AN IMPROVED METHOD OF REQUESTING INSURANCE UNDER UK CONSTRUCTION CONTRACTS.

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DECLARATION

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ABSTRACT

From attending various seminars concerning insurance for the construction industry over the years it is apparent that architects, consultant structural engineers and quantity surveyors find themselves saddled with the responsibility of inspecting the contractors` insurances on behalf of their client, who commissions the work.

This comes about not so much by reason of a contractual term, although it can happen in that way, but more frequently because the private (as distinct from the commercial developer or local authority) employer looks to his construction professional to do this work for him. Because this professional knows more about the conventional insurance policies called for by the construction contract than his private client does, he finds it difficult to avoid this pitfall. The construction professional can disclaim liability or pass his client to an insurance professional to carry out this work. However, he tends to avoid this approach, partly because a disclaimer is possibly not acceptable to a fee-paying client, and partly because insurance is usually regarded as a peripheral matter and the insurance consultant would probably require a fee.

In these circumstances in the event of the employer, who commissions the work, suffering a loss which is not met by the contractors ` insurance (in accordance with the contract) the construction professional may find himself liable, or at least facing a claim, to meet the uninsured loss. The test the courts apply would be the standard applicable to an insurance professional, which the construction professional is not.

Therefore to assist him (and others who may be similarly responsible) the suggestion is made in this thesis that the construction contract should give more detail in the way of a policy operative clause and exclusions which the contract allows for the conventional policies usually required by construction contracts. This involves the contractors` all risks (CAR) policy covering the works, the employers' liability (EL) policy covering the liability for injury to the contractors` employees, and the public liability (PL) policy covering the liability to the public other than the contractors` employees.

The main U.K. construction contracts are considered in detail, together with their subsidiary contracts, requiring these conventional policies and a suggested wording is included. In the case of the JCT contract a CAR policy wording is already in existence following the 1986 amendment, and this wording is used in the other contracts. In the case of the liability policies (EL and PL) a wording is suggested for all the above mentioned construction contracts. Details are given of where and how all the wording used should be inserted for all contracts concerned except for the CAR policy in the JCT contract. Criticisms and alternative suggestions are considered with their advantages and disadvantages. Conclusions and recommendations are summarised.

CHAPTER 1

INTRODUCTION

In construction work the person acting for the individual, firm or company commissioning the work to be done is usually an architect or quantity surveyor for building work and a structural engineer for civil engineering work. These professionals not only decide the type of contract to be used but, among many other responsibilities, may determine whether the insurance policies, produced by the contractor, are in accordance with the contract requirements. Sometimes this agent of the employer having the work done, has to decide whether a particular type of insurance is required for the work concerned, as well as deciding whether the policy produced complies with the construction contract. Thus in the JCT Standard Form of Building Contract 1980 clause 21.2.1 provides for a special cover for the protection of the employer in certain circumstances and it is for the architect to give instructions concerning the taking out of this insurance.

Architects, quantity surveyors and engineers often complain that such specialised insurance work, coming outside their normal area of knowledge, should not fall on their shoulders. In practice they sometimes take the advice of an insurance broker specialising in the construction field. The fact remains that the insurances called for by the construction contract can still be the responsibility of the architect or engineer, usually as a volunteer and not by the terms of the contract,

even though the employer expressly accepts this responsibility under the contract.

The above statements are supported by extracts from the following relevant publications and legal judgments (full information of publications is given in the bibliography at the end of the thesis under authors` names arranged in alphabetical order chronologically for each author):

Madge, P. (1985), P.9.

> The aim of this book is to explain to architects, quantity surveyors, project managers and the like, the insurance principles and practices governing building contracts. They are frequently involved in insurances by being responsible for drafting insurance provisions into the building contract, checking the adequacy of the contractor's policies, agreeing premiums, explaining to the employer the insurance to be considered and often having to protect the employer's interests in the event of insurance claims. It is the author's experience, however, that not many of them would wish to claim any great insurance expertise. Indeed, it is often the opposite with many expressing the view that insurance is an area where they have no great wish to become too deeply involved. Unfortunately, involved they must be. The growing complexity of many building contracts often presents insurance problems. The high values at risk in many of today's contracts, plus the increasingly high awards of damages being made by the courts in liability claims, makes adequate insurance essential. The insurance provisions of building contracts is one of the architect's responsibilities, even though in relation to other matters it may be considered to be less important.

It is interesting to note how the responsibility for checking insurance cover has varied under the JCT contract over the last fifteen years or so, bearing in mind the tendency of architects and other construction professionals to use the edition with which they are familiar whether it is the current one or not. Prior to the 1980 edition clause19(1)(b) (dealing with the insurance against injury to persons and property) requires the

contractor, when required to do so by the architect, to produce for inspection by the employer documentary evidence that the insurances required were properly maintained and when required produce the policies and receipts in question, for inspection. Clause 20A concerning insurance of the works uses the same wording. The 1980 edition in clause 21, which took the place of clause 19 of the previous edition, requires the contractor, when required by the architect, to produce for inspection by the architect the insurance evidence etc. The insurance of the works clause 22A uses the same wording. In the 1980 edition following the 1986 amendment, the equivalent clauses make the employer responsible for inspection of these insurances. Consequently it depends on the edition and revision or amendment used as to whether the architect or employer is expressly responsible for inspection of the insurance required.

In Samuel Smith Old Brewery (Tadcaster) and Others v G S Cronk Builders (Tintern) Limited and Alan Miles (1982) the architect was sued by the employer under the pre-1980 edition of the JCT contract for inadequate design and supervision, and also for negligently approving the insurance documents purported to be produced by the contractor under clause 19(1)(b). The contractor, it was alleged, never obtained the required insurances set out in clause 19(1)(a). Consequently, it was alleged, the losses incurred by the plaintiffs were not recoverable under any insurance policy. Without going into further detail (other than to say that the plaintiffs only succeeded against the builder) it is clear that

whether the construction contract requires the professional, instructed by the employer, to inspect the insurance documents, or merely to be the intermediary in obtaining that evidence (but the latter assumes that inspection responsibility as a volunteer) there is always a danger that the employer will blame the professional for any insurance discrepancy. So it does not matter that the construction professional is not a party to the construction contract (although he is a party to his Conditions of Engagement, see later), nor does it matter that he is not expressly responsible for inspection of the contractor's insurances. The point is whether he voluntarily accepts that responsibility, and it appears that he often does so, as alleged in the Samuel Smith case. Another case showing the architect's liability for the insurance arrangements in a construction contract is Tomkinson & Sons Ltd and The Parochial Church Council of St Michael-in-the-Hamlet v Holford Associates (1990), which involved a judgment on a number of preliminary issues of which the insurance of the church organ was one. The contractor (Tomkinson) was responsible for carrying out work at the church and Holford Associates was the architect. The work consisted of three phases but the architect was only responsible for the second and third phases. The work for phase three involved the organ. This concerned the re-roofing of the north and south aisles of the church. The contractor cut a hole in the roof and during the night rainwater entered the building damaging the organ beyond economical repair. The church accused the contractor of negligence in failing to cover the hole. The organ was valued at over

£100,000. The contractor denied negligence and pleaded alternatively that clause 6.3B of the JCT Minor Works Contract applied. This clause reads as follows:

> The Works (and the existing structures together with the contents thereof owned by him and for which he is responsible) and all unfixed materials and goods intended for, delivered to, placed on or adjacent to the Works and intended therefore (except temporary buildings, plant, tools and equipment owned or hired by the contractor or any subcontractor) shall be at the sole risk of the employer as regards loss or damage by fire, lightning, explosion, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, earthquake, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion, and the employer shall maintain adequate insurance against that risk.

The church had taken out insurance but only for £10,000, plus a slight increase for inflation, which was paid by the insurers. Previous case law had established that the words "sole risk" meant that the employer was responsible even though the contractor was negligent. Thus the church should have insured against these perils adequately. Whether the loss was caused as alleged and, if so, whether by storm within the meaning of clause 6.3B, were not among the preliminary issues. One of the preliminary issues raised by the church was whether the architect was in breach of contract and/or negligent in failing to advise the church of the effect of clause 6.3B and that it should obtain adequate insurance to cover the risks. The judge decided that the architect was under a duty to advise the church to insure against the perils specified in clause 6.3B, and this he had not done. The church never had the opportunity to study in detail the JCT Minor Works Contract and thus had no opportunity to realise that the risk of damage to the contents of the church rested with it nor that it had an obligation to insure. Incidentally, at the main hearing of

this case it was decided that the rainwater damage was not storm damage and the contractors were liable to pay for it, but this does not detract from the points made above concerning architect's duties.

The quotation from Peter Madge's book set out earlier was written before the 1986 amendment to the main JCT contract was published. However, having spoken to this author on the point, the writer understands that he still feels his remarks are applicable. This view of this author is supported by the following statement he made when reviewing the Tomkinson case in the Architect's Journal of the 23rd January 1991 on page 54:

> Architects frequently tell me that they do not understand the indemnity and insurance clauses of the Standard JCT Forms of Contract. That I can understand and I sympathise with them, because they are often complicated, but unfortunately it is no excuse. The JCT contracts are complicated documents but if the architect is to advise on the correct form to use it presupposes that he has a knowledge of the contents.

The conclusion from these cases is that the construction professional can be alleged responsible in the first place to the employer for not obtaining and/or inspecting the contractor's insurances (the Samuel Smith case). Secondly, for failing to advise the employer when he is responsible for the insurances, and what perils are to be insured (the Tomkinson case).

The tendency of private employers is to look to their construction professional to approve the contractor's insurances, whatever the construction contract says, consequently this professional may become a volunteer, even if the contract refers to him as an intermediary, and the law does not regard volunteers sympathetically. Private employers are

those who do not regularly engage in construction work (unlike developers and local authorities), but probably only engage in such a contract once in a lifetime, eg the biscuit manufacturer who requires a new factory to be built. Consequently it is not surprising for the private employer (as defined above) to expect his construction professional, who is in contract with him, to give advice on the contractor's insurances. This professional knows more about the insurance cover required from the contractor than the employer does, although neither are insurance professionals. Furthermore, it is difficult when such pressure is put upon the construction professionals not to accept this responsibility, particularly as their employer client is paying their fee.

The usual terms of engagement for construction professionals are the Royal Institute of British Architects (RIBA) Conditions of Engagement for architects and the Association of Consulting Engineers (ACE) Conditions of Engagement for engineers. Outside this contractual area the leading case of Hedley Byrne & Co Ltd v Heller & Partners Ltd (1964) on liability for giving negligent advice depends on whether

(a) the loss to the claimant is economic and

(b) the loss is due to a careless statement and

(c) there is a special relationship between the parties.

The failure of the contractor's insurances to protect the employer in accordance with the construction contract may result in an economic loss to him. Thus it seems that whether the advisory work of the construction professional breaches his terms of engagement (and they

are commonly drafted in a vague manner referring, inter alia, to the supervision of the work in the client's interest and the administration of the contract according to its provisions) or is negligent, ie failure to exercise skill and care, there is a liability. In Tomkinson's case there was a breach of the terms of the engagement in failing to advise on the contract. In Smith's case the statement of claim does not give sufficient detail to decide how the architect came to approve policies which were not those required. The statement of claim was amended evidently omitting the insurance allegations as the judge in his judgment makes no mention of them. However, an expert witness for the insurers covering the architect, presumably against professional negligence, informed the writer that at the time of arranging the contract with G.S. Cronk (the builder) the architect was shown a number of documents from an insurer, a copy of a policy, copies of endorsements to the policy and he was shown a receipt for insurance premiums. This formed his check of the builders 19(1) insurance (against injury to persons and property), which it eventually transpired was not valid to cover third party property, which was damaged. Without details of the builder's insurers' reason for considering the policy invalid it is impossible to say whether the architect was in breach of his terms of engagement or otherwise negligent. Nevertheless, it appears that, as clause 19(1)(b) of the 1963 JCT contract 1977 revision, which was involved in this case, required the employer to inspect the insurance documents, the architect had taken over this task to his detriment.

In the Annexes to the Likierman Report on Professional Negligence the Construction Study Team in Annex B give a Summary of the Capper/Uff Report and on page 42 the following comment concerning advisory work is made:

> Initial advisory and planning services frequently extend to areas outside the traditional role of construction industry professionals. For example, they may involve consideration of financial or legal matters. In regard to such work, the law will not excuse the professional on the ground that the area of expertise was outside his or her professional competence (Morest Cleaners v Hicks (1966) 2 Lloyd's Rep 338; see also BL Holdings v Wood 12 BLR 1). Where expertise in other fields is required, the professional should either employ a specialist directly or advise clients to employ specialists themselves.

This comment would clearly apply to the inspection of insurance policies but it is doubtful whether the advice in the last sentence is taken. In any event unless the contractor's insurance broker is used (and even he may require a fee) the question arises as to who is going to pay the insurance specialist's fee?

Abrahamson, M.W. (1979), P96

> The key on pp.360-3 tries to set out the insurance requirements in a way that will help the contractor to arrange cover and the engineer to check both the contractor's and employer's policies. However, it may be very difficult to be sure that the pieces for what is often an insurance jigsaw are all present and dovetail together precisely. The engineer is not bound to be an expert on insurance and should have any doubtful points clarified in writing direct by insurers or brought to the employer's notice for legal advice if necessary. It has indeed been argued that, particularly as these clauses require approval of policies by "the Employer", the engineer has no duty to play any role at all in connection with insurance. But the engineer is no more an expert on legal matters than he is on insurance matters, yet there are many situations in which it is undoubtedly his duty to take preliminary precautions on behalf of the employer, subject to having any difficult points finally dealt with by a lawyer (p.390). In particular the engineer is no less qualified to require production of policies by the contractor and to check any departure in policies from the requirements of these clauses than to advise on the preparation of contracts, as he is specifically required to do by cl.2C

> of the A.C.E. service agreement (p.375). Indeed if the engineer does not have a reasonable knowledge of insurance matters, is he competent to recommend the employer to accept and include unaltered in the main contract the terms of these insurance clauses?

See Appendix 3 for the acceptance of the situation by the Institution of Civil Engineers.

Bunni, N. (1986), preface.

> Those involved in major construction have to cope with so much learning in their own discipline that they shun further involvement in subjects such as insurance and law which themselves are so deeply and intensely complex. However , insurance and law are interwoven in the basic procedures used in the construction industry to undertake work, be it design or construction or supervision or operation or any combination of the foregoing.
>
> Insurance costs have recently escalated to become now a major cost factor in any branch of the construction industry. Such escalation makes it essential for decision- makers within the industry to have a thorough understanding of the risks and liabilities which play an important role in the division of responsibility of those involved.
>
> The need to know more about construction law and construction insurance have prompted some lawyers and insurers to become specialists in these topics. But the pursuit of knowledge is hampered by a large gap in published material dealing with construction insurance for people whose discipline is not insurance.

Later, on pages 177 and 178 he refers to gaps and overlaps existing in the insurance cover provided by insurance clauses of the ICE and FIDIC contracts and comments as follows :

> It is essential however for the gaps and overlaps to be reduced and if possible eliminated, a task which can only be achieved if these clauses are clearly understood by all concerned. Therefore, despite the fact that the employer, contractor and professional team are not expected to be experts in the field of liability, indemnity and insurance, they nevertheless required a working knowledge of these subjects.

Admittedly this author is concerned with obtaining the widest insurance cover possible. However, this thesis is concerned with making the requirements of construction contracts clearer by being more exact than they are, as to the cover required. Thus those responsible for inspecting the contractor's insurances required can be more certain that they have carried out this work as far as is reasonably possible. Nevertheless both the objectives of this author and the writer of this thesis involve the insurance clauses of the construction contracts being understood by all concerned. Consequently the setting out of the insurance policy operative clause and exclusions, allowable by the insurance clauses of the construction contract , in those clauses, must assist this understanding. This will be considered in detail later.

Some architects, engineers and quantity surveyors alter the standard responsibility for the works, liability to third parties and complementary insurance clauses to include their own and their client' s requirements. So far as the JCT contract is concerned there are two cases which show that to be effective these alterations must be made to the actual contract itself, and provisions in the contract bills without such alterations to the contract are not sufficient. These cases did not result in action against the construction professional but could easily have done so, as the JCT contract has always made it clear that nothing in the contract bills "shall override or modify the application or interpretation of that which is

contained in the Articles of Agreement, the Conditions or the Appendix" (currently clause 2.2.1). The first case, Gold v Patman & Fotheringham (1958), the bill of quantities required the contractor to insure in connection with :

> National Insurance Acts and National Insurance (Industrial Injuries) Acts..... Employers' Liability..... Third Party..... Damages by Aircraft Storm Flood and Tempest or Lightning. Insurance of adjoining properties against subsidence or collapse.

Because of subsidence the employer (the building owner) became liable to an adjacent property owner. The employer alleged that he should have been insured against this liability by a clause in the contract bills. The contractors had insured against their own liability but not that of the employer. The contract required the work to be insured in the joint names of the employer and the contractor but not the public liability policy. The court decided in favour of the contractor, ie that he was only obliged to insure his own legal liability against the subsidence of adjacent property. The second case of English Industrial Estates v Wimpey & Co Ltd (1973) concerned insurance of the works (see chapter 4.5.4 for full details). When fire damage occurred Wimpey argued that the tenants had taken possession and therefore the risk had passed to them under clause 16 (taking possession) and that the provision in the contract bills had no application in view of the clause quoted above. The court agreed with the latter point although Wimpey lost the case on other grounds.

Whilst these cases concern arranging insurances incorrectly, not the checking of insurances, which concerns this thesis, such checking can involve rearrangement .

Insurance is a complex subject especially when arranged for construction work and when one adds to this the difficulty of interpreting the wording of construction contracts, problems are bound to arise. Insurers are by no means entirely to blame as in the past words and clauses have been drafted (calling for insurance) which have not only lacked precision but required cover that would not be given by the insurance industry as a general rule. There was a failure to consult the insurance industry in the first place.

This was particularly obvious in 1963 when following the decision of Gold v Patman & Fotheringham in 1958 the Joint Contracts Tribunal introduced into the Standard Form of Building Contract a clause to protect the employer by requiring insurance of subsidence risks. In the original version of this clause insurers were given neither the risk nor the identity of the property to be covered. The contractors tended to blame the insurers for refusing to produce the necessary insurance and even when an attempt was made to do so nobody really knew whether the attempt was adequate. The insurers felt that they were exposed to a very wide and unforeseeable liability. There were also problems with the wording of the clause, eg whether the word "property" included the

contract works. However, in 1968 the clause was reworded and these problems were cleared up by indicating more precisely what was required. At the time of writing there is another example of an apparent failure to consult insurers as to their willingness to provide the cover required. This appears in the JCT contract in the new clause 22D introduced in 1986. Without going into considerable detail there are certain circumstances where the contractor does not have to pay to the employer liquidated damages for delay in completing the contract. These circumstances are known as "relevant events" one of which is loss or damage caused by the specified perils which includes fire (a comparatively common occurrence). Thus although the employer is unable to occupy the premises being constructed at the anticipated time of completion and will lose money as a result, he will not be able to obtain liquidated damages to pay for this loss. Clause 22D gives the employer the opportunity to require the contractor to arrange insurance to provide such liquidated damages. Now the very nature of liquidated damages is that they should be a genuine pre-estimate of the employer's possible loss. However, many insurers do not like giving cover for agreed values, preferring to give an indemnity calculated at the time of the loss. The advantage of any agreed value is that it avoids any dispute over the amount of the payment due under the insurance once the policy is issued, although it could favour the employer. At present only very few insurers are prepared to provide the cover. This could have been discovered before inserting the requirement into the

contract with the hope of providing a wider choice for the party responsible for arranging the cover.

Nevertheless it is the general conventional insurance policies that should be explained in more detail in the common standard construction contracts as these policies are required in all such contracts. These conventional policies are the contractors ' all risks policy covering the works and the liability policies covering the insured's liability to his employees and to the public (the employers' and public liability policies). Most Insurers will provide these policies but the cover can vary. The terms CAR, EL and PL will be used for these policies.

The basic question is how can this aspect of the professional's duty under construction contracts be made easier, and the policy cover required made clearer to all?

Probably the most obvious method, but not always the most simple, is to include in the contract the actual wording of the operative and exclusion clauses of the insurance policies required. In this way the professional responsible is left in no doubt as to the cover required by the contract. At the time of writing in all UK contracts there is at least one policy required where he is left in the air as to whether, for example, a particular exclusion is an acceptable one for the policy purporting to comply with the contract. Policy conditions are rarely mentioned in the

construction contract because policy conditions are fairly standard, ie most insurers will include those conditions in that type of policy, so that they need not be stated.

This method is not simple because while, for example, the type of exclusion may usually appear in the policy concerned, the wording can vary from one insurer's policy to another's giving wide or narrow cover. Thus in selecting the wording of a policy to appear in a contract the drafters have to decide whether they are going to ask for wide or narrow cover or even cover which lies somewhere between these extremes. This is seen in the JCT contract where the exclusion concerning defective design in the contractors' all risks policy is neither wide nor narrow, presumably in the hope that most insurers will be prepared to provide the cover required, but more of this later.

This thesis will examine in the following chapters the extent to which construction contracts have used this method of requesting insurance and examine how it might be developed to make the exact cover required clearer to all parties involved in such contracts .

There are other suggestions which would improve the professional's lot in this respect but they will be found to have obstacles at the present time. In order to adopt a practical approach to the subject of this thesis two ground rules must be accepted and it will be seen that the other

suggestions fall foul of one of these ground rules. These rules are that UK law as it exists at the time of writing must be taken without considering possible improvements, and similarly the present state of the insurance market must be accepted without suggesting changes . To do otherwise would lead to a diversification of the object of the thesis due to speculative views. The object is to consider how the construction contract wording can be altered within the UK law and insurance market in order to make the improvement in the clauses requiring insurance. It is the lack of support from the insurance market that makes the following suggestions impractical for everyday use, with the exception of the performance bond suggestion, which has its basic flaws. Incidentally it would have made the attainment of the object of this thesis easier if the bodies concerned with the production of the various standard forms of construction contracts had got together and devised one single form of contract to be used in all cases. In 1964 the Banwell Committee's opinion was that a common form of contract for all construction work, covering England, Scotland and Wales, is both desirable and practicable, but nothing came of this. In fact, in spite of the desire to bring building and civil engineering work into one construction contract, and for adoption by the Government of the JCT form thus abandoning the CCC/Works/1 contract form, the tendency has been to go the other way and produce different contracts for minor and intermediate works.

To turn to the alternative suggestions to improve the professional's position:

A. Much has been written about project or wrap-up insurance whereby the employer, commissioning the work, through one insurer directs as many insurable claims as possible to that insurer. Thus the employer insures for himself and on behalf of all contractors on the project. The main difficulty is that the insurance market may not be prepared to co-operate particularly if the professional negligence of architects, engineers and quantity surveyors is involved because there is such a limited market transacting this class of insurance. Admittedly professional negligence insurance for contractors is only required in "design and build" contracts but even ignoring this type of insurance there are still many problems for insurers one of which became clear when the JCT 1986 amendment was being drafted, namely that both nominated and domestic sub contractors would not be covered under the contractor's CAR policy, but only for specified perils. For other difficulties see below Eaglestone, F. (1985) pp. 143 - 147.

A discussion of the advantages and disadvantages of project insurance tends to become one of employer-arranged against main-contractor-arranged insurances. This is for the simple reason that the employer will include all contractors he directly employs as well as the main contractor, and all sub-contractors in the policy he arranges for the project, whereas the main contractor will not include all these parties in his policy. However, before listing the points for and against project insurance, it must be made clear what cover is being discussed.

In project insurance the professional indemnity cover must be ignored for the reason mentioned earlier (limited cover) plus the fact that professional indemnity policies are usually arranged on a claims-made basis, thus cover virtually ceases when the policy lapses (i.e. when the contract is completed). While the CAR policy with a public liability extension will also often cease on completion of the contract, plus a limited form of cover during the maintenance period, this policy is on a losses-occurring basis, consequently the cover is wider. Professional indemnity claims, particularly in the construction industry, have a long tail, i.e. defects can arise over many years after the contract is completed. See, for example, the cases following *Anns* v. *The London Borough of Merton* (1978),* and as a result the Government's suggestions in the draft Regulations for the Housing and Building Control Bill, where 15 years' professional indemnity cover is required for the approved inspectors who may take over from the local authority inspectors.

In project insurance it is normally only the CAR and public liability risks that are included. This leaves as a residue the insurances of employers' liability and motor outside the project cover. As these two are legally compulsory in the United Kingdom, it is probably better to leave such insurances for the participants in the project to make their own arrangements.

Contractors will give the following drawbacks in employer-arranged insurances:

(1) The employer's insurers cannot know, at the time when the covers are being arranged, even the identity of the contractor who is going to carry out the work and certainly nothing about the efficiency of the contractor's organisation and his insurance claims record. Therefore it is difficult to see upon what basis the risks insured can be rated. Consequently, most underwriters would load premium rates and excesses of CAR insurance arranged by the employer, where the identity of the successful contractor is unknown.

(2) If, because of the foregoing, the employer's insurance is not arranged until after the contract is let, then there are going to be delays in effecting cover which do not occur where the contractor is responsible for his own insurances. This is because the contractor will almost invariably (except for overseas projects) have an annual policy on a post-declaration basis so that cover is always in force in respect of any contract undertaken.

* Note that Anns case is no longer good law.

(3) Contractors carry out many contracts and therefore are in the best position to know the risks against which they should insure. The contractor's policy will be tailored to his needs and the activities which he undertakes. See, for example, the extensions available to the CAR policy in chapter 7* Furthermore, the contractor is constantly in the market and dependent on his claims experience. Thus he is in a better position to obtain competitive rates in respect of the risks which are insured.

The employer, on the other hand, will frequently only be undertaking a once-in-a-lifetime construction project and will lack the 'muscle' in the insurance market quite apart from the lack of knowledge of where to go for specialist and best advice. In any event, it is doubtful whether the employer will have sufficient detailed knowledge of such factors as the temporary works, as these will only become apparent when they have been designed by the contractor (e.g. cofferdams and falsework to bridges, etc. are usually the contractor's responsibility): according to the Bragg Report on Falsework, temporary works failures have been the cause of large insurance claims.

(4) Frequently there are residual risks which are stated not to be included in the covers effected by the employer. These have to be insured by the contractor, usually under his annual policy, and the resultant saving by the contractor between the full risks and the residual risks can be marginal. In fact it has been known for employer-arranged CAR cover purporting to be project insurance not to cover the temporary works of the constructional plant, temporary buildings and other property of the contractor.

Although, on the face of it, this may not seem unreasonable as he owns most of these items, if the contractor has to insure this property separately, the cost can be prohibitive as it is the hazardous part of the risk. Similarly, some insurers are unable to add a public liability section to the CAR policy, particularly on overseas projects, as their reinsurance facilities do not allow this, and again the premium cost would be heavier. Furthermore the overall premium (employer's and contractor's) is higher than if one policy handled all the risks.

(5) There is an argument for saying that as the contractor is usually responsible for the works under the contract, he should also be empowered to take steps to protect himself, including effecting insurance, whereas when the employer seeks to arrange the contract insurances he still leaves responsibility for the works with the contractor. Similarly, if the employer insures the project, the contractor should be relieved of responsibility for any inadequacies in the insurance cover to the extent that it falls short of the contract requirements.

* Note this is chapter 4 in this thesis.

A contractor usually has a long-standing relationship with his insurers and the loss adjusters his insurers use, and claims are expeditiously and often generously settled. Therefore a contractor does not take kindly to an employer-arranged package which falls short of those arranged by the contractor. Consequently, it will often be necessary for the contractor to arrange a 'difference in conditions' policy in order to avoid exposure to any risk attaching to him and normally covered under his own insurances. For example, the JCT form and the ICE Conditions require insurances for off-site goods certified and paid for, but it is doubtful whether an employer-arranged CAR cover would always cater for these risks or for the transit cover of such goods. As mentioned in (4) above, separately arranged off-site goods and transit cover can be expensive for the contractor.

In spite of what is said by contractors, certain advantages do exist for the employer-arranged project insurance.

(1) The very strong argument is that mentioned at the beginning of this consideration of project insurance, namely, it avoids the time and trouble spent by all parties involved in a loss, damage or liability claim in blaming the other parties to the contract or sub-contract.

(2) In very large projects, particularly where civil or mechanical engineering as well as building work is involved, with many sub-contractors being used, project insurance covering all interested parties avoids gaps in each of the individual parties' cover.

(3) The employer, in one way or another, pays the premium, even when the contractor arranges insurance cover. Therefore the employer has the right to protect himself by buying project insurance, but the contractor regards this as a theoretical argument as the employer is not often in a position to provide more adequate insurance than the contractor, or at least to match his cover. However, assuming the employer is properly advised, it could apply particularly in the case of the inadequately insured sub-contractor. In any event, the cost of the insurance to the employer can only be defined in any detail when the main contractor is known. The cost can be only broadly established before the contractor is selected.

(4) Subject to the employer obtaining the best advice:

(a) The use of excesses can be controlled.
(b) Loss or damage by design failures can be minimised as the employer would control the overall cover, and the settlement of claims would be quicker and easier as it would be a matter of negotiation between the employer's brokers and the insurers or their loss adjusters, with the consequent improvement in overhead costs and cash flow on insurance claims.
(c) Use and occupancy problems can be catered for easily.

It is explained earlier on page 142 of the book from which the above quotation is taken that a few insurers overcome, in a limited way, the problems arising and disputes between contractors and the professional men involved in construction contracts with regard to liability and responsibility for accidents arising from defects. These insurers provide a wider CAR project policy to include cover for these professionals. The policy provides design cover, not only for their site activities, but also for their office work in the design of the project. This policy only covers professional negligence so far as it causes damage to the works (not defects without such damage), which arises during the construction period (not for any period thereafter). This special cover is also mentioned by Levine, M. and Wood, J. (1991), P 67. However, professional negligence cover is not usually included in project insurance. Therefore, because the main advantages of project insurance are to avoid double insurance by the various parties involved in the contract and/or to avoid gaps in cover between the policies of those parties, and also to avoid frequent disputes between those parties' insurers in the event of a claim, the tendency is for it to apply to the larger projects. This follows because it is the large projects which have a considerable number of parties involved. In fact, it is only in the large contracts such as the Thames Barrier and the Channel Tunnel where project insurance has been successfully arranged. Messrs Levine and Wood in their book mentioned earlier devote a whole chapter to major

UK projects, explaining in each case the insurance cover arranged. However, there are only six of them. Nevertheless, where it is arranged this can be a method of the construction professional avoiding responsibilities in the insurance field. It is unfortunate that this method of arranging the conventional insurances is not available for the everyday construction contract, but as mentioned in the quotation earlier there is too much opposition from contractors.

B. Another suggestion is to arrange latent defects insurance. However, this insurance basically is not a "building in course of erection" insurance but a protection for the ultimate user of the building. It applies after practical completion, and when the defects liability period has expired, if he finds structural defects or other types of damage occurring to his property. In any event the majority of insurers with the main exceptions of the National House-Building scheme (BUILDMARK) for dwellings and the Norman Insurance Company's scheme for commercial buildings are still reluctant to enter a class of insurance with long term fixed periods of cover. It is unlikely in these circumstances that many more insurers will enter this field in the future in spite of the National Economic Development Office's report recommending Building User's Insurance Against Latent Defects (BUILD), although an EC Directive may require it.

C. Wallace Duncan, I.N. (1969), p88, submits that a performance bond, if requested under the construction contract, will protect the employer commissioning the work, so far as his financial interests are concerned,

and should take the place of the conventional insurances. These insurances are the contractors all risk policy covering the works and the employers` liability policies protecting the contractor`s and the principal's (the commissioner of the works) liability to the contractor`s workmen and the public. The commissioner of the works (usually known as "the employer" in the construction contract should not be confused with the insured employer of workmen under the employers` liability policy who is the contractor under the construction contract) is normally covered as a joint insured under the contractor`s policies as required by the contract. Mr Wallace argues that the present system means that the contractor is being protected from his own contractual risks or breaches of contract at the employer`s expense. He says:

> The only possible interest of the employer in such a situation, which can be easily exaggerated, is that he may fear that the contractor will be financially crippled by a risk of this kind, so that he will no longer be capable of completing the contract and the project may be delayed. Apart from the possibility of suffering delay, the employer's interests are likely to be far more cheaply, and just as effectively from the financial point of view, protected by obtaining a bond in the usual form for due performance of all the contractor's obligations under the contract, which it is probably not generally realised gives a protection overlapping any contractor's insurance of this type of risk. A bond is cheaper because the bondsman's liability is, unlike the case of insurance, secondary and arises only in the event of the contractor's insolvency, and the bondsman has a right of indemnity against the contractor which will enable him at least to prove in any bankruptcy or liquidation. A further important advantage of a bond is that, unlike insurance, it offers no encouragement to carelessness or the running of risks by the contractor. The R.I.B.A. contracts, however, make no provision for such a bond, unlike the I.C.E. forms, though the standing orders of most local authorities require a bond. Any policy of requiring insurance rather than a bond in respect of matters for which, as between the employer and the contractor, the contractor will be liable, in reality benefits no one except the contractor and the insurance industry.

However, he did not mention the following points which are against a bond in place of a stipulation for insurances:

1. There is a statutory requirement (not in force at the time Mr Wallace wrote) that all employers take our employers' liability insurance and part of the premium for this may be passed by the contractor to the employer.

2. The bond amount is usually 10 per cent of the contract price in England, Scotland and Wales, and this could be inadequate, especially if on the contractor's bankruptcy or liquidation a legal liability for third party injury or damage could fall upon the employer. The limit of indemnity will be much larger, if properly arranged, in the case of the contractor's public liability policy, which also covers the employer, than a percentage of the contract price, and under the employers' liability policy the indemnity is unlimited. Even where the bond amount is 100 per cent of the contract price, when the premium would be much larger (if such a performance bond is obtainable), the amount concerned may still be inadequate. If properly arranged, the employer's own liability policies could cover these building activities (which under the existing construction contract are passed to the contractor) but this entails extra premium. The main point is that neither the policy limit of indemnity nor a liability claim amount (employers' or public liability) has any connection with the contract price.

Apart from the liability insurances the destruction of the contract works by fire, for example, could cripple the contractor financially without the conventional material damage cover, which is usually the contractors' all

risks policy. Something much more than 10 per cent performance bond would be necessary to protect the employer and if obtainable the premium is unlikely to be cheaper than the insurance premiums necessitated by the existing contract.

3. Ignoring the question of adequacy of the bond amount, compared with the indemnity limits mentioned in 2 above, it is doubtful whether a bond is always cheaper bearing in mind that the liability insurances required should already be in existence in the shape of the contractor's employers' and public liability policies on an annual basis. Thus the cost of the majority of these should not be included in the contract price as they are a contractor's standing charge which would apply irrespective of the existence of the contract. There could be an additional premium (for example, for an indemnity to the employer in the public liability policy) which is legitimately due to the contract, but it is unlikely to be a large sum which bears comparison with the charge for a bond. This leaves the premium for the contractors' all risks policy, which is also required by the contract, to compare with the bond charge, and although the all risks premium is based on the contract price in the same way that the charge for a performance bond is calculated, the former is likely to be charged at a lower rate. This is a generalisation but it is wrong to assume in the above circumstances that a bond is always cheaper. It is true that some public and local authorities have arranged special schemes with insurers where it is those authorities' normal practice to require a bond from the

contractor, and in this event the bond rate of premium would be lower than normal because of the bulk business being offered to the insurer.

4. Without the existence of the contractor's conventional insurances probably the bond would be unobtainable or the premium would be prohibitive. Also the bond is designed to protect the employer, but the CAR, EL and PL policies are initially intended to cover the contractor and the employer's cover is additional.

D. Finally a suggestion to help the construction professional with this insurance problem (which resembles closely the suggestion first mentioned and favoured by the writer), ie instead of merely including the operative clause and exclusions of the policies concerned, why not complete the job and print the whole insurance policy in the construction contract? An approved combined policy wording (containing the CAR, EL and PL policies) would be printed as an appendix to that contract. For example, the ICE Conditions already incorporate a performance bond wording at the end of the Conditions, so why not include a standard insurance policy wording as well? Each insurance clause in the ICE Conditions, viz clauses 21 and 23 would have to refer to the approved policy in the appendix. Clause 24, although not an insurance clause would have to refer to the policy in the appendix. Similarly the JCT and GC/Works/1 contracts could incorporate similar appendixes. The GC/Works/1 form involves a Certificate of Insurance and a Summary of Essential Insurance Requirements at the end of the contract to which the approved policy could be added.

The arguments in favour of this suggestion are that the standardisation involved would not necessarily be a bad thing. There would have to be negotiation beforehand with the insurance industry. The policy form could be printed by the construction body concerned, and the name of the insurers could be typed on the schedule of the policy in each case. There would be nothing to prevent an individual insured asking for wider cover than the standard. However, there would be a standard minimum cover available and everyone would know what risks were covered. Reductions in cover would not be allowed. This suggestion has the merit that the construction professional would no longer have to decide the suitability of the cover produced.

Against this suggestion would be the opposition to the imposition of such a sweeping suggestion both from the insurance industry and from the construction contract drafters. Insurers value their freedom to draft their own wordings. However, it is true that competition has already forced insurers to accept individual brokers' wordings, but this is usually in exchange for the promise of bulk business or where the proposed insured is a contractor of international repute which is a form of bulk business. Nevertheless, possibly a sufficient number of insurers would be prepared to form a panel to make such a scheme viable. The construction professionals would still have to check that the approved policy had been effected and the first and renewal premiums paid. Probably more opposition would come from the construction contract drafters, who, in the case of the main contracts in the UK, have at the

time of writing recently introduced a new edition or amendment and this applies to the ICE, JCT and GC/Works/1 contracts. The drafters of the JCT contract particularly would be unlikely to agree to an approved CAR policy in the appendix as they already have one in clause 22, which has the headnote "Definitions" but consists of an operative clause and basic exclusions.

In the circumstances the less interference with the construction contract wording the better, and only imposing an operative clause (which often appears already in the insurance clauses of most construction contracts) plus basic exclusions, is to be preferred, but still helps the professional to check a minimum cover without being too cumbersome. This suggestion is more likely to appeal to the JCT drafters, as it follows what already appears in clause 22.2. In the JCT contract it is a matter of suggesting an operative clause and basic exclusion for the liability policies, whereas in other construction contracts this procedure will be suggested for both a CAR and the EL and PL policies. In conclusion it is considered that comparatively minor amendments to the present wording of construction contracts is preferable to adding a complete insurance contract to the existing construction contract, as in practice the former is more likely to be acceptable to the drafters and even the insurers.

An important point about the combined contractor's insurance policy mentioned in Appendix 1 is that while it is used as a basis in this thesis, it must be recognised that a number of the operative clauses and exclusions in the policy sections (contractors' all risks, employers' and

public liability) are standard in the insurance industry, and others can vary from one insurer to another. Either their wording or even their subject matter can be different. Where the clauses or exclusions given on the Appendix 1 form are not standard some indication will be given in the chapters concerned that this is so. An excellent comparison of the various wordings available in the conventional policies of some of the leading UK insurers, can be seen in the October and November 1991 issues of World Policy Guide entitled Insuring Contractors I and II, pages 17 to 76 and 16 to 107 respectively, published by Financial Times Business Information Ltd.

In conclusion Appendix 3 does not concern an actual case, but is more than mere imagination as it was a question set by the Institution of Civil Engineers for their Examination In Civil Engineering Law And Contract Procedure. It demonstrates the necessity for the engineer, or anybody responsible for inspecting the contractor's insurances, as required by the construction contract, to be given as much assistance as possible by the wording of that contract. This is done in the case of the ICE Conditions by the suggestion in chapter 9.3 to improve the wording of clause 21. In fact Lloyd, H. (1986), P16 said:

> The extent and restrictions on cover is a matter which ought clearly to be specified in the construction contract.

Wallace Duncan, I.N. (1978), p70 is even more positive, and gives an additional reason. He says:

> In addition, where contractors are tendering in competition, it is essential that the contract documents should spell out with the utmost precision the exact insurance required ....., since otherwise the tenders will not be truly comparable until after examination of the details of a proffered insurance policy.

CHAPTER 2

STAGES OF THE INVESTIGATION

2.1 Historical background.

Historically the drafters and parties to construction contracts when calling for insurance cover (if requested at all) seemed to make the assumption that there were no terms exceptions or conditions which would limit the cover. This was strange when one considers that these contracts were compiled by business men or their lawyers. These people are well aware, as is the man in the street, of the allegations made against insurers (however unfairly) that they use small print to set out their exceptions and conditions. Nevertheless, they just stated the risks and required insurance cover (see 2.4 below).

2.2 Clarification of the aims of the study.

It is proposed to show how this historical perspective has changed in recent years and how it might be improved in the future just by adding to the contract wording requesting insurance, and keeping within the existing law and insurance market. By detailing policy cover in the contract this can be achieved.

2.3 The conventional insurance policies required for contracts.

The types of policies in common use by the insurance market which normally are called for under a construction contract and which could be incorporated in that contract are a material damage policy and two liability policies. The former is the all risks policy covering the works and the latter are the employers' and public liability policies. The liability policies cover the insured's legal liability to employees and to the public. These policies are best illustrated by a contractors' combined policy containing all three policies. This combined policy is set out in Appendix 1 and it includes the special liability policy required by the JCT contract in clause 21.2.1 which protects the employer commissioning the work against certain subsidence risks.

2.3.1. The Contractors' All Risks (CAR) Policy.

This policy indemnifies the insured for loss, damage or destruction of any of the property specified in the schedule, usually while on the contract site, for which the insured is responsible in accordance with the terms of the contract, arising from any cause whatsoever, subject to the terms and conditions of the policy. The exclusions of this policy follow the "Excepted Risks" of the ICE Conditions, as listed in clause 20(2), because it was this contract which resulted in the formation of this policy soon after the second world war in the 1940s. In any event most of the risks concerned in these exclusions are uninsurable. They are as follows:

(a) Riot which is only uninsurable in certain areas, eg Northern Ireland.

(b) War (including kindred risks) and nuclear risks which are the responsibility of the government.

(c) Sonic waves.

(d) Loss or damage due to use or occupation by the employer his servants agents or other contractors (not employed by the contractor) of any part of the permanent works.

(e) Fault defect error or omission in the design of the works (other than the contractor's design pursuant to his contractual obligations).

While the above risks appear as exclusions under a CAR policy an insurer also excludes other risks under this policy and while these extra exclusions appear in most policies they can vary according to the views of the underwriter concerned, and will be dealt with in more detail later. See Chapter 4.

2.3.2 The Employers' Liability (EL) Policy.

This policy covers the liability of an employer (master) to his employees (those persons under a contract of service or apprenticeship with the employer) for bodily injury or disease arising out of or in the course of their employment.

This insurance is compulsory by virtue of the Employers' Liability (Compulsory Insurance) Act 1969 which came into force on 1.1.72. This Act not only ensures a fund for valid claims by employees, it also prevents insurers from repudiating liability under their EL policies because of breach of certain terms and conditions.

This policy is almost without exclusions, but basically only employees employed in the United Kingdom or temporarily outside the UK are covered. The UK (or Territorial Limits as it is referred to in most policies) is defined as Great Britain (England, Wales and Scotland) Northern Ireland (Ulster), the Isle of Man, the Channel Islands or off-shore installations within the continental shelf around those countries. Chapter 5 will give full details of this policy.

2.3.3. The Public Liability (PL) Policy.

This policy provides the insured with an indemnity against personal injury claims by the public (other than employees) and property damage claims from third parties.

The exclusions of which there are a considerable number vary in their wording but they can be classified into risks:

(a) more properly insured under separate policies;

(b) needing careful investigation and if acceptable justifying an additional premium;

(c) considered undesirable for insurance.

These exclusions will be dealt with in more detail later.

See Chapter 6.

2.3.4 The Clause 21.2.1. Policy.

The majority of insurers follow the wording of clause 21.2.1 of the JCT contract in the operative clause of the policy, and include the five exceptions taken from that clause. See Appendix 1 Section 4. There is an exclusion of the works, which usually includes materials on site for

incorporation in such works, and tools, equipment, temporary works and buildings or other property brought on to the site for the purpose of the execution of the contract. Other exclusions depend upon the views of the underwriter of the risk. The damage must occur during the period of the policy. Chapter 7 will not give full details of this policy because it is not a conventional policy.

2.4 Current stages of progress in requiring insurance.

The stages by which construction contracts have progressed in calling for insurance cover can be seen by considering those contracts which have altered their wording over the years to make clearer the cover required.

2.4.1. First stage - illustrated by the ICE Conditions.

The Institution of Civil Engineers Conditions of Contract, Sixth Edition (published in January 1991), which is the current contract, is a good contract to start this investigation for two reasons. In the first place it illustrates the basic pattern of all construction contracts in the area requiring insurance. Thus there is a responsibility for the works clause followed by a requirement for insurance clause (to cover that responsibility). Then there is a liability to third parties clause followed by a requirement for insurance (to cover that liability excluding employees). The liability to employees clause follows.

Sometimes in other construction contracts the two clauses concerning the liability to third parties come first and those concerning the

responsibility for the works follow immediately thereafter. A liability clause means a clause imposing a legal liability on the contractor to indemnify the employer (or vice versa) against third party claims. Third party claims in this respect include claims by the contractor's employees as well as claims by the public, although insurers have two policies to deal with these two types of claims, namely the employers' and public liability policies.

The ICE Conditions start with a responsibility for the works clause followed by an insurance clause to cover that responsibility ie. clauses 20 and 21. Then there is a liability clause followed by an insurance clause to cover that liability ie. clauses 22 and 23. Clause 24 deals with the EL aspect.

Secondly, the ICE Conditions do not specify the actual terms of the policies required. In this respect this contract has not progressed very much since its inception. See Chapter 9.

2.4.2 Second stage - illustrated by the JCT Contract.

The second stage of this investigation is shown in the Standard Form of Building JCT Contract (the current wording was first published in 1986) as it supplies, in the responsibility for the works clause 22, an insurance operative clause and exclusions which are required. This is a step forward although it does not provide such detail under the liability insurance clause 21. See Chapter 10.

2.4.3. Third stage - illustrated by the GC/Works/1 Contract Edition 3.

The final and most progressive stage at the time of writing is illustrated by the General Conditions of Government Contracts for Building and Civil Engineering Works namely Edition 3 of GC/Works/1, which was first published in December 1989. While the insurance clause 8 does not incorporate the insurance policy wordings for both responsibility for the works and liability to third parties it partially does so by means of a separate document which is referred to in the contract. This has its drawbacks which will be referred to later. See Chapter 11.

2.5 Other relevant contracts.

This heading includes subcontracts, contracts for special purposes and special types of construction work, plus collateral contracts. These other contracts are often relevant to the main contracts of the ICE, JCT and GC/works/1 contracts in that they are designed for use with these main contracts or based on them. However, they are not relevant to the investigation in this thesis where they do not call for the same insurance cover as the main contract requires ie, the conventional policies (CAR, EL and PL policies). The majority do not do so, but the exceptions will be indicated in the following list and will be dealt with later. See Chapter 12.

2.5.1 Subcontracts.

(a) ICE, This does call for the conventional policies. See Chapter 12.

(b) JCT (NSC/4 and 4a and DOM/1). These subcontracts do not call for CAR cover.

(c) GC/Works/1 (GW/S). This subcontract is only for use with edition 2 of GC/Works/1 and the latter does not call for insurance cover at all.

2.5.2 Contracts for smaller works.

(a) JCT (Minor Building Works). This does not require CAR cover.

(b) JCT (Intermediate Form). This contract does call for the conventional policies. See Chapter 12.

(c) GC/Works/1 (Minor Works). This does not call for insurance cover at all.

2.5.3. Contracts for special purposes.

(a) JCT Fixed Fee Form of Prime Cost Contract (October 1976 revision). This does not call for CAR cover.

(b) JCT Standard Form of Building Contract with contractor`s Design. This does call for the conventional cover. See Chapter 12.

(c) Collateral Contracts. The only insurance policy these contracts might call for is the professional indemnity policy. The conventional policies are rarely involved.

(d) Model Form of General Conditions of Contract recommended by the Institution of Mechanical Engineers and the Institution of Electrical Engineers - Home Contracts, With Erection (MF/1). This contract calls for the conventional policies. See Chapter 12.

2.6 The general law of contract and insurance.

Before starting to explain in detail the conventional policies required by the standard construction contracts it is as well for the benefit of the layman to insurance, to indicate in the next chapter the way in which the

general law of contract applies to the insurance contract. Thus the principles of insurance and the terms used to indicate the parts of the policy, can be used thereafter without further explanation.

2.7 Recommendations for improvement of construction contracts when requiring conventional insurances.

When setting out the details of the conventional policies in the next chapters a conclusion will be made as to which parts of these polices should be included in the wording of the construction contracts. Reasons will be given for the decisions made.

When explaining the clauses concerned in the main and other relevant contracts requiring conventional insurances, in the following chapters, a conclusion will be reached as to how each insurance clause could be improved with advantage to all concerned.

These conclusions will then be drawn together in a final chapter concerning these recommendations, after indicating in a penultimate chapter, those individuals who are likely to benefit, and how they will benefit from such recommendations, with possible criticisms of the specific insurance cover suggested.

CHAPTER 3.

THE GENERAL LAW OF CONTRACT RELATED TO INSURANCE.

3.1. What Is a Contract?

It has been defined as "an agreement and promise enforceable at law" and to some extent this is correct, although it is necessary to warn that while a contract may exist it may not be enforceable because of some disability of one of the parties to that contract. Also there must be two elements for a contract to be enforceable at law namely an agreement and an obligation. To constitute an agreement there must be an accord between two or more persons in one and the same intention, which lawyers refer to as "consensus ad idem". However, it is clear that something more than a mere agreement is required before a contract can be made enforceable at law. Agreements are being made all the time, eg a business appointment, or social engagement. Such agreements are really "arrangements" and cannot be regarded as legal contracts otherwise the default by one party might give rise to a legal action and this is not in the minds of either party. The essence of a contract lies in the important fact that there is an intention on the part of those entering into the agreement to create a legal obligation, ie that the parties can turn to the courts, or arbitration, if the contract so provides, in the event of a breach on one side or the other.

