all other areas as the **Contractor** shall be permitted to use in connection with the **Works**, as specified in Schedule 1 (Description of Works) . . .

"Subcontractor" means any subcontractor or supplier of any tier to whom the preparation of any design, the supply of any **Materials** or the carrying out of any other part of the **Works** is subcontracted . . .

"Works" means the design, engineering and other services to be provided by the **Contractor** including, but not limited to, the provision and construction of the **Plant** and any temporary works, and any other work to be carried out by the **Contractor** in accordance with the **Contract** . . .

3. Contractor's responsibilities

3.4 The **Plant** as completed by the **Contractor** shall be in every respect fit for the purpose for which it is intended as defined in the **Specification** or in any other provision of the **Contract** . . .

30. Care of the Works

30.1 Unless otherwise agreed, the **Plant** and **Materials** shall be under the care, direction and control of the **Contractor** until the **Plant** (or any specified section thereof) is taken over by the **Purchaser**. Access to the **Site** and all activities on it pursuant to the **Contract** (other than the activities of the **Purchaser** or the **Purchaser's** agents) shall, subject to the terms of Sub-clause 23.1, be under the direction and control of the **Contractor** until the whole of the **Plant** is taken over by the **Purchaser**.

30.2 The **Contractor** shall, at his expense, make good any loss or damage that may occur to the **Materials, Plant** or **Documentation**:

(a) before the **Plant** (or each specified section thereof) is taken over by the **Purchaser**, howsoever caused; and

(b) after the **Plant** (or each specified section thereof) has been taken over by the **Purchaser** but before the issue of the **Final Certificate**, when the loss or damage results from any cause or operation described in Sub-clause 31.1 (a) or (b);

other than loss or damage arising from the **Purchaser's** risks as defined in Sub-clause 30.4.

30.3 To the extent that any loss or damage arises from any of the **Purchaser's** risks, the **Contractor** shall, if so instructed by the **Project Manager**, rectify the loss or damage at the expense of the **Purchaser**. The **Contractor** shall submit a claim to the **Project Manager** in accordance with Clause 18 (Contractor's claims) and Sub-clause 19.5 for the **Cost** he incurs in carrying out the **Project Manager's** instruction to rectify such loss or damage, plus **Profit** thereon.

30.4 The "**Purchaser's** risks" under this Clause are loss or damage due to:

(a) the use or occupation of the **Plant** by the **Purchaser**, his employees or agents, or other contractors (not being employed by the **Contractor**);

(b) any design or information provided by the **Purchaser** (other than in any design verified by the **Contractor** pursuant to his obligations under the **Contract**);

(c) any wrongful or negligent act or omission of the **Purchaser**, his consultants, employees or agents, or other contractors (not being employed by the **Contractor**);

(d) riot, war, invasion, act of foreign enemies, or hostilities (whether or not war be declared), terrorism, civil unrest, civil war, rebellion, revolution, insurrection or military or usurped power; or similar events;

(e) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste, from the combustion of nuclear fuel, radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof; or

(f) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speed.

30.5 The **Contractor** shall assume entire responsibility for and shall indemnify the **Purchaser** against all losses, liabilities, claims, and costs arising directly or indirectly out of

or in connection with or as a result of, the death or bodily injury to any person in the employment of the **Contractor** or of any **Subcontractor** and loss or damage to the **Contractor's Equipment** or other property of the **Contractor** or any **Subcontractor**.

30.6 The **Purchaser** shall assume entire responsibility for and shall indemnify the **Contractor** and all **Subcontractors** against all losses, liabilities, claims and costs arising directly or indirectly out of or in connection with or as a result of death or bodily injury to any person in the employment of the **Purchaser** or the **Project Manager**.

30.7 Subject to the provisions of Sub-clauses 30.2, 30.3 and 30.4, the **Contractor** shall be liable for and shall indemnify the **Purchaser** against any loss of or damage to the property of the **Purchaser** and his **Affiliates** (other than **Materials, Plant** or **Documentation**) from any cause arising out of the performance of the **Works** up to a limit of such amount as may be stated in the Agreement or, if no such sum is stated, up to £5,000,000 (five million pounds) in respect of any one incident or series of incidents arising from any one event, and the **Purchaser** shall indemnify the **Contractor** and all **Subcontractors** from any sums in excess of such amount.

30.8 The **Contractor** shall be liable for and shall indemnify the **Purchaser** against any loss or damage to property of third parties and death of or injury to third parties to the extent that such loss, damage, death or injury results from any wrongful or negligent act or omission of the **Contractor**, his employees, agents or consultants.

31. Insurance

31.1 The **Contractor** shall effect and maintain a policy or policies of insurance with insurers approved by the **Purchaser** in the joint names of the **Purchaser, Project Manager, Contractor** and **Subcontractors**, upon the **Materials, Plant** and **Documentation** to the full cost of their replacement (or such other sum as may have been agreed) for any loss or damage thereto resulting from any one incident or series of incidents arising from any one event until the **Plant** or any specified section thereof has been taken over by the **Purchaser** under the provisions of Clause 33 (Taking over), and thereafter until the issue of the **Final Certificate** for any loss or damage resulting from:

(a) any cause occurring prior to taking over;

(b) any testing or other operations after taking over carried out or supervised by the **Contractor** or any **Subcontractor** for the purpose of complying with their obligations under the **Contract**

The policy or policies shall cover all normally insurable risks including loss or damage during transport by land, sea or air, but excluding the cost of making good defective designs or specifications and faulty workmanship or **Materials** (provided that this exclusion shall not apply to loss or damage resulting therefrom), those risks specified in Sub-clauses 30.4 (d), (e) and (f), and other common exclusions.

As policyholder, the **Contractor** shall represent the **Purchaser** in all matters relating to the policy or policies. The **Contractor** shall not give any release or compromise any claim affecting the interests of the **Purchaser** without the prior written consent of the **Purchaser**

31.2 The **Purchaser** shall insure all of his property and that of his **Affiliates** on or adjacent to the **Site** (other than the **Plant** and **Materials** prior to taking over) against all normal risks including fire, lightning, explosion, storm, tempest, flood, earthquake, aircraft (or articles dropped therefrom), riot and civil commotion, and the interest of the **Contractor** shall be noted thereon.

31.3 The **Contractor** shall effect and maintain a policy or policies of insurance covering:

(a) his liability to the **Purchaser** and his **Affiliates** in an amount of not less than the limit of such liability referred to in Sub-clause 30.7; and

(b) his legal liability to any third party for such sum as the **Contractor** considers appropriate, but in any event not less than £5,000,000 (five million pounds).

The above insurance policy or policies shall contain an indemnity to principals clause and shall become effective upon commencement of the **Works** and shall remain in place until the issue of the last **Final Certificate**

31.4 Before the **Contractor** starts work on the **Site** each party shall provide the other with details of his insurances as provided herein. Each party shall also provide details in a timely manner of any additions or restrictions thereto which may be made from time to time. Each party shall provide to the other sufficient evidence of the payment of premiums.

32. Completion of construction

32.1 If the **Contract** provides for the completion of construction of the **Plant** to be by specified sections, the provisions of Sub-clauses 32.2 to 32.5 shall apply as if the reference therein to **Plant** were a reference to a specified section.

32.2 As soon as the **Plant**, or any part thereof, is in the opinion of the **Contractor** substantially complete and ready for inspection, he shall so notify the **Project Manager** by means of a draft Construction Completion Certificate, listing the parts of the **Plant** considered to be substantially complete, and also the criteria listed in Schedule 14 which apply to such parts of the **Plant** . . .

32.3 Upon satisfactory completion of any such inspection and tests, the **Project Manager** shall complete and issue to the **Purchaser** and to the **Contractor** copies of the completed Construction Completion Certificate confirming that the **Contractor** has demonstrated to the **Project Manager** that the **Plant** or part thereof is substantially complete and in a condition such that any procedures needed to be carried out before the **Plant** is put into operation may be safely carried out. Such Construction Completion Certificate may include a note of any minor items requiring completion before the issue of a **Take-Over Certificate**, as provided in Clause 33 (Taking over) . . .

33. Taking over

33.1 If the **Contract** provides for the **Plant** to be taken over by specified sections, the provisions of this Clause shall apply as if the references therein to the **Plant** were references to a specified section.

33.2 As soon as the construction of the **Plant** has been demonstrated to be complete in accordance with the provisions of Sub-clause 32.3 and is, in the opinion of the **Contractor**, ready for the conduct of any of the take-over procedures, which may include take-over tests, specified in Schedule 15, the **Contractor** shall so notify the **Project Manager** and shall specify a time not sooner than seven days and not later than fourteen days after the date of the notice when the **Contractor** intends to begin to conduct such procedures. If the **Project Manager** requires the **Contractor** to carry out any take-over procedures which are not included in Schedule 15, such requirements shall be treated as a **Variation**.

33.3 Unless otherwise agreed between the **Project Manager** and the **Contractor**, the **Contractor** shall begin such procedures at the time notified and conduct them in accordance with the quality assurance system, if any, described in Schedule 6 (Quality assurance and validation). The **Project Manager** shall be entitled to attend and observe them, and the **Contractor** shall give the **Project Manager** every reasonable facility to satisfy himself as to the results of any take-over tests . . .

33.7 As soon as any minor items referred to in Sub-clause 32.3 have been completed and all the procedures specified in Schedule 15 have been successfully carried out . . . including any which affect the operability or safety of the **Plant**, the **Project Manager** shall issue a **Take-Over Certificate** for the **Plant** to the **Contractor** with a copy to the **Purchaser** stating that the **Contractor** has satisfied the requirements of the **Specification** and Schedule 15, whereupon the **Plant**, apart from any parts that are excluded from the taking over by the terms of the Certificate, shall be at the risk of the **Purchaser** . . .

37. Liability for Defects

37.1 If the **Contract** provides for the **Plant** to be taken over by specified sections, the provisions of this Clause shall apply as if the references therein to the **Plant** were references to a specified section.

37.2 If at any time before the **Plant** is taken over pursuant to Clause 33 (Taking over) or within a period of three hundred and sixty-five days after the date of the relevant **Take-Over Certificate** (the **Defects Liability Period**), the **Project Manager**:

(a) decides that any work done or **Materials** supplied by the **Contractor** or any **Subcontractor** is or are defective or not in accordance with the **Contract** (normal wear and tear excepted) or that the **Plant** or any part thereof is defective or incomplete or does not fulfil the requirements of the **Contract** (any such matter being herein called a "**Defect**"); and

(b) as soon as reasonably practicable gives to the **Contractor** notice in writing of the particulars of the alleged **Defects**;

the **Contractor** shall as soon as reasonably practicable make good the **Defects** so specified . . .

37.6 If in the course of making good any **Defect** which arises during the **Defects Liability Period** the **Contractor** repairs, replaces or renews any part of the **Plant**, the provisions of this Clause shall apply to the repair or to that part of the **Plant** so replaced or renewed

and shall further apply until the expiry of a period of three hundred and sixty-five days from the date of such repair, replacement or renewal (the extended **Defects Liability Period**) . . .

37.10 If the **Plant** cannot be used because of a **Defect** to which this Clause applies, the **Defects Liability Period**, or if applicable the extended **Defects Liability Period**, shall be extended by a period equal to the period during which it cannot be used. Similarly the **Defects Liability Period**, or if applicable the extended **Defects Liability Period**, shall be extended by any period wherein the **Plant** cannot be used by reason of the **Contractor** attempting to put the **Plant** into such condition that it passes any relevant take-over procedures or any relevant performance test . . .

38. Final Certificate

38.1 . . . as soon as the **Defects Liability Period** for the **Plant** has expired or the **Contractor** has made good all **Defects** that have within such period appeared in the **Plant** or a specified section thereof, in accordance with Clause 37 (Liability for Defects), whichever is the later, the **Project Manager** shall issue a certificate (a "**Final Certificate**") to the **Contractor** with a copy to the **Purchaser** stating that the **Plant** or specified section and any related work have finally been completed and the date of that completion.

38.2 If the provisions of Sub-clause 37.6 continue to apply to any repair or part of the **Plant**, the **Project Manager** shall, as soon as the provisions of Sub-clause 38.1 are otherwise satisfied, issue a **Final Certificate** for the remainder of the **Plant** or specified section in which the repair or part is included, provided that such repair or part is then free from **Defects** which the **Contractor** is bound to make good under Clause 37. Such repair or part shall thereafter be treated as if it were a separate specified section and shall be the subject of a separate **Final Certificate** . . .

INSTITUTION OF CHEMICAL ENGINEERS REIMBURSABLE (GREEN BOOK) CONTRACT

30. Care of the Works

30.1 Unless otherwise agreed, the **Plant** and **Materials** shall be under the care, direction and control of the **Contractor** until the **Plant** (or any specified section thereof) is taken over by the **Purchaser**. Access to the **Site** and all activities on it pursuant to the **Contract** (other than the activities of the **Purchaser** or the **Purchaser's** agents) shall, subject to the terms of Sub-clause 23.1, be under the direction and control of the **Contractor** until the whole of the **Plant** is taken over by the **Purchaser**.

30.2 The **Contractor** shall make good any loss or damage that may occur to the **Materials**, **Plant** or **Documentation**:

(a) before the **Plant** (or each specified section thereof) is taken over by the **Purchaser**, howsoever caused; and

(b) after the **Plant** (or each specified section thereof) has been taken over by the **Purchaser** but before the issue of the **Final Certificate**, when the loss or damage results from any cause or operation described in Sub-clause 31.1 (a) or (b);

other than loss or damage arising from the **Purchaser's** risks as defined in Sub-clause 30.4.

Without prejudice to the **Contractor's** liability under Clause 37 (Liability for Defects), the **Contractor's** liability under this Sub-clause for the cost of making good loss or damage shall be limited to the amount recoverable under the policy or policies of insurance effected by the **Purchaser** in accordance with Sub-clauses 31.1 and 31.2. However, except in the case of loss or damage arising from the **Purchaser's** risks as defined in Sub-clause 30.4, the **Contractor** shall bear the deductible stated in the Agreement for each and every claim.

30.3 To the extent that any loss or damage arises from any of the **Purchaser's** risks, the **Contractor** shall, if so instructed by the **Project Manager**, rectify the loss or damage and the cost thereof shall form part of the **Contract Price**

30.4 The "**Purchaser's** risks" under this Clause are loss or damage due to:

(a) the use or occupation of the **Plant** by the **Purchaser**, his employees or agents, or other contractors (not being employed by the **Contractor**);

(b) any design or information provided by the **Purchaser** (other than in any design verified by the **Contractor** pursuant to his obligations under the **Contract**);

(c) any wrongful or negligent act or omission of the **Purchaser**, his consultants, employees or agents, or other contractors (not being employed by the **Contractor**);

(d) riot, war, invasion, act of foreign enemies, hostilities (whether or not war be declared), terrorism, civil unrest, civil war, rebellion, revolution, insurrection, military or usurped power, or similar events;

(e) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste, from the combustion of nuclear fuel, radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof; or

(f) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speed.

30.5 The **Contractor** shall assume entire responsibility for and shall indemnify the **Purchaser** against all losses, liabilities, claims and costs arising directly or indirectly out of or in connection with or as a result of, the death or bodily injury to any person in the employment of the **Contractor** or of any **Subcontractor** and loss or damage to the **Contractor's Equipment** or other property of the **Contractor** or any **Subcontractor**.

30.6 The **Purchaser** shall assume entire responsibility for and shall indemnify the **Contractor** and all **Subcontractors** against all losses, liabilities, claims and costs arising directly or indirectly out of or in connection with or as a result of death or bodily injury to any person in the employment of the **Purchaser** or the **Project Manager**.

30.7 Subject to the provisions of Sub-clauses 30.2, 30.3 and 30.4, the **Contractor** shall be liable for and shall indemnify the **Purchaser** against any loss of or damage to the property of the **Purchaser** and his **Affiliates** (other than **Materials, Plant** or **Documentation**) from any cause arising out of the performance of the **Works** up to a limit of such amount as may be stated in the Agreement or, if no such sum is stated, up to 5,000,000 (five million pounds) in respect of any one incident or series of incidents arising from any one event, and the **Purchaser** shall indemnify the **Contractor** and all **Subcontractors** from any sums in excess of such amount.

30.8 The **Contractor** shall be liable for and shall indemnify the **Purchaser** against any loss or damage to property of third parties and death of or injury to third parties to the extent that such loss, damage, death or injury results from any wrongful or negligent act or omission of the **Contractor**, his employees, agents or consultants.

30.9 The **Purchaser** shall indemnify **Contractor** and all **Subcontractors** in respect of any legal liability for loss of or damage to property of the **Purchaser** (other than that to the **Plant** or **Materials** prior to their being taken over by the **Purchaser**) caused by fire, explosion and all other perils insured by the **Purchaser** as referred to in Sub-clause 31.2 to the extent that such liability exceeds for any one incident or series of incidents arising from one event the amount recoverable under such insurance.

31. Insurance

31.1 The **Purchaser** shall effect and maintain a policy or policies of insurance in the joint names of the **Purchaser, Project Manager, Contractor** and **Subcontractors**, upon

the **Materials, Plant** and **Documentation** to the full cost of their replacement (or such other sum as may have been agreed) for any loss or damage thereto resulting from any one incident or series of incidents arising from any one event until the **Plant** or specified section thereof has been taken over by the **Purchaser** under the provisions of Clause 33 (Taking over), and thereafter until the issue of the **Final Certificate** for any loss or damage resulting from:

(a) any cause occurring prior to taking over;

(b) any testing or other operations after taking over carried out or supervised by the **Contractor** or any **Subcontractor** for the purpose of complying with their obligations under the **Contract**.

31.2 The policy or policies shall cover all normally insurable risks including loss or damage during transport by land, sea or air, but excluding:

(a) the cost of making good defective designs or specifications and faulty workmanship or **Materials** (provided that this exclusion shall not apply to loss or damage resulting therefrom); and

(b) those risks specified in Sub-clauses 30.4 (c), (d), (e) and (f), and such other common exclusions as may be accepted by the **Purchaser**.

The deductible under the policy or policies shall be as stated in the **Agreement**.

