

DESIGN & CONSTRUCT

Professional Indemnity Insurance Policy

DESIGN & CONSTRUCT PROFESSIONAL INDEMNITY INSURANCE POLICY

Whereas the Insured has submitted to the Insurer a proposal form or forms and, where requested, a declaration form containing particulars and statements which are the basis of this Policy and are incorporated herein and in consideration of the Insured having agreed to pay the Total Premium to the Insurer it is agreed that:-

SECTION 1 - INSURING CLAUSES

1. Civil Liability

The Insurer will indemnify the Insured against any Claim first made against the Insured and notified to the Insurer during the Period of Insurance in respect of any civil liability, including liability for claimants' costs, incurred in the exercise and conduct of the Insured's Professional Business on the part of:

- (a) the Insured; or
- (b) any specialist sub-contractor or sub-consultant acting on behalf of the Insured and for whom the Insured is responsible but subject always to the Insurer's rights under Condition 13.

The Insurer will not indemnify the Insured in respect of any claim, set-off or counterclaim by the Insured for outstanding fees or any other sum.

In respect of any Claim by reason of any dishonest or fraudulent act or omission of any person

- (1) any monies which, but for the dishonest or fraudulent act or omission of that person, would have been payable by the Firm to that person shall not be paid if the Firm is legally entitled to withhold payment in diminution or extinction of any claim by the Firm against that person arising out of the dishonest or fraudulent act or omission and the amount of the indemnity by the Insurer shall be reduced by the amount withheld by the Firm from that person; and
- (2) the Insurer will not indemnify that person; and
- (3) that person shall be liable to reimburse the Insurer for the amount of any monies paid by it.

2. Loss of Documents

The Insurer will indemnify the Insured in respect of any reasonable costs and expenses incurred by the Insured with the prior written consent of the Insurer in replacing or restoring Documents owned by the Insured in the conduct of the Insured's Professional Business, which are discovered and notified to the Insurer during the Period of Insurance to be damaged, destroyed, lost or mislaid and which after diligent search cannot be found.

The maximum amount payable by the Insurer under this Clause shall be £100,000 in respect of each loss or series of losses arising from the same cause or event and in the aggregate during the Period of Insurance. This sum is not additional to and shall not increase the Limit of Indemnity.

3. Costs of Mitigation

The Insurer will indemnify the Insured against costs and expenses necessarily incurred with the Insurers' prior written consent in respect of any action taken to mitigate a loss or potential loss that otherwise would be the subject of a claim under this Policy. The onus of proving a claim under this Clause shall be upon the Insured and is subject to the Insured giving prior written notice to the Insurer of the intention to take action that will incur such costs and expenses.

SECTION 2 - DEFINITIONS

1. **“Circumstance”** shall mean an intimation to the Insured of a possible Claim or loss under this Policy or an awareness by the Insured of facts which are likely to give rise to a Claim or loss under this Policy.
2. **“Claim”** shall mean:
 - (a) any demand for damages or compensation made against the Insured; or
 - (b) any notice of intention, whether orally or in writing, to commence legal proceedings against the Insured; or
 - (c) any communication invoking any Pre-Action Protocol involving the Insured.
3. **“Collateral Warranty”** shall mean a warranty, duty of care agreement, certificate or similar agreement between the Insured and a party with whom no contractual relationship would otherwise exist in relation to the Insured’s involvement in building or construction works.
4. **“Defence Costs”** shall mean legal costs, disbursements and expenses reasonably necessary incurred by the Insured with the written consent of the Insurer or by the Insurer in:
 - (a) defending any proceedings in relation to a Claim or loss; or
 - (b) conducting any proceedings for indemnity, contribution or recovery relating to a Claim or loss; or
 - (c) investigating, reducing avoiding or compromising any actual or potential Claim or loss; or
 - (d) acting for the Insured in connection with any investigation, enquiry or disciplinary proceedings.

Defence Costs do not include any internal or overhead expenses of the Insured or the cost of any Insured’s time.

