

CONSTRUCTION ALL RISKS: PUBLIC LIABILITY

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Construction All Risks – common sections

- **Section 1** – Contractor's All Risks – cover for the Works (possibly including plant, machinery and other equipment)
- **Section 2** – Consequential losses arising from delay to the Project and business interruption
- **Section 3** – Public Liability – damage and loss to **third party** property and personal injury

Coverage

- The potential liability to third parties is an important project risk that has the potential to hold up the project
- Despite the name of the overarching policy – the PLI will not cover “all risks”

Coverage

- **Restrictions on cover include:**
 - Liability imposed by law
 - Liability in respect of a particular project
 - Liability in respect of a particular type of business carried on by the insured (where you have an annual/open/floater policy)
- **Options for cover:**
 - Single project
 - All projects in a year – annual or open cover or floater

The Schedule

- The Schedule to the Policy will generally set out the key information, explaining how the policy is to operate:
 - Identity of the insurer
 - Scope of the building contract
 - Period of insurance
 - Limit of indemnity
 - Sum insured in respect of delay to the Project
 - Deposit premium

Rights of third parties

- Rights under the Contract (Rights of Third Parties) Act 1999 generally excluded
- Instead, dealt with by the Third Parties (Rights Against Insurers) Act 2010, which came into force on 1 August 2016.

Occurrence

- Occurrence - *“each and every occurrence or series of occurrences consequent upon or attributable to one source or original cause”*
- Each occurrence or series of occurrences will be attributable to one source or original cause
- Relevant to determination of the limit of indemnity available

Typical clause

“The Insurers will indemnify the Insured except as hereinafter provided in respect of all sums which the Insured shall become legally or contractually liable to pay in respect of or consequent upon:

(a) Personal Injury suffered by any person

(b) loss of or damage to property

occurring during the Period of Insurance anywhere within the Territorial Limits in connection with the [Business or the] Project [or the execution of the Contract].”

Personal Injury

“Bodily injury, death, disease, illness, disability, mental injury, shock, false arrest, discrimination, invasion of rights of privacy, detention, false imprisonment, false eviction, malicious prosecution, libel, slander and defamation of character, unintentional breach or infringement or unauthorised use of Intellectual Property Rights and Advertising Injury.”

Loss of or damage to property

- Loss of or damage to third parties' property resulting from the construction works
- Must be accidental to be covered
- Usually an exclusion to that effect if the word accidental is not used in the insuring clause

Accidental damage

- *Blue Circle Industries Plc v Ministry of Defence* [1999] Ch. 289; [1999] 2W.L.R. 295; [1998] 3 All E.R. 385 – damage was caused by the intermingling of plutonium
- *Mills (John) v Smith (Robert)* [1964] 1 Q.B. 30; [1963] 3W.L.R. 367; [1963] 2 All E.R. 1078 – settlement damage caused by encroachment of tree roots being accidental

Liability for tort and contract

- Liabilities normally covered are:
 - breaches of statutory duty
 - tortious claims or
 - cover for liability in contract that is co-extensive with duties that arise in tort

“Legally liable to pay”

- In *Tesco Stores Ltd [2008] EWCA Civ 362*, it was held that in the absence of clear express words in a public liability policy (or a section contained in a CAR policy), the insured is only afforded cover for liability in contract that is co-extensive with duties that arise in tort
- It is not afforded cover for liability in contract for pure economic loss
- Since damage is a pre-requisite of indemnity

Tesco Stores

“A public liability policy provides cover against liability to the public at large. By contrast private liability arises from contracts entered into between individuals. Public liability in this sense arises in tort; it does not and cannot arise in contract... . Of course it is not conclusive: The wording may extend cover to third party claims in contract even for pure economic loss although one would expect it to say so clearly and for such insurance to be described as contract liability, financial or consequential cover.”

