

The brownfield risk jungle: don't fall into the trap

Specialist environmental insurance provides cost-effective solutions to the technical, legal and financial uncertainties of brownfield, argues Graham De Roy of Tyser

In 1996 I spoke at a conference about partnering in the construction industry. There was to be a new atmosphere of collaboration in an integrated fashion; the old adversarial ways didn't work and the industry was wasting a fortune as a result.

Last year I spoke at another conference where the topic was, yes you guessed it.....partnering. Some speakers enthused as though it was a great new idea but, in reality, almost a decade later, nothing had changed. For most, partnering remains a myth, the confrontational approach continues, unabated.

Origin of the problem

The major problem, I believe, is the traditional structure of construction contracts. Take the most common, JCT, for example. JCT is all about what will go wrong.

It perpetuates an acutely defensive approach. On the one hand, you have the client who wants a "Rolls Royce" job at a "Mondeo" price. On the other you have the poor contractor who, to win the tender, has had to cut cost to a suicidal price to hang on to his miserly 1% margin. No wonder the trouble starts!

About 20 years ago, the industry created a wonderful new concept "design and build". Instead of suing the entire profes-

sional team when a defect manifested itself, you just sued the contractor to whom all the professional skills had been novated. A classic case of risk being passed down to the entity least able to embrace it. Is it any wonder, therefore, that today 80% of all construction insurance claims consist of legal and forensic costs only? It doesn't take much to figure who takes the real margins out of the industry.

So many of today's construction professionals have been brought up in this adversarial culture and they just can't see that, when it comes to risk, the traditional procurement route is utterly flawed.

So, chances are when clients say "I'm risk averse: I pass all risk to clients and consultants", they are probably being advised by the "luddite" project managers and quantity surveyors and perhaps lawyers who have a vested interest or perhaps, don't know any better.

Even worse, many of the banks who provide the project financing, are often paying a lot of money for this suspect advice.

Professional Indemnity Insurance

Traditionally procured insurance mirrors the construction industries fault lines. It

protects individual firms, not integrated teams and the "blame culture" perpetuates a protectionist approach. There are various mechanisms which underpin the client's false sense of security; the most common being professional indemnity insurance (PI).

Many clients possess a kind of "machismo" when it comes to PI. One will say "I've got £5,000,000 PI from the contractor" while the other upstages him with "I've got £10,000,000 from the consultants". The sad thing is they don't know why they want £5,000,000 or £10,000,000. Even worse, they don't know what it covers.

It is likely that a huge amount of potential remediation work will be undertaken in the next few years; the Thames Gateway area is the largest regeneration opportunity in Europe and the winning of the 2012 Olympics has had the construction industry generating a fervour of anticipation.

Chances are, much of the work will be inappropriately insured or not insured at all, with potentially disastrous consequences.

The principal risk

Once I was amazed (now I just shrug my shoulders) that remediation contractors, tasked with the actual work of cleaning up contamination, are being asked for high levels of PI cover which is of no value to anyone.

PI essentially protects consultants against negligent professional advice. The principal risk associated with a remediation contractor's work is that its activities mobilise residual contamination to create a pollutant linkage.

In such circumstances, a site can be brought into *Part IIA of the Environmental Protection Act 1990*. If sued as a result, the client will have no remedy under a PI policy.

This is a Public Liability (PL) risk but crazily, most remediation contractors have "pollution" exclusions under their PL policies.

