

Recent developments in professional indemnity insurance for the construction sector

14/01/2021

Construction analysis: Jonathan Spencer, partner and Harry Speak, associate at Simmons & Simmons consider some of the recent developments in the professional indemnity (PI) insurance market for construction professionals and the challenges of obtaining adequate levels of cover.

How have recent issues in the construction industry, such as the Hackitt Report and the coronavirus (COVID-19) pandemic, affected the availability of PI insurance cover?

The UK's construction PI insurance market has been noticeably hardening since around mid-2018. Indeed, several insurers have left the PI market altogether following consecutive years of loss-making, the collapse of Carillion plc, and the implications of the Grenfell disaster in June 2017, together with other major economic headwinds. Increasingly complex and large-scale construction projects, together with increased regulatory scrutiny, have led to more claims being notified. Premiums and excesses have risen significantly in a relatively short period of time. The International Underwriting Association established its Construction Working Group in late 2019 specifically to look at the pricing and availability issues affecting the construction PI market.

Overall willingness to write PI cover has fallen, so that rates have increased, and cover is increasingly provided with additional conditions attached. For example, aggregate limits are more widespread, compared with traditional 'any one claim' cover.

Underwriters seem less willing to deploy their capacity across consecutive levels, preferring instead to participate, for example, at a primary layer and then only at the second excess layer. This makes it more difficult to obtain complete PI insurance programmes.

All this without mentioning coronavirus. While the ongoing coronavirus pandemic continues to result in delays and even cancellation of construction projects, its full impact on the availability and affordability of PI insurance (and the claims landscape) is, as yet, unknown and will likely only materialise fully later this year or next.

The difficulties faced by construction professionals in a hardening market have particularly affected one profession. It has been reported that some approved inspectors have struggled to find adequate PI cover to such an extent that they have been forced to stop work altogether. While this may not be typical of all construction professions, it certainly illustrates the difficulties faced now that would not have been contemplated only a few years ago.

In the current market, are consultants and contractors able and/or willing to provide the levels of PI insurance required by employers on projects?

A hardening market has seen some consultants and contractors struggle to obtain the level of cover required by employers, particularly as the size of projects continues to increase and, as a result, so too the associated potential liability.

Sufficient cover for those consultants and contractors who are able to obtain it comes at a price, with insurers only able to write cover with higher excesses, increased premiums and additional exclusions to cover.

Are consultants still willing to provide each and every claim cover, or are they instead insisting on an aggregate basis of cover subject to a specified number of reinstatements? Are you seeing unlimited reinstatements offered as a compromise?

Generally, we have seen movement from each and every claim cover towards single aggregate policy limits, often with higher excesses also applied. However, this may not, of course, represent the case across the market.

Unlimited reinstatements are sometimes offered and may on their face seem tantamount to each and every claim cover. However, the devil is in the detail on exactly what reinstatement is being offered, and some policies may exclude reinstatements where the claim(s) results from the same original source or cause.

In the current market, are contractors able to obtain PI insurance cover without difficulty? If not, do they seek to pass the obligation to maintain cover down to the consultants?

Both contractors and consultants are expected to obtain and maintain cover, and an important element for underwriters when pricing PI policies may be the right of recourse for contractors against subcontractors and consultants (and their respective insurers). In some policies, it may be a condition precedent that any subcontractors and consultants carry adequate insurance cover.

Contractors should be cautious before relying heavily on a subcontractors' or consultants' insurance arrangements, whose obligations and insurance cover may well not fully match the obligations owed to the employer by the contractor. This can obviously leave contractors liable and uninsured for gaps in the event of a claim.

Similarly, overreliance on a subcontractor's or consultant's insurance arrangements leaves contractors open to the risk of subcontractor insolvency. While the [Third Parties \(Rights against Insurers\) Act 2010](#) may allow a contractor to pursue their claim directly against an insolvent subcontractor's insurer(s), this can be a drawn out process and may still leave the contractor with gaps in the cover available, as described above.

How are fire safety and cladding claims most frequently dealt with in your experience—are they excluded altogether or subject to separate aggregate limitations in the same way as pollution, contamination and asbestos?

So-called 'cladding exclusions' are more common post-Grenfell and the subsequent legislative changes relating to fire safety. However, there is no market uniformity in the relevant policy wordings. Ultimately, the cover available remains at the discretion of the underwriter.

The scope and specificities of these exclusions can vary from a full cladding exclusion for any circumstance relating to cladding, to simple coverage restrictions like restricting cover in respect of any buildings above 18 metres in height.

Where coverage is restricted, this often also includes lower aggregate limits of indemnity, with cover provided only for the costs of rectification or redesign of the cladding, thereby excluding liability for consequential losses arising from a cladding claim.

We have also seen cladding exclusions widened to exclude cover for 'fire safety' issues more generally. This is important as the Grenfell Inquiry continues; architects, engineers and surveyors may subsequently be held to be negligent in respect of more general fire safety breaches not solely cladding issues.

Are you seeing any other exclusions that consultants or their PI insurers are seeking to include in the PI cover required to be provided on projects?

The standard exclusions which we regularly see operate to exclude cover in respect of fitness for purpose obligations or other express contractual warranties and obligations.

The exclusion of cover for any breach of contractual warranties has taken on particular significance since the Supreme Court's 2017 decision in *MT Højgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2017] UKSC 59. In that case, it was held that a fitness for purpose obligation under the contract had still been breached, meaning Højgaard was responsible for the necessary rectification work, notwithstanding that

it had complied with the applicable design standards specified under the contract and was, therefore, not negligent.

Therefore, where a contractor is not negligent, but fails to comply with all contractual warranties, it may find itself facing liability but without any PI cover available whatsoever. PI cover may only be triggered for breach of an absolute contractual obligation for fitness for purpose where liability would have existed in any event for negligence.

We also regularly see exclusions for any liability for penalties or liquidated damages, such that PI cover is limited only to the costs of rectification.

Interviewed by Sabina Habib