The essential elements are:

(a) offer and acceptance resulting in a legal relationship;

(b) capacity to contract;

(c) legality;

(d) seal or consideration;

(e) absence of fraud, misrepresentation, mistake, duress or undue influence.

If one of these elements is missing the contract may be:

(a) Unenforceable, which means it is valid in itself but cannot be proved in a court, which occurs when written evidence cannot be produced and which is required in some cases. For example, the position with regard to a contract for the disposition of an interest in land which cannot be enforced except against a party who has signed it or a note or memorandum of it. Coming closer to the subject of this thesis, a performance bond is required to be in writing, signed and under seal to be enforceable.

(b) Void, ie having no validity and the parties have no rights thereunder, as occurs in the case of contracts with infants (persons under the age of 18, more fashionably known as minors), for the sale of goods other than necessaries (such as compulsory insurance contracts) and those which were binding unless repudiated and have been repudiated, see (c) below.

(c) Voidable, capable of being affirmed or rejected at the option of one of the parties, eg in the case of continuous contracts with infants.

3.2. The Law Relating To The Insurance Contract.

An insurance contract is one where the insurer agrees in return for a consideration, called the premium, to pay to the insured a sum of money or its equivalent upon the happening of a certain event. Insurers are either insurance companies or underwriters of Lloyd's of London.

There are three main principles which distinguish the formation of the contract of insurance dealt with in this thesis (there are others which will be mentioned later). In the first place there must be present what is known as insurable interest to make the contract valid. Secondly, the transaction must be supported by what is called "the utmost good faith". Thirdly, the contract must be one of indemnity.

3.2.1. What is the meaning of insurable interest?

In the case of a contract of indemnity (which will be dealt with in detail later), such as a fire policy or the contractors' all risks policy, it was stated in Lucena v Craufurd (1806), that a person has an insurable interest in a thing where he is so circumstanced with respect to it as to have benefit from its existence, or prejudice from its destruction. Insurable interest also includes the legal liability of the policyholder to pay damages.

3.2.1.1. Examples of insurable interest.

(a) An insurance company in its commitments. Thus it can reinsure.

(b) A contractor for the goods, works, plant and site in his possession.

(c) The employer of the contractor as legal owner of the site and usually by virtue of a contractual right to the materials on site.

(d) The owner of property, whether movable or otherwise.

From an indemnity aspect, to uphold an insurable interest:

(a) There must be a physical object capable of suffering loss or damage or a liability capable of being incurred.

(b) The physical object or liability must be stated as the subject matter of the insurance.

(c) The person named as the insured must have an interest in the subject matter, in accordance with the definition mentioned earlier. The insured always has an interest in his own legal liability.

It must be remembered that it is the insured's interest in the property which is covered and strictly speaking, it is incorrect to say the property is covered against loss or damage. Consequently, as it is the insured's interest that is covered, the policy is a personal contract with the insured. When the interest ceases, no claim to indemnity can be made by another person, unless by operation of law, or by reason of an endorsement by which the personal interest has been substituted by consent of the insured and the insurers.

3.2.1.2. Difference between insurance and gambling.

There is some similarity in that there is an agreement to pay a sum of money on the happening of certain events. However, the fundamental differences are as follows:

(a) The party affecting the insurance must have an interest in the subject matter, but the interest of those who participate in gambling is solely confined to the stake lost or won in the wager.

(b) In an insurance contract only the insured is immune from loss, but in a wager either party may win or lose.

(c) The occurrence of the event insured against is not in the interest of either party to the policy, since under it, the insured is only indemnified (see under the heading 3.2.3.) and the insurer loses, whilst in a gamble, the winner benefits.

(d) In an insurance contract it is clear from the inception of the contract who is immune from loss, but in a wager this is not known until the event has taken place.

(e) An insurance contract is subject to the principle of the utmost good faith but this principle does not apply to a wager . The principle is explained under the next heading.

(f) A contract of insurance is enforceable at law, but a wager is not recognised by the courts, because the Gaming Act 1845 section 18 rendered all contracts by way of gaming or wagering void.

3.2.2. Utmost Good Faith.

The common law principle of entering into contracts is based on the fact that the parties contract at their peril, because the legal maxim "caveat emptor" (let the buyer beware) prevails. Thus if you sell your house you do not have to tell the buyer that the roof lets in the snow and when the thaw comes the ceiling will leak, unless you are asked. Also while certain Acts have been passed, such as the Sale of Goods Act 1979, through which some protection is afforded to contracting parties influenced by these Acts, even this protection does not bring such contracts within the sphere of the privileged class (there are a very few others) of which insurance is the main one, which enjoy the benefit of the utmost good faith principle.

The principle arises from the fact that "the underwriter knows nothing and the man who asks him to insure knows everything". Hence the latter is, as a general rule, bound to declare all facts which are material to the risk. The following extract from the case of Carter v Boehm (1766) gives more detail:

"The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representations, and proceeds upon confidence that he does not keep back any circumstances in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist.

The keeping back of such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the underwriter is deceived, and the policy is void; because the risk is really different from the risk understood and intended to be run at the time of the agreement.

The policy would be equally void against the underwriter if he concealed; as, if he insured a ship on her voyage, which he privately knew to be arrived; and an action would lie to recover the premium."

The last paragraph of this extract has been emphasised in the recent case of La Banque Financiere de la Cite SA (formerly Banque Keyser Ullman SA) v Skandia (UK) Insurance Co and Others (1988). In this case the decision of the Court of Appeal under the name Banque Financiere de la Cite v Westgate Insurance Co. Ltd. (1990), reversing the decision of the court of first instance, was affirmed by the House of Lords on other grounds. The higher courts rejected the existence of a duty of care owed by the Insurer to the Insured and, while acknowledging the existence of a duty of good faith, considered that breach of that duty was not actionable in damages. However, the case is primarily about whether such duty gave rise to an

action in tort for damages. In the reverse situation (ie non-disclosure by the insured) insurers had the remedy of avoidance not damages. It was decided that the principle of utmost good faith could not, by itself, justify the awarding of damages, although it must be admitted that to rescind the contract and obtain a return of the premium does not help the insured a great deal in these cases.

Therefore, it is clear that the reason for the principle of the utmost good faith by both parties to the contract is to prevent fraud and to establish this, full disclosure must be wedded to materials facts.

A material fact is one which would influence the judgement of a prudent insurer in fixing the premium or determining whether he will accept the risk. Section 18(2) of the Marine Insurance Act 1906. The Court of Appeal decision in Container Transport International Ltd v Oceanus Mutual Underwriting Association (Bermuda) Ltd (1984) adopted a much wider meaning to include information which would have "an impact on the formation of his opinion and on his decision-making process". Thus it is not necessary for the insurer to go further and to demonstrate that a prudent insurer would have charged a higher premium or would have refused the risk.

Certain facts have come to be recognised as being material to a risk and these are usually obvious, eg facts showing the subject matter of the insurance is exposed to more than usual danger from the peril proposed to be insured against, or there is a moral or physical hazard in the proposer's

history or his approach to the insurance. In the case of a dispute, it is always a question for a court to decide.

3.2.2.1. Facts which need not be disclosed by the proposer.

During the passage of time it has been established that the following facts need not be disclosed:

(a) Non-material facts and those which improve the risk.

(b) Facts which the insurer ought to know in the ordinary course of his business.

(c) Information which is waived by the insurer.

(d) Facts which ought to be deduced from the information given by the proposer.

(e) Facts common to the knowledge of the insurer, eg matters of public knowledge.

(f) Facts which should be brought to light by making the usual enquiries apart from the information already given.

3.2.2.2. Proposal Forms.

Questions on proposal forms must be truthfully answered and this is emphasised by the declaration at the foot of the form. However, the duty of the utmost good faith is not necessarily discharged by the proposer who replies truthfully to all questions on the proposal. Any other material facts which might affect the insurer's mind in considering the risk must be disclosed. This means any material facts not covered by questions on the proposal. See Hair v Prudential Assurance Company Ltd (1982).

The following list, which is not exhaustive, should assist in the completion of the proposal form:

(a) All questions should be answered fully and completely honestly. Although this may seem elementary, it is often not complied with. Even if questions are not applicable, this should be stated, explaining why the question does not apply unless it is obvious.

(b) All matters should be disclosed which a prudent insurer would wish to consider in deciding whether to offer cover. If in doubt the matter should be disclosed.

(c) A specimen of the policy required should be obtained. A check should be made that the exclusions and conditions are understood and are acceptable.

(d) Any special explanations required concerning the cover should be obtained in writing and the correspondence retained; similarly in the case of policy extensions.

(e) Sums insured and limits of indemnity must be adequate.

(f) A copy of the completed proposal should be kept.

Throughout the policy period:

(a) any change in risk should be notified which is basic to the cover provided, eg an extension of geographical, or type of, activity;

(b) claims should be notified immediately. If in doubt the circumstances concerning a possible claim should be notified;

(c) in the case of liability insurance claims no admission, offer, promise or payment to the third party should be made and relevant correspondence should be passed to the insurer immediately.

On renewal the proposal answers should be checked and all changes or requirements notified to the insurers.

If the above points are followed, repudiation of policy liability by the insurer on the grounds of non-disclosure is unlikely.

If the proposal form is completed by an agent the position is usually governed by the case of Newsholme Bros v Road Transport and General Insurance Company (1929) where it was decided that if the agent fills in the proposal at the request of the proposer, for that purpose he must be considered the agent of the proposer. Also Scrutton LJ said:

> "I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed."

There are exceptions in the case of proposers who are illiterate and even those of little education and, possibly where the agent is more than a mere commission agent , but ostensibly has some authority to vary the contract. The authorities for these exceptions are Bawden v London, Edinburgh & Glasgow Assurance Co (1892) and Stone v Reliance Mutual Insurance Society (1972).

The duty upon the proposer to disclose material facts only applies to the proposer before the contract or renewal is concluded. There is no duty at common law to disclose material facts which occur during the period of

insurance. However, some policies include an alteration in risk condition which in effect extends the common law duty of disclosure throughout the period of insurance should the risk increase. For example, in a contractors' all risks policy such a condition would call for notification to the insurer should any defect or conditions of working render the risk more than usually hazardous. This would not include variations of the works allowed by a provision in the construction contract. See Mitchell Conveyor and Transport Co Ltd v Pullbrook (1933). If the insured fails to comply with the condition then the policy is voidable at the option of the insurer from the date of the breach.

3.2.3. Indemnity

On the happening of the event insured against, the insured shall not be paid more in money than the value he has lost, subject to the sum insured. In Castellain v Preston (1883), Brett LJ, said:

> "The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine and fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured shall be fully indemnified, but shall never be more than fully indemnified."

Although an insured, under normal circumstances, is entitled to be placed in the same financial position which he occupied before the happening of the event insured against, this need not mean precisely the same position, but only that which is reasonably possible. Whether the damage is total or partial, and in the case of a building in course of erection it is usually the latter, the insured is entitled to reconstruction cost in the case of a total destruction (within the sum insured), and the cost of repair where a partial loss has taken place. In this way the insured will get an indemnity but it is

not always as simple as this, particularly in the case of buildings which are some years old. In Harbutt`s Plasticine v Wayne Tank Co Ltd (1970) Lord Denning said:

> "The destruction of a building is different from the destruction of a chattel. If a second-hand car is destroyed, the owner only gets its value; because he can go into the market and get another second-hand car to replace it. He cannot charge the other party with the cost of replacing it with a new car. But, when this mill is was destroyed the plaintiffs had no choice. They were bound to replace it as soon as they could, not only to keep their business going, but also to mitigate the loss of profit (for which they would be able to charge the defendants). They replaced it in the only possible way without adding any extras. I think they should be allowed the cost of replacement. True it is they got new for old, but I do not think the wrongdoer can diminish the claim on that account. If they had added extra accommodation or made extra improvements, they would have to give credit. But that is not this case."

The following points about this statement should be appreciated. In the first place Harbutt`s case was not an action to determine the value of an indemnity under a material damage insurance policy but an action in negligence for damages, and the failure to allow deductions in the case of new for old is not unusual in such actions. However, it is well established that in providing an indemnity under an insurance policy the liability of insurers is subject to any necessary deductions for prior wear and tear. The difficulty in the case of buildings is that certain damaged items are considered to last the life of a building, eg the roof (subject to the condition of the tile nails), and some insurers may consider that no allowance should be deducted for betterment in such cases.

Secondly, in the case of the CAR policy it is very unlikely that betterment has to be considered as the goods and materials used in the erection or installation are obviously new. Nevertheless, as betterment is an important

aspect in dealing with indemnity claims under material damage policies the point has to be made.

3.2.4 Subrogation

The principle of subrogation is a corollary of the principle of indemnity. Subrogation is the right which the insurer has of standing in the place of the insured and availing himself of all the rights and remedies of the insured, whether already enforced or not, but only up to the amount of the insurer's payment to the insured. This right of subrogation is exercisable at common law after the insurer has paid the claim, subject to a condition in the policy which may entitle the insurer to exercise the right before the payment is made.

In the construction industry it is sometimes the practice to insure many of the parties involved in the construction project as "joint insureds" under the one policy. In this event the principle of subrogation cannot operate to allow the insurer, after paying one insured, to recover from a joint insured. This was first decided in the UK in the case of Petrofina (UK) Ltd v Magnaload (1983) where this exception to the principle applied to the plaintiffs, having the work carried out, and the main contractor and subcontractors who were co-insurers in a common enterprise. Another point insurers, contemplating the right of subrogation, should consider is the decision in M H Smith (Plant Hire) v D L Mainwaring (t/as Inshore) (1986). From this case it is clear that insurers should consider whether their insured are likely to remain solvent before suing a third party in their insured`s name. In this case the insurers' recovery action failed as the insured had ceased to exist when the action

was taken in the insured's name. A non-existent party cannot be a party to an action.

It seems from this case that there are steps the insurers can take to protect themselves against this situation. They could include a conditional assignment in the proposal declaration, or better still in the declaration on the claim form, thus obtaining the insured's signature to the assignment. Alternatively, if it was known that the insured was going into liquidation, a separate document of assignment could be obtained. Unfortunately, the insured's fate would be probably not be known until it was too late, as in Smith's case.

The final choice, suggested in the judgment of Smith's case, is to make use of section 651 of the Companies Act 1985. Under this section the court may at any time within two years (under the latest Act it is twenty years) of the date of the dissolution of the company, on an application made for the purpose by the liquidator of the company or any other interested person, make an order, on such terms as the court thinks fit, declaring the dissolution to have been void. Thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

3.2.5. Contribution.

Like subrogation this principle is a corollary of the principle of indemnity, but it only applies between insurers. It is the right of an insurer, who has paid under a policy to call upon other insurers, equally or otherwise liable for the same loss, to contribute to the payment. Before the principle can be applied, the insurance called into contribution must cover:

(a) the same interest;

(b) the same subject matter;

(c) against the same peril, and

(d) the policies must be legally enforceable, as a policy which is not legally binding cannot give rise to a claim for contribution.

Contribution will not operate if one policy clearly states that it only applies after any other double insurances (other insurances complying with the rules above) have been exhausted, and provided the other insurance(s) does (do) not contain the same limited wording. In practice policies usually contain a non-contribution condition of some kind, but some are more strictly worded as just indicated. See the New Zealand Court of Appeal case of State Fire Insurance General Manager v Liverpool and London and Globe Insurance Co Ltd (1952).

It must be appreciated that the omission of a contribution condition in a policy does not destroy the doctrine. A contribution condition merely precludes an insured from selecting any insurers to indemnify him when he has a choice, and thus leaving that insurer to collect rateable proportions from his co-insurers. Consequently this condition compels the insured to claim from each insurer the rateable proportion due to him in order to obtain an indemnity.

The following extract, in further explanation of the principle of "Contribution" and in explanation of the next paragraph "The Insurance Contract", is taken from Eaglestone,F.(1993), pp11-14.

The statements made above have been verified in the Scottish appeal case of *Steelclad Ltd v Iron Trades Mutual Insurance Co Ltd* (1984). However, the interesting part of that case was the court's view of the words in the contribution condition of the policy of the defender which refers to loss or damage insured by any other policy *"effected by the insured . . . on his behalf"* when the defender would not be liable except in respect of any excess beyond the amount payable under such other policy. The pursuer was the insured under the Iron Trades policy and was a subcontractor on a project policy covering the employer, all contractors and all sub-contractors. The contribution clause in that policy was worded exactly the same as the Iron Trades policy except for the phrase mentioned above in quotes. The court considered the project policy was not a policy effected by the insured *on his behalf*. Because the phrase was ambiguous, it was construed *contra proferentum* against the insurer who had refused to contribute. The project policy insurer had already paid almost half of the claim. The court did not have to go any further, having come to a decision on this wording. However, they did in effect say that even without this phrase or if the project policy had been effected on the pursuer's behalf, they *would still not allow the two policy conditions to cancel the cover given* (by ignoring in each case the condition which was worded exactly the same way in the other policy), with the result that if the loss is covered elsewhere, it is covered nowhere.

The correct decision, and surely the intention, is that each policy should contribute subject always to a rateable proportion condition. Basically, an insured must get an indemnity whether he or she insures once or twice the same subject matter against the same peril, subject always to the other terms and conditions of the policy or policies. It is rather strange that the matter should ever have been in doubt.

3.3. The insurance contract.

An insurance contract is formed when one party has made an offer and the other party has accepted it, both parties being in agreement as to the terms.

The contract is normally contained in a policy. This document is evidence of the contract which has usually come into existence before the policy is issued. Policies vary with different classes of insurance, and those dealt with in this book can be divided into the following sections.

(1) Recital clause, which refers to a schedule for details (see below). This clause also refers to the proposal form and its declaration as being the basis of the contract. However one qualifies "the event", it must be uncertain.

(2) Operative clause, which describes the cover which is the subject matter of the insurance.

(3) Exceptions which help to describe the cover by stating what is excluded.

(4) Signature clause on behalf of the insurer.

(5) Schedule, which contains the names of the parties, the address of the insured, the period of insurance, possibly the business of the insured, the sums insured or limit(s) of indemnity (in liability insurance), and the premium payable.

(6) Conditions, which limit the insured's legal rights, stipulate the various things the insured may or may not do and sometimes express or amend the common law or indicate an agreed state of

affairs. It is usual to classify conditions (whether expressed or implied) as:

(i) conditions precedent to the policy, eg all material facts must be disclosed during negotiations preceding the insurance contract;

(ii) conditions subsequent of the policy, eg notice by the insured of a change of risk during the period of the policy;

(iii) conditions precedent to liability, eg the notice of loss by the insured.

The following is the result of this classification:

(a) conditions precedent to the policy must be observed for the insurance to be valid from the beginning;

(b) conditions subsequent of the policy refer to matters arising after the contract has been completed and affect the validity of the policy from the date of breach of the condition;

(c) conditions precedent to liability only affect the claim which the breach of the condition concerns, the policy remaining in force.

A condition by which the insured undertakes that some particular things will be done or not done or that a state of affairs exists or shall continue to exist is referred to as a warranty or a continuing warranty. Breach of such condition will probably allow the insurer to repudiate liability, as a warranty must be complied with strictly and literally.

Occasionally a so-called condition in the policy has been held to be a mere stipulation. Thus it has been stated that the condition in the employers' and public liability policies requiring the insured to keep a proper wages book in order to return his or her annual wage roll on which the premium is based is a mere stipulation, a breach of which results in the insurer possibly obtaining damages as compensation but not allowing him or her to repudiate.policy liability.

(7) Endorsements are clauses which amend the policy cover to suit the particular insured. See chapter 4.9 for further explanation. *

* This paragraph has been inserted for the purpose of this thesis.

There is a general rule of evidence (among many) concerning the interpretation of the insurance policy, which occasionally arises. It is called the *contra proferentum* rule and states that in the event of ambiguity a document will be construed strictly against the party who has drawn it up. Thus the interpretation less favourable to the insurer will be taken.

From what has been said under the last few headings concerning non-disclosure and breach of warranty, it will be appreciated that insurance law is tilted in favour of the insurer. However, the Law Commission's Working Paper No 73 entitled *Insurance Law, Non-disclosure and Breach of Warranty* recommended reforms to improve the insured's position. This was followed by a Final Report on the same subject and on the same lines, with a draft Insurance Law Reform Bill annexed. This report is dated October 1980 and the matter has not been pursued since.

However, British insurers endeavour to behave reasonably and in 1977 they agreed to the publication of statements of their practice (all to the advantage of the insured), but this applied to insurances effected by individuals resident in the United Kingdom but insured in their private capacity only. Nevertheless, this tends to "rub off" onto the practice of other kinds of insurance such as those required in the construction industry.

It has often been considered a material fact that a proposer has been convicted of a criminal offence and thus non-disclosure thereof invalidates the insurance. This is because the non-disclosure either directly concerns the risks insured or it shows a degree of dishonesty making a prudent insurer reluctant to give cover on normal terms, or at all.

Now the main purpose of the Rehabilitation of Offenders Act 1974 is to rehabilitate offenders who have not been reconvicted of any serious offence for a number of years and prima facie entitles such persons to deny the existence of certain convictions. This Act does not apply to sentences of imprisonment of more than two and a half years. Where the Act applies, there is a rehabilitation period after which the conviction is considered spent and s. 4 of the Act provides that a spent conviction is to be treated for all purposes in law as though it had never happened. Therefore, a proposer whose conviction is spent need not disclose it to the insurer concerned. Furthermore, the publisher of a spent conviction could be liable in a defamation action if the publication was made with malice. See s. 4 of the 1977 Act and *Herbage v Pressdam* (1984). Thus many insurers refuse to disclose spent convictions within their knowledge to third parties.

3.4. Standard Forms of Construction Contract.

The law of the UK provides that parties are usually free to choose their own terms. In practice parties tend to use a standard form of contract because they have not the desire or ability to draft their own contracts. In the case of a professional agent acting for the person having the work done, he will use the contract he is familiar with, which will be a standard form. Also if certain provisions are not stated, implied terms, imposed by statue, could operate and drafting one's own terms can result in uncertainty and disputes. In any event responsibility for the works under a construction contract usually calls for a CAR policy and liability to third parties for EL and PL policies. Sometimes, particularly in the construction industry, standard forms are imposed by the employer who is having the work done, so there is no choice for the contractor. These forms often place responsibility for the works and liability to third parties on the contractors as well as a requirement to insure them. The works are normally set out in drawings, and in a bill of quantities or a specification. The use of standard forms is partly due to the impossibility of writing the conditions for each contract, and to the fact that the courts have interpreted the more ambiguous phrases of the more common forms, such as the JCT and ICE contracts, so their meaning is no longer in doubt. Also. the wording of these contracts are usually agreed by the representative bodies of both parties to the contract, which is a better situation than a unilateral contract drawn up by the employer only, whose main aim is to protect his own interests. This can be seen in some of the

motor manufacturer's building and engineering contracts as seen in the case of Smith v South Wales Switchgear (1978). The GC/Works/1 contract is an exception in that although it is a unilateral contract the Government tends to be open to an even handed approach to wordings. See the acceptance of responsibility for its own negligence by Government departments after Farr v The Admiralty (1953) showed the unfairness of this decision arising from the earlier contract CCC/Works/.1. In Farr`s case the plaintiffs were building a jetty for the Admiralty and due to negligent navigation an Admiralty vessel collided with it causing damage. The phrase "any cause whatsoever" was given a wide meaning and no exception existed concerning the employer`s negligence, although the current GC/Works/1 edition has such an exception. Thus the decision went against the contractors, who had to indemnify the Admiralty in accordance with the contract, and pay for the repairs to the jetty. In Smith's case the standard contract terms applicable in an overhaul contract contained in indemnity clause whereby the supplier (South Wales Switchgear) indemnified the purchaser (Chrysler) against "Any liability, loss claim or proceedings whatsoever under Statute or Common Law (i) in respect of personal injury to, or death of, any person whomsoever...". The injured man was an electrical fitter employed by South Wales Switchgear at Chryslers's factory. The trial judge held that the accident had been caused by negligence and breach of statutory duty by Chrysler and this decision was not appealed. The judge also decided that Chrysler were entitled to be indemnified by South Wales Switchgear and this was appealed in Scotland and affirmed.

On appeal to the House of Lords it was decided that the indemnity clause wording was not wide enough to cover Chrysler`s negligence. They said that an express agreement to accept liability for negligence required the word "negligence" or a synonym for it. It was also held that the clause contemplated South Wales Switchgear indemnifying Chrysler in respect of liabilities incurred by Chrysler for acts and/or omissions on the part of South Wales Switchgear in connection with their carrying out of the contractual works. It did not contemplate South Wales Switchgear indemnifying Chrysler in respect of liability incurred by Chrysler for its own acts or omissions. The Unfair Contract Terms Act 1977 does not allow the contracting out of negligent acts causing personal injury, but Smith's case was heard before this Act came into force.

While a standard contract can be altered by the parties to it to suit their requirements, the difficulty is that alteration of one clause involves making alterations to others on which the first clause depends, and this may be difficult to agree. To some extent this explains why it takes such a long time for the representative bodies to agree how an ambiguity or controversy should be resolved. This was seen in the alteration to the JCT form changing the required cover for the works insurance in 1986 from a fire and special perils policy to a CAR policy. Failure to make all necessary alterations throughout a contract can produce ambiguities. Fortunately this does not apply to any extent in the alterations to be suggested later in this thesis, as adding policy wordings to a contract which already requires that policy is not as extensive as calling for a complete policy wording.

CHAPTER 4

THE CONTRACTORS` ALL RISKS POLICY

4.1. Section 3 of a Contractors` Policy (Appendix 1).

The material damage insurance (the CAR policy) is set out in section 3 of this contractors` Policy. This policy appears in full in Appendix 1, but this is a combined policy, which also includes in section 1 employers` liability cover, and in section 2 public liability cover, as well as section 4 entitled "21.2.1" (a clause of the JCT contract) cover. Sections 1 and 2, but not 4 (as it is not a conventional policy), will be considered in detail in the following chapters. However, the whole Contractors` Policy is included in Appendix 1 in order to show how the various sections of the policy are involved with those parts of the policy which apply to more than one section, ie the parts entitled "Definitions", "Extensions". "General Exceptions", "Conditions of the Policy", "Endorsements" and the "Schedule". Taking the recital clause, section 3 of the policy, and the appropriate parts applicable to section 3 in order that they appear in the policy document, the following comments are relevant. Note that a reference to "the CAR policy" in this thesis refers only to the parts of the Contractors` Policy just mentioned.

4.2. Recital clause.

> In consideration of the payment of the premium the Independent Insurance Company Ltd (the Company) will indemnify the Insured in the terms of the Policy against the events set out in the Sections operative (specified in the Schedule) and occurring in connection with the Business during the Period of Insurance or any subsequent period for which the Company agrees to accept payment of premium.
> The proposal made by the Insured is the basis of and forms part of this policy.

The premium is the consideration for which the insurers issue the policy. The insured, business, premium and period of insurance are all set out in the policy schedule (see Appendix 1). The insured events must arise from the business and occur in the insurance period.

"Proposal" appears in the "Definitions" section as follows:

> Proposal; shall mean any information provided by the Insured in connection with this insurance and any declaration made in connection therewith.

Absolute accuracy of the answers on the proposal form is required as it is made the basis of the contract and legally the slightest inaccuracy will entitle the insurers to avoid liability. Whether they do so is another matter and if the incorrect answer is not material to the risk, the fact that the insurers are unlikely to take the point is irrelevant to the insurers' right to do so. See the previous chapter under the heading "3.2.2.2. Proposal Forms".

4.3. Damage to the works (operative clause or insuring clause).

In the event of Damage to the Property Insured the Company will by payment or at its option by repair reinstatement or replacement indemnify the Insured against such Damage

Provided that;

1. the Company shall not indemnify the Insured in any one Period of Insurance for any amount exceeding the Limit of Indemnity in respect of each item of Property Insured

2. the Property belongs to or is the responsibility of the Insured

3. the Property is
a) on or adjacent to the site of the Contract Works or
b) being carried by road rail or inland waterway to or from the site of the Contract Works within the Territorial Limits.

This insuring or operative clause indicates the cover given.

4.3.1. In the event of damage to the property insured.

Under the heading "Definitions" the word "damage" includes loss and "property" means material property.

The property insured appears in the schedule of the policy as follows:

Item 1 - Contract Works

Item 2 - Constructional Plant Tools and Equipment owned by the Insured.

Item 3 - Temporary Buildings and Site Huts (including fixtures and fittings therein).

Item 4 - Hired-in Property described in Items 2 and 3 not exceeding £.... any one item.

Item 5 - Personal Effects and Tools of the Insured's Employees not exceeding £.... any one Employee.

The policy defines "contract works" as follows:

> Contract Works means the temporary or permanent works executed or in course of execution by or on behalf of the Insured in the development of any building or site or the performance of any contract including materials supplied by reason of the contract and other materials for use in connection therewith.

4.3.2. The Company will ..... indemnify

The alternative method of indemnity to a payment, ie repair, reinstatement or replacement , will in practice be a payment to the insured for the cost of repairing or replacing the damage to the insured property.

4.3.3. The insured

To comply with most construction contracts the Insured will be the main contractor and the employer, although other parties such as subcontractors may be included as the insured in the schedule of the policy. However the

prudent contractor will insure his property including the works even when not required to do so by contract conditions. Further the CAR cover could well be more extensive than the perils required to be insured by contract.

4.3.4. Against such damage

Damage is defined as including loss, and all forms of loss or damage are covered subject to the policy exceptions and conditions (see later).

4.3.5. Proviso 1

Clearly the intention here is to limit the maximum amount payable in respect of each item of property to the amount stated in the schedule in each period of insurance, which is also stated in the schedule.

4.3.6. Proviso 2

Obviously all the property listed in items 1 to 5 of the schedule either belongs to or is the responsibility of the insured under the construction contract, otherwise there would be a lack of insurable interest and the property concerned could not be insured by those named as insureds in the policy schedule.

4.3.7. Proviso 3

Unlike proviso 2 it is not so obvious that all the property listed in the items 1 to 5 of the schedule is either on or adjacent to the site of the contract works, or is being carried by road, rail, or inland waterway, to or from the site of the contract works within the territorial limits. Some materials or goods might be stored offsite, and it will be seen later that if they have been certified for payment under the contract terms, the indemnity provided by the policy is

extended to apply to such goods or materials, as they are intended for incorporation in the contract works.

The Territorial Limits are defined in the policy as follows:-

Territorial Limits shall mean

a) Great Britain Northern Ireland the Isle of Man the Channel Islands or off-shore installations within the continental shelf around those countries

b) member countries of the European Economic Community where the Insured or directors partners or Employees of the Insured who are ordinarily resident in a) above are temporarily engaged on the Business of the Insured

c) elsewhere in the world where the Insured or directors partners or Employees of the Insured who are ordinarily resident in a) above are on a temporary visit for the purpose of non-manual work on the Business of the Insured.

Transit anywhere within the territorial limits of the policy is covered. It should be noted that transit by sea or air is not included, which is because of the heavier risks involved which in turn call for specialised underwriting considerations.

It is difficult to visualise how paragraphs b) or c) can apply to a CAR policy other than possibly to the personal effects and tools of an employee travelling abroad on business for the insured. In fact as the definition of Territorial Limits applies to the whole of the contractors' policy no doubt the insurers' intention is to apply these paragraphs to the employers' and public

liability sections of this policy. If the insured does not send employees overseas these paragraphs do not apply. Some insurers exclude even temporary visits to the United States of America and Canada.

4.4 Additional Covers

4.4.1 Professional fees.

The Company will indemnify the Insured for architects surveyors consulting engineers and other professional fees necessarily incurred in the repair reinstatement or replacement of Damage to the Property Insured to which the indemnity provided by this Section applies Provided that

(a) such fees shall not exceed that authorised under the scales of the appropriate professional body or institute regulating such charges

(b) the Company shall not indemnify the Insured against any fees incurred by the Insured in preparing or contending any claim.

It is important that the limit of indemnity (sum insured) estimated by the insured for the contract works, including temporary works, should make provision for these fees. Some construction contracts such as clause 22 of the JCT 1980 contract and clause 21 of the ICE conditions require this risk to be covered by the CAR policy.

Proviso (a) is self-explanatory and proviso (b) emphasises the fact that insurers are not going to pay to assist the insured by financing claims against themselves.

The words "professional fees necessarily incurred in the repair, reinstatement or replacement of Damage to the Property Insured" emphasise that the cost of a site investigation will be claimable under the policy if it is related to the repair, reinstatement or replacement of damage to the property insured to which the indemnity provided by the policy applies.

Sometimes professional fees are duplicated. Thus a surveyor or architect dealing with the repair of subsidence damage involving the employment of a consulting engineer to advise on, and prepare a scheme for, underpining, can result in the architect or surveyor submitting the full professional scale fee on all the work, in addition to the engineer's fees, as if the latter had not been appointed. In the first place if additional work, over and above the repair, reinstatement or replacement of the original work, is necessary, the cost of such additional work and fees connected with it are not covered by the policy. The policy does not cover defective or incorrect workmanship, design or specification, or materials or goods installed, erected or intended for incorporation in the contract works, See exception 1 later in this chapter. Secondly, even if the work does only involve the repair, reinstatement or replacement of existing work and the surveyor or architect does not perform the complete duties specified in the RICS or RIBA scales of professional charges, because the engineer does some of the work, the surveyor or architect is not entitled to the complete percentage scale fee.

The onus of proof is on the insured that the costs relate to the repair, reinstatement or replacement of damage to the property insured as these words come from the operative clause of the policy. They must provide evidence which will mean incurring costs. However, if they employ a claim maker or adviser, such as an assessor, their fees will not be covered. See proviso (b).

4.4.2. Debris removal.

> The Limit of Indemnity provided in respect of Item 1 of the Property Insured shall include the cost and expenses necessarily incurred by the Insured with the consent of the company in
>
> a) removing and disposing of debris from or adjacent to the site of the Contract Works
> b) dismantling or demolishing
> c) shoring up or propping
> d) cleaning or clearing of drains mains services gullies manholes and the like within the site of the Contract Works
>
> consequent upon Damage for which indemnity is provided by this Section
> Provided that the Company shall not be liable in respect of seepage pollution or contamination of any Property not insured by this Section.

The reason for the existence of "debris removal" cover is to allow the insured to recover costs that would otherwise have been outside the protection of the CAR policy. If debris removal is not covered difficulties can arise as to what is an act of debris removal and what is an act of repair. The test is whether it is necessary to carry the work out before reconstruction can begin or not. If the work need not be carried out before reconstruction can begin then it is an act of repair and covered by the policy without the debris removal extension. Otherwise it is not covered by the policy without the extension.

The expense of removing debris can be very high. There is not only the possibility of rubble from a collapsed building but debris spread over the site following a storm. This rubble cannot be dumped anywhere but may have to be transported to a suitable and permitted place. It should be noted that the insurer's permission for such expense to be incurred must be obtained

and it is important to include a sum within item 1 of the schedule (contract works) to cater for such costs.

This cover includes both dismantling and demolishing, shoring and propping up as well as cleaning or clearing of drains and the like, the cost of which can be considerable in the case of flooding of the site. In any event shoring or propping done in order to minimise damage to the work, etc would be covered and would not need the permission of the insurers. The proviso is understandable and merely emphasises that this policy is a material damage one and does not cover third party property or even the insured's extraneous property not within the definition of, and listed as insured property in the schedule.

4.4.3. Off-site storage.

> The indemnity provided by this Section extends to apply to materials or goods whilst not on the site of the Contract Works but intended for incorporation therein where the Insured is responsible under contract conditions provided that the value of such materials and goods has been included in an interim certificate and they are separately stored and identified as being designated for incorporation in the Contract Works.

The important point about this cover is that, apart from the value to the contractor, no CAR policy should be accepted by an architect or engineer on behalf of his client (the employer) without this cover being given in some shape or form, as the JCT 1980 contract requires it under clauses 16 and 30.3 and the ICE Conditions under clause 54.

4.4.4. Final contract price.

This term is probably better known as an escalation clause.

It reads:

> In the event of an increase occurring to the original price the Limit of indemnity in respect of Item 1 of the Property Insured shall be increased proportionately by an amount not exceeding twenty percent.

In this way the insurers have built into the policy a 20% inflation factor but this does not protect the contractor and employer from the necessity to ensure the limit of indemnity (or sum insured) is always adequate, ie of a sufficient sum to cover the cost of repairing any damage which may occur plus debris removal costs and professional fees. Incidentally, it is usual to use the term "limit of indemnity" to apply to the policy limit in liability policies and the term "sum insured" is used in the case of material damage policies to indicate a policy limit.

4.4.5. Tools, plant, equipment and temporary buildings.

The wording of this clause reads:

> The Limit of Indemnity in respect of Items 2, 3 and 5 of the Property Insured is subject to average and if at the time of any Damage the total value of such Item of the Property Insured is of greater value than the Limit of Indemnity the Insured shall be considered as being his own insurer for the difference and shall bear a rateable share of the loss accordingly.

Incidentally, this clause would read more correctly if the letters "ie" were substituted for the word "and" in the second line. Average only applies to items 2, 3 and 5 of the property insured as listed in the policy schedule. Once average is applied all claims are affected if the limit of indemnity (sum insured) is inadequate, as the claim is scaled down in proportion to the amount the sum insured bears to the full value at risk. Thus if property

worth £40,000 is only insured for £30,000 the insured is under-insured and the amount payable of the loss sustained under the policy, is calculated as follows:

Sum insured £30,000

Value at risk £40,000

4.4.6. Speculative housebuilding.

This clause reads:

> The insurance in respect of Item 1 of the Property Insured shall notwithstanding Exception 4(b) for private dwelling houses flats and maisonettes constructed by the Insured for the purpose of sale continue for a period up to 180 days beyond the date of substantial completion pending completion of sale
> Substantial completion shall mean when the erection and finishing of the private dwelling house are complete apart from any choice of decoration fixtures and fittings which are left to be at the option of the purchaser.

The reason for this additional cover is to protect the insured contractor between the completion of the construction work (in accordance with the second paragraph above) and the sale of the premises to a purchaser, for a period of about six months beyond the date of such completion. This is a useful addition (which is not usually in the basic cover of a CAR policy) especially in the case of theft and malicious damage.

4.4.7. Local authorities.

This clause reads:

> The Indemnity provided by this Section shall include any additional cost of reinstatement consequent upon Damage to the Property Insured which is incurred solely because of the need to comply with building or other regulations made under

statutory authority or with bye-laws of any Municipal or Local Authority.

Provided that

1. the Company shall not indemnify the Insured against the cost of complying with such regulations or bye-laws
   (a) in respect of Damage which is not insured by this Section
   (b) if notice has been served on the Insured by the appropriate authority prior to the occurrence of such Damage
   (c) in respect of any part of the Insured Property which is undamaged other than the foundations of that part which is the subject of Damage.
2. the Company shall not indemnify the Insured against any rate tax duty development or other charge or assessment arising out of capital appreciation which may be payable in respect of the Property by its owner by reason of compliance with such regulations or bye-laws.
3. reinstatement is commenced and carried out with reasonable despatch.

Local authorities have their own bye-laws which allow them to require the owners of property to reinstate damaged or destroyed buildings in a way which is acceptable to the authority. This clause (often included in a fire policy as an extension) covers the extra cost incurred by the insured in complying with these requirements. The wording emphasises that the insured cannot claim for the extra cost of improvements he decides to carry out whilst the reinstatement of the damage is being done, nor even for changes which are recommended by the authorities. Only when the insured has no alternative but to have the additional work or different work done because of the local authority's requirements, which has the legal power to

enforce such requirements, does the clause impose liability on the insurers to pay for this extra expense incurred by the insured.

In the event of this clause being involved in a claim the insurer will obtain confirmation from the authority of the date on which the insured was informed that the extra cost was to be incurred. If this date was prior to the occurrence of the damage resulting in the claim the extra expense is not recoverable from the insurers, even though the notice did not require any alteration or addition to be carried out before the date of the damage. This extra cost and cover is still subject to the limit of indemnity.

The remaining exclusions are self explanatory.

4.4.8. Immobilised plant.

This clause reads:

> The indemnity provided in respect of Items 2 and 4 of the Property Insured shall include the cost of recovery or withdrawal of unintentionally immobilised construction plant or equipment provided that such recovery is not necessitated solely by reason of electrical or mechanical breakdown or derangement.

This clause draws attention to the fact that although plant may be covered under items 2 and 4 in the schedule there is an exception 3 (see later under the heading "Exceptions") which excludes damage to plant tools or equipment due to its own explosion, breakdown or derangement. However, whereas the exception 3 wording only applies to the part responsible and does not extend to other parts of the plant tools or equipment which sustain direct accidental damage therefrom, this clause excludes the whole of the plant tools and equipment (including hired-in plant etc.) immobilised solely by reason of electrical or mechanical breakdown or derangement.

4.4.9. Free materials.

> Property for which the Insured is responsible shall include all free materials supplied by or on behalf of the Employer (named in the contract or agreement entered into by the insured)
> Provided that the total value of all such materials shall be included in the Limit of Indemnity for Item 1 of the Property Insured and also included in the declaration made to the Company under Condition 2.

As under the majority of construction contracts involving a standard form the employer would be included as an insured in the policy schedule, this wording is again merely for emphasis. However, the proviso should prevent the value of such materials being overlooked when deciding the limit of indemnity for item 1 of the property insured in the policy schedule. The insured must insure the property for its full value (under the JCT form for its reinstatement value).

Condition 2 is a premium adjustment condition when the premium is based on estimates. Consequently it is important to include the value of free materials in making the return at the end of the policy period as required by this condition.

4.5 Exceptions.

The Company shall not indemnify the Insured against

4.5.1. Exception 1. Defective workmanship, design or materials.

> the cost and expenses of replacing or making good any of the Property Insured which is in a defective condition due to faulty defective or incorrect
> a) workmanship
> b) design or specification
> c) materials goods or other property installed erected or intended for incorporation in the Contract Works

> but this exclusion shall not apply to accidental Damage which occurs as a direct consequence to the remainder of the Property Insured which is free of such defective condition.

This exception concerns in (a) and (c) defective workmanship and materials which insurers consider to be a trade risk. Consequently they will not pay for the expense of remedying, repairing, or making good defective materials or workmanship. The policy does not cover the insured's competency in this respect. However, the exclusion is qualified making it clear that consequential damage to the remainder of the property insured is covered as the latter damage is free of such defective condition. Nevertheless difficulties can arise as it is not always possible to indicate what is and what is not a defective part, and what cost should be excluded.

The meaning of part (b) is clear, namely to exclude the professional negligence risk as the professionals concerned should carry this risk and they should insure accordingly. If this part of the exclusion did not carry the later qualification (as some policies do) it would dispose of most difficulties but with the qualification which excludes only the defective part there can be controversy in identifying the part which is defectively designed. For example, defective piling can result in a complete rebuild.

The JCT contract by clause 22.2 in the 1986 amendment sets out the meaning of "All Risks Insurance" in that contract and the same type of exclusion reads as follows;

> "any work executed or any Site Materials lost or damaged as a result of its own defect in design, plan, specification, materials or workmanship or any other work executed which is lost or damaged in consequent thereof where such work relied for its support or stability on such work which was defective".

Now this exclusion is wider than the exception under discussion as it excludes work which relied for its support or stability on the work which was defective, as well as the defective part. So if a beam supporting a ceiling is held up by a defective bolt and the beam collapses because of the defective bolt and the beam falls through the two floors underneath, there is damage to the bolt, to the beam, and to the floors (all part of the contract works). Consequently the exception under discussion, as it only excludes the defective part, would only exclude the bolt, but the JCT exclusion would exclude the bolt and the beam as the latter relied for its support on the defective bolt. This indicates that the policy exception under discussion would only exclude work which can be inexpensive to remedy, ie the bolt, whereas the JCT form would exclude both the cost of the beam replacement as well as the bolt which together are more expensive. Neither exception would exclude the damage to the floors below, which would involve the major expense.

The explanations of the next two legal cases are taken from Eaglestone, F. and Smyth, C. (1985), pp 62-63 and Eaglestone ,F. (1985), pp 123-125.

The Canadian case of *Pentagon Construction (1969) Co. Ltd* v. *United States Fidelity and Guarantee Co.* (1978) illustrates the difficulties in differentiating between defective workmanship and defective design, although that case did not concern the limited cover given by U.K. insurers for defective material or workmanship. The interpretation of the following wording was considered. 'This insurance does not cover: (a) Loss or damage caused by: (i) faulty or improper material or (ii) faulty or improper workmanship or (iii) faulty or improper design.'

In this case Pentagon were building contractors engaged to construct a sewage treatment plant which included a concrete tank. The plans and specifications required a number of steel struts to be laid across the top of the tank with each end welded to a plate let into the concrete wall beneath it. The purposes of the struts were to strengthen the tank by holding the sides together and to hang equipment from them. The contract required Pentagon to test the tank. Pentagon insured the work under a contractors' all risks policy.

After the concrete work of the tank was completed and the struts laid across the tank, but before the end of the struts had been welded, the tank was tested by filling with water. The tank bulged and a claim was lodged under the policy and repudiated by the insurers who relied on the above exclusion.

At the court of first instance it was held that the design of the tank was not faulty or improper and there was no faulty or improper workmanship. The insurers appealed, and argued that the word 'design' included the plans and specifications and that they were faulty in that they omitted to state that the tank should not be tested until after the struts had been welded.

All three judges in the appeal court decided that as the evidence clearly established that the wall of the tank failed because of the failure to weld the steel struts to the top of each side of the wall before testing, this amounted to improper workmanship, or, to put it another way, testing before welding was improper workmanship. This led one judge to decide it was unnecessary for him to consider the question of faulty or improper design. The other two judges reached different opinions on the meaning of 'design'.

The conclusions to be drawn from this case are that:

(a) Workmanship is not limited to the work or result produced by a worker. It includes the combination or conglomeration of all the skills necessary to complete the contract, including, in this case, the particular sequence necessary to achieve the performance of the contract. Failure to follow that sequence could constitute faulty or improper workmanship and in this case did so.

(b) It is not known whether:

(i) detailed instructions on the plans and specifications on how the work of construction is to be carried out are not part of the design, which was one judge's view (he added that if he were wrong he did not think it was necessary for the plans and specifications to warn that the tank should not be filled with water before the struts were welded); or

(ii) design includes the drawings and specifications, which was the other judge's view.

Thus on the meaning of 'design', with the third judge abstaining, the case is unsatisfactory.

Defective workmanship is a contract hazard normally accepted by contractors. The cost of doing such work twice is not properly a matter for insurers (but the cost of rebuilding other parts of the insured property is), and if the use of defective materials is not due to the negligence of the contractor, he will probably have a remedy against the suppliers.

Nothing is said in the policy about the cost of dismantling or exposure work necessary to get at a defective part. It is arguable both ways, i.e. it is part of the cost of rectifying the property excluded by the policy or it is part of the insured property not excluded. The same position can arise when a limited form of design cover is given, i.e. who pays for the cost of getting at the defectively design part? In practice, an insurer may be prepared to pay for half of such costs on the grounds that a court might hold that it is an ambiguous matter, and therefore decide against the insurer *contra proferentem*. See chapter 1* under the heading 'The insurance contract'.

Some policies will exclude 'intentional damage'. None will pay if no damage occurs at all but purely a defect comes to light.

A case on the meaning of 'faulty design' as used in the exclusion to this policy is *Queensland Government Railways* v. *Manufacturers' Mutual Insurance Ltd* (1969). A railway bridge in Australia was being constructed by Electric Power Transmission Pty Ltd for QGR (railway authority) to replace the bridge built in 1897 which had been swept away by flood waters. Prismatic piers (similar to the original piers, but strengthened) were being erected when they were overturned by flood waters after exceptionally heavy rains. EPT and QGR claimed to be indemnified by the insurers under a contractors' all risks policy, which provided (*inter alia*):

'. . . this insurance shall not apply to or include:

(vii) cost of making good faulty workmanship or construction . . .

(xi) loss or damage arising from faulty design and liabilities arising therefrom.'

The insurers denied liability, contending that the loss was due to faulty design of the piers. The arbitrator found that, in the state of engineering knowledge at that time, the design of the new piers was satisfactory. However investigations into the cause of failure of the piers showed that during floods they were subjected to greater transverse forces than had been realised, and that the loss was not due to faulty design, in that 'faulty design' meant that 'in the designing of the piers there was some element of personal failure or non-compliance with the standards which would be expected of designing engineers'. Therefore, the insurers were liable. They applied to have an award set aside or remitted on the ground that the arbitrator misconstrued the term.

It was held by the Supreme Court of Queensland that, in the context, 'faulty design' implied some element of blameworthiness or negligence, which had been negatived by the arbitrator's findings; that subsequently acquired knowledge revealing that the piers were not strong enough could not convert the design, which would at the time have been accepted by responsible and competent engineers, into a 'faulty design', and that, therefore, the insurers were liable.

On appeal the decision of the Queensland Supreme Court was reversed. It was held that 'faulty design' did not imply an element of blameworthiness or negligence; the loss of piers through the inadequacy of their design to withstand an unprecedented flood was outside the policy, notwithstanding that the design complied with the standards that would be expected of designing engineers according to engineering knowledge and practice at the time of their design.

* Chapter 3 in this Thesis.

In Hitchins (Hatfield) Ltd v Prudential Assurance Co Ltd (1991) the plaintiff, a firm of builders, was insured under a contractors' policy issued by the defendants. The policy covered loss arising from "any fault, defect, error or omission in design", but went on to exclude liability for "any increased costs due to redesigning the property insured or any part thereof which is defectively designed".

The plaintiff was engaged in building a housing estate on a slope, which he levelled off to create four separate terraces but increased the slope between the terraces. The slope was unstable due to the composition of the soil and landslips occurred. The Prudential relied on the exclusion to avoid payment to cover the cost of reinstating the slope by arguing that the slope had been "defectively designed". This point came before the Court of Appeal as a preliminary issue. It was agreed by both parties that the words "defect in design" covered both negligent and non-negligent defects in design in accordance with the QGR case mentioned earlier. The plaintiff argued that the meaning of the words "defectively designed" in the exclusion clause imported an element of negligence, which meant that the Prudential had to demonstrate the plaintiff's negligence to rely on the exclusion. The Prudential argued that there was no difference between the phrases "defect in design" and "defectively designed" so the loss was excluded from liability. The Court decided that the two phrases had to be distinguished and that a building could have a defect in design with nobody at fault, but "defectively designed" referred to the conduct of the designer. The distinction was between an inanimate object (defect in design) and the activity which gave

rise to that inanimate object (defectively designed). Furthermore it was clear that some distinction had to be made, as the policy deliberately used two different phrases and had to be presumed to be referring to two different concepts. Thus the Prudential could rely upon this exclusion only by showing that the plaintiff had been negligent. However, it should be noted that the Court of Appeal has confirmed the decision that a "defect in design" can occur without any negligence upon the part of the designer.

A similar problem arose in BC Rail Ltd v American Home Assurance Co (1992) heard by the British Columbia Court of Appeal. Here work between 1983 and 1985 to support a railway line on a steep embankment, designed by an employee of the plaintiff, failed due to inadequate soil tests, and a landslide occurred. BC had to re-route rail traffic (costing 456,340 dollars), pending the building of a temporary bridge (costing 598,210 dollars), and eventually a permanent bridge (costing 1,263,707 dollars).

The wording of the BC all risks policy defined the perils insured against as "all risks of physical loss or damage from any cause except as hereinafter excluded". The policy excluded loss or damage caused by "error in design ..... however, damage resulting from (inter alia error in design) is hereby covered". The questions were had there been an error in design and if so was it possible to reconcile this apparently contradictory wording. The view of the majority of the court was that the word "error" in "error in design" referred to the design itself and not to the workmanship producing the design. Thus whether the BC employee was negligent or not, was irrelevant and the exclusion applied to the loss. The dissenting judge considered the

word "fault" in the previous cases discussed earlier was not the same as "error". "Fault", he thought , could refer either to the design or to the workmanship itself, but "error" could refer only to the workmanship. Thus, he ruled that the insurer could not exclude the claims without proof of negligence on the employee's part.

Turning to the second question mentioned above, the majority of the court held that the costs of reconstruction (the two bridges) were not "damage resulting from" the error within the meaning of the exclusion clause, as the railroad bed was an integral part of the design. So this clause operated to exclude these costs. The expenses of re-routing traffic were not "physical loss or damage" within the meaning of the primary definition (the operative clause), and the references to "loss or damage" and "damage" in the exclusion clause should be construed to mean physical damage only. The re-routing costs were economic loss and not covered by the policy. Consequently, all BC Rail's claims failed.

Apart from the decisions on design this case also indicates the importance to insurers of not merely excluding consequential loss from all risks policies, but of using the word "physical" in the operative clause in order to restrict the cover in this respect.

See on these last two cases Merkin (1991) Issue No. 6 P3 and (1993) Issue No. 3 P4.

4.5.2. Exception 2 Wear etc., normal upkeep and inventory shortage.

Damage due to

(a) wear tear rust or other gradual deterioration
(b) normal upkeep or normal making good
(c) disappearance or shortage which is only revealed when an inventory

is made or is not traceable to an identifiable event.

Wear, tear, rust or other gradual deterioration as trade risks would probably constitute cover that would not be expected by the insured contractor, who, in any event, cannot insure for such risks as the policy is not a maintenance contract but an indemnity contract. See chapter 3. Also these are inevitable risks; they are not fortuitous and thus are not suitable subjects for insurance.

Normal upkeep and making good are in the same position as wear, tear, rust and other gradual deterioration as the former are usually the remedial work necessary to rectify the latter risks.

Although theft losses are covered, the object here is to exclude shortages not arising out of a specific identifiable incident but due to regular pilfering, ie general losses over a period of time. Condition 6 of this policy, mentioned later, requires notice as soon as possible after the occurrence of any event which may give rise to liability under the policy. Clearly it would not be possible to comply with this condition in the case of shortages discovered at the time of stocktaking, ie unexplained shortages. In all these circumstances it is not intended to cover such losses. Contract sites suffer minor pilferages which in themselves are difficult to detect and virtually impossible to investigate, although over a period they can amount to a considerable sum. So this risk has also an inevitable or non-fortuitous aspect to it.

4.5.3. Exception 3 Machinery (etc) own explosion (etc) and certain other property

Damage to

(a machinery plant tools or equipment due to its own explosion breakdown or derangement but this exception shall be limited to that part responsible and shall not extend to other parts which sustain direct accidental Damage therefrom.
(b aircraft hovercraft or watercraft other than hand propelled watercraft not exceeding 20 ft in length
(c) any mechanically propelled vehicle licensed for road use including trailer attached thereto other than Damage which occurs to plant whilst it is on the site of the Contract Works or it is being carried to or from such site or it is stored in premises or compound of the Insured
(d) bank notes cheques securities for money deeds or stamps
(e) structures (or any fixtures fittings or contents thereof) existing at the time of commencement of the contract Works
(f) Item 1 of the Property Insured in respect of any contract or development
  (i) the value or anticipated cost of which at the time of its commencement exceeds the Limit of Indemnity for Item 1
  (ii) the period for which at the time of its commencement exceeds the Maximum Period.

(a) Loss of or damage to plant, etc due to its own explosion, etc is a risk which can be covered by an engineering policy, and is not covered here, but the exception does not exclude damage to other parts of the plant, etc. caused by the explosion, etc. and this follows the principle mentioned in exception 1 above concerning defective workmanship and materials.

(b) and (c)

These concern exclusions in respect of loss of or to mechanically propelled vehicles which are licensed for road use, aircraft, watercraft (except hand propelled craft not exceeding 20 feet in length), or hovercraft. These risks are properly the subject of more specialist insurances such as motor, engineering, aviation and marine,

although special arrangements can be made where individual types of plant are required to be covered by this policy. Regarding mechanically propelled vehicles, clearly the Road Traffic Act risk (liability to third parties) is excluded from the policy cover while the tool of trade risk is covered. In this policy the cover for plant is wide as carriage to and from the site and storage in the insured's premises are covered. In some policies there can be difficulty in deciding what risks are covered by the motor policy and the CAR policy, eg when the plant is moving by its own power on a road works site as some policies only cover the plant when used as a tool of trade.

(d) This policy excludes bank notes, etc as there are likely to be large sums on the site at the time of payment of wages and this property should be more correctly covered under a money insurance policy. Furthermore, there is a doubt whether this exception is necessary since this type of property does not come within the items in the schedule under the heading "Property Insured". As with a number of terms in policies this exception merely emphasises the basic position under the policy which is stated elsewhere.

(e) Existing structures which are not part of the contract works are clearly not covered by the policy. Nevertheless what is not always clear is what are works and what are existing structures when there is an extension of an existing structure or an alteration of an existingstructure.

In the JCT 1980 edition the "Works" are defined in clause 1.3 as those "briefly described in the First recital and shown and described in the Contract Drawings and in the Contract Bills". Loosely, "works" in the same contract means the work done by the contractor and not yet handed over and also the unfixed materials and goods, delivered to, placed on or adjacent to the work done and intended for incorporation therein in accordance with clause 22. On the other hand in the JCT contract clause 22C.1 the existing structures which are the responsibility of the employer as well as the contents thereof owned by him must be insured. Therefore although the employer is required by that clause 22C.1 to take out a joint names policy covering those responsibilities against specified perils it is clear that the wording under discussion would not cover the existing structures.

(f) Both parts of this exception seem almost unnecessary as it can only emphasise what is already stated in the policy schedule.

4.5.4. Exception 4 Use or occupancy and after completion.

Damage to the Contract Works or any part thereof

(a) caused by or arising from use or occupancy other than for performance of the contract or for completion of the Contract Works by or on behalf of the Insured

(b) occurring after practical completion or in respect of which a Certificate of Completion has been issued unless such Damage arises

  (i) during any period (other than the Maintenance Period) not exceeding 14 days following practical completion or issue of such Certificate in which the Insured shall remain responsible under the terms of the contract for the Contract Works or the completed part thereof

  (ii) during the Maintenance Period and from any event occurring prior to the commencement thereof

  (iii) by the Insured in the course of any operations carried out in pursuance of any obligation under the contract during the Maintenance Period.

This exception concerns loss or damage after the contract works (or any part thereof) have been completed and delivered to or taken into use or occupation by the principal (employer), except to the extent that the insured may remain liable

(a) under the maintenance conditions of the contract;
(b) during a period not exceeding fourteen days after the issue of a certificate of completion and which it is the responsibility of the insured to insure.

So far as the JCT 80 form is concerned, sub-clause 22A requires the contractor to insure until the " date of issue of the certificate of Practical Completion". In any event, once the works have been completed and delivered, it is arguable that the contractor no longer has an insurable interest in the works, assuming he has been paid and subject to the contract terms. Sometimes insurers are asked to cover occupation before completion, and they may be prepared to do so for an additional premium. Any occupation will usually involve a change of information on which the insurance business was placed and thus a probable change of rate for premium purposes. In the case of failure to notify the insurer, the fact of the employer`s or his tenant's occupation is rarely in doubt but the part of the property in occupation can be in contention. However, once notification takes place, in most cases the problem is resolved quite easily.

At practical completion the risk of loss or damage passes to the employer, who is responsible for arranging his own insurances. Sometimes the wording in the construction contract concerning possession by the employer is not the same as "caused by or arising from use or occupancy" which is the expression used in the policy. Thus clause 18 of the JCT 80 form deals

with "partial possession by the employer", and it is arguable that "possession" in this clause is not the same or may not be the same as the wording used in the policy, as merely use for storage may not involve taking possession.

Nevertheless, such use would fall foul of the policy wording. Secondly, the question arises as to the effect of such use or occupancy. Does it just affect the cover for that part of the site used or occupied, or is the whole of the policy cover prejudiced? Probably the answer depends on the additional risk the use or occupancy imposed on the remainder of the site which is not used or occupied. If the whole site risk is increased then it will affect the whole policy cover. For example, the storage of inflammable material could affect the whole site.

The responsibility to insure in the case of sectional completion was considered in English Industrial Estates Corporation v George Wimpey & Co Ltd (1972) which was a case of alleged sectional completion.

A factory owned by the plaintiffs was leased to tenants who wanted to extend it, while continuing to make corrugated cardboard, to install a large new machine and have storage space for hundreds of reels of paper. Wimpey obtained the contract which was on the pre-1980 JCT form incorporating the bill of quantities. Wimpey had a CAR policy which came into operation when a fire occurred destroying much of the new factory, as the work had not been completed. The Corporation argued that although the tenants had installed the machine and 1500 reels of paper in the new factory, as the work had not been completed it was Wimpey's duty to insure,

and that the loss, should therefore fall upon Wimpey or its insurers. Wimpey relied upon the partial possession clause in the contract. The question before the court was, had the employer before the date of the fire "taken possession" of any part or parts of the works? If it had, that part was at the employer`s risk .

The facts showed that the car park, for example, was accepted for handover by the employer's architect, when he issued a certificate on a RIBA printed form which certified that "a part..... of the works, namely, car park, the value of which I estimate to be £10,000 was completed to my satisfaction and taken in possession on 22 September, 1969.....". Evidence was given that form of certificate was normal for sectional completion.

The matter was complicated by special provisions in the bills of quantities showing that the tenant would install plant and equipment and would occupy and use part of the works, but that the contractor was still to keep the works covered by insurance. Lord Denning was prepared to consider the partial possession clause without placing any reliance on the provisions just mentioned. In his opinion the words "taking possession" of a part of the works must be so interpreted as to give precision to the time of taking possession and in defining the part, because of the important consequences which followed on it.

To achieve this precision, the parties themselves had evolved suitable machinery to determine it by way of a definite handing over of the part by the contractors to the employers. The practice was for the contractors to tell the architect that a part was ready for hand over. The architect would

inspect it and, if satisfied, would accept it on behalf of the employers. He would give a certificate defining the part, its value and the date of taking possession. The hand-over was thus precise and definite. It was the accepted means of defining the hand-over.

In Lord Denning`s view, the contractor at the time of the fire had not handed over to the employer the responsibility for certain buildings, although the tenant was using those buildings, thus it was the contractor's responsibility to insure them until actual hand-over. The risk remained with the contractor and their insurers must bear the loss. The other two judges came to the same conclusion as Lord Denning, but they merely considered that some formality was required in interpreting the partial possession clause. Clearly there are dangers for contractors in allowing use or possession of the works which they are insuring for all risks without clarifying responsibility for insurance of the works, and agreeing the position with their insurers. It seems from the above case that whatever type of construction contract applies some clear cut and final formalised conduct by the parties must be shown, evidencing the transfer of possession so that the parties are in no doubt that the various consequences of taking possession have come into effect.

4.5.5. Exception 5 Relief of responsibility by the construction contract.

Damage for which the Insured is relieved of responsibility under the terms of any contract or agreement.

In some construction contracts the contractor is relieved of responsibility for loss or damage to the works in certain circumstances. Thus, under the optional clauses 22B and 22C of JCT 80 (as amended in 1986) the

employer is responsible for the works and site materials (as defined), in that he is to take out and maintain a joint names insurance policy (in the joint names of the main contractor and the employer) for all risks insurance. Under the sixth edition of the ICE conditions of contract the "excepted risks" (those for which the main contractor is not responsible) so far as the contract works are concerned, include damage due to use or occupation by the employer, his agents, servants or other contractors (not employed by the main contractor) or due to fault defect error or omission in the design of the works (other than a design provided by the contractor pursuant to his obligations under the contract) as well as war and kindred risks, nuclear risks and sonic waves "Exception 5 would exclude the excepted risks".

4.5.6. Exception 6 Liquidated damages, penalties or consequential loss.

(a) liquidated damages or penalties for delay or non-completion
(b) consequential loss of any nature

Regarding (a) insurers prefer to work on an indemnity basis when paying claims under a material damage policy and are reluctant to enter into payments on an agreed value basis. Apart from this, penalty payments as defined are consequential losses and the following remarks apply.

Turning to (b) the operative clause of the CAR policy is usually worded so that without this exclusion it would cover consequential loss. The danger for the insurer is that legally "consequential loss or damage" has been held to mean loss which does not result directly and naturally from the act concerned or, in the situation under discussion, the perils covered by the policy. The point is that the type of loss which (within the insurance industry) is considered by insurers (in their terminology) to be consequential

loss is not in fact considered by the courts to be consequential because it is a direct and natural loss, eg loss of profit from loss or use, increased cost of working, and loss arising from delay in completing contracts. Therefore, a safer way is for the insurer to state specifically what he intends to exclude by the words "consequential loss", otherwise the legal interpretation of "indirect or consequential" will not include those heads of damage intended by the insurer to be excluded from the policy cover of the CAR policy. However, this could result in a large list, which even then may not exclude everything intended to be excluded from the policy. Possibly the best way is to confine the operative clause to physical or material loss or damage which the policy in Appendix 1 does. For the legal authorities on this aspect see the line of cases from Millar`s Machinery Co Ltd v David Way & Son (1934) to Croudace Construction Ltd v Cawoods Concrete Products Ltd (1978). A combination of both methods may be even more satisfactory to all concerned, specifically excluding the financial losses mentioned above. Some consequential losses may be covered under special policies and sometimes the employer (the principal under the construction contract) is the insured. These policies normally give cover against the same perils as the material damage policy for the protection of the works, and are subject to the material damage policy operating. The following quotation from Eaglestone, F. (1985) pp 128-129 gives an indication of the consequential loss policies that can be obtained.

(a) Advance profits: The protection provided by this policy is in respect of financial loss through delay by damage to the works or at the supplier's premises of important plant or equipment or during transit. Payment under this policy does not start until the date the business would have commenced but for the damage, and is in respect of the anticipated income, i.e. the gross profit of a manufacturer or the rent of a property developer which is not earned at the estimated date.

(b) Additional cost of working: This is an expense incurred by the contractor and can be an extension of the contractors' all risks policy as it follows a claim under that policy and involves costs beyond those incurred in making good that damage. For example, the basis of claims settlements in the case of payment to workmen by reason of guaranteed time or such agreements is by calculating the difference between the amount paid to the workmen and the amount which would have been payable had no such agreement been in force. In the case of plant standing idle, the calculation for hired plant as the amount payable for the affected period and for the contractors' own plant, is based on an allowance in respect of loss of working time, say 66⅔ per cent of the rates for such plant in either of the publications applicable (*Definition of Prime Cost of Daywork carried out under a Building Contract*, published jointly by the RICS and BEC (formerly the NFBTE), or the *Schedules of Dayworks carried out incidental to Contract Work*, issued by the Federation of Civil Engineering Contractors). Sometimes the expense is difficult to identify, especially when time has also been lost on the contract before the damage.

(c) Fines and damages: This is also a possible extension of the contractors' all risks policy covering fines and damages payable by the contractor under the construction contract, following loss or damage due to some or all of the perils covered by this all risks policy. This cover is not easily obtainable and the rate of premium is high.

(d) Additional or extended interest charges: Where the subject matter of the contract is to be sold on completion, in the case of damage there could be delay in receipt of the money from the sale. The cover can give the agreed amount of interest on the net amount of the sale to the extent that it is delayed subject to a limitation of the indemnity period. On the other hand, the actual interest on a loan could be insured so far as it is extended due to the damage.

4.5.7. Exception 7 Sonic waves.

Damage occasioned by pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds.

Material damage and loss of profits policies were never intended to cover loss, destruction or damage directly occasioned by sonic waves and, as will be seen when dealing with sub-clause 1.3 in chapter 8, the JCT 80 contract specifically excludes sonic waves in the definition of "excepted risks" as do the ICE Conditions. Furthermore, the United Kingdom Government indicated that if such damage were to result from Concorde's flights it would pay compensation. In fact this does not appear to have been necessary.

The material damage policies concerned would include the CAR policy.

4.5.8. Exception 8 Excess.

the Excess specified in the Schedule.

The CAR policy can have an overall excess of £250, however the loss or damage arises, and/or a higher excess for whatever the underwriter considers the more hazardous perils.

4.5.9. Exception 9 Damage in Northern Ireland by civil commotion or terrorist acts.

Damage in Northern Ireland caused by or happening or in consequence of

(a) civil commotion
(b) unlawful wanton or malicious act committed maliciously by a person or persons acting on behalf of or in connection with any unlawful association.

For the purpose of this exclusion

(i) unlawful association means any organisation which is engaged in terrorism and includes any organisation which at the relevant times is a prescribed organisation within the meaning of the Northern Ireland (Emergency Provisions) Act 1973
(ii) terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public in fear

In any suit action or other proceedings where the Company alleges that by reason of this Exception any Damage is not covered by this Section the burden of proving that such Damage is covered shall be on the Insured.

This is an insurance market clause the reason for which is obviously as a result of the unrest in Northern Ireland. It should be noted that whereas normally the burden of proving that an exception applies is on the insurer, in this particular exception the burden is placed on the insured.

4.6. Extension

Indemnity to Principal
Where any contract or agreement entered into by the Insured for the performance of work so requires the company will
(a) indemnify the Principal in like manner to the Insured in respect of the principal's liability arising from the performance of the work by the Insured
(b) note the interest of the Principal in the Property Insured by Section 3 to the extent that the contract or agreement requires such interest to be noted

"Principal" means the employer who commissions the work in a construction contract. By making the principal an insured party with the contractor the policy complies with the obligation under clause 22 of the JCT 80 contract (as amended in 1986), and under clause 21 of the ICE conditions , for the insurance of the works to be in the joint names of the employer and the contractor. The advantage of "joint insureds" is seen in the commentary under the heading "Subrogation" in chapter 3.

4.7. General Exceptions

All the following exceptions are subject to the introductory paragraph reading "The Company shall not indemnify the Insured".

4.7.1. Exception 1 Nuclear risks.

(i) for loss destruction of or damage to any property whatsoever or any loss or expense whatsoever resulting or arising therefrom or any consequential loss
(ii) for any legal liability of whatsoever nature
directly or indirectly caused by or contributed to or arising from
(a) ionising radiations or contaminating by radioactivity from any nuclear waste from the combustion of nuclear fuel

(b) the radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof

In respect of Bodily Injury caused to an Employee this Exception shall apply only when the Insured under a contract or agreement has undertaken to indemnify a Principal or has assumed liability under contract for such Bodily Injury and which liability would not have attached in the absence of such contract or agreement.

This is an insurance market clause which appears on all policies because the risks are so great as not to be suitable for ordinary commercial insurance.

The Nuclear Installations Acts of 1965 and 1969, together with the Energy Act 1983, make the operator of a nuclear installation solely liable for injury to any person or damage to any third party property. Only the operator is liable, notwithstanding that other parties such as contractors may be liable in tort for the consequences of a nuclear accident on the licensed site. Because the operator alone is liable, he only is required to provide insurance, and the United Kingdom Pool policy meets the operator's nuclear legal requirements. This policy is a type of liability insurance written through the British Insurance (Atomic Energy) Committee and, inter alia, covers the operator's nuclear liabilities under the statutes mentioned for an overall indemnity figure of £20 million (in relevant cases £5 million) for the current "cover period". Above £20 million the Government is responsible up to £190 million. The cover period in practice means the lifetime of a licensed installation subject to certain information.

4.7.2. Exception 2 Contractual liability - not applicable.

This general exception, as can be seen from Appendix 1 does not apply to the CAR policy, ie section 3 of the Contractors' Policy.

4.7.3. Exception 3 War and kindred risks.

> under Sections 2, 3 or 4 for any consequence of war invasion act of foreign enemy hostilities (whether war be declared or not) civil war rebellion revolution insurrection or military or usurped power.

This again is an insurance market clause as it deals with matters that a commercial insurance policy could not underwrite for this type of cover. War risks were handled by the Government in the First and Second World Wars. So far as kindred risks, ie "invasion, act of foreign enemy, hostilities (whether war be declared or not)" are concerned, they all imply the existence of a state of war with a foreign power, and the pattern of international events during and since the last world war is reflected in the qualification "whether war be declared or not". The exclusion is worded so that it applies not only to losses due to enemy acts but also to those incurred through the steps taken to oppose the enemy, as shown in the Falklands crisis. Construction contracts often deal respectively with the procedure in the event of an outbreak of hostilities and how war damage is to be handled, eg clauses 32 and 33 of JCT 1980.

Civil war implies something in the nature of organised acts of warfare. Rebellion in Lindsay and Pirie v General Accident, etc Corp Ltd (1914) was defined as the taking up of arms traitorously against the Crown, whether by natural subjects or others when subdued. It can also mean disobedience to the process of law as applied by the courts. Revolution is very similar. Insurrection is a stage short of rebellion and is defined in Jowitt's Dictionary of English Law as a rising of the people in open resistance against established authority with the object of supplanting it.

The term "military power" includes acts done by the Crown's military forces in opposition to subjects of the realm in open rebellion and organised as a military force. "Usurped power" applies to an organised rebellion which is acting under some authority and has assumed the power of government by making laws and enforcing them. In Curtis v Mathews (1919) Banks LJ said:

> Usurped power seems to me to mean something more than the action of an organised rabble. How much more I am not prepared to define. There must probably be action by some more or less organised body with more or less authoritative leaders.

4.8. Conditions Of The Policy.

This heading has an introductory paragraph which reads:

> This policy and the Schedule shall be read together and any word or expression to which a specific meaning has been attached in any part of this Policy or of the Schedule shall bear such meaning wherever it may appear.

4.8.1. Condition 1. Alteration in risk.

> The Company shall not be liable under this Policy if the risk be materially increased without the consent of the Company.

The duty of disclosure comes to an end when the policy is issued and does not apply again until renewal since this is, in effect, the negotiation of a new contract.

In order to protect itself against a substantial increase in the risk during the policy period the insurance company uses the above condition. From the wording it is clear that the company is not on cover in respect of any such material change or risk until it has agreed to accept the change. Insurers normally regard as material a basic alteration in design, or an increase in value which considerably exceeds the original estimated contract price, or

the amount already provided for in any automatic provision for increasing the sum insured (see heading 4.4.4.).

4.8.2. Condition 2. Premium adjustment.

> If the premium for this Policy is based on estimates an accurate record containing all particulars relative thereto shall be kept by the Insured.
> The Insured shall at all times allow the Company to inspect such records and shall supply such particulars and information as the Company may require within one month from the expiry of each Period of Insurance and the premium shall thereupon be adjusted by the Company (subject to the Minimum Premium chargeable for the risk being retained by the Company).

This condition sets out the requirements concerning returns the insurers require in order to estimate their premiums which are adjusted at the year end when the correct figure is available. The second paragraph allows the insurer to examine the insured's records concerning wages or turnover on which the premium is based, and reinforces the actions required by the insured in the context of the duty of disclosure within the doctrine of the utmost good faith.

4.8.3. Condition 3. Duties of the insured.

The Insured shall take all reasonable care
(a) to prevent any event which may give rise to a claim under this Policy
(b) to maintain the premises, plant and everything used in the Business in proper repair
(c) in the selection and supervision of Employees
(d) to comply with all statutory and other obligations and regulations imposed by any authority.

The insurers are entitled to expect their insureds to behave with the same care as they would if they were uninsured. However, as the insureds can reasonably expect to be covered when they have failed to take some precautions on the grounds that these circumstances give rise to the very

situation for which they arranged insurance, the insurers cannot take too literal an interpretation.

Insurers should not attempt to apply this condition when the insured's employees are negligent as this condition is imposed upon the insured, ie the proprietor, whether an individual or a board of directors. Failure to take reasonable care has to be deliberate, wilful or blatant action on the part of the insured before the insurer can be certain that any attempt to operate the condition will be upheld by a court.

In Duncan Logan (Contractors) Ltd and Others v Royal Exchange Assurance Group (1973) where a CAR policy required the insured to take all reasonable precautions for the safety of the property, an attempt was made under the policy to argue that the insured contractor was vicariously responsible for its employee's negligence, which is so in the case of negligence claims. However the interpretation of an insurance policy wording, between the parties to that contract, was considered to involve different arguments. The court considered it would be curious to find that an all risks policy was worded so as to exclude negligence on the part of the insured's own officers and servants. Thus when insureds agree to take reasonable precautions, they do not, as a condition precedent to the policy operating, undertake that none of their officers or servants will be negligent. In other words the insured does not warrant that all employees will behave reasonably. The court did not think it right to consider the policy position when the insured's employee alone has failed to take care. It was decided that the duty to take care lay upon the insureds and in this they could fail by

appointing incompetent officers or by failing to take proper procedures or give adequate instructions regarding any danger of which the board of directors ought to have been aware. In any event the policy did not by its wording attempt to apply the duty to the insured's officers.

4.8.4. Condition 4. Make good defects.

> The Insured shall make good or remedy any defect or danger which becomes apparent and take such additional precautions as circumstances may require.

This condition is self-explanatory and follows from (a) and (b) of the previous condition. For example, it may become necessary to insert longer piles if it becomes obvious that the piles inserted or suggested for the foundations of a building are inadequate.

4.8.5. Condition 5. Maximum payments.

This condition only applies to the employers' and public liability sections of the policy in Appendix 1 and will be considered when dealing with those policies in chapters 5 and 6.

4.8.6. Condition 6. Claims.

> The insured or his legal personal representatives shall give notice in writing to the Company as soon as possible after any event which may give rise to liability under this Policy with full particulars of such event. Every claim notice letter writ or process or other document served on the Insured shall be forwarded to the Company immediately on receipt. Notice in writing shall also be given immediately to the Company by the Insured of impending prosecution inquest or fatal inquiry in connection with any such event. No admission offer promise payment or indemnity shall be made or given by or on behalf of the Insured without the written consent of the Company. In the event of Damage by theft or malicious act the Insured shall also give immediate notice to the police.

So far as CAR claims are concerned the only circumstance where an insured might think that he need not comply with this condition would be if the policy contained a large excess (deductible) and the insured decided to handle the repair cost himself as the amount concerned was well within the excess. Nevertheless on the policy wording the insurer should still be notified. In any event costs can be substantially under-estimated in their initial stages, and it would be prudent to advise insurers of the incident.

4.8.7. Condition 7. Subrogation.

> The Company shall be entitled if it so desires to take over and conduct in the name of the Insured the defence or settlement of any claim or to prosecute in the name of the Insured for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any claim and the Insured shall give all such information and assistance as the Company may require.

This condition increases the insurer's common law rights of subrogation (whereby an insurer can stand in the place of the insured and claim in his name after indemnifying him) by giving such rights before indemnifying the insured. It also gives the insurer the control of proceedings and settlement of any claim and reminds the insured of his duty to give all information and assistance that the Company may require.

The JCT contract requires insurers to waive subrogation rights against subcontractors.

4.8.8. Condition 8. Contribution.

> If at the time of any event to which this Policy applies there is or but for the existence of this Policy there would be any other insurance covering the same liability or Damage the Company shall not be liable under this Policy except in respect of any excess beyond the amount which would be payable

under such other insurance had this Policy not been effected.

This wording adopts the modern approach of not merely stating that if there is another insurance in operation covering the same subject matter against the same risk in respect of the same insured, this policy will not apply, as in addition it emphasises that it will only pay any excess beyond the amount which would be payable under such other insurance. Without this emphasis the effect is the same as if the clause had said it would only pay its rateable proportion assuming both insurers say they are not going to contribute and both their policies are in operation. The authority for this is Gale v Motor Union and Loyst v General Accident Fire and Life Assurance Corporation Ltd (1928). The courts will not allow the two non-contribution policy conditions (which are exactly the same) to cancel the cover given with the result that if the loss is covered elsewhere it is covered nowhere.

The correct decision must be that each policy should contribute its rateable proportion. However, once the wording is different so that one policy contains, as here, an excess wording in the contribution condition stating that it will not operate until the second policy is exhausted and the second policy does not contain such a clause, then the common law principle of contribution will not operate between the two policies. See chapter 3.2.5. and the case of State Fire Insurance General Manager v Liverpool and London and Globe Insurance Co Ltd (1952).

Reference should also be made in chapter 3.2.5. to the Scottish appeal case of Steelclad Ltd v Iron Trades Mutual Insurance Co Ltd (1984) where

both policies contained excess wording and the decision was that both insurers had to contribute on a rateable proportion basis.

An illustration of the basic rule that for contribution to apply the same risk and the same property must be covered for the same interest, appeared in the case of Petrofina (UK) Ltd and Others v Magnaload Ltd and Others (1983) which concerned a CAR policy. In this case an attempt was made to draw the CAR policy into contribution with a liability policy provided by another insurer. It was said that the insurances were not therefore insurances on the same property and against the same risk and it followed that there was no possibility of double insurance in the true sense.

4.8.9. Condition 9. Cancellation.

> The Company may cancel this Policy by giving thirty days' notice by recorded delivery letter to the last known address of the Insured. The Company shall make a return of the proportionate part of the premium in respect of the unexpired Period of Insurance or if the premium has been based wholly or partly upon estimates the premium shall be adjusted in accordance with condition 2.

Those policies which contain a cancellation clause give the insurers, but not the insured, the right to cancel. However, a cancellation clause is not usually contained in policies dealing with a single project. Normally contractors have annual blanket (or floater) policies covering all their work during the policy year provided that work comes within the business description in the policy schedule. In respect of new contracts' blanket policies, the cancellation condition normally applies to work not yet commenced, thus allowing cover to continue until completion of contracts

already being performed. This limits the use of this condition to new contracts not yet commenced.

4.8.10. Condition 10. Disputes.

> Any dispute concerning the interpretation of the terms of this policy shall be resolved in accordance with the jurisdiction of the territory in which this policy is issued.

This is an unusual wording as most policies contain an arbitration condition which applies to disputes on amount only, the insured being allowed to use the courts in cases of disputes abroad as well as for those which arise concerning liability under policies provided in the UK. However, as the policy is not likely to be issued in a territory other than the UK, it probably only means that UK law will apply.

4.8.11. Condition 11. Rights.

> In the event of Damage for which a claim is or may be made under Section 3
> (a) the Company shall be entitled without incurring any liability under this Policy to
> (i) enter any site or premises where Damage has occurred and take and keep possession of the Property Insured
> (ii) deal with any salvage as they deem fit but no property may be abandoned to the Company
> (b) if the Company elects or becomes bound to reinstate or replace any property the Insured shall at their own expense produce and give to the Company all such plans and documents books and information as the Company may reasonably require. The Company shall not be bound to reinstate exactly or completely but only as circumstances permit and in reasonably sufficient manner and shall not in any case be bound to expend in respect of any one of the items of Property Insured more than the Limit of Indemnity in respect of such item.

In a number of aspects this seems to be a "belt and braces" condition in that it merely emphasises a right which would exist without this condition. Thus in (a) while the onus of proof is primarily on the insured, the insurers could hardly be expected to pay a claim without investigation which must involve

entering the site and at least examining the property insured. The insurers similarly are entitled to all information, which they may reasonably require, to support a claim, and the insurers in complying with the principle of indemnity would not be expected to reinstate exactly or completely but only as circumstances permit and in a reasonably sufficient manner up to the limit of indemnity stated in the policy schedule.

The abandoning of property to the insurers is not a situation which the insurers would want as they might become liable for potential third party liabilities, ie cost of removal, etc. In any event the insured's claim is basically for the loss of value, ie after salvage value has been considered.

4.8.12. Condition 12. Observance of policy terms, etc.

> The due observance and fulfilment of the terms exceptions conditions and endorsements of this Policy in so far as they relate to anything to be done or complied with by the Insured and the truth of the statements and answers in the proposal shall be conditions precedent to the liability of the company to make a payment under this policy.

It has been mentioned earlier that the recital clause makes the proposal completed by the insured, the basis of, and states that it forms part of, the policy. In addition this condition makes observance of the terms exceptions conditions and endorsements, conditions precedent to the liability of the insurer to pay any claim. This is in accordance with the explanation of a "condition precedent to liability" given in chapter 3.3. Consequently, as well as, inaccuracies on the proposal form, failure to observe or fulfil all the terms, exceptions, conditions and endorsements of the policy gives the insurers an opportunity to avoid the claim if they so wish.

4.9. Endorsements.

Endorsements are clauses which vary the standard cover so that it is tailor-made to fit the work of the particular insured. The basic cover provided by most insurers for the construction industry has general building work in mind and even, in some cases, civil engineering work except for the most hazardous.

It is usual for the endorsements to be numbered and printed in the standard form as part of that policy, but only to apply if the endorsement number concerned is incorporated in the policy schedule. Thus the insurer is able to print one document and then apply the endorsements as necessary to the particular insured's requirements.

The first endorsement mentioned below is a particular example of what has just been said. Obviously the nature of the risk affects the premium to be paid, and in the case just mentioned the restriction reduces the premium. Not all the endorsements set out in the policy example in Appendix 1 apply to the CAR policy, but the general remarks mentioned above do.

4.9.1. Limitations of work.

> For the purposes of this policy the Business of the Insured is restricted to work on or in connection with private dwellings blocks of flats shops offices public houses guest houses or hotels not exceeding four storeys in height (including the ground floor) and attic.

This is an underwriting restriction in a positive form for use with an annual policy where necessary, ie it states what type of work is covered which is usually stated in the policy schedule. Work involving five or more storeys would have to be referred to the insurers for special underwriting consideration.

4.9.2. Hazardous premises exclusion.

> The company shall not indemnify the Insured under Sections 1, 2 or 3 against liability or Damage arising from any work in or on or in connection with
> (a) towers steeples chimney shafts blast furnaces dams canals viaducts bridges or tunnels
> (b) aircraft airports ships docks piers wharves breakwaters or sea walls
> (c) collieries mines chemical works gas works oil refineries or power stations
> (d) off shore installations or bulk oil petrol gas or chemical storage tanks or chambers.

This is an underwriting restriction in a negative form for use with an annual policy when considered necessary, ie it states the type of work which is not covered (largely of a civil engineering nature). Hence it is in the form of an exclusion.

4.9.3. Automatic reinstatement.

> The Limits of Indemnity under Section 3 will not be reduced by the amount of any claim.
> Provided that the Insured shall pay an additional premium at a rate to be agreed on the amount of each claim from the date Damage occurs to the date of the expiry of the Period of Insurance and that any such additional premium will be disregarded for the purpose of any adjustment of premium under Condition 2.

Usually the policy schedule indicates that the liability of the insurers in respect of loss or damage to any item of property insured shall not exceed the sum insured (the limit of indemnity in the policy schedule of the policy in Appendix 1). Exception 3 (f) (see paragraph 4.5.3.) also emphasises this point. The insured buys a certain amount of insurance, ie up to the amount of the sum insured which is the limit of indemnity. Some of this is used up by payment of a claim and the insured would need to restore the maximum cover available. The policy normally also contains a type of clause or endorsement providing for reinstatement of the sums insured after a loss.

This condition requires the insured to pay an additional premium calculated pro rata from the date of the loss or damage to the expiry of the period of insurance, it being understood that the additional premium should be disregarded for the purpose of the adjustment of the premium to be made on expiry of the period of insurance.

4.9.4 Showhouses.

> Exception 4(b) of Section 3 shall not apply to showhouses showflats or showmaisonettes including the contents thereof the property of the Insured or for which they may be responsible until completion of sale takes place. Provided that the liability of the Company shall not exceed £500,000 in any one period of Insurance nor £100,000 in respect of any one showhouse showflat or showmaisonette.

Exception 4 (b) terminates the insurers' liability when the contract works have been completed and delivered to or taken into use or occupation by the employer subject to a limited extent (maintenance conditions and fourteen days after the issue of the certificate of completion). In the case of showhouses the developer, whether he is the contractor or employer, will require the insurance to continue beyond the terms of termination mentioned both for the building and the contents and this endorsement arranges that cover subject to the limits of indemnity stated in the endorsement. The Insured already has some protection in this respect under paragraph 4.4.6.

4.9.5. Negligent breakdown.

> Exception 3(a) of Section 3 shall not apply to explosion breakdown or derangement of machinery plant or tools hired to the Insured under the Model Conditions for the Hiring of Plant of the Contractors Plant Association or other similar conditions
> Provided that
> (a) such explosion breakdown or derangement is due to the negligence misuse or misdirection of the Insured or any Employee
> (b) the liability of the company shall not exceed £50,000 for any one item

(c) the company shall not provide indemnity against the first £250. of each and every occurrence.

Exception 3(a) limits the exclusion of damage to machinery plant tools or equipment due to its own explosion breakdown or derangement, thus other parts of the contract works so damaged are covered. However, by this endorsement the exception just mentioned does not apply to hired-in plant, etc under the Model Conditions referred to or other similar conditions subject to the provisos mentioned.

This is necessary because these conditions may place responsibility for such damage on the insured, thus he needs the cover.

Nevertheless, the insurers do not intend to provide cover to the plant owner which is not transferred to the insured hiring-in making him or any employee responsible for their negligence, misuse or misdirection. Hence proviso (a).

The other two provisos are self-explanitory.

4.9.6. Continuing hire charges.

The Company will indemnify the Insured under Section 3 in respect of liability assumed by the Insured under Clause 9(d) of the Model Conditions for the Hiring of Plant of the Contractors Plant Association (or similar conditions) for the payment of hire charges arising from explosion breakdown or derangement of machinery plant or tools hired to the Insured.
Provided that
(a) such explosion breakdown or derangement is due to the negligence misuse or misdirection of the Insured or any Employee
(b) the liability of the Company in any one Period of Insurance shall not exceed £10,000
(c) the Company shall not provide indemnity against the first £250 of each and every occurrence or the hiring fee for the first 48 hours following each and every occurrence whichever is the greater.

Reference to the CPA conditions clause 9(d) shows that as in the previous endorsement the intention is to cover the hirer's liability for negligence, etc under that subclause 9(d), subject to the limit of indemnity in any one period

of insurance as stated and the excess applicable to each and every occurrence or the hiring fee for the first 48 hours following each and every occurrence whichever is the greater.

4.9.7. Plant immobilisation.

> It is a condition precedent to the liability of the Company under section 3 in respect of Damage caused by the theft of plant insured by Items 2 and 4 of the Property Insured that such plant shall be immobilised when left unattended.

This is a precautionary requirement for security purposes.

4.9.8. Plans

> Section 3 shall extend to indemnify the Insured in respect of the cost and expenses necessarily incurred in re-writing or re-drawing plans drawings or other contract documents following Damage thereto.
> Provided that the liability of the Company shall not exceed £25,000. in respect of any one contract or development.

It should be noted that only the cost and expenses (presumably limited to labour and materials) necessarily incurred in re-writing or re-drawing plans, drawings or other contract documents are covered, not the other financial consequential losses (due, for example, to delay in pursuing the contract work) which could be considerable. There is also a limitation of £25,000 in respect of any one contract or development, which could prove to be too low on some contracts.

4.10. Schedule.

This section of the policy document can be seen in Appendix 1.

The operative or insuring clause of the policy does not identify the insured, the property insured, etc so the identification, description, definition and limitations in amount of certain particulars of the individual risk and terms of the insurance are normally presented in a compact way in a policy schedule. The policy schedule is usually the only typewritten part of the policy (the

remainder being printed). This document is largely self-explanatory but where an explanation is necessary it has been given when proceeding through the policy wording in this chapter.

4.11. What parts of this policy should be included in a construction contract?

On the one hand it is clear that it would be cumbersome and possibly inapplicable to include the whole of this CAR policy in the wording of a construction contract when it requests insurance cover, bearing in mind that these construction contracts apply to various types of construction work. On the other hand it is essential that the basic cover is set out in some detail. Therefore it is suggested that it is unnecessary to include the following in a construction contract for the reasons stated:

(a) Recital clause (4.2).

This clause, so far as policy cover is concerned, is not referred to in order to ascertain the meaning of the operative words unless they are ambiguous. Otherwise the operative words prevail.

(b) Additional covers (4.4).

It is arguable that a number of these additional covers are essential and it is to be hoped that they will be involved in the CAR policy cover. Nevertheless, whether a construction contract should call for these if it already has fairly detailed cover (see clause 22.2 of the 1986 JCT contract as given in chapter 10.4), is doubtful. The definition of "all risks insurance" given in clause 22 was a compromise. See Madge P. (1987) p36. It is intended to represent a minimum form of cover which insurers are prepared to provide. Some policies provide a wider cover, but those providing less

cover have to be amended if they are to be used for this contract. It seems clear after about five years that this cover works in practice. No doubt most CAR policies, as their drafters will wish to compete with other insurers, will at least cover professional fees (4.4.1), debris removal (4.4.2), off -site storage (4.4.3), and final contract price (4.4.4).

So far as the JCT contract is concerned the optional clauses 22A, B and C all state or imply that professional fees and debris removal costs are to be covered by this policy.

(c) Conditions of the Policy (4.8)

Some conditions are imposed by common law and would apply without being expressed in the policy. They concern the law of insurance (see chapter 3) rather than policy cover, other than the cancellation and observance conditions , which would affect policy cover, but these two conditions are standard. Other conditions concern procedure, eg the making of claims and the keeping of records by the insured. In general it is unusual for the conditions to give, exclude or restrict cover.

(d) Endorsements (4.9)

Endorsements usually impose restrictions or provide extensions for a particular type of work. Therefore, they cannot be incorporated in a construction contract as it applies to a general type of work and the insurance protection required for it eg, building, civil or mechanical engineering.

Therefore, in answering the question posed by the main heading 4.11, it is logical to set out in the construction contract the operative, or insuring

clause (4.3), the exceptions (4.5), including the general exceptions (4.7), and the indemnity to principal extension (4.6). Now the JCT contract by the 1986 amendment does this, as is seen in chapter 10.6, although the following exceptions are not included in the JCT for the reasons given:

(i) Loss or damage to plant etc, due to its own explosion etc, to aircraft, ships, mechanically propelled vehicles, and money risks. Also existing structures not part of the contract works, limits of indemnity and policy period limits complete this exception (4.5.3).

These exclusions are either covered by more specific policies, or set out elsewhere in the policy. Thus regarding existing structures the operative clause only covers contract works and the limits mentioned appear in the policy schedule.

(ii) Use or occupancy after completion (4.5.4)

Once the works have been completed and formally delivered it is arguable that the contractor no longer has an insurable interest in the works.

(iii) Relief of responsibility by the construction contract(4.5.5)

It is self-evident that if the contract relieves the contractor of responsibility the policy need not cover the contractor.

(iv) Liquidated damages or penalties for delay or non-completion and consequential losses (4.5.6).

Liquidated damages and penalties, as defined here, are consequential losses and as the operative clause is limited to physical loss or damage to work executed and site materials, these consequential losses are not covered apart from this exception.

(v) Excess (4.5.8).

This excess appears in the policy schedule, and is not standard.

In case it is thought that the JCT contract does not include the extension "Indemnity to Principal" the fact that joint names cover is required by clause 22 is equivalent to requesting an indemnity to the principal. The ultimate conclusion is that the JCT detailed definition of all risks insurance in clause 22.2 is sufficient for a construction contract. The only slight doubt is whether the more important additional covers mentioned earlier should be inserted in the construction contract. The other main construction contracts will be considered in chapters 9, 11 and 12, and the other conventional policies (the employers' and public liability policies) will be considered in the next two chapters 5 and 6.

CHAPTER 5.

THE EMPLOYERS' LIABILITY POLICY

5.1 Section1 of a Contractors Policy (Appendix 1)

The employers' liability insurance (the EL policy) is set out in section 1 of the Contractors' Policy, which is printed in full in Appendix 1. Certain clauses , terms and conditions in this policy are exactly the same as those already explained in the previous chapter and will therefore not be considered other than to point out the repetition. It should be noted that this policy has no exceptions as such.

Before considering the parts of this policy in the order in which they appear in this section of the combined policy document, it is necessary to make a brief comment about the compulsory aspect of this type of insurance. The Employer's Liability (Compulsory Insurance) Act 1969 in section 1(1) provides that every employer carrying on any business in Great Britain shall insure, and maintain insurance under one or more approved policies with an authorised insurer or insurers against liability for bodily injury or disease sustained by his employees and arising out of and in the course of their employment in Great Britain in that business but, except so far as regulations otherwise provide, not including injury or disease suffered or contracted outside Great Britain.

Section 3 provides for the purposes of this Act that an approved policy means a policy of insurance not subject to any conditions or exceptions prohibited by regulations under this Act, and business includes a trade or

profession, and includes any activity carried on by a body of persons, whether corporate or unincorporate.

Section 2(1) states that an employee means an individual who has entered into or works under a contract of service or apprenticeship with the insured whether by way of manual , labour, clerical work or otherwise, whether such contract is expressed or implied, oral or in writing.

The Employers' Liability (Compulsory Insurance) General Regulations deal inter alia with the prohibition of certain conditions in policies. The conditions concerned are those that provide that no liability shall arise under the policy, or that any such liability so arising shall cease:

1. In the event of some specified things being done or omitted to be done after the happening of the event giving rise to a claim under the policy, eg giving written notice to the insurers as soon as possible after the accident.
2. Unless the policyholder takes reasonable care to protect his employees against the risk of bodily injury or disease in the course of their employment.
3. Unless the policyholder complies with the requirements of any enactment for the protection of employees against the risk of bodily injury or disease in the course of their employment.
4. Unless the policyholder keeps specified records or provides the insurer with or makes available to him information therefrom.

Thus insurers cannot use a breach of these conditions in order to avoid paying a claim and the above remarks will facilitate the understanding of the wording in the operative clause under the heading "Avoidance of Certain terms and rights of recovery", see paragraph 5.3 below.

5.2. Recital clause.

This clause has been detailed in the previous chapter 4.2.

5.3. Operative clause.

In the event of Bodily Injury caused to an Employee within the Territorial Limits the Company will indemnify the Insured in respect of all sums which the Insured shall be legally liable to pay as compensation for such Bodily Injury arising out of such event.
Avoidance of Certain Terms and Right of Recovery
The indemnity provided under this Section is deemed to be in accordance with such provisions as any law relating to the compulsory insurance of liability to Employees in Great Britain Northern Ireland the Isle of Man or the Channel Islands may require but the Insured shall repay to the company all sums paid by the Company which the Company would not have been liable to pay but for the provisions of such law.
World-wide
The indemnity granted by this Section extends to include liability for Bodily Injury caused to an Employee whilst temporarily engaged in manual work outside the Territorial Limits
Provided that
(a) such Employee is ordinarily resident within Great Britain Northern Ireland the Isle of Man or the Channel Islands.
(b) the Company shall not be liable to indemnify the Insured in respect of any amount payable under Workmen's Compensation Social Security or Health Insurance legislation.

5.3.1. Bodily injury

"Bodily Injury" is defined under the Definitions section of the policy as follows:
Bodily Injury shall include
(a) death illness or disease
(b) wrongful arrest wrongful detention false imprisonment or malicious prosecution
(c) mental injury mental anguish or shock but not defamation.

5.3.2. Caused to an Employee within the Territorial Limits.

"Employee" is defined as meaning:
(a) any person under a contract of service or apprenticeship with the Insured
(b) (i) any labour master or labour only subcontractor or person supplied or employed by them
(ii) any self-employed person
(iii) any person hired or borrowed by the Insured from another employer under an agreement by

which the person is deemed to be employed by the Insured

(iv) any student or person undertaking work for the Insured under a work experience or similar scheme while engaged in the course of the Business.

"Business" is defined as including:

(a the provision and management of canteens clubs sports athletics social and welfare organisations for the benefit of the Insured's Employees

(b) the ownership repair maintenance and decoration of the Insured's premises and the provision and management of first aid fire and ambulance services.

(c) private work carried out by an Employee of the Insured (with the consent of the Insured) for any director partner or senior official of the Insured.

