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# JCT Insurance: the challenges of working in existing buildings

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# What we're going to cover

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My bit:

- What's the problem?
- Why is it a problem?
- The basics of liability and insurance, and the importance of understanding the difference

David's bit:

- Replacement C1 Schedule
- Subrogation waivers
- Different ways to cover off the risk

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# What's the problem?

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- JCT gives 3 insurance options - A, B and C. These affect not only insurance but also, in the case of Option C, liability.
- 2 types of insurance - the work itself (CAR) and the existing building
- Options A and B for 'New Buildings', 'C' for existing buildings. 'C' requires the Employer to insure for 'Specified Perils' (includes fire and flood)
- Liability and insurance are very different things. The JCT contract determines who is liable and the size of the 'liability bill'. The insurance contract says whether the pot of insurance money is big enough to pay that bill.
- Liability for damage to property is covered in clauses 6.2 and 6.3. Insurance in clause 6.4.

# What does JCT say about insurance and liability?



## **Contractor's liability – loss, injury or damage to property**

6.2 Subject to clause 6.3, 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 insofar 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 Contractor's Person.

## **Loss or damage to Existing Structures or their contents**

6.3.1 Where paragraph C1 of insurance Option C applies, the Contractor's liability and indemnity under clause 6.2 excludes any loss or damage to the Existing Structures or to any of their contents required to be insured under that option that is caused by any of the risks or perils required or agreed to be insured against under that option.

6.3.2 The exclusion in clause 6.3.1 shall apply notwithstanding that the loss or damage is or may be due in whole or in part to the negligence, breach of statutory duty, omission or default of the Contractor or any Contractor's Person.

...

## **Insurance against Personal Injury and Property Damage**

### **Contractor's Insurance of his liability**

6.4.1 Without limiting or affecting his indemnities to the Employer under clauses 6.1 and 6.2, the Contractor shall effect and maintain insurance in respect of claims arising out of the liabilities referred to in those clauses which:"

# What does this mean in practice?



- Option C is a 'joint names' policy meaning (1) the contractor is named on the policy (2) insurers cannot 'subrogate'.
- Tenants of buildings don't often insure the building – that's the landlord's job.
- Landlords and their insurers, not tenants, decide who gets named on the policy – a tenant may have no say in the matter. So, a tenant cannot agree Option C without the landlord and the insurers agreeing to put the contractor on the insurance.
- Contractors will push for Option C (for obvious reasons) and there can be a tendency for PMs to 'tick' Option C because the job is clearly not A or B (new build). PMs should be very wary of this.
- Ticking Option C affects liability even if the contractor is not named on the policy
- If a contractor agrees A or B when working in an existing building, the 'liability' under 6.2 is unlimited. Only Option C gives the 'get out of jail' card under 6.3.
- This is a summary of the problem, does David have answer?

# Summary of the main types of construction insurances

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## Employers Liability (EL)

Legal liability for death, injury or disease to "Employees"



## Construction 'All Risks' (CAR)

Covers physical loss or damage to the Works



## Existing Structure

Covers damage to the building being worked upon



## Third Party Liability (TPL)

Covers injury or damage (plus consequential losses) to Third Party Persons or Property



## Delay in Start Up (DSU)

Covers loss of rent/revenue due to delays covered under the CAR policy



## Professional Indemnity (PI)

Covers legally liability for neglect, errors or omissions or negligence in the carrying out of their professional activities and duties



## Latent Defects/Residential Warranty

Covers inherent defects during the 10 or 12 years post Practical Completion of the Works

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# JCT 2016 – Clause 6.7



- “Joint Names” cover for the Works (and Existing Structure (ES) /contents if applicable)
- Option A – New build where Contractor insures Works
- Option B – New build where Employer insures Works
- Option C – Alterations or Extensions where Employer insures Works & ES

6.7 and Schedule 3

~~Works insurance of the Works – Insurance Options applicable~~<sup>[22][24]</sup>

Where Insurance Option C applies, paragraph C.1<sup>[27]</sup>  
(Unless otherwise stated, paragraph C.1 applies. If it is not to apply, state the reference number and date or other identifier of the replacement document(s).)

Schedule 3:

- \* Insurance Option A applies/
- \* Insurance Option B applies/
- \* Insurance Option C applies
- \* applies/
- \* is replaced by the provisions of the following document(s)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
(the 'C.1 Replacement Schedule')

# Issues with traditional Option C

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The “Employer” will not (e.g. risk management) or cannot (e.g. they are a tenant) provide traditional Option C “Joint Names” cover

Therefore, what are the options:

1. The Contractor takes out the traditional Option C cover – can be problematic, requires consent and is potentially risky
2. The risk of damage to the Existing Structure is passed to the Contractor
3. The first £x million of damage to the Existing Structure is passed to the Contractor

Where 2 or 3 applies, it is not uncommon for the Contractor to take out a Project Specific Third Party Liability policy and pass on the cost of this to the Employer (rather than exposing their annual to what would otherwise be an Employer risk)



# Conclusion



- When undertaking a contract within/attaching to an Existing Structure, it is advisable to establish at an early stage where the risk for damage to the Existing Structure sits (esp. if the Employer does not own the building).
- If this does not happen:
  - the Contract could be delayed while risk allocation is agreed
  - there could be an unbudgeted cost to the contract or unpriced exposure to your Insurance
  - in the event of a loss, it could be unclear as to who is responsible for the damage

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- \* applies/
- \* is replaced by the provisions of the following document(s)

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(the 'C.1 Replacement Schedule')

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**Thank you**

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