

# PROPERTY ISSUES

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INTEGRATED PROFESSIONAL PROPERTY & CONSTRUCTION SERVICES

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## HAVE YOU LOST YOUR COVER? MANAGING ENVIRONMENTAL RISKS

Some significant changes have been made to the JCT forms of contract this year. They are known as the 2009 revisions.

One of the notable changes should be of concern to employers and funders. It relates to the type and level of insurance cover which will usually be on offer from a contractor to cover environmental risks. It is likely to affect the balance of commercial risk allocation between developers and contractors in respect of environmental risks.

There is now a default position under the standard contracts where there will be no duty on a contractor to maintain asbestos, pollution and contamination cover unless an amount of cover is stipulated in the Contract Particulars. Further, even if the contract does expressly stipulate the level of cover required, the default position is that this will be an annual aggregate level of cover only rather than on an each and every claim basis.

The JCT's Guide seeks to justify these changes by referring to changes in the insurance market. The insurance market may well have changed and will continue to do so, but the JCT's new changes will have the effect of reducing the default level of cover maintained

by the contractor. Further, the changes make it harder for an employer to obtain a higher standard of cover (even if that cover is available on the insurance markets, albeit at a higher price). Insurers and contractors will be able to argue that the employer's request is bespoke and not in keeping with the "market practice" of Revision 2 2009. Most employers and funders welcomed the introduction of meaningful professional indemnity insurance provisions in the original 2005 edition of the JCT Standard Building Contract. In contrast, these changes are likely to prove unpopular with employers and funders. It may become steadily more difficult for employers to ensure the contractor maintains adequate cover without having to pay an increased price.

Arguably the JCT should have introduced a default position for fungal mould cover. It is the only entry in the Contract Particulars for the relevant insurance clause that requires the parties to make a selection, with no default option. The JCT's Guide states that fungal mould is not normally subject to a separate cover limit, so the logical default position would be that fungal mould claims were covered.

In addition, the JCT may not have used the most appropriate words to refer to "mould claims".

Some insurers refer to "toxic mould" in policies. The purpose of that exclusion, based on insurance practice in the US, has been partly to exclude the possibility of the insurer being liable for a claim that a toxic mould has caused personal injury (or would or could cause personal injury) to users of the building, because of its alleged toxicity. If a policy excludes all claims for "fungal mould" there is a risk that the policy will not respond in circumstances where it arguably should (for example, where the Contractor's negligent design of a bathroom with poor ventilation means that harmless, but unsightly, mould needs to be eliminated). In some circumstances, the employer may be able to frame its claim in terms of, for example, a breach of building regulations: failing to provide adequate ventilation. (The JCT has limited the Contractor's default insurance obligations, but not excluded the contractor's liability for mould, whether toxic or otherwise.)

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## CONTRACTS CORNER

The JCT Ltd has recently revised some of its standard forms of contract (e.g. SBC, IC & MW) to include Revision 2 2009. In general the amendment reflect the principles of the Office of Government Commerce for the Achieving Excellence in Construction initiative and simplifies the payment provisions. There are a number of new optional clauses called Supplemental Provisions.

The JCT Ltd does not see Revision 2 as fundamentally altering the risk distribution in the contract between the parties. It views the amendments as reflecting good management practice. The amendments cover:

- New sustainability provisions – these amendments allow for specifying a range of contractual provisions covering value engineering, requirements to reduce, reuse and recycle waste, save energy and water, and use sustainable materials and products;
- Modifications to the payment provisions – modifications to certain aspects of the payment provisions. The proposed amendments to the Housing Grants Construction & Regeneration Act 1996 currently going through Parliament are intended to be addressed in a Revision 3; and
- Changes relating to the OGC 'Achieving Excellence' criteria – these cover such matters as collaborative working, key performance indicators, the resolution of disputes by senior executives and, health and safety.

These amendments are intended to remove any possible barriers that may exist to the use of the JCT contracts by central government departments.

In addition SBC includes provision for the parties to agree acceleration measures and for the contractor to show critical path information on its master programme.

The new optional health and safety Supplemental Provision would apply if selected notwithstanding the parties' statutory or regulatory duties and responsibilities and would:

- Place a contractual obligation on the parties to endeavour to establish and maintain a culture and working environment in which health and safety was of paramount concern; and
- Place a contractual obligation upon the Contractor to:
  - Comply with the approved codes of practice published by the HSE and HSC;
  - Ensure that all personnel engaged by the Contractor, including its supply chain, receive appropriate health and safety training;
  - Ensure that all personnel have access to competent health and safety training in accordance with current regulations, and ensure that there is full and proper health and safety consultation with employees in accordance with current legislation.

**RP&P MANAGEMENT LIMITED. ALWAYS ON TARGET.**

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