In respect of ... or consequent on

- *“in respect of”* does not provide cover for all the consequences of damage to property
- it has a limiting effect on cover – to the direct or proximate consequences of damage
- secondary, indirect or more remote consequences are not covered

Tesco Stores Ltd; Horbury Building Systems Ltd; Rodan International Ltd

EXTENSIONS TO COVER APPLICABLE TO PUBLIC LIABILITY

Kort Egan

Extensions

- Often a section that lists a number of extensions that are applicable specifically to the third party liability section – extends the coverage beyond that set out in the core insuring clause;
- Extensions usually subject to the same terms, conditions and exclusions applicable to the third party liability section;
- Any money that is paid as a result of any of the extensions of cover will reduce the limit of indemnity unless the contrary is stated.

Self-standing or governed by the insuring clause

- *Mj Gleeson Group Plc v AXA Corporate Solutions Assurance SA*
- “This Section of the Policy extends to indemnify” vs “The Company will indemnify”
- The former indicates that the extension was not intended to be a self-standing insuring clause whereas the latter indicated that the extension was intended to be self-standing

Obstruction, nuisance etc

- If not generally provided, the third party liability section will often be extended to indemnify the insured against claims by third parties that have suffered personal injury or incurred loss or damage to property due, for example, to:
“[o]bstruction, loss of amenities, trespass nuisance or interference with any right of way light air or water or any like cause which results in the interference with any property of third parties or their employment or use or the value thereof other than that which is reasonably foreseeable as being inevitable having regard to the nature of work undertaken.”
- Significant proviso

Site visitors

- Extension normally provided to indemnify the insured against legal liability incurred as a result of visitors attending the site as part of the contract or to do works or

“[o]ther premises of the Insured in connection with ground breaking, topping out or other similar ceremonies and other invited visitors not directly involved in the execution or the performance of the contracts or works” in connection with the insured’s business or project

- Of real practical value as significant potential for claims from site visitors or visitors of the insured’s premises

Clause 6.5.1 - JCT SBCQ 2016

“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 effect and maintain 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: ”

- The clause is applicable if the Contract specifies that the Contractor is to take out a policy in the names of the Employer and the Contractor so as to indemnify the Employer against the matters described;
- The minimum amount of the indemnity must be stated in the contract;
- The Architect/Contract Administrator has to instruct the Contractor to take out the policy.

Clause 6.5.1 - JCT SBCQ 2016

- The clause is subject to a number of perils/exceptions in clauses 6.5.1.1-6.5.1.9 which the Contractor need not insure against for injury or damage caused to property belonging to third parties

"...excluding injury or damage:

6.5.1.1. for which the Contractor is liable under clause 6.2; or

6.5.1.2. which is attributable to errors or omissions in the designing of the Works; or

6.5.1.3. 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

6.5.1.4. (if Insurance Option C applies) which it is the responsibility of the Employer to insure under paragraph C.1 of Schedule 3; or

6.5.1.5. to the Works and Site materials except where the Practical Completion Certificate has been issued or in so far as any Section is the subject of a Section Completion Certificate... ."

Clause 6.5.1 - JCT SBCQ 2016

“...excluding injury or damage:

...

6.5.1.6. 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

6.5.1.7. which is directly or indirectly caused by or contributed to by or arises from the Excepted Risks; or

6.5.1.8. 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

6.5.1.9. 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.”

Clause 6.5.1 - JCT SBCQ 2016

- The purpose of the clause appears to be to provide the Employer with cover against claims arising in nuisance or specifically strict liability claims e.g. *Rylands v Fletcher*;
- Seems little cover left after the exceptions are taken into account;
- The residual value may well be that it gives the Employer the opportunity to request that the Contractor provide an indemnity in respect of a situation where neither the Employer nor the Contractor is liable for PI or damage to property caused to a third party due to nuisance or the rule in *Rylands*.