Except as may be agreed otherwise, the **Purchaser**, as policyholder shall represent the insured parties in all matters relating to the policy or policies. The **Purchaser** undertakes not to give any release or compromise any claim affecting the interests of the **Contractor** without the prior written consent of the **Contractor**.

31.3 The **Purchaser** shall insure all of his property and that of his **Affiliates** on or adjacent to the **Site** (other than the **Plant** and **Materials** prior to taking over) against all normal risks including fire, lightning, explosion, storm, tempest, flood, earthquake, aircraft (or articles dropped therefrom), terrorism, riot and civil commotion, and the interest of the **Contractor** shall be noted thereon.

31.4 The **Contractor** shall effect and maintain a policy or policies of insurance covering:

(a) his liability to the **Purchaser** and his **Affiliates** under Sub-clause 30.7;

(b) loss or damage to **Contractor's Equipment**; and

(c) his legal liability to any third party for such sum as the **Contractor** considers appropriate, but in any event not less than £5,000,000 (five million pounds).

The above insurance policy or policies shall contain an indemnity to principals clause and shall become effective upon commencement of the **Works** and shall remain in place until the issue of the last **Final Certificate**.

31.5 Before the **Contractor** starts work on the **Site** each party shall provide the other with details of his insurances as provided herein. Each party shall also provide details in a timely manner of any additions or restrictions thereto which may be made from time to time. Each party shall provide to the other sufficient evidence of the payment of premiums.

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APPENDIX 24.1

OTHER INSURANCE POLICIES

ALLIANZ GLOBAL CORPORATE & SPECIALTY LIABILITY POLICY

Allianz Global Corporate & Specialty AG (herein called the Company) and the Named Insured (as named in the Schedule) agree:

The Company will indemnify or otherwise compensate the Named Insured in accordance with and subject to the terms and conditions of this Policy, in consideration of the payment to the Company of the premium for the Period of Insurance.

The proposal made to the Company by or on behalf of the Named Insured whether in writing or otherwise shall be the basis of the contract.

Provided that this Policy shall not be in force unless it has been signed by an authorised official of the Company.

.....
Signed for and on behalf
of the Company

Date of Signature

POLICY SCHEDULE

Policy No: UX7

The Named Insured:

Address:

The Business:

Period of Insurance

a) **From:** hours GMT
to: hours GMT

b) any subsequent period for which the Company accepts a renewal premium.

Premiums

Policy Premium:	GBP
IPT:	GBP
Total Payable:	GBP

Limits of Indemnity

Maximum Overall Limit of Indemnity any one Occurrence but not including Employers' Liability	GBP
Public and Products Liability Section	
Any one Occurrence and in the aggregate during the Period of Insurance in respect of Products	GBP
Any one Occurrence and in the aggregate during the Period of Insurance in respect of Pollution and Contamination	GBP
Any one other Occurrence	GBP

Excess

Public and Products Liability Section	
Any one Occurrence not contributing towards the Maximum Aggregate Contribution	GBP
Any one Occurrence in respect of _____ not contributing towards the Maximum Aggregate Contribution	GBP
Any one Occurrence contributing towards the Maximum Aggregate Contribution	GBP
Any one Occurence in respect of _____ contributing towards the Maximum Aggregate Contribution	GBP
Any one Occurrence following the exhaustion of Maximum Aggregate Contribution	
Maximum Aggregate Contribution applicable to this Section	GBP

Broker

GENERAL DEFINITIONS APPLYING TO THIS POLICY

Any word or expression to which a specific meaning has been attached shall bear such meaning wherever it appears.

Additional Definitions are stated in the Section Wordings.

Additional Insureds means

a. any Principal for whom the Insured is carrying out work under contract or agreement against liability arising out of the performance of such work by the Named Insured and in respect of which the Named Insured is legally liable and would have been entitled to indemnity under this Policy if the claim had been made against the Named Insured but only to the extent required by the terms and conditions of such contract.

b. if the Named Insured so requests any partner director or Employee of the Named Insured against liability incurred in such capacity and in respect of which the Named Insured would have been entitled to indemnity under this Policy if the claim had been made against the Named Insured as though each partner director or Employee was individually named as the Insured in this Policy and provided that no indemnity will be provided to any medical or dental practitioner while working in a professional capacity as such a practitioner

c. if the Named Insured so requests any officer or committee member or other member of the Named Insured's canteen social sports or welfare organisations or ambulance first aid fire medical or security services against liability incurred in such capacity

d. the personal representatives of any party constituting the Named Insured or any Additional Insured against legal liability in respect of which such party would have been indemnified under this Policy

Employee means

a. any person under a contract of service or apprenticeship with the Named Insured

b. any of the following persons whilst working for the Named Insured in connection with the Business

   i. any labour master or labour only subcontractor or person supplied by him

   ii. any self-employed person

   iii. any person who is borrowed by or hired to the Named Insured including persons on secondment from overseas countries

   iv. any trainee or person undergoing work experience

   v. prospective employees being assessed by the Named Insured as to their suitability for employment

   vi. any voluntary helper.

Insured means

the Named Insured as stated in the Policy Schedule and the Additional Insureds

Maximum Aggregate Contribution means

The sum of

a. the maximum amount to be borne by the Insured in respect of any Excess to which it is specified in the Policy Schedule that the Maximum Aggregate Contribution applies

plus

b. the maximum amount to be reimbursed by the Insured in respect of any Insured's Contribution specified in the Policy Schedule

during any Period of Insurance.

Maximum Overall Limit of Indemnity means

The sum of all compensation payable under this Policy in respect of any one Occurrence other than under any Employers' Liability Section.

North America means

the United States of America its territories and possessions Puerto Rico and Canada

Occurrence means

any one occurrence or all occurrences of a series consequent on or attributable to one source or original cause

Offshore Installation means

a. any installation in the sea or tidal waters which is intended for underwater exploitation of mineral resources or exploration with a view to such exploitation

b. any installation in the sea or tidal waters which is intended for the storage or recovery of gas

c. any pipe or system of pipes in or under the sea or tidal waters

d. any wind energy installation in the sea or tidal waters

e. any installation in the sea or tidal waters which is intended to provide accommodation for persons who work on at or from the locations specified in Definition a. b. c. or d. above

Offshore Operations means

a. the ownership or operation of

b. travel (from the time of embarkation onto any vessel or aircraft for conveyance to an Offshore Installation until disembarkation onto land upon return from such Offshore Installation) to or from

c. work or attendance on

any Offshore Installation.

Pollution and Contamination means

a. all pollution or contamination of buildings or other structures or of water or land or the atmosphere; and

b. any Occurrence directly or indirectly caused by or arising out of such pollution or contamination.

Principal means

any party (other than a director partner or Employee of the Named Insured) with whom the Named Insured has entered into a contract in the course of the Business

Products means

any goods or other property sold supplied delivered installed erected repaired altered treated or tested by the Named Insured in connection with the Business and not in the Insured's charge or control.

Property Damage means

physical loss of or physical damage to material property

material property shall not include facts, concepts and information converted to a form useable for communications, interpretation or processing by electronic and electromechanical data processing or electronically controlled equipment and such facts concepts and information shall include programmes, software and other coded instructions for the processing and manipulation of data or the direction and manipulation of such equipment.

DIFFERENCE IN CONDITIONS/DIFFERENCE IN LIMITS CLAUSE

Definitions Applicable only to this Clause

Any word or expression to which a specific meaning has been attached shall bear such meaning wherever it appears in this Clause only.

Additional definitions are stated elsewhere in the General Definitions Applying to This Policy and the Definitions to this Section.

Programme means this Policy and Local Underlying Policies.

Local Underlying Policies means policies issued by or on behalf of the Company and the Allianz Group in territories specified in Policy Schedule A below

Programme Construction

Local Underlying Policies have been issued to the Insured in the territories listed in Schedule A below and only these shall constitute part of the Programme over which this Difference in Conditions/Difference in Limits Clause shall operate are as follows:

Policy Schedule A

Territory	Effective Date

Other local policies have also been issued to the Insured in the territories listed in Schedule B below and these do not for part of this Programme.

Policy Schedule B

Territory	Effective Date

Difference in Conditions

Should any Local Underlying Policies by virtue of its scope of cover or definitions or conditions or limits of liability not indemnify the Insured in whole or part the Company will indemnify the Insured against legal liability as defined in the Public and Products Liability Section of this Policy subject to its terms conditions and limitations to the extent that such indemnity is not provided by the Local Underlying Policies but which would have been provided had such Local Underlying Policies had the same terms conditions limitations and exclusions as this Policy.

Difference in Limits

The Company will indemnify the Insured to the extent that the Limit of Indemnity under the Public and Products Liability Section of this Policy exceeds the limit of indemnity under any Local Underlying Policies provided that:

i. where the limit of indemnity under the Local Underlying Policies includes legal costs and expenses the Limit of Indemnity hereunder shall be inclusive of the amount of all compensation claimants costs and expenses and Other Costs and Expenses

or

ii. the indemnity provided by the Company for claimants costs and expenses and Other Costs and Expenses shall be limited to that proportion which the amount payable under this Policy excluding all such costs and expenses bears to the total sum payable under the underlying local policy and this Policy excluding all such costs and expenses

All Provided that

a. the Local Underlying Policies issued in the territories listed in the Policy Schedules A and B shall be maintained in force without reduction or restriction in cover

b. all payments made under this Policy and Local Underlying Policies specified in Schedule A constituting part of this Programme shall be counted in diminution of the Limit of Indemnity specified in the Policy Schedule

c. notwithstanding the number of separate Insureds under all Local Underlying Policies the aggregate liability of the Company under this Policy to the Insureds shall not exceed the Limit of Indemnity specified in the Policy Schedule

d. in respect of each Local Underlying Policies this Policy shall not provide any indemnity in respect of the greater of any deductible excess or franchise applying under the underlying local policy and the excess stated in the Policy Schedule of all compensation and claimant costs and expenses payable in respect of any one Occurrence

e. where the Company is by law or circumstance outside its control prevented from indemnifying the Insured locally all claims for which the Company accepts liability under this Clause will be paid in the United Kingdom

f. no indemnity will be provided against any legal liability that is the subject of an exclusion under any policy issued in North America and listed in Schedule A

Where any amounts paid by the Company under any Local Underlying Policies as specified in Schedule A constituting part of this Programme exceed the Limit of Indemnity all such excess amounts shall be recoverable from the Insured.

PUBLIC AND PRODUCTS LIABILITY SECTION

Definitions Applicable only to this Public and Products Liability Section

Any word or expression to which a specific meaning has been attached shall bear such meaning wherever it appears in this Section only.

Additional definitions are stated elsewhere in the General Definitions Applying to This Policy.

Business means

that which is specified in the Policy Schedule in respect of operations of the Named Insured conducted at or from premises in territories advised to the Company and shall include:

i. the provision and management of catering social sports welfare childcare theatrical and related facilities including galas for the benefit of Employees

ii. the provision of fire first aid medical ambulance and security services

iii. private work carried out by an Employee for a director or partner or Employee of the Named Insured

iv. the ownership maintenance repair and occupation of premises or facilities

v. attendance at or participation in trade fairs shows and exhibitions by any Employee or director in connection with their employment

vi. provision of sponsorship

vii. repair or servicing of motor vehicles.

Excess means

the first part of all compensation and claimant costs and expenses payable in respect of each and every Occurrence to be borne by the Insured before the Company shall be liable to make any payment.

Fungi means

any type or form of fungus, including mould or mildew and any mycotoxins, spores, scents or by products produced or released by fungi.

Other Costs and Expenses means

reasonable costs and expenses incurred by the Company or with its written consent

a. in connection with the defence of any claim

b. for representation of the Insured

   i. at any coroner's inquest or fatal accident inquiry in respect of death

   ii. at proceedings in any court of summary jurisdiction or on indictment in any higher court in respect of any alleged breach of statutory duty resulting in Personal Injury or Property Damage

which may be the subject of indemnity under this Section.

Personal Injury means

a. bodily injury death disease illness mental injury nervous shock

b. invasion of the right of privacy wrongful arrest false imprisonment wrongful eviction or malicious prosecution

Silica means

silicon dioxide (occurring in crystalline, amorphous and impure forms), silica particles, silica dust or silica compounds.

Silica-related Dust means

a mixture or combination of Silica and other dust or particles.

Territorial Limits means

anywhere in the world.

Covers Provided by this Public and Products Liability Section

Public and Products Liability

The Company will indemnify the Insured against legal liability to pay compensation and claimants costs and expenses in respect of accidental

a. Personal Injury

b. Property Damage

c. nuisance trespass to land or interference with any easement right of air light water or way

occurring within the Territorial Limits during the Period of Insurance in connection with the Business.

Other Costs and Expenses

In addition the Company will pay Other Costs and Expenses.

Limits of Indemnity applying to this Public and Products Liability Section

The Company's Liability

The Company's liability for all compensation payable in respect of

a. any one Occurrence

b. all Personal Injury and Property Damage occurring during any one Period of Insurance and caused by or arising from Products

c. all Pollution and Contamination which is deemed to have occurred in any one Period of Insurance

shall not exceed the Limit of Indemnity shown in the Schedule.

North American Costs

In respect of all

a. claims made against the Insured in North America

b. suits brought against the Insured before any Court arbitrator or tribunal in North America

the Limit of Indemnity shall be inclusive of the amount of all compensation claimants costs and expenses and Other Costs and Expenses

Aggregation of Limits

The Company's liability to the Insured shall not exceed in total the Limit of Indemnity shown in the Schedule.

Extensions and Memoranda

The Company's Liability (as stated above) shall include any amount payable under any Extension or Memorandum

Extensions applying to this Public and Products Liability Section

Court Attendance Compensation

If during the Period of Insurance any partner director or Employee of the Named Insured is required to attend court as a witness at the request of the Company in connection with a claim which is the subject of indemnity under this Section the Company will pay the following amount to the Named Insured for each day that attendance is required:

a. any director or partner GBP500

b. any employee GBP250

Data Protection

The Company will indemnify the Named Insured and at the request of the Named Insured any partner director or Employee of the Named Insured against all sums which the Named Insured

or any partner director or Employee of the Named Insured become(s) legally liable to pay as compensation for damage or distress resulting from failure of the Named Insured to comply with data protection legislation and caused in connection with the Business during the Period of Insurance

Provided that the Named Insured is:

i. a registered user in accordance with the terms of such legislation

ii. not in business as a computer bureau

The Company's liability for all compensation claimants' costs and expenses and Other Costs and Expenses under this Extension in respect of all claims occurring during any one Period of Insurance shall not exceed GBP500,000.

The Company will not pay for

a. any damage or distress caused by any deliberate act or omission by the insured the result of which could reasonably have been expected by the insured having regard to the nature and circumstances of such act or omission

b. any damage or distress caused by any act of fraud or dishonesty

c. the costs and expenses of rectifying rewriting or erasing data

d. liability arising from the recording processing or provision of data for reward or to determine the financial status of any person

e. the payment of fines or penalties

f. compensation ordered or awarded by a Court of Criminal Jurisdiction

g. liability arising outside Great Britain Northern Ireland, The Isle of Man and the Channel Islands

h. liability for damage or distress sustained by any Employee

Defective Premises Act

The Company will indemnify the Named Insured in the terms of this Policy in respect of legal liability incurred under section 3 of the Defective Premises Act 1972 or Section 5 of the Defective Premises Act (Northern Ireland) Order 1975 for Personal Injury or Property Damage.

Provided that:

i. cover is in respect of premises in Great Britain or Northern Ireland.

ii. the indemnity will not apply where indemnity is provided by any other insurance.

iii. the indemnity will not apply to costs of remedying any defect or alleged defect in premises disposed of by the Named Insured

Indemnities to Additional Insureds

the Company will indemnify any Additional Insureds provided that

a. each Additional Insured shall observe fulfil and be subject to the terms and conditions of this policy insofar as they can apply

b. the Company's liability to the Named Insured and all Additional Insureds shall not exceed in total the Limit of Indemnity specified in the Policy Schedule

c. such Additional Insureds shall not be entitled to indemnity under any other policy for any Claim in respect of which indemnity may be provided under this policy

Joint Insured—cross liabilities

If more than one party is named as the Insured this Policy shall apply as though each was insured separately, provided that the Company's liabilities to all parties indemnified shall not exceed in the aggregate the Limit of Indemnity shown in the Policy Schedule.

Legal Defence Costs

The Company will indemnify the Named Insured and if the Named Insured so requests any partner director or Employee of the Insured in the terms of this Extension in respect of

a. costs and expenses incurred with the company's written consent

b. costs and expenses of the prosecution awarded against any such party

in connection with criminal proceedings or an appeal against conviction arising from such proceedings brought in respect of a breach of

i. the Health and Safety at Work etc. Act 1974 or the Health and Safety at Work (Northern Ireland) Order 1978 where the proceedings relate to the health safety and welfare of any person other than a partner director or Employee of the Insured

ii. Part II of the Consumer Protection Act 1987

iii. Section(s) 7, 8, 14 and/or 15 of the Food Safety Act 1990

committed or alleged to have been committed during the Period of Insurance in connection with the Business.

Provided that

i. the proceedings do not relate to the health safety or welfare of any Employee

ii. the Company shall have the absolute conduct and control of all the said proceedings and appeals

iii. this Section shall not apply to

A. fines or penalties of any kind

B. any costs expenses or reimbursements arising in connection with any order made under sections 16, 17 or 36 of the Consumer Protection Act 1987.

C. costs or expenses insured by any other policy

D. proceedings brought in any country other than Great Britain Northern Ireland the Channel Islands and the Isle of Man

E. compensation ordered or awarded by a Court of Criminal Jurisdiction

F. proceedings consequent upon any deliberate act or omission by

i. the Insured

ii. any partner or director of the Insured

iii. any Employee with any specific responsibility for compliance with the legislation specified in this Extension

which could reasonably have been expected to constitute a breach of the legislation specified in this Extension.

