

**Guidance note
for JCT clause 21.2.1
(and similar)
insurance**



Why does JCT 21.2.1 (or similar) Insurance exist?

The need for JCT 21.2.1 (and similar) Insurance arose following the identification of a potential gap in insurance cover for Employers on construction projects, which arose from the decision in the legal case *Gold v Patman & Fotheringham Ltd* [1958].

Patman & Fotheringham (Contractor) caused damage to a third party building as a result of piling works undertaken on Gold's property. It was accepted that the works were responsible for causing the damage, but the Contractor had not been negligent. This left Gold (Employer) liable in nuisance to the third-party building owner, with no recourse to recover from another party, and neither did he have any insurance protection of his own. Gold's liability arose as a result of his interference with the legal right that the third party had to the support of his building from Gold's land.

This led to Clause 19(2)(a) being inserted in RIBA contracts, and subsequently Clause 21.2.1 (now 6.5.1) being inserted into JCT contracts, requiring the Contractor to take out a policy to protect the Employer against such claims caused by:

- Collapse
- Subsidence
- Heave
- Vibration
- Weakening or removal of support
- Lowering of ground water

Traditional Public Liability insurance taken out by the Contractor does not provide the necessary cover, as negligence on the part of the Contractor would be needed to trigger a claim, and this was not present in the *Gold* case. JCT 21.2.1 (and similar) Insurance was developed in order to fill this gap, and it provides the Employer with the cover in accordance with the requirements of the relevant JCT clause.

How does the cover operate?

In exactly the way it is intended to by the JCT clause. The policy wording follows the language of the JCT conditions and indemnifies the Employer in circumstances like those in *Gold v Patman & Fotheringham*. It protects the owner of a property against claims made against them by a third party (usually a neighbour) who has suffered damage to their property as a result of the works being undertaken.

It is important to note that the policy only provides indemnity in respect of the narrow set of circumstances envisaged in the JCT clause. There is no automatic right to compensation, and the policy will only respond if it has not been possible to prove fault on the part of the Contractor or any other party involved with the contract.

The cover will usually be taken out on the recommendation of the architect or legal advisors involved in the project. It is important that the intention of the cover and the legal basis for its existence are carefully explained to the Policyholder beforehand. This will ensure there is no misunderstanding in the event of a potential claim, which can often be very sensitive in nature given the proximity of the parties involved.

What is not covered?

The Policy Exclusions similarly follow the wording of the JCT clause. Whilst the Policy must be considered in its entirety there are three key scenarios where a 21.2.1 (or similar) policy will not provide cover:

- Loss or damage caused by the negligence of the Contractor (or subcontractors)
- Loss or damage resulting from errors or omissions in the designing of the works
- Loss or damage which can reasonably be foreseen to be inevitable

It should be obvious as to why the first two points are relevant – both scenarios imply fault on the part of the person involved in the design or the carrying out of the works and the relevant Public Liability or Professional Indemnity policies should respond in such cases.

The final point is intended to restate one of the fundamental principles of insurance, that losses must be fortuitous for them to be insurable. 21.2.1 (or similar) cover is not a blanket “non-negligence” insurance but a niche policy that is intended to cover a distinct exposure faced by the Employer. Any damage caused by negligence, or damage that could be reasonably foreseen as inevitable, is not covered. This includes any minor cosmetic repair which should be expected with any structural building works.

When will the policy respond?

The policy will respond if loss or damage has occurred to Third Party property when:

- The Contractor made no mistakes in workmanship;
- All market standards and protocols have been followed;
- There are no errors in the design of the works;
- The loss could not have been foreseen as inevitable.

Example of a covered loss

Subsidence caused to Third Party property during excavation due to unforeseen ground conditions. All precautions taken and all industry standards followed. No negligence on behalf of the contractor.

When should a claim be notified to Insurers?

As soon as an Employer or Contractor is aware of or receives notification of an incident that may give rise to a claim (this includes and is not limited to, a knock on a door from a neighbour who believes their property has suffered some damage as a result of the works,) the Policyholder should notify all relevant parties as soon as reasonably practicable. This should include:

1. their 21.2.1 insurers;
2. the Contractor (and any subcontractors) who should be advised to inform their Public Liability insurers;
3. the architect, project manager or any other professional involved in the project who should be told to inform their Professional Indemnity insurers.



As 21.2.1 insurers TMHCC will note the circumstances and appoint Loss Adjusters where appropriate. However, as it is necessary to firstly establish if the alleged damage is the fault of the Contractor or other party involved in the project, the potential claimant will need to pursue the parties that could be liable for the loss and, if necessary, liaise with the Policyholder to appoint their own engineer to determine the likely cause of the damage. TMHCC will provide the appropriate guidance at the time the potential claim is notified to us.

This document is intended to be used as a basic guide and does not supersede the policy wording.