The basic cover is for the insured's liability to employees under a contract of service or apprenticeship with the insured. However, it is the right of control which is the main aspect which decided whether the relationship is that of employer/employee or employer/independent contractor. The latter relationship is not covered by the EL policy, except as mentioned below. Self-employed contractors and labour gangs can give rise to doubts as to their legal relationship with the employer (the insured), ie whether they are employees or independent contractors. Therefore it is the general practice of insurers to define them as employees in order to make it clear that the EL policy will handle claims made against the insured by such persons, provided that payments made by the insured to them as wages or fees are declared for the purposes of calculating the premium. However, this still allows the insurers to defend any claim against the insured if it can be argued that legally such persons are not employees and by doing so show that, for example, no duty of care is owed to that person by his employer in the particular circumstances. The same concession of cover applies to

employees of another person who are lent to the insured on the basis that they are employees of the insured. In fact an employee's contract of service is personal to him and only he can agree to change it so that their position is similar to that of self employed persons under the EL policy. Their claims are handled under that policy but their legal status remains as it was. Students and persons undertaking work for the insured under a work experience or similar scheme are usually employees in law and this paragraph merely makes the position clear.

The word "Business" (as mentioned in the definition of "Territorial Limits") has a wide definition. Canteen and club administration, and management of first aid, fire and ambulance services carries a liability to the employees involved which is covered by the policy. Decoration of the insured's property is clearly within the insured's business as a construction contractor but private work carried out for a senior official of the insured would be considered a different activity, nevertheless it comes within the cover provided by the EL policy.

The "Territorial Limits" have been defined in the previous chapter 4.3.7.

5.3.3. The Company will indemnify the Insured in respect of his legal liability.

The meaning of the words "legal liability" will be considered in chapter 8 and it is sufficient here to say that all forms of legal liability are covered as stated in that chapter, ie the policy is not limited to negligence cover.

5.3.4. Avoidance of Certain Terms and Right of Recovery.

This clause is included because of the Employers' Liability (Compulsory Insurance) Act 1969 explained earlier. The purpose of this Act is to make

sure that employees having a successful claim against their employers would receive damages. The circumstances set out earlier disallowing insurers to repudiate policy liability under the regulations of this Act and forcing insurers to pay an employee's claim is not to benefit the insured employer. It is only to benefit the employees. Thus by this clause insurers can recover any such payment made to the employee, from the insured employer in these circumstances. It must be appreciated that this recovery only applies where the insurers have been obliged to pay because of the Act's regulations.

5.3.5. World-wide.

While this clause gives cover for employees who are temporarily engaged in manual work outside the territorial limits, doubts can arise about the period of time covered by the word "temporarily". Consequently some insurers omit this word.

5.3.5.1. Provisos.

These provisos apply to the extended cover abroad mentioned in the previous paragraph so such employees must be resident in the UK. The world-wide cover also gives rise to possible foreign workmen's compensation or other social security or health insurance legislation requiring the insured to make payments to its employees, and the policy will not cover such payments. This second proviso seems to have taken the place of the proviso used by some policies requiring employees temporarily engaged abroad to bring any action for damages against the insured employer in a UK court.

5.4. Extensions.

Whether a policy drafter decides to list extra covers immediately after the operative clause (as is done with "Additional Covers" in the previous chapter) or list them under the heading "Extensions" (as in this chapter) does not have any significance. However, in the case of a combined policy, as shown in Appendix 1, if the drafter places his extra covers under the heading "Extensions", he is forced to indicate to which sections of the policy they apply. Whereas if he puts them immediately after the operative clause there is no need to indicate the section applicable, because they clearly come within the section to which the operative clause applies. In fact, to avoid repetition if an extra cover applies to more than one section of a combined policy it has to appear under the heading "Extensions". Nevertheless, in both positions in the policy they are extra covers.

5.4.1. Costs.

It is the practice for the insurers of liability policies to indemnify the insured against the plaintiff's costs and expenses as well as any damages for which he is liable. These costs and expenses are payable in addition to the limit of indemnity which may be applicable, although in the case of employers' liability policy there is no such limit. The clause applying to Section 1 and 2 reads:

The Company will in addition to the indemnity granted by each section pay

(i) for all costs and expenses recoverable by any claimant from the Insured
(ii) for solicitors fees incurred with the written consent of the Company for representation of the Insured at
  (a) any coroner's inquest or fatal accident inquiry
  (b) proceedings in any Court arising out of any alleged breach of a statutory duty resulting in Bodily Injury or Damage to Property

(iii) all costs and expenses incurred with the written consent of the Company in respect of a claim against the Insured to which the indemnity expressed in this Policy applies.

The costs and expenses of proceedings incurred with the written consent of the insurers in the defence or payment of the claim are payable over and above the limit of indemnity and plaintiff's costs and expenses. In fact, the intention is that the policy should pay for all costs and expenses concerning the investigation or negotiation of the settlement of a claim provided they are incurred with the consent of the insurers.

5.4.2. Legal defence.

This clause applying to Section 1 and 2 reads:

> Irrespective of whether any person has sustained Bodily Injury the Company will at the request of the Insured also pay the costs and the expenses incurred in defending any director manager partner or Employee of the Insured in the event of such a person being prosecuted for an offence under the Health and Safety at Work etc. Act 1974 or the Health and Safety at Work (Northern Ireland) Order 1978 The Company will also pay the costs incurred with its written consent in appealing against any judgement given.

Normally the legal costs and expenses cover given under the previous clause applies only when an employee has been injured. However, many insurers give an extension to cover costs and expenses incurred in defending a prosecution under the legislation mentioned in this clause although no employee has been injured.

5.4.2.1. Provisos.

(a) the offence was committed during the Period of Insurance
(b) the indemnity granted hereunder does not
    (i) provide for the payment of fines or penalties
    (ii) apply to prosecutions which arise out of any activity or risk excluded from this Policy
    (iii) apply to prosecutions consequent upon any deliberate act or omission
    (iv) apply to prosecutions which relate to the health safety or welfare of any Employee unless Section 1 is operative at the time when the offence was committed.

(v) apply to prosecutions which relate to the health and safety or welfare of any person not being an employee unless Section 2 is operative at the time when the offence was committed

(c) the director manager partner or Employee shall be subject to the terms exceptions and conditions of the Policy in so far as they can apply.

(b) (iv) and (v) only apply because the above provisos are taken from a combined policy. See Appendix 1. The other provisos are self explanatory.

5.4.3. Indemnity to other persons

This clause applying to Sections 1 and 2 reads:

The company will indemnify the following as if a separate Policy has been issued to each

(a) in the event of the death of the Insured the personal representatives of the Insured in respect of liability incurred by the Insured

(b at the request of the Insured

(i) any officer or member of the Insured's canteen clubs sports athletic social or welfare organisations and first aid fire security and ambulance services in his respective capacity as such

(ii) any director partner or Employee of the Insured while acting in connection with the Business in respect of liability for which the Insured would be entitled to indemnity under this Policy if the claim for which indemnity is being sought had been made against the Insured.

Under the Law Reform (Miscellaneous Provisions) Act 1934, all actions against or for a deceased person survive against or for the benefit of the deceased's estate. Consequently if the policy is issued to an individual who dies the policy will cover any action which survives against the estate of the Insured.

If the facilities set out in (b)(i) are provided by the insured the policy can be extended to cover the officials on the committees of such organisations. Similarly insurers are willing to indemnify directors, partners and employees of the Insured who may be sued in their own names.

5.4.3.1. Provisos.

(a) any persons specified above shall as though they were the Insured be subject to the terms exceptions and conditions of this policy in so far as they can apply
(b) nothing in this extension shall increase the liability of the Company to pay any amount exceeding the Limit of Indemnity of the operative Section(s) regardless of the number of persons claiming to be indemnified.

Both these provisos make it clear that no greater indemnity is given to directors, officials and employees than is given to the insured.

5.4.4. Indemnity to Principal.

This clause was explained in chapter 4.6, and applies to Policy Sections 1,2 and 3.

5.5. General Exceptions.

5.5.1. Exception 1 Nuclear risks.

See chapter 4.7.1. for the wording. This exception applies to an EL policy only when it indemnifies a principal. Such an indemnity undertaken by the contractor means that the principal is being given public liability cover for injury to the contractor's employees, hence the application of this exception. The insured contractor's liability to his employees is covered.

5.5.2. Exception 2 Contractual liability.

The company shall not indemnify the Insured under Sections 1 or 2 in respect of Contractual Liability unless the sole conduct and control of claims is vested in the Company but the Company will not in any event indemnify the Insured in respect of

(i) Liquidated damages or liability under any penalty clause
(ii) Damage to Property which comprises the Contract Works and occurs after the date referred to in Exception 3 of Section 2 if liability attaches solely by reason of the contract
(iii) Damage against which the Insured is required to effect insurance under the terms of Clause 21.2.1. of the Joint Contracts Tribunal Standard Form of Building Contract (or any subsequent revision or substitution thereof) or under the terms of any other contract requiring insurance of like kind.

This is a negative way of giving contractual liability cover by explaining the circumstances which are not covered in the case of contractual liability. It is more applicable to section 2 (public liability) than to employers' liability because it deals with damage to property and less with bodily injury.

5.5.3. Exception 3 War and kindred risks.

This general exception was explained in chapter 4.7.3. It does not apply to an EL Policy.

5.6 Conditions of the Policy.

These conditions were explained in chapter 4.8.

5.7 Endorsements

5.7.1. Limitations of work.

As explained in chapter 4.9.1.

5.7.2. Hazardous work exclusion

The company shall not indemnify the Insured under Sections 1 or 2 against liability arising from

(a) demolition by the Insured or an Employee unless in connection with any work of erection re-construction alteration maintenance installation or repair by the Insured or any employee
(b) any work of dismantling steel structures by the Insured or an Employee other than scaffolding or machinery belonging to or hired to the Insured or undergoing maintenance repair or replacement by the Insured
(c) pile-driving water diversion or the use of explosives by the Insured or any Employee.

This endorsement is self explanatory. Demolition is very hazardous work as are the other activities mentioned.

5.7.3. Hazardous premises exclusion

This endorsement is explained in chapter 4.9.2.

5.8 Schedule

This section is explained in chapter 4.10.

5.9. what parts of this policy should be included in a construction contract?

As mentioned in chapter 4.11. when considering the CAR policy with a view to including parts of it in the construction contract, it is not necessary to include the recital clause, the conditions and endorsements for the reasons given in chapter 4.11. Also it has to be remembered that brevity demands a minimum form of cover should be inserted in the construction contract. Therefore in answering the question in this heading 5.9. it is reasonable to set out in the construction contract, in the first place, the operative or insuring clause 5.3. Although because it has to be concise, the definitions of "bodily injury", "territorial limits" and "business" need not be included as they are, more or less, standard clauses in the insurance industry. In any event any variation of the operative clause from insurer to insurer is likely to be an extension rather than a limitation of cover and as the objective, in deciding what is to go into the construction contract, is to set out a basic cover, it is a limitation of the basic cover that will fall foul of it not an extension. Nevertheless, the short definition of an employee as a person under a contract of service or apprenticeship with the insured could appear as part of the basic wording of the operative clause of the EL policy. Secondly, there are no exceptions to an EL policy, although the general exception of nuclear risks (in the limited contractual form mentioned in 5.5.1) applies to the EL policy, but not to the indemnity to the insured contractor in respect of claims by his own employees. However, where the contractor's employees claim against a principal indemnified under a construction contract the nuclear risks exclusion applies, because this small part of the

principals' public liability risk is being transferred to the insured contractor's employers' liability policy, and the nuclear risks exclusion applies to all public liability policies.

It is not usual to include a war risks exception in the EL policy. General exception 2 is more applicable to a PL policy. See chapter 5.5.2.

Thirdly, the extension of legal costs and expenses and also the indemnity to principals and others (see chapter 5.4.1., 5.4.2, 5.4.3, and 5.4.4. respectively) are so ingrained in all liability policies as standard clauses that they will always be there without being specifically required under the construction contract. Similarly it is not considered that the sub-clauses in the EL operative clause entitled "Avoidance of Certain Terms etc" and "World-wide" together with two provisos as standard wording merit inclusion in the construction contract because they will appear on all policies in some form or other. Therefore in the main construction contracts no further explanation of the EL cover is necessary. In the JCT contract clause 21.1.1.2. (as shown in chapter 10.3) the operative clause basic wording already appears. Incidentally, it should be noted that in lines 2 and 3 of this clause the words "or a sub-contractor as the case may be" have been deleted by Amendment 4 issued in July, 1987, so the contractor has no responsibility for the insurance of sub-contractors under this construction contract. Furthermore, the required compliance (in the JCT contract clause 21.1.1.2) with the Employers' Liability (Compulsory Insurance) Act 1969 and statutory orders made thereunder or any amendment or re-enactment thereof, means that the clause "Avoidance of Certain Terms and Right of

Recovery" in the operative clause is catered for (see 5.3.4). Also Regulation 2(2) of the Employers' Liability (Compulsory Insurance) General Regulations 1971, makes reference to costs and expenses covered by the policy in the operation of the avoidance clause. Clause 21.1.1.1. refers to the obligation of the contractor to indemnify the employer and by implication suggests the policy should cover this obligation by contractual liability or indemnity to principal clause. Therefore the EL policy is sufficiently detailed in the JCT contract. Other main contracts will be considered in chapters 9, 11 and 12.

CHAPTER 6

THE PUBLIC LIABILITY POLICY.

6.1. Section 2 of a Contractor's Policy (Appendix 1).

The public liability insurance (the PL policy) is set out in section 2 of the Contractor's policy, which appears in full in Appendix 1. Certain clauses, terms and conditions in this policy are exactly the same as those already explained in the previous two chapters and will therefore not be considered other than to point out the repetition.

6.2. Recital clause.

This clause is explained in chapter 4.2.

6.3. Operative clause.

It reads :

> In the event of accidental
> (a) Bodily Injury to any person
> (b) Damage to Property
> (c) obstruction trespass or nuisance
>
> occurring within the Territorial Limits the Company will indemnify the Insured in respect of all sums which the Insured shall be legally liable to pay as compensation in respect of such event.
> The Company shall not be liable for any amount exceeding the Limit of Indemnity.

6.3.1. Accidental Bodily Injury and accidental Damage to Property

In the first place the word "accidental" means accidental from the insured's point of view, ie the injury or damage was unintentional even if the act that caused it was intentional. Thus if a contractor is instructed to demolish the outside toilet at number 35 Acacia Avenue but by mistake demolished the

toilet at number 37, it is accidental as far as the insured is concerned, although at the time he intended to demolish the toilet he worked on. Legally the word "accidental" has been defined in Fenton v Thorley (1903) as "an unlooked for mishap or an untoward event which is not expected or designed".

In a contractor's public liability policy the word "accidental" is used to avoid paying for damage to property or interference with rights of access, which are unavoidable if the contract is to be completed, as these losses should be charged to the contract. Although intentional bodily injury is also excluded in the above wording, this is extremely unlikely. To return to damage to property, damage to fences and crops, which must take place if the contract is to be carried out, should not be the subject of a claim under the public liability policy. During recent years the meaning of the word "accidental" has been considered and those insurers who see it as a limitation of the policy cover, have replaced it with a policy exception relating to injury or damage which is inevitable or results from acts or omissions which are deliberate.

The point is that under a policy covering liability for injury or damage under an accidental wording the onus of proving that the injury or damage is accidental, and thus within the cover of the policy, rests with the insured, because it appears in the operative clause. Unless he can prove this he is not entitled to indemnity under the policy. The authority for this statement is Munro Brice & Co v War Risks Association (1918). Under a non-accidental wording of the operative clause however, once the insured has shown that

the injury or damage has occurred, the claim falls within the operative clause and the onus is then on the insurer to prove the policy exception of deliberate act or omission, if he does not wish to accept the claim. The authority here is Bond Air Services v Hill (1955).

Ambiguous policy exceptions are construed against the insurers as the drafters of the policy, and thus the courts tend to favour policyholders when such disputes occur. This arises from the contra proferentum rule of construction.

"Bodily Injury", "Damage" and "Property" are defined in the policy and commented upon in chapters 5.3.1 and 4.3.1 respectively.

In law the word "property" has a wider meaning than insurers intend it to have under their public liability policies. It is the intention of insurers to cover loss or damage to tangible property in a physical sense such as damage to motor cars, homes, machinery, stock and the like.

In a judicial sense, however, the word property has a much wider meaning relating to anything which a person may own or possess. Intangible forms of property such as easements, copyrights, patents, design rights, trademarks and trade names are not intended to be covered or embraced within the word "property". But insurers do not say so and unless there is a definition of the word "property" in the policy, the matter is in doubt. In the wording of Section 2 of the policy in Appendix 1 "property" is defined as material property.

6.3.2. Accidental obstruction trespass or nuisance.

Claims for loss of business due to obstruction of access to premises or loss of production caused by failure of the electricity supply due to the insured contractors' negligent actions are fairly frequent. Three types of claims can be considered from:

(i) The electricity, water or gas authorities for damage to their cables or pipes.

(ii) Occupiers of shops or garages for loss of business due to obstruction of the highway, although they suffer no physical damage.

(iii) A nearby factory owner who has lost production because of the cut in the power supply.

Assuming the contractor is negligent and that the construction contract concerned does not affect the legal position then the policy position in the case of:

(i) above is that this is damage to property within the meaning of (b) in the operative clause.

(ii) above is that occupiers of premises adjoining the highway may recover in an action based on public nuisance when they suffer special damage as a result of a nuisance on the highway over and above the inconvenience suffered by the users of the highway. In Fritz v Hobson (1880) an unreasonable obstruction of a private way to the home and shop of an antique dealer was held to be actionable because it resulted in loss of custom to him. While (a) and (b) of the operative clause would not cover

such a claim because there was no bodily injury or damage to property, (c) would cover such incidents.

(iii) above is that pure economic loss claimed in negligence is not recoverable in current law unless it flows directly from injury or damage to property. See Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd (1972). The exceptions to this rule are the decisions in the cases of Hedley Byrne & Co v Heller and Partners (1982) (when there can be liability for pure economic loss arising from negligent mis-statements), and Junior Books Ltd v Veitchi Co Ltd (1982) (which was decided mainly on the relationship between the two parties to the action being employer and nominated subcontractor, which although not contractual was very close to it). The point in the second case arose from the fact that there can be liability for pure economic loss where a contractual relationship exists between the two parties. However, both these exceptions do not apply to (iii) above so there would be no legal liability unless the loss of production flowed directly from damage to the claimant's property, when the policy would operate under (b) of the operative clause.

See chapter 8 for an explanation of trespass and nuisance.

6.3.3. Territorial Limits.

This term has already been explained in chapter 4.3.7.

6.3.4. The Insured shall be legally liable to pay.

Strictly speaking this means that the insurer is under no obligation to pay a claim by a third party until liability of the insured has been established by the courts. See Post Office v Norwich Union Fire Insurance Society Ltd (1967)

which concerned the Third Party (Rights Against Insurers) Act 1930, which was intended to assist third parties where the insured, against whom they have a claim, becomes insolvent. This was to avoid any money recoverable under a liability policy being added to the general assets of the insured, thus putting the third party in no better position than other creditors.

In the Post Office case the Post Office claimed against an insured contractor's insurers under the 1930 Act because the contractor had damaged a Post Office underground cable, before going into liquidation. The contractor had denied liability, saying it had received incorrect information from the Post Office concerning the cable's position. It was held that the Post Office could not claim under the contractor's policy until judgment had been obtained against the contractor. The point was that the right to indemnity under the policy did not arise until the insured's liability to pay had been decided by the court and the Post Office had no better policy rights under the Act than the insured contractor.

In practice insurers take over the handling of a third party claim immediately they are informed of the occurrence, as they wish to control the situation and any costs involved. The vast majority of claims are handled without litigation.

The term "legally liable" appears the same as "liability at law", which is used by some insurers, and the latter phrase was considered in M/S Aswan Engineering Establishment Co v Iron Trades Mutual Insurance Co Ltd (1988). The Iron Trades argued that it did not include contractual liability but the court decided otherwise. The judge said the meaning of "liability at

law" was to be determined by reference to the ordinary use of language. It should not be given any restricted meaning to accord with the insurer's intentions, if the words used in the insurer's standard form give rise to any doubt. Thus the term was not restricted to liability in tort. See chapter 8 for further details of legal liabilities.

6.3.5. Limit of Indemnity.

This limit of indemnity is specified in the policy schedule. The amount payable in any one period of insurance is usually unlimited but the limit is applied to any one occurrence or series of occurrences arising out of one event. As a generalisation there is no limit to the amount of damages a court might award.

6.4. Additional Covers.

6.4.1. Motor Contingent Liability.

This clause reads;

> Notwithstanding Exception 2(c) below the company will indemnify the Insured within the terms of this Section in respect of liability for Bodily Injury or Damage to Property caused by or through or in connection with any motor vehicle or trailer attached thereto (not belonging to or provided by the Insured) being used in the course of the Business.
> Provided that the company shall not be liable for
> (a) Damage to any such vehicle or trailer
> (b) any claim arising whilst the vehicle or trailer is
> (i) engaged in racing pacemaking reliability trials or speed testing
> (ii) being driven by the Insured
> (iii) being driven with the general consent of the Insured or of his representative by any person who to the knowledge of the Insured or other such representative does not hold a licence to drive such a vehicle unless such a person has held and is not disqualified from holding or obtaining such a licence
> (iv) used elsewhere than in Great Britain Northern

> Ireland the Isle of Man or the Channel Islands.

Contractors may incur liability, known as contingent liability, in respect of a vehicle which is being used on the contractor's behalf but over which he has no direct control. For example, the contractor who permits his employee to use the employee's own car on his (the contractor's) business or the contractor who hired from the owner a vehicle with a driver.

The Road Traffic Act requires that the person who has effective control of the vehicle, ie the person who uses the vehicle or causes or permits any other person to use the vehicle, shall effect third party insurance. This means in the above examples that the employee and the owner of the hired out vehicle (with driver) are the people who should take out insurance. While the policies issued to these persons can be extended to indemnify the contractor, there are dangers that this cover may not operate to the contractor's advantage. For example, such policies may lapse, they may be invalid, or they may not cover the particular use which the contractor requires. Therefore, a contingent liability cover is necessary, however unlikely it may be considered to arise.

The wording obviously has to override exception 2(c) (see later) and the provisos are self-explanatory.

6.4.2. Defective Premises Act 1972.

This clause reads:

> The indemnity provided by this Section shall extend to include liability arising under Section 3 of the Defective Premises Act 1972 or Section 5 of the Defective Premises (Northern Ireland) Order 1975 in respect of the disposal of any premises which were occupied or owned by the Insured in connection with the Business.

> Provided that the Company shall not be liable for the cost of remedying any defect or alleged defect in such premises.

Under the Defective Premises Act liabilities might arise out of premises which the insured contractor has disposed of and which are not specified in the policy schedule.

The introductory paragraph of section 3 of this Act reads as follows

> Where work of construction, repair, maintenance or demolition or any other work is done on or in relation to premises, any duty of care owed, because of the doing of the work, to persons who might reasonably be expected to be affected by defects in the state of the premises created by the doing of the work shall not be abated by the subsequent disposal of the premises by the person who owed the duty.

The above quoted clause in the policy is intended to deal with this potential liability in respect of property no longer owned or occupied by the insured.

This cover only applies to accidents occurring during the policy period even though the defects may have arisen earlier.

6.4.3. Movement of Obstructing Vehicles.

Reads:

> Exception 2(c) shall not apply to liability arising from any vehicle (not owned or hired by or lent to the Insured) being driven by the Insured or by any Employee with the Insured's permission whilst such vehicle is being moved for the purpose of allowing free movement of any vehicle owned hired by or lent to the Insured or any employee of the Insured.
>
> Provided that
> (a) movements are limited to vehicles parked on or obstructing the Insured's own premises or at any site at which the Insured are working
> (b) the vehicle causing obstruction will not be driven by any person unless such person is competent to drive the vehicle
> (c) the vehicle causing obstruction is driven by use of the owner's ignition key
> (d) the Company shall not indemnify the Insured against
> (i) Damage to such vehicle

(ii) liability for which compulsory insurance or security is required under any legislation governing the use of the vehicle.

This clause is self explanatory although not standard in the insurance world.

Incidentally exception 2(c) excludes liability arising out of the ownership possession or use by the insured of mechanically propelled vehicles licensed for road use (subject to certain exceptions) known as Road Traffic Act liability.

6.4.4. Leased or Rented Premises

This clause reads

> Exception 4(b) shall not apply to damage to premises leased or rented to the Insured
> Provided that the Company shall not indemnify the Insured against
> (a) Contractual Liability
> (b) the first £100 of Damage caused otherwise than by fire or explosion

One effect of the custody or control exception (exception 4(b) in the policy under discussion) is that if the insured is the tenant of property then his legal liability for damage to that property is excluded. Now the tenant may be liable because of his negligence or contractually, under the terms of the lease. The effect of the clause quoted above is to cover the insured's liability for negligence for such damage, but not contractually under the lease, as contractual liability is defined under the "Definitions" section of the policy as follows :

> Contractual Liability shall mean liability which attaches by virtue of a contract or agreement but which would not have attached in the absence of such contract or agreement.

If the Insured requires this cover it can be done by taking out a separate fire policy in his own name or by arranging such a policy in the joint names of the landlord and tenant, which will prevent the fire insurers from exercising subrogation rights against the tenant.

Proviso (b) is self-explanatory.

6.5 Exceptions.

Each of these exceptions is prefaced by the words "The Company shall not indemnify the Insured against liability".

6.5.1 Liability to Employees.

It reads:

in respect of Bodily Injury to any Employee arising out of and in the course of his employment by the Insured.

The obvious reason for this exception is that the employers' liability policy covers this liability.

6.5.2. Risks insured more specifically by other policies

It reads:

arising out of the ownership possession or use by or on behalf of the Insured of any

(a) aircraft aerospacial device or hovercraft

(b) watercraft other than hand propelled watercraft or other watercraft not exceeding 20 ft in length

(c) mechanically propelled vehicle licensed for road use including trailer attached thereto other than liability caused by or arising out of

(i) the use of plant as a tool of trade on site or at the premises of the Insured

(ii) the loading or unloading of such vehicle

(iii) damage to any building bridge weighbridge road or to anything beneath caused by vibration or by the weight of such vehicle or its load

but this indemnity shall not apply if in respect of such liability compulsory insurance or security is required under any legislation governing the use of vehicle.

Aircraft or watercraft are excluded because they should be insured in the aviation or marine market. Similarly any mechanically propelled vehicle used in circumstances to which the Road Traffic Acts apply. However, a public liability policy may be extended to cover what is known as the "tool of trade" risk attaching to plant where this risk is not covered by the motor policy. Loading and unloading risks not covered by the motor policy should also be included in the Public Liability cover. The third exception made to the mechanically propelled vehicle exclusion is to cover an exception which used to apply universally (but not nowadays) to the commercial vehicle

policy concerning liability for damage to buildings bridges and weigh

- bridges etc. Nevertheless, the obligatory insurance required by the Road

Traffic Acts is still a matter for the Motor policy.

6.5.3. Contract Works.

It reads :

> for Damage to Property which comprises the Contract Works in respect of any contract entered into by the Insured and occurring before practical completion or a certificate of completion has been issued.

Contract Works is defined in the definition section of the policy as follows:

> Contract Works means the temporary or permanent works executed or in course of execution by or on behalf of the Insured in the development of any building or site or the performance of any contract including materials supplied by reason of the contract and other materials for use in connection therewith.

Contract Works as defined is properly insured under the Contractors' all

risks policy.

6.5.4. Property owned by or in the custody or control of the Insured.

It reads;

> In respect of Damage to Property
> (a) belonging to the Insured
> (b) in the custody or under the control of the Insured or any Employee (other than Property belonging to visitors directors partners or Employees of the Insured)
> Exception 4(b) shall not apply to Damage to buildings (including contents therein) which are not owned or leased or rented by the Insured but are temporarily occupied by the Insured for the purpose of maintenance alteration extension installation or repair.

Liability for damage to property belonging to the insured should be covered

by material damage policies as should property in the insured's custody or

control. For contractors working on the premises of third parties the

exception is qualified to make it clear that such premises, and their contents

are for the purposes of the public liability policy not to be considered as in

the custody or control of the insured.

6.5.5. Defective workmanship etc.

It reads;

> for the cost of and expenses incurred in replacing or making good faulty defective or incorrect.
> (a) workmanship
> (b) design or specification
> (c) materials goods or other property supplied installed or erected by or on behalf of the Insured.

While liability insurers do not intend to pay for the replacement of defective workmanship, and (b), and (c) are akin to defective workmanship, the liability for the consequences of such defective work are covered.

6.5.6. Breach of professional advice given for a fee.

It reads;

> caused by or arising from advice design or specification provided by or on behalf of the Insured for a fee.

This is particularly necessary where a firm of contractors have their own architects department. These risks are covered by the professional indemnity insurance market.

6.5.7. Excess.

It reads;

> for the Excess specified in the Schedule other than for Damage to premises leased or rented by the Insured.

Contractors` public liability policies sometimes include a large excess in respect of underground services as well as a separate excess (not usually applicable to bodily injury claims) for general third party claims. The excess is not usually applicable to bodily injury claims as insurers wish to have full control of these claims. It does not apply to premises leased or rented by the insured as there is already an excess in operation under this cover. See 6.4.4.

6.5.8. Pollution

It reads;

caused by or arising from seepage pollution or contamination unless due to a sudden unintended and unexpected event.

The effect of this clause is that sudden accidental pollution is covered, otherwise this risk is not covered.

6.6. Precautions required in certain circumstances.

These precautions are conditions precedent to the liability of the insurers in circumstances which arise out of the activities of contractors and could be, and by some insurers are, put under the conditions section of the policy.

6.6.1. Use of heat.

This clause reads as follows:

It is a condition precedent to the liability of the Company that when

(a) welding or flame-cutting equipment blow lamps blow torches or hot air guns are used by the Insured or any Employee away from the Insured's premises the Insured shall ensure that
   (i) all moveable combustible materials are removed from the vicinity of the work
   (ii) suitable portable fire extinguishing apparatus will be kept ready for immediate use as near as practicable to the scene of the work
   (iii) before heat is applied to any wall or partition or to any material built into or passing through a wall or partition an inspection will be made prior to commencement of each period of work to make certain that there are no combustible materials which may be ignited by direct or conducted heat on the other side of the wall or partition
   (iv) they are lit as short a time as possible before use and extinguished immediately after use and that they are not left unattended whilst alight
   (v) blow lamps are filled and gas cylinders or canisters are changed in the open
   (vi) the area in which welding or flame-cutting equipment is used will be screened by the use of blankets or screens of incombustible material
   (vii) a fire safety check is made in the vicinity of the work on completion of each period of work
(b) vessels for the heating of asphalt or bitumen are used away from the Insured's premises the Insured shall ensure that each vessel
   (i) shall be kept in the open whilst heating is taking place
   (ii) shall not be left unattended whilst heating is taking place

(iii) if used on a roof shall be placed on a surface of non-combustible material
(iv) shall be suitable for the purpose for which it is intended and be maintained and used strictly in accordance with the manufacturer's instructions.

The size and extent of third part claims from fires caused by negligent contractors are such that the insured and his employees are required to take reasonable precautions in the conduct of their operations to prevent the outbreak of fire. The wordings of this clause are set out in considerable detail and are therefore self-explanatory.

6.6.2. Property in the ground.

This clause reads:

The indemnity provided by this Section shall not apply to liability in respect of Damage to pipes cables mains and other underground services unless the Insured

1. has taken or caused to be taken all reasonable measures to identify the location of pipes cables mains and other underground services before any work is commenced which may involve a risk of Damage thereto
2. has retained a written record of the measures which were taken to comply with1. above before such work has commenced
3. has adopted or caused to be adopted a method of work which minimises the risk of Damage to such pipes cables mains and other underground services.

Damage to property in the ground is a common cause of claims under this policy. Post Office and electricity cables, gas pipes and water mains are damaged by excavators. Consequently insurers try to impose some care in the approach of contractors to road works and other work which may involve damage to these services.

6.7. Extensions

6.7.1. Costs.

See chapter 5.4.1.

6.7.2. Legal defence.

See chapter 5.4.2.

6.7.3. Indemnity to other persons.

See chapter 5.4.3.

6.7.4. Indemnity to Principal.

See chapter 4.6.

6.7.5. Cross liabilities.

This clause reads;

> The company will indemnify each insured to whom this Policy applies in the same manner and to the same extent as if a separate policy had been issued to each provided that the total amount of compensation payable shall not exceed the Limit of Indemnity regardless of the number of persons claiming to be indemnified. Provided that the Company shall not indemnify the Insured against liability for which an indemnity is or would be granted under Employers` Liability Insurance but for the existence of this Policy.

A public liability policy covering joint insureds requires a cross liabilities clause because it does not cover damage to property owned by the joint insured and often excludes property in his custody or control. Also it does not cover injury to persons under a contract of service of apprenticeship with the employer commissioning the work because he is a joint insured. All this is to the contractor`s disadvantage as the property damaged and injuries concerned are claims which should be covered by the public liability policy because the claimants are third parties to the contractor. Similarly the employer who commissions the work in a construction contract has no cover in respect of this legal liability for damage to property belonging to the contractor ,in the contractor`s custody or control, nor for injury to persons under a contract of service or apprenticeship with the contractor. This results in a reduction of cover to the employer given by the contractor`s

policy. All these restrictions are overcome by a cross liabilities clause which construes the policy as though separate policies had been issued to each of the joint insureds.

However, it has to be made clear that this does not mean that there are two limits of indemnity as only the one applies. Similarly it is made clear that if an employers' liability policy applies, the cross liabilities clause does not alter that position.

6.8. General Exceptions.

6.8.1. Exception 1. Nuclear risks.

See chapter 4.7.1.

6.8.2. Exception 2. Contractual liability..

See Chapter 5.5.2.

6.8.3. Exception 3. War and kindred risks.

See chapter 4.7.3.

6.9. Conditions of the Policy.

See chapter 4.8.

6.10. Endorsements.

See chapters 4.9 and 5.7

6.10.1. Excluding Welding or Flame-cutting Equipment.

> The Company shall not indemnify the Insured under Section 2 against liability caused by or arising from the use by the Insured or any Employee of welding or flame-cutting equipment away from the premises of the Insured.

This is the most hazardous of the "use of heat" equipment used by contractors and therefore is often excluded unless it is agreed to be covered.

6.10.2. Limitations of Work.

See chapter 4.9.1.

6.10.3. Hazardous Premises Exclusion.

See chapter 4.9.2.

6.11 Schedule.

See chapter 4.10.

6.12 What parts of this policy should be included in a construction contract?

As mentioned in the last two chapters (4.11 and 5.9) it is not necessary to include the recital clause, the additional covers, the conditions and the endorsements for the reasons given in those chapters, although additional covers was not a feature of the employers` liability policy. This leaves the operative or insuring clause (6.3.), the exceptions (6.5.) including the general exceptions (6.8.), the precautions required in certain circumstances (6.6), and extensions (6.7).

The precautions required in certain circumstances clause (6.6) varies from insurer to insurer. Thus it is seen from endorsement 6.10.1 the particularly hazardous aspects of the use of heat (6.6.1) can be excluded altogether. Also the damage to property in the ground precautions (6.6.2) are more applicable to contractors involved in road works. In these circumstances it would be confusing for the drafters of a construction contract to attempt to lay down both the requirements set out in 6.6. as if they applied to all contractors and to all contracts.

As mentioned in chapter 5.4 the extensions concerning costs (5.4.1), legal defence (5.4.2), indemnity to other persons (5.4.3) are standard clauses in liability policies which do not have to be specifically required to appear in a construction contract. Similarly the indemnity to principal clause (6.7.4) is standard in a construction contractor's liability policies. This still leaves the cross liabilities clause which as explained in chapter 6.7.5 is necessary where joint names liability policies are required in a construction contract. Therefore the answer to the question posed in the heading 6.12 is that the following clauses of the public liability policy should be included in construction contracts:

(a) The operative or insuring clause (6.3).

(b) The exceptions (6.5) which are set out below:
    (i) Liability to employees (6.5.1)
    (ii) Risks insured more specifically by other policies (6.5.2)
    (iii) Contract Works (6.5.3) arguably unnecessary if a CAR policy is needed and in view of the next exception (iv).
    (iv) Property owned by or in the custody or control or the Insured (6.5.4)
    (v) Defective workmanship etc (6.5.5)
    (vi) Breach of professional advice given for a fee (6.5.6)
    (vii) Pollution (6.5.8)
    (viii) Nuclear risks (4.7.1)
    (ix) War and Kindred risks (4.7.3).

(c) The cross liabilities extension (6.7.5) where joint names cover is required.

It will be noted that there are two omissions from the heading (b) above. In the first place the excess exception(6.5.7) varies from insurer to insurer, and the figure for which the insured is responsible is set out in the schedule, therefore it is unnecessary to mention this in a construction contract. Secondly, the general exception 2 "contractual liability" (5.5.2.) emphasises three facts namely that only material damage to property is covered (not

liquidated damages or penalties), that contractual liability for damage to the contract works after the contract is completed (such as defective work design or goods) is excluded and that cover provided by other policies is excluded. Now all these three aspects are excluded elsewhere in the policy or at least overlap with other terms or exceptions which exclude these aspects already. Consequently the inclusion of this general exception 2 in a construction contract is not merited in that form. In any event a contractors' public liability policy will nearly always give contractual liability cover as well as an indemnity to principals.

CHAPTER 7

THE CLAUSE 21.2.1. POLICY.

7.1. Section 4 of the Contractors Insurance (Appendix 1).

Under this clause of the JCT contract insurance has to be taken out indemnifying the employer "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 other than the Works or Site Materials 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". This clause is subject to five exceptions set out in this clause.

To understand the necessity for this insurance the limitations of clause 20.2. must be appreciated. This clause requires the contractor to indemnify the employer for claims made for loss or damage to property due to negligence, breach of statutory duty, omission or default of the contractor, his servants or agents or of other persons. Also clause 21.1.1 requires the insurance to support this indemnity under clause 20.2. However, this insurance does not protect the employer directly, ie there is no requirement for the insurance to be in the joint names of the contractor and the employer. Thus in the event of the employer being liable for damage to property which is not due to the negligence, breach of statutory duty, omission or default of the contractor, the employer will be without the indemnity from the contractor and also without insurance protection.

Gold v Patman and Fotheringham (1958) was such a case and this resulted in clause 21.2.1. requiring the insurance to protect the employer as quoted above. In this case the employer was liable for interfering with the right of support enjoyed by neighbouring building owners causing damage to that building.

The wording of this clause 21.2.1. insurance is given in Section 4 of the Contractors Insurance set out in Appendix 1.

7.2. Reasons for not giving details of this policy.

These reasons are as follows :

(a) This thesis deals with the conventional insurances, namely the contractors' all risks, the employers' liability and the public liability policies required by construction contracts generally. As explained above the clause 21.2.1 policy is an insurance cover required due to the peculiarities of the JCT contract so it is not a conventional insurance as defined above.

(b) Even under the JCT contract the requirement for this 21.2.1. cover depends upon the kind of work the contract requires. For example, piling, the removal of support to existing building or excavating near the foundations are clearly relevant, as is the type and condition of property adjacent to the site of the works. The greater the hazard the greater the requirement for this type of cover, ie there is a natural selection against the insurer. Thus a single storey school to be erected in the middle of a large field involves little or no clause 21.2.1. risk. However, work on old property in the middle of a city, involving work near the foundations of third party buildings, carries a very high 21.2.1 risk. Consequently, because this cover

is not always required is reason enough to dispense with details as far as this thesis is concerned. Only insurances called for as a basic requirement in a construction contract can be considered when deciding details of wording to be incorporated in the construction contract.

CHAPTER 8

INTRODUCTION TO LEGAL LIABILITIES

8.1.. Legal liabilities.

The purpose of this chapter is to explain legal terms which are often used in construction contracts and sometimes appear in insurance policies (especially in liability policies). Unfortunately because the common construction contracts are drafted by the representative bodies of both parties to these contracts the legal terms are intermingled with words and phrases which have no legal meaning. More about this complaint will be considered later in this chapter.

The wording of construction contracts inevitably widens the contractor's legal liability for damage to property (including the works) and for personal injuries caused by the carrying out of the works. Therefore it is necessary to set out the contractor's liability in tort and his more common statutory duties in order to see the extent to which the contract terms add to this tortious and statutory liability. The following are the basic legal liabilities

which exist in the United Kingdom, and with which this thesis is concerned :

(1) Negligence) The) Common)
(2) Nuisance) main) law)
(3) Absolute or strict liability) torts))
(4) Trespass)))
(5) Liability under contract))
(6) Breach of statutory duty)

While this is regarded by legal authors as a tort and the liability here can be 'strict' in that it can lie in some circumstances even though the conduct of the wrong doer is neither intentional nor negligent, it is placed last in order to distinguish it from the common law for the purposes of this thesis.) Civil as distinct from criminal law

The difference between a crime and a civil wrong depends on whether criminal or civil proceedings follow it. In the latter event it is a civil wrong. Sometimes the act is capable of being followed by both civil and criminal proceedings when it is both a civil wrong and a crime.

The phrase "common law" has various meanings. In this thesis it means the law that is not the result of legislation, ie the law created by the custom of the people and the decisions of the courts. While the latter is sometimes called case law there are case law decisions on breaches of statutory duty, which has been defined in the above diagram as exclusive of the common law, from which it will be realised that it is impossible to explain the law without defining as one proceeds.

8.2. Tort.

One of the main difficulties in explaining the law is to define "tort", which is a type of civil wrong. From the above diagram it will be appreciated that a tort is a civil wrong independent of contract, ie it gives rise to an action for damages irrespective of any agreement giving the right to take the proceedings concerned. However, it is basic to the law dealt with in this thesis that the terms of a contract between the parties may override a tort action otherwise available between them.

The meaning of "tort" will be appreciated more when each of the main torts is considered in turn. In this connection it should be appreciated that there are defences to the torts which follow. The main defences are contributory negligence and consent to run the risk by the claimant, but the same defences are not always available to each tort.

8.2.1. Negligence.

This tort has been defined in Blyth v Birmingham Waterworks Co (1856) as "the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do". The following conditions must exist if an action for negligence is to succeed:

(1) The defendant must owe a duty of care to the plaintiff.

(2) There must be a breach of that duty.

(3) The plaintiff must sustain injury or damage as a result.

Only a knowledge of the law will indicate when a duty of care is owed. The contractor owes a duty of care to those people with whom he might come into contact in carrying out his work, including their property, but, for example, there is no duty to rescue a child drowning in a pond. Moral obligations are not necessarily legal liabilities.

The most important test as to whether a duty of care exists was propounded by Lord Atkin in Donoghue v Stevenson (1932) when he set out his test of reasonable foreseeability otherwise known as the "neighbour" rule.

There are a number of circumstances, apart from the moral aspect mentioned earlier, where no duty of care is owed in spite of damage being foreseeable. In Langbrook Properties Ltd v Surrey CC (1969) it was held that the owner of land owes no duty of care to his neighbour for the results of his abstraction of water percolating underground in undefined channels.

On the other hand the categories of negligence are constantly being extended. For example, the courts were always reluctant to recognise a

duty to avoid causing pure economic loss without any attendant physical damage to property. However, such loss flowing from negligent advice was allowed in Hedley Byrne v Heller & Partners (1984) but even here there has to be a relationship of proximity between the negligent adviser and the person who suffered the pure economic loss. In addition, it may still be the case that relationships which verge on the contractual without being quite contractual may give rise to a duty of care. See the case of Junior Books Ltd v Veitchi Co Ltd (1982) although over the years this case, which concerned the production of a defective floor (an economic loss) by a subcontractor who was not in contractual relationship with the employer, seems to have been dismissed as of little value. It was said in the House of Lords in D & F Estates Ltd & Others v Church Commissioners for England & Others (1988) that the Junior Books case depended upon the unique relationship between the parties and it could not be regarded as laying down any principle of general application in the law of tort.

Apart from negligent advice, where physical damage to property was sustained only the economic loss flowing directly from that physical damage was allowed in damages, which resulted in a very arbitrary line being drawn for economic loss claims. Thus in Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd (1972) the all-too-frequent situation arose of a contractor damaging a cable in the ground and cutting off the power to a nearby factory occupied by the plaintiffs. They suffered some decrease in the value of the molten metal in a furnace, plus loss of the profit arising from that melt. They also claimed for the loss of profit in respect of melts whose treatment

in the furnace was delayed. This last item was disallowed, being classed as economic loss which did not flow directly from the physical damage. It was therefore pure economic loss. The House of Lords in Murphy v Brentwood DC (1990), which was the case which decided that Anns v Merton LBC (1978) (placing a duty of care on local authorities towards owners/occupiers of houses in relation to inspection during the building process) was wrongly decided, stated that the Spartan decision with its limitation was not an application of logic. It was due to the perceived necessity as a matter of policy to place some limits to what would otherwise be an endless, cumulative chain bounded only by theoretical foreseeability.

8.2.2. Nuisance.

One of the earliest definitions of nuisance is "the wrong done to a man by unlawfully disturbing him in the enjoyment of his property (a private nuisance) or, in some cases, in the exercise of a common right (a public nuisance)".

8.2.2.1. Public nuisance.

This is a crime and only falls within the law of torts when it causes a person "special damage" above that caused to the community in general. Thus the builder who leaves a pile of sand on the highway and fails to light it at night would be guilty of a public nuisance because of the general inconvenience to the public who have to avoid the obstruction. It is for the police to take action in the case of a public nuisance, but if a car collides with the unlit obstruction and the driver sustains injury, he has a right of action against the

builder as he has suffered an injury over and above that caused to the remainder of the public.

8.2.2.2. Private nuisance.

This was defined in Cunard v Antifyre (1932) as "an interference for a substantial length of time by owners or occupiers of property with the use or enjoyment of neighbouring property".

Private nuisances are of two kinds:

(1) Wrongful disturbance of rights attaching to land. The main rights, interference with which may be actionable, are rights to light and air, rights to support of land and buildings thereon, and rights in respect of water and rivers.

(2) The act of wrongfully causing or allowing the escape of noxious things, such as smoke, smells, noise, gas, vibration, damp and tree roots, into another person's property so as to interfere with his health, comfort or convenience, or so as to interfere with his enjoyment of, or cause damage to, his property.

8.2.3. Absolute or strict liability.

Probably the word "strict" is the better term as absolute implies that the defendant is always liable and this is not so. There are defences available and the word "strict" more aptly describes the situation, which is that there are certain liabilities imposed by law making the defendant liable even though he has exercised reasonable care and did not intend the injury or damage.

The usual example under this heading is the rule in Rylands v Fletcher (1868):

> "....that the person who, for his own purposes, brings on his land and collects and keeps there any thing likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequences of its escape."

Therefore there is a strict liability without proof of negligence. However, there are the following defences:

(1) The escape was due to the plaintiff's default.

(2) The escape was due to an Act of God.

(3) The incident results from the natural use of the land.

(4) The accumulation took place with the plaintiff's consent.

(5) There was statutory authority to carry out the activity, depending on the wording of the Act concerned.

(6) The escape was due to the act of a stranger. The word "stranger" here does not include a servant or contractor, for whose acts the defendant would be responsible. For example, there would be no liability under the rule for the act of a trespasser.

Another illustration of strict liability occurs where one person is vicariously liable for the acts or omissions of another. This occurs in the following relationships (the first named being responsible for the acts of the second named in each case):

(1) Master and servant, usually in all circumstances.

(2) Principal and independent contractor, in certain circumstances only.

(3) Principal and agent, in particular circumstances only.

8.2.4. Trespass.

This has been defined as an unlawful act committed with force and violence on the person, property, or rights of another. The "violence" may be only implied, eg. mere wrongful entry on to the plaintiff's land or even to his air space by a tower crane. The injury must be "direct" which means that it must not be consequential. Thus if a builder throws a brick into the road injuring a passer-by it is a direct injury, but if the brick thrown into the road is later the cause of injury to a passer-by, who falls over it, the injury is an indirect one.

8.3. Liability under contract.

This has been dealt with under chapter 3.1.

8.4. Breach of statutory duty.

Certain Acts of Parliament create statutory liabilities, and the following are among those most likely to be involved in claims concerning the construction industry and involving damage to property.

(1) The Building Act 1984. This Act received the Royal Assent on 31 October 1984 and most of its provisions came into force on 1 December 1984. Part I of the Building Act is concerned with building regulations; Part II deals with the system of private certification, ie the supervision of building work etc otherwise than by local authorities; and Part III deals with miscellaneous but related matters.

(2) The Defective Premises Act 1972.

Section 1 of this Act provides that:

> "a person taking on work for or in connection with the provision of a dwelling owes a duty" to the purchaser and any other person who acquires an interest, "to see that the work which he takes on is done in

a workmanlike manner, or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling is fit for human habitation when completed".

Section 2 excludes from the purport of section 1 schemes relating to the protection of purchasers of new dwellings. Until 1979 the scheme operated by the National House Building Council was approved but application for approval was not made from this year.

Section 3 of this Act has been considered in chapter 6.4.2.

Section 4 concerns the landlord's duty of care by virtue of an obligation or right to repair premises demised:

(a) Where premises are let under a tenancy, which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons, who might reasonably be expected to be affected by defects in the state of the premises, a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to property caused by a relevant defect.

(b) The said duty is owed if the landlord knows (whether as a result of being notified by the tenant or otherwise) or if he ought in all the circumstances to have known of the relevant defects.

8.5. Lack of precision in drafting construction contracts.

It is surprising, after so many years of standard forms of contract that words having a legal meaning are used in conjunction with general words having no legal meaning, thus leaving the reader in doubt as to whether the general words add anything or are superfluous. In the former case the drafter should be more specific by using words with a legal meaning (instead of the

general words) to indicate this intention, and in the latter event he should leave out the general words which are superfluous. For example, in clause 20.1 of the JCT Contract (1980 edition incorporating the 1986 Amendment) and clause 22(2)(e) of the ICE Conditions (Edition 6) require the contractor to indemnify the employer for any third party claim for personal injury (the ICE conditions also include damage to property). The exception occurs where the claim is due to any "act or neglect" of the employer or those for whom he is responsible. The ICE Conditions also add "or breach of statutory duty" to "act or neglect", in this exception. The point is that it has taken case law to show that the word "act" is superfluous. See Hosking v De Havilland Ltd (1949) and Murfin v United Steel Companies Ltd (1957) in the case of the JCT Contract and Strathclyde Regional Council v James Waddell and Son Ltd (1982) in the case of the ICE Conditions. However, reference to the courts would not have been necessary if the clauses had been drafted properly in the first place. In both these contracts the word "act" has not been dropped in subsequent editions since the cases were heard.