Motor Contingent Liability

The Vehicles and Craft Exclusion, paragraph a.i. shall not apply to liability arising out of the use in connection with the Business of any vehicle not owned provided or being driven by the Named Insured but this Section shall not apply to any such liability

a. in respect of loss of or damage to the said vehicle

b. arising out of any such use in any country outside the European Union

c. incurred by any party other than the Named Insured and Extension Indemnities to Additional Insureds shall not apply thereto.

for the purpose of this Extension Exclusion Injury to Employees shall not apply

Overseas Personal Cover

The Business is extended to include personal activities (not connected with any gainful occupation or profession nor with the ownership or tenure of any land or building) of

a. any partner director or Employee of the Named Insured

b. any spouse or child accompanying such partner director or Employee of the Named Insured

in the course of any journey or temporary visit outside Great Britain, Northern Ireland, the Channel Islands and the Isle of Man made in connection with the Business.

Exclusions applying to this Public and Products Liability Section

Advice and Design

This Section does not cover legal liability consequent upon advice design specification inspection certification or testing provided or performed for a fee by or on behalf of the Insured and not connected with the supply or intended supply of the Insured's Products

Asbestos

This Section does not cover any liability directly or indirectly caused by or arising from the manufacture mining processing distribution testing remediation removal storage disposal sale use of or exposure to asbestos or material or products containing asbestos whether or not there is another cause of loss which may have contributed concurrently or in any sequence to such liability

Provided that

a. in respect of liability for Property Damage, only that part of any such loss or damage which is directly or indirectly arising out of or resulting from the manufacture mining processing distribution testing remediation removal storage disposal sale use of or exposure to asbestos is excluded by the foregoing

b. in respect of liability for Personal Injury, only that part of any such Injury which is directly or indirectly arising out of or resulting from the manufacture mining processing distribution testing remediation removal storage disposal sale use of or exposure to asbestos is excluded by the foregoing

proviso a. and b. shall not apply to, and no indemnity shall be provided for, any claim made or suit brought against the Insured before any court arbitrator or tribunal in North America resulting from asbestos in any form

Contract Works and JCT (RIBA) Clause 21.2.1

This Section does not cover liability in respect of Property Damage, nuisance or trespass

a. comprising or to be incorporated in the contract works in respect of any contract undertaken by the Insured or

b. against which the Insured is required to effect insurance under the terms of Clause 21.2.1 of the J.C.T. (R.I.B.A.) Conditions of Contract or of any other contract condition requiring insurance of a like kind.

Damage to goods supplied etc.

This Section does not cover liability in respect of

a. loss of or damage to any goods or other property, sold, supplied, delivered, installed, erected, repaired, altered, treated or tested by the Insured

b. all costs of or arising from the need for making good removal repair rectification replacement or recall of

   i. any such goods or property

   ii. any defective work executed by or on behalf of the Insured.

Provided that paragraph a. and b.i. above shall not apply to liability in respect of loss of or damage to the said goods or property if such loss or damage is caused by or arises from

1. any alteration repair or servicing work executed

2. any other goods or property sold supplied delivered installed or erected

by the Insured under a separate contract.

Excess Clause

This Section does not cover the amount of the Excess specified in the Policy Schedule

Injury to Employees

This Section does not cover liability in respect of Personal Injury to any Employee arising out of and in the course of the employment or engagement of such person by the Insured

North America

This Section does not cover liability arising in North America directly or indirectly caused by or arising from:

1. the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any Fungi or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

   Provided that this exclusion does not apply to any Fungi or bacteria that are, are on, or are contained in, a good or product intended for consumption.

2. the actual, alleged, threatened or suspected inhalation of, or ingestion of, Silica or Silica-related Dust.

Offshore Operations

This Section does not cover any liability in respect of Offshore Operations

Penalties Liquidated and Punitive damages

This Section does not cover any liability in respect of

a. fines penalties or liquidated damages

b. punitive exemplary or aggravated damages and/or any additional damages resulting from the multiplication of compensatory damages

c. compensation ordered or awarded by any Court of Criminal Jurisdiction

Pollution

This Section does not cover any liability in respect of

a. Pollution and Contamination occurring in North America

b. Pollution and Contamination occurring elsewhere unless caused by a sudden identifiable unintended and unexpected incident which takes place in its entirety at a specific time and place during the Period of Insurance.

All Pollution and Contamination which arises out of one incident shall be deemed to have occurred at the time such incident takes place.

Products

In respect of Personal Injury or Property Damage caused by or arising from Products this Section shall not apply to:

a. any liability which attaches to the Insured solely under the terms of an agreement other than

   i. under any warranty of goods implied by law

ii. under any indemnity clause in any agreement between the Insured and any independent carrier in respect of Personal Injury or loss of or damage to material property caused by Products entrusted to such carrier for transit by road rail or waterway.

b. any Product installed or incorporated in any craft designed to travel in or through air or space and which to the Insured's knowledge was intended to be installed or incorporated in any such craft

Property in Insured's charge or control

This Section does not cover any liability in respect of loss of or damage to any property belonging to or in the charge or control of the Insured other than

a. personal effects or vehicles of any partner director or Employee of or visitor to the Insured

b. premises (and their contents) not belonging leased rented or hired to the Insured but temporarily in the Insured's charge for the purpose of carrying out work

c. premises (including their fixtures and fittings) leased rented or hired to the Insured but this Section shall not apply to liability attaching to the Insured solely under the terms of any tenancy or other agreement

Radioactive Contamination

This Section does not cover liability in respect of

a. loss or damage to any property whatsoever or any loss or expense whatsoever resulting or arising therefrom or any consequential loss

b. any legal liability of whatsoever nature

c. any Personal Injury

directly or indirectly caused by or contributed to by or arising from:

i. ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel,

ii. the radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof

Vehicles and craft

This Section does not cover any liability arising out of the ownership possession or use by or on behalf of the Insured of

a. any mechanically propelled vehicle or trailer attached thereto

i. whilst on any road within the meaning of the Road Traffic Acts or other road traffic legislation excepting liability arising out of the operation (as a tool) of any mechanical plant

ii. if such liability is insured by any other policy as required by any road traffic legislation to be subject of compulsory insurance or other security

b. any vessel or craft designed to travel in on or through water air or space other than barges motor launches and non-powered craft not exceeding 10 metres in length used on inland or territorial waters.

War

This Section does not cover liability in respect of any consequence of war invasion act of foreign enemy hostilities (whether war be declared or not) civil war rebellion revolution insurrection military or usurped power nationalisation confiscation requisition seizure or destruction by the government or any public authority.

Conditions applying to this Public and Products Liability Section

Additional Conditions are stated elsewhere in the General Conditions To This Policy.

Reasonable Precautions

The Insured shall take all reasonable precautions to prevent accidents and to prevent or cease any activity which may give rise to a liability and any Personal Injury and shall take all reasonable steps to observe and comply with all statutory or local authority laws obligations and requirements.

GENERAL CONDITIONS TO THIS POLICY

Additional Conditions are stated in the Section Wordings.

Conditions Precedent

The observance and fulfilment of the terms and conditions of this Policy shall be conditions precedent to any liability of the Company to make any payment under this Policy.

Additional Insureds

a. each of the Additional Insureds and the Named Insured accepts and agrees that the Named Insured shall have the sole right to make a claim hereunder (whether on its own behalf or on behalf of an Additional Insured) and it shall be a condition precedent to any liability of the Company under this Policy that the Named Insured and not an Additional Insured shall have made any such claim

b. each Additional Insured shall observe fulfil and be subject to the terms and conditions of this policy insofar as they can apply

c. The Company's liability to the Named Insured and all Additional Insureds shall not exceed in total the Limit of Indemnity specified in the Policy Schedule

Alterations in Risk

If at any time anything shall occur or be done materially affecting the risk insured the Insured shall give notice in writing to the Company as soon as reasonably practicable.

Arbitration

All disputes which may arise under out of in connection with or in relation to this Policy or to its existence validity or termination or to the determination of the amount or any amounts payable under this Policy shall be referred to Arbitration.

The Arbitration shall be conducted in accordance with the Rules of the London Court of International Arbitration and the place of Arbitration shall be London. The language of the Arbitration shall be English.

The Arbitral Tribunal shall consist of three Arbitrators. One shall be appointed by the Company, one shall be appointed by the Named Insured, and once those two Arbitrators shall have been appointed they shall jointly appoint a third Arbitrator as Chairman of the Arbitral Tribunal. The Company or the Named Insured shall be entitled in the event of any dispute arising to call upon the other to nominate an Arbitrator pursuant to the provisions of this Clause and if either party shall fail to so nominate a party Arbitrator within 30 days of a receiving a notice to do so the party not in default shall be entitled to request the President of the Law Society for the time being (''the Appointer'') to appoint a party Arbitrator on behalf of the party in default. The Appointer shall also appoint the Third Arbitrator as Chairman in default of appointment by the Party Appointed Arbitrators within 28 days after their respective appointments.

Cancellation

The Company may cancel this Policy by sending 30 days notice by registered post to the Named Insured at the last known address and in such event the Named Insured shall become entitled to the return of a proportionate part of the premium corresponding to the unexpired Period of Insurance.

Claims

On the happening of any claim or any Occurrence or circumstance which may give rise to a claim under this Policy, and again upon receipt by the Insured in writing of any notice of any claim or legal proceeding the Insured shall:

a. notify the Company in writing as soon as reasonably possible, with full particulars.

b. make no admission of liability or offer promise of payment without the Company's written consent.

c. inform the Company immediately of any impending prosecution inquest or fatal inquiry or civil proceedings and send to the Company every relevant document unanswered.

d. retain unaltered and unrepaired anything in any way connected with the Injury for as long as the Company may reasonably require.

e. produce to the Company at the Insured's expense such books of account or other business books or documents or such other proofs as may reasonably be required by the Company for investigating or verifying the claim.

Choice of Law and Jurisdiction

In the event that the Arbitration provisions in this Policy shall be held to be invalid in whole or in part all disputes arising under out of or in connection with or in relation to this Policy

shall be subject to the exclusive jurisdiction of the Courts of England and Wales and the law applicable to the construction and interpretation of the Policy and governing all such disputes shall in any event be the law of England and Wales

Contracts (Rights of Third Parties) Act 1999

A person or party who is not a party to this Policy has no right under the Contracts (Rights of Third Parties) Act 1999 or any subsequent legislation to enforce any term of this Policy but this does not affect any right or remedy of a third party which exists or is available apart from such Act.

Maximum Overall Limit of Indemnity

The Company's Maximum Overall Limit of Indemnity (other than under any Employers' Liability Section) shall not exceed the Limit of Indemnity shown in the Schedule.

Non-disclosure

The insurance will be voidable if there has been misrepresentation misdescription or non-disclosure of any material fact.

Other Insurances

The Company will not indemnify the Insured in respect of liability which is insured by or would but for the existence of this Policy be insured by any other policy except in respect of any excess beyond the amount payable under such other policy or which would have been payable under such other policy had this insurance not been effected.

Policy Construction

a. Unless otherwise agreed the construction interpretation and meaning of the provisions of this Policy shall be determined in accordance with the Law of England

b. The headings and titles of paragraphs in this Policy are included for descriptive purposes only and do not form part of this Policy for the purpose of its construction or interpretation

c. In this Policy references to any statute or regulation shall be to that statute or regulation as amended or re-enacted from time to time.

Premium Adjustments

If any part of the premium is based on estimates furnished by the Insured, the Insured shall keep an accurate record containing all relative particulars and shall allow the Company to inspect such record. The Insured shall supply such particulars as the Company may require within one month from the expiry of each Period of Insurance and the premium shall thereupon be adjusted by the Company subject to any minimum premium that may apply. At

the request of the Company the Insured shall supply an auditor's certificate in support of such particulars.

If the Insured fails to supply such particulars within the period stated the Company shall be entitled to make a reasonable estimate of such particulars and adjust the premium accordingly.

Rights of the Company

a. The Company shall be entitled at their discretion to take over and conduct in the name of the Insured the defence or settlement of any claim and to take proceedings at their own expense and for their own benefit but in the name of the Insured to recover compensation or secure indemnity from any third party in respect of any Personal Injury Property Damage or other legal liability to which this Policy applies and the Insured shall give all information and assistance required.

b. the Company may at any time pay the Limit of Indemnity (less any sums already paid as compensation) or any lesser amount for which at the absolute discretion of the Company the claims arising out of any Occurrence can be settled. The Company will then relinquish control of such claims and be under no further liability in respect thereof except for costs and expenses for which the Company may be responsible prior to the date of such payment.

PREMIUM PAYMENT CONDITION

The Insured undertakes that premium shall be paid in full to the Company within 60 days of inception of this Policy (or, in respect of instalment premiums, when due) and shall have the burden of establishing that such payment has been made.

If the premium due under this Policy has not been so paid to the Company by the 60th day from the inception of this Policy (and, in respect of instalment premiums, by the date they are due) the Company shall have the right to cancel this Policy by notifying the Insured in writing direct or via the broker or agent as appropriate. In the event of cancellation, premium is due to the Company calculated in accordance with the premium adjustment provisions of this Policy for the period the Company has been on risk, subject to any minimum premiums payable. The full policy premium shall be payable in the event of a loss or occurrence prior to the date of termination which gives rise to a valid claim under this Policy.

It is agreed that the Company shall give not less than 7 days prior notice of cancellation to the Insured via the broker or agent or direct. If premium due is paid in full to the Company before the notice period expires, notice of cancellation shall automatically be revoked. If not, the policy shall automatically terminate and be of no effect at the end of the notice period.

If any provision of this condition is found by any court or administrative body of competent jurisdiction to be invalid or unenforceable, such invalidity or unenforceability will not affect the other provisions of this condition which will remain in full force and effect.

COMPLAINT HANDLING PROCEDURES

Internal Complaints Procedure

At Allianz Global Corporate & Specialty we are committed to providing our customers with the highest possible level of service. We realise, however, that things can go wrong and you may feel we have not provided the service you expect.

Our internal complaints procedure is designed to resolve problems promptly and fairly

What you need to do

You should first contact the intermediary who arranged your insurance. If they are unable to resolve your complaint, you can write to us or telephone your usual contact at:

Allianz Global Corporate & Specialty
27 Leadenhall Street
London
EC3A 1AA
Tel: 020 7877 3000

When you contact us please give us a name and contact number and quote your policy and/or claim number. Please explain clearly and concisely the reason for your complaint.

APPENDIX 24.2

THE GABLE INSURANCE CONTRACTORS INDEMNITY INSURANCE POLICY WORDING

This document sets out the standard terms and conditions on which the insurance provided under it is granted.

It is to be read alongside the Certificate of Insurance issued to confirm the purchase of the insurance to which this policy wording applies.

The Contract of Insurance, of which this policy wording forms a part, includes the Certificate of Insurance and is issued by Gable in reliance on the accuracy of the information provided by the Policyholder in the facts and financial declarations supplied to Gable on the Policyholder's proposal for this insurance.

For the avoidance of doubt, the information provided on the proposal has been relied on by Gable in setting out all of the terms and conditions on which the Certificate of Insurance is granted.

Policyholders can obtain free legal advice on issues relating to any event that may form the subject of claims under this policy by calling the Gable Help Line 0870 084 8220.

[This service is available from 9 a.m. through to 5:45 p.m. Monday to Friday (except Bank and Public Holidays). Calls are charged at the national call rate. The service is intended to provide guidance only. In the event a Policyholder wishes to engage a Solicitor to act on their behalf they do so as a private client.]

Definitions

So far as possible, Gable has used clear English to set out the terms and conditions of this insurance. However, for the sake of clarity, certain expressions in this policy are subject to particular definitions which are set out below.

"Gable"	The insurer who has issued this policy to you, and their representatives from time to time (which may include their underwriting agents, their adjusters or solicitors and other professional advisers).
"Bodily Injury"	Physical or mental injury to the body, death, illness, or disease
"Period of Insurance"	The period of time over and during which incidents may occur that may require an indemnity payment under this policy
"Premium"	The full price payable by You for this policy
"You", or "Policyholder"	The person, firm or company to whom this policy has been issued, and "Your" shall be construed accordingly

"Schedule"	A document that Gable will issue to You confirming which sections of the policy applied, and what particular conditions or endorsements (if any) additionally apply
"Terrorism"	Any act of any person acting on behalf of or in connection with any organisation with activities directed towards the overthrowing or influencing of any government de jure or de facto by force or violence

SECTION 1: EMPLOYERS LIABILITY

Gable agrees to indemnify the Policyholder as stated in the Schedule for all sums which the Policyholder becomes legally liable to pay as damages (and claimant/third party legal costs) up to the Limits of Indemnity (as per Memorandum No. 5a) in respect of accidental bodily injury sustained by an employee arising out of and in the course of his/her employment by or under a contract of service with the Policyholder in connection with the Business of the Policyholder as stated in the Schedule and occurring during the Period of Insurance as stated in the Schedule.

This indemnity extends to include liability for any hired or borrowed employee for whom the Policyholder is responsible or for any other person who is under a contract of service with a contractor of the Policyholder and where the Policyholder in the course of the Business of the Policyholder has agreed to accept responsibility for the control of that person.

The indemnity provided shall only apply to bodily injury sustained:

(i) within Great Britain, Northern Ireland, the Isle of Man and the Channel Islands (to the exclusion of an offshore installation within the territorial waters around Great Britain, Northern Ireland, the Isle of Man and the Channel Islands);

(ii) by employees of the Policyholder during temporary visits abroad.

In addition, Gable will pay legal expenses incurred by and in the Policyholder's name with the written consent of Gable and associated with such legal liability to pay damages

Jurisdiction Clause

It is hereby agreed between Gable and the Policyholder that the indemnity provided by this Section shall apply only to judgements of first instance against the Policyholder in the Courts of Law of Great Britain, Northern Ireland, the Isle of Man and the Channel Islands (excluding Employment Tribunals) and not to judgements obtained elsewhere nor to judgements or orders obtained in the said courts for the enforcement of foreign judgements whether by way of reciprocal agreements or otherwise.

The Premium for this Insurance has been calculated accordingly and no consideration has been paid in respect of sums payable under any other law or the jurisdiction of any other courts.