5. **“Documents”** shall mean all forms of documents of whatsoever nature whether written printed or reproduced by any other method, including computer system records provided the Insured maintains duplicates of such records, and excludes bearer bonds, coupons, bank notes, currency notes and negotiable instruments.
6. **“Excess”** shall mean any excess stated in the Schedule for which the Insurer will not indemnify the Insured in respect of each Claim.
7. **“Finance Provider”** shall mean a third party who enters into an agreement with the Insured to pay the Total Premium to it by instalments.
8. **“Firm”** shall mean the firm stated in the Schedule being either a principal, a partnership comprised of the present and past partners named in the proposal form or forms submitted to the Insurer and any person who becomes a principal or partner of the practice during the Period of Insurance or a corporate body.

This definition also includes any firm for which the Insured is legally liable in consequence of the acquisition prior to inception of this Policy, whether partial or otherwise, of any firm and which the Insurer has specifically agreed by endorsement to this Policy to insure.

9. **“Insured”** shall mean:
 - (a) the Firm; and

- (b) any present or past, principal, partner, director or employee of the Firm; and
- (c) the estate or legal representatives of any of the persons in (b) above in the event of death, incapacity, liquidation or bankruptcy.

10. **“Insurer”** shall mean the insurer as stated in the Schedule.

11. **“Limit of Indemnity”** shall mean the limit of indemnity as stated in the Schedule which is the maximum amount payable by the Insurer in respect of each Claim save as otherwise expressly limited and the maximum amount payable by the Insurer in the aggregate in the Period of Insurance.

Any Claim resulting from:

- (a) one and the same act, error or omission; or
- (b) a series of acts, errors or omissions arising out of the same proximate cause; or
- (c) the acts, errors or omissions of one person or persons acting together or in which such person or persons are concerned or implicated,

shall for the purpose of the Limit of Indemnity and the Excess be treated as one Claim save that for the purpose of the Excess any Claim in respect of more than one property or owner or occupier of a property or properties shall be treated as one Claim in respect of each owner or occupier or claimant.

12. **“Period of Insurance”** shall mean the period stated in the Schedule.

13. **“Professional Business”** shall mean the performance by the Insured of the following activities and duties:

- (a) design or specification; or
- (b) supervision of construction; or
- (c) feasibility study; or
- (d) technical information calculation; or
- (e) surveying,

undertaken only by or under the direction and direct control of a properly qualified architect, engineer or surveyor employed by the Insured.

This definition does not include supervision by the Insured of its own or its sub-contractors' work where such supervision is undertaken in its capacity as building or engineering contractor.

14. **“Total Premium”** shall mean the amount stated in the Schedule payable by the Insured to the Insurer.

SECTION 3 - CONDITIONS

1. Payment of Total Premium

Unless otherwise agreed in writing between the Insurer and the Insured, it is a condition precedent to the Insurer's liability under this Policy that the Insured shall pay the Total Premium to the Insurer within 14 days of inception of the Policy and that time is of the essence. If the Total Premium is not paid to the Insurer within 14 days of inception, the Policy is terminated immediately with effect from inception and the Insurer will have no liability under the Policy.

Where the Insurer and the Insured have agreed in writing that a Finance Provider will pay the Total Premium on behalf of the Insured to the Insurer it is a condition precedent to the Insurer's liability under this Policy that the Insured shall pay to the Finance Provider each of the instalments due to the Finance Provider on the dates that they are due and that time is of the essence and that the Insured shall not breach any of the terms and conditions of the agreement between the Finance Provider and the Insured. Unless all of the instalments are paid by the due date, the Policy is terminated:

- (a) with effect from inception if no instalment has been paid and the Insurer will have no liability under the Policy; or
- (b) with effect from the date that the instalment which has not been paid was due if one or more instalments have been paid and the Insurer will have no liability after that date.

It is also a condition precedent to the Insurer's liability under the Policy that the Finance Provider does not, pursuant to the agreement between the Finance Provider and the Insured, instruct the Insurer to cancel the Policy. If the Finance Provider instructs the Insurer to cancel the Policy it is terminated in accordance with (a) or (b) above or, in any other circumstance, with effect from the date of the instruction from the Finance Provider to the Insurer.

2. No Admission of Liability

It is a condition precedent to the Insurer's liability under this Policy that in the event of a Circumstance or Claim the Insured shall not admit liability and no admission, arrangement, offer, promise or payment shall be made by the Insured without the Insurer's prior written consent.

3. Notification

Save for notification required under Conditions 4 and 5 the Insured shall give to the Insurer as soon as practicable notice in writing:

- (a) of any Claim; or
- (b) of any Circumstance; or
- (c) of any loss or event that will or may be the subject of indemnity under this Policy.