There are other examples of poor drafting. Both the contracts concerned use the word "default", which is a non-legal term. The JCT Contract uses it in clause 20.2, where the contractor gives an indemnity to the employer for damage to property to the extent that such damage is due to "any negligence, breach of statutory duty, omission or default of the contractor". The ICE Conditions in clause 24, concerning accident or injury to workpeople where the contractor must indemnify the employer except to the

extent that such accident or injury results from "any act or default" of the employer, give no indication of the meaning of this phrase in quotes.

8.6. The pattern of the responsibility for the works and liability clauses in relation to the insurance clauses.

In the next four chapters the responsibility for the works clauses and the liability to third party clauses on the one hand and the related insurance clauses on the other, will be considered. Suggestions for improving the insurance clauses will then be made. However, the usual pattern of all these clauses should be appreciated. This is for a liability (indemnity) clause and a responsibility for the works clause (or vice versa), each to be followed by an insurance clause concerning that liability or responsibility. The ICE Conditions are the best example of this pattern, and they will be considered in the next chapter.

CHAPTER 9

THE ICE CONDITIONS OF CONTRACT - 6TH EDITION.

9.1. Introduction

The usual problem for those writing about construction contracts is the constant publication of fresh editions, revisions and amendments and the sixth edition of these Conditions was published as recently as January 1991. This means that the fifth edition will still be used by practitioners for some time to come, but this does not justify ignoring the new edition, which will eventually take over. Consequently the sixth edition will be considered in this thesis.The clauses relevant to the subject of this thesis are as follows:

Clause 20 (Responsibility for the Works) contain three sub-clauses:

(1) Care of the works. (2) Excepted Risks. (3) Rectification of loss or damage. Clause 21 (Insurance of the Works) contains two sub-clauses:

(1) Insurance of the Works etc. (2) Extent of cover.

Clause 22 (Liability to third parties) contains four sub-clauses:

(1) Damage to persons and property (2) Exceptions (3) Indemnity by Employer (4) Shared responsibility.

Clause 23 (Third party insurance) contains three sub-clauses:

(1) Third party insurance. (2) Cross liability clause. (3) Amount of insurance.

Clause 24 (Accident or injury to workpeople).

Clause 25 (Evidence and terms of insurance) contains four sub-clauses:

(1) Evidence and terms of insurance. (2) Excesses.

(3) Remedy on Contractor's failure to insure.

(4) Compliance with policy conditions.

The wording of these clauses is set out below:

Care of the Works **20** (1) (a) The Contractor shall save as in paragraph (b) hereof and subject to sub-clause (2) of this Clause take full responsibility for the care of the Works and materials plant and equipment for incorporation therein from the Works Commencement Date until the date of issue of a Certificate of Substantial Completion for the whole of the Works when the responsibility for the said care shall pass to the Employer.

(b) If the Engineer issues a Certificate of Substantial Completion for any Section or part of the Permanent Works the Contractor shall cease to be responsible for the care of that Section or part from the date of issue of such Certificate of Substantial Completion when the responsibility for the care of that Section or part shall pass to the Employer.

(c) The Contractor shall take full responsibility for the care of any outstanding work and materials plant and equipment for incorporation therein which he undertakes to finish during the Defects Correction Period until such outstanding work has been completed.

Excepted Risks

(2) The Excepted Risks for which the Contractor is not liable are loss or damage to the extent that it is due to

(a) the use or occupation by the Employer his agents servants or other contractors (not being employed by the Contractor) of any part of the Permanent Works

(b) any fault defect error or omission in the design of the Works (other than a design provided by the Contractor pursuant to his obligations under the Contract)

(c) riot war invasion act of foreign enemies or hostilities (whether war be declared or not)

(d) civil war rebellion revolution insurrection or military or usurped power

(e) ionizing radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof and

(f) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds.

Rectification of loss or damage

(3) (a) In the event of any loss or damage to

(i) the Works or any Section or part thereof or
(ii) materials plant or equipment for incorporation therein

while the Contractor is responsible for the care thereof (except as provided in sub-clause (2) of this Clause) the Contractor shall at his own cost rectify such loss or damage so that the Permanent Works conform in every respect with the provisions of the Contract and the Engineers's instructions. The Contractor shall also be liable for any loss or damage to the Works occasioned by him in the course of any operations carried out by him for the purpose of complying with his obligations under Clauses 49 and 50.

(b) Should any such loss or damage arise from any of the Excepted Risks defined in sub-clause (2) of this Clause the Contractor shall if and to the extent required by the Engineer rectify the loss or damage at the expense of the Employer.

(c) In the event of loss or damage arising from an Excepted Risk and a risk for which the Contractor is responsible under sub-clause (1)(a) of this Clause then the Engineer shall when determining the expense to be borne by the Employer under the Contract apportion the cost of rectification into that part caused by the Excepted Risk and that part which is the responsibility of the Contractor.

Insurance of Works etc.

21 (1) The Contractor shall without limiting his or the Employers obligations and responsibilities under Clause 20 insure in the joint names of the Contractor and the Employer the Works together with materials plant and equipment for incorporation therein to the full replacement cost plus an additional 10% to cover any additional costs that may arise incidental to the rectification of any loss or damage including professional fees cost of demolition and removal of debris.

Extent of cover

(2) (a) The insurance required under sub-clause (1) of this Clause shall cover the Employer and the Contractor against all loss or damage from whatsoever cause arising other than the Excepted Risks defined in Clause 20 (2) from the Works Commencement Date until the date of issue of the relevant Certificate of Substantial Completion.

(b) The insurance shall extend to cover any loss or damage arising during the Defects Correction Period from a cause occuring prior to the issue of any Certificate of Substantial Completion and any loss or damage occasioned by the Contractor in the course of any operation carried out by him for the purpose of complying with his obligations under Clauses 49 and 50.

(c) Nothing in this Clause shall render the Contractor liable to insure against the necessity for the repair or reconstruction of any work constructed with materials or workmanship not in accordance with the requirements of the Contract unless the Bill of Quantities shall provide a special item for this insurance.

(d) Any amounts not insured or not recovered from insurers whether as excesses carried under the policy or otherwise shall be borne by the Contractor or the Employer in accordance with their respective responsibilities under Clause 20.

Damage to persons and property 22 (1) The Contractor shall except if and so far as the Contract provides otherwise and subject to the exceptions set out in sub-clause (2) of this Clause indemnify and keep indemnified the Employer against all losses and claims in respect of

(a) death of or injury to any person or

(b) loss of or damage to any property (other than the Works)

which may arise out of or in consequence of the execution of the Works and the remedying of any defects therein and against all claims demands proceedings damages costs charges and expenses whatsoever in respect thereof or in relation thereto.

Exceptions (2) The exceptions referred to in sub-clause (1) of this Clause which are the responsibility of the Employer are

(a) damage to crops being on the Site (save in so far as possession has not been given to the Contractor)

(b) the use or occupation of land (provided by the Employer) by the Works or any part thereof or for the purpose of executing and maintaining the Works (including consequent losses of crops) or interference whether temporary or permanent with any right of way light air or water or other easement or quasi-easement which are the unavoidable result of the construction of the Works in accordance with the Contract

(c) the right of the Employer to construct the Works or any part thereof on over under in or through any land

(d) damage which is the unavoidable result of the construction of the Works in accordance with the Contract and

(e) death of or injury to persons or loss of or damage to property resulting from any act neglect or breach of statutory duty done or committed by the Employer his agents servants or other contractors (not being employed by the Contractor) or for or in respect of any claims demands proceedings damages costs charges and expenses in respect thereof or in relation thereto.

Indemnity by Employer (3) The Employer shall subject to sub-clause (4) of this Clause indemnify the Contractor against all claims demands proceedings damages costs charges and expenses in respect of the matters referred to in the exceptions defined in sub-clause (2)of this Clause.

Shared responsibility

(4) (a) The Contractor's liability to indemnify the Employer under sub-clause (1) of this Clause shall be reduced in proportion to the extent that the act or neglect of the Employer his agents servants or other contractors (not being employed by the Contractor) may have contributed to the said death injury loss or damage.

(b) The Employer's liability to indemnify the Contractor under sub-clause (3) of this Clause in respect of matters referred to in sub-clause (2)(e) of this Clause shall be reduced in proportion to the extent that the act or neglect of the Contractor or his sub-contractors servants or agents may have contributed to the said death injury loss or damage.

Third party Insurance

23 (1) The Contractor shall without limiting his or the Employer's obligations and responsibilities under Clause 22 insure in the joint names of the Contractor and the Employer against liabilities for death of or injury to any person (other than any operative or other person in the employment of the Contractor or any of his sub-contractors) or loss of or damage to any property (other than the Works) arising out of the execution of the Contract other than the exceptions defined in Clause 22(2)(a)(b)(c) and (d).

Cross liability clause

(2) The insurance policy shall include a cross liability clause such that the insurance shall apply to the Contractor and to the Employer as separate insured.

Amount of insurance

(3) Such insurance shall be for at least the amount stated in the Appendix to the Form of Tender.

Accident or injury to workpeople

24 The Employer shall not be liable for or in respect of any damages or compensation payable at law in respect or in consequence of any accident or injury to any operative or other person in the employment of the Contractor or any of his sub-contractors save and except to the extent that such accident or injury results from or is contributed to by any act or default of the Employer his agents or servants and the Contractor shall indemnify and keep indemnified the Employer against all such damages and compensation (save and except as aforesaid) and against all claims demands proceedings costs charges and expenses whatsoever in respect thereof or in relation thereto.

Evidence and terms of insurance

25 (1) The Contractor shall provide satisfactory evidence to the Employer prior to the Works Commencement Date that the insurances required under the Contract have been effected and shall if so required produce the insurance policies for inspection. The terms of all such insurances shall be subject to the approval of the Employer (which approval shall not unreasonably be withheld). The Contractor shall upon request produce to the Employer receipts for the payment of current insurance premiums.

Excesses

(2) Any excesses on the policies of insurance effected under Clauses 21 and 23 shall be as stated by the Contractor in the Appendix to the Form of Tender.

Remedy on Contractor's failure to insure

(3) If the Contractor shall fail upon request to produce to the Employer satisfactory evidence that there is in force any of the insurances required under the Contract then and in any such case the Employer may effect and keep in force any such insurance and pay such premium or premiums as may be necessary for that purpose and from time to time deduct the amount so paid from any monies due or which may become due to the Contractor or recover the same as a debt due from the Contractor.

Compliance with policy conditions

(4) Both the Employer and the Contractor shall comply with all conditions laid down in the insurance policies. In the event that the Contractor or the Employer fails to comply with any condition imposed by the insurance policies effected pursuant to the Contract each shall indemnify the other against all losses and claims arising from such failure.

9.2. Responsibility for and insurance of the works - Clauses 20 and 21.

It is not intended to use space in giving a very detailed explanation of these clauses as that is not the intention of this thesis and also they are largely self-explanatory. However, a general picture of the situation can be obtained from the following comments.

Under clause 20 the care of the works is the contractor`s responsibility. He is required at his own cost to rectify any loss or damage to the works or materials plant or equipment for incorporation therein, unless it is due to one of the excepted risks. The period of his responsibility is from the Works Commencement Date until the date of issue of a Certificate of Substantial Completion for the whole of the works when responsibility passes to the employer. The contractor is also responsible for any outstanding work and materials plant and equipment for incorporation therein, which he has undertaken to finish during the Defects Correction Period until it is completed.

Under clause 21 (the insurance of the works) the main requirements are as follows:

(1) to insure in the joint names of the contractor and the employer	) The) Insured
(2) the works (which by definition includes the permanent and temporary works) including materials plant and equipment for incorporation therein to the full replacement cost, plus an additional 10% to cover additional costs including professional fees, cost of demolition and removal of debris	) The subject) matter of) the) insurance) and the) sum) insured
(3) against any loss or damage from whatsoever cause arising (other than the excepted risks);	) The perils) insured) against
(4) both during the construction period and the defects correction period arising from a cause occurring during the construction period or through loss or damage	) The period) of) insurance

caused by the contractor in course of any operation)
carried out by him for the purpose of complying with the)
"outstanding work and defects" clauses)

9.3. A suggested improvement in the wording of clause 21.

It has been argued in chapter 4.11 that parts of a contractors` all risks (CAR) policy which should be included in a construction contract are those which appear in clause 22.2 of the JCT contract 1980 edition 1986 amendment. See chapter 10.4. Therefore, it is suggested that sub-clause 21(2)(a) of the ICE Conditions is extended by adding the following wording, bearing in mind clause 21(2)(a) is a form of operative clause and exclusions (the excepted risks):

> This all risks insurance may also exclude the cost necessary to repair replace or rectify
> (i) property which is defective due to wear and tear, obsolescence, deterioration, rust or mildew;
> (ii) loss or damage caused by or arising from confiscation, commandeering, nationalisation or requisition or loss or destruction of or damage to any property by or under the order of any government de jure or de facto or public, municipal or local authority, or disappearance or shortage is only revealed when an inventory is made or is not traceable to an indentifiable event;
> and if the contract is carried out in Northern Ireland
> (iii) loss or damage caused by or arising from civil commotion or any unlawful, wanton or malicious act committed maliciously by any person or persons acting on behalf of or in connection with an unlawful association; "unlawful association" shall mean any organisation which is engaged in terrorism and includes an organisation which at any relevant time is a proscribed organisation within the meaning of the (Northern Ireland Emergency Provisions) Act 1973; "terrorism" means the use of violence for political ends and includes any use of violence for the purpose or putting the public or any section of the public in fear.

The use of the word "may" rather than "shall" in the introductory sentence of this extension allows these exclusions and is not mandatory. It will be noted that the design exclusion set out in clause 22.2 of the JCT contract is not

included in the above extension, and this is because it already appears in the excepted risks of the ICE conditions excluded from the CAR cover by the original sub-clause 21(2)(a) mentioned above. The wording of this design exclusion is not exactly the same as that in the JCT contract, but this does not justify any alteration, bearing in mind that the ICE Conditions concern engineering work and the drafters consider the wording in the ICE excepted risks to be suitable. It must be remembered that the contractor is only responsible for a design he provides pursuant to his obligations under the contract and this would be unusual in the ICE Conditions. This risk requires a professional indemnity policy. There is no requirement in clause 21(2)(c) for insurance against the repair of work constructed with materials or workmanship not in a accordance with the contract. The design exclusion applies only if the damage was caused by a design not provided by the contractor. In both the JCT and the ICE contracts the nuclear risks and sonic waves exclusions come within the excepted risks of those contracts. The wording in both contracts is the same. In the ICE Conditions war and kindred risks also appear in the excepted risks, but they appear separately in the JCT insurance exclusions in clause 22.2. See also Appendix 3 on the excepted risks.

It should also be noted that clause 21(1) of the ICE Conditions requires cover for the works, materials plant and equipment for incorporation therein to the full replacement cost plus an additional 10% to cover any additional costs that may arise incidental to the rectification of any loss or damage including professional fees, cost of demolition and removal of debris.

Consequently, the doubt indicated at the end of chapter 4.11 as to whether it was necessary to call for the more important additional covers of professional fees, debris removal and plant and equipment, has been justified as far as the ICE Conditions are concerned as these covers are automatically included in these Conditions.

9.4. Liability for injury to persons and damage to property - clause 22.

In the first place the contractor is required to indemnify the employer in respect of injury and property (other than the works) claims by third parties, subject to certain exceptions set out in sub clause 22(2).The first four exceptions are those which one would reasonably expect to be the responsibility of the employer. The fifth exception also rightly leaves the employer responsible for his own "act neglect or breach of statutory duty done or committed by the Employer etc". It has already been assumed that "act" is a superfluous word. See chapter 8.5. Under clause 22(3) where the position is reversed, ie third party claims being made against the contractor in respect of the matter referred to in the exceptions set out in sub-clause 22(2), the employer is required to indemnify the contractor. In both sub-clauses 22(1) and 22(3) the indemnities given are limited to proportionate liability only. See clause 22(4).

9.5. Insurance against injury to persons and damage to property - clause 23.

This clause deals with third party insurance, ie a public liability policy is required and employees of the contractor (or any of his sub-contractors) making injury claims are specifically excluded, as such claims come within

clause 24. A joint names policy is required, with a cross liability clause for at least the amount stated in the Appendix to the Form of Tender. A cross liability clause is necessary as a public liability policy excludes property owned by the joint insureds or in their custody or control, nor does it cover employees of the joint insureds. This is to the contractor's detriment and similarly to the employer (who commissions the work in the construction contract) as they have no cover in respect of their legal liability for damage to the other joint insured's property, or in his custody or control, nor to the other's employees, which a public liability policy should give. A cross liabilities clause overcomes these difficulties as it construes the policy as though separate policies had been issued to each of the joint insureds. It seems clear from Clause 23(1) that the Joint Names Policy is intended to give the Employer cover under Clause 22(2)(e).

9.6. A suggested improvement in the wording of clause 23

It has been argued in chapter 6.12. that the request for a public liability policy in a construction contract should include the operative clause and a cross liability extension as well as certain policy exceptions.

Clause 23(1) is a form of operative clause in that it only falls short of the operative clause wording given in chapter 6.3. in not mentioning obstruction, trespass and nuisance. However, as the drafters of clause 23(1) refer to the exceptions defined in clause 22(2)(a)(b)(c) and (d) it is advisable not to interfere with these exceptions which impose a limitation on obstruction, trespass and nuisance, because such exceptions all concern claims arising from the use or occupation of land in order to construct the works, which is

the employer's responsibility. Clause 23(1) contains exclusions of claims by employees of the contractor and contract works claims arising from the construction of the works, so these exceptions need not appear in the exclusions mentioned later. Clause 23(2) imposes a cross liability clause in the policy so no additional wording is necessary in this connection. Similarly in the case of the limit of indemnity which appears in clause 23(3). Consequently in order to include the exceptions suggested in chapter 6.12 an additional sub-clause numbered 23(4) should be added as follows, but note that a nuclear risks exception is included as otherwise clause 23 makes no provision for this risk. However, war and kindred risks are catered for by clause 65.

The insurance policy may not indemnify the insured against liability
(a) arising out of ownership possession or use by or on behalf of the Insured of any
  (i) aircraft aerospacial device or hovercraft
  (ii) watercraft other than hand propelled watercraft or other watercraft not exceeding 20 feet in length
  (iii) mechanically propelled vehicle licensed for road use including trailer attached thereto other than liability caused by or arising out of the use of plant as a tool of trade on site or at the premises of the insured, the loading or unloading of such vehicle, damage to any building weighbridge road or to anything beneath caused by vibration or by the weight of such vehicle or its load but this indemnity shall not apply if in respect of such liability compulsory insurance or security is required under any legislation governing the use of vehicles.
(b) in respect of Damage to Property
  (i) belonging to the Insured
  (ii) in the custody or under the control of the Insured or any Employee (other than property belonging to visitors directors partners or Employees of the Insured). But this part of this exception shall not apply to Damage to buildings (including contents therein) which are not owned by or leased or rented by the Insured but are temporarily occupied by the Insured for the purpose of maintenance alteration extension installation or repair.
(c) for the cost of and expenses incurred in replacing or making good faulty defective or incorrect

(i) workmanship
(ii) design or specification
(iii) materials goods or other property supplied installed or erected by or on behalf of the Insured

(d) caused by or arising from advice design or specification provided by or on behalf of the Insured for a fee.

(e) caused by or arising from seepage pollution or contamination unless due to a sudden unintended and unexpected event.

(f) (i) for loss destruction of or damage to any property whatsoever or any loss expense whatsoever resulting or arising therefrom or any consequential loss
(ii) for any legal liability of whatsoever nature
directly or indirectly caused by or contributed to or arising from ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, the radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or component thereof.

9.7. Accident or injury to workpeople - clause 24.

Under this clause the contractor must indemnify the employer against any damages payable in respect of injury to any employee of the contractor or any sub-contractor unless this is contributed to by any act or default of the employer his servants or agents. It is presumed that this means negligence of the employer etc (see chapter 8.5) when the indemnity is proportionally reduced. There is no insurance requirement as it is compulsory in the UK under the Employers' Liability (Compulsory Insurance) Act 1969, but a specific suggestion is made under the next heading

9.8. A suggested improvement in the wording of clause 24.

A conclusion reached in chapter 5.9. was there was nothing to add to improve the construction contracts generally so far as the EL policy cover was concerned. However, as clause 24 of the ICE Conditions requires the contractor to indemnify the employer for damages for injury caused to sub-contractors' employees as well as to the contractor's own employees an

additional clause on the following lines is suggested. This means numbering clause 24 as 24(1) and the following 24(2).

Insurance against accident or injury to workpeople

(2) The contractor shall insure against such liability and shall continue such insurance during the whole of the time that any persons are employed by him on the Works. Provided that, in respect of any persons employed by any sub-contractor, the Contractor's obligations to insure as aforesaid under this sub-clause shall be satisfied if the sub-contractor shall have insured against the liability in respect of such persons in such manner that the Employer is indemnified under the policy, but the Contractor shall require such sub-contractor to produce to the Employer, when required, such policy of insurance and the receipt for the payment of the current premium.

This clause is taken from the International Civil Engineering Contract (FIDIC). This contract will be considered later in this chapter. Clause 24(2) provides that the contractor's obligation to insure would be satisfied if the sub-contractor insures against his own liabilities to his own workpeople in a similar way to that done by the contractor so that the employer is indemnified under the sub-contractor's policy. Also the contractor is required to see that his sub-contractors produce to the employer, when required, the policy of insurance and the receipt for the payment of the current premium.

9.9 The International Civil Engineering Contract.

This contract is known as the FIDIC contract, these capital letters coming from the international federation producing it. The current edition is the fourth edition, which was published in 1987, and the wording still bears some considerable resemblance to that in the ICE Conditions, hence the reason for its inclusion in this chapter. The clauses concerned are numbered the same as those in the ICE Conditions. The general pattern is

given below in comparison with that of the ICE Conditions. The wording of the FIDIC clauses follows this comparison.

ICE Conditions	FIDIC Contract
Clause 20 Three sub-clauses: (1) Care of the works. (2) Excepted Risks. (3) Rectification of loss or damage.	Four sub-clauses: .1 Care of works .2 Responsibility to rectify loss or damage. .3 Loss or damage due to employer's risks. .4 Employer's risks (same as ICE excepted risks plus the restriction of riot, commotion or disorder to those other than the employees of the contractor or the sub-contractor, also any operation of the forces of nature). Note .2 and .3 include the same requirements as the ICE rectification of loss or damage sub-clause.
Clause 21 Two sub-clauses: (1) Insurance of works etc. (2) Extent of cover.	Four sub-clauses: .1 Insurance of works and contractor's equipment. .2 Scope of cover. .3 Responsibility for amounts not recovered. .4 Exclusions. Note: all four sub-clauses basically cover the same ground as Clause 21 in the ICE Conditions, except that the percentage for additional costs is 15%.
Clause 22 Four sub-clauses (1) Damage to persons and property (2) Exceptions (3) Indemnity to Employer (4) Shared responsibility.	Three sub-clauses: .1 Damage to persons and property. .2 Exceptions. .3 Indemnity to Employer. Note: The proportionate liability or shared responsibility appears in sub-clauses .2 and .3, other wise these three sub-clauses basically include the same requirements as Clause 22 in the ICE Conditions.

Clause 23	Three sub-clauses: (1) Third party insurance. (2) Cross liability clause. (3) Amount of insurance.	Three sub-clauses: .1 Third party insurance (including Employer's property). .2 Minimum amount of insurance. .3 Cross liabilities. Note: Here again all three sub-clauses cover the same ground as the ICE Clause 23.
Clause 24	Accident or injury to workpeople.	Two sub-clauses: .1 Accident or injury to workmen (same as ICE) .2 Insurance against accident to workmen. Note: See Chaper 9.8 for this sub-clause 24.2.

Care of Works 20.1 The Contractor shall take full responsibility for the care of the Works and materials and Plant for incorporation therein from the Commencement Date until the date of issue of the Taking-Over Certificate for the whole of the Works, when the responsibility for the said care shall pass to the Employer. Provided that:

(a) if the Engineer issues a Taking-Over Certificate for any Section or part of the Permanent Works the Contractor shall cease to be liable for the care of that Section or part from the date of issue of the Taking-Over Certificate, when the responsibility for the care of that Section or part shall pass to the Employer, and

(b) the Contractor shall take full responsibility for the care of any outstanding Works and materials and Plant for incorporation therein which he undertakes to finish during the Defects Liability Period until such outstanding Works have been completed pursuant to Clause 49.

Responsibility to Rectify Loss or Damage 20.2 If any loss or damage happens to the Works, or any part thereof, or materials or Plant for incorporation therein, during the period for which the Contractor is responsible for the care thereof, from any cause whatsoever, other than the risks defined in Sub-Clause 20.4, the Contractor shall, at his own cost, rectify such loss or damage so that the Permanent Works conform in every respect with the provisions of the Contract to the satisfaction of the Engineer. The Contractor shall also be liable for any loss or damage to the Works occasioned by him in the course of any operations carried out by him for the purpose of complying with his obligations under Clauses 49 and 50.

Loss or Damage Due to Employer's Risks 20.3 In the event of any such loss or damage happening from any of the risks defined in Sub-Clause 20.4, or in combination with other risks, the Contractor shall, if and to the extent required by the Engineer, rectify the loss or damage and the Engineer shall determine an addition to the Contract Price in accordance with Clause 52 and shall notify the Contractor accordingly, with a copy to the Employer. In the case of a combination of risks causing loss or damage any such determination shall take into account the proportional responsibility of the Contractor and the Employer.

Employer's Risks 20.4 The Employer's risks are:

(a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,

(b) rebellion, revolution, insurrection, or military or usurped power, or civil war,

(c) ionising radiations, or contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component thereof,

(d) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds,

(e) riot, commotion or disorder, unless solely restricted to employees of the Contractor or of his Subcontractors and arising from the conduct of the Works,

(f) loss or damage due to the use or occupation by the Employer of any Section or part of the Permanent Works, except as may be provided for in the Contract,

(g) loss or damage to the extent that it is due to the design of the Works, other than any part of the design provided by the Contractor or for which the Contractor is responsible,

(h) any operation of the forces of nature against which an experienced contractor could not reasonably have been expected to take precautions.

Insurance of Works and Contractor's Equipment 21.1 The Contractor shall, without limiting his or the Employer's obligations and responsibilities under Clause 20, insure:

(a) the Works, together with materials and Plant for incorporation therein, to the full replacement cost

(b) an additional sum of 15 per cent of such replacement cost, or as may be specified in Part II of these Conditions, to cover any additional costs of and incidental to the rectification of loss or damage including professional fees and the cost of demolishing and removing any part of the Works and of removing debris of whatsoever nature

(c) the Contractor's Equipment and other things brought onto the Site by the Contractor, for a sum sufficient to provide for their replacement at the Site.

Scope of Cover

21.2 The insurance in paragraphs (a) and (b) of Sub-Clause 21.1 shall be in the joint names of the Contractor and the Employer and shall cover:

(a) the Employer and the Contractor against all loss or damage from whatsoever cause arising, other than as provided in Sub-Clause 21.4, from the start of work at the Site until the date of issue of the relevant Taking-Over Certificate in respect of the Works or any Section or part thereof as the case may be, and

(b) the Contractor for his liability:

(i) during the Defects Liability Period for loss or damage arising from a cause occurring prior to the commencement of the Defects Liability Period, and

(ii) for loss or damage occasioned by the Contractor in the course of any operations carried out by him for the purpose of complying with his obligations under Clauses 49 and 50.

Responsibility for Amounts not Recovered

21.3 Any amounts not insured or not recovered from the insurers shall be borne by the Employer or the Contractor in accordance with their responsibilities under Clause 20.

Exclusions

21.4 There shall be no obligation for the insurances in Sub-Clause 21.1 to include loss or damage caused by

(a) war, hostilities (where war be declared or not), invasion, act of foreign enemies,

(b) rebellion, revolution, insurrection, or military or usurped power, or civil war,

(c) ionising radiations, or contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component thereof,

(d) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds.

Damage to Persons and Property

22.1 The Contractor shall, except if and so far as the Contract provides otherwise, indemnify the Employer against all losses and claims in respect of:

(a) death of or injury to any person, or

(b) loss of or damage to any property (other than the Works), which may arise out of or in consequence of the execution and completion of the Works and the remedying of any defects therein, and against all claims, proceedings, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto, subject to the exceptions defined in Sub-Clause 22.2.

Exceptions

22.2 The "exceptions" referred to in Sub-Clause 22.1 are:

(a) the permanent use or occupation of land by the Works, or any part thereof,

(b) the right of the Employer to execute the Works, or any part thereof, on, over, under, in or through any land,

(c) damage to property which is the unavoidable result of the execution and completion of the Works, or the remedying of any defects therein, in accordance with the Contract,

(d) death of or injury to persons or loss of or damage to property resulting from any act or neglect of the Employer, his agents, servants or other contractors, not being employed by the Contractor, or in respect of any claims, proceedings, damages, costs, charges and expenses in respect thereof or in relation thereto or, where the injury or damage was contributed to by the Contractor, his servants or agents, such part of the said injury or damage as may be just and equitable having regard to the extent of the responsibility of the Employer, his servants or agents or other contractors for the injury or damage.

Indemnity by Employer

22.3 The Employer shall indemnify the Contractor against all claims, proceedings, damages, costs, charges and expenses in respect of the matters referred to in the exceptions defined in Sub-Clause 22.2.

Third Party Insurance (including Employer's Property)

23.1 The Contractor shall, without limiting his or the Employer's obligations and responsibilities under Clause 22, insure, in the joint names of the Contractor and the Employer, against liabilities for death of or injury to any person (other than as provided in Clause 24) or loss of or damage to any property (other than the Works) arising out of the performance of the Contract, other than the exceptions defined in paragraphs (a), (b) and (c) of Sub-Clause 22.2.

Minimum Amount of Insurance

23.2 Such insurance shall be for at least the amount stated in the Appendix to Tender.

Cross Liabilities

23.3 The insurance policy shall include a cross liability clause such that the insurance shall apply to the Contractor and to the Employer as separate insureds.

Accident or Injury to Workmen

24.1 The Employer shall not be liable for or in respect of any damages or compensation payable to any workman or other person in the employment of the Contractor or any Subcontractor, other than death or injury resulting from any act or default of the Employer, his agents or servants. The Contractor shall indemnify and keep indemnified the Employer against all such damages and compensation, other than those for which the Employer is liable as aforesaid, and against all claims, proceedings, damages, costs, charges, and expenses whatsoever in respect thereof or in relation thereto.

Insurance Against Accident to Workmen

24.2 The Contractor shall insure against such liability and shall continue such insurance during the whole of the time that any persons are employed by him on the Works. Provided that, in respect of any persons employed by any Subcontractor, the Contractor's obligations to insure as aforesaid under this Sub-Clause shall be satisfied if the Subcontractor shall have insured against the liability in respect of such persons in such manner that the Employer is indemnified under the policy, but the Contractor shall require such Subcontractor to produce to the Employer, when required, such policy of insurance and the receipt for the payment of the current premium.

Evidence and Terms of Insurances

25.1 The Contractor shall provide evidence to the Employer prior to the start of work at the Site that the insurances required under the Contract have been effected and shall, within 84 days of the Commencement Date, provide the insurance policies to the Employer. When providing such evidence and such policies to the Employer, the Contractor shall notify the Engineer of so doing. Such insurance policies shall be consistent with the general terms agreed prior to the issue of the Letter of Acceptance. The Contractor shall effect all insurances for which he is responsible with an insurer and in terms approved by the Employer, which approval shall not be unreasonably withheld.

Adequacy of Insurances

25.2 The Contractor shall notify the insurers of changes in the nature, extent or programme for the execution of the Works and ensure the adequacy of the insurances at all times in accordance with the terms of the Contract and shall, when required, produce to the Employer the insurance policies in force and the receipts for payment of the current premiums.

Remedy on Contractor's Failure to Insure

25.3 If the Contractor fails to effect and keep in force any of the insurances required under the Contract, or fails to provide the policies to the Employer within the period required by Sub-Clause 25.1, then and in any such case the Employer may effect and keep in force any such insurances and pay any premium as may be necessary for that purpose and from time to time deduct the amount so paid from any monies due or to become due to the Contractor, or recover the same as a debt due from the Contractor.

Compliance with Policy Conditions

25.4 In the event that the Contractor or the Employer fails to comply with conditions imposed by the insurance policies effected pursuant to the Contract, each shall indemnify the other against all losses and claims arising from such failure.

9.10. A suggested improvement in the FIDIC clauses concerned.

To improve the insurance requirements of the FIDIC contract a similar approach to that suggested for the ICE Conditions can be made, because the wording is so similar.

However, the following should be considered.

1. In adding the wording suggested in 9.3 to sub-clause 21.2(a) of the FIDIC contract some provision has to be made for the fact that the permitted exclusions from the insurance cover are only war and kindred risks, nuclear risks and sonic waves. Consequently, insurance cover is required for use or occupation of the works by the employer, and the faulty materials, workmanship and design risks (although employer's risks). Making good faulty materials and workmanship and full design risks together are generally uninsurable by the CAR policy. See chapter 4.5.1 and 4.5.4 for further details. The best that the employer will get in the UK is cover for the consequences of the faulty materials and workmanship risks affecting other property covered by the CAR policy with a limited form of design protection. Some amendment should therefore be made to this clause 21 in the FIDIC contract to avoid it asking for the impossible. Unfortunately the more important claims tend to involve disputes which can be traced to these risks. Finally the forces of nature risk (an employer's risk) is vague and insurers are unlikely to put this wording in their policies. Some forces of nature risks are covered by the CAR policy, eg storm and flood, others such as earthquake, tidal waves and volcanic eruptions have to be considered when fixing terms for overseas contracts as do the risks of riot, commotion or disorder.

2. There seems to be no reason why the wording suggested in chapter 9.6 should not be added to clause 23 of the FIDIC contract by including the additional sub-clause 23.4, which was suggested for the ICE Conditions.

3. There is no addition necessary for clause 24 of the FIDIC contract as sub-clause 24.2, which was suggested for the ICE Conditions, already exists in the FIDIC contract.

4. According to sub-clause 5.1 of the FIDIC contract it is stated in Part II of this contract, the language in which the contract documents shall be drawn up and the country or state, the law of which shall apply to the contract and according to which it shall be construed.

Part II also makes allowance for the employer to effect the necessary insurances with alterations being made to the appropriate clauses.

9.11. Single market in the EC, and the Mathurin Report.

Having just mentioned the international contract (FIDIC) it is an appropriate place to make a brief reference to changes within the European Community. What effect harmonisation will have on opportunities for contractor's insurances to be effected under construction contracts remains to be seen. The European Parliament on October 12th 1988 approved a resolution calling for the standardisation of contracts and controls in the construction industry. This was followed by a report commissioned to be produced by a committee headed by Claude Mathurin.

The Mathurin Report was to investigate whether it would be desirable and possible to harmonise the laws, contracts, liabilities and insurances relating to the construction industry throughout the European Community. This Report was issued in February 1990. However, the various opinions

expressed on some questions about harmonisation, and differences within the law, have not resulted in any progress being made to further the conclusions and recommendations.

A summary of the Mathurin Report contained the following proposals.

(i) A definition of the main functions of those involved in construction especially the role of the principal designer. This aspect has a direct connection with the subject of this thesis.

(ii) Harmonisation of building control, bearing in mind the "essential requirements" set out in Annex 1 of the Construction Products Directive, implemented in the UK by the Construction Products Regulations 1991. These "essential requirements" concern stability, fire, safety, health and hygiene, safety in use, protection against noise and energy economy. The building or engineering structure itself, more than particular products, must satisfy the "essential requirements".

(iii) The standardisation of the responsibilities of parties involved in building projects. This again concerns the subject of this thesis.

(iv) A minimum generalised five-year guarantee of satisfactory completion and durability. The Internal Market Directorate of the European Commission appears to favour supporting any guarantees with independent financial cover, and this may be by insurance or bonds.

(v) Effective protection for buyers of new and renovated houses against construction defects and damage, by means of high quality insurance schemes. This would appear to mean something more than the conventional insurances, eg after-sales guarantees on housing.

(vi) Improvement of the relationship between parties involved in projects, whether in the private or public sectors. The writer would like to think that this thesis might have some effect here.

Apart from the doubt as to whether sufficient resources are available to pursue the October 1988 Resolution in the near future, when the differences in language, bases of contracts, and the outlook of designers and contractors in the Member States are considered, the task becomes almost insurmountable.

In 1991 the EC authorised four working groups of construction and insurance experts with a view to proposing an EC Directive on "Responsibilities, Guarantees And Insurance In The Building Sector For Post Acceptance Defects Or Damage". This is very similar to the proposal (iv) of the Mathurin Report. The working parties proposals currently recommend a National House Building Council style warranty to be adopted for all buildings constructed in the EC above a certain limit.

This proposal does not affect this thesis directly, as the latter concerns conventional insurances for buildings in course of erection, whereas the former is a protection for the ultimate user of the building. This protection applies after practical completion if the user finds structural defects or other types of damage occurring to the building. See chapter 1 paragraph B. However, it is worth noting that the responsibilities of the four groups are as follows:

I Practical Completion. The time of practical completion differs in the various states of the EC.

II Liability. The liability of the consultants, contractors, subcontractors and all producers of buildings for post construction defects also varies in the EC states.

III The Giving of Financial Guarantees. This warranty decides how the building owner can be compensated for post construction defects.

IV Insurability. It has to be decided how and to what extent the warranty can be covered by insurance or by a bank or other financial institution.

In conclusion further details can be obtained from Appendix 3 of the Insurance Institute of London's Report of Advanced Study Group No 230 entitled "Insurance Against Inherent Defects in Buildings".

CHAPTER 10

THE JCT CONTRACT - 1980 EDITION (1986 AND 1987 AMENDMENTS)

10.1. Introduction

The clauses relevant to the subject of this thesis are as follows:

Clause 20 (Injury to persons and property and indemnity to Employer) contains three sub-clauses:

1. Liability of Contractor - personal injury or death - indemnity to Employer.
2. Liability of Contractor - injury or damage to property - indemnity to Employer.
3. Injury or damage to property - exclusion of the Works and Site materials.

Clause 21 (Insurance against injury to persons or property) contains three sub-clauses:

1. Contractors insurance - personal injury or death - injury or damage to property.
2. Insurance - liability etc of Employer.
3. Excepted Risks (These are nuclear and sonic waves risks defined in sub-clause 1.3)

Clause 22 (Insurance of the Works) contains three sub-clauses:

1. Insurance of the Works - alternative clauses.
2. Definitions of All Risks Insurance and Site Materials.
3. Nominated and Domestic Sub-Contractors - benefit of Joint Names Policies - Specified Perils.

Clause 22A (Erection of new buildings - All Risks Insurance of the Works by the Contractor) contains four sub-clauses:

1. New Buildings - Contractor to take out and maintain a Joint Names Policy for All Risks Insurance.

2. Single Policy - insurers approved by Employer - failure by Contractor to insure.

3. Use of annual policy maintained by Contractor - alternative to use of clause 22A.2.

4. Loss or damage to Works - insurance claims - Contractor's obligations - use of insurance monies.

Clause 22B (Erection of new buildings - All Risks Insurance of the Works by the Employer) contains three sub-clauses:

1. New buildings - Employer to take out and maintain a Joint Names Policy for All Risks Insurance.

2. Failure of the Employer to insure - rights of Contractor.

3. Loss or damage to Works - insurance claims - Contractor's obligations - payment by Employer.

Clause 22C (Insurance of existing structures - Insurance of Works in or extensions to existing structures) contains four sub-clauses:

1. Existing structures and contents - Specified Perils - Employer to take out and maintain Joint Names Policy.

2. Works in or extensions to existing structures - All Risks Insurance - Employer to take out and maintain Joint Names Policy.

3. Failure of Employer to insure - rights of Contractor.

4. Loss or damage to works - insurance claims - Contractor's obligations - payment by Employer.

Clause 22D (Insurance for Employer's loss of liquidated damages - clause 25.4.3.). This is not a conventional insurance.

The wordings of these clauses are set out below.

Clause 20		Delete the existing clause and insert the following:
	20	**Injury to persons and property and indemnity to Employer**
Liability of Contractor – personal injury or death – indemnity to Employer	20·1	The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or caused by the carrying out of the Works, except to the extent that the same is due to any act or neglect of the Employer or of any person for whom the Employer is responsible including the persons employed or otherwise engaged by the Employer to whom clause 29 refers.
Liability of Contractor – injury or damage to property – indemnity to Employer	20·2	The Contractor shall, subject to clause 20·3 and, where applicable, clause 22C·1, be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any injury or damage whatsoever to any property real or personal in so far as such 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, his servants or agents or of any person employed or engaged upon or in connection with the Works or any part thereof, his servants or agents or of any other person who may properly be on the site upon or in connection with the Works or any part thereof, his servants or agents, other than the Employer or any person employed, engaged or authorised by him or by any local authority or statutory undertaker executing work solely in pursuance of its statutory rights or obligations.
Injury or damage to property – exclusion of the Works and Site Materials	20·3 ·1	Subject to clause 20·3·2 the reference in clause 20·2 to 'property real or personal' does not include the Works, work executed and/or Site Materials up to and including the date of issue of the certificate of Practical Completion or up to and including the date of determination of the employment of the Contractor (whether or not the validity of that determination is disputed) under clause 27 or clause 28 or, where clause 22C applies, under clause 27 or clause 28 or clause 22C·4·3, whichever is the earlier.
	20·3 ·2	If clause 18 has been operated then, in respect of the relevant part, and as from the relevant date such relevant part shall not be regarded as 'the Works' or 'work executed' for the purpose of clause 20·3·1.

21 Insurance against injury to persons or property

Contractor's Insurance – personal injury or death – injury or damage to property

21·1 ·1 ·1 Without prejudice to his obligation to indemnify the Employer under clause 20 the Contractor shall take out and maintain insurance which shall comply with clause 21·1·1·2 in respect of claims arising out of his liability referred to in clauses 20·1 and 20·2.

·1 ·2 The insurance in respect of claims for personal injury to, or the death of any person under a contract of service or apprenticeship with the Contractor, and arising out of and in the course of such person's employment, shall comply with the Employer's Liability (Compulsory Insurance) Act 1969 and any statutory orders made thereunder or any amendment or re-enactment thereof. For all other claims to which clause 21·1·1·1 applies the insurance cover shall be not less than the sum stated in the Appendix [1·1] for any one occurrence or series of occurrences arising out of one event.

21·1 ·2 As and when he is reasonably required to do so by the Employer the Contractor shall send to the Architect for inspection by the Employer documentary evidence that the insurances required by clause 21·1·1·1 have been taken out and are being maintained, but at any time the Employer may (but not unreasonably or vexatiously) require to have sent to the Architect for inspection by the Employer the relevant policy or policies and the premium receipts therefor.

21·1 ·3 If the Contractor defaults in taking out or in maintaining insurance as provided in clause 21·1·1·1 the Employer may himself insure against any liability or expense which he may incur arising out of such default and a sum or sums equivalent to the amount paid or payable by him in respect of premiums therefor may be deducted by him from any monies due or to become due to the Contractor under this Contract or such amount may be recoverable by the Employer from the Contractor as a debt.

Insurance – liability etc. of Employer

21·2 ·1 Where it is stated in the Appendix that the insurance to which clause 21·2·1 refers may be required by the Employer the Contractor shall, if so instructed by the Architect, take out and maintain a Joint Names Policy for such amount of indemnity as is stated in the Appendix 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 other than the Works and Site Materials 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 excepting injury or damage:

·1 ·1 for which the Contractor is liable under clause 20·2;

·1 ·2 attributable to errors or omissions in the designing of the Works;

·1 ·3 which can reasonably be foreseen to be inevitable having regard to the nature of the work to be executed or the manner of its execution;

·1 ·4 which it is the responsibility of the Employer to insure under clause 22C·1 (if applicable);

·1 ·5 arising from war risks or the Excepted Risks.

21·2 ·2 Any such insurance as is referred to in clause 21·2·1 shall be placed with insurers to be approved by the Employer, and the Contractor shall send to the Architect for deposit with the Employer the policy or policies and the premium receipts therefor.

21·2 ·3 The amounts expended by the Contractor to take out and maintain the insurance referred to in clause 21·2·1 shall be added to the Contract Sum.

21·2 ·4 If the Contractor defaults in taking out or in maintaining the Joint Names Policy as provided in clause 21·2·1 the Employer may himself insure against any risk in respect of which the default shall have occurred.

Excepted Risks

21·3 Notwithstanding the provisions of clauses 20·1, 20·2 and 21·1·1, the Contractor shall not be liable either to indemnify the Employer or to insure against any personal injury to or the death of any person or any damage, loss or injury caused to the Works or Site Materials, work executed, the site, or any property, by the effect of an Excepted Risk.

Footnote

[1·1] The Contractor or any sub-contractor may, if they so wish, insure for a sum greater than that stated in the Appendix.

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22 Insurance of the Works [m]

Insurance of the Works – alternative clauses

22·1 Clause 22A or clause 22B or clause 22C shall apply whichever clause is stated to apply in the Appendix.

Definitions

22·2 In clauses 22A, 22B, 22C and, so far as relevant, in other clauses of the Conditions the following phrases shall have the meanings given below:

All Risks Insurance: [n] insurance which provides cover against any physical loss or damage to work executed and Site Materials but excluding the cost necessary to repair, replace or rectify

1 property which is defective due to
·1 wear and tear,
·2 obsolescence,
·3 deterioration, rust or mildew;

[m·1] 2 any work executed or any Site Materials lost or damaged as a result of its own defect in design, plan, specification, material or workmanship or any other work executed which is lost or damaged in consequence thereof where such work relied for its support or stability on such work which was defective;

3 loss or damage caused by or arising from

·1 any consequence of war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, confiscation, commandeering, nationalisation or requisition or loss or destruction of or damage to any property by or under the order of any government *de jure* or *de facto* or public, municipal or local authority;

·2 disappearance or shortage if such disappearance or shortage is only revealed when an inventory is made or is not traceable to an identifiable event;

·3 an Excepted Risk (as defined in clause 1·3);

and if the Contract is carried out in Northern Ireland

·4 civil commotion;

·5 any unlawful, wanton or malicious act committed maliciously by a person or persons acting on behalf of or in connection with an unlawful association; 'unlawful association' shall mean any organisation which is engaged in terrorism and includes an organisation which at any relevant time is a proscribed organisation within the meaning of the Northern Ireland (Emergency Provisions) Act 1973; 'terrorism' means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.

Site Materials: all unfixed materials and goods delivered to, placed on or adjacent to the Works and intended for incorporation therein.

Nominated and Domestic Sub-Contractors – benefit of Joint Names Policies – Specified Perils

22·3 ·1 The Contractor where clause 22A applies, and the Employer where either clause 22B or clause 22C applies shall ensure that the Joint Names Policy referred to in clause 22A·1 or clause 22A·3 or the Joint Names Policies referred to in clause 22B·1 or in clause 22C·1 and 22C·2 shall

either provide for recognition of each Sub-Contractor nominated by the Architect as an insured under the relevant Joint Names Policy

or include a waiver by the relevant insurers of any right of subrogation which they may have against any such Nominated Sub-Contractor

22·3 ·1 *continued*

in respect of loss or damage by the Specified Perils to the Works and Site Materials where clause 22A or clause 22B or clause 22C·2 applies and, where clause 22C·1 applies, in respect of loss or damage by the Specified Perils to the existing structures (which shall include from the relevant date any relevant part to which clause 18·1·3 refers) together with the contents thereof owned by the Employer or for which he is responsible; and that this recognition or waiver shall continue up to and including the date of issue of the certificate of practical completion of the Sub-Contract Works (as referred to in clause 14·2 of the Sub-Contract NSC/4 or NSC/4a) or the date of determination of the employment of the Contractor (whether or not the validity of that determination is contested) under clause 27 or clause 28 or clause 28A, or, where clause 22C applies, under clause 27 or clause 28 or clause 28A or clause 22C·4·3, whichever is the earlier. The provisions of clause 22·3·1 shall apply also in respect of any Joint Names Policy taken out by the Employer under clause 22A·2 or by the Contractor under clause 22B·2 or under clause 22C·3 in respect of a default by the Employer under clause 22C·2.

22·3 ·2 Except in respect of the Joint Names Policy referred to in clause 22C·1 (or the Joint Names Policy referred to in clause 22C·3 in respect of a default by the Employer under clause 22C·1) the provisions of clause 22·3·1 in regard to recognition or waiver shall apply to Domestic Sub-Contractors. Such recognition or waiver for Domestic Sub-Contractors shall continue up to and including the date of issue of any certificate or other document which states that the Domestic Sub-Contract Works are practically complete or the date of determination of the employment of the Contractor as referred to in clause 22·3·1 whichever is the earlier.

22A Erection of new buildings – All Risks Insurance of the Works by the Contractor [m]

New buildings – Contractor to take out and maintain a Joint Names Policy for All Risks Insurance

22A·1 The Contractor shall take out and maintain a Joint Names Policy for All Risks Insurance for cover no less than that defined in clause 22·2 [n] [o·1] for the full reinstatement value of the Works (plus the percentage, if any, to cover professional fees stated in the Appendix) and shall (subject to clause 18·1·3) maintain such Joint Names Policy up to and including the date of issue of the certificate of Practical Completion or up to and including the date of determination of the employment of the Contractor under clause 27 or clause 28 or clause 28A (whether or not the validity of that determination is contested) whichever is the earlier.