Employers Liability Compulsory Insurance Clause

The Policyholder shall repay to Gable all sums paid by Gable which Gable would not have been liable to pay but for the provisions of any law relating to compulsory insurance of liability

to employees in Great Britain, Northern Ireland, the Isle of Man, the Channel Islands or offshore installations in territorial waters around Great Britain and its Continental Shelf.

Exclusion to Section 1

This Section does not provide any indemnity in respect of any liability for which compulsory motor insurance or security is required under the Road Traffic Act 1988 as amended by the Motor Vehicles (Compulsory Insurance) Regulations 1992 and the Road Traffic (Northern Ireland) Order 1981 as amended by the Motor Vehicles (Compulsory Insurance) Regulations (Northern Ireland) 1993 or any other Compulsory Road Traffic Legislation.

SECTION 2: PUBLIC LIABILITY

Gable agrees to indemnify the Policyholder as stated in the Schedule for all sums which the Policyholder becomes legally liable to pay as damages (and claimant/third party legal costs) up to the Limits of Indemnity (as per Memorandum No. 5b) in respect of accidental bodily injury to persons other than those in respect of whom indemnity is provided under Section 1 of this policy or accidental loss of or damage to tangible property in connection with the Business of the Policyholder as stated in the Schedule and occurring during the Period of Insurance as stated in the Schedule.

This indemnity extends to include liability:

1. arising out of the provision of any canteen, medical or welfare facilities provided by the Policyholder;
2. of the committees for the time being of any of the Policyholder's sports or social clubs including as though they were the Policyholder, the officers and/or members of any such club jointly or severally;
3. in respect of accidental obstruction, loss of amenities, trespass, nuisance, denial of access, stoppage of or interference with road, air or waterborne traffic or infringement of light easement.

The indemnity provided shall only apply to bodily injury and loss of or damage to tangible property sustained:

(i) within Great Britain, Northern Ireland, the Isle of Man and the Channel Islands (to the exclusion of an offshore installation within the territorial waters around Great Britain, Northern Ireland, the Isle of Man and the Channel Islands);

(ii) during the course of temporary visits abroad by employees of the Policyholder.

In addition, Gable will pay legal expenses incurred by the Policyholder and in the Policyholder's name with the written consent of Gable and associated with such legal liability to pay damages

Jurisdiction Clause

It is hereby agreed between Gable and the Policyholder that the indemnity provided by this Section shall apply only to judgements of first instance against the Policyholder in the Courts

of Law of Great Britain, Northern Ireland, the Isle of Man and the Channel Islands (excluding Employment Tribunals) and not to judgements obtained elsewhere nor to judgements or orders obtained in the said courts for the enforcement of foreign judgements whether by way of reciprocal agreements or otherwise.

The Premium for this insurance has been calculated accordingly and no consideration has been paid in respect of sums payable under any other law or the jurisdiction of any other courts.

Exclusions to Section 2

This indemnity does not provide any indemnity for any liability:–

1. for bodily injury sustained by any person arising out of and in the course of his/her employment by the Policyholder or to any person arising out of and in the course of his/her participation in the performance of a contract with the Policyholder the primary purpose of which is the provision of labour only;
2. for loss or damage to property owned by the Policyholder or in the Policyholder's care, custody and control other than:–
   a) employees' property
   b) premises (including contents thereof) not owned nor rented by the Policyholder but temporarily occupied by them for the purpose of work therein or thereon
   c) premises leased or rented by the Policyholder provided that liability is not assumed by the Policyholder under agreement which would not have attached in the absence of such agreement;
   d) parked motor vehicles of the Policyholder's employees or of sub-contractors' employees or of visitors which for the purposes of this Insurance shall not be deemed to be in the care, custody or control of the Policyholder;
3. a) arising out of the ownership possession or used by the Policyholder of any motor vehicle or trailer for which compulsory insurance required by legislation other than that liability:
      i. caused by the use of any tool of plant forming part of or attached to or used in connection with any motor vehicle or trailer
      ii. arising beyond the confines of any carriageway or throughway by the loading or unloading of any motor vehicle or trailer
      iii. for damage to any bridge, weighbridge, road or anything beneath caused by the weight of any motor vehicle or trailer or of the load carried on such vehicle or trailer
      iv. arising out of any motor vehicle or trailer temporarily in the Policyholder' as custody or control for the purpose of parking

      and where such liability does not require compulsory insurance by legislation applicable to the use of any motor vehicle or trailer
   b) caused by the ownership or operation by or on behalf of the Policyholder of any waterborne craft or aircraft or railborne vehicle, other than railborne vehicles on site of the contract works;

4. which solely arises as the inevitable or unavoidable consequence of the performance of a contract;

5. for damage to telecommunications, gas suppliers, water authorities or companies, electrical authorities or companies, television or satellite underground services unless prior to the commencement of and for the duration of the works the Policyholder has taken such steps as were reasonably practicable to comply with the New Roads & Street Works Act 1991 and its associated Code of Practice (or any subsequent amendments or replacements of similar effect), and the HSG47 "Avoiding Danger from Underground Services" (or any subsequent revisions or replacements of similar effect), to include the making of enquiries with those authorities or companies regarding the location of their underground services and where practicable receiving a written response, and has kept and can produce a record of such compliance, and has advised the location of such underground services to those carrying out such works on the Policyholder's behalf;

6. arising out of pollution or contamination of the atmosphere or of any water, land or other tangible property except to the extent that it can be proved that such pollution or contamination:

   (a) was the direct result of a sudden, specific and identifiable event occurring during the Period of Insurance

   (b) was not a direct result of the Policyholder failing to take reasonable precautions to prevent such pollution or contamination.

   and that where such indemnity is provided it shall apply in the aggregate to a sum not exceeding the sum stated in the Schedule as the indemnity limit for this Section in respect of the Period of Insurance;

7. for contractually assumed liabilities which but for such contractual arrangements the Policyholder would not otherwise be liable unless such indemnity is requested of and is granted by Gable by issuance of a written endorsement to the policy to that effect;

8. for professional advice, design or specification given by the Policyholder for a consideration;

9. for trespass or nuisance where the act or omission that has caused such trespass or nuisance was intentional;

10. for claims arising out of goods or products sold or supplied by the Policyholder.

SECTION 3: ALL RISKS OF PHYSICAL LOSS OR DAMAGE

Gable will agree to indemnify the Policyholder as stated in the Schedule for all physical loss or damage of whatsoever nature sustained during the Period of Insurance up to the Limits of Indemnity (as per Memorandum No. 5c) to

a) The works, whether permanent or temporary, materials incorporated or for incorporation therein property in the Policyholder's care, custody and control and any other property of whatsoever nature other than property insured by item (b) below, the property of the Policyholder or for which the Policyholder are responsible whilst anywhere within the Territorial Limits, including all transits therein (other than transits by sea) in respect of

any contract or work undertaken whether such contract or work was commenced during the Period of Insurance or otherwise, including liability arising under the maintenance provisions of such contract or work. Provided that Gable shall be under no liability in respect of contracts originally scheduled to be of longer duration than three years (inclusive of the maintenance period).

b) Contractors' plant tools and equipment, demountable and temporary building and/or caravans, and/or other items of a like nature and materials and/or stores and, or any other property of whatsoever nature for use in connection therewith the property of the Policyholder or for which the Policyholder are responsible whilst anywhere within the Territorial Limits including all transits therein (other than transits by sea).

c) Employees Effects, for which the Employees are responsible whilst anywhere within the Territorial Limits

The indemnity provided shall only apply within Great Britain, Northern Ireland, the Isle of Man and the Channel Islands (to the exclusion of an offshore installation within the territorial waters around Great Britain, Northern Ireland, the Isle of Man and the Channel Islands) and shall be limited to "like for like" replacement valuation; Gable reserve the right on such occasions as they shall think fit to assume responsibility for arranging replacement of such property belonging to the insured in the alternative to making a payment on a "like for like" replacement basis.

Exclusions to Section 3

No indemnity is provided hereunder in respect of:

1. any consequential and/or financial/economic loss, and loss of use, penalties for delay or non-completion;
2. loss of or damage to:
   a) Aircraft
   b) waterborne craft other than safety boats, non-self propelled craft or other craft up to 20 feet in length on or about the contract site;
3. loss of or damage to mechanically propelled vehicles other than:
   a) vehicles designed primarily to operate as tools of trade (which term shall be deemed to include any plant primarily designed to operate on or about a contract site)
   b) other vehicles brought onto a site for use only on such site;
4. the costs necessary to replace, repair or rectify any of the property insured which is in a defective condition due to a defect in design, plan, specification, materials or workmanship, but this exclusion shall not apply to the remainder of the property insured which is free of such defective condition but is damaged as a consequence of such defect;
5. the cost of making good
   a) mechanical or electrical breakdown or derangement
   b) wear and tear and gradual deterioration

   but this Exclusion shall be limited to the parts immediately affected and shall not apply to loss or damage arising in consequence thereof;

6. stock and materials in trade, except under Section 3, All Risks, Paragraph (b) of the Operative Clause, whilst at any premises owned, leased or rented by the Policyholder other than property allocated for incorporation in specific works being or to be carried out by the Policyholder away from such premises;
7. loss of or damage to cash, notes, postal and/or money orders, cheques, stamps or negotiable instruments of whatsoever nature or other securities for money;
8. loss or damage to property insured by Section 3, All Risks, Paragraph a) of the Operative Clause arising out of the works being taken into use by any Principal with the consent of the Policyholder or their Employers (except for testing and commissioning when applicable) unless the Policyholder shall give notice to Gable as soon as possible and shall agree to pay such additional premium as Gable may reasonably require;

   This Exclusion shall not apply

   a) to use of any property as a show house

   b) during the period of 14 days from the date of issue by the Engineer of a Policy of Completion when a contract is subject to the standard conditions of contract of the Institute of Civil Engineers, or equivalent conditions of contract;
9. any loss by disappearance, including but not limited to left, or by shortage of Contractors' plant tools and equipment, demountable and temporary buildings and/or caravans, and/or other items of a like nature and materials and/or stores and/or any other property of whatsoever nature for use in connection therewith, the property of the Policyholder or for which the Policyholder are responsible whilst within the territorial limits including all transits therein (other than transits by sea):

   a) If such disappearance or shortage is only revealed when a routine inventory is made or is not traceable to an event

   b) where such disappearance or shortage dates from the insolvency of the Policyholder. For the purposes of this exclusion, insolvency shall be deemed to exist no later than from such date and for the duration of such period as the Policyholder becomes unable to pay its debts as they fall due or having an excess of liabilities over assets. Insolvency for the purposes of this exclusion shall include, but is not limited to, the status of the Policyholder from the date of appointment by any government official, agency or court of any Receiver, Liquidator, Administrator or Trustee, or similar official to take control, supervise or manage such Receiver, Liquidator, Administrator, Trustee of the Policyholder;
10. for contractually assumed liabilities which but for such contractual arrangements the Policyholder would not otherwise be liable unless such indemnity is requested of and is granted by Gable by issuance of a written endorsement to the policy to that effect.

CLAUSES

1. Professional Fees

The Insurance provided by Section 3 includes architects, surveyors, consulting engineers and other professional fees necessarily incurred in connection with the reinstatement of loss or damage insured thereunder.

2. Debris Removal

The Insurance by Section 3 hereof includes costs and expenses necessarily incurred in respect of removal of debris, dismantling, demolition (including off site storage), shoring, propping and clearance of drains and sewers following loss or damage insured thereby.

3. Speculative Housing

In the event of speculative housing being completed but unsold, cover under Section 3 of this Certificate shall continue for a period of twelve months from the date of practical completion but Gable liability shall not exceed that stated under Section 3 of the Certificate Schedule.

4. Non-Renewal

In the event of non-renewal of this Insurance and subject to the Policyholder giving notice to Gable prior to expiry of his intention to avail himself of the following provisions, this Certificate shall continue in force in respect of contracts or work commenced prior to expiry until completion thereof, provided that the Policyholder shall agree to pay such additional premium as Gable may require.

5. Plans

The property insured by Item a) of Section 3 shall be deemed to include plans and specifications or other contract documentation of the works or temporary works but only for the cost of reproducing such plans, specifications and documentation.

6. New Activities And/Or Subsidiaries

This Insurance will automatically include new activities and/or subsidiaries of the Policyholder provided always that Gable herein shall receive due notification of the new or intended activity and/or subsidiary company with such further details and subject to such terms and conditions as Gable may require.

7. Clause 21.2.1 (1980 Edition) of J.C.T. Conditions and Clause 19(2) (A) (1963 Edition) of R.I.B.A. Conditions or Similar

Indemnity under this insurance will only be available in relation to any such liabilities when expressly requested of Gable, and that in consequence of such request Gable have expressly agreed to provide it.

Subject to the foregoing and unless directed otherwise by Gable, and when so required by Clause 21.2.1. (1980 Edition) of the Standard Form of Building Contract issued by the Joint Contracts Tribunal or Clause 19(2) (A) (1963 Edition) of the Standard Form of Building Contract issued by the Royal Institute of British Architects or other similar Clauses, Section 2 of this Certificate shall be extended to indemnify the Policyholder in respect of

(a) any loss or expense which the Employer may incur or sustain by reason of loss or damage to any property belonging to the Employer, or for which the Employer is responsible;

(b) the legal liability of the Policyholder for loss of or damage to other property

to the extent that such insurance is required by that Clause, provided that such loss or damage arises out of or in the course of or by reason of the carrying out of such contract or work. Unless directed otherwise by Gable, the Policyholder shall declare the number and value of such contracts to Gable at the expiry of the Period of Insurance and shall pay the additional premium applicable thereto.

For the purpose of this Extension (where granted), the Period(s) of Insurance shall be stipulated by Gable.

8. General Interest

This Certificate duly notes the interest of any Bank, Finance Company, Building Society and any other institution or concern that have a financial interest in the property covered by this Certificate including Plant Owners to the extent required by hire conditions.

9. Terrorism

Indemnity under this insurance for claims for loss, destruction or damage to property by fire or explosion occasioned by or happening through or in consequence directly or indirectly of Terrorism will only be available where such loss, destruction or damage has occurred in the United Kingdom, and that all such claims for indemnity under this insurance will be subject to an indemnity limit of £100,000 in the aggregate for the period of the insurance.

10. Consequential Loss

Indemnity under this insurance for any consequential and/or financial/economic loss and loss of use claims will be subject to an indemnity limit of £500,000 in the aggregate for the period of the insurance.

GENERAL EXCLUSIONS TO ALL SECTIONS (UNLESS STATED OTHERWISE)

This indemnity does not include liability:

1. (a) directly or indirectly occasioned by happening through or in consequence of war invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or nationalisation or requisition

   (b) directly or indirectly caused by or arising from:

      (i) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel

      (ii) the radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;

2. for loss, destruction or damage directly occasioned by pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds;

3. for any claim arising in connection with:–

(a) any work of demolition except demolition solely undertaken with hand held tools and of structures not exceeding 5 metres in height by employees in the direct service of the Policyholder when such work forms an ancillary part of a contract for construction, alteration or repair carried out by the Policyholder

(b) the construction, alteration or repair of bridges, towers, steeples, chimney shafts, blast furnaces, viaducts or mines

(c) pile driving, tunnelling or quarrying

(d) the use of explosives for any purpose, other than in respect of 'Hilti Guns' or similar equipment which operates by use of a small explosive charge

(e) handling disturbing and/or stripping out of or exposure to asbestos and/or any other substance or compound that incorporates asbestos which is subject to the Asbestos Licensing Regulations as defined in the Health and Safety Commission Approved Code of Practice entitled "Work with asbestos insulation, asbestos coating and asbestos insulation board" but this exclusion shall not operate in respect of surprise discovery or the handling by a bona fide sub-contractor of such asbestos during contract works providing that upon the Policyholder becoming aware all work on the area is immediately halted and access restricted until discovery is tested and confirmed then sub-contracted to licensed asbestos removal contractors

(f) erection, striking or use of scaffolding equipment for any purpose unless the business description of the Policyholder in the Schedule expressly acknowledges scaffolding and related activities;

4. for any aggravated or exemplary damages;

5. for bodily injury or loss of or damage to tangible property wilfully or deliberately caused by the Policyholder or any employee of the Policyholder;

6. **In respect of Sections 2 & 3 only**:

   liquidated damages clauses, penalty clauses or performance warranties unless it can be demonstrated that liability would have attached notwithstanding such clauses or warranties.

EXTENSIONS/EXCLUSION (ONLY APPLICABLE IF STATED IN THE SCHEDULE)

1. Continuing Hire Charges

Cover under this Certificate is extended to indemnify the Policyholder in respect of their legal liability for the payment of hiring charges in respect only of plant hired in by the Policyholder under CPA Conditions (as defined below) and the Scottish Plant Operators Association Conditions of Hire, and whilst such plant is out of use following loss or damage for which an indemnity is provided by Section 3 of this Certificate (or which would be provided thereunder but for the application of an Excess Clause).

Gable will not be liable under this extension for:

i) liability for a period longer than 6 months;

ii) liability for the first 72 hours such plant is out of use.

For the purposes of this Extension, Exclusions 2 and 3 of Section 2 of this Certificate shall not apply.

2. Negligent Breakdown

When Plant is hired in by the Policyholder under the Model Conditions for the Hiring of Plant of the Construction Plant Hire Association (''CPA Conditions''), Section 2 of this Certificate is extended to indemnify the Policyholder against his legal liability under Clause 9(d) of such conditions for damage to such Plant by breakdown.

The indemnity provided by the Extension will also apply to liability for damage by breakdown to Plant hired in by the Policyholder under conditions other than the CPA Conditions to the extent that the Policyholder would have been legally liable for such damage had the hire been subject to the CPA Conditions and in any event to an amount no greater than would have been the Policyholder's liability under the CPA Conditions.

3. Immobilised Plant

In the event of constructional plant and/or equipment becoming unintentionally immobilised in any physical situation in or about the site of an Insured Contract the necessarily incurred cost of recovery and/or withdrawal shall be ''damage'' within the meaning of Section 3, All Risks, of this Certificate.

No indemnity shall be provided hereunder in these circumstances in respect of the cost of rectifying electrical and/or mechanical breakdown or derangement where such is the sole requirement necessary to effect the said recovery or withdrawal.