Such notice having been given and having been accepted by the Insurer as having been validly given under (b) or (c) above, any subsequent Claim made shall be deemed to have been made during the Period of Insurance.

4. Adjudication

It is a condition precedent to the Insurer's liability under Insuring Clause 1 in respect of any civil liability under an award made by an adjudicator against the Insured arising out of an adjudication under the adjudication provisions of the Housing Grants, Construction and Regeneration Act 1996 and which award is consequent upon any Claim or Circumstance notified to the Insurer during the Period of Insurance that:

- (a) the Insured shall give written notice as soon as possible and in any event within two working days to the Insurer upon:
 - (i) receipt of any notice of intention to refer to adjudication; or
 - (ii) becoming aware that a dispute is likely to be referred to adjudication; or
 - (iii) becoming aware of decision by the Insured to refer a dispute to adjudication; and
- (b) the Insured shall not agree in contract documents or otherwise to accept adjudication as finally determining the dispute thereby removing the jurisdiction of the Courts; and

- (c) the Insured shall provide all documents relevant to the dispute to the Insurer as soon as possible after notice is given under (a) above and in any event within two working days of such notice.

5. Dishonesty or Fraud

It is a condition precedent to the Insurer's liability under Insuring Clause 1 in respect of any Claim or loss by reason of any dishonest or fraudulent act or omission that the Insured shall give to the Insurer as soon as possible, and in any event within two working days of discovery, notice in writing:

- (a) of any Claim; or
- (b) of any Circumstance; or
- (c) of any reasonable cause for suspicion of fraud or dishonesty on the part of any past or present partner, director or employee of the Firm whether giving rise to a Claim or not;

and the Insurer shall not be liable for any Claim or loss by reason of any such act or omission after the date of such discovery.

Following notification to the Insurer, under this Condition, the Insured shall give all necessary information and assistance to enable the Insurer to sue for and obtain reimbursement from the person concerned or from his/her successors in title or assignees of any monies paid or payable by the Insurer.

6. Claims Control and Co-operation

Following notification to the Insurer under this Policy the Insurer shall conduct the investigation, defence or settlement of any actual or potential Claim save that if the Insured does not consent to the Claim being defended the Insurer shall only conduct the defence of the Claim if a Queen's Counsel agreed upon by the Insurer and the Insured advises that the Claim can be defended with a probability of success.

It is a condition precedent to the Insurer's liability under this Policy that the Insured shall fully co-operate with the Insurer, comply with all reasonable requests for information and documents and give all such assistance as the Insurer may reasonably require.

7. Settlement

If the Insured does not want an actual or potential Claim to be settled the Insurer may, at its sole discretion, as an alternative to settling the Claim, pay to the Insured the amount for which the Claim could have been settled, not exceeding the Limit of Indemnity, and the Insurer will have no further liability under the Policy in respect of the Claim.

8. Limit of Indemnity

The liability of the Insurer shall not exceed the Limit of Indemnity except that Defence Costs shall be paid in addition.

9. Defence costs

If a payment beyond the amount of indemnity available under this Policy has to be made by the Insurer to dispose of a Claim, the Insurer's liability for the Defence Costs shall be such proportion as the amount of indemnity available under this Policy bears to the amount paid to dispose of the Claim.

10. Excess

Any Excess shall be borne by the Insured at the risk of the Insured and the Insurer shall only be liable to indemnify the Insured under Insuring Clause 1 in excess of such amount. Any Excess shall not apply to Defence Costs or to Insuring Clauses 2 and 3.

11. Choice of Law and Jurisdiction

The law applicable to this Policy is the law of England and Wales and any proceedings shall be subject to the exclusive jurisdiction of the Courts of England and Wales.

12. Dispute Resolution

Any dispute or difference between the Insured and the Insurer arising from this Policy shall be referred to a Queen's Counsel of the English Bar to be agreed upon between the Insurer and the Insured or to any other party as may be agreed. In the event of a dispute regarding the appointment, the President for the time being of the professional body of which the Insured is a member shall nominate an appropriate independent arbitrator whose decision shall be binding on both parties. The dispute shall be arbitrated in accordance with the statutory provisions as to arbitration for the time being in force. The findings of the appointed arbitrator shall be binding upon the Insurer and the Insured and the costs of such an exercise shall be allocated by the arbitrator on the basis he/she considers fair and equitable.

