

PROPERTY



TECHNICAL UPDATE

Joint contracts
tribunal overview

Joint Contracts Tribunal Overview

Given the technicality of the Joint Contracts Tribunal (JCT) contracts, Sedgwick Legal Services considers what the potential implications are, and how they present in subrogated insurance claims.

What are JCT Contracts

The Joint Contracts Tribunal (“JCT”) was founded in 1931 by the Royal Institute of British Architects (RIBA) and produces standard forms of contract for the construction industry to facilitate the process of delivering a project.

A JCT contract will save time, minimize costs, allocate risk fairly and provide a dispute resolution mechanism.

The main parties to a JCT contract are the “Employer” who is often the developer or freehold owner of the property and the “Main Contractor” who is responsible for the works. There will be other parties involved such as consultants, architects and subcontractors.

The JCT contract will set out the roles and responsibilities of each party. There are provisions for insurance that focus on the Employers’ and Main Contractors’ liabilities.

In relation to insuring works, the parties will state the insurance option that is to apply in the Contract Particulars. The details of each insurance option are set out in Schedule 3 of a JCT Contract.

The parties will choose the insurance option that is most appropriate for the works as it will be maintained until the date of practical completion (or termination if earlier).

Insurance options

Option A – New Build – Contractor Insured

The Main Contractor must insure the works, including full reinstatement and site materials. If the Contract Particulars also include a percentage for professional fees, then that sum must be insured.

The policy must be a Joint Names Policy and the Main Contractor must obtain the approval of the Employer to the insurer being used.

Option B – New Build – Employer Insures

The Employer must take out a Joint Names All Risks Policy for the full reinstatement value of the works, including full reinstatement and site materials. If the Contract Particulars also include a percentage for professional fees, then that sum must be insured.

Option C – Existing Structures – Employer Insurers

This applies where the works are being carried out to an existing structure. The Employer must take out a Joint Names All Risks Policy for the existing structures for the costs of reinstatement, repair or replacement of loss or damage due to Specified Perils in respect of the works as well as covering the full reinstatement value of the works. This includes full reinstatement and site materials. If the Contract Particulars also include a percentage for professional fees, then that sum must be insured. An all-risks policy covers any physical loss or damage to the Works, whereas coverage for existing structures is only covered by Specified Perils.

The parties may agree to replace standard terms with a C.1 Replacement Schedule. Where a C.1 Replacement Schedule has been agreed upon in respect of the insurance by the Employer, note that the Main Contractor’s liability and indemnity under Clause 6.2 will be subject to any limitations or exclusions stated in the Replacement Schedule.

Rectification Period – “Defects Liability Period”

The defects liability period is now known as the rectification period.

It is a period specified within JCT contracts that begins on certification of practical completion and typically lasts six to twelve months.

During this period, the Employer reports any defects that arise to the contract administrator who decides whether they are defects or maintenance issues. If they are defects, then the Contractor will be notified and allowed to make good of the defects within a reasonable timeframe. Similarly, the Contractor may identify their own defects.

If the Contractor fails to make good of the defects within a reasonable time frame, they may then be in breach of contract and other Contractors may be appointed to rectify the defects.

After the rectification period, the Employer does not have a contractual right to insist that the Contractor rectifies any defect that is not notified during that period. The Employer would have to pursue a claim under the appropriate action i.e. breach of contract/negligence.

Insurance Claims

Where loss or damage occurs to the works or, site materials, or the existing structures are damaged by a risk covered under the policy this will give rise to an insurance claim.

A subrogated recovery claim may exist under breach of contract subject to exclusions. Limitation will run for six years for a standard contract or 12 years for a deed from the date of practical completion.

A subrogated recovery may also exist under the Defective Premises Act 1972. Limitation will run for six years from the date of practical completion.

Primary limitation for latent defects will run from completion albeit there is a further period of three years from date of knowledge.

Case Law

FM Conway Ltd v Rugby Football Union [2023]

In this case, a policy was taken out by FM Conway (“the Employer”) under insurance Option C to cover RFU (“the Contractor”).

The insurance policy provided cover for “all other contractors and/or sub-contractors of any tier”.

A dispute arose as to whether the Employer could bring a claim against the Contractor although they were co-insured under the same policy.

The Court of Appeal held that the Employer’s claim was not barred and the Contractor could not benefit from an exemption of liability in respect of the damage that had occurred as the contract obliged the Employer to obtain Option C cover but nothing more.

In this case, the underlying construction contract made clear that it was not the party’s intention that the Contractor benefit from the policy, and did not require the employer to effect insurance on behalf of the Contractor in the event that the Contractor carried out defective work that needed to be rectified.

Haberdashers’ Aske’s Federation Trust Ltd v. Lakehouse Contracts Ltd [2018]

In this case, a fire was caused due to the negligence of a subcontractor. The contract between the Employer and Main Contractor provided that project insurance would be taken out by the Employer in the joint names of the Employer, Main Contractor and its subcontractors. However, the subcontract between the Main Contractor and the subcontractor expressly required the roofing subcontractor to indemnify the Main Contractor in respect of negligence and obliged the subcontractor to take out liability insurance.

The Court found that the subcontractor was not, therefore, an insured under the project policy because the subcontractor had agreed with the Main Contractor that it would have its own insurance.

Therefore, implied exclusion will be displaced where the express terms of a contract confirm that the parties intended one co-insured to remain liable.

Sub-Contractors

Under the insurance policy for the Works, the policy must either recognise sub-contractors as an insured or include a waiver by the insurers of any rights of subrogation that they may have for loss or damage caused by Specified Perils.

Collateral Warranty

A Collateral Warranty is an underlying contract that creates a link between the Employer and a Third Party who is not associated to the main JCT contract such as a sub-contractor, consultant or architect.

A Collateral Warranty will contain obligations such as ensuring that the works are carried out in a professional workmanlike manner, or that the materials are of an appropriate quality.

This contract will give the Employer contractual rights to claim against the Third Party in the event that they suffer a loss due to their actions. It is usually the Main Contractors responsibility to ensure that the Collateral Warranty is signed by any party that they introduce to the works.

Implications & Pitfalls

It is important to consider the particulars of the JCT contract. This includes the insurance option chosen, replacement schedules, collateral warranties and so forth as this will help to ascertain if a subrogated recovery is possible.

Developments

Currently the JCT 2024 edition is at Parliamentary reception and the main changes include:

- Modernising and streamlining the contracts by adopting gender neutral language and flexibility around the use of electronic notices.
- The introduction of The JCT Target Cost Contract (TCC) comprising the main contract, sub-contract, and guide.
- Legislative changes regarding the Building Safety Act 2022 and the Corporate Insolvency and Governance Act 2020; and
- Future proofing to reflect changes to the objectives of the Construction Playbook.

In summary

- The insurance option chosen for a JCT contract is very important as it affects the liabilities of the parties.
- The ability to bring a subrogated claim under a JCT contract depends on the insurance option chosen and its underlying factors.
- Having sight of all contracts at the outset of a claim is essential to correctly analyse contractual obligations.



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