

# COVERED BY PROJECT INSURANCE? SUB-CONTRACTORS BEWARE

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- ▶ Guidance from the TCC on the basis on which sub-contractors are covered by project insurance.
- ▶ An obligation on a sub-contractor to maintain its own public liability insurance means that it is not a joint insured under the project insurance policy.
- ▶ How a sub-contractor can safeguard its position.

## What's it about?

In the case of *Haberdashers' Aske's Federation Trust Ltd (Haberdashers'') and another v Lakehouse Contracts Ltd (Lakehouse) and another [2018] EWHC 558*, the TCC considered the basis on which project insurance operates and the ability of project insurers, by way of a subrogated claim, to recover losses from a sub-contractor who is insured under a separate policy.

Lakehouse was the Design and Build Contractor, and it entered into a sub-contract with Cambridge Polymer Roofing Limited (CPR) (**Sub-Contract**). The project was an extension to a college building, for which project insurance was in place (**Project Insurance**).

A fire broke out during roofing works which was caused by CPR and the damage was covered by the Project Insurance. Under the Sub-Contract CPR was required to take out, and had in place, public liability insurance that covered such damage. Haberdashers' claimed against Lakehouse and CPR for damages in excess of £11m, Lakehouse issued an additional claim against its co-defendant, CPR, seeking a contribution.

The claim against Lakehouse settled for the sum of £8.75m including costs, interest and damages in respect of the fire. The settlement monies came from the Project Insurers, and they, in turn, sought to recover £5m damages from CPR. The Project Insurers contended that, although they were the first port of call for the damages pay-out, they were entitled to recover losses which had been insured by CPR under its own separate policy (such insurance being expressly required under the Sub-Contract) – the court agreed.

## Why does it matter?

The case highlights how, even though project insurance may expressly cover sub-contractors in policy wording, an express term in the sub-contract requiring them to have their own policy in place is likely to prevent the sub-contractor from being covered under the project insurance, at least in respect of the overlap in cover (and possibly beyond).

Project insurance policies are increasingly common in the market on large scale developments and, given the potential implications of cover not applying, parties should ensure that the insurance arrangements are clear and accurately documented.

## Basis of cover

This is the first case in which the TCC has had to decide how parties involved in construction projects are covered by project insurance policies. Having considered three options, the Court adopted the analysis that there is a standing offer by the project insurers to insure persons who are subsequently identified as part of a defined group (e.g. subcontractors). When this offer is accepted, by becoming part of the group by executing the sub-contract, a sub-contractor is covered under the policy and a term implied into the sub-contract that the sub-contractor cannot be sued by the main contractor for matters covered by the project insurance. This is also the case where project insurance pre-dates the appointment of the sub-contractor, so long as the category of 'sub-contractors' is included (and not restricted).

However the Court will look at the actual contractual arrangements before seeking to imply terms and where the parties have included contradictory express terms as to insurance, this will operate to exclude the possibility of implying a term to the contrary. In this case, the obligation on CPR to take out its own public liability insurance negated the implied term and meant that CPR was not insured under the Project Insurance.

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## Now what?

This case is an important reminder that parties must be aware of their position with regard to insurance and ensure that the contractual terms reflect their wishes. We suspect that many sub-contractors sign up to sub-contracts requiring public liability insurance to be maintained without considering the impact on their status under a project insurance policy. If the intention is that the sub-contractor is to be a joint insured under a project policy then the sub-contract should not contain any overlapping obligation to take out insurance.

It should also be noted that the Court spoke of the standing offer made by insurers being accepted by the sub-contractor upon execution of the sub-contract. In many cases a sub-contractor does not execute the sub-contract prior to commencing work on site which would seem to create a potential risk that he is not covered by the project insurance at that time. In such circumstances it would seem prudent for the sub-contractor (at the least) to obtain written confirmation of the insurance arrangements separately prior to start on site, so that it is clear that they are part of the defined grouping to whom cover is extended if this is the intention of the parties.

Finally, whilst not at issue in these proceedings (as the claim against the sub-contractor was for an amount equal to the amount of his insurance) it is worth noting that the judge thought it unlikely that it could be shown that where a sub-contractor was obliged to maintain insurance for a specified amount it was the intention that the sub-contractor would be exposed to all losses on the occurrence of an insured event – i.e. that for losses in excess of the required limit of indemnity of its own insurance the sub-contractor would likely be covered by the project insurance policy. This, however, remains to be finally decided, and accordingly is something which contracting parties should consider and address.

## Who to contact?



**MATTHEW COLLINGWOOD-COOPER**

Managing Associate

0113 209 2367

07872 675385

[matthew.collingwood-cooper@addleshawgoddard.com](mailto:matthew.collingwood-cooper@addleshawgoddard.com)



**SUSAN BENNETT**

Managing Associate

0161 934 6725

07734 769544

[susan.bennett@addleshawgoddard.com](mailto:susan.bennett@addleshawgoddard.com)

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10-22578540-2

addleshawgoddard.com

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