Market developments

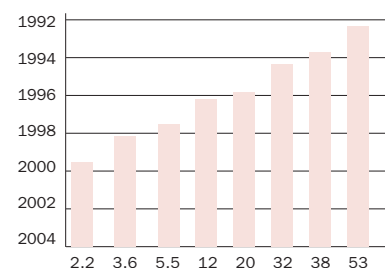
Specialist Environmental Insurers

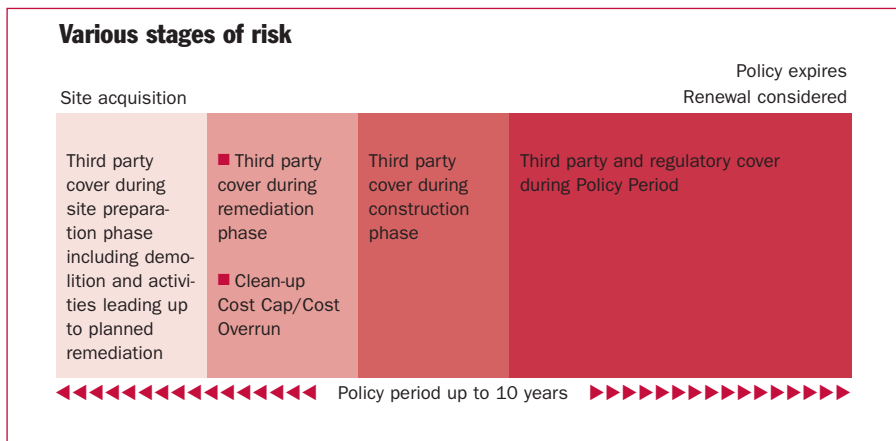
Year	Insurers
1990	2
1995	3
2005	6

Limits of Indemnity & Periods

Year	Limits of Indemnity	Period of Cover
1990	£3m	3 Years
1995	£10m	10 Years
2001	£100m	25 Years
2005	£100m	10 Years Historical 5 Years Operational

Gross Premium Written





Collateral warranties

Within the construction industry, there is an institutional obsession with collateral warranties. To have any effect whatsoever, they have to be backed by PI.

Even in circumstances where a PI policy may respond, clients should be reminded that PI is no benefit to them; it is a defence mechanism for the consultant.

The chances of proving negligence under someone's PI policy, within 5 years, if at all, are remote. In my view, collateral warranties are a complete waste of time and money. In over 20 years I never known a client, a tenant or a third party successfully seek redress under a collateral warranty.

Why are they getting it so wrong? Well, many professionals believe they know better than the few specialist insurance brokers in the market who are often not consulted until it is too late. We are better placed than anyone to understand how risk should be managed, mitigated or transferred. We should be seen as a member of the professional team; not as a bunch of used endowment salesmen.

Getting it right

The client, with the assistance of the professional broker, is best placed to handle risk, not the contractor or consultants.

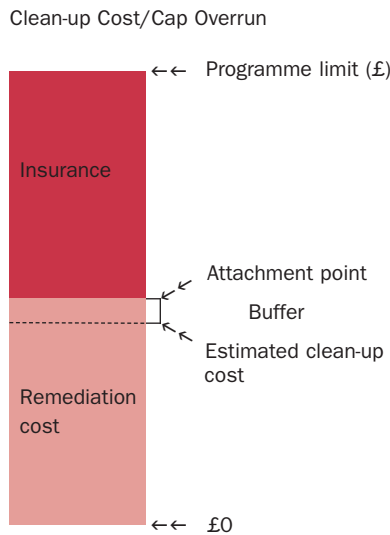
There are too many prevailing uncertainties to pass the liability parcel. Many of these uncertainties can be removed with controlled risk transfer through the use of specialist environmental insurance.

This market has developed dramatically during the past few years and now provides cost effective solutions to the technical, legal and financial uncertainties associated with brownfield development.

Much of this insurance is triggered by funders and institutional investors who are not prepared to expose their

"Underwriters shall not be liable to indemnify the insured against any claim based upon, arising out of or relating directly or indirectly from any consequence of or any way involving seepage, pollution or contamination of any kind."
A real remediation contractor/consultant's PI policy.

Typical insurance product solutions



investment to such risk.

The Law Society's "warning card" focusing on the importance of environmental due diligence has resulted in increasing numbers of law firms recognising the value of insurance.

We collaborate with many in designing and delivering bespoke insurance solutions, which make a solid contribution to real risk transfer.

Graham De Roy
Tysers

Risk Assessment – Where are we going?

9-10 May 2006

New Connaught Rooms, Central London

Brownfield Briefing will hold its fourth annual risk assessment conference, on 9 and 10 May 2006 in central London.

What is happening in the field of environmental risk assessment, what will the future direction be and how will we be affected?

There is still vast uncertainty in regulation, guidance and application of risk assessment procedures. The issue is becoming increasingly complex with the development of the environmental liability directive. Can environmental specialists be confident that they will not be held liable, and won't end up facing large fines or disciplinary action?

Sessions on Tuesday 9 May will provide a 'big picture' summary of recent developments and the current situation, with specific reference to the Soil Guideline Values Task Force, CLEA developments, the effects of land contamination on health, international case studies, megasites and special sites.

On Wednesday 10 May, presentations focus on new and developing tools and specialist areas of risk assessment, including biological assays and ecological risk assessment, radioactive and asbestos risk assessment, complex site data management and comparisons of risk assessment models.

Sponsored by:



This conference will take place at New Connaught Rooms in Covent Garden, London. For a full programme email conference@newzeye.com, Tel: +44 (0)20 8969 1008, or go to www.newzeye.com