Single policy – insurers approved by Employer – failure by Contractor to insure

22A·2 The Joint Names Policy referred to in clause 22A·1 shall be taken out with insurers approved by the Employer and the Contractor shall send to the Architect for deposit with the Employer that Policy and the premium receipt therefor and also any relevant endorsement or endorsements thereof as may be required to comply with the obligation to maintain that Policy set out in clause 22A·1 and the premium receipts therefor. If the Contractor defaults in taking out or in maintaining the Joint Names Policy as required by clauses 22A·1 and 22A·2 the Employer may himself take out and maintain a Joint Names Policy against any risk in respect of which the default shall have occurred and a sum or sums equivalent to the amount paid or payable by him in respect of premiums therefor may be deducted by him from any monies due or to become due to the Contractor under this Contract or such amount may be recoverable by the Employer from the Contractor as a debt.

Footnotes

[m] **Clause 22A** is applicable to the erection of new buildings where the Contractor is required to take out a Joint Names Policy for All Risks Insurance for the Works and **clause 22B** is applicable where the **Employer** has elected to take out such Joint Names Policy. **Clause 22C** is to be used for alterations of or extensions to existing structures under which the **Employer** is required to take out a Joint Names Policy for All Risks Insurance for the Works and also a Joint Names Policy to insure the existing structures and their contents owned by him or for which he is responsible against loss or damage thereto by the Specified Perils.

[m·1] In any policy for 'All Risks Insurance' taken out under clauses 22A, 22B or 22C·2 cover should not be reduced by the terms of any exclusion written in the policy beyond the terms of paragraph 2; thus an exclusion in terms 'This Policy excludes all loss of or damage to the property insured due to defective design, plan, specification, materials or workmanship' would not be in accordance with the terms of those clauses and of the definition of 'All Risks Insurance'. Cover which goes beyond the terms of the exclusion in paragraph 2 may be available though not standard in all policies taken out to meet the obligation in clauses 22A, 22B or 22C·2: and leading insurers who underwrite 'All Risks' cover for the Works have confirmed that where such improved cover is being given it will not be withdrawn as a consequence of the publication of the terms of the definition in clause 22·2 of 'All Risks Insurance'.

[n] The definition of 'All Risks Insurance' in clause 22·2 defines the risks for which insurance is required. Policies issued by insurers are not standardised and there will be some variation in the way the insurance for those risks is expressed. See also Practice Note 22 and Guide, Part A.

[o·1] In some cases it may not be possible for insurance to be taken out against certain of the risks covered by the definition of 'All Risks Insurance'. This matter should be arranged between the parties prior to entering into the Contract and either the definition of 'All Risks Insurance' given in clause 22·2 amended or the risks actually covered should replace this definition; in the latter case clause 22A·1, clause 22A·3 or clause 22B·1, whichever is applicable, and other relevant clauses in which the definition 'All Risks Insurance' is used should be amended to include the words used to replace this definition.

Use of annual policy maintained by Contractor – alternative to use of clause 22A·2

22A·3 ·1 If the Contractor independently of his obligations under this Contract maintains a policy of insurance which provides (*inter alia*) All Risks Insurance for cover no less than that defined in clause 22·2 for the full reinstatement value of the Works (plus the percentage, if any, to cover professional fees stated in the Appendix) then the maintenance by the Contractor of such policy shall, if the policy is a Joint Names Policy in respect of the aforesaid Works, be a discharge of the Contractor's obligation to take out and maintain a Joint Names Policy under clause 22A·1. If and so long as the Contractor is able to send to the Architect for inspection by the Employer as and when he is reasonably required to do so by the Employer documentary evidence that such a policy is being maintained then the Contractor shall be discharged from his obligation under clause 22A·2 to deposit the policy and the premium receipt with the Employer but on any occasion the Employer may (but not unreasonably or vexatiously) require to have sent to the Architect for inspection by the Employer the policy to which clause 22A·3·1 refers and the premium receipts therefor. The annual renewal date, as supplied by the Contractor, of the insurance referred to in clause 22A·3·1 is stated in the Appendix.

22A·3 ·2 The provisions of clause 22A·2 shall apply in regard to any default in taking out or in maintaining insurance under clause 22A·3·1.

Loss or damage to Works – insurance claims – Contractor's obligations – use of insurance monies

22A·4 ·1 If any loss or damage affecting work executed or any part thereof or any Site Materials is occasioned by any one or more of the risks covered by the Joint Names Policy referred to in clause 22A·1 or clause 22A·2 or clause 22A·3 then, upon discovering the said loss or damage, the Contractor shall forthwith give notice in writing both to the Architect and to the Employer of the extent, nature and location thereof.

22A·4 ·2 The occurrence of such loss or damage shall be disregarded in computing any amounts payable to the Contractor under or by virtue of this Contract.

22A·4 ·3 After any inspection required by the insurers in respect of a claim under the Joint Names Policy referred to in clause 22A·1 or clause 22A·2 or clause 22A·3 has been completed the Contractor with due diligence shall restore such work damaged, replace or repair any such Site Materials which have been lost or damaged, remove and dispose of any debris and proceed with the carrying out and completion of the Works.

22A·4 ·4 The Contractor, for himself and for all Nominated and Domestic Sub-Contractors who are, pursuant to clause 22·3, recognised as an insured under the Joint Names Policy referred to in clause 22A·1 or clause 22A·2 or clause 22A·3, shall authorise the insurers to pay all monies from such insurance in respect of the loss or damage referred to in clause 22A·4·1 to the Employer. The Employer shall pay all such monies (less only the percentage, if any, to cover professional fees stated in the Appendix) to the Contractor by instalments under certificates of the Architect issued at the Period of Interim Certificates.

22A·4 ·5 The Contractor shall not be entitled to any payment in respect of the restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris other than the monies received under the aforesaid insurance.

22B Erection of new buildings – All Risks Insurance of the Works by the Employer [m]

New buildings – Employer to take out and maintain a Joint Names Policy for All Risks Insurance

22B·1 The Employer shall take out and maintain a Joint Names Policy for All Risks Insurance for cover no less than that defined in clause 22·2 [n] [o·1] for the full reinstatement value of the Works (plus the percentage, if any to cover professional fees stated in the Appendix) and shall (subject to clause 18·1·3) maintain such Joint Names Policy up to and including the date of issue of the certificate of Practical Completion or up to and including the date of determination of the employment of the Contractor under clause 27 or clause 28 or clause 28A (whether or not the validity of that determination is contested) whichever is the earlier.

Failure of Employer to insure – rights of Contractor

22B·2 The Employer shall, as and when reasonably required to do so by the Contractor, produce documentary evidence and receipts showing that the Joint Names Policy required under clause 22B·1 has been taken out and is being maintained. If the Employer defaults in taking out or in maintaining the Joint Names Policy required under clause 22B·1 then the Contractor may himself take out and maintain a Joint Names Policy against any risk in respect of which a default shall have occurred and a sum or sums equivalent to the amount paid or payable by him in respect of the premiums therefor shall be added to the Contract Sum.

Loss or damage to Works – insurance claims – Contractor's obligations – payment by Employer

22B·3 ·1 If any loss or damage affecting work executed or any part thereof or any Site Materials is occasioned by any one or more of the risks covered by the Joint Names Policy referred to in clause 22B·1 or clause 22B·2 then, upon discovering the said loss or damage, the Contractor shall forthwith give notice in writing both to the Architect and to the Employer of the extent, nature and location thereof.

22B·3 ·2 The occurrence of such loss or damage shall be disregarded in computing any amounts payable to the Contractor under or by virtue of this Contract.

22B·3 ·3 After any inspection required by the insurers in respect of a claim under the Joint Names Policy referred to in clause 22B·1 or clause 22B·2 has been completed the Contractor with due diligence shall restore such work damaged, replace or repair any such Site Materials which have been lost or damaged, remove and dispose of any debris and proceed with the carrying out and completion of the Works.

22B·3 ·4 The Contractor, for himself and for all Nominated and Domestic Sub-Contractors who are, pursuant to clause 22·3, recognised as an insured under the Joint Names Policy referred to in clause 22B·1 or clause 22B·2, shall authorise the insurers to pay all monies from such insurance in respect of the loss or damage referred to in clause 22B·3·1 to the Employer.

22B·3 ·5 The restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris shall be treated as if they were a Variation required by an instruction of the Architect under clause 13·2.

22C Insurance of existing structures – Insurance of Works in or extensions to existing structures [m]

Existing structures and contents – Specified Perils – Employer to take out and maintain Joint Names Policy

22C·1 The Employer shall take out and maintain a Joint Names Policy in respect of the existing structures (which shall include from the relevant date any relevant part to which clause 18·1·3 refers) together with the contents thereof owned by him or for which he is responsible, for the full cost of reinstatement, repair or replacement of loss or damage due to one or more of the Specified Perils [o·2] up to and including the date of issue of the certificate of Practical Completion or up to and including the date of determination of the employment of the Contractor under clause 22C·4·3 or clause 27 or clause 28 or clause 28A (whether or not the validity of that determination is contested) whichever is the earlier. The Contractor, for himself and for all Nominated Sub-Contractors who are, pursuant to clause 22·3·1, recognised as an insured under the Joint Names Policy referred to in clause 22C·1 or clause 22C·3 shall authorise the insurers to pay all monies from such insurance in respect of loss or damage to the Employer.

Works in or extensions to existing structures – All Risks Insurance – Employer to take out and maintain Joint Names Policy

22C·2 The Employer shall take out and maintain a Joint Names Policy for All Risks Insurance for cover no less than that defined in clause 22·2 [n] [o·2] for the full reinstatement value of the Works (plus the percentage, if any, to cover professional fees stated in the Appendix) and shall (subject to clause 18·1·3) maintain such Joint Names Policy up to and including the date of issue of the certificate of Practical Completion or up to and including the date of determination of the employment of the Contractor under clause 22C·4·3 or clause 27 or clause 28 or clause 28A (whether or not the validity of that determination is contested) whichever is the earlier.

Failure of Employer to insure – rights of Contractor

22C·3 The Employer shall, as and when reasonably required to do so by the Contractor, produce documentary evidence and receipts showing that the Joint Names Policy required under clause 22C·1 or clause 22C·2 has been taken out and is being maintained. If the Employer defaults in taking out or in maintaining the Joint Names Policy required under clause 22C·1 the Contractor may himself take out and maintain a Joint Names Policy against any risk in respect of which the default shall have occurred and for that purpose shall have such right of entry and inspection as may be required to make a survey and inventory of the existing structures and the relevant contents. If the Employer defaults in taking out or in maintaining the Joint Names Policy required under clause 22C·2 the Contractor may take out and maintain a Joint Names Policy against any risk in respect of which the default shall have occurred. A sum or sums equivalent to the premiums paid or payable by the Contractor pursuant to clause 22C·3 shall be added to the Contract Sum.

Loss or damage to Works – Insurance claims – Contractor's obligations – payment by Employer

22C·4 If any loss or damage affecting work executed or any part thereof or any Site Materials is occasioned by any one or more of the risks covered by the Joint Names Policy referred to in clause 22C·2 or clause 22C·3 then, upon discovering the said loss or damage, the Contractor shall forthwith give notice in writing both to the Architect and to the Employer of the extent, nature and location thereof and

22C·4 ·1 the occurrence of such loss or damage shall be disregarded in computing any amounts payable to the Contractor under or by virtue of this Contract;

Footnote

[o·2] In some cases it may not be possible for insurance to be taken out against certain of the Specified Perils or the risks covered by the definition of 'All Risks Insurance'. This matter should be arranged between the parties prior to entering into the Contract and either the definition of Specified Perils and/or All Risks Insurance given in clauses 1·3 and 22·2 amended or the risks actually covered should replace the definition; in the latter case clause 22C·1 and/or clause 22C·2 and other relevant clauses in which the definitions 'All Risks Insurance' and/or 'Specified Perils' are used should be amended to include the words used to replace those definitions.

22C·4 ·2 the Contractor, for himself and for all Nominated and Domestic Sub-Contractors who are, pursuant to clause 22·3, recognised as an insured under the Joint Names Policy referred to in clause 22C·2 or clause 22C·3, shall authorise the insurers to pay all monies from such insurance in respect of the loss or damage referred to in clause 22C·4 to the Employer;

22C·4 ·3 ·1 if it is just and equitable so to do the employment of the Contractor under this Contract may within 28 days of the occurrence of such loss or damage be determined at the option of either party by notice by registered post or recorded delivery from either party to the other. Within 7 days of receiving such a notice (but not thereafter) either party may give to the other a written request to concur in the appointment of an Arbitrator under clause 41 in order that it may be determined whether such determination will be just and equitable;

·3 ·2 upon the giving or receiving by the Employer of such a notice of determination or, where a reference to arbitration is made as aforesaid, upon the Arbitrator upholding the notice of determination, the provisions of clause 28·2 (except clause 28·2·2·6) shall apply.

22C·4 ·4 If no notice of determination is served under clause 22C·4·3·1, or, where a reference to arbitration is made as aforesaid, if the Arbitrator decides against the notice of determination, then

·4 ·1 after any inspection required by the insurers in respect of a claim under the Joint Names Policy referred to in clause 22C·2 or clause 22C·3 has been completed, the Contractor with due diligence shall restore such work damaged, replace or repair any such Site Materials which have been lost or damaged, remove and dispose of any debris and proceed with the carrying out and completion of the Works; and

·4 ·2 the restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris shall be treated as if they were a Variation required by an instruction of the Architect under clause 13·2.

22D Insurance for Employer's loss of liquidated damages – clause 25·4·3

22D·1 Where it is stated in the Appendix that the insurance to which clause 22D refers may be required by the Employer then forthwith after the Contract has been entered into the Architect shall either inform the Contractor that no such insurance is required or shall instruct the Contractor to obtain a quotation for such insurance. This quotation shall be for an insurance on an agreed value basis [o·3] to be taken out and maintained by the Contractor until the date of Practical Completion and which will provide for payment to the Employer of a sum calculated by reference to clause 22D·3 in the event of loss or damage to the Works, work executed, Site Materials, temporary buildings, plant and equipment for use in connection with and on or adjacent to the Works by any one or more of the Specified Perils and which loss or damage results in the Architect giving an extension of time under clause 25·3 in respect of the Relevant Event in clause 25·4·3. The Architect shall obtain from the Employer any information which the Contractor reasonably requires to obtain such quotation. The Contractor shall send to the Architect as soon as practicable the quotation which he has obtained and the Architect shall thereafter instruct the Contractor whether or not the Employer wishes the Contractor to accept that quotation and such instruction shall not be unreasonably withheld or delayed. If the Contractor is instructed to accept the quotation the Contractor shall forthwith take out and maintain the relevant policy and send it to the Architect for deposit with the Employer, together with the premium receipt therefor and also any relevant endorsement or endorsements thereof and the premium receipts therefor.

22D·2 The sum insured by the relevant policy shall be a sum calculated at the rate stated in the Appendix as liquidated and ascertained damages for the period of time stated in the Appendix.

22D·3 Payment in respect of this insurance shall be calculated at the rate referred to in clause 22D·2 (or any revised rate produced by the application of clause 18·1·4) for the period of any extension of time finally given by the Architect as referred to in clause 22D·1 or for the period of time stated in the Appendix, whichever is the less.

22D·4 The amounts expended by the Contractor to take out and maintain the insurance referred to in clause 22D·1 shall be added to the Contract Sum. If the Contractor defaults in taking out or in maintaining the insurance referred to in clause 22D·1 the Employer may himself insure against any risk in respect of which the default shall have occurred.

Footnote

[o·3] The adoption of an agreed value is to avoid any dispute over the amount of the payment due under the insurance once the policy is issued. Insurers on receiving a proposal for the insurance to which clause 22D refers will normally reserve the right to be satisfied that the sum referred to in clause 22D·2 is not more than a genuine pre-estimate of the damages which the Employer considers, at the time he enters into the Contract, he will suffer as a result of any delay.

The relevant clauses start with the same clause number as those in the ICE Conditions but the coincidence then ceases as, while the pattern (an insurance clause following the indemnity or responsibility for the works clauses) is the same, the subject matter is dealt with in a different order. Thus clause 20 deals with the legal liability to third parties. Whilst it has a complementary insurance clause 21 this latter clause concerns both a public liability and an employers' liability policy. Finally clause 22 deals with both responsibility for the works and the requirement of insurance. This clause also concerns the insurance for the liability of the employer's liquidated damages (a consequential loss), not covered by the conventional CAR. policy.

10.2 Injury to persons and property and indemnity to employer - clause 20.

This indemnity to the employer concerns the contractor's legal liability to pay damages to others as distinct from damage to the works.

Clause 20.1 only concerns personal injury or death to others but releases the contractor from liability to the extent that it is due to any act or neglect of the employer of or any person for whom the employer is responsible. The word "act" is superfluous (see chapter 8.5) and the burden of proof of negligence of the employer etc is on the contractor.

Clause 20.2 deals in similar fashion to clause 20.1. with the indemnity to the employer for damage caused to the property of others. However, the meaning of the terms "omission or default" are in doubt, possibly they are superfluous as the word "act" is in the previous sub-clause. Again it is a pity

that legal terms were not used in their place, or if superfluous they were not left out.

The words "any other person who may properly be on the site upon or in connection with the Work or any part thereof, his servants or agent" make it clear that sub sub-contractors are included among those for whom the contractor is responsible, thus altering the decision in City of Manchester v Fram Gerrard (1974). The burden of proof of negligence of the contractor etc. is on the employer.

Clause 20.3. makes it clear that the phrase "property real or personal" in sub-clause 20.2 "does not include the Works, work executed and/or Site Materials". Nevertheless, the indemnity will apply to parts taken into the possession of the employer under clause 18 (Partial possession by Employer).

10.3 Insurance against injury to persons or property - clause 21.1.

These insurances must cover:

personal injury to the contractor's employees and to third parties; and

damage to property, other than the works etc as defined in clause 20.3.

The employers' liability policy must comply with the Employers' Liability (Compulsory Insurance) Act 1969. While this clause does not state the type of insurance required the practice is for the contractors to produce their employers' liability and public liability policies. While the employers' liability policy covers the risk included in clause 20 (the indemnity clause) and clause 21 (the insurance clause) the public liability policy does not, since

such policies are subject to exclusions. In order to make compliance easier an improvement of this clause 21 is suggested under the next heading.

10.4 A suggested improvement in the wording of clause 21.1.

In accordance with chapter 6.12 the following sub-clause should be added to clause 21.1.1. and numbered 2.1.1.1.3 The existing sub-clauses 21.1.1.1. and 2.1.1.1.2. are suitable as operative clauses of an insurance policy covering both the employers' liability and public liability risks. However, an additional clause numbered 21.1.1.3. is necessary to provide the exceptions which operate for the public liability risk. It should read as follows:

The insurance, under the public liability risk, need not indemnify the insured against liability

(a) arising out of ownership possession or use by or on behalf of the Insured of any
    (i) aircraft aerospacial device or hovercraft
    (ii) watercraft other than hand propelled watercraft or other watercraft not exceeding 20 feet in length
    (iii) mechanically propelled vehicle licensed for road use including trailer attached thereto other than liability caused by or arising out of the use of plant as a tool of trade on site or at the premises of the insured, the loading or unloading of such vehicle, damage to any building weighbridge road or to anything beneath caused by vibration or by the weight of such vehicle or its load but this indemnity shall not apply if in respect of such liability compulsory insurance or security is required under any legislation governing the use of vehicles.
(b) in respect of Damage to Property
    (i) belonging to the Insured
    (ii) in the custody or under the control of the Insured or any Employee (other than property belonging to visitors directors partners or Employees of the Insured). But this part of this exception shall not apply to Damage to buildings (including contents therein) which are not owned by or leased or rented by the Insured but are temporarily occupied by the Insured for the purpose of maintenance alternation extension installation or repair.
(c) for the cost of and expenses incurred in replacing or making good faulty defective or incorrect
    (i) workmanship

(ii) design or specification
(iii) materials goods or other property supplied installed or erected by or on behalf of the Insured

(d) caused by or arising from advice design or specification provided by or on behalf of the Insured for a fee.

(e) caused by or arising from seepage pollution or contamination unless due to a sudden unintended and unexpected event.

(f) (i) for loss destruction of or damage to any property whatsoever or any loss or expense whatsoever resulting or arising therefrom or any consequential loss

(ii) for any legal liability of whatsoever nature

directly or indirectly caused by or contributed to or arising from ionising radiations or contamination by radioactivity from any nuclear waste from the combustion of nuclear fuel, the radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or component thereof.

As sub-clause 21.1.1.1 refers to the contractor's compliance with sub-clause 21.1.1.2. in maintaining insurance it is necessary, in view of the suggestion to add the above quoted sub-clause 21.1.1.3, to make reference to this new sub-clause in sub-clause 21.1.1.1., ie that the contractor "shall comply with clauses 21.1.1.2 and 21.1.1.3."

In comparison with the list of exceptions suggested in chapter 6.12 the contract works and war and kindred exceptions do not appear as they are not necessary because they are catered for in the JCT contract in clauses 20.3, 32 and 33. Clauses 32 and 33 do not refer to war and kindred risks but to the outbreak of hostilities involving the general mobilisation of the armed forces. However, war and most of the kindred risks could involve this situation. In any event the war risks exception is so standard that it will appear in all the conventional policies mentioned in this thesis, except the employers' liability policy unless it is part of a combined policy.

The cross liabilities extension is not necessary as the insurance required in clause 21 is not a joint names policy. Otherwise the suggestions in chapter 6.12 have been complied with.

Clause 21.2.1 is not a conventional insurance as explained in chapter 7 and therefore does not concern this thesis.

10.5 Insurance of the Works - clause 22.

Clause 22.1 is self-explanatory and by a footnote the circumstances under which 22A, 22B and 22C are to be used are set out below :

A: the erection of a new building where the contractor must insure the works against loss or damage by all risks;

B: the erection of a new building where the employer must insure the works against loss or damage by all risks;

C: the alteration of or extension to an existing building where the employer must insure:

(a) the works against all risks

(b) existing structures and contents owned by him or for which he is responsible against specified perils.

Clause 22.2. defines the meaning of all risks insurance. The words "physical loss" in the operative clause makes it clear that consequential loss is not covered. The intention is to disallow any additional exceptions as clauses 22.A.1, 22.B.1 and 22.C.2 (all of which concern all risks insurance), when referring to the cover to be provided, use the phrase "no less than that defined in clause 22.2 (n) (01)". However, this cannot disallow exceptions concerning risks which are covered by other policies, eg motor,

marine and engineering risks. Footnote (n) warns that policies are not standardised. Footnote (o.1) states that it may not be possible for insurance to be taken out against certain of the risks covered by the definition of "all risks insurance". It says that this matter should be arranged between the parties prior to entering into the contract, and either the definition of "all risks insurance" given in clause 22.2 should be amended or the risks actually covered should replace this definition. In the latter case, clause 22.A.1, 22.A.3 or 22.B.1 (whichever is applicable) and other relevant clauses in which the definition of "all risks insurance" is used should be amended to include the words used to replace this definition, eg, riot as well as civil commotion cover is unobtainable in Northern Ireland.

10.6 Reasons for accepting clause 22.2 as it stands.

The main reason is that clause 22.2 has been in operation for five years, at the time of writing and as far as the writer can ascertain there have been no real difficulties. What better reason is there than that it works in practice? Secondly, it seems to fit into the other clauses of the contract without causing ambiguity or confusion.

Probably a third reason why this JCT clause 22.2 has operated successfully is that it is not rigid in the sense that it does not prevent wider insurance cover, it only specifies a minimum cover.

This is also the intention of the writer in this thesis in his suggestions for the improvement of construction contracts by giving more detail of the insurance cover required.

Madge, P. (1987), p36 explains clause 22.2 by saying:

> The original drafts were not acceptable to insurers and eventually the definition used in the 1986 clause 22.2 was agreed as a compromise. It is intended to represent a minimum form of cover which insurers have said they will make available. Many policies are already in existence and will continue to be in existence which will give a wider form of cover. Those giving less cover will have to be altered.

Later p.38 he says:

> Since policy forms are not standardised those checking the various policies may have some difficulty in identifying whether they comply with the definition in clause 22.2. In cases of doubt confirmation should be obtained from the insurers or the brokers that the policy does give the minimum cover required in clause 22.2.

CHAPTER 11.

THE GC/WORKS/1 CONTRACT EDITION 3.

11.1 Introduction.

The Property Services Agency (PSA) of the Department of the Environment was the Directorate of Contracts concerning contracts designed for use by Government departments. In December 1989 it published this edition, (now the Construction Policy Directorate governs this publication) and the following general points should be noted :

1. This contract does not follow the pattern of the ICE Conditions nor the JCT contract, but it applies to building and civil engineering.

2. This edition introduces for the first time in this contract the necessity for insurance.

3. It is a unilateral contract that is to say it is not prepared by the representative bodies of both parties to the contract, but by one party only, the employer. Consequently "The Authority" (the Government department concerned) is able to make decisions which govern both parties. Also a number of matters are excluded from arbitration. Arbitration is not permitted on "a matter as to which a decision is expressed to be final and conclusive". See condition 60.

4. The numbered paragraphs of this contract are called "Conditions" not "Clauses".

The conditions relevant to the subject of this thesis are as follows :

Condition 1 (1) concerning the definition of "the Accepted Risks".

Condition 8 (Insurance) requiring the contractor to effect and maintain employers' and public liability policies and a CAR policy. There is an "Alternative A" to be used for contracts up to £3m, and "Alternative B" to be used for larger contracts.

Conditions 13 (Protection of Works).

Condition 19 (Loss or damage) which concerns both responsibility for the works and third party liability.

The wording of these conditions are set out below.

Definitions etc

(1) 'the Abstract of Particulars' means the document so headed included with the invitation to tender;

'the Accepted Risks' means the risks of–

(a) pressure waves caused by the speed of aircraft or other aerial devices,

(b) ionising radiations or contamination by radioactivity from any nuclear fuel or from nuclear waste from the combustion of nuclear fuel,

(c) the radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly (including any nuclear component), and

(d) war, invasion, act of foreign enemy, hostilities (whether or not war has been declared), civil war, rebellion, insurrection, or military or usurped power;

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Insurance

(1) The Contractor shall by such existing or new policies as he sees fit effect and maintain for the duration of the Contract and the longest maintenance period;

(a) employers' liability insurance in respect of persons in his employment;

(b) insurance against loss or damage to the Works and Things for which the Contractor is responsible under the terms of the Contract;

(c) insurance against personal injury to any persons and loss or damage to property arising from or in connection with the Works which is not covered by sub-paragraphs (a) and (b) above.

(2) Any insurance policy effected under paragraph (1)(b) shall be for the full reinstatement value (including the cost of transit and off-site risks).

Alternative A

(3) The Authority shall have the right to receive, on request, a copy of insurances effected or held. The Contractor shall within 21 days from acceptance of the tender and also within 21 days of any subsequent renewal or expiry date of relevant insurances send to the Authority a certificate in the form attached to the Abstract of Particulars from his insurer or his broker attesting that appropriate insurance policies have been effected.

Alternative B

(3) In addition to employers' liability insurance the Contractor shall effect and maintain insurance in the joint names of the Authority, the Contractor and all subcontractors in accordance with the Summary of Essential Insurance Requirements attached to the Abstract of Particulars. Without prejudice to the Authority's right to receive, on request, a copy of insurances effected or held the Contractor shall within 21 days of acceptance of the tender send to the Authority a certificate in the form attached to the Abstract of Particulars provided by his insurer or broker attesting that a combined policy of insurance has been effected in accordance with the Contract.

(4) If without the approval of the Authority the Contractor fails to effect and maintain insurance as described, or obtains a different policy of insurance, the Authority may effect appropriate insurance cover and deduct the cost of doing so from any advance payment due to the Contractor under the Contract. Where the Contractor effects the required insurance by annually renewable policy or policies then if the Works are not complete at the renewal date or dates the Contractor shall give notice to the Authority that the policy or policies have been renewed. Should the policy or policies no longer exist or are known to the Contractor to be ineffective the Contractor shall produce evidence to the Authority that alternative fully equivalent cover has been arranged.

(5) For the avoidance of doubt it is agreed that nothing in this Condition shall relieve the Contractor from any of his obligations and liabilities under the Contract.

13

Protection of Works

(1) The Contractor shall during the execution of the Works take measures and precautions needed to take care of the Site and the Works, and shall have custody of all Things on the Site against loss or damage from fire and any other cause. The Contractor shall be solely responsible for and shall take all reasonable and proper steps for protecting, securing, lighting and watching all places on or about the Works and the Site which may be dangerous to his workpeople or to any other person.

(2) The Contractor shall comply with any statutory regulations (whether or not binding on the Crown) which govern the storage and use of all Things which are brought on to the Site in connection with the Works.

19

Loss or damage

(1) This Condition applies to any loss or damage which arises out of or is in any way connected with the execution or purported execution of the Contract.

(2) The Contractor shall without delay and at his own cost reinstate, replace or make good to the satisfaction of the Authority, or if the Authority agrees compensate the Authority for, any loss or damage.

(3) Where a claim is made, or proceedings are brought against the Authority in respect of any loss or damage, the Contractor shall reimburse the Authority any costs or expenses which the Authority may reasonably incur in dealing with, or in settling, that claim or those proceedings.

(4) The Authority shall notify the Contractor as soon as possible of any claim made, or proceedings brought, against the Authority in respect of any loss or damage.

(5) The Authority shall reimburse the Contractor for any costs or expenses which the Contractor incurs in accordance with paragraphs (2) and (3) to the extent that the loss or damage is caused by:

(a) the neglect or default of the Authority or of any contractor or agent of the Authority,

(b) any Accepted Risk or Unforseeable Ground Conditions, or

(c) any other circumstances which are outside the control of the Contractor or of any of his subcontractors or suppliers and which could not have been reasonably contemplated under the Contract; provided that this sub-paragraph shall not apply where the loss or damage is loss or damage falling within 6(c) below.

(6) In this Condition loss or damage includes:

(a) loss or damage to property,

(b) personal injury to or the sickness or death of any person,

(c) loss or damage to the Works or to any Things on the Site, and

(d) loss of profits or loss of use suffered because of any loss or damage.

11.2. Loss or damage - condition 19.

As it is necessary to deal with the contractors' responsibility for the works and third party liability before the insurance condition, the conditions will not be taken in numerical order. It can be seen from paragraph (6) that this condition not only applies to loss or damage to the works and anything which is on the site, but also to third party injury or damage to property and loss of profits or loss of use suffered because of any loss or damage. However, the contractor is still basically responsible for loss or damage to the works and any things on the site. See particularly paragraphs (1) and (2), which deal with both the works loss or damage and that of third parties, while paragraph (3) and (4) deal with third party proceedings. It is appropriate to mention condition 13 at this stage as a similar condition in the previous edition of this contract is sometimes used to argue that the contractor has behaved unreasonably and thus avoid payment by the Authority where otherwise the Authority would be responsible.

By paragraph (5) where loss or damage is caused by the following, the authority will reimburse the contractor for any costs or expenses:

(a) the neglect or default of the Authority or of any contractor or agent of the Authority;
(b) any Accepted Risk or Unforeseeable Ground Conditions; or
(c) any other circumstances which are outside the control of the Contractor or any of his sub-contractors or suppliers and which could not have been reasonably contemplated under the Contract;
provided that this sub-paragraph shall not apply where the loss or damage is loss or damage falling within 6(c) below

Unforeseeable ground conditions is a reasonable concession to the contractor and the phrase as defined in condition 1 as meaning "ground

conditions certified by the PM in accordance with condition 7 (Conditions affecting Works)".

PM is defined also in condition 1 as "the Project Manager appointed for the time being by the Authority to manage and superintend the Works on his behalf". Paragraphs (3) to (5) of condition 7 deal with "Unforeseeable Ground Conditions" and reads as follows:

> (3) If, during the execution of the Works, the Contractor becomes aware of ground conditions (excluding those caused by weather but including artificial obstructions) which he did not know of, and which he could not reasonably have foreseen having regard to any information which he had or ought reasonably to have ascertained, he shall by notice immediately–
>
> (i) inform the PM of those conditions, and
>
> (ii) state the measures which he proposes to take to deal with them.
>
> (4) If the PM agrees that the ground conditions specified in a notice under paragraph (3) could not reasonably have been foreseen by the Contractor having regard to any information he should have had in accordance with that paragraph and paragraph (1), he shall certify those conditions to be Unforeseeable Ground Conditions. The PM shall notify the Contractor of his decision.
>
> (5) If as a result of Unforeseeable Ground Conditions the Contractor in executing the Works properly carries out or omits any work which he would not otherwise have carried out or omitted, then, without prejudice to any Instruction given by the PM the value of the work carried out or omitted shall be ascertained in accordance with Condition 42 (*Valuation of Variation Instructions*) and the Contract Sum shall be increased or decreased accordingly.

These paragraphs are self-explanatory but attention is drawn to the reference to paragraph (1) of condition 7 in paragraph (4) above.

Paragraph (1) merely requires the contractor to satisfy himself as to various aspects of the site. One of these aspects reads "the nature of the soil and material (whether natural or otherwise) to be excavated". This might affect the PM's decision in deciding whether the ground conditions are unforeseeable.

In condition 19 exception (c) of paragraph 5 concerning other circumstances outside the contractor's or his sub-contractor's or suppliers' control (which could not have been reasonably contemplated) is probably more beneficial to the contractor than the "unforeseeable ground conditions" exception. This is because the former is not stated in the contract to be subject to the PM's decision. In this connection it should be appreciated that paragraph (6) of condition 7 states "The Contractor shall not be released from any risks or obligations imposed on or undertaken by him ..... because he did not or could not foresee any matter which might affect or have affected the execution of the Works", which might reduce the effect of both these exceptions.

11.3. Insurance - condition 8.

Paragraph (1) requires three policies "for the duration of the Contract and the longest maintenance period", ie

(a) an employers' liability policy;

(b) a contractors' all risks policy; and

(c) a public liability policy.

Paragraph 2 explains the make up of the CAR policy sum insured, as being "for the reinstatement value (including the cost of transit and off-site risks)".

Paragraph (3) is in two alternative forms. In Alternative A the authority, who is the employer offering the contract for tender, can request a copy of the insurances concerned. The contractor has 21 days from the acceptance of the tender (and also within the same period of any subsequent renewal or expiry date of the insurances) to send to the authority a certificate in the form attached to the Abstract of Particulars from his insurer or insurance broker verifying that the appropriate policies have been effected.

This Abstract of Particulars published at the end of these Conditions has attached two forms of Certificate one for each Alternative plus the "Summary of Essential Insurance Requirements", which is only applicable to Alternative B. All these forms are set out below, and should be read in conjunction with condition 8. The certificate for the Alternative A is brief.

When this contract was first published 1989 the PSA indicated that the Alternative A and the appropriate certificate were to be used for contracts up to £3m, but according to insurance brokers specialising in insurance for the construction industry, this is not always followed.

Therefore it seems in practice that each case depends on the Alternative the Government department concerned chooses.

Contract No. .....

Tender for .....

at .....

Abstract of Particulars

The Authority shall be .....

The Project Manager shall be ..... who shall act on behalf of the Authority in carrying out those duties described in the Contract subject to the following exclusions:
.....
.....
.....

Periods for completion of the Works shall be: The day after the expiration of a period of ..... *weeks/months from the day on which the Contractor is given notice of possession of the Site.

Periods for completion of the Sections shall be: The day after the expiration of the period set out below opposite each Section from the day on which the Contractor is given possession of the Site.

Section	Period	
.....	.....	*weeks/months
.....	.....	*weeks/months
.....	.....	*weeks/months

Damages for delay shall be £ ..... per calendar day

Damages for delay in respect of each Section shall be:
Section ..... £ ..... per calendar day
Section ..... £..... per calendar day
Section ..... £..... per calendar day

Other than for the services listed below, the Maintenance Period for the Works (or each Section where completion is required in Sections) shall be ..... months and shall apply from the day after that on which the Works (or each Section) are completed as certified by the PM

The Maintenance Period for each of the following services shall be

Service	Period	
.....	.....months	and shall apply from the day after that on which the Works (for each Section where completion of the Works is required in Sections) are complete as certified by the PM
.....	.....months	
.....	.....months	

See Addendum to this Abstract

Issues of Passes: *Required/Not required

Insurance: *Alternative A/B required (see Condition 8)

Adjudication – The person to whom requests for adjudication shall be referred to shall be .....

Period within which notice of possession to be given .....

**Note* – the Summary of Essential Insurance Requirements and form of certificate referred to in Condition 8 are appended.

MODEL FORM

CERTIFICATE OF INSURANCE (ALTERNATIVE A) IN RESPECT OF CONDITION 8 OF THE GENERAL CONDITIONS OF CONTRACT GC/WORKS/1 (EDITION 3)

1. This certificate relates to Contract No. ..... with respect to work at (Short Title of the Works), ...

.....

2. A tender has been accepted from (name of Contractor) ..... for execution of the above Contract.

3. The Contract requires under Condition 8 confirmation that within 21 days from acceptance of the tender there be in force as described in the Contract:

(a) Employers Liability Insurance

(b) Contractors All Risks Insurance

(c) Public Liability Insurance

4. Signature and return of this Certificate is to be deemed due confirmation by either the Contractor's Insurance Brokers or Insurers that the above described insurance requirements have been fully complied with.

ON BEHALF OF THE CONTRACTOR'S INSURANCE BROKERS

(i) Name of Insurance Brokers:

.....

(ii) Signed on behalf of (i)

.....

ON BEHALF OF THE CONTRACTOR'S INSURERS

(i) Name of Insurers

.....

(ii) Signed on behalf of (i)

.....

MODEL FORM

CERTIFICATE OF INSURANCE (ALTERNATIVE B) IN RESPECT OF CONDITION 8 OF THE GENERAL CONDITIONS OF CONTRACT GC/WORKS/1 (EDITION 3)

1. This certificate relates to Contract No. ..... with respect to work at (Short Title of the Works), ...

.....

2. A tender has been accepted from (name of Contractor) ..... for execution of the above Contract.

3. The Contract requires under Condition 8 confirmation that within 21 days from acceptance of the tender there be in force as described in the Contract:

(a) Employers Liability Insurance

(b) Contractors All Risks Insurance

(c) Public Liability Insurance

The policy or policies effected by the Contractor under (b) and (c) above shall jointly indemnify for their respective rights and interests:

(a) The Authority or any client body for which it may work

(b) The Contractor

(c) All Sub-Contractors

(d) Professional Consultants to (a) above

4. Signature and return of this Certificate is to be deemed due confirmation by either the Contractor's Insurance Brokers or Insurers that the above described insurance requirements have been fully complied with.

ON BEHALF OF THE CONTRACTOR'S INSURANCE BROKERS

(i) Name of Insurance Brokers:

.....

(ii) Signed on behalf of (i)

.....

ON BEHALF OF THE CONTRACTOR'S INSURERS

(i) Name of Insurers

.....

(ii) Signed on behalf of (i)

.....

SUMMARY OF ESSENTIAL INSURANCE REQUIREMENTS – to be read in conjunction with Condition 8 OF THE GENERAL CONDITIONS OF CONTRACT GC/WORKS/1 (EDITION 3)

EMPLOYERS' LIABILITY INSURANCE: The insurance to be completely free from any monetary limitation as to the amount of indemnity provided.

COMBINED CONTRACTORS "ALL RISKS"/PUBLIC LIABILITY INSURANCE

INSURED PARTIES:

1. The Authority or any client body for whom it acts,
2. The Contractor and/or Sub-Contractors,
3. Professional Consultants to 1 above,
   for their respective rights and interests other than those normally covered by Professional Indemnity Insurance.

INSURED PERIOD: to represent the total construction/erection period plus the maintenance period stated in the Contract.

CONSTRUCTION "ALL RISKS"

Risks Insured: All Risks of physical loss or damage.

Property Insured:

1. All Permanent Works and materials or equipment for incorporation therein including free supplied items:
2. Temporary Works, ie. those other things erected or constructed for the purposes of making possible the erection or installation of the Permanent Works and which it is intended shall not pass the ownership of the Authority:

AMOUNT INSURED

The full Contract Sum of the Insured Project including an allowance for variations and free supplied items.

TERRITORIAL LIMITS OF COVER

While on the Site of the Insured Project or in transit thereto or therefrom (other than by sea or air), including loss or damage occurring during any deviation therein or storage in the course of transit, temporary off-site storage or temporary removal from the Site for any purpose whatsoever (including any loading transit or unloading incidental thereto) or while held for the purpose of the Insured Project at the premises of the Insured or anywhere in the United Kingdom.

INSURED'S RETAINED LIABILITY

The Insured's retained liability shall not exceed:

(i) £2,500 each and every occurrence in respect of loss or damage caused by Storm, Tempest, Flooding, Water, Subsidence or Collapse.

(ii) £1,000 each and every occurrence in respect of any other Insured loss or damage.

and if insured by the contractor (see Note 2)

(iii) £50 each and every occurrence in respect of Employees' Personal Effects, Tools or other property except when caused by Fire or Explosion when there shall be no retained liability.

(iv) Loss of or damage to Temporary Buildings, Constructional Plant and Equipment, the first £500 or each and every claim arising from any single occurrence or series or occurrences constituting a single event.

PUBLIC LIABILITY

RISKS INSURED

All sums for which the Insured shall become legally liable to pay (including claimants costs and expenses) as damages in respect of:

(i) death or bodily injury to or illness or disease contracted by any person, not being a person who at the time of suffering such death, bodily injury or disease was in the Insured's employment and where the same arose out of and in the course of such employment;

(ii) loss of or damage to property;

(iii) interference to property or the enjoyment of use thereof by obstruction, trespass, loss of amenities, nuisance or any like cause;

happening during the Insured Period and arising out of or in connection with the Insured Project.

TERRITORIAL LIMITS OF COVER

(i) anywhere in the United Kingdom in connection with the Insured Project:

(ii) elsewhere in the course of commercial visits by the Insured and/or his employees in connection with the Insured Project.

INSURED'S RETAINED LIABILITY

The Insured's retained liability shall not exceed:

£1,000 each and every occurrence (in respect of property damage claims only – personal injury claims will be paid in full).

NOTES

1. Your attention is specifically drawn to the fact that insurance is to be effected in respect of those matters described in Condition 8. The insurance should indemnify the Contractor and nominated and domestic Sub-Contractors. Your tender should therefore reflect the likely savings in Sub-Contract prices.
2. Your attention is particularly drawn to the fact that if the policy effected to meet these Requirements and Condition 8 does not provide cover in respect of loss or damage to Temporary Buildings, Constructional Plant and Equipment and employees' personal effects and tools, you should price the risk in respect of Temporary Buildings, Construction Plant/Equipment etc within the BQs in the normal way.

In condition 8 Alternative B paragraph (3) the joint names insurance in accordance with the "Summary of Essential Insurance Requirements "(apart from employers' liability policy) is a combined CAR and public liability policy. This paragraph (3) then follows the requirement of Alternative A in calling for a copy of the insurances effected when such a request is made and a certificate within 21 days of the acceptance of the tender in the form attached to the Abstract of Particulars from the insurer or insurance broker. However, the certificate for Alternative B is different from that required in Alternative A. The Alternative B certificate certifies that the policy effected by the contractor for CAR and public liability insurance shall jointly indemnify for their respective rights and interests:

(a) The Authority or any client body for which it may work

(b) The Contractor

(c) All Sub-Contractors

(d) Professional Consultants to (a) above

The employers' liability insurance section of the "Summary of Essential Insurance Requirements" only states that the insurance is to be completed free from any monetary limitation as to the amount of indemnity provided. This is in accordance with the usual insurance practice.

The CAR/PL sections of the "Summary of Essential Insurance Requirements" contain the following main aspects:

(a) The insured and insured period:

This consists of the three parties mentioned in (a) to (c) above, plus the professional consultants in (d) above for their respective rights and interests

other than those normally covered by professional indemnity insurance.

The total construction period plus the maintenance period comprises the insured period.

The following headings (b) to (f) only concern the CAR policy.

(b) The risks insured:

All risks of physical loss or damage which emphasises that consequential losses are not covered.

(c) Property insured.

(i) Permanent works, and materials or equipment for incorporation therein including free supplied items:

(ii) Temporary works, ie those things erected or constructed for the purposes of making possible the erection or installation of the permanent works and which it is intended shall not pass to the ownership of the authority.

These works do not have to include temporary buildings constructional plant and equipment and employees personal effects. This is verified by the "Notes" at the end of the form.

(d) Amount insured:

The full contract sum of the insured project including an allowance for variations and free supplied items.

(e) Territorial limits:

While on site or in transit thereto or therefrom (other than by sea or air), including loss or damage occurring during any deviation therein or storage in the course of transit, temporary off-site storage or temporary removal

from the site for any purpose whatsoever (including any loading transit or unloading incidental thereto) or while held for the purpose of the insured project at the premises of the insured or anywhere in the United Kingdom.

(f) Insured's retained liability:

The insured's retained liability shall not exceed:

(i) £2,500 each and every occurrence in respect of the loss or damage caused by storm, tempest, flooding, water, subsidence or collapse.

(ii) £1,000 each and every occurrence in respect of any other insured loss or damage.

and if insured by the contractor

(iii) £50 each and every occurrence in respect of employees' personal effects, tools or other property except when caused by fire or explosion when there shall be no retained liability.

(iv) Loss or damage to temporary buildings, constructional plant and equipment, the first £500 of each and every claim arising from any single occurrence or series of occurrences constituting a single event.

The "Summary of Essential Insurance Requirements" contains a heading reading "Combined Contractors' "All Risks/Public Liability Insurance", and the public liability section makes the following points:

(a) Risks insured:

This is the usual legal liability of the insured to pay damages (including the claimants' costs and expenses) in respect of death, injury, illness, disease (but not to the insured's employees arising from the employment). It includes loss of or damage to property, plus interference to property or the

enjoyment of use thereof by obstruction, trespass, loss of amenities, nuisance or any like cause. All happening during the insured period and arising out of or in connection with the insured project.

(b) Territorial limits of cover:

(i) anywhere in the UK in connection with the insured project:

(ii) elsewhere in the course of commercial visits by the insured and/or his employees in connection with the insured project.

(c) Insured's retained liability

This liability shall not exceed:

£1,000 each and every occurrence (in respect of property damage claims only - personal injury claims will be paid in full).

11.4 Why the Summary of Essential Insurance Requirements in Condition 8 is inadequate.

In view of the system adopted by this construction contract in using extraneous documents to set out the insurance requirements, it is the "Summary of Essential Insurance Requirements" which must be considered if the insurance information concerning the cover required by this contract is to be made clear. It is already an improvement on most construction contracts from the insurance viewpoint. The use of certificates signed by insurance brokers or insurers confirming the insurance requirements under the construction contract have been complied with, has considerable merit as it puts the responsibility with the specialist, who usually has arranged the insurance, and away from the construction professional, who otherwise may be held responsible (see chapter 1). Apparently this method is working in

that it is understood that there is no difficulty in getting brokers and insurers to sign these certificates. However, the Government is really ensuring that the contractor's insurances cover certain parties, certain risks (in a broad sense, eg injury and damage to property), for a certain geographical area, and that the contractor does not accept more than a certain amount as a retained liability. This is fine as far as it goes, but it gives no guide as to the specific exceptions, which are often standard in the CAR and public liability policies, and which the Government department will accept.

At least these exceptions would give some guide to those who are responsible for seeing that the required cover is provided. A peculiarity of this contract is that nowhere does the contract limit the indemnity required under the public liability policy. Thus, while the contract is apparently asking for unlimited liability cover, this is unobtainable. The insurance practice is for this policy to cover a limit of indemnity any one occurrence or series of occurrences arising out of one event, although it is unlimited for the insurance period. Most construction contracts indicate the limit required in the form of tender or appendix published with the construction contract, but this is not so in the form of tender published with the GC/Works/1 (edition 3). The Government in print and Supplementary Condition 213 Annex D call for a minimum amount of indemnity of £5 million for any single occurrence or series of occurrences arising out of a single event, but otherwise unlimited during the insurance period. It is a pity space was not provided in one of the published documents for a figure to be inserted not less than this amount.

11.5 A suggested improvement in the wording of condition 8 and the Summary of Essential Insurance Requirements.

The first suggestion is that the Summary of Essential Insurance Requirements should apply to all contracts. This means deleting Alternative A and its Certificate. This will allow the following suggestions to be applicable to all contracts, to which condition 8 applies.

Secondly it is suggested that there should be an additional heading under both the Contractors' All Risks section and the Public Liability section of this document. This heading should be entitled "Exceptions" and will provide the exceptions which have been suggested should appear in all construction contracts concerning the insurance cover for the conventional policies. See chapters 4.11 and 6.12 concerning the CAR and PL policies. In view of the compulsory aspect of employers' liability insurance and the lack of exceptions in this policy no suggested improvements are made for this policy. See chapter 5.9.

The operative clauses already appear in the "Summary of Essential Insurance Requirements" under the headings "Risks Insured" and "Property Insured" under the CAR policy and "Risks Insured" under the PL policy. This leaves the suggested allowable exceptions under both the CAR and PL policies, to be inserted under the next heading.

Consequently for the CAR policy the additional heading "Exceptions" following the Risks Insured and Property Insured headings should read as set out below. It should be noted that the wording is taken from clause 22.2 of the JCT contract without the war and kindred risks, nuclear and sonic

waves risks which are already excluded from the contractor's responsibility as they are "the Accepted Risks", and should be excluded as such. In any event no insurer will cover these risks except possibly sonic waves.

> This insurance may exclude the cost necessary to repair, replace or rectify
> 1. property which is defective due to wear and tear, obsolescence, deterioration, rust or mildew;
> 2. any work executed or site materials etc as defined under "Property Insured" above lost or damaged as a result of its own defect in design, plan, specification, material or workmanship or any other work executed which is lost or damaged in consequence thereof where such work relied for its support or stability on such work which was defective;
> 3. loss or damage caused by or arising from
>   (i) confiscation, commandeering, nationalisation or requisition or loss or destruction of or damage to any property by or under the order of any government de jure or de facto or public, municipal or local authority;
>   (ii) disappearance or shortage if such disappearance or shortage is only revealed when an inventory is made or is not traceable to an identified event;
>   and if the contract is carried out in Northern Ireland
>   (iii) civil commotion;
>   (iv) any unlawful, wanton or malicious act committed maliciously by a person or persons acting on behalf of or in connection with an unlawful association;
>   "unlawful association" shall mean any organisation which is engaged in terrorism and includes an organisation which at any relevant time is a proscribed organisation within the meaning of the Northern Ireland (Emergency Provisions) Act 1973; "terrorism" means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.