4. Contingent Motor Liability

It is hereby noted and agreed that Exclusion 3 of Section 2 of this Certificate will not apply to Bodily injury, Loss or Damage caused by any vehicle:

1. owned or being subject to purchase by a hire purchase agreement by any Director or employee of the Policyholder and being used by any Director or employee in the course of the Business

   OR

2. hired in with a driver by the Policyholder

Provided that:

a. this Clause will not provide Indemnity to any Director or employee of the Policyholder;

b. the Indemnity provided by this Clause will not apply to Legal Liability:

   i. for loss of or damage to such vehicle or to property conveyed therein;

ii. for Bodily injury, Loss or Damage arising whilst such vehicle is being driven with the general consent of the Policyholder or his representative by any person who to the knowledge of the Policyholder or of such representative does not hold a licence to drive such vehicle unless such person has held and is not disqualified from holding or obtaining such a licence;

iii. for Bodily injury, Loss or Damage caused or arising beyond the limits of any carriageway or thoroughfare in connection with:

a) the bringing of the load to such vehicle for loading thereon or,
b) the taking away of the load from such vehicle after unloading therefrom

by any person other than the driver or attendant of such vehicle;

iv. for Loss of or Damage to any bridge, viaduct or weighbridge or to any road or anything beneath by vibration or by weight of such vehicle or of the load carried by such vehicle;

v. which has been incurred only by its having been accepted by agreement;

c. the indemnity provided by this Clause will not apply if at the time of the event giving rise to a claim under this Clause there is any other existing insurance covering the same Legal Liability;

d. the liability of Gable under this Clause in respect of any event shall not exceed the Limit of Indemnity stated in the Schedule under Section 2 of the Certificate Wording.

5. Date Recognition (and Data) Exclusion

There is no cover under this Certificate in respect of any

i. liability of whatsoever nature directly or indirectly caused by or contributed to by or arising

ii. proceedings which result directly or indirectly

from the failure of any computer or other equipment or system for processing, storing or retrieving data whether the property of the Policyholder or not and whether occurring before or after the year 2000, to

a. correctly recognise any data as its true calendar date

b. capture, save or retain and/or correctly to manipulate, interpret or process any data or information or command or instruction as a result of treating any date otherwise than as its true calendar date

c. capture, save, retain or correctly process any data as a result of the operation of any command which has been programmed in to any computer

Where cover is in force, this Date Recognition (and Data) Exclusion shall not apply to Section 1 of this Certificate.

MEMORANDA APPLICABLE TO ALL SECTIONS (UNLESS STATED OTHERWISE)

1. Legal Expenses

Gable will pay any legal expenses incurred by the Policyholder with Gable's written consent within the Courts of Law of Great Britain, Northern Ireland, the Isle of Man and the Channel Islands:

a) for representation of the Policyholder or any of the Policyholder's employees at a Coroner's Inquest or Fatal Accident Inquiry;

b) incurred by or awarded against the Policyholder arising out of any prosecution of the Policyholder for breach or alleged breach of the Health and Safety at Work Act 1974 and such Regulations as are passed under or exist as a consequence of that Act, limited to prosecutions under Section 33 (1)(a) to (c) of the Act or similar duty imposed in legislation in Northern Ireland, the Isle of Man or the Channel Islands

c) incurred by or awarded against the Policyholder arising out of any prosecution of the Policyholder for breach or alleged breach of Construction (Design and Management) Regulations 1994.

Provided that the Gable shall not be liable for any fines or penalties. The Indemnity so provided shall be limited to the following amounts:

i) £10,000 in respect of any one originating cause;

ii) £100,000 in the aggregate in respect of any one Period of Insurance.

"Legal Expenses" are defined as legal costs and disbursements incurred by or on behalf of the Policyholder with Gable's prior written consent.

2. Principals Clause

Where the Policyholder so requests and Gable agrees, Gable will indemnify any Principal of the Policyholder but only to the extent that such liability arises solely out of the work performed for the Principal by or on behalf of the Policyholder. Such Principal shall be subject to and comply with the terms and conditions herein and this clause shall in no way operate to increase the Limits of Indemnity as stated in the Schedule.

3. Excess Clause

Where an excess is stated in the Schedule the Policyholder shall be responsible for the first amount so specified. It is a condition precedent to Gable's liability to indemnify that an applicable excess is immediately payable to Gable as and when they demand it.

4. Cross Liability Clause

It is hereby declared and agreed that where more than one party is named in the Schedule as the Policyholder, cover shall apply as though individual insurances have been issued to each party provided always that Gable's total liability shall not exceed the sums stated in the Schedule as the Limits of Indemnity.

5. a) Limits of Indemnity (applicable to Section 1 only)

The liability of Gable for all sums payable under this Insurance (including Legal Expenses) shall not exceed the Limit of Indemnity stated in the Schedule which shall apply in respect of or arising out of any one occurrence or series of occurrences arising out of one originating cause but in respect of bodily injury sustained Legal Expenses will be payable in addition to the Limit of Indemnity. Nothing contained in this clause shall operate to increase Gable's liability to pay Legal Expenses beyond the amounts stated under Memorandum 1. of this Insurance.

b) Limits of Indemnity (applicable to Section 2 only)

The liability of Gable under this Insurance for all claims made against the Policyholder in respect of or arising out of any one accident or series of accidents arising out of any originating cause shall not exceed the Limits of Indemnity stated in the Schedule but Gable will in addition in the event of their requiring any claim to be contested by the Policyholder pay all Legal Expenses incurred with their written consent in connection therewith subject nevertheless to the following conditions.

If payment exceeding the Limits of Indemnity stated in the Schedule has to be made to dispose of a claim, the liability of Gable to pay all Legal Expenses in connection therewith shall be limited to such proportion of the said Legal Expenses as the Limits of Indemnity bear to the amount paid to dispose of a claim.

c) Limits of Indemnity (applicable to Section 3 only)

The liability of Gable under this Insurance is respect of each and every loss shall be limited to the amount stated in the Schedule.

6. Offshore Definition

It is understood and agreed that for the purpose of this Certificate a Policyholder's employees shall be deemed to be on an offshore installation as from the time when they embark onto a conveyance at the point of final departure to an offshore rig or offshore platform. All such employees shall continue to be deemed to be Offshore until such time as they disembark from the conveyance onto land upon their return from an offshore rig or an offshore platform.

7. Employees Effects Definition

It is understood and agreed that for the purpose of this Certificate the Policyholder's Employees Effects shall include loss of or damage to tools, clothing and personal effects belonging to any

a) Director or employer of the Policyholder

b) Clerk of Works, Resident Engineer or his employee.

9. Gable's Entitlement to pay their Limit of Indemnity

Gable may at any time pay to the Policyholder in connection with any claim or series of claims under this policy to which an indemnity limit applies the amount of such limit (after deduction

of any sums already paid) or any lesser amount for which such claims can be settled and upon such payment being made Gable shall relinquish conduct and control of and be under no further liability in connection with such claims.

GENERAL CONDITIONS ATTACHING TO THIS INSURANCE

1. Adjustment of Premium

1.1 If any of the Premium for this insurance has been calculated on financial estimates and other declarations furnished by You, then You shall keep accurate records containing all particulars relative thereto and shall at all times allow Gable immediate access to such records on request.

1.2 You shall within three months from the expiry of each Period of Insurance furnish such particulars to Gable as Gable may deem necessary to check the accuracy of such estimates or other declarations and the premium for such period shall thereupon be adjusted and the difference shall be paid by or allowed to You as the case may be (subject to any minimum premium required).

1.3 Gable reserves the right to request that You supply an auditor's certificate with such calculations that are the subject of adjustment under this Certificate attesting to the accuracy thereof. Such calculations shall include all remuneration paid to employees and all payments made to self-employed persons or employees of labour only sub-contractors for whom liability is assumed or on such other basis as may be agreed. Such rights reserved to Gable are without prejudice to their rights and remedies available for material misrepresentation.

2. Claims Procedure

It is a condition precedent to liability that:

i) The Policyholder shall give immediate notice to the Gable of and on the happening of any event that may conceivably give rise to a claim under this Certificate and shall immediately give all such additional information as Gable may require. Every letter of claim, writ, summons or process and all documents relating thereto and other written notification of claim shall be forwarded unanswered to Gable immediately they are received

ii) You will at all times, in addition to Your obligations set out above co-operate with Gable and provide promptly such further information as and when requested by Gable, and as is required to such an extent that would allow Gable to be able to comply with such relevant Practice Directions and Pre-Action Protocols as may be issued and approved from time to time by the Head of Civil Justice, and which obligation to inform and co-operate continues until such time as any claim arising from the incident notified in accordance with this Claims Procedure is finally determined, including to appeal

iii) You must make no admission, offer, promise or payment without written consent of the Gable who shall be entitled to take over and conduct in Your name the defence or settlement of any claim (and which will include an assumed authority on Your part to Gable to issue a formal admission of breach of duty for the purposes of any such claim,

should Gable consider it appropriate to do so) or to prosecute in Your name for their own benefit any claim for indemnity or damages or otherwise and Gable shall have full and unfettered discretion in the conduct of any proceedings and in the settlement of any claim

iv) In relation to any claim that is or may be capable of settlement within the value of any applicable excess:

a) You are required to keep in compliance with the Claims Procedure in 2 i) to iii) above

b) You agree to allow Gable, at their option, to appoint loss adjusters and/or solicitors to handle and settle such claims within the terms of 2 iii) above at any time during the currency of the claim and that the Policyholder will be responsible in the first instance for payment of such adjusters/solicitors charges and which liability will include any disbursements incurred by those adjusters/solicitors

c) if Gable declines to take over the conduct of the claim under 2 iii) above, You will properly, diligently and prudently manage and/or settle the claim in a manner which takes into account their and Gable's best interests, and will keep Gable fully and promptly informed of any fact or development that may, if known by the Gable, cause them to take the reasonable view the risk of the applicable excess being exceeded was more than fanciful.

3. Reasonable Precautions

It is a condition precedent to Gable's liability that You will have taken all reasonable steps to prevent such bodily injury, loss or damage as may become the subject of a claim for indemnity or payment under this policy.

4. Alterations in Risk

It is a condition precedent to Gable's liability that You are required to notify Gable of all material facts or alterations in the risk which come to Your knowledge or arise during the currency of this insurance as and when they come to your knowledge. The duty includes but is not limited to the obligation to immediately advise Gable of the date of Your entry into a state of insolvency as provided for and defined in Exclusion 9 in Section 3 of this wording, and of any material alterations to or developments in that status. You will at all times immediately and/or on request from and on behalf of Gable make available to the Gable such trading information or documentation for inspection as Gable may require in relation to Your business and which is subject to this insurance, to such extent as is necessary to satisfy Gable as to the continuing solvency of the Policyholder at any time. In the event of a failure on Your part to make available such trading information or documentation for inspection when requested to do so (and by any deadline Gable may at their complete discretion stipulate for doing so) Gable may at their unfettered discretion and election assume that insolvency on Your part has occurred on a date no later than the date of the Gable request and that You have failed to comply with the notification and/or inspection provisions of this General Condition.

5. Other Insurance

If any claim covered by this Insurance is also covered in whole or in part by any other insurance the liability of the Gable shall apply excess of and not as contributory with such other insurance.

6. Fraudulent Claims

If You make any claim knowing the same or any part of it to be fraudulent or false, this insurance shall become void in its entirety, and all claims hereunder shall be forfeited. If You produce, in support of any claim, evidence or assertions that You know to be false or could not reasonably believe to be other than false, then at Gable's election this insurance is voidable with the consequences above set out.

7. Cancellation Clause

Gable may cancel this Insurance by sending thirty days' written notice to Your last known address whereupon You shall become entitled to refund of a proportionate part of the premium.

8. Disputes Clause

Any dispute concerning the interpretation of the terms, conditions, limitations or exclusions contained herein is understood and agreed by both You and Gable to be subject of English law. Each party agrees to submit to the exclusive jurisdiction of any court of competent jurisdiction within England and to comply with all requirements necessary to give such court jurisdiction. All matters arising hereunder shall be determined in accordance with the law and practice of such court. Gable may direct such dispute be referred to mediation in which event You and Gable will share equally the costs of the mediation, and which will include (if such mediation does not settle the dispute) an invitation to the mediator to issue a non-binding determination.

9. Contracts (Rights of Third Parties) Act 1999

A person who is not a party to this contract has no rights under the Contract (Rights of Third Parties) Act 1999 to enforce any term of this agreement but this does not affect any right or remedy of a third party which exists or is available apart from that Act.

Contractors Indemnity Insurance HOG 2007 wording

Please note that this is only a summary and does not contain the full terms and conditions of the insurance contract which can be found in the policy document.

The Issuer

This Policy is underwritten by Gable Insurance A.G., registered at Feldstrasse 16, FL–9490 Vaduz, Furstentum, Liechtenstein. Gable Insurance A.G. are registered with the FSA under number 446896 (see www.fsa.gov.uk/register).

Type of Insurance and Cover

Employers Liability—This section indemnifies the insured for any legal liability incurred arising from any bodily injury sustained by an employee occurring during the period of insurance and in the course of the business.

Public Liability—This section indemnifies the insured for any legal liability incurred for bodily injury (other than to employees) and/or loss of or damage to property occurring during the period of insurance and in the course of the business.

Products Liability—This section indemnifies the insured for any legal liability incurred for bodily injury (other than to employees) and/or loss of or damage to property occurring during the period of insurance and in the course of the business arising from any product.

Contractors All Risks—This section indemnifies the Insured against all risks of loss or damage to contract works, owned or hired in plant occurring during the period of insurance and in the course of business.

Standard Extensions

Legal Fees and Expenses incurred in connection with the defence of a Claim
Health & Safety at Work—Legal Defence Costs
Compensation for Court Attendance
Unsatisfied Court Judgements
Defective Premises Act
Leased Premises
Contingent Motor Liability
Data Protection Act
Indemnity to Principals
Immobilised Plant
Negligent Breakdown
Continuing Hire Charges
Consequential and Economic/Financial Loss—£500,000 limit
Terrorism Cover—£100,000 limit

Significant and unusual exclusions or limitations

Hazardous Works (unless specifically endorsed)
Pollution and Contamination other than sudden and accidental
Offshore Work
Goods in the care, custody or control of the Insured and/or property being worked upon
Damage to or the repair or reinstatement of any spare parts, components, units, accessories or other goods sold or supplied or which were the subject of repair, servicing or maintenance giving rise to the liability of the Insured
The use of heat (to include soldering, blow lamps, welding or cutting equipment) unless specifically agreed by the Company and endorsed on the quotation accordingly
Deliberate Acts
Professional Indemnity
JCT Clause 21.2.1 or similar clause with same intent
Fines, Penalties & Liquidated Damages, Punitive and Exemplary Damages

Vessels and Craft
Defamation
Terrorism Exception/Limitation
Territorial Limits restricted to Great Britain, Channel Islands & Isle of Man, other than for non manual activities

Period of Insurance

The period of insurance coverage will be for 12 months unless shown differently on the quotation attached. You will be given at least 21 days notice of the annual expiration date of the policy of the renewal terms.

How to Make a Claim

For help and assistance with all general claims queries contact Joanne King or by email at jo.king@gableinsurance.com

For a fast and efficient claims service or to report any event that might give rise to a claim please call our loss adjustors on 020 7337 7460

You must not settle, reject, negotiate or agree to pay any claim without Gable's written permission.

Dispute Resolution

If you have a complaint please contact your broker in the first instance. If the dispute remains unresolved please contact Gable on Tel: 020 7337 7460 or by email at phil.foot@gableinsurance.com

a. We will acknowledge within five working days and advise you of the name and title of the person who is handing your complaint.

   We will deal with your complaint as quickly as possible and aim to provide you with a formal response within twenty working days of receipt of the complaint. If compensation or redress is appropriate we will provide details with our response. If we feel your complaint is not justified full reasons for our decision will be provided to you.

   If we are unable to resolve your complaint within twenty working days we will write to you and explain why we have been unable to resolve the issue. We will also advise you when you can expect to receive our final response.

b. If you are not satisfied with the result of Gable's internal complaints procedure we will give you our final response so that you can, if you wish, refer the matter to the Financial Market Authority Liechtenstein, Holy Cross 8, P.O. Box 684, Li-9490 Vaduz, Principality of Liechtenstein. Tel: +423 236 7373, Fax: +423 236 7374 or Email: info@fma-li.li

Premium Payable

The total premium payable is as per the quotation provided which is attached to this document. Insurance Premium Tax at the rate of 5 per cent, which is imposed by HM Government, is compulsory and payable in addition to the insurance premium shown. Any

policy fees are separately shown on the insurance quotation; if they are applicable they are at a fixed rate of £50 per policy.

Free Legal Advice

Policyholders can obtain free legal advice on issues that may form the subject of a claim under the policy cover by calling the Gable help line on 0870 084 8220

Free Health & Safety Compliance System

Policyholders are entitled to access an internet based Risk Assessment and Training Software package including telephone support which is included in the cost of the insurance package. For further information please look at our website under risk management www.gableinsurance.com.

Compensation

Gable Limited is a member of the Financial Services Compensation Scheme. This provides compensation in case the company goes out of business or into liquidation and are unable to meet any valid claims under its policies. The first £2,000 of a claim is protected in full. Above this the threshold, a minimum of 90 per cent of the remainder of the claim will be met. Further information can be obtained from us or the Financial Services Authority.

APPENDIX 25

LATENT DEFECTS INSURANCE POLICY

LATENT DEFECTS INSURANCE

Policy Number .....

In the name of .....

And for use following issue of
Certificate of Intention No. .....

INFORMATION

The Insured is requested to read this Policy and, if it is incorrect, return it immediately for alteration. In all communications the Policy Number given in the Schedule should be quoted.

This Policy consist of the:

(i) Insurance Agreement—giving precise details of the cover subject to any variation by endorsement

(ii) Policy Exclusions—detailing exclusions which apply to the whole Policy

(iii) Special Policy Conditions—defining terms which apply to the whole Policy

(iv) Endorsements—detailing extensions or limitations to the whole Policy

(v) Schedule—describing who is insured at what Premises, the business carried on and the amounts insured

(vi) Attachments—Certificate(s) of Approval issued by the Inspection Service

Note

Alterations in cover after issue of this Policy will be confirmed by separate endorsements which you should file with the Policy. You should refer to these endorsements and the Policy to ascertain the precise details of cover currently in force.

