

Option C insurance under JCT 2016 – not such a C change?



By way of a reminder, the JCT contracts have three ways of taking out appropriate insurances in relation to a development. Option A insurance is used in instances where a new building is to be constructed and where the contractor is required to take out all risks insurance for the works. Option B insurance is used in instances where the employer takes out such insurance. The post-2008 era has seen a big increase in large scale refurbishments rather than commencing entirely new developments and this brought into sharp focus the inadequacy of how the JCT dealt with Option C insurance arrangements (the insurance option to be used where works are being undertaken to an existing building).

Pre-2016 JCT Option C insurance required the employer to:

- take out and maintain a joint names policy (usually in the names of the employer and the contractor) in respect of the existing structures, under which the insurers have no right of recourse against either party. This policy should cover the costs of reinstatement, repair or replacement for any loss or damage caused by any 'Specified Perils'; and
- take out and maintain a joint names policy for the Works (ie an 'all risks' insurance policy).

This is still the case in the 2016 JCT, unless a 'C1 Replacement Schedule' is provided. This schedule gives parties the ability to adjust the default requirements and replace them with bespoke provisions to better reflect the position on the ground. This finally adds some flexibility to deal with the issue of taking out existing structures insurance if the party carrying out the works is not the building owner and therefore doesn't have existing structures insurance (for example, it is a tenant of a multi-storied building and it is the landlord's responsibility to take out buildings insurance).



However, make no mistake – this issue is still complicated. Even if the JCT has brought in some much needed flexibility on this point, there are a number of practical issues that can arise from the development of existing structures. In circumstances where the tenant is carrying out works and the landlord has existing buildings insurance, the landlord *may* be willing to let the employer/tenant and contractor be named on its insurance policy. Quite often it won't, however, particularly in larger buildings where the landlord will be concerned about the risk of a claim being made under the insurance policy and its insurance premium being increased in the future as a result. In much larger, multi-storied, multi-tenanted buildings, the landlord may (justifiably) not want the administrative burden of arranging each of the tenants' insurance arrangements.

One answer might be for the tenant to insure the entire structure itself. Whether or not this is a cost effective option is another matter. Where this isn't cost effective, discussions will need to be held between the contractor and the employer as to which party would be most appropriate to carry the risk for existing structures under the contract and whether a mixture of risk allocation can be reached. For example, sometimes contractors will have sufficient public liability insurance to cover the reinstatement of an entire building.

Note, however, that public liability insurance policies usually exclude loss caused by specific perils and so it may be that the employer can take out a specific insurance policy to cover its gap in protection on this matter. Whether the contractor's public liability policy also contains any additional exclusions that leave the employer exposed should also be reviewed. If the contractor does not have sufficient public liability insurance to cover the reinstatement of the entire building, the parties could also discuss whether the liability of the contractor could extend to a level which is acceptable to both parties.

The JCT (rightly) advises that insurance specialists are used when advising on whether or not the C1 Replacement Schedule is correct and adequately covers both parties in the event of damage giving rise to a claim under an insurance policy being incurred. It would also be appropriate in some circumstances to try to obtain written confirmation from the insurers that whatever hybrid structure is put in place the insurance policy covers the risks referred to in the Option C insurance requirements.

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