



Protecting The Developer's Interests

Project Specific Insurance Policies

The prudent developer, having arranged finance to undertake a building project, must always retain a commercial view. The vagaries of the property market aside, the management of financial risks is essential before and during the construction period to enable the developer to achieve his goal.

The developer will surround himself with a team of construction professionals, and ensure that proper contractual relationships are established with his advisers, the main contractors and specialist sub-contractors. Either through traditional forms, or under bespoke contracts, one feature will always be risk allocation between the stakeholders, ranging from: warranties in relation to standards of materials, workmanship and design; the care of the works during the course of the project; indemnities for damage to third party property or third party injury and the future of the development through the acquisition of collateral warranties. Through the contractual matrix, and the imposition of liquidated and ascertained damages, the developer will seek to protect himself against delays in completion of the work, with the consequent delay in the return from the capital investment.

Can the developer then sit back content in the knowledge that he has done all that he can to protect his position? Allied to the principle of risk allocation, is a requirement for stakeholders to arrange appropriate insurances. However the allocation of risk is achieved, the developer will find himself paying for the insurances: either because it is his responsibility to do so by arranging insurances for the works during the construction period, or because both main and sub-contractor arrange insurances and this is included in their preliminary charges. Reliance upon the operation of insurances taken out by others can be difficult, and there is no control upon the costs of the insurances by the developer.

Project specific policies have been developed to avoid complications which might otherwise arise from multi-party disputes/discussions, and to control costs. Such project insurances are by no



means new, and it is often the case that, amongst others, the employer, main contractor and sub-contractors in all tiers receive the benefit of both the cover arranged for the Contract Works themselves, and Third Party Liabilities. While it is not possible to insure against every eventuality, it is commonly held that, as far as is possible, this is the best means of protecting all of the stakeholders' interests.

In principle, project insurances work very well, and serve to simplify what could otherwise be a complicated analysis of risk and insurance responsibility between multiple parties. What could possibly go wrong?

While Insurers have accepted a premium to provide cover to a number of parties, often not specifically named on the policy schedule, it is frequently the case that in the event of a claim stakeholders may not have such full access to the insurance cover as might be suggested by the schedule. The case of *National Oil Well (UK) Ltd –v- Davy Offshore Ltd*, addressed, amongst other things, issues relating to co-insurance and the benefit of subrogation waivers. In brief, Mr Justice Coleman maintained that there had to be at least an implied authority from a low level stakeholder (a sub-contractor) for another higher level party (employer or main contractor) to insure on their behalf. The more recent case of *BP Exploration Operating Co Ltd –v- Kvaerner Oilfield Products Ltd and Others (2004)* reaffirmed the principle.

The authority to insure is best demonstrated through contract terms, and all of the recognised forms, i.e. JCT, NEC, etc, in their base form seek to allocate responsibility for certain risks and to determine with whom insurance responsibility rests. Take for example a new build project where the employer has taken on the responsibility to insure the works. Traditionally, under the JCT forms, the main contractor will be granted the benefit of the insurances to the extent of a traditional All Risks cover up to one of the specific terminal dates, i.e. determination of the contract, or sectional or practical completion. The intent is to pass on the “protection” of the main contract insurances for the same period to the sub-contractors, usually only to the extent of the specified or defined perils. The configuration of such contracts, therefore, fully supports the implied authority doctrine.



The project policy may provide additional cover and it would be quite normal for the Contract Works section to provide both the main contractor and sub-contractors with All Risks cover and further, for periods beyond the actual construction period, (as in certain circumstances, an indemnity will be provided for damage occurring in the maintenance and defects period). If, however, traditional contracts are unamended, it will be argued that a lower tier party gave no authority for the developer to insure such additional risks and therefore, the lower tier party's access to the project insurance would be in doubt and probably denied.

It is thus of paramount importance that the contract terms between stakeholders are amended from any standard forms to ensure that the cover purchased by the developer - and intended to be granted to other stakeholders - is properly passed down. This can be achieved through the amendment of standard clauses. While often the case that this is properly achieved in the main contract, main contractors often fail to adapt their standard sub-contract terms. When an insurance policy is needed most, this can lead to unnecessary difficulty and (potentially) additional costs when for example, repairs are delayed until the dispute over whether the sub-contractor has access to the policy is resolved.

The adaption of standard contract forms to reflect the intended insurance responsibilities must, therefore, be a feature in pre-works negotiations. It would be unfair to say that contract terms would be the exclusive means of demonstrating implied authority but contract amendments are safe, and enable an early agreement to be reached to the effect that all the contracting parties have the intended access to the project policy.

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