13. Subrogation

If any payment is made under the terms of this Policy the Insured grants to the Insurer all rights of recovery against any parties from whom a recovery may be made. The Insurer has rights of recovery against any present or past principal, partner, director or employee of the Firm where liability has resulted from a dishonest or fraudulent act or omission on the part of the present or past principal, partner, director or employee.

14. Other Insurance

If at the time any claim by the Insured under this Policy arises the Insured is or would but for the existence of this Policy be entitled to indemnity under any other policy, the Insurer shall not be liable except in respect of any excess beyond the amount which would have been payable under such other policy had this Policy not been effected.

15. Joint Indemnity

The indemnity afforded by the terms of this Policy is provided jointly to all parties constituting the Insured and for all purposes this Policy shall be considered as a joint policy with one Limit of Indemnity.

16. Misrepresentation, Mis-statement or Non-disclosure

Should the Insurer be entitled to avoid liability under this Policy by reason of misrepresentation, mis-statement or non-disclosure, the Insurer may at its sole discretion, as an alternative to avoiding this Policy, give written notice to the Insured that it regards the cover hereunder as continuing in full force and effect. This is subject to the proviso that there shall be excluded from such indemnity any Circumstance or Claim which is related to such misrepresentation, mis-statement or non-disclosure, whereupon this Policy shall continue in full force and effect but shall be deemed to exclude, as if the same had been specifically endorsed, the particular or possible Circumstance or Claim referred to in such written notice.

17. Breach of Condition

Where the Insured's breach of or non-compliance with any condition of this Policy has resulted in prejudice to the Insurer in the handling or settlement of any Circumstance or Claim the Insurer shall be entitled to reduce the indemnity under this Policy in respect of such Circumstance or Claim to such

sum as in the Insurer's reasonable opinion would have been payable by it in the absence of such prejudice.

18. False, Dishonest or Fraudulent Claims

If the Insured shall make any claim under this Policy knowing the same to be false, dishonest or fraudulent, as regards amount or otherwise, this Policy shall become void and all claims hereunder shall be forfeited.

19. Tax

The Insured will pay any tax due on the premium in accordance with current legislation.

SECTION 4 - EXCLUSIONS

The Insurer shall not indemnify the Insured in respect of any liability, loss, damage, cost or expense directly or indirectly caused by, in connection with or arising out of any of the following:

1. Previous Circumstance or Claim

Any Circumstance or Claim notified by the Insured under any other insurance prior to the inception of this Policy or known by the Insured prior to the inception of this Policy.

2. Other Business or Occupation

Any business or occupation, other than the Insured's Professional Business, even though the same may be carried on by the Insured in conjunction with that Professional Business.

3. Public Liability

Any death, bodily injury, sickness or disease sustained by any person or damage, accidental destruction, nuisance, trespass or interference to property unless arising from any neglect, error in performing or omission to perform a professional duty by the Insured.

4. Employer's Liability

Any death, bodily injury, sickness or disease sustained by any person arising out of and in the course of his employment by the Insured under a contract of service, apprenticeship or work experience.

5. Employment Disputes

Any dispute between the Insured and any present or past employee or any person who has been offered employment with the Insured.

6. Ownership, Use, Occupation or Leasing of Property

Any ownership, use, occupation or leasing of mobile or immobile property by, to or on behalf of the Insured.

7. Road Traffic Acts

Any use of any motor vehicles by the Insured in circumstances in which provisions of the Road Traffic Acts apply.

8. Trading Losses

Any trading loss or trading liability incurred by any business managed by or carried on by or on behalf of the Insured.

9. Territorial

Any work in connection with contracts outside the United Kingdom, the Channel Islands, the Isle of Man or the member countries of the European Community.

10. Jurisdiction

Any action for damages brought against the Insured in a Court of Law outside the United Kingdom, the Channel Islands, the Isle of Man or the member countries of the European Community.

11. USA or Canada Judgments

Any enforcement of any judgment originally obtained in any Court of the United States of America or Canada or any territories which come under the jurisdiction of the United States of America or Canada.

12. Nuclear Risks

Any:

- (a) ionising radiations or contamination by radioactivity from any nuclear fuel or nuclear waste, the combustion of nuclear fuel; or
- (b) radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof.