Special note

This Policy is transferable to subsequent owners of the Premises insured but such owners or their Brokers should contact the Insurers to ensure that any change in use or occupancy of the Premises does not invalidate the Insurance.

Interpretation

Wherever the words "Insured" and "Insurers" appear in this Insurance they shall be deemed to read "Assumed" and "Underwriters" respectively.

DEFINITIONS

For the purposes of this Policy, the following definitions shall apply:

1. Insured

The person(s) named in the Schedule and their successors in title and assigns and such other persons as are described in the Schedule, to the extent of their respective rights and interests in the Premises specified in the Schedule.

2. The Premises

The whole and any and every part of the building and Building Works carried out thereto at the address stated in the Schedule and subject to the unqualified Certificate(s) of Approval issued by the Inspection Service as appointed by the Insurers, as attached to and forming an integral part of this Policy, comprising:

2.1 Structural Works

(i) All internal and external load-bearing structures essential to the stability or strength of the Premises including but not limited to foundations, columns, walls, floors, beams; and

(ii) All other works forming part of external walls and roofing but excluding moveable elements of external windows, doors, skylights and the like.

2.2 Other Works

All non load-bearing parts of the Premises including but not limited to electrical wiring and connections, equipment and fixtures for the collection and distribution of gas, water, heating and ventilation that are fixed to or incorporated in any part of the Structural Works referred to above: partitions, internal windows, plaster, tiling, floor coverings, doors, surface finishing and internal drains but excluding those parts defined in Paragraph 2.1 above as Structural Works.

All landlords' fixtures and fittings and all permanent mechanical and electrical apparatus required for the proper functioning of the Premises including boilers and similar plant as included in the Building Contract.

All external non-structural works owned by the Insured at the Premises within the perimeter fencing, including but not limited to pavements, cross-overs, paved areas, pedestrian and vehicular landscaping and all external drains, sewers, pipes, cables, wires and other service media.

3. Date(s) of Acceptance

The date(s) of issue by the Insured's Architect or Engineer of a Certificate of Practical Completion, provided that where the Building Contract provides for more than one Certificate of Practical Completion, acceptance shall take place in respect of each part of the Premises upon the issue of the Certificate of Practical Completion for that part of the Premises unless otherwise agreed.

4. Building Contract

The contract or contracts for the construction of the Premises.

5. Certificate(s) of Practical Completion

The Certificate(s) of Practical Completion confirming substantial completion of the Premises to be issued by the Insured's Architect or Engineer under the Building Contract.

6. Building Works

The Works to be carried out under the Building Contract.

7. Finishing Operations

Any operation carried out for the purposes of completing and finishing the Premises after the issue of the Certificate(s) of Practical Completion as provided for under the Building Contract.

8. Inspection Service

Persons retained by or agents of the Insurers, for providing such examinations of plans, bills of quantities and similar documentation, and such inspections of the Building Works as the Insurers shall require, and as provided for in the Certificate of Intention.

9. Latent Defect

Any defect in the Structural Works notified to the Insurers during the Period of Insurance which is attributable to:

(a) Defective design; or

(b) Defective workmanship; or

(c) Defective material(s),

which was/were undiscovered by the Insured at the date of issue of the Certificate(s) of Practical Completion.

10. Certificate of Intention

The Certificate issued by the Insurers before commencement of the Building Works containing the agreement of the Insurers' intention to provide the Insurance described in this Policy subject to the terms and conditions set out within the Certificate.

11. Certificate(s) of Approval

The Certificate(s) issued by the Inspection Service to the Insurers, prior to the Date of Inception of the Insurance, forming an integral part of the Policy document.

INSURING AGREEMENT

The Insurers agree to indemnify the Insured against the cost of repairing, replacing, renewing and/or strengthening the Premises following and consequent upon a Latent Defect, as defined hereinabove, causing physical damage or threat of imminent instability. Such physical damage or threat of imminent instability must be discovered and notified to Insurers during the Period of Insurance.

It is a condition of this Policy that such physical damage or threat of imminent instability must occur during the Period of Insurance provided herein.

In addition, the Insurers will pay within the Limit of Indemnity:

(i) the cost of demolition and/or the removal of debris reasonably incurred by the Insured in connection with the works of repairing, replacing, renewing and/or strengthening the Premises as a result of such physical damage or threat of imminent instability;

(ii) reasonable legal, professional or consultants' fees incurred by the Insured in connection with such physical damage or threat of imminent instability other than fees incurred solely for the purpose of preparing a claim hereunder;

(iii) such additional costs of repair or reinstatement following physical damage or threat of imminent instability arising out of alterations in design, use or application of improved materials, improved or altered methods of working or construction incurred solely and specifically in compliance with or consequent upon any building or other regulations under or if caused in pursuance of any Act of Parliament or with Bye-Laws of any Public or Local Authority. This does not include the costs of such Government or Local Authority requirements if notice thereof has been served before discovery and notification to Insurers of physical damage or threat of imminent instability. Moreover, this does not include additional costs of compliance with such Government or Local Authority requirements which relate to undamaged parts of the Premises;

(iv) the cost of repairing or replacing that part of the weatherproofing of the sloping roof of the Premises damaged by a Latent Defect in such weatherproofing;

(v) the cost of repairing or replacing those parts of the Premises damaged as a result of a Latent Defect in the weatherproofing of the sloping roof; A sloping roof is deemed herein to be a roof with a pitch of greater than 10 degrees.

(vi) the cost of repairing or replacing that part of the weatherproofing of the flat roof of the Premises damaged by a Latent Defect in such weatherproofing;

(vii) the cost or repairing of replacing those parts of the Premises damaged as a result of a Latent Defect in the weatherproofing of the flat roof;
A flat roof is deemed herein to be a roof with a pitch of less than 10 degrees.

(viii) the cost of repairing or replacing that part of the weatherproofing of the external walls of the Premises above ground level damaged by a Latent Defect in such weatherproofing;

(ix) the cost of repairing or replacing those parts of the Premises damaged as a result of a Latent Defect in the weatherproofing of the external walls of the Premises above ground level.

Date of Inception and Period of Insurance

From the date of commencement of this Insurance as specified in the Schedule to midnight ten years after such date provided that:

(a) the appropriate premiums specified in the Schedule hereto have been paid;

(b) the Certificate(s) of Practical Completion has/have been issued and received by the Insurers in accordance with Special Condition 1 and provided that the Certificate(s) of Approval has/have been issued to Insurers prior to such date of commencement.

The period of Insurance for weatherproofing of flat roofs shall be for four years with an option of a further five years' cover subject to inspection by the Inspection service and an Additional Premium at that time.

Limit of Indemnity

The liability of the Insurers shall not exceed in respect of each item which appears in the Schedule the Final Sum Insured shown in relation to that item in the Schedule or in the whole the Total Sum Insured shown in the Schedule for the Period of Insurance unless cover has been either increased or reinstated by endorsement and the appropriate Additional Premium paid excluding in respect of each and every claim the amount specified in the Schedule in accordance with Special Condition 10.

Total Sum Insured

The total amount shown in the Schedule adjusted in accordance with Special Condition 3 and Special Condition 5.

Average

The proportional reduction for under-insurance will only apply if the full replacement cost of the Premises calculated in the same manner as that specified for the Total Sum Insured exceeds the original Total Sum Insured increased by the percentage indexation factor specified in the Schedule over the period expired since inception of the Policy, to the date of notification of the claim. Should the proportional reduction for the under-insurance apply, the Insured shall only be entitled to recover such proportion of the said loss as the adjusted Total Sum Insured herein bears to the full replacement cost. Notwithstanding the foregoing, the Limit of Indemnity stated in the Schedule shall not be increased unless amended by the terms of Special Condition 5 of this Policy.

Provided that, where separate Certificates of Practical Completion are to be provided under the Building Contract and separate sums incurred are specified in the Schedule, these provisions will apply to each separate Total Provisional Sum Insured pending final adjustment as provided in Special Condition 3 when the Sums Insured will be aggregated.

EXCLUSIONS

A. This Policy does not cover any loss, destruction, damage or threat of imminent instability caused by or consequent upon:

1. any fault, defect, error or omission in the design, workmanship or materials of the Other Works;

2. any structural alterations, repairs, modifications or additions to the Premises during the Period of Insurance which materially affect the stability quality of the Premises unless the Insurers have been informed, the Policy endorsed, and any appropriate Additional Premium paid;

3. inadequate maintenance of the Structural Works or abnormal use of the Premises or the imposition of any load greater than that for which the structure of the Premises was designed or the use of the Premises for any purpose other than that for which they were designated as stated in the Schedule unless the Insurers have been informed, the Policy endorsed, and any appropriate Additional Premium paid;

4. inadequate maintenance of or abnormal use of the weatherproofing materials, or any structural alterations, repairs, modifications or finishing operations which materially affect the weatherproofing quality of the Premises;

5. the wilful acts or wilful omissions of the Insured;

6. any change in colour, texture, opacity or staining or other ageing process;

7. ionising radiations or contamination by radioactivity from any nuclear waste or from the combustion of nuclear fuel or the radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;

8. war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, revolution, rebellion, insurrection or military or usurped power, riot, civil commotion;

9. seepage of water into or humidity in the Premises below ground level which causes physical damage or threat of imminent instability to the Premises;

10. failure by the Insured or their Contractors or Agents to carry out the Finishing Operations remaining to be completed after the issue of the Certificate(s) of Practical Completion or to carry out Building Works which need to be performed on or in respect of the Premises together with any consequence of such failure in so far as these would materially affect the stability quality of the Premises;

11. substandard, unsatisfactory or subquality workmanship, design or materials notified to the Insurers by the Inspection Service and referred to in the Certificate(s) of Approval or the Certificate(s) of Practical Completion and not rectified by the Insured and subsequently approved by the Inspection Service;

12. subsidence, heave or landslip from any cause not related to a Latent Defect in the Structural Works;

13. defects which are the responsibility of the Insured's Architect or Engineers or the Building Contractor whether within the terms of the Building Contract for the Building Works or otherwise identified and notified to the Insured before issue of the Certificate(s) of Practical Completion unless rectified by the Insured and subsequently approved by the Inspection Service;

14. failure or omission of the Insured to commence or substantially undertake the repair or reinstatement of damage for which indemnity is recoverable hereunder within a reasonable period of time or such other period of time as may be agreed by the Insurers unless the delay is due to reasons beyond the Insured's control.

B. This Policy does not cover any loss of rent, or any other consequential or economic loss associated with a Latent Defect in the Structural Works of the Premises.

SPECIAL POLICY CONDITIONS

1. Duties of the Insured

(i) To supply the Insurers with a copy of the Certificate(s) of Practical Completion within one month of the date of such Certificate(s);

(ii) At their own expense, or through tenants, to take all reasonable precautions to prevent loss or damage to the Premises and shall comply with Building or other regulations under or framed in pursuance of any Act of Parliament or with Bye-Laws of any Public or Local Authority which relate to the physical condition of the Premises;

(iii) Not to enter into or permit any agreement, lease or contract with any person or persons involved to any extent whether directly or indirectly in the design, materials or construction of the insured Premises which would materially limit or curtail the Insurers' rights or entitlements to the extent of Insurance provided herein.

2. Claims Procedures and Requirements

(a) On discovery of physical damage or threat of imminent instability which may give rise to a claim hereunder or the happening of any damage not insured hereunder but which may threaten the stability of the Structural Works, the Insured will at their own expense:

(i) give written notice to the Insurers as soon as possible;

(ii) take all reasonable precautions to prevent further damage;

(iii) within 60 days of such discovery submit in writing full details then available to the Insurers;

(iv) supply, or, to the extent this is possible, assist in procuring all reports, certificates, plans, specifications, bills of quantities, information and assistance as may reasonably be required by the Insurers.

(b) The Insured will allow the Insurers and/or their agents access to the Premises at all reasonable times.

3. Premium Payments

The premium due hereon at Inception of the Period of Insurance is that calculated on the Total Provisional Sum Insured as stated in the Certificate of Intention less the deposit premiums paid.

Within three months of the Date of Inception (or such later date as may be agreed), the Insured must submit to the Insurers, the final amounts for the Total Sum Insured. Any Additional Premium due must be paid to the Insurers within 30 days of notification of the amount due.

All Additional Premiums for modifications, alterations or extensions of the Policy must be paid to the Insurers within 30 days of notification of the amount due.

4. Basis of Loss Settlement

On the discovery of a Latent Defect causing:

(i) physical damage to the Premises, the basis of settlement of the claim shall be the cost of repairing, replacing, renewing and/or strengthening of the Premises to a condition substantially the same as but not better than or more extensive than its condition when new;

(ii) the threat of imminent instability, the basis of settlement of the claim shall be the costs incurred by way of any remedial works indemnified by this Policy to the Premises within the Period of Insurance,

however, only to the extent the costs claimed had to be borne by the Insured and to the extent they are included in the Sums Insured and provided always that the provisions and conditions of this Insurance have been complied with.

The cost of any provisional repairs will be borne by the Insurers if such repairs constitute part of the final repairs and do not increase the total repair expenses.

The cost of any alternations, additions and/or improvements shall not be recoverable under this Policy except as provided for within the provisions of Clause (iii) of the Insuring Agreement.

5. Mid-Term Alteration

The Insured may, from time to time, request an increase in the Total Sum Insured stated in the Schedule by written application to the Insurers and if the increase is accepted, cover will commence upon payment of such Additional Premium as the Insurers may require.

Before agreement to such increases, the Insurers have the right to request the Insured to arrange an examination of the Premises by the Inspection Service at the Insured's own expense.

6. Fraudulent Acts

If any claim is fraudulent or if any fraudulent means or devices be used by the Insured or any person acting on behalf of the Insured and entitled to receive any part of the proceeds of Insurance hereunder in order to obtain any benefit under this Policy or if any damage be occasioned by the wilful act of or with the connivance of the Insured, all benefit under this Policy will be forfeited.

7. Change in Risk

If any material change shall occur varying any of the circumstances disclosed to or known to the Insurers whether occurring before or after the Date of Inception of this Policy which, had

it been known to Insurers would have influenced their acceptance of the risk or the premium at which they would have accepted it, the Insured shall immediately give notice to Insurers of such change with full particulars thereof and the Insurers shall have the right to vary the terms of the Policy or to cancel the Policy.

8. Arbitration

If any difference shall arise as to the amount to be paid under this Policy (liability being otherwise admitted), such difference shall be referred to an Arbitrator to be appointed by the parties in accordance with the provisions of the Arbitration Acts 1950, 1975 and 1979 and any other statutory modifications or re-enactment thereof for the time being in force. Where any difference is by this Condition to be referred to Arbitration, the making of an award shall be a condition precedent to any right of action against the Insurers.

9. Non-contribution

The Insurers will not be liable for any loss, destruction or damage insured by any other policy in the name of the Insured except in respect of any excess beyond the amount that would have been payable under such policy or policies had this Insurance not been effected.

10. Deductible amount

The deductible amount is that part of the risk insured which remains at the Insured's own expense and the said amount will be applied to each and every claim after the application of Average where appropriate and not to the aggregate of claims occurring during the Period of Insurance.

No insurance may be contracted to cover the deductible amount without the prior agreement of the Insurers.

11. Subrogation

Any Insured making a claim under this Policy will at the request and at the expense of the Insurers do and concur in doing and permit to be done all such acts and things as may be necessary or reasonably required by the Insurers for the purpose of enforcing any rights and remedies or of obtaining relief or indemnity from other parties to which the Insurers will be or would become entitled or subrogated upon their paying for or making good any destruction or damage under this Policy whether such acts and things will be or become necessary or required before or after indemnification of the Insured by the Insurers.

12. Misdescription, Error or Omission

The Policy will be voidable in the event of misrepresentation, misdescription, error, omission or non-disclosure by the Insured with intention to defraud.

13. Reinstatement

The Total Sum Insured is reduced by the amount of each and every loss in excess of the deductible from the date of first notification of each and every claim to the Insurers.

The Insured have the option, subject to agreement of the Insurers, to reinstate the Total Sum Insured on payment of the appropriate Additional Premium.

14. Governing Law and Jurisdiction

It is hereby agreed that this Policy shall be governed by and construed in accordance with English Law and the English Courts shall have exclusive jurisdiction in any dispute arising hereunder.

15. Assignment

The Insured shall not assign this Policy without the prior consent in writing of the Insurers, such consent not to be unreasonably withheld, and at the same time as any permitted assignment, the Insured shall assign to the assignee of the Policy all their rights, title and interest in and to contracts in respect of the design and construction of the Building Works.

SCHEDULE

Policy Number

Date of Proposal

Broker

The Insured

Name .....
Interest in the Premises.....

The Premises

Type of Structure

Occupation of and Use of the Premises

Provisional Sums Insured

Item 1. Structural works	£
Item 2. Other Works	£
Item 3. Cost of demolition and/or removal of debris	£
Item 4. Professional Fees	£
Total Provisional Sum Insured	£

Final Sums Insured

Item 1. Structural Works	£
Item 2. Other Works	£
Item 3. Cost of demolition and/or removal of debris	£
Item 4. Professional Fees	£
Total Sum Insured	£

Indexation

Annual Rate chosen for Average clause in Policy	%

Deductible amount £

Time Deductible for Weatherproofing £

Date of inception of the Policy £

Periods of Insurance £

(i) Structural Works, Other Works	10 years from .....
(ii) Weatherproofing of Sloping Roofs and External Walls	9 years from ..... after a time deductible of 1 year
(iii) Weatherproofing of Flat Roofs	4 years from ..... after a time deductible of 1 year
(iv) Weatherproofing Extension Period (subject to additional premium and inspection in .....)	of 5 years from ..... after a time deductible of 5 years

Premium

	Deposit	*Provisional on Acceptance*	*Final*
(i) Basic Cover	£	£	£
(ii) Weatherproofing of Sloping Roofs/External Walls	£	£	£
(iii) Weatherproofing of Flat Roofs	£	£	£
TOTAL			

CERTIFICATE OF APPROVAL OF BUILDING WORKS

Certificate of Approval of Building Works to be Covered by Latent Defects Insurance

We hereby certify that the undernoted Building Works have been the subject of the Inspection Service Survey as instructed by Insurers:

Project Name .....
Name of Premises .....
Address .....
Owner of Premises .....
Description .....
.....
.....
.....
.....
Insured Value .....
Extent of Inspection Service Survey .....