The PL policy under the heading "Risks Insured" in the "Summary of Essential Insurance Requirements" contains an exclusion of injury claims by

employees of the insured contractor arising from the construction of the works, so this exception need not appear in the exceptions mentioned under the suggested additional heading. Therefore, in accordance with chapter 6.12 the wording under the suggested "Exceptions" heading should read:

This insurance need not indemnify the insured against liability

(a) arising out of ownership possession or use by or on behalf of the Insured of any
  (i) aircraft aerospecial device or hovercraft
  (ii) watercraft other than hand propelled watercraft or other watercraft not exceeding 20 feet in length.
  (iii) mechanically propelled vehicle licensed for road use including trailer attached thereto other than liability caused by or arising out of the use of plant as a tool of trade on site or at the premises of the Insured, the loading or unloading of such vehicle, damage to any building weighbridge road or to anything beneath caused by vibration or by the weight of such vehicle or its load, but this indemnity shall not apply if in respect of such liability compulsory insurance or security is required under any legislation governing the use of vehicles.

(b) in respect of Damage to Property
  (i) which comprises the Contract Works in respect of any contract entered into by the Insured and occurring before practical completion or a certificate of completion has been issued
  (ii) belonging to the Insured
  (iii) in the custody or under the control of the Insured or any Employee (other than Property belonging to visitors directors partners or Employees of the Insured). But this part of this exception shall not apply to Damage to buildings (including contents therein) which are not owned or leased or rented by the Insured but are temporarily occupied by the Insured for the purpose of maintenance alteration extension installation or repair.

(c) for the cost of and expenses incurred in replacing or making good faulty defective or incorrect
  (i) workmanship
  (ii) design or specification
  (iii) materials goods or other property supplied installed or erected by or on behalf of the Insured.

(d) caused by or arising from advice design or specification provided by or on behalf of the Insured for a fee.

(e) caused by or arising from seepage pollution or contamination unless due to a sudden unintended and unexpected event.

The operative clauses for the public liability policy in the "Summary of Essential Insurance Requirements" does not exclude the contract works, whereas the clause suggested as a PL policy operative clause (23(1)) in the ICE Conditions, does so. Similarly, in the JCT contract the suggested operative clause (21.1.1) makes reference back to clauses which do exclude the contract works. Therefore, it is necessary in the above quoted exceptions to exclude the contract works. Indirectly condition 19 makes the "accepted risks" inapplicable to the risks covered by the PL policy. Therefore the war and kindred risks and the nuclear risks exceptions should be included in the above exceptions. Because the insured parties include the Authority and others as well as the contractor, it seems that a joint names policy is required and thus a cross liabilities clause is necessary. Therefore, such a clause must be called for after the exceptions. A wording similar to clause 23(2) of the ICE Conditions, would suffice. See chapter 9.1.

CHAPTER 12

OTHER RELEVANT CONTRACTS.

12.1. Sub-Contracts calling for conventional insurance policies.

It was explained in chapter 2.5.1. that the ICE form of sub-contract was the only one among the main construction sub-contracts calling for all the conventional policies

12.1.1. Sub-contract designed for use in conjunction with the ICE Conditions 6th Edition.

This contract was published by the Federation of Civil Engineering Contractors in September 1991. Apparently it is appropriate whether or not the sub-contractor has been nominated by the employer under the main contract. This form includes five schedules for completion by the parties. The fifth schedule concerns "insurances". This form also includes "Notes for the guidance of contractors on the completion of the schedules", and these notes concerning the fifth schedule read as follows:

> Reference should be made to Clause 14 (Insurances) of the Sub-Contract. In completing the two parts of this Schedule the parties should take care to ensure that all insurances required by the Main Contract are effected by one or other of them and that there is no unnecessary duplication of Insurance.
> Part 1 should specify insurances to be effected by the Sub-Contractor.
> Part 2 should specify the policy of insurance which the Contractor is effecting in pursuance of Clause 21 of the Main Contract Conditions, if it is intended that the Sub-Contractor shall have the benefit thereof . In such cases his interest should be noted either generally or specifically on the policy and this Part of the Schedule should so state. If the Sub-Contractor is not to have any benefit under this policy of the Contractor, then that part should be marked "not applicable".

The fifth schedule only contains two sub-headings after the main headings of "Fifth Schedule" and "Insurances" and they are:

> Part 1 Sub-Contractor's Insurance;
> Part 2 Contractor's Policy of Insurance.

Appendix 2 gives examples of how this fifth schedule might be completed and improved by giving more details than usual of the policies concerned. The relevant clauses of the sub-contract form are clause 12, Indemnities, and clause 14, Insurances, which are set out below.

Indemnities.

12. (1) The Sub-Contractor shall at all times indemnify the Contractor against all liabilities to other persons (including the servants and agents of the Contractor or Sub-Contractor) for bodily injury, damage to property or other loss which may arise out of or in consequence of the execution, completion or maintenance of the Sub-Contract Works and against all costs, charges and expenses that may be occasioned to the Contractor by the claims of such persons.

Provided always that the Contractor shall not be entitled to the benefit of this indemnity in respect of any liability or claim if he is entitled by the terms of the Main Contract to be indemnified in respect thereof by the Employer.

Provided further that the Sub-Contractor shall not be bound to indemnify the Contractor against any such liability or claim if the injury, damage or loss in question was caused solely by the wrongful acts or omissions of the Contractor, his servants or agents.

(2) The Contractor shall indemnify the Sub-Contractor against all liabilities and claims against which the Employer by the terms of the Main Contract undertakes to indemnify the Contractor and to the like extent, but no further.

Outstanding Work and Defects.

13. (1) If the Sub-Contractor shall complete the Sub-Contract Works as required by Clause 2(1) before the substantial completion of the Main Works, or where under the Main Contract the Main Works are to be completed by sections before the substantial completion of the section or sections in which the Sub-Contract Works are comprised, the Sub-Contractor shall maintain the Sub-Contract Works in the condition required by the Main Contract (fair wear and tear excepted) to the satisfaction of the Engineer and shall make good every defect and imperfection therein from whatever cause arising until such substantial completion of the Main Works or section thereof is achieved and subject to Clause 14 (Insurance), shall not be entitled to any additional payment for so doing unless such defect or imperfection is caused by the act, neglect or default of the Employer, his servants or agents under the Main Contract or of the Contractor, his servants or agents under the Sub-Contract.

(2) After completion of the Main Works or of the section or sections thereof in which the Sub-Contract Works are comprised, as the case may be, the Sub-Contractor shall maintain the Sub-Contract Works and shall make good such defects and imperfections therein as the Contractor is liable to make good under the Main Contract for the like period and otherwise upon the like terms as the Contractor is liable to do under the Main Contract.

Provided always that if any defect or imperfection made good by the Sub-Contractor under this sub-clause is caused by the act, neglect or default under the Sub-Contract of the Contractor, his servant or agents, then notwithstanding that the Contractor may have no corresponding right under the Main Contract, the Sub-Contractor shall be entitled to be paid by the Contractor his reasonable costs of making good such defect or imperfection.

Insurances.

14. (1) The Sub-Contractor shall effect insurance against such risks as are specified in Part I of the Fifth Schedule hereto and in such sums and for the benefit of such persons as are specified therein and unless the said Fifth Schedule otherwise provides, shall maintain such insurance from the time that the Sub-Contractor first enters upon the Site for the purpose of executing the Sub-Contract Works until he has finally performed his obligations under Clause 13 (Outstanding Work and Defects).

(2) The Contractor shall maintain in force until such time as the Main Works have been substantially completed or ceased to be at his risk under the Main Contract, the policy of insurance specified in Part II of the Fifth Schedule hereto. In the event of the Sub-Contract Works, or any Sub-Contractor's Equipment, Temporary Works, materials or other things belonging to the Sub-Contractor being destroyed or damaged during such period in such circumstances that a claim is established in respect thereof under the said policy, then the Sub-Contractor shall be paid the amount of such claim, or the amount of his loss, whichever is the less, and shall apply such sum in replacing or repairing that which was destroyed or damaged. Save as aforesaid the Sub-Contract Works shall be at the risk of the Sub-Contractor until the Main Works have been substantially completed under the Main Contract, or if the Main Works are to be completed by sections, until the last of the sections in which the Sub-Contract Works are comprised has been substantially completed, and the Sub-Contractor shall make good all loss of or damage occurring to the Sub-Contract Works prior thereto at his own expense.

(3) Where by virtue of this Clause either party is required to effect and maintain insurance, then at any time until such obligation has fully been performed, he shall if so required by the other party produce for inspection satisfactory evidence of insurance and in the event of his failing to do so, the other party may himself effect such insurance and recover the cost of so doing from the party in default.

The following points should be noted in clause 12:

(a) The indemnity of the sub-contractor to the contractor applies to "bodily injury, damage to property or other loss which may arise out of or in consequence of the execution, completion or maintenance of the sub-contract works".

(b) If the main contractor is entitled to an indemnity from the employer under the main contract the contractor is not entitled to an indemnity from the sub-contractors under the sub-contract. Under clause 12(2) the contractor passes on to the sub-contractor the indemnity he receives from the employer.

(c) The sub-contractor is not bound to indemnify the contractor if the injury, damage or loss in question was caused solely by the wrongful acts or omissions of the contractor, his servants or agents. The word "solely" means that the contractor must be 100% at fault. If there is less an 100% fault on the contractor's part the sub-contractor still has to indemnify the main contractor in full.

Turning to clause 14(1) and bearing in mind the notes on the fifth schedule quoted earlier it seems that Part I of the fifth schedule should require the sub-contractor to arrange employers' and public liability insurances for his own benefit so far as clause 12 is concerned. Furthermore if he is not to have the benefit of the main contractor's CAR policy he will have to arrange his own CAR policy covering the sub-contract works.

Under chapter 9.2 it will be seen that the main contractor has an obligation to insure the contract works under clause 21 of the ICE conditions. This

CAR policy will be in the joint names of the contractor and the employer and will include the sub-contract works but only the contractor's and employer's interest in the sub-contract works. The sub-contractor is not an insured under this policy.

It will be seen from the last part of clause 14(2) that (subject to the first part) the sub-contract works are at the risk of the sub-contractor until the contract works have been substantially completed under the main contract. Consequently he must arrange his own CAR policy to expire on completion if the main contract has been substantially completed. The first part of clause 14(2) can only apply where the main contractor has given the sub-contractor the benefit of his CAR policy as it states that "In the event of the Sub-Contract Works, or any Sub-Contractor's Equipment, Temporary Works, materials or other things belonging to the Sub-Contractor being destroyed or damaged ---- the Sub-Contractor shall be paid the amount of such claim, or the amount of his loss ----". Now the sub-contractor can only be paid the amount of such claim if he is to have the benefit of the main contractor's policy. Even then he will not be paid directly by the insurers (unless he is made a party to the policy, ie as a named insured) he can only have the money passed to him by the main contractor, who can recover, or will have recovered, it from the insurers.

If the sub-contractor is not given the benefit of the main contractor's CAR policy then the sub-contractor, as mentioned earlier, will have to arrange his own CAR policy covering the sub-contract works, sub-contractor's equipment, temporary works, materials and other things belonging to the

sub-contractor. In this event of the Fifth Schedule Part II headed "Contractor's Policy of Insurance" should be marked "not applicable".

12.1.1.1. Use of the Fifth Schedule to improve the call for insurances.

In making suggestions to give the main details of the conventional insurances requested by the sub-contract it is necessary to fit in with the system adopted by this contract. This means expanding Part I of the Fifth Schedule as this is where the sub-contractors's insurances are listed. Assuming the sub-contractor is to get the benefit of the main contractor's CAR policy set out in Part II this only leaves the employers' and public liability policies of the sub-contractor to be detailed in part I.

The employers' liability policy as explained in chapter 5.9. is compulsory, standard and almost exclusionless, therefore little need be stated about it in Part I. Possibly it would help to indicate that the operative clause of the policy should cover all those persons under a contract of service or apprenticeship with the insured for legal liability for bodily injury and death arising out of and in the course of the employment in the business set out in the policy schedule.

The important aspects of the public liability policy were considered in chapter 6.12, and the first requirement is a modified wording of the operative clause given in chapter 6.3 possibly reduced to legal liability for bodily injury and damage to property to ensure the main cover is given. Secondly, the wording of the policy exceptions were given in chapters 9.6, 10.4 and 11.5. Therefore to avoid too much repetition it seems that the exceptions wording in 9.6 and 10.4 (which is the same) would be suitable.

However, this leaves the following exceptions for consideration, namely liability to employees, contract works, and war risks. In the first place these exceptions are so standard and often mentioned in the basic wording of the main construction contracts, that they will always appear in the policy whether allowed or not. Secondly, it is obvious to the layman that if the construction contract calls for specific policies including the public liability policy then the latter will exclude the cover provided by those specific policies, eg liability to employees and for the contract works. War risks are known to be covered by the Government at least so far as damage to property is concerned and insurers are not expected to cover this risk. Therefore in this sub-contract these exceptions could be ignored and allowed without extending the wording to them.

Finally, unless this public liability policy is in the joint names of the sub-contractor and contactor a cross liabilities clause is unnecessary, and as such a policy is not required this policy clause can also be ignored.

Turning to the position where the contractor is not allowing the sub-contractor the benefit of his CAR policy by indicating this in Part II of the Fifth Schedule, it will be necessary for the sub-contractor to arrange his own CAR policy covering the sub-contract works and this involves stating an operative clause and exceptions in Part I of the Fifth Schedule. Again to avoid too much repetition it seems that the wording used by the JCT contract clause 22.2 is suitable. See chapter 10.1. However, the wording will have to include the usual wording for the exceptions of nuclear risks and sonic waves defined in clause 1.3 of the JCT contract. They cannot be

merely mentioned as "excepted risks" as there are no such things in the ICE Sub-Contract. The EL and PL details can be printed and the CAR details, if necessary, typed in Part I. See Appendix 2.

12.2. Contracts for smaller works calling for conventional policies.

The only well-known smaller works contract requiring all the conventional policies is the JCT Intermediate Form known as IFC 84.

12.2.1. The JCT Intermediate form of building contract known as IFC 84.

This contract, like the JCT 80 contract, was amended in 1986 to make considerable alterations in the liability, responsibility for the works and corresponding insurance clauses.

The IFC contract was introduced to fill a gap between the JCT Standard Form and the JCT Minor Works Form. According to the endorsement on the back of the form the contract is suitable where the proposed building works are :

1. Of a simple content involving the normally recognised basic trades and skills of the industry;
2. Without any building service installations of a complex nature, or specialist work of a similar nature; and
3. Adequately specified, or specified and billed, as appropriate prior to the invitation of tenders.

Practice Note 20 (revised 1988) and Practice Note IN/1 (revised January 1987) state that this form would normally be most suitable where the contract period is not more than twelve months and the value of the works is

not more than £280,000 (1987 prices) subject to the money limits within which the use of the Minor Works Form may be appropriate.

The liability, responsibility for the works, and corresponding insurance clauses in the IFC all come within clause 6 and the wording follows the JCT 86 contract very closely indeed.

Thus clause 6.1.1 follows clause 20.1 JCT 86;
clause 6.1.2 follows clause 20.2 JCT 86;
clause 6.1.3 follows clause 20.3.1 JCT 86;
and so on.

12.2.1.1. Insurance against injury to persons or property.

This is clause 6.2.1 and it deals with the insurances required by the contractor to indemnify the employer for liability for injury to third parties as mentioned in the clauses 6.1 above. It follows almost exactly the wording of clause 21.1.1. of the JCT 86 contract.

12.2.1.2. A suggested improvement in the wording of clause 6.2.1.

Consequently, because of this close similarity in wording, the same suggestions to improve the wording of clause 6.2.1 of the IFC contract can be made as were suggested in chapter 10.4 for clause 21.1.1 of JCT 86. Thus clause 6.2.1 can have an additional clause 6.2.1.1 equivalent to the suggested clause 21.1.1.3. Clause 6.2.1 is suitable as operative clauses of an insurance policy covering employers' and public liability risks. However, an additional clause numbered 6.2.1.1 is necessary to provide the exceptions which operate for the public liability policy risk. It should read as set out in chapter 10.4.

In comparison with the list of exceptions suggested in chapter 6.12 the contract works and war and kindred risks exceptions do not appear as they

are unnecessary, because contract works are catered for in the IFC contract in clause 6.1.3, and the war risks exception is so standard that cover cannot be obtained. The cross liabilities extension is not necessary as the insurance required in clause 6.2.1 is not a joint names policy. Otherwise the suggestions in chapter 6.12 have been followed.

12.2.1.3. Responsibility for and insurance of the works.

Clause 6.3.1 of IFC sets out the alternative clauses 6.3A, 6.3B and 6.3C as in clause 22.1 of the JCT contract.

Clause 6.3.2. of the IFC contract follows almost exactly clause 22.2 of the JCT contract and all the remarks in chapter 10.5 apply reading clause 6.3 for clause 22

12.2.1.4. Reasons for accepting clause 6.3.2.

The remarks in chapter 10.6 apply reading clause 6.3.2 for clause 22.2.

12.3. Contracts for special purposes calling for conventional policies.

The standard form of Building Contract with Contractor's Design 1981 incorporating Amendment 1 in 1986, and Model Form of General Conditions of Contract recommended by the Institutions of Mechanical and Electrical Engineers - Home Contracts with Erection (MF/1) are the two contracts under this heading which call for all the conventional insurance policies.

12.3.1. The JCT Standard Form of Building Contract with Contractor's Design.

The main difference between this contract and the basic 1986 JCT contract, from the insurance viewpoint, concerns clause 2.5.1 (Contractor's design warranty). The liability set out by this clause requires a professional

indemnity policy to cover it, but this is not a conventional policy as explained in this thesis. Therefore this aspect will not be considered. Otherwise this contract follows the basic JCT 1986 contract even more closely than the Intermediate Form (IFC 84) dealt with at 12.2.1. Therefore, it is clear that the same suggestions will apply as just mentioned for the IFC contract. As the clauses 20 to 22 are numbered exactly the same in both the Design contract and the basic JCT contract, it would be unnecessary to repeat these suggestions. Reference need only be made to chapter 10 (sections 10.4 and 10.6 are relevant).

12.3.2. Model Form of General Conditions of Contract by the Institutions of Mechanical and Electrical Engineers (MF/1)

This current form of contract published in June 1988 states that it is for use with "Both Home or Overseas Contracts - With Erection", and is known as MF/1. It does not follow the usual pattern of the insurance clauses following a "care of the works" clause and a "liability to third parties" clause. There is a distinct separation of the insurance provisions from those concerning responsibility for the works and liability to third parties.

Clause 43 deals with responsibility for the works and liability for injury to persons and damage to property. This clause also makes reference to clause 46 concerning Force Majeure. Clauses 47 and 48 deal with the insurance requirements for the works and for liability to third parties. These clauses are set out below. While reference to a Contractors' All Risks (CAR) policy will be made in the comments it has to be appreciated that this contract relates as much to Erection All Risks (EAR) insurance as CAR, ie

the installation (and testing) in the works of mechanical and electrical plant, and this cover does not come within the conventional policies as defined by this thesis. Thus it will not be considered, but for details see Eaglestone, F.N. (1979), pp138-141.

Accidents and Damage

Care of the Works

43.1 The Contractor shall be responsible for the care of the Works or any Section thereof until the date of taking-over as stated in the Taking-Over Certificate applicable thereto. The Contractor shall also be responsible for the care of any outstanding work which he has undertaken to carry out during the Defects Liability Period until all such outstanding work is complete. In the event of termination of the Contract in accordance with these Conditions, responsibility for the care of the Works shall pass to the Purchaser upon expiry of the notice of termination, whether given by the Purchaser or by the Contractor.

Making Good Loss or Damage to the Works

43.2 In the event that any part of the Works shall suffer loss or damage whilst the Contractor has responsibility for the care thereof, the same shall be made good by the Contractor at his own expense except to the extent that such loss or damage shall be caused by the Purchaser's Risks. The Contractor shall also at his own expense make good any loss or damage to the Works occasioned by him in the course of operations carried out by him for the purpose of completing any outstanding work or of complying with his obligations under Clause 36 (Defects Liability).

Damage to Works caused by Purchaser's Risks

43.3 In the event that any part of the Works shall suffer loss or damage whilst the Contractor has responsibility for the care thereof which is caused by any of the Purchaser's Risks the same shall, if required by the Purchaser within six months after the happening of the event giving rise to loss or damage, be made good by the Contractor. Such making good shall be at the expense of the Purchaser at a price to be agreed between the Contractor and the Purchaser. In default of agreement such sum as is in all the circumstances reasonable shall be determined by Arbitration under Clause 52 (Disputes and Arbitration). The price or sum so agreed or determined shall be added to the Contract Price.

Injury to Persons and Property whilst Contractor has responsibility for Care of the Works

43.4 Except as hereinafter mentioned the Contractor shall be liable for and shall indemnify the Purchaser against all claims in respect of personal injury or death and in respect of loss of or damage to any property (other than property forming part of the Works not yet taken over) which arises out of or in consequence of the execution of the Works whilst the Contractor has responsibility for the care thereof and against all demands, costs, charges and expenses arising in connection therewith. The Contractor shall not be liable under this Clause for, and the Purchaser shall indemnify him from and against, any claims in relation to death or personal injury or loss of or damage to property to the extent that the same results from any act or neglect of the Purchaser, his agents, servants or other contractors (not being the Contractor's servants, agents or Sub-Contractors) and in the case of damage to property to the further extent that the damage is an inevitable consequence of the execution of the Works.

Injury to Persons and Damage after responsibility for Care or Works passes to Purchaser

43.5 If there shall occur any death or injury to any person or loss of or damage to any property (other than the Works) after the responsibility for the care of the Works shall have passed to the Purchaser the Contractor shall be liable for and shall indemnify the Purchaser against all such claims and all actions, demands, costs, charges and expenses arising in connection therewith to the extent that such death or personal injury or loss of or damage to property was caused by the negligence or breach of statutory duty of the Contractor, his Sub-Contractors, servants or agents or by defective design [other than a design for which the Contractor has disclaimed responsibility in accordance with Sub-Clause 13.3 (Contractor's Design)], materials or workmanship but not otherwise. The Contractor's liability for any loss or damage to the Works shall be limited to the fulfilment of his obligations in relation thereto under Clause 36 (Defects Liability).

Accidents or Injury to Workmen

43.6 The Contractor shall indemnify the Purchaser against all actions, suits, claims, demands, costs, charges and expenses arising in connection with the death of or injury to any person employed by the Contractor or his Sub-Contractors for the purposes of the Works. This indemnity shall not apply to the extent that any death or injury results from act or default of the Purchaser, his servants, agents or other contractors for whom he is responsible. The Purchaser shall indemnify the Contractor against all claims, damages, costs, charges and expenses to such extent.

Claims in Respect of Damage to Persons or Property

43.7 In the event of any claim being made against the Purchaser arising out of the matters referred to and in respect of which it appears that the Contractor may be liable under this Clause the Contractor shall be promptly notified thereof and may at his own expense conduct all negotiations for the settlement of the same and any litigation that may arise in relation thereto. The Purchaser shall not unless and until the Contractor shall have failed to take over the conduct of the negotiations or litigation make any admission which might be prejudicial thereto. The conduct by the Contractor of such negotiations or litigation shall be conditional upon the Contractor having first given to the Purchaser such reasonable security as shall from time to time be required by him to cover the amount ascertained or agreed or estimated, as the case may be, of any compensation, damages, expenses and costs for which the Purchaser may become liable. The Purchaser shall at the request of the Contractor afford all available assistance for any such purpose and shall be repaid all Costs reasonably incurred in so doing.

Purchaser's Risks

Purchaser's Risks

45.1 The 'Purchaser's Risks' are:–

fault, error, defect or omission in the design of any part of the Works by the Purchaser or the Engineer [responsibility for which has been disclaimed by the Contractor in the manner provided for by Sub-Clause 13.3 (Contractor's Design)];

the use or occupation of the Site by the Works, or for the purposes of the Contract; interference, whether temporary or permanent with any right of way, light, air, or water or with any easement wayleaves or right of a similar nature which is the inevitable result of the construction of the Works in accordance with the Contract;

damage (other than that resulting from the Contractor's method of construction) which is the inevitable result of the construction of the Works in accordance with the Contract;

- use of the Works or any part thereof by the Purchaser;

- the act, neglect or omission or breach of contract or of statutory duty of the Engineer or the Purchaser, his agents, servants or other contractors for whom the Purchaser is responsible;

- Force Majeure except to the extent insured under the insurance policies to be effected by the Contractor in accordance with Clause 47 (Insurance).

e Majeure

46.1 Force Majeure means:–

- war, hostilities (whether war be declared or not), invasion, act of foreign enemies;

- ionising radiations, or contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;

- pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;

- rebellion, revolution, insurrection, military or usurped power or civil war;

- riot, civil commotion or disorder;

- any circumstances beyond the reasonable control of either of the parties.

tice of Force jeure

46.2 If either party is prevented or delayed from or in performing any of his obligations under the Contract by Force Majeure, then he may notify the other party of the circumstances constituting the Force Majeure and of the obligations performance of which is thereby delayed or prevented, and the party giving the notice shall thereupon be excused the performance or punctual performance, as the case may be, of such obligation for so long as the circumstances of prevention or delay may continue.

rmination for orce Majeure

46.3 Notwithstanding that the Contractor may have been granted under Sub-Clause 33.1 (Extension of Time for Completion) an extension of the Time for Completion of the Works, if by virtue of Sub-Clause 46.2 (Notice of Force Majeure) either party shall be excused the performance of any obligation for a continuous period of 120 days, then either party may at any time thereafter, and provided such performance or punctual performance is still excused, by notice to the other terminate the Contract.

ayment on ermination for orce Majeure

46.4 If the Contract is terminated under Sub-Clause 46.3 (Termination for Force Majeure) the Engineer shall certify, and the Purchaser shall pay to the Contractor in so far as the same shall not have already been included in certificates of payment paid by the Purchaser or be the subject of an advance payment, the Contract Value of the Works executed prior to the date of termination.

The Contractor shall also be entitled to have included in a certificate of payment and to be paid:

(a) the Cost of materials or goods reasonably ordered for the Works or for use in connection with the Works which have been delivered to the Contractor or of which the Contractor is legally liable to accept delivery. Such materials or goods shall become the property of the Purchaser when paid for by the Purchaser. The Purchaser shall be entitled to withhold payment in respect thereof until such goods or materials have been delivered to or to the order of, the Purchaser;

(b) the amount of any other expenditure which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the whole of the Works;

(c) the reasonable Cost of removal of Contractor's Equipment and the return thereof to the Contractor's works in his country or to any other destination at no geater Cost;

(d) the reasonable Cost of repatriation of all the Contractor's staff and workmen employed at the Site on or in connection with the Works at the date of such termination.

Insurance

Insurance of Works

47.1 The Contractor shall, in the joint names of the Contractor and the Purchaser insure the Works and Contractor's Equipment and keep each part thereof insured for their full replacement value against all loss or damage from whatever cause arising, other than the Purchaser's Risks. Such insurance shall be effected from the date of the Letter of Acceptance, until 14 days after the date of issue of a Taking-Over Certificate in respect of the Works or any Section thereof; or if earlier, 14 days after the date when responsibility for the care of the Works passes to the Purchaser.

Extension of Works Insurance

47.2 The Contractor shall so far as reasonably possible extend the insurance under Sub-Clause 47.1 (Insurance of Works) to cover damage which the Contractor is responsible for making good pursuant to Clause 36 (Defects Liability) or which occurs whilst the Contractor is on Site for the purpose of making good a defect or carrying out the Tests on Completion during the Defects Liability Period or supervising the carrying out of the Performance Tests or completing any outstanding work or which arises during the Defects Liability Period from a cause occurring prior to taking-over.

Application of Insurance Monies

47.3 All monies received under any such policy shall be applied in or towards the replacement and repair of the Works lost, damaged or destroyed but this provision shall not affect the Contractor's liabilities under the Contract.

Third Party Insurance

47.4 The Contractor shall, prior to the commencement of any work on the Site by the Contractor pursuant to the Contract, insure in an amount not being less than the amount stated in the Special Conditions against his liability for damage or death or personal injury occurring before all the Works have been taken over to any person (including any employee of the Purchaser) or to any property (other than property forming part of the Works) due to or arising out of the execution of the Works. The terms of the policy shall include a provision whereby, in the event of any claim being made against the Purchaser in respect of which the Contractor would be entitled to indemnity under the policy, the insurers will indemnify the Purchaser against such claims and any costs, charges and expenses in respect thereof.

Insurance against Accident etc. to Workmen

47.5 The Contractor shall insure and shall maintain insurance against his liability under Sub-Clause 43.6 (Accidents or Injury to Workmen). The terms of any such policy shall also include the provision to indemnify the Purchaser mentioned in Sub-Clause 47.4 (Third Party Insurance) provided always that in respect of any persons employed by any Sub-Contractor, the Contractor's obligation under this Sub-Clause shall be satisfied if the Sub-Contractor shall have insured against the liability in respect of such persons in such manner that the Purchaser is indemnified under the policy, but the Contractor shall require such Sub-Contractor to produce to the Engineer when required the policy, the receipt for the premiums or satisfactory evidence of insurance cover.

General Insurance Requirements

47.6 All insurances shall be effected with an insurer and in terms to be approved by the Purchaser (such approval not to be unreasonably withheld) and the Contractor shall from time to time, when so required by the Engineer, produce the policy and receipts for the premium or other satisfactory evidence of insurance cover. The Contractor shall promptly notify the Purchaser of any alteration to the terms of the policy or in the amounts for which insurance is provided.

Exclusions from Insurance Cover

47.7 The Insurance Policies may exclude cover for any of the following:–

(a) the cost of making good or repairing any Plant which is defective or work which is not in accordance with the Contract;

(b) the Purchaser's Risks;

(c) indirect or consequential loss or damage including any deductions from the Contract Price for delay;

(d) fair wear and tear; shortages and pilferages;

(e) risks related to mechanically propelled vehicles for which third party or other insurance is required by law.

Remedy on Failure to Insure

48.1 If the Contractor shall fail to effect and keep in force the insurances referred to in these Conditions the Purchaser may effect and keep in force any such insurance and pay such premiums as may be necessary for that purpose and from time to time deduct the amount so paid by the Purchaser from any monies due or which may become due to the Contractor under the Contract or recover the same as a debt from the Contractor.

Joint Insurances

48.2 Wherever insurance is arranged under the Conditions in the joint names of the parties, or on terms containing provisions for indemnity to principals, the party effecting such insurance shall procure that the subrogation rights of the insurers against the other party are waived and that such policy shall permit either:

(a) the co-insured, or

(b) the other party to the Contract

to be joined to and be a party to any negotiations, litigation or arbitration upon the terms of the policy or any claim thereunder.

12.3.2.1. Responsibility for the works - clauses 43.1 to 43.3.

Under clause 43.1 the contractor is responsible for the care of the works including outstanding work which he has undertaken to carry out during the defects liability period. This responsibility continues until the date of issue of a take over certificate or expiry of any notice of termination of the contract by either party.

Clause 43.2 emphasises the previous clause 43.1. making the contractor liable for the cost of such loss or damage to the works subject to the purchaser being responsible for loss or damage by the "Purchaser's Risks". Equally the contractor must make good at his own expense any loss or damage caused after taking-over whilst completing any outstanding work or in complying with his obligations in relation to defects under clause 36 (Defects Liability). Purchaser's risks are defined in clause 45.1, and force majeure, mentioned in clause 45.1, is defined in clause 46.1. It will be seen that this last definition follows fairly closely the GC/Works/1 "Accepted Risks" mentioned in condition 1(1) (see chapter 11.1), namely war and kindred risks, nuclear risks and sonic waves, plus circumstances beyond the reasonable control of either of the parties.

Taking the "Purchaser`s Risks" in the order they appear in the definition;

(a) In the case of the first of the purchaser`s risks concerning design it is necessary for the contractor to have disclaimed liability in accordance with clause 13.3 (Contractors`s Design) for him to avoid responsibility and for the risk to fall on the purchaser.

(b) Damage caused by the contractor through use or occupation of the site is self-explanatory. It has to be inevitable.

(c) Damage caused as an inevitable result of the construction of the works, unless it arises from the contractor`s method of construction, should be the purchaser's responsibility.

(d) Use of the works by the purchaser is distinguished from use or occupation of the site by the works (see (b) above) as it includes risks within the purchaser`s control, eg his use of the works.

(e) These legal liabilities of the engineer and purchaser are self-explanatory, and are dealt with in chapter 8.

(f) Force majeure as defined concerns risks which are usually not insurable, with the possible exception of riot and circumstances beyond the reasonable control of either of the parties.

Clause 43.3 states that if any part of the works is damaged by reason of the "Purchaser`s Risks" while the contractor has responsibility for care of the works, the purchaser has six months to require the contractor to make good the loss or damage at the purchaser`s expense. If a price cannot be agreed then it is to be determined by arbitration under clause 52.

12.3.2.2. Insurance of the works clauses 47.1,47.2 and 47.7.

Clause 47.1 requires a policy in the joint names of the contractor and the purchaser to insure the works and the contractor`s equipment for their full replacement value against all loss or damage from whatever cause arising, other than the purchaser`s risks. So a CAR policy is required from the date of the letter of acceptance until 14 days after the date of issue of a

taking-over certificate in respect of the works, or 14 days after the date when responsibility for the care of the works passes to the purchaser. Letter of acceptance means the formal acceptance by the purchaser of the tender. Clause 47.2 requires the policy to cover damage which is the contractor`s responsibility in accordance with clause 36 (defects liability). In fact CAR policies provide this cover only in a limited form. Clause 36.2 refers to defect or damage to any part of the works which arises from any defective materials, workmanship or design, and the normal CAR policy would only give a limited design cover at best. Also the CAR policy would usually exclude the cost of replacing defective materials or workmanship (see chapter 4.5.1). However, the first line of clause 47.2 does say "so far as reasonably possible" so presumably the limitations mentioned above can be ignored as not being reasonably possible. Moreover, the contractor`s obligations under the defects liability clause 36.2 do not apply to defects in design furnished or specified by the purchaser or engineer in respect of which the contractor has disclaimed responsibility in accordance with clause 13.3 (Contractor's Design) mentioned earlier. Furthermore, exclusion (a) of clause 47.7, mentioned in the next paragraph, seems to exclude the cost of defective materials and workmanship, bearing in mind that "Plant" includes materials and the exclusion refers to "work which is not in accordance with the Contract".

Clause 47.7 lists allowable exclusions in the insurance policies. The confusing aspect is that these exclusions apparently apply to the CAR policy and the public liability policy. Clearly a number of these exclusions can only

apply to the CAR policy. Bearing in mind the object of this thesis, the question is whether these exclusions together with the other insurance clauses are sufficient to meet the requirements one would like to see in construction contracts asking for a CAR policy. While this aspect will be dealt with under the next heading it is sufficient to refer again to the phrase in clause 47.7(a) reading "work which is not in accordance with the Contract" as probably including the policy exclusion concerning the cost of defective workmanship. The other exclusions in the clause are self-explanatory.

12.3.2.3. Reasons for accepting clauses 47.1, 47.2 and 47.7 subject to the Northern Ireland exception.

The reader is reminded that it was argued in chapter 4.11 that the parts of a CAR policy which should be included in a construction contract should be those which appear in clause 22.2 of the JCT contract 1980 Edition, 1986 Amendment. Turning to the clauses in the heading and applying the test just mentioned, it seems that clause 47.1 calls for a satisfactory operative clause for a CAR policy. Incidentally, clause 1 of this MF/1 contract defines "Works" and "Plant" so that works includes plant, which includes materials. Therefore it seems that "works" includes materials intended to form part of the works.

The exclusions of the CAR policy, which a construction contract should mention, and are mentioned, in the MF1 contract are;

(a) The defect in design, materials and workmanship, which has already been discussed when considering clauses 47.2 and 47.7. Clearly this contract expects some exclusions in this respect.

(b) War and kindred risks, nuclear risks and sonic waves which appear in the Force Majeure clause 46.1. It is also arguable that the phrase in the same clause reading "circumstances beyond the reasonable control of either of the parties" would include "confiscation, commandeering, nationalisation etc" mentioned in clause 22.2 of the JCT contract as an exception.

(c) Wear and tear, shortages and pilferages are excluded in clause 47.7. This leaves the Northern Ireland exclusion, which is included in clause 22.2 of the JCT contract, but not in the MF/1 contract. The next question is where should this exclusion appear in the MF/1 contract? Probably the best place is to add a paragraph on to clause 47.7. This would not include civil commotion as this already appears in the Force Majeure clause 46.1. It would read as follows;

> (f) if the contract is carried out in Northern Ireland any unlawful, wanton or malicious act committed maliciously by a person or persons acting on behalf of or in connection with an unlawful association; "unlawful association" shall mean any organisation which is engaged in terrorism and includes an organisation which at any relevant time is a proscribed organisation within the meaning of the Northern Ireland (Emergency Provisions) Act 1973; "terrorism" means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.

12.3.2.4. Injury to persons and property - clauses 43.4 and 43.5.

Under clause 43.4 whilst the contractor is responsible for the works, he is liable to indemnify the purchaser in respect of any claims for injury or death to, or loss or damage to any property of, third parties. This applies unless the purchaser or a person for whom he is responsible, causes the injury or damage through his act or neglect. If damage is an inevitable consequence of the execution of the works the contractor is not liable.

Under clause 43.5 after the responsibility for the works has passed to the purchaser, if any injury or property damage is caused by negligence or breach of statutory duty by the contractor or any person for whom he is responsible or by defective design materials or workmanship (but not the purchaser`s or engineer's design responsibility), the contractor must indemnify the purchaser. See sub-clause 13.3 (Contractor`s design responsibility) and 12.3.2.1 above.

12.3.2.5. Third Party Insurance - clause 47.4.

This clause requires the contractor to effect public liability insurance cover for an amount set out in the Special Conditions at the end of the General Conditions. Cover must be for liability for damage or injury arising out of the execution of the works. The policy must contain an indemnity to principal provision (the purchaser in this contract) for any claims for incidents for which the contractor would have been entitled to an indemnity. There is no requirement to effect joint names insurance.

12.3.2.6. A suggested improvement in the wording of clause 47.4

It has been argued in chapter 6.12 that the request for a public liability policy in a construction contract should include the operative clause, a cross liability extension (if joint names cover is required) and certain policy exceptions. Now clause 47.4 calls for an operative clause of the type mentioned in chapter 6.3 although it falls short of mentioning obstruction, trespass and nuisance. However, as the drafters of clause 45.1 (Purchaser`s Risks) impose a limitation on the contractor`s liability for obstruction, trespass and nuisance in the "use or occupation of the site in order to construct the works" paragraph, it is as well to leave out any cover for these torts in order not to cause confusion.

By implication clause 47.4 does not include claims by employees of the contractor in two respects. It mentions that claims by employees of the purchaser are to be included in the cover, but no mention of the employees of the contractor is made, and clause 47.5 deals with this aspect as far as liability insurance is concerned. Consequently, when including the exceptions suggested in chapter 6.12 the injury to employee's exclusion need not appear, nor need the war and kindred risks, and the nuclear risks exclusions as they appear in clause 46.1 (Force Majeure). Furthermore, the mechanically propelled vehicle (licensed for road use) exception already appears in clause 47.7, as the purchaser's risks do.

This leaves the following exceptions to be incorporated, it is suggested, as an addition to clause 47.7, bearing in mind that paragraph (f) has already been used (see 12.3.2.3 above), as follows:

and legal liability of the insured

(g) arising out of ownership possession or use by or on behalf of the insured of any
(i) aircraft aerospacial device or hovercraft
(ii) watercraft other than hand propelled watercraft or other watercraft not exceeding 20 feet in length.

(h) in respect of damage to property
(i) belonging to the insured
(ii) in the custody or under the control of the insured or any employee (other than property belonging to visitors directors partners or employees of the insured). But this part of this exception shall not apply to damage to buildings (including contents therein) which are not owned by or leased or rented by the Insured but are temporarily occupied by the Insured for the purpose of maintenance alteration extension installation or repair.

(i) for the cost of and expenses incurred in replacing or making good faulty defective or incorrect
(i) workmanship
(ii) design or specification
(iii) materials goods or other property supplied installed or erected by or on behalf of the insured

(j) caused by or arising from advice design or specification provided by the insured for a fee.

(k) caused by or arising from seepage pollution or contamination unless due to a sudden unintended and unexpected event.

12.3.2.7. Accidents or Injury to Workmen - clause 43.6.

The remarks in chapter 9.7 are applicable here, reading "purchaser" for "employer". However, the last sentence should now read "While there is an insurance requirement (see clause 47.5), in the UK this is compulsory".

12.3.2.8. Insurance against Accident etc to Workmen - clause 47.5.

As this MF/1 contract is used for oversees contracts it is necessary to require insurance against the contractor`s liability under clause 43.6 (see previous heading). This inevitably includes catering for the indemnity given to the purchaser for accident etc to workmen of any sub-contractor. This is done in the same way as is set out in chapter 9.8 by the wording similar to the FIDIC contract, being already incorporated. In these circumstances the

same conclusion can be reached as mentioned in chapter 5.9, is that there is nothing to add to improve this construction contract as far as the employers` liability policy is concerned.

CHAPTER 13

CONCLUSIONS

13.1.A construction professional should not render services outside his area of expertise but cannot always avoid this.

The editors of Building Law Reports in volume 10 on page 50 make the following comments concerning the judgement of Gibson J in B L Holdings V Wood & Partners (1978) (mentioned in the quotation from the Capper/Uff Report in chapter 1):

> The decision seems to us to illustrate the general proposition that a professional man who takes on a particular task may be judged by the standard applicable to a reasonably competent man versed in work of that category (unless by agreement with his client he is not to be so judged). Thus in many cases the best advice that a person in such a position can give is that his client should seek better and more qualified advice.

The Court of Appeal did not disapprove of the statements of principle of Gibson J, although they decided the defendants, on the particular facts (a difficult point of law), were not negligent in not specifically advising their clients of the need to obtain legal advice.

Brown, J.C. (1992), p12 anticipates the creation of multi-disciplinary practices in the professions.

He says;

> It is always the advice of insurers to professionals that they should desist from straying into areas giving gratuitous advice where there is no knowledge and expertise. However, this is dependent upon there being a static defined boundary for the activities of the professions.

He then goes on to indicate trends among the professions to overlap their areas of activity, which will give rise to difficulties for the courts in

ascertaining the appropriate legal tests to apply. However, as mentioned in chapter 1, it is not for this thesis to anticipate law reform.

More to the point of this thesis is the following extract from a talk by Sandridge, H.M. (1989) p114.

> Construction professionals on occasion will be requested to prepare specifications or requirements related to insurance covers for other parties, such as contractors involved in the project. Again, this is an area that is outside the expertise of almost every construction professional. Just as you could not appropriately provide legal advice nor can you appropriately provide advice in the area of insurance. Your client has many sources for this information within the insurance industry. Unfortunately, by giving this information or, worse yet, merely transferring the requirements from a previous project to a current one, the construction professional runs the risk of facing an exposure to a claim when his client suffers a loss for which there is inadequate or no insurance cover.

All this confirms that the law does not sympathise with volunteer professionals who can easily become involved in liability because they give advice outside their specialised knowledge. It is true that they could issue a disclaimer of liability on this subject, but this may not be so easy when a client, who is paying a fee, is involved.

Consequently, although the advice given in the heading to this section is fine concerning the preparation of specifications relating to insurance cover, when it comes to the use of a construction contract (often prepared by the professional`s own association) which basically calls for named policies, eg the conventional policies, the position can be different. Thus, the JCT and ICE contracts create this position, and the professional who is without any guide as to the specific cover required by the construction contracts from these policies (except for the JCT CAR cover) can be in difficulty. It is a fact that these current construction contracts require the contractor`s policies to

be forwarded to the architect or employer for inspection by the employer. See the JCT contract clauses 21.1.2 and 22A.2 and the ICE clauses 25(1) and 25(3). In practice the experienced architect, engineer and quantity surveyor in this position, especially when his client is not having construction work carried out regularly, ie the client has little experience in this field, will rightly consider he knows more about insurance than his client. There seems little doubt that the professional does know more about the conventional policies than his client in these circumstances, and probably will not trouble his client with what he considers to be a peripheral matter. It would probably be different if the client were, say a local authority or developer, who would have insurance knowledge. Whether the construction professional makes much of a practice of seeking the advice of an insurance professional, concerning the conventional policies, is doubtful. Unfortunately when there is a claim and there is no cover, the client will look for someone to blame, and who better than a party who is in contractural relationship with him, ie the construction professional. Now if the construction contract gives an indication of the specific cover required there is every hope that the professional will have taken note of the insurance policy details set out in the construction contract. It should be fairly easy to check these with the contractor`s cover as standard exclusions have been chosen, but occasionally it may not be so easy. For example, the cover given by CAR policies can vary in respect of design risks, as seen in chapter 4.5.1 Even so if the construction contract sets out the wording of the design exclusion permitted there should be no difficulty in deciding whether the

CAR policy submitted by the contractor is acceptable. Apart from exclusions covered by other policies, eg motor, aviation and marine risks, other exclusions are not allowed. Thus the setting out of the insurance cover more specifically is essential in the construction contracts at least to the extent of detailing the operative clause and the exclusions of the policy concerned. See also Appendix 3.

13.2. The employer.

Assuming the construction contract puts the responsibility for inspecting the insurance policies required on the employer and this is adhered to literally, then the employer will appreciate some help from the construction contract in the way just suggested at the end of the previous paragraph. Even if the employer is a local authority or developer he will still appreciate some guidance in this respect. If he so wishes he can obtain wider cover, but at least he will know the minimum cover required.

13.3. The insurance adviser

A professional insurance adviser will be able to indicate whether a particular policy submitted to him for inspection is a standard one, ie a commonly used operative clause and common exclusions. Construction contracts usually only name the insurance policies required or the risks to be covered in general terms, so arguably a standard policy so named or covering the risks concerned complies with the construction contract. In 99 out of 100 cases this argument will probably be acceptable to the client. It will certainly pass the responsibility from the construction professional, who may otherwise be involved as a volunteer (see 13.1 and chapter 1), or at least give him the

defence that he consulted an insurance specialist. However, in the 100th case the employer, who finds a claim is not covered, will look round to recover from another source and may argue that wider cover is available in the insurance market. While this can be defended on the ground that the contruction contract did not ask for the wider cover, nobody wants the bother and worry of a claim, so it is far better for the construction contract to be specific as suggested, even for the insurance adviser`s benefit.

If the insurance specialist consulted did not place the insurance and thus earn commission the question arises as to who is going to pay him? For example, the employer`s insurance broker may not be a CAR specialist thus the architect or engineer may not wish to consult him or may prefer his own specialist, This tends to militate against using an insurance specialist.

13.4. Insurers.

While insurers do not wish to give wider cover than their standard policy wording, they will always consider wider cover subject to an additional premium, unless the risk is regarded as uninsurable. However, it is confidently considered that the suggested wordings for the conventional policies are standard wordings. More often than not the insurer's wordings will be at least as wide as the wording suggested in this thesis. Consequently insurers should support the suggested wordings.

13.5. Lawyers.

The cynical school of thought might suggest that as lawyers make a living from litigation, and litigation arises through uncertainty, it is not in their interest to support any suggestion which replaces uncertainty with certainty.

By far the better view is that any part of their involvement which is simplified would be more acceptable and beneficial to them.

13.6. Possible criticisms of the specific insurance cover suggested.

1. Those responsible for checking the insurance cover provided by the contractor would still have to:

(a) decide whether for the particular construction contract concerned any extension of cover and/or removal of exclusion(s) is required; and

(b) check that the policy conditions (as opposed to exclusions) are acceptable; and

(c) ensure that the insurances are in force and are kept in force.

This is a criticism which cannot be avoided (except (b) and possibly (a) by a complete agreed combined contractors` policy being added to the construction contract, which has been disregarded as not practical at the present, see 6 below) whatever improvement is adopted. Thus it is not within the aim of this thesis.

2. There is possible danger in asking for cover which the insurance market in general does not give. This occurred under the JCT contract in 1963 when the original clause 19(2)(a) (now 21.2.1) was introduced as it did not state the risks or identify the property required to be covered by the insurance. Insurers avoided transacting this type of insurance as they felt they were exposing themselves to a very wide and unfavourable measure of liability. Architects and quantity surveyors were inclined to take the attitude that they were neither insurance experts nor lawyers and they should not be called upon to decide the extent of cover to be specified in the contract bills.

Even so one insurer, the Sun Alliance, at the time was prepared to cover the original wide ranging clause. Eventually in 1968 a new clause was introduced giving more detail and more insurers were prepared to produce the type of special policy concerned. Again in 1986 the JCT contract in clause 22D called for a type of consequential loss insurance cover, which originally only one insurer, the Trinity, was (now the Avon is) prepared to provide. These mistakes do not seem to worry the drafters, at least they do not react to such mistakes very quickly, and for a time it puts a strain on the insurance adviser as well as the professional construction adviser, which is good reason for ensuring that the insurance market, as a whole will provide the cover required. Admittedly the examples given are of special types of insurance and not the conventional policies which this thesis considers. Therefore the writer is more likely to have avoided this trap of asking for cover which is not generally given, although the 1986 drafters seemed to be testing the insurance market in asking for a rather wide design cover by the CAR exclusion in clause 22.2. See chapter 4.5.1, but the exception in Appendix 1, section 3 gives even wider cover.

3. It seems clear that where specific exclusions are given in the construction contract, as they are in clause 22.2 of the 1986 JCT contract concerning the CAR policy, the intention seems to be to disallow any additional exclusions. This raises a query about those exclusions applying to risks which are covered by other policies, eg motor, marine, aviation and engineering risks in the case of the CAR policy. The answer to this criticism is that it seems to be accepted that where apparent non-allowable

exclusions appear in a policy submitted for inspection under the terms of a construction contract, provided those exclusions merely apply to risks covered by other standard policies, they should not be considered in violation of the construction contract.

4. Some critics might argue that the task of the professional adviser would become even more onerous if he were expected to check the wording of policies submitted by the contractor, against specific details contained in a construction contract. This view is combined with the argument that the aim of this thesis would be better served by suggesting that the various drafters of construction contract should follow the example of the PSA in the GC/Works/1 Edition 3 and include Certificates of Insurance seeking confirmation from the contractor`s insurers, and when appropriate from the employer`s insurers, that policies have been arranged which satisfy the insurance clauses. Thus the responsibility for this confirmation would be transferred to the insurance professionals, ie the insurers or the brokers. The answer to this criticism is that it is a defeatist or laissez-faire approach in that it accepts the present position, as the professional adviser is having to check policy wordings without any guide against which to check those wordings, except for clause 22.2 of the JCT contract. Furthermore Certificates of Insurance are fine as far as they go, namely to transfer responsibility to the insurance professionals, but the latter would still be better off to have some guide from the construction contract.

5. The idea of embracing in a construction contract an insurance policy operative clause and main exclusions could be considered as introducing

the lowest denominator of cover with insurers hiding behind it. On the other hand any standard introduced into the construction contract would, and should, not prevent wider cover being taken if the contractor wanted, and could obtain, it. However, even if the idea is not criticised on these grounds, individual policy items chosen for incorporation into a construction contract, will possibly be criticised. This latter point is a pure matter of opinion.

6. Finally the suggested alternative of adding a complete form of combined policy as an appendix to a construction contract has the advantage over the suggestion adopted by this thesis that, once the insurance industry (or a sufficient number of insurers) has accepted a combined policy wording, there would be nothing for those responsible for checking this cover to do. The insurer concerned would merely confirm the issued policy follows exactly the agreed wording.

Nevertheless, one has to be practical and, as explained in chapter 1 para D, there is little likelihood of all the drafters of the main construction contracts agreeing to do this in the near future, because these drafters have only recently (in the last few years) remodelled the wording of the clause concerned. The JCT contract in 1986, the ICE Conditions in 1991, and the GC/Works/1 (with important subsidiary documents) in 1990, remodelled the wording of their responsibility for the works, their liability and insurance clauses. Perhaps this is a legitimate aim for the distant future. Even then it might be considered cumbersome to include a contract within a contract, bearing in mind that approximately ten pages would be added to the construction contract, assuming a separate page for each main heading of

the policy (see Appendix 1). Drafters will not accept alterations to their existing wording easily. Additions are more easily acceptable as they do not involve remodelling. This is where the suggestion adopted by this thesis has the advantage over this alternative suggestion, apart from being more practical. The suggestion under discussion not only involves adding a large appendix, but altering all the present insurance clauses so that they refer to that appendix and deleting most of the present references to insurance requirements. Clearly this suggestion is not as straightforward as it first appears.

CHAPTER 14

RECOMMENDATIONS

14.1. The ICE Conditions of Contract.

The improvement in clause 21 (the CAR insurance) is given in chapter 9.3. Basically this treats clause 21(2)(a) as an operative clause and extends it by listing the exclusions in clause 22.2 of the JCT contract. However, the defective design, nuclear risk, sonic waves, war and kindred risks exclusions are left out because they already appear in the "excepted risks" excluded from the CAR cover by clause 21(2)(a), and similarly materials or workmanship not in accordance with the contract are excluded by clause 21(2)(c).

The improvement in clause 23 (the Third Party or Public Liability insurance) is given in chapter 9.6. Basically this treats clause 23(1) as a form of operative clause plus clauses 23(2) (Cross liability clause) and 23(3) (Amount of insurance), and adds a new clause 23(4) to include the exceptions suggested in chapter 6.12.

The improvement in clause 24 (Accident or injury to workpeople), which concerns compulsory insurance in the UK, is merely to cater for the provision requiring the contractor to indemnify the employer for injury caused to sub-contractors' own employees. The additional clause 24(2) is taken from the FIDIC contract. See chapter 9.8.

14.2 The FIDIC contract.

A similar improvement to this contract is suggested as was made to the ICE Conditions just mentioned because this wording is so similar. See chapter 9.10 to avoid too much repetition.

14.3 The JCT contract.

The improvement in clause 21.1 is given in chapter 10.4. Basically the existing clauses 21.1.1.1 and 21.1.1.2 are considered suitable for the required operative clause of an insurance policy covering employers` and public liability risks, but an additional clause 21.1.1.3 provides the exceptions suggested in chapter 6.12 for the public liability policy. However, the exclusions concerning contract works and war and kindred risks are not involved as they are catered for elsewhere in the contract. The cross liability clause is not necessary as a joint names policy is not required.
By chapter 10.6 the existing clause 22.2 is considered satisfactory as it stands when insuring the works against all risks.

14.4 The GC/Works/1 contract.

The initial recommendation in chapter 11.5 is that the Summary of Essential Insurance Requirements should apply to all contracts using the GC/Works/1 form. This allows the following suggestions to apply to all contracts to which clause 8 (Insurance) applies.
Secondly, as the operative clauses already appear in the document of essential insurance requirements, it is suggested under both the CAR and PL sections of this document that there should be an additional heading entitled "Exceptions". This will provide the exceptions which have been

recommended for all construction contracts in chapters 4.11 and 6.12 including the "Accepted risks". These risks are war and kindred risks, nuclear risks and sonic waves. The liability to employees exception will not appear in the PL section as it already appears in the operative clause of the "Summary of Essential Insurance Requirements". However, it is necessary to request a cross liability clause for the PL section as it seems a joint names policy is required.

In view of the compulsory aspect of employers` liability insurance and the lack of exceptions in that policy no improvements are suggested for this policy. See Chapter 5.9.

14.5. Other relevant contracts.

14.5.1. Use of the Fifth Schedule of the ICE Sub-Contract to improve the request for insurance.

Chapter 12.1.1.1 deals with this recommendation.

Assuming the sub-contractor is to get the benefit of the main contractor`s CAR policy set out in Part II of the Fifth Schedule, this only leaves the employers` and public liability policies of the sub-contractor to be detailed in Part I. So in any event the Fifth Schedule could print out the operative clause of the employers` liability policy covering the legal liability of the insured for bodily injury to employees arising out of the employment. There are no exceptions to this policy. The important aspects of the public liability policy were considered in chapter 6.12, which includes a modified wording of the operative clause (see chapter 6.3), reduced to legal liability for bodily injury and damage to property. The wording of the exceptions is given in

chapter 9.6 and 10.4, which are the same, leaving out the following exclusions, liability to employees, contract works, and war and kindred risks, as they will appear in all public liability policies, but they could be included. Where the sub-contractor is not allowed the benefit of the main contractor`s CAR policy in Part II of the Fifth Schedule, the wording of the sub-contractor`s CAR policy must now appear in Part I. The wording of the operative clause and exceptions set out in clause 22.2 of the JCT contract is suitable, and could be typed into Part I. However, the usual wording of the exceptions of nuclear risks and sonic waves will have to be specifically mentioned, as "excepted risks" do not appear in the ICE Sub-Contract.

14.5.2. An improvement in the JCT Intermediate Form IFC 84 as amended in 1986.

The insurance requirements all appear in clause 6.2 and 6.3. Because of the close similarity in wording (but not in clause numbers) to the JCT contract the same suggestions to improve the wording of clause 6.2.1 (Insurance against injury to persons and property) can be made as was made to improve the wording of clause 21.1.1.1 of the JCT 1986 contract. See chapter 10.4. This involves an additional clause 6.2.1.1 to provide the exceptions to the PL risk equivalent to the additional clause 21.1.1.3 suggested for the JCT contract.

Regarding the insurance of the works the remarks in chapter 10.5 apply reading clause 6.3.2 for clause 22.2. In other words the JCT suggestion for an all risks policy can be accepted.

14.5.3. The JCT Contract with Contractor's Design.

This contract merits the same improvements as JCT 1986. As this contract follows the JCT 1986 contract even more closely (even to the same clause numbers) than the Intermediate Form (IFC 84 with Amendment 1 of 1986) dealt with under the previous heading, it is clear that the same suggestions will apply.

14.5.4. The Model Form of General Conditions of Contract by the Institutions of Mechanical and Electrical Engineers (MF/1)

Improvements here are to apply to clauses 47.1, 47.2, and 47.7 (Insurance of Works, Extension, and Exclusions), also to clauses 47.4 (Third Party Insurance) and 47.5 (Insurance against Accidents to Workmen).

14.5.4.1. Improvement of Insurance of the Works.

The improvement to clauses 47.1, 47.2,and 47.7 is to accept them subject to the Northern Ireland exclusions as otherwise the parts of the CAR policy suggested in chapter 4.11 are already present. See chapter 12.3.2.3.

14.5.4.2. Improvement of the Insurance of Third Party cover.

The improvement in clause 47.4 suggested by chapter 6.12 only involves those exceptions listed in 12.3.2.6. as the others are already present.

14.5.4.3 Improvement of Insurance against Accident to Workmen.

No improvement in clause 47.5 is necessary. See chapter 12.3.2.8.

14.6. The improvement of the insurance requirements of construction contracts generally.

There seems to be no reason why any construction contract calling for the conventional (CAR, PL and EL) insurance policies should not be extended to explain the basic operative clause required and exceptions allowed. This does not mean to say that other policy exceptions cannot appear provided they detail cover given by other standard policies, eg motor, marine, aviation, engineering and professional negligence policies.

In drafting these insurance improvements the general rule is to try to keep within the existing pattern or system adopted by the construction contract concerned. See for example the suggestions made for the GC/Works/1 Edition 3 explained in chapter 11.5 and the suggestions made for the ICE Sub-Contract Form in chapter 12.1.1.1.

There is no doubt that clause 22.2 in the JCT contract, with the 1986 Amendment, has been useful in pointing out the way this can be done so far as the CAR policy is concerned. Thereafter it is a matter of following this approach for the other construction contracts and the other conventional policies. It is hoped that this thesis has achieved this result.

Justifying the object of this thesis in another way, it is fair to say that what has been proved, by passage of time without complaint, to be a practical success in one construction contract concerning one conventional policy, should be a practical proposition in other construction contracts and for other conventional policies.

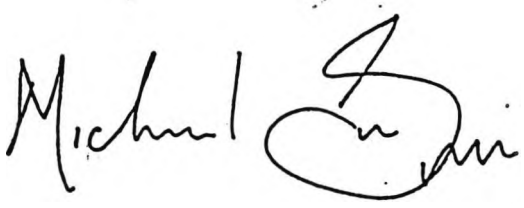
APPENDIX 1

CONTRACTORS INSURANCE POLICY.

SPECIMEN

In consideration of the payment of the premium the Independent Insurance Company Ltd (the Company) will indemnify the Insured in the terms of this Policy against the events set out in the Sections operative (specified in the Schedule) and occurring in connection with the Business during the Period of Insurance or any subsequent period for which the Company agrees to accept payment of premium.

The Proposal made by the Insured is the basis of and forms part of this Policy.



M J Bright
Managing Director

DEFINITIONS

1. Proposal shall mean any information provided by the Insured in connection with this insurance and any declaration made in connection therewith.

2. Business shall include
   (a) the provision and management of canteens clubs sports athletics social and welfare organisations for the benefit of the Insured's Employees
   (b) the ownership repair maintenance and decoration of the Insured's premises and the provision and management of first aid fire and ambulance services
   (c) private work carried out by an Employee of the Insured (with the consent of the Insured) for any director partner or senior official of the Insured.

3. Employee shall mean
   (a) any person under a contract of service or apprenticeship with the Insured
   (b) (i) any labour master or labour only subcontractor or person supplied or employed by them
   (ii) any self-employed person
   (iii) any person hired or borrowed by the Insured from another employer under an agreement by which the person is deemed to be employed by the Insured
   (iv) any student or person undertaking work for the Insured under a work experience or similar scheme while engaged in the course of the Business.

4. Bodily Injury shall include
   (a) death illness or disease
   (b) wrongful arrest wrongful detention false imprisonment or malicious prosecution
   (c) mental injury mental anguish or shock but not defamation.

5. Damage shall include loss.

6. Property shall mean material property.

7. Territorial Limits shall mean
   (a) Great Britain Northern Ireland the Isle of Man the Channel Islands or off shore installations within the continental shelf around those countries
   (b) member countries of the European Economic Community where the Insured or directors partners or Employees of the Insured who are ordinarily resident in (a) above are temporarily engaged on the Business of the Insured
   (c) elsewhere in the world where the Insured or directors partners or Employees of the Insured who are ordinarily resident in (a) above are on a temporary visit for the purpose of non-manual work on the Business of the Insured.

8. Excess shall mean the total amount payable by the Insured or any other person entitled to indemnity in respect of any Damage to Property or the Property Insured arising out of any one event or a series of events arising out of one original cause before the Company shall be liable to make any payment.

   If any payment made by the Company shall include the amount for which the Insured or any other person entitled to indemnity is responsible such amount shall be repaid to the Company forthwith.

9. Contractual Liability shall mean liability which attaches by virtue of a contract or agreement but which would not have attached in the absence of such contract or agreement.

10. Contract Works means the temporary or permanent works executed or in course of execution by or on behalf of the Insured in the development of any building or site or the performance of any contract including materials supplied by reason of the contract and other materials for use in connection therewith.

11. Principal shall mean any person firm company ministry or authority for whom the Insured is undertaking work.

Section 1 - EMPLOYER'S LIABILITY

In the event of Bodily Injury caused to an Employee within the Territorial Limits the Company will indemnify the Insured in respect of all sums which the Insured shall be legally liable to pay as compensation for such Bodily Injury arising out of such event.

Avoidance of Certain Terms and Right of Recovery

The indemnity provided under this Section is deemed to be in accordance with such provisions as any law relating to the compulsory insurance of liability to Employees in Great Britain Northern Ireland the Isle of Man or the Channel Islands may require but the Insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the provisions of such law.

World-wide

The indemnity granted by this Section extends to include liability for Bodily Injury caused to an Employee whilst temporarily engaged in manual work outside the territorial Limits

Provided that

(a) such Employee is ordinarily resident within Great Britain Northern Ireland the Isle of man or the Channel Islands

(b) the Company shall not be liable to indemnify the Insured in respect of any amount payable under Workmen's Compensation Social Security or Health Insurance legislation.

Section 2 - PUBLIC LIABILITY

In the event of accidental
(a) Bodily Injury to any person
(b) Damage to Property
(c) obstruction trespass or nuisance
occuring within the Territorial Limits the Company will indemnify the Insured in respect of all sums which the Insured shall be legally liable to pay as compensation in respect of such event.

The Company shall not be liable for any amount exceeding the Limit of Indemnity.

Motor Contingent Liability

Notwithstanding Exception 2(c) below the Company will indemnify the Insured within the terms of this Section in respect of liability for Bodily Injury or Damage to Property caused by or through or in connection with any motor vehicle or trailer attached thereto (not belonging to or provided by the Insured) being used in the course of the Business

Provided that the Company shall not be liable for
(a) Damage to any such vehicle or trailer
(b) any claim arising whilst the vehicle or trailer is
  (i) engaged in racing pacemaking reliability trials or speed testing
  (ii) being driven by the Insured
  (iii) being driven with the general consent of the Insured or of his representative by any person who to the knowledge of the Insured or other such representative does not hold a licence to drive such a vehicle unless such a person has held and is not disqualified from holding or obtaining such a licence
  (iv) used elsewhere than in Great Britain Northern Ireland the Isle of Man or the Channel Islands.

Defective Premises Act 1972

The indemnity provided by this Section shall extend to include liability arising under Section 3 of the Defective Premises Act 1972 or Section 5 of the Defective Premises (Northern Ireland) Order 1975 in respect of the disposal of any premises which were occupied or owned by the Insured in connection with the Business.

Provided that the Company shall not be liable for the cost of remedying any defect or alleged defect in such premises.

Movement of Obstructing Vehicles

Exception 2(c) shall not apply to liability arising from any vehicle (not owned or hired by or lent to the Insured) being driven by the Insured or by any Employee with the Insured's permission whilst such vehicle is being moved for the purpose of allowing free movement of any vehicle owned hired by or lent to the Insured or any Employee of the Insured

Provided that
(a) movements are limited to vehicles parked on or obstructing the Insured's own premises or at any site at which the Insured are working
(b) the vehicle causing obstruction will not be driven by any person unless such person is competent to drive the vehicle
(c) the vehicle causing obstruction is driven by use of the owner's ignition key
(d) the Company shall not indemnify the Insured against
  (i) Damage to such vehicle
  (ii) liability for which compulsory insurance or security is required under any legislation governing the use of the vehicle.

Leased or Rented Premises
Exception 4(b) shall not apply to Damage to premises leased or rented to the Insured

Provided that the Company shall not indemnify the Insured against
(a) Contractual Liability
(b) the first £100 of Damage caused otherwise than by fire or explosion.

EXCEPTIONS
The Company shall not indemnify the Insured against liability
1. in respect of Bodily Injury to any Employee arising out of and in the course of his employment by the Insured.
2. arising out of the ownership possession or use by or on behalf of the Insured of any
   (a) aircraft aerospatial device or hovercraft
   (b) watercraft other than hand propelled watercraft or other watercraft not exceeding 20ft in length
   (c) mechanically propelled vehicle licenced for road use including trailer attached thereto other than liability caused by or arising out of
      (i) the use of plant as a tool of trade on site or at the premises of the Insured
      (ii) the loading or unloading of such vehicle
      (iii) damage to any building bridge weighbridge road or to anything beneath caused by vibration or by the weight of such vehicle or its load

   but this indemnity shall not apply if in respect of such liability compulsory insurance or security is required under any legislation governing the use of vehicle.
3. for Damage to Property which comprises the Contract Works in respect of any contract entered into by the Insured and occurring before practical completion or a certificate of completion has been issued.

4. in respect of Damage to Property
   (a) belonging to the Insured
   (b) in the custody or under the control of the Insured or any Employee (other than Property belonging to visitors directors partners or Employees of the Insured)

Exception 4(b) shall not apply to Damage to buildings (including contents therein) which are not owned or leased or rented by the Insured but are temporarily occupied by the Insured for the purpose of maintenance alteration extension installation or repair.

5. for the cost of and expenses incurred in replacing or making good faulty defective or incorrect
   (a) workmanship
   (b) design or specification
   (c) materials goods or other property supplied installed or erected by or on behalf of the Insured.

6. caused by or arising from advice design or specification provided by or on behalf of the Insured for a fee.

7. for the Excess specified in the Schedule other than for Damage to premises leased or rented by the Insured.

8. caused by or arising from seepage pollution or contamination unless due to a sudden unintended and unexpected event.

Use of heat

It is a condition precedent to the liability of the Company that when

(a) welding or flame-cutting equipment blow lamps blow torches or hot air guns are used by the Insured or any Employee away from the Insured's premises the Insured shall ensure that
   (i) all moveable combustible materials are removed from the vicinity of the work
   (ii) suitable portable fire extinguishing apparatus will be kept ready for immediate use as near as practicable to the scene of the work
   (iii) before heat is applied to any wall or partition or to any material built into or passing through a wall or partition an inspection will be made prior to commencement of each period of work to make certain that there are no combustible materials which may be ignited by direct or conducted heat on the other side of the wall or partition
   (iv) they are lit as short a time as possible before use and extinguished immediately after use and that they are not left unattended whilst alight
   (v) blow lamps are filled and gas cylinders or cannisters are changed in the open
   (vi) the area in which welding or flame-cutting equipment is used will be screened by the use of blankets or screens of incombustible material
   (vii) a fire safety check is made in the vicinity of the work on completion of each period of work

(b) vessels for the heating of asphalt or bitumen are used away from the Insured's premises the Insured shall ensure that each vessel
   (i) shall be kept in the open whilst heating is taking place
   (ii) shall not be left unattended whilst heating is taking place
   (iii) if used on a roof shall be placed upon a surface of non-combustible material
   (iv) shall be suitable for the purpose for which it is intended and be maintained and used strictly in accordance with the manufacturer's instructions.

Property in the Ground

The indemnity provided by this Section shall not apply to liability in respect of Damage to pipes cables mains and other underground services unless the Insured

1. has taken or caused to be taken all reasonable measures to identify the location of pipes cables mains and other underground services before any work is commenced which may involve a risk of Damage thereto

2. has retained a written record of the measures which were taken to comply with 1. above before such work has commenced

3. has adopted or caused to be adopted a method of work which minimises the risk of Damage to such pipes cables mains and other underground services.

In the event of Damage to the Property Insured the Company will by payment or at its option by repair reinstatement or replacement indemnify the Insured against such Damage

Provided that

1. the Company shall not indemnify the Insured in any one Period of Insurance for any amount exceeding the Limit of Indemnity in respect of each item of Property Insured

2. the Property belongs to or is the responsibility of the Insured

3. the Property is
   (a) on or adjacent to the site of the Contract Works or
   (b) being carried by road rail or inland waterway to or from the site of the Contract Works within the Territorial Limits.

Professional Fees

The Company will indemnify the Insured for architects surveyors consulting engineers and other professional fees necessarily incurred in the repair reinstatement or replacement of Damage to the Property Insured to which the indemnity provided by this Section applies

Provided that

(a) such fees shall not exceed that authorised under the scales of the appropriate professional body or institute regulating such charges
(b) the Company shall not indemnify the Insured against any fees incurred by the Insured in preparing or contending any claim.

Debris Removal

The Limit of Indemnity provided in respect of Item 1 of the Property Insured shall include the cost and expenses necessarily incurred by the Insured with the consent of the Company in

(a) removing and disposing of debris from or adjacent to the site of the Contracts Works
(b) dismantling or demolishing
(c) shoring up or propping
(d) cleaning or clearing of drains mains services gullies manholes and the like within the site of the Contract Works

consequent upon Damage for which indemnity is provided by this Section

Provided that the Company shall not be liable in respect of seepage pollution or contamination of any Property not insured by this Section.

Off-site Storage

The indemnity provided by this Section extends to apply to materials or goods whilst not on the site of the Contract Works but intended for incorporation therein where the Insured is responsible under contract conditions provided that the value of such materials and goods has been included in an interim certificate and they are separately stored and identified as being designated for incorporation in the Contract Works.

Final Contract Price

In the event of an increase occurring to the original price the Limit of Indemnity in respect of Item 1 of the Property Insured shall be increased proportionally by an amount not exceeding 20%.

Tools Plant Equipment and Temporary Buildings

The Limit of Indemnity in respect of Items 2, 3 and 5 of the Property Insured is subject to average and if at the time of any Damage the total value of such Item of the Property Insured is of greater value than the Limit of Indemnity the Insured shall be considered as being his own insurer for the difference and shall bear a rateable share of the loss accordingly.

Speculative Housebuilding

The insurance in respect of Item 1 of the Property Insured shall not withstanding Exception 4(b) for private dwelling houses flats and maisonettes constructed by the Insured for the purpose of sale continue for a period up to 180 days beyond the date of practical completion pending completion of sale.

Practical completion shall mean when the erection and finishing of the private dwelling house are complete apart from any choice of decoration fixtures and fittings which are left to be at the option of the purchaser.

Local Authorities

The Indemnity provided by this Section shall include any additional cost of reinstatement consequent upon Damage to the Property Insured which is incurred solely because of the need to comply with building or other regulations made under statutory authority or with bye-laws of any Municipal or Local Authority

Provided that

1. the Company shall not indemnify the Insured against the cost of complying with such regulations or bye-laws
   (a) in respect of Damage which is not insured by this Section
   (b) if notice has been served on the Insured by the appropriate authority prior to the occurrence of such Damage
   (c) in respect of any part of the Insured Property which is undamaged other than the foundations of that part which is the subject of Damage

2. the Company shall not indemnify the Insured against any rate tax duty development or other charge or assessment arising out of capital appreciation which may be payable in respect of the Property by its owner by reason of compliance with such regulations or bye-laws

3. reinstatement is commenced and carried out with reasonable despatch.

Immobilised Plant

The indemnity provided in respect of Items 2 and 4 of the Property Insured shall include the cost of recovery or withdrawal of unintentionally immobilised construc-tional plant or equipment provided that such recovery is not neccessitated solely by reason of electrical or mechanical breakdown or derangement.

Free Materials

Property for which the Insured is responsible shall include all free materials supplied by or on behalf of the Employer (named in the contract or agreement entered into by the Insured)

Provided that the total value of all such materials shall be included in the Limit of Indemnity for Item 1 of the Property Insured and also included in the declaration made to the Company under Condition 2.

EXCEPTIONS

The Company shall not indemnify the Insured against

1. the cost and expenses of replacing or making good any of the Property Insured which is in a defective condition due to faulty defective or incorrect
   (a) workmanship
   (b) design or specification
   (c) materials goods or other property installed erected or intended for incorporation in the Contract Works

   but this exclusion shall not apply to accidental Damage which occurs as a direct consequence to the remainder of the Property Insured which is free of such defective condition.

2. Damage due to
   (a) wear tear rust or other gradual deterioration
   (b) normal upkeep or normal making good
   (c) disappearance or shortage which is only revealed when an inventory is made or is not traceable to an identifiable event.

3. Damage to
   (a) machinery plant tools or equipment due to its own explosion breakdown or derangement but this exception shall be limited to that part responsible and shall not extend to other parts which sustain direct accidental Damage therefrom
   (b) aircraft hovercraft or watercraft other than hand propelled watercraft not exceeding 20ft in length
   (c) any mechanically propelled vehicle licensed for road use including trailer attached thereto other than Damage which occurs to plant whilst it is on the site of the Contract Works or it is being carried to or from such site or it is stored in a premises or compound of the Insured
   (d) bank notes cheques securities for money deeds or stamps
   (e) structures (or any fixtures fittings or contents thereof) existing at the time of commencement of the Contract Works
   (f) Item 1 of the Property Insured in respect of any contract or development
      (i) the value or anticipated cost of which at the time of its commencement exceeds the Limit of Indemnity for Item 1
      (ii) the period for which at the time of its commencement exceeds the Maximum Period.

4. Damage to the Contract Works or any part thereof
   (a) caused by or arising from use or occupancy other than for performance of the contract or for completion of the Contract Works by or on behalf of the Insured
   (b) occuring after practical completion or in respect of which a Certificate of Completion has been issued unless such Damage arises
      (i) during any period (other than the Maintenance Period) not exceeding 14 days following practical completion or issue of such Certificate in which the Insured shall remain responsible under the terms of the contract for the Contract Works or the completed part thereof

(ii) during the Maintenance Period and from an event occurring prior to the commencement thereof
(iii) by the Insured in the course of any operations carried out in pursuance of any obligation under the contract during the Maintenance Period.

5. Damage for which the Insured is relieved of responsibility under the terms of any contract or agreement.

6. (a) liquidated damages or penalties for delay or non-completion
(b) consequential loss of any nature.

7. Damage occasioned by pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds.

8. the Excess specified in the Schedule.

9. Damage in Northern Ireland caused by or happening through or in consequence of
(a) civil commotion
(b) any unlawful wanton or malicious act committed maliciously by a person or persons acting on behalf of or in connection with any unlawful association

For the purpose of this exclusion
(i) unlawful association means any organisation which is engaged in terrorism and includes any organisation which at the relevant time is a prescribed organisation within the meaning of the Northern Ireland (Emergency Provisions) Act 1973
(ii) terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public in fear

In any suit action or other proceedings where the Company alleges that by reason of this Exception any Damage is not covered by this Section the burden of proving that such Damage is covered shall be on the Insured.

In the event of the Insured entering into any contract or agreement by which the Insured is required to effect insurance under the terms of Clause 21.2.1 of the Joint Contracts Tribunal Standard Form of Building Contract (or any subsequent revision or substitution thereof) or under the terms of any other contract requiring insurance of like kind the Company will indemnify the Insured and the Employer in respect of any expense liability loss claim or proceedings which the Employer may incur or sustain by reason of Damage to any property other than the Contract Works occurring during the Period of Insurance within the Territorial Limits and caused by

(a) collapse
(b) subsidence
(c) heave
(d) vibration
(e) weakening or removal of support
(f) lowering of ground water

arising out of and in the course of or by reason of the carrying out of the Contract Works

Provided that

1. the Company shall not be liable for any amount exceeding the Limit of Indemnity
2. the Insured shall notify the Company within 21 days of entering into or commencing work under such contract or agreement whichever is the sooner together with full details of the contract
3. once notified the Company may give 14 days notice to cancel the cover granted by this Section in respect of such contract or agreement or alternatively provide a quotation which may vary the terms of this Section
4. the indemnity provided by this Section in respect of such contract or agreement shall terminate 14 days from the date of issue of the quotation if the quotation has not by then been accepted by the Insured or the Employer.

Employer

For the purpose of this Section Employer shall mean any person firm company ministry or authority named as the Employer in the contract or agreement entered into by the Insured.

EXCEPTIONS

The Company shall not indemnify the Insured or the Employer

1. against any expense liability loss claim or proceedings
   (a) caused by the negligence omission or default of the Insured or any agent or Employee of the Insured or of any sub-contractor or his employees or agents
   (b) which is attributable to errors or omissions in the planning or the designing of the Contract Works
   (c) arising from Damage which could reasonably be foreseen to be inevitable having regard to the nature of the work to be executed or the manner of its execution
   (d) arising from Damage to property which is at the risk of the Employer under the terms of the contract or agreement
   (e) arising from Contractual Liability
   (f) arising from Damage occasioned by pressure waves caused by aircaft or other aerial devices travelling at sonic or supersonic speeds.
2. if the contract or agreement specifies that shoring of any building or structure is required and such shoring is necessary within 35 days of commencement of the contract or agreement.

3. against any expense liability loss claim or proceedings arising from
   (a) demolition or partial demolition of any building or structure
   (b) the use of explosives
   (c) tunnelling or piling work
   (d) underpinning
   (e) deliberate dewatering of the site.

4. in respect of any sum payable under any penalty clause or by reason of breach of contract.

5. the Excess specified in the Schedule.

EXTENSIONS
Extensions to Sections 1 and 2 only

(a) Costs
The Company will in addition to the indemnity granted by each section pay
(i) for all costs and expenses recoverable by any claimant from the Insured
(ii) the solicitors fees incurred with the written consent of the Company for representation of the insured at
   (a) any coroner's inquest or fatal accident inquiry
   (b) proceedings in any Court arising out of any alleged breach of a statutory duty resulting in Bodily Injury or Damage to Property
(iii) all costs and expenses incurred with the written consent of the Company in respect of a claim against the Insured to which the indemnity expressed in this Policy applies.

(b) Legal Defence
Irrespective of whether any person has sustained Bodily Injury the Company will at the request of the Insured also pay the costs and the expenses incurred in defending any director manager partner or Employee of the Insured in the event of such a person being prosecuted for an offence under theHealth and Safety at Work etc. Act 1974 or the Health and Safety at Work (Northern Ireland) Order 1978

The Company will also pay the costs incurred with its written consent in appealing against any judgement given

Provided that
(a) the offence was committed during the Period of Insurance
(b) the indemnity granted hereunder does not
   (i) provide for the payment of fines or penalties
   (ii) apply to prosecutions which arise out of any activity or risk excluded from this Policy
   (iii) apply to prosecutions consequent upon any deliberate act or omssion
   (iv) apply to prosecutions which relate to the health safety or welfare of any Employee unless Section 1 is operative at the time when the offence was committed
   (v) apply to prosecutions which relate to the health and safety or welfare of any person not being an Employee unless Section 2 is operative at the time when the offence was committed
(c) the director manager partner or Employee shall be subject to the terms exceptions and conditions of the Policy in so far as they can apply.

(c) Indemnity to Other Persons
The Company will indemnify the following as if a separate Policy has been issued to each

(a) in the event of the death of the Insured the personal representatives of the Insured in respect of liability incurred by the Insured
(b) at the request of the Insured
    (i) any officer or member of the Insured's canteen clubs sports athletic social or welfare organisations and first aid fire security and ambulance services in his respective capacity as such
    (ii) any director partner or Employee of the Insured while acting in connection with the Business in respect of liability for which the Insured would be entitled to indemnity under this Policy if the claim for which indemnity is being sought had been made against the Insured

Provided that

(a) any persons specified above shall as though they were the Insured be subject to the terms exceptions and conditions of this Policy in so far as they can apply
(b) nothing in this extension shall increase the liability of the Company to pay any amount exceeding the Limit of Indemnity of the operative Section(s) regardless of the number of persons claiming to be indemnified.

Extention to Sections 1 2 and 3 only

(d) Indemnity to Principal
Where any contract or agreement entered into by the Insured for the performance of work so requires the Company will

(a) indemnify the Principal in like manner to the Insured in respect of the principal's liability arising from the performance of the work by the Insured
(b) note the interest of the Principal in the Property Insured by Section 3 to the extent that the contract or agreement requires such interest to be noted.

Extension to Section 2 only

(e) Cross Liabilities
The Company will indemnify each insured to whom this Policy applies in the same manner and to the same extent as if a separate policy had been issued to each provided that the total amount of compensation payable shall not exceed the Limit of Indemnity regardless of the number of persons claiming to be indemnified

Provided that the Company shall not indemnify the Insured against liability for which an indemnity is or would be granted under any Employers Liability Insurance but for the existence of this Policy.

GENERAL EXCEPTIONS

The Company shall not indemnify the Insured

1. (i) for loss destruction of or damage to any property whatsoever or any loss or expense whatsoever resulting or arising therefrom or any consequential loss
   (ii) for any legal liability of whatsoever nature

   directly or indirectly caused by or contributed to or arising from
   (a) ionising radiations or contamination by radioactivity from any nuclear waste from the combustion of nuclear fuel
   (b) the radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof

   In respect of Bodily Injury caused to an Employee this Exception shall apply only when the Insured under a contract or agreement has undertaken to indemnify a Principal or has assumed liability under contract for such Bodily Injury and which liability would not have attached in the absence of such contract or agreement.

2. under Sections 1 or 2 in respect of Contractual Liability unless the sole conduct and control of claims is vested in the Company but the Company will not in any event indemnify the Insured in respect of

   (i) liquidated damages or liability under any penalty clause
   (ii) Damage to Property which comprises the Contract Works and occurs after the date referred to in Exception 3 of Section 2 if liability attaches solely by reason of the contract
   (iii) Damage against which the Insured is required to effect insurance under the terms of Clause 21.2.1 of the Joint Contracts Tribunal Standard Form of Building Contract (or any subsequent revision or substitution thereof) or under the terms of any other contract requiring insurance of like kind.

3. under Sections 2, 3 or 4 for any consequence of war invasion act of foreign enemy hostilities (whether war be declared or not) civil war rebellion revolution insurrection or military or usurped power.

CONDITIONS OF THE POLICY

This policy and the Schedule shall be read together and any word or expression to which a specific meaning has been attached in any part of this Policy or of the Schedule shall bear such meaning wherever it may appear.

1. Alteration in Risk

The Company shall not be liable under this Policy if the risk be materially increased without the written consent of the Company.

2. Premium Adjustment

If the premium for this Policy is based on estimates an accurate record containing all particulars relative thereto shall be kept by the Insured

The Insured shall at all times allow the Company to inspect such records and shall supply such particulars and information as the Company may require within one month from the expiry of each Period of Insurance and the premium shall thereupon be adjusted by the Company (subject to the Minimum Premium chargeable for the risk being retained by the Company).

3. Duties of The Insured

The Insured shall take all reasonable care

(a) to prevent any event which may give rise to a claim under this Policy
(b) to maintain the premises plant and everything used in the Business in proper repair
(c) in the selection and supervision of Employees
(d) to comply with all statutory and other obligations and regulations imposed by any authority.

4. Make Good Defects

The Insured shall make good or remedy any defect or danger which becomes apparent and take such additional precautions as circumstances may require.

5. Maximum Payments

The Company may at any time at its sole discretion pay to the Insured the Limit of Indemnity (less any sum or sums already paid in respect or in lieu of damages) or any lesser sum for which the claim or claims against the Insured can be settled and the Company shall not be under any further liability in respect of such claim or claims except for costs and expenses incurred prior to such payment

Provided that in the event of a claim or series of claims resulting in the liability of the Insured to pay a sum in excess of the Limit of Indemnity the Company's liability for costs and expenses shall not exceed an amount being in the same proportion as the Company's payment to the Insured bears to the total payment made by or on behalf of the Insured in settlement of the claim or claims.

6. Claims

The Insured or his legal personal representatives shall give notice in writing to the Company as soon as possible after any event which may give rise to liability under this Policy with full particulars of such event. Every claim notice letter writ or process or other document served on the Insured shall be forwarded to the Company immediately on receipt. Notice in writing shall also be given immediately to the Company by the Insured of impending prosecution inquest or fatal inquiry in connection with any such event. No admission offer promise payment or indemnity shall be made or given by or on behalf of the Insured without the written consent of the Company. In the event of Damage by theft or malicious act the Insured shall also give immediate notice to the police.

7. Subrogation

The Company shall be entitled if it so desires to take over and conduct in the name of the Insured the defence or settlement of any claim or to prosecute in the name of the Insured for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any claim and the Insured shall give all such information and assistance as the Company may require.

8. Contribution

If at the time of any event to which this Policy applies there is or but for the existence of this Policy there would be any other insurance covering the same liability or Damage the Company shall not be liable under this Policy except in respect of any excess beyond the amount which would be payable under such other insurance had this Policy not been effected.

9. Cancellation

The Company may cancel this Policy by giving thirty days notice by recorded delivery letter to the last known address of the Insured. The Company shall make a return of the proportionate part of the premium in respect of the unexpired Period of Insurance or if the premium has been based wholly or partly upon estimates the premium shall be adjusted in accordance with Condition 2.

10. Disputes

Any dispute concerning the interpretation of the terms of this Policy shall be resolved in accordance with the jurisdiction of the territory in which this Policy is issued.

11. Rights

1. In the event of Damage for which a claim is or may be made under Section 3
   (a) the Company shall be entitled without incurring any liability under this Policy to
      (i) enter any site or premises where Damage has occurred and take and keep possession of the Property Insured
      (ii) deal with any salvage as they deem fit

   but no property may be abandoned to the Company
   (b) if the Company elects or becomes bound to reinstate or replace any property the Insured shall at their own expense produce and give to the Company all such plans and documents books and information as the Company may reasonably require. The Company shall not be bound to reinstate exactly or completely but only as circumstances permit and in reasonably sufficient manner and shall not in any case be bound to expend in respect of any one of the items of Property Insured more than the Limit of Indemnity in respect of such item.

12. Observance

The due observance and fulfilment of the terms exceptions conditions and endorsements of this Policy in so far as they relate to anything to be done or complied with by the Insured and the truth of the statements and answers in the proposal shall be conditions precedent to the liability of the Company to make any payment under this Policy.

ENDORSEMENTS

These Endorsements apply only if the number against them appears in the Schedule to this Policy.

No.Z001 EXCLUDING WELDING OR FLAME-CUTTING EQUIPMENT
The Company shall not indemnify the Insured under Section 2 against liability caused by or arising from the use by the Insured or any Employee of welding or flame-cutting equipment away from the premises of the Insured.

No.Z002 LIMITATIONS OF WORK
For the purposes of this Policy the Business of the Insured is restricted to work on or in connection with private dwellings blocks of flats shops offices public houses guest houses or hotels not exceeding four storeys in height (including the ground floor) and attic.

No.Z003 HAZARDOUS WORK EXCLUSION
The Company shall not indemnify the Insured under Sections 1 or 2 against liability arising from

(a) demolition by the Insured or any Employee unless in connection with any work of erection re-construction alteration maintenance installation or repair by the Insured or any employee
(b) any work of dismantling steel structures by the Insured or any Employee other than scaffolding or machinery belonging to or hired to the Insured or undergoing maintenance repair or replacement by the Insured
(c) pile-driving water diversion or the use of explosives by the insured or any Employee.

No.Z004 HAZARDOUS PREMISES EXCLUSION
The Company shall not indemnify the Insured under Sections 1 2 or 3 against liability or Damage arising from any work in or on or in connection with

(a) towers steeples chimney shafts blast furnaces dams canals viaducts bridges or tunnels
(b) aircraft airports ships docks piers wharves breakwaters or sea walls
(c) collieries mines chemical works gas works oil refineries or power stations
(d) offshore installations or bulk oil petrol gas or chemical storage tanks or chambers.

No.Z005 AUTOMATIC REINSTATEMENT
The Limits of Indmenity under Section3 will not be reduced by the amount of any claim

Provided that the Insured shall pay an additional premium at a rate to be agreed on the amount of each claim from the date Damage occurs to the date of the expiry of the Period of Insurance and that any such additional premium will be disregarded for the purpose of any adjustment of premium under Condition 2.

No.Z006 SHOWHOUSES
Exception 4(b) of Section 3 shall not apply to showhouses showflats or show maisonettes including the contents thereof the property of the Insured or for which they may be responsible until completion of sale takes place

Provided that the liability of the Company shall not exceed £500,000 in any one Period of Insurance nor £100,000 in respect of any one showhouse showflat or showmaisonette.

No.Z007 NEGLIGENT BREAKDOWN
Exception 3(a) of Section 3 shall not apply to explosion breakdown or derangement of machinery plant or tools hired to the Insured under the Model Conditions for the Hiring of Plant of the Contractors Plant Association or other similar conditions

Provided that
(a) such explosion breakdown or derangement is due to the negligence misuse or misdirection of the Insured or any Employee
(b) the liability of the company shall not exceed £50,000 for any one item
(c) the Company shall not provide indemnity against the first £250 of each and every occurrence.

No.Z008 CONTINUING HIRE CHARGES
The Company will indemnify the Insured under Section 3 in respect of liability assumed by the Insured under Clause 9(d) of the Model Conditions for the Hiring of Plant of the Contractors Plant Association (or similar conditions) for the payment of hire charges arising from explosion breakdown or derangement of machinery plant or tools hired to the Insured

Provided that
(a) such explosion breakdown or derangement is due to the negligence misuse or misdirection of the Insured or any Employee
(b) the liability of the Company in any one Period of Insurance shall not exceed £10,000
(c) the Company shall not provide indemnity against the first £250 of each and every occurrence or the hiring fee for the first 48 hours following each and every occurrence whichever is the greater.

No.Z009 PLANT IMMOBILISATION CONDITION
It is a condition precedent to the liability of the Company under Section 3 in respect of Damage caused by theft to plant insured by Items 2 and 4 of the Property Insured that such plant shall be immobilised when left unattended.

No.Z010 PLANS
Section 3 shall extend to indemnify the Insured in respect of the cost and expenses necessarily incurred in re-writing or re-drawing plans drawings or other contract documents following Damage thereto

Provided that the liability of the Company shall not exceed £25,000 in respect of any one contract or development.

SCHEDULE

POLICY NO: _____

INSURED: _____

ADDRESS: _____

_____

_____

BUSINESS: _____

_____

PERIOD OF INSURANCE: FROM _____ TO _____

FIRST PREMIUM: _____

ANNUAL PREMIUM: _____

MINIMUM PREMIUM:
75% of the Premium for the respective Period of Insurance (see Condition 2).

MAXIMUM PERIOD:
(for the purpose of Section 3): months plus months Maintenance Period.

LIMITS OF INDEMNITY:

SECTION 1 EMPLOYERS' LIABILITY: _____

SECTION 2 PUBLIC LIABILITY: £ _____
This limit applies in respect of any one occurrence or series of occurrences arising out of one cause.

SECTION 3 - CONTRACT WORKS:

PROPERTY INSURED	LIMIT OF INDEMNITY
Item 1 - Contract Works	£ _____
Item 2 - Constructional Plant Tools and Equipment owned by the Insured	£ _____
Item 3 - Temporary Buildings and Site Huts (including fixtures and fittings therein)	£ _____
Item 4 - Hired - in Property described in Items 2 and 3 not exceeding	£ _____ any one item
Item 5 - Personal Effects and Tools of the Insureds Employees not exceeding £ any one Employee	£ _____

SECTION 4 21.2.1: £_____

This limit applies in respect of any one occurrence or series of occurrences arising out of one cause.

Where 'NIL' is inserted above that Section is inoperative and the Company shall not be under any liability therefor.

EXCESS

SECTION 2:

SECTION 3:

SECTION 4: £500 in the aggregate for any one contract or agreement

ENDORSEMENTS APPLICABLE:

AGENCY: _____

DATE OF ISSUE: _____

P.F. CI12 EXAMINED: _____

APPENDIX 2

FORM OF SUB-CONTRACT FOR USE WITH THE ICE CONDITIONS OF CONTRACT 6TH EDITION.

FIFTH SCHEDULE.

INSURANCES

Part I Sub-Contractor's Insurances

Employers` liability - to cover the insured sub-contractor in respect of his legal liability to any person under a contract of service or apprenticeship with the insured for bodily injury and death arising out of and in the course of the employment.
Public (third party) liability-to cover the insured sub-contractor in respect of his legal liability for bodily injury and damage to property
This policy may not indemnify the insured against liability

(a) arising out of ownership possession or use by or on behalf of the insured of any
  (i) aircraft aerospacial device or hovercraft
  (ii) watercraft other than hand propelled watercraft or other watercraft not exceeding 20 feet in length
  (iii) mechanically propelled vehicle licensed for road use including trailer attached thereto other than liability caused by or arising out of the use of plant as a tool or trade on site or at the premises of the insured, the loading or unloading of such vehicle, damage to any building weighbridge road or to anything beneath caused by vibration or by the weight of such vehicle or its load, but this indemnity shall not apply if in respect of such liability compulsory insurance or security is required under any legislation governing the use of vehicles.

(b) in respect of damage to property
  (i) belonging to the Insured
  (ii) in the custody or under the control of the insured or any employee (other than property belonging to visitors directors partners or employees of the insured). But this part of this exception shall not apply to damage to buildings (including contents therein) which are not owned by or leased or rented by the Insured but are temporarily occupied by the Insured for the purpose of maintenance alteration extension installation or repair

(c) for the cost of and expenses incurred in replacing or making good, faulty, defective or incorrect
  (i) workmanship
  (ii) design or specification

(iii) materials goods or other property supplied installed or erected by or on behalf of the insured

(d) caused by or arising from advice design or specification provided by or on behalf of the insured for a fee.

(e) caused by or arising from seepage pollution or contamination unless due to a sudden unintended and unexpected event.

(f) (i) for loss destruction of or damage to any property whatsoever or any loss or expense whatsoever resulting or arising therefrom or any consequential loss

(ii) for any legal liability of whatsoever nature

directly or indirectly caused by or contributed to or arising from ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, the radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or component thereof.

* Sub-Contract Works - to cover any physical loss or damage to work executed and site materials but excluding the cost necessary to repair, replace or rectify

(a) property which is defective due to

(i) wear and tear,

(ii) obsolescence,

(iii) deterioration, rust or mildew;

(b) any work executed or any site materials lost of damaged as a result of its own defect in design, plan specification, material or workmanship or any other work executed which is loss or damaged in consequence thereof where such work relied for its support or stability on such work which was defective

(c) loss or damage caused by or arising from

(i) any consequence of confiscation, commandeering, nationalisation or requisition or loss destruction of or damage to any property by or under the order of any government de jure or de facto or public, municipal or local authority;

(ii) disappearance or shortage if such disappearance or shortage is only revealed when an inventory is made or is not traceable to an identifiable event;

(iii) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof, pressure waves caused by aircraft or other aerial device travelling at sonic or supersonic speeds;

and if the contract is carried out in Northern Ireland.

(iv) civil commotion;

* This insurance will not apply if the main contractor, in Part II of this Schedule, gives the sub-contractor the benefit of his Contractor`s All Risks policy.

(v) any unlawful, wanton or malicious act committed maliciously by a person or persons acting on behalf or in connection with an unlawful association; "unlawful association" shall mean any organisation which is engaged in terrorism and includes an organisation which at any relevant time is a proscribed organisation within the meaning of the Northern Ireland (Emergency Provisions) Act 1973; "terrorism" means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.

Part II Contractor's Policy Insurance

This Part should specify the main contractor`s all risks insurance if it is intended that the sub-contractor shall have the benefit thereof. In such cases the sub-contractor`s interest should be noted either generally or specifically on the policy and this part of the schedule should so state. If the sub-contractor is not to have any benefit under this policy of the main contractor, then this Part should be marked "not applicable".

APPENDIX 3

AN EXAMINATION QUESTION WHICH ILLUSTRATES THE MAIN REASON FOR THIS THESIS.

The following question was set by the Institution of Civil Engineers in their 1992 Examination in Civil Engineering Law and Contract Procedure.

> A Contract is let for the construction of works alongside an estuary, including a small jetty and an underground control room. On the order to commence being given, the Engineer's Representative (ER) writes to the Contractor requiring sight of his insurance policies and premium receipts. After inspecting them, the ER writes to the Contractor stating; "I approve your policies".
>
> During construction, the jetty is struck by a stolen luxury yacht. The Contractors All Risks Insurance policy, under Clause 21, as approved by the ER, contains a specific exclusion in respect of damage caused by stolen vessels. The Contractor's solvency is in question.
>
> (A third paragraph to this question concerns a matter which does not affect the first two paragraphs.)
>
> Discuss the liability and insurance issues.

Clause 21 of the ICE Conditions limits exclusions of the CAR policy to the wording of the excepted risks, which does not include damage by stolen vessels. Clause 25 states that the contractor shall provide satisfactory evidence to the Employer that the insurances required under the contract have been effected. Apparently the engineer (the ER mentioned in the question) has taken it upon himself (so the question says) to inspect the policies, ie he has not sent them to the employer for approval. Having approved the policies negligently in the case of the CAR policy (the exclusion is not even a standard one and certainly not among the excepted risks) the engineer will be liable to the employer if the contractor becomes insolvent involving a loss to the employer. The law does not sympathise

with a volunteer and the test of negligence in such a case is whether the insurance professional would have overlooked this exclusion and he would not have done so. One hopes the engineer has a professional indemnity policy which operates in these circumstances.

Without going further into this question it clearly demonstrates the need to assist the person responsible for inspecting the contractor`s insurances, as no CAR policy limits the exclusions to the excepted risks, and chapter 9.3 suggests a suitable improvement in the wording of clause 21.

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