



NON-NEGLIGENCE INSURANCE

These guidance notes stem from our experience with certain clauses, typically found in JCT contracts, commonly described as “non-negligence”, 21.2.1, 19 (2)(a), and other similar titles.

The JCT IC contract for example, contains clause 6.5.1.

If the Contract Particulars state that insurance under clause 6.5.1 may be required, the Contractor shall, if instructed by the Architect/ Contract Administrator, take out a policy of insurance in the names of the Employer and the Contractor for the amount of indemnity there stated in respect of any expense, liability, loss, claim or proceedings which the employer may incur or sustain by reason of injury or damage to property 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, excluding injury or damage:

- 1. for which the Contractor is liable under clause 6.2*; or*
- 2. which is attributable to errors or omissions in the designing of the Works; or*
- 3. which can be reasonably foreseen to be inevitable having regard to the nature of the work to be executed and the manner of its execution; or*
- 4. which it is the responsibility of the Employer to insure under paragraph C1 of Schedule 1; or*
- 5. to the Works and Site Materials brought on to the site of the Contract for the purposes of its execution except where the Practical Completion Certificate has been issued or in so far as any Section is the subject of a Section Completion Certificate; or*
- 6. 6.5.1.6-6.5.1.9 are standard exclusions*

** Clause 6.2 requires that the Contractor shall be liable for and indemnify the Employer for loss, injury or damage due to negligence, breach of statutory duty, omission or default of the Contractor or the Contractor’s Persons.*



The origin of this cover arises from a court case in 1958. A contractor was responsible in the contract for his own negligence. Damage by vibration was caused to an adjoining property. The contractor was found to not have been negligent but the principal was found strictly liable in nuisance. They had been assuming the contractor's insurance would respond and had no cover of their own, so had to meet the claim themselves. Non-negligence insurance was then designed to fill the gap.

The request by the architect for the contractor to insure the liability makes sense because the contractor can usually extend his third party coverage to cover non-negligence. In practice it means that if there is (e.g. vibration) damage to adjoining property then the contractor's third party insurance will meet the claim one way or other. The risk of insuring non-negligence cover with a different insurer is that the two insurers could well argue as to whether or not there has been negligence and thus which insurer should respond.

Most contractors' insurances would nowadays cover strict liability envisaged by the clause thus removing the need for separate non-negligence coverage.

Also, the contingent liability coverage in the Homeworks policy would cover the owner's strict liability if the contractor does not in fact have this.

This does not deal with the fact that clause 6.5.1. includes provision to insure damage to "First Party" property. The Homeworks wording usually covers "All Risks" albeit excluding Subsidence Heave and Landslip, so there would seem to be no need for the coverage here either.

The Homeworks policy cannot cover Subsidence Heave and Landslip because of its long-term (rather than accidental) causes, but sudden damage is usually covered.



With this all taken into account we would normally see no reason for the client to buy non-negligence coverage. If he or his architect insists on the coverage then best practice would seem to be for the contractor to have the non-negligence endorsed to their third party coverage.

If, after all these routes have been exhausted, the broker believes the client must have the coverage then Homeworks will supply coverage. However, the provision of this coverage will be provided on an "execution basis", i.e. without advisory input for the benefit of the client.