.....
.....
Number of Inspection Visits .....
Dates of Inspection Visits .....
We further certify that in our opinion the completed Building Works present a normal risk for the Insurers of a Latent Defects Insurance Policy on the above Premises.
We further certify that in our opinion the completed Building Works are generally satisfactory but that we have the following reservations:
.....
With the exception of defects in or arising from the elements listed above we consider that the remainder of the Building Works present a normal risk for the Insurers providing a Latent Defects Insurance Policy on the above Premises.
Name of Inspection Service .....
Inspection Engineer .....
Date .....

APPENDIX 26

LATENT DEFECTS INSURANCE PROPOSAL FORM

PROPOSAL FORM FOR LATENT DEFECTS INSURANCE

1.1 General Information.....

1.2 Name of Insured(s) .....
.....

1.3 Location of Premises.....
.....

2.1 Is the insured to be any of the following? (Please tick where relevant)
Future Owner of Building
The Contractor for the Building
The Architect
The Consulting Engineer
Future Occupier of Building
Any Other (Please specify)

2.2 Is there a financial relationship through ownership or shareholding between the insured and any of following?
(Please tick where relevant)
The Architect
The Consulting Engineer
The Property Developer
The Project Manager
The Main Contractor

2.3 What is the form of contract used by the following? (Please tick where relevant)
Architect..... Fixed Price ..... Under Seal .....
Consulting Engineer..... Fixed Price ..... Under Seal .....
Property Developer ..... Fixed Price ..... Under Seal .....
Project Manager ..... Fixed Price ..... Under Seal .....
Main Contractor..... Fixed Price ..... Under Seal .....

2.4 Please state, where applicable, the names of the following:
Architect .....
Consulting Engineer.....
Property Developer .....
Project Manager.....
Main Contractor .....

2.5 Please supply on separate sheet the contractual obligations owed by the Contractor(s) to the Owner(s) under the terms of the Latent Defects Agreement or similar clauses within the Building Works Contract for the period post completion of the building works.

2.6 Type of Building Works Contract (Please tick where relevant)
ICE ..... RIBA ..... Fixed Price .....
Other ..... in which case please specify .....
.....

3.1 Technical Information

Please give a brief description of:
3.1.1 The structure .....
3.1.2 The foundations .....
3.1.3 The roof (including extent of flat roofs) .....
3.1.4 The external walls (including cladding) .....
3.1.5 Number of basement levels .....
3.1.6 Number of floors above ground level .....
3.1.7 Ground water level/level of foundations/lowest level of occupation or use .....
3.1.8 Site history (reclaimed land, mining, subsidence, fill, etc.) .....
3.1.9 Are any of the following to be incorporated in building works? (Please tick where relevant)

Chimney	Exhibition Hall	Warehouse .....
Hangar	Storage Tanks	Silos .....
Swimming Pool	Water Tower	Car Parking at
	Road	Roof Level .....

Vehicle or Pedestrian Bridge .....
Pedestrian Walkways at Roof Level .....
Existing Party Walls ..... Existing Foundations .....
Existing Columns or Beams ..... Existing Buildings .....

3.2 Has there been a soil/geological survey and if so by whom? .....
3.2.1 Building works period .....
Expected date of start of demolition .....
Expected date of start of building works .....
Expected date of completion of building works .....
3.2.2 Premises to be insured
3.2.2.1 Total *estimated* value of the contract at the end of construction .....
3.2.2.2 Breakdown of total *estimated* contract value at the end of construction:

(a) Structural works
(b) Other works
(c) Cost of demolition and removal of debris (max 5 per cent of (a), (b) above)
(d) Professional fees (max 10 per cent of (a) and (b) above)

3.2.3 Inspection service survey
The inspection service survey of plans and work on site is an integral part of this insurance policy. A reputable group of engineers will be sub-contracted to undertake such work and their name and cost will be communicated at the same time as the insurance quotation(s).

3.2.4 Insurance requirements
3.2.4.1 Deductible (each and every loss) £ .....
3.2.4.2 Indexation for inflation for the application of average 0 per cent, 5 per cent, 10 per cent.
3.2.4.3 Waiver of rights of subrogation
Should the Insured wish to waive rights against other parties his broker or insurance agent should be consulted.

4.1 Attached technical documents
4.1.1 Plans and cross sections of the Building Works to be insured YES/NO
4.1.2 Soils Report YES/NO
4.1.3 An inspection services preliminary report on design and proposed methods of construction YES/NO

I, (we), the undersigned, certify that all answers to this questionnaire are complete and true and that to my (our) knowledge no information relating to the nature of the risk has been voluntarily withheld or omitted.
Drawn up in..... on .....
(Signature) .....
Name .....
Position in Company .....

APPENDIX

Definitions

(a) Structural Works

(i) All internal and external load-bearing structures essential to the stability or strength of the Premises including but not limited to foundations, columns, walls, floors, beams and
(ii) All other works forming part of external walls and roofing but excluding moveable elements of external windows, doors, skylights and the like.

(b) Other Works

All non-load bearing parts of the Premises including but not limited to electrical wiring and connections, equipment and fixtures to electrical wiring and connections, equipment and fixtures for the collection and distribution of gas, water, heating and ventilation that are fixed to or incorporated in any part of the Structural Works referred to above: partitions, internal windows, plaster, tiling, floor coverings, doors, surface finishing and internal drains, but excluding those parts defined in paragraph (a) above as Structural Works.

All landlords' fixtures and fittings and all permanent mechanical and electrical apparatus required for the proper functioning of the premises including boilers and similar plant as included in the Building Contract.

All external non-structural works owned by the Insured at the Premises within the perimeter fencing including but not limited to pavements, cross-overs, paved areas, pedestrian

and vehicular landscaping and all external drains, sewers, pipes, cables, wires and other service media.

(c) Demolition and Debris Removal

Estimate of the cost of demolition and the removal of debris reasonably incurred by the Insured following damage, not exceeding 5 per cent of (a) and (b) above.

(d) Professional Fees

All legal, professional and consultants' fees incurred by the Insured in connection with the above, not exceeding 10 per cent of (a) and (b) above.

APPENDIX 27

ANNEX GUIDANCE NOTE

1 STANDARD REQUIRED INSURANCE SCHEDULE

Standard Required Insurance Schedule (Schedule [ ] Required Insurances)

This is Schedule [] comprising the Required Insurances referred to in the Contract for [ ] between:

[Authority/Trust]
–And–
[Contractor]

This Schedule [] comprises five Parts—

PART 1: Policies to be taken out by the Contractor and maintained during the [design and construction phase]
PART 2: Policies to be taken out by the Contractor and maintained during the Service Period
PART 3: Endorsements
PART 4: Broker's Letter of Undertaking
PART 5: Definitions

PART 1

Policies to be taken out by the Contractor and maintained during the [design and construction phase].

Common to each policy in Part 1 (unless stated otherwise):

Insureds:—

1. Authority/Trust.
2. Contractor.
3. Construction Sub-Contractor.
4. [Operating Sub-Contractor].
5. Construction sub-contractors of any tier.
6. Senior Lenders.
7. Subordinated Lenders.
8. Consultants—for their site activities only.

each for their respective rights and interests in the Project.

1. CONTRACTORS' 'ALL RISKS' INSURANCE (CAR)

1.1 Insured Property

The permanent and temporary works, materials [(including but not limited to equipment supplied by the Authority/Trust)][1], goods, plant and equipment for incorporation in the

1. Include as appropriate as this is project specific.

works (other than constructional plant, tools, accommodation and equipment belonging to or the responsibility of the Construction Sub-Contractor or the Construction Sub-Contractor's sub-contractors) and all other property used or for use in connection with works associated with the Project.

1.2 Coverage

"All risks" of physical loss or damage to the Insured Property unless otherwise excluded.

1.3 Sum Insured

At all times an amount not less than the full reinstatement or replacement value of the Insured Property, but not less than the value specified in the building contract plus provision to include extensions as appropriate[2].

1.4 Maximum Deductible

£ [ ]

1.5 Territorial Limits

United Kingdom including offsite storage and during inland transit.

1.6 Period of Insurance

From the date of the Contract until the Service Commencement Date and thereafter in respect of defects liability until expiry of the [12] months defects liability period.

1.7 Cover Features & Extensions[3]

1. Terrorism.[4] [5]
2. Munitions of war clause.
3. Additional costs of completion clause.
4. Professional fees clause.
5. Debris removal clause.
6. 72 hour clause.
7. European Union local authorities clause.

2. For certain projects where a total loss is inconceivable (e.g. road and rail) the sum insured could correspond to the Estimated Maximum Loss (ABI definition), rather than the full reinstatement value.

3. Additional Cover Features & Extensions may be appropriate for certain projects.

4. For certain projects where there is only a very remote likelihood of the risk materialising, and the probable impact of any such loss is perceived as being very low, e.g. street lighting projects, an Authority may elect not to include this extension as a Required Insurance.

5. For projects in England, Scotland and Wales the majority of this cover is typically provided by the Government-backed market mutual reinsurer: "Pool RE": Pool RE does not provide protection for projects in Northern Ireland. However under the provisions of the Criminal Damage (Compensation) Northern Ireland Order 1977, these projects will instead benefit from compensation provided by the Northern Ireland Office (see SoPCNI Section 24.3). (Note: This does not preclude use of commercial insurance should it become available).

8. Free issue materials clause.
9. [10] per cent escalation clause.
10. Automatic reinstatement of sum insured clause.
11. Loss minimisation.

1.8 Principal Exclusions

1. War and related perils (UK market agreed wording).
2. Nuclear/radioactive risks (UK market agreed wording).
3. Pressure waves caused by aircraft and other aerial devices traveling at sonic or supersonic speeds.
4. Wear, tear and gradual deterioration.
5. Consequential financial losses.
6. Cyber risks.
7. Inventory losses, fraud and employee dishonesty.

2. DELAY IN START UP INSURANCE (DSU)

2.1 Insureds

1. Contractor.
2. Senior Lenders.
3. Subordinated Lenders.
4. Authority/Trust[6].

each for their respective rights and interests in the Project.

2.2 Indemnity

In respect of:

1. loss of anticipated Revenue during at least the Minimum Indemnity Period arising from a delay in completion of the Project as a result of loss or damage covered under the Contractors' All Risks' Insurance effected in accordance with Item 1 of Part 1 of this Schedule, including physical loss or damage which would be indemnifiable but for the application of any deductible;
2. the economic additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing the loss of Revenue of the Contractor which without such expenditure would have taken place, during the Minimum Indemnity Period.

2.3 Sum Insured

An amount sufficient to cover the sums the subject of the Indemnity for the Minimum Indemnity Period.[7]

6. The Authority/Trust should be named as a co-insured party to the extent that it has a demonstrable insurable interest. This will be in connection with any additional cost of working Insured against under the terms of the policy, and not with respect to any loss of anticipated Revenue.

7. For certain projects where a total interruption to the operation of the project is inconceivable (e.g. multiple sites), a sum insured which is lower than the theoretical maximum loss of Revenue may be appropriate.

2.4 Maximum Excess

[ ] days.

2.4 Minimum Indemnity Period

[12] months.

2.6 Period of Insurance

As per the Contractors' "All Risks" Insurance, excluding the defects liability period.

2.7 Cover Features & Extensions[8]

1. Denial of access.
2. Utilities.
3. Terrorism.[9] [10]
4. Automatic Reinstatement of sum insured.
5. Professional Fees.

2.8 Principal Exclusions

1. The exclusions under the Contractors' "All Risks" Insurance, other than for consequential financial losses.
2. Delayed response by a public body or state authority.

3. CONSTRUCTION THIRD PARTY LIABILITY INSURANCE[11]

3.1 Interest

To indemnify the Insured in respect of all sums that they may become legally liable[12] to pay (including claimant's costs and expenses) as damages in respect of accidental:

(a) death, or bodily injury, illness, death, disease contracted by any person;
(b) loss or damage to property;
(c) interference to property or any easement right of air, light, water or way or the enjoyment or use thereof by obstruction, trespass, nuisance, loss of amenities, or any like cause.

8. For certain projects additional Cover Features & Extensions may be appropriate e.g. suppliers extension for the premises of specified suppliers.

9. For certain projects where there is only a very remote likelihood of the risk materialising, and the probable impact of any such loss is perceived as being very low, e.g. street lighting projects, an Authority may elect not to include this extension as a Required Insurance.

10. For projects in England, Scotland and Wales the majority of this cover is typically provided by the Government-backed market mutual reinsurer: "Pool RE": Pool RE does not provide protection for projects in Northern Ireland. However, under the provisions of the Criminal Damage (Compensation) Northern Ireland Order 1977, these projects will instead benefit from compensation provided by the Northern Ireland Office (see SoPCNI Section 24.3). (Note: This does not preclude use of commercial insurance should it become available).

11. If possible, insurance should be placed on a losses occurring basis.

12. Cover should be for contractual liability, statutory liability and liability in tort.

happening during the Period of Insurance and arising out of or in connection with the Project.

3.2 Limit of Indemnity

Not less than £[ ]m[13] in respect of any one occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution liability.

3.3 Maximum Deductible

£[ ] for each and every occurrence of property damage. (Personal injury claims will be paid in full[14]).

3.4 Territorial Limits

UK [and elsewhere in the world in respect of non manual visits].

3.5 Jurisdiction

UK [and elsewhere in the world in respect of non manual visits].

3.6 Period of Insurance

As per the Contractors' "All Risks" Insurance, including the defects liability period.

3.7 Cover Features & Extensions[15]

1. Munitions of war.
2. Cross liability clause.
3. Contingent motor.
4. Legal defense costs.

3.8 Principal Exclusions

1. Liability for death, illness, death or bodily injury sustained by employees of the insured.
2. Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by legislation in respect of such vehicles.
3. Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the insured.
4. Liability in respect of loss or damage to property in the care, custody and control of the insured but this exclusion is not to apply to all property belonging to the Authority/ Trust which is in the care, custody and control of another Insured.

13. Limit should be determined by the Authority, in conjunction with its insurance adviser, taking into account the relevant circumstances of the project.

14. For certain projects an excess may apply to personal injury claims.

15. For certain projects, additional Cover Features & Extensions may need to be noted e.g. terrorism, legionella (for schools and hospitals) and liabilities arising from maintenance of site helipad (for hospitals).

5. Events more properly covered under a professional indemnity policy.
6. Liability arising from the ownership, possession or use of any aircraft or marine vessel.
7. Liability arising from seepage and pollution unless caused by a sudden, unintended and unexpected occurrence.
8. Losses indemnified under the CAR policy or DSU policy.

PART 2

Policies to be taken out by the Contractor and maintained during the Service Period.

Common to all policies in Part 2 (unless stated otherwise):

Insureds:—

1. Authority/Trust.
2. Contractor.
3. Operating Subcontractor.
4. Operating Sub-subcontractors.[16]
5. Senior Lenders.
6. Subordinated Lenders.

each for their respective rights and interests in the Project.

1. PROPERTY DAMAGE INSURANCE

1.1. Insured Property

The project assets which are the property of the Contractor or for which the Contractor may be responsible including but not limited to the new facilities.

1.2 Coverage

"All risks" of physical loss or damage to the Insured Property from any cause not excluded, including machinery breakdown and computer breakdown in respect of appropriate equipment[17].

1.3 Sum Insured

At all times an amount not less than the total reinstatement or replacement value of the Insured Property[18] plus provision to include other Principal Extensions as appropriate. (escalated periodically as appropriate)[19]

16. To the extent that their activities are required to be insured under contract.
17. For projects with large and expensive equipment/machinery (e.g. large hospital projects) a separate engineering policy may be required.
18. For certain projects, where a total loss is inconceivable (e.g. road and rail) the sum insured could correspond to the Estimated Maximum Loss, rather than the full reinstatement value.
19. It will be important for the parties to agree an appropriate method of escalation.

1.4 Maximum Deductible

£ [ ] each and every claim. (escalated periodically as appropriate)

1.5 Territorial Limits

United Kingdom

1.6 Period of Insurance

From the Service Commencement Date or as otherwise specified in the Contract for the duration of the Contract and renewable on an annual basis unless agreed otherwise by the Parties.

1.7 Cover Features & Extensions[20]

1. Terrorism.[21] [22]
2. Automatic reinstatement of sum insured.
3. Capital additions clause.
4. 72 hour clause
5. European Union local authorities clause.
6. Professional fees.
7. Debris removal.
8. Pollution and contamination to the Insured Property arising from an event which itself is not otherwise excluded.
9. Repair/reinstatement basis of claims settlement with cash option for non-reinstatement.

1.8 Principal Exclusions

1. War and related perils (UK market agreed wording).
2. Nuclear/radioactive risks (UK market agreed wording).
3. Pressure waves caused by aircraft and other aerial devices traveling at sonic or supersonic speeds.
4. Wear, tear and gradual deterioration.
5. Consequential financial losses.
6. Cyber risks.

20. For certain hospital projects additional Cover Features & Extensions should be noted, including cover for clean up costs necessarily incurred by the Insured as a result of the outbreak of any infectious or contagious disease, including but not limited to MRSA and Legionella.

21. For certain projects where there is only a very remote likelihood of the risk materialising, and the probable impact of any such loss is perceived as being very low, e.g. street lighting projects, an Authority may elect not to include this extension as a Required Insurance.

22. For projects in England, Scotland and Wales the majority of this cover is typically provided by the Government-backed market mutual reinsurer: "Pool RE": Pool RE does not provide protection for projects in Northern Ireland. However under the provisions of the Criminal Damage (Compensation) Northern Ireland Order 1977, there projects will instead benefit from compensation provided by the Northern Ireland Office (see SoPCNI Section 24.3). (Note: This does not preclude use of commercial insurance should it become available).