EXCLUSIONS TO PUBLIC LIABILITY

Michael Maris

Exclusions to the third party liability sections of CAR policies

- As already explained, CAR policies commonly insure not only the works performed by the contractor but also provide all the named parties with public liability cover in a separate section
- That section will usually contain several standard exclusion clauses that are common to liability policies generally

Exclusions to Public Liability Policies in the Construction Context

- Construction accidents often result in damage to third party property
- Contractors want to reallocate risk – but there are necessarily limitations to this
- Key feature of exclusions: they prevent the risk being assumed by the insurer moving beyond that which would ordinarily be encompassed in a public liability policy



Personal injury sustained by any person employed by the insured directly

- Typically the indemnity will exclude:

“Liability, death, illness, disease or bodily injury sustained by any person under a contract of employment or apprenticeship with the Insured directly arising out of or in the course of employment of such person in the service of the Insured”

Liability for or loss of or damage to property which is 'foreseeable'

- The insured will not be covered for loss of damage or property belonging to a third party which is 'foreseeable as being inevitable'

Loss of/damage to property in the care, custody or control of the insured, or loaned to the insured

- Clauses such as this are commonplace in the UK and international markets
- Purpose: explained in the Australian case of *Botany Fork & Crane Hire Pty Ltd v The New Zealand Insurance Co* (1993) 116 A.L.R.473

(1) English case law on 'custody or control'

Oei v Foster (formerly Crawford) and Eagle Star Insurance Co Ltd [1982] Lloyd's Rep.170

- Claimant was insured under householder's and owner's "all-in" policy
- Policy covered damage to property caused by C and the members of C's family, wherever damage was caused
- C and his wife moved into neighbour's house to look after his children
- Fire broke out as a result (it was alleged) of C's wife leaving cooking pot unattended
- Insurer sought to rely on 'custody and control' exclusion
- Court found that insurer could not rely on that exclusion, but permitted it to rely on another, separate exclusion

(2) English case law on 'custody or control'

Acergy Shipping Ltd v Société Bretonne de Réparation Navale SAS (The Acergy Falcon) [2011] EWHC 2490 (Comm)

- Claimant's ship being repaired in Defendant's dock
- D was cutting out/replacing main deck above the hold
- Fire broke out in the bottom of the hold, causing damage to hold and surrounding spaces
- Contract contained a series of indemnities providing that D would be liable if the property damaged was within its 'custody and care' at the time of the fire
- Court found in favour of D – the ship was not within its custody and care

Why is this exclusion clause relevant in the construction context?

- Very little English authority on the meaning and interpretation of such clauses, despite being widespread in third party liability sections
- Abundance of commonwealth authority involving 'custody and control' exclusion clauses in the construction context
- See, for example, the Canadian case of *Acadia Road Contractors Ltd v Canadian Surety Co* 81 D.L.R. (3d) 169
- Or the US case of *McCreary Roofing Co, Inc v The Northern Insurance Co of New York* 218 Pa. Super.193

Interpretation of 'care, custody and control'

Following principles could be considered as the starting point:

1. Real property is unlikely to fall within an insured's care, custody or control – as per *Oei*
2. Property must fall within exclusive possession of insured. If the Employer retains and exercises a right to access or use the property then it will not be within the insured's care, custody or control – as per *Acergy Shipping*
3. The fact that the insured's right to take decisions about property is limited in some material way will suggest that it is not within their care, custody or control – *Oei*
4. Arguably, the purpose of the insured's possession of the property must include its protection or preservation. This is supported by *Oei* but does not feature in the Court's reasoning in *Acergy Shipping*.

Liability arising from failure to perform the contract works

- The insured will generally not be covered for a failure to perform or complete the contract works
- This is because the insurer will not usually warrant the performance of the work done, products supplied or services provided

Damage to contract works

- A public liability policy may contain an exclusion for the contract works:

“The Insurer shall not be liable under this Policy for any claim in respect of the loss or damage to or the cost incurred by anyone in recalling removing repairing rectifying replacing or reapplying any contract works provided that after handover of any part of the contract works this exclusion shall only apply to the part of the contract works which is defective”

Damage during the defects liability period

- Following practical completion there will typically be a defects liability/rectification period of 6 months to 1 year
- Possession of the site will usually have reverted to the Employer, notwithstanding that (if properly notified) the main contractor will have to return to the site and carry out the remedial works
- This marks a shift in the contractor's interest in that the site is no longer under their control

Examples of other exclusion clauses

- Liability in respect of pre-determined penalties or liquidated damages
- Liability arising out of the failure of work done, products supplied or services provided by the insured
- Pollution exclusion
- Loss or damage to property arising from professional advice rendered for a fee

Thank you!

Any questions?

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