13. War or Terrorism Risks

Any:

- (a) war, invasion, acts of foreign enemies, hostilities or warlike operations, whether war be declared or not, civil war, rebellion, revolution, insurrection, civil commotion, assuming the proportions of or amounting to an uprising, military or usurped power; or
- (b) act of terrorism.

For the purpose of this exclusion an act of terrorism means an act, including but not limited to the use of force or violence or the threat thereof, of any person or group of persons, whether acting alone or on behalf of or in connection with any organisation or government, committed for political, religious, ideological or similar purposes, including the intention to influence any government or to put the public, or any section of the public, in fear.

This exclusion excludes any liability, loss, damage, cost or expense of any action taken in controlling, preventing, suppressing or in any way relating to (a) and/or (b) above.

If the Insurer alleges, by reason of this exclusion, that any liability, loss, damage, cost or expense is not covered by this Policy the burden of proving the contrary shall be upon the Insured.

14. Computer System Records

Any loss, distortion or erasure of computer system records:

- (a) whilst mounted in or on any machine for use or processing unless caused by fire, lightning, aircraft, water or any neglect, error in performing or omission to perform a professional duty by the Insured; or
- (b) resulting from wear, tear, vermin or gradual deterioration; or
- (c) caused by climatic or atmospheric conditions or extremes of temperature unless not recoverable under a standard fire policy; or

- (d) caused by the presence of magnetic flux or by the loss of magnetism unless caused by lightning,

15. Contractual Liability

Any:

- (a) acceptance of or guarantee of fitness for purpose or similar provision; or
- (b) guarantee, including any relating to performance by the Insured, including performance warranties or as to the period of a project; or
- (c) acceptance of liability for penalties or liquidated damages; or
- (d) assignment of a Collateral Warranty more than twice.

This exclusion does not exclude liability which would have attached to the Insured in the absence of such acceptances, guarantees, Collateral Warranty or similar provisions.

16. Pollution or Contamination

Any pollution or contamination by naturally occurring or man-made substances, forces or organisms or any contamination of them whether permanent or transitory and however occurring. This exclusion does not exclude liability for the Insured's negligent structural design or specification or failure to report a structural defect in a property but cover shall only extend to that part of any liability, loss, damage, cost or expense which relates to the cost of re-designing, respecifying, remedying or rectifying the defective structure and shall not include the cost of remedying or rectifying any loss or damage to or diminution-in-value of any property.

17. Cyber Liability

Any transaction or communication via the internet, extra-net, via the Insured's own web site, web address or via the transmission of electronic mail or documents by electronic means, arising directly or indirectly out of:

- (a) corruption, erasure, theft, alteration of; or
- (b) access or lack of access to; or
- (c) interference with

electronically-held data of the Insured wholly or partly caused by any computer virus or by any person who is not a principal, partner, director or employee currently employed by the Insured.

18. Asbestos

Any:

- (a) mining, processing, manufacturing, use, testing, ownership, sale or removal of asbestos fibres or material containing asbestos; or
- (b) exposure to asbestos, asbestos fibres or materials containing asbestos; or
- (c) provision of instructions, recommendations, notices, warnings, supervision or advice given, or which should have been given, in connection with asbestos, asbestos fibres or structures or materials containing asbestos.

19. Insolvency

The insolvency of the Insured.

20. Insurance or Financial Services

Any maintenance of or effecting insurance or the provision of finance or advice on financial matters including the conduct by the Insured of any business which is "Investment Business" as defined by the Financial Services Act 1986 or the Financial Services & Markets Act 2000.

21. Estimates

Any negligence on the part of the Insured in connection with estimates of construction costs except where such estimates are compiled by a professionally qualified quantity surveyor.

22. Termination of Firm

Any Circumstance or Claim in respect of the exercise and conduct of the Insured's Professional Business on or after the date of:

- (a) a winding up order against the Firm where the Firm is a limited company; or
- (b) a bankruptcy order against the principal of the Firm or of all the partners of the Firm; or
- (c) the death of the principal of the Firm or of all the partners of the Firm; or
- (d) the Firm ceasing to trade for any other reason.

23. Retroactive Date

Where a Retroactive Date is stated in the Schedule, any conduct of the Insured's Professional Business prior to the Retroactive Date.