7. Losses recovered under the CAR policy.

2. BUSINESS INTERRUPTION INSURANCE[23]

2.1 Insureds

1. Contractor.
2. Senior Lenders.
3. Subordinated Lenders.
4. Authority/Trust.[24]

each for their respective rights and interests in the Project.

2.2 Indemnity

In respect of:

1. loss of anticipated Revenue during at least the Minimum Indemnity Period arising from an interruption or interference in the operation of the Project as a result of loss or damage covered under the Property Damage Insurance effected in accordance with paragraph 1 of Part 2 of this Schedule including physical loss or damage which would be indemnifiable but for the application of any deductible;
2. the economic additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing the loss of Revenue of the Contractor which without such expenditure would have taken place, during the Indemnity Period.

2.3 Sum Insured

An amount sufficient to cover the sums the subject of the Indemnity for the Minimum Indemnity Period.

2.4 Maximum Excess

[ ] days.

2.5 Minimum Indemnity Period

[12] months.

2.6 Period of Insurance

From the Service Commencement Date for the duration of the Contract and renewable on an annual basis unless agreed otherwise.

23. Not typically required for street-lighting projects.

24. The Authority/Trust should be named as a co-insured party to the extent that it has a demonstrable insurable interest. This will be in connection with any additional cost of working insured against under the terms of the policy, and not with respect to any loss of anticipated Revenue.

2.7 Cover Features & Extensions[25]

1. Denial of access.
2. Terrorism.[26] [27]
3. Utilities.
4. Accountants Clause.
5. Automatic reinstatement of sum insured.

2.8 Principal Exclusions

1. Financial losses.
2. Delayed response by a public body or state authority.

3. THIRD PARTY PUBLIC AND PRODUCTS LIABILITY INSURANCE[28]

3.1 Interest

To indemnify the Insured in respect of all sums that they may become legally liable[29] to pay (including claimant's costs and expenses) as damages in respect of accidental:

1. death, or bodily injury, illness, death, disease contracted by any person;
2. loss or damage to property;
3. interference to property or any easement right of air, light, water or way or the enjoyment or use thereof by obstruction, trespass, nuisance, loss of amenities, or any like cause.

happening during the period of insurance and arising out of or in connection with the Project and the provision of the Services.

3.2 Limit of Indemnity

Not less than £[ ]m[30] *(escalated periodically as appropriate)*[31] in respect of any one occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution and products liability.

25. For certain projects additional Cover Features & Extensions may be required: infectious disease, specified suppliers.

26. For projects in England, Scotland and Wales the majority of this cover is typically provided by the Government-backed market mutual reinsurer: "Pool RE". Pool RE does not provide protection for projects in Northern Ireland. However under the provisions of the Criminal Damage (Compensation) Northern Ireland Order 1977, these projects will instead benefit from compensation provided by the Northern Ireland Office (see SoPCNI Section 24.3). (Note: This does not preclude use of commercial insurance should it become available).

27. For certain projects where there is only a very remote likelihood of the risk materialising, and the probable impact of any such loss is perceived as being very low, e.g. street lighting projects, an Authority may elect not to include this extension as a Required Insurance.

28. Insurance should be maintained on a losses occurring basis.

29. Cover should be for contractual liability, statutory liability and liability in tort.

30. Limit should be determined by the Authority in conjunction with its insurance adviser, taking into account the relevant circumstances of the project.

31. It will be important for the parties to agree an appropriate method of escalation.

3.3 Maximum Deductible

£[ ] for each and every occurrence of property damage (escalated periodically as appropriate). (Personal injury claims will be paid in full).[32]

3.4 Territorial Limits

UK [and elsewhere in the world in respect of non manual visits].

3.5 Jurisdiction

UK [and elsewhere in the world in respect of non manual visits].

3.6 Period of Insurance

From Service Commencement Date or as otherwise specified in the Contract for the duration of the Contract and renewable on an annual basis unless agreed otherwise.

3.7 Cover Features & Extensions[33]

1. Munitions of war.
2. Cross liability clause.
3. Contingent motor.
4. Legal defense costs.

3.8 Principal Exclusions

1. Liability for death, illness, disease or bodily injury sustained by employees of the insured.
2. Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by legislation in respect of such vehicles.
3. Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the insured.
4. Liability in respect of loss or damage to property in the care, custody and control of the insured but this exclusion is not to apply to all property belonging to the Authority/Trust which is in the care, custody and control of another Insured Party.
5. Liability arising out of technical or professional advice (given for a fee) other than in respect of death or bodily injury to persons or damage to third party property.
6. Liability arising from the ownership, possession or use of any aircraft or marine vessel.
7. Liability arising from seepage and pollution unless caused by a sudden, unintended and unexpected occurrence.
8. Losses under the property damage policy or business interruption policy.

32. For certain projects an excess may apply to personal injury claims.
33. For certain projects, additional Cover Features & Extensions may be required e.g. legionella (for schools and hospitals), liabilities arising from maintenance of site helipad (for hospitals) and terrorism.

PART 3

Endorsements[34]

Unless the context otherwise requires defined terms set out in the following endorsements shall have the meaning set out in the Contract.

Endorsement 1

Cancellation

This policy shall not be cancelled or terminated before the original expiry date is to take effect except in respect of non-payment of premium.

The insurer shall by written notice advise the Authority:

(a) at least 30 days before any such cancellation or termination is to take effect;
(b) at least 30 days before any reduction in limits or coverage or any increase in deductibles is to take effect; and
(c) of any act or omission or any event of which the insurer has knowledge and which might invalidate or render unenforceable in whole or in part this policy.

Endorsement 2

Multiple Insured/Non-Vitiation Clause

Each of the parties comprising the insured shall for the purpose of this policy be considered a separate co-insured entity, insured on a composite basis, with the words "the insured" applying to each as if they were separately and individually insured provided that the total liability of the insurers under each Section of this policy to the insured collectively shall not (unless the policy specifically permits otherwise) exceed the limit of indemnity or amount stated to be insured under that Section or policy. Accordingly, the liability of the insurers under this policy to any one insured shall not be conditional upon the due observance and fulfilment by any other insured party of the terms and conditions of this policy or of any duties imposed upon that insured party relating thereto, and shall not be affected by any failure in such observance or fulfilment by any such other insured party.

It is understood and agreed that any payment or payments by insurers to any one or more of the insureds shall reduce, to the extent of that payment, insurers' liability to all such parties arising from any one event giving rise to a claim under this policy and (if applicable) in the aggregate.

Insurers shall be entitled to avoid liability to or (as may be appropriate) claim damages from any insured party in circumstances of fraud misrepresentation non-disclosure or material breach of warranty or condition of this policy (each referred to in this clause as a "Vitiating Act") committed by that insured party save where such misrepresentation non-disclosure or breach of warranty or condition was committed innocently and in good faith.

34. The endorsements in this Part 3 of Annex 1 is recommended drafting. Whilst the parties should endeavour to obtain cover in accordance with these wordings, if these are not in practice available, the parties should obtain the best terms reasonably available in the market at the time.

For the avoidance of doubt it is however agreed that a Vitiating Act committed by one insured party shall not prejudice the right to indemnity of any other insured who has an insurable interest and who has not committed the Vitiating Act.

Insurers hereby agree to waive all rights of subrogation and/or recourse which they may have or acquire against any insured party (together with their employees and agents) except where the rights of subrogation or recourse are acquired in consequence of a Vitiating Act in which circumstances insurers may enforce such rights against the insured responsible for the Vitiating Act notwithstanding the continuing or former status of the vitiating party as an insured.

Notwithstanding any other provision of this policy or any other document or any act and/or omission by any insured party insurers agree that:

(1) no party other than the Authority has any authority to make any warranty, disclosure or representation in connection with this policy on behalf of the Authority;
(2) where any warranty, disclosure or representation is required from the Authority in connection with this policy insurers will contact the Authority in writing (in accordance with Endorsement 3 to the Contract) and set out expressly the warranty, disclosure and/or representation required within a reasonable period of time from the Authority (regarding itself); and
(3) save as set out in a request from insurers to the Authority in accordance with (2) above, the Authority shall have no duty to disclose any fact or matter to insurers in connection with this policy save to the extent that for the Authority not to disclose a fact or matter would constitute fraudulent misrepresentation and/or fraudulent non-disclosure.

Endorsement 3

Communications

All notices or other communications under or in connection with this policy shall be given to each insured (and the Authority) in writing or by facsimile. Any such notice will be deemed to be given as follows:

(a) if in writing, when delivered;
(b) if by facsimile, when transmitted but only if, immediately after transmission, the sender's facsimile machine records a successful transmission has occurred.

The address and facsimile number of the Authority for all notices under or in connection with this policy are those notified from time to time by the Authority for this purpose to the Contractor at the relevant time. The initial address and facsimile number of the Authority are as follows:

1. The Authority:
   Address:
   Facsimile No: [ ]
   Attention: The Chief Executive from time to time of the Authority

It is further agreed that a notice of claim given by the Authority or any other insured shall in the absence of any manifest error be accepted by the insurer as a valid notification of a claim on behalf of all insureds.

Endorsement 4

Loss Payee (applicable only to the Physical Damage Policies)

Subject to the provision of Clause [24.5(b)] all proceeds of this policy shall be payable without deduction or set-off to the Joint Insurance Account.

Endorsement 5

Primary Insurance

It is expressly understood and agreed that this policy provides primary cover for the insured parties and that in the event of loss destruction damage or liability covered by this policy which is covered either in whole or in part under any other policy or policies of insurance effected by or on behalf of any of the insured parties the insurers will indemnify the insured parties as if such other policy or policies of insurance were not in force and the insurers waive their rights of recourse if any against the insurers of such other policy or policies of insurance.

Endorsement 6

Ringfencing

The level of any indemnity available to an insured party under this policy in relation to any claim(s) concerning the Project shall not be affected and/or reduced by any claim(s) unrelated to the Project.

PART 4

Chapter 2 Broker's Letter of Undertaking[35]

To: The Authority
Dear Sirs
Agreement dated[ ] entered into between [ ] Limited (the "Contractor") and [ ] (the "Authority") (the "Agreement")

We refer to the Agreement. Unless the context otherwise requires, terms defined in the Agreement shall have the same meaning in this letter.

We act as insurance broker to the Contractor in respect of the Required Insurances and in that capacity we confirm that the Required Insurances which are required to be procured pursuant to clause [ ] and schedule [ ] of the Agreement:

- where appropriate name you and such other persons as are required to be named pursuant to the Agreement for their respective interests;
- are, in our reasonable opinion as insurance brokers, as at today's date, in full force and effect in respect of all the matters specified in the Agreement; and that all premiums due

35. The wording in this Part 4 of Annex 1 is recommended drafting. If agreement to this wording is not in practice achievable, then the parties should agree the best terms reasonably available in the market at the time.

to date in respect of the Required Insurances are paid and the Required Insurances are, to the best of our knowledge and belief, placed with insurers which, as at the time of placement, are reputable and financially sound. We do not, however, make any representations regarding such insurers' current or future solvency or ability to pay claims; and that

- the endorsements set out in Part 3 to Schedule [ ] of the Agreement are as at today's date in full force and effect in respect of the Required Insurances.

We further confirm that the attached cover notes confirm this position.

Pursuant to instructions received from the Contractor and in consideration of your approving our appointment [or continuing appointment] as brokers in connection with the Required Insurances, we hereby undertake in respect of the interests of the Authority in relation to the Required Insurances:

Notification Obligations

- to notify you at least 30 (thirty) days prior to the expiry of any of the Required Insurances if we have not received instructions from the Contractor to negotiate renewal and in the event of our receiving instructions to renew, to advise you promptly of the details thereof;
- to notify you at least 30 (thirty) days prior to ceasing to act as brokers to the Contractor unless, due to circumstances beyond our control, we are unable to do so in which case we shall notify you as soon as practicable; and
- to pay into the Joint Insurance Account without set off or deduction of any kind for any reason all payments in respect of claims received by us from insurers in relation to the Required Insurances specified in Clause [25.5] of the Agreement.

Advisory Obligations

- to notify you promptly of any default in the payment of any premium for any of the Required Insurances;
- to notify you if any insurer cancels or gives notification of cancellation of any of the Required Insurances, at least 30 (thirty) days before such cancellation is to take effect or as soon as reasonably practicable in the event that notification of cancellation takes place less than 30 (thirty) days before it is to take effect;
- to notify you of any act or omission, breach or default of which we have knowledge which in our reasonable opinion may either invalidate or render unenforceable in whole or in part any of the Required Insurances or which may otherwise materially impact on the extent of cover provided under the Required Insurances; and
- to advise the Contractor of its duties of disclosure to insurers and to specifically advise upon:

  the facts, circumstances and beliefs that should generally be disclosed to insurers; and
  the obligation not to misrepresent any facts, matters or beliefs to insurers.

Disclosure Obligations

- to disclose to insurers all information made available to us from any source and any fact, change of circumstances or occurrence made known to us from any source which in our

reasonable opinion is material to the risks insured against under the Required Insurances and which properly should be disclosed to insurers as soon as practicable after we become aware of such information, fact, change of circumstance or occurrence whether prior to inception or renewal or otherwise; and

- to treat as confidential all information so marked or otherwise stated to be confidential and supplied to us by or on behalf of the Contractor or the Authority and not to disclose such information, without the prior written consent of the supplier, to any third party other than those persons who, in our reasonable opinion have a need to have access to such information from time to time, and for the purpose of disclosure to the insurers or their agents in respect of the Required Insurances in discharge of our obligation set out at Clause 4.3.1 of this letter. Our obligations of confidentiality shall not conflict with our duties owed to the Contractor and shall not apply to disclosure required by an order of a court of competent jurisdiction, or pursuant to any applicable law, governmental or regulatory authority having the force of law or to information which is in the public domain.

Administrative Obligations

- to hold copies of all documents relating to or evidencing the Required Insurances, including but without prejudice to the generality of the foregoing, insurance slips, contracts, policies, endorsements and copies of all documents evidencing renewal of the Required Insurances, payment of premiums and presentation and receipt of claims;
- to supply to the Authority and/or its insurance advisers (or the Authority's or its insurance advisers' authorised representatives) promptly on written request copies of the documents set out in Clause 4.4.1 of this letter, and to the extent available, to make available to such persons promptly upon the Authoritys' request the originals of such documents;
- to administer the payment of premiums due pursuant to the Required Insurances such that, in so far as we hold appropriate funds, all such premiums shall be paid to insurers in accordance with the terms of the Required Insurances;
- to administer the payment of claims from insurers in respect of the Insurances (the "Insurance Claims") including:

  negotiating settlement of Insurance Claims presented in respect of the Required Insurances;
  collating and presenting all information required by insurers in relation to Insurance Claims presented in respect of the Required Insurances, and
  insofar as it is relevant and practicable, liaising with and reporting to each Authority throughout the settlement, payment and administration of such Insurance Claims.

- to advise the Authority promptly upon receipt of notice of any material changes which we are instructed to make in the terms of the Required Insurances and which, if effected, in our opinion as Insurance Brokers would result in any material reduction in limits or coverage or in any increase in deductibles, exclusions or exceptions;
- to advise the Authority in advance of any change to the terms of, or any lapse, non-renewal and/or cancellation of any policy maintained in respect of the Required Insurances; and

- to use our reasonable endeavours to have endorsed on each and every policy evidencing the Required Insurances (when the same is issued) endorsements substantially in the form set out in Part 3 to Schedule [] of the Agreement.

Insurance Cost Reporting Procedures

- to prepare following request, at the expense of the Contractor, a Joint Insurance Cost Report on behalf of both the Contractor and the Authority in accordance with the Insurance Review Procedure as set forth in [Section 24.8] of the Agreement. We shall ensure that the information in the Joint Insurance Cost Report is fairly represented, based on the information available to us.[36]

Notification Details

Our obligations at Clause 4 of this letter to notify or inform you shall be discharged by providing the requisite information in hard copy to:

[ ] Authority

We shall supply further letters substantially in this form on renewal of each of the Required Insurances and shall supply copies of such letters to those parties identified to us by the Authority for such purposes.

Yours faithfully

For and on behalf of [Contractor's broker][37]

PART 5

Definitions

"Revenue" is defined as the projected Unavoidable Fixed Costs and Senior Debt Service Costs of the Contractor.
"Senior Debt Service Costs" shall mean interest and debt service costs incurred in respect of the Senior Financing Agreements less

(a) sums which are in arrears;
(b) all sums reserved by the Contractor and which the Contractor is entitled to use to make such payments, without breaching the Senior Financing Agreements.

"Unavoidable Fixed Costs" should mean the fixed costs incurred by the Contractor which first fall due for payment by the Contractor during the period of indemnity but excluding:—

(a) costs which could have reasonably been mitigated or avoided by the Contractor;
(b) payments to the Contractor's Associated Companies;

36. This provision under Clause 4.5 is Required Drafting and may not be altered.
37. The Contractor's broker may wish to limit its liability and include additional liability wording in the Broker's Letter of Undertaking. Whilst this is in principle acceptable, the Authority will need to check that (i) the scope of such additional wording is appropriate (e.g. does not extend to a limitation of liability for fraudulent acts), and (ii) the capped amount is set at a sufficiently high level.

(c) payments which are not entirely at arm's length;
(d) payments to holders of equity in the Contractor, Subordinated Lenders and any other financing costs other than Senior Debt Service Costs;
(e) indirect losses suffered or allegedly suffered by any person;
(f) fines, penalties or damages for unlawful acts, breaches of contract or other legal obligations;
(g) payments the Contractor can recover under contract or in respect of which the Contractor has a remedy against another person in respect of the same liability;
(h) payments to the extent that the Contractor has available to it

  (i) reserves which the Contractor can draw upon without breaching the Senior Financing Agreement;
  (ii) standby or contingent facilities or funds of Senior Debt or equity which the Contractor is entitled to have available;

(i) payments representing any profits of the Project (to the extent not already excluded in (e) above).

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(All references are to paragraph numbers.)