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# What to know before you start digging a hole

A residential owner's guide to construction works

Q&A





This guide provides a brief, general overview of various aspects of construction projects which are often faced by residential occupiers.

For more detailed information and advice, it is strongly recommended that you seek professional legal advice before starting any construction work or agreeing any contracts or appointments.

# Contents

- Q1 Why do I need a written building contract?

---

- Q2 What type of building contract should I use? I'm being told that the JCT Minor Works will be good.

---

- Q3 Why shouldn't I use the architect's or engineer's standard form appointment?

---

- Q4 What issues do I need to look for in my architect's and/or engineer's appointment?

---

- Q5 What is Professional Indemnity Insurance, and why should my builder have it?

---

- Q6 What should I do before I sign a contract with my builder?

---

- Q7 What Professional Indemnity Insurance (PII) should my architect and engineer hold and for how long?

---

- Q8 What is a Contract Administrator/Employer's Agent, why do I need one and who should it be?

---

- Q9 Why does my lender need to see my construction documents?

---

- Q10 What are collateral warranties and why are they important?

---

- Q11 Do I need a performance bond from my builder?

---

- Q12 Why do I need works insurance?

---

- Q13 Who insures the works and my house if it is only being extended?

---

- Q14 When do I need a new build guarantee?





- Q15** I thought my new build guarantee covered all defects!
- 
- Q16** Why is there so much concern about new basements or basement extensions?
- 
- Q17** Do I need any consents/permission from the adjoining owners before I start my building works?
- 
- Q18** Is there anything else I need to think about involving third parties or neighbours when doing my building works?
- 
- Q19** Should I give money to the builder in advance to buy materials or other items before they are installed/delivered?
- 
- Q20** What's the difference if the contract/appointment is signed as a deed?
- 
- Q21** If the builder damages my house, he has to fix it, doesn't he?
- 
- Q22** What happens if the builder damages my neighbour's house?
- 
- Q23** What do I do if the builder doesn't finish the job?
- 
- Q24** How can I make the builder fix defects?
- 
- Q25** But the builder said it would only cost £x!
- 
- Q26** It's been X years and the builder still isn't done!!
- 
- Q27** My builder has gone bankrupt – now what?
- 
- Q28** Why does my lender not accept the 'noting' of its interest on my insurance?

# Q1

## Why do I need a written building contract?

A building contract formalises the agreement between you and your builder. Although you can have an oral contract, without a written document, it is difficult to determine then what has been agreed between the parties. Common terms which often cause disputes include:

- (a) costs and increases of costs
- (b) time for completion
- (c) delays, and
- (d) ability to terminate.

Without a written contract, if a dispute arises, it can be difficult and costly to resolve.



# Q2

What type of building contract should I use? I'm being told that the JCT Minor Works will be good.

The Joint Contracts Tribunal (JCT) provides industry standard forms of building contract which are generally used for residential projects. However, there are many types of JCT contracts, the use of which depends on the type and nature of the project. JCT Minor Works is only meant to be used for extremely minor works and is not appropriate for most residential construction works. Specifically, JCT Minor Works should not be used for basement works, major extensions, any works where the contractor is doing any element of design, entire new builds or where you have a lender funding the costs.

Also, any standard contract like the JCT generally requires amendments to make the contract suitable for residential projects, especially basements. Therefore, you should always seek professional legal advice before agreeing a contract with your builder.



# Q3

## Why shouldn't I use the architect's or engineer's standard form appointment?

There are various standard forms of professional appointments such as RIBA for architects, ACE for engineers and RICS for surveyors. These forms of appointment have been drafted by the consultants' professional bodies for the benefit of the consultants, not for you.

Whilst it can be acceptable to use the standard forms as a starting point, in all cases, these documents will need to be amended in order to protect you. Also, your lender will need certain terms in these standard forms to be altered.



# Q4

## What issues do I need to look for in my architect's and/or engineer's appointment?

The key terms in a standard form appointment which need to be amended to provide you increased protection include:

- (a) requiring Professional Indemnity Insurance to be on an each and every claim basis, and to be held for 12 years from practical completion of the development
- (b) ensuring that any limitation of the consultant's liability is for an amount no less than the current amount of the consultant's Professional Indemnity Insurance
- (c) removing any net contribution clause
- (d) ensuring that copyright in designs and documents is not revoked or suspended for non-payment of a consultant's fees
- (e) enabling you to assign the appointment generally and to your lender specifically, and
- (f) ensuring that your lender and, where necessary, you or a purchaser from you are provided with collateral warranties.



# Q5

## What is Professional Indemnity Insurance, and why should my builder have it?

Undertaking the design of a building or any part of it (for example, foundations or mechanical and electrical systems) is deemed to be a professional duty. Where a designer is negligent in its duty such that damage occurs as a result, the designer can be sued for breach of its duty of care. Professional Indemnity Insurance (PII) provides insurance cover for such claims.

Where a builder is responsible for any element of the design of your development, it must have PII. Otherwise, since most construction companies have very few, if any, tangible assets, in the event that the builder is negligent and you make a claim against it, you may not be able to recover your loss.

The amount of PII which the builder has should be sufficient to cover the maximum claim that you might make. This is especially important where the works include the construction of a basement. If your house was to be completely destroyed by the builder's negligence, your builder should have sufficient PII to cover the cost to rebuild your house. Also, your builder should maintain its PII for 12 years from practical completion of the works.



# Q6

## What should I do before I sign a contract with my builder?

It is always recommended that you seek proper legal advice before signing any building contract, as otherwise you might find that you are contractually bound in ways which you had not intended or that the building contract does not cover all the issues it should.

In addition you will need to determine if you need consent for the works from:

- (a) your lender
- (b) your landlord and/or estate owner
- (c) your neighbour, or
- (d) the local planning authority.

All or any combination of the above items may apply depending on the nature of the works you are doing.



# Q7

## What Professional Indemnity Insurance (PII) should my architect and engineer hold and for how long?

Since professional firms generally have few assets, any claim you make against your consultant, will likely end up being against the consultant's insurers. Therefore, the amount of a consultant's PII should be sufficient to cover the maximum claim that you might make.

For example, if your house has to be completely rebuilt due to the consultant's negligence, you would need to claim the amount it will cost to rebuild.

Ideally, you want the consultant to be obliged to hold PII for 12 years from practical completion, although in certain cases it may be acceptable to agree a 6 year limit. However, you should seek professional advice before agreeing to anything less than 12 years.



# Q8

## What is a Contract Administrator/Employer's Agent, why do I need one and who should it be?

The terms Contract Administrator (CA) and Employer's Agent (EA) are used by different forms of building contract to refer to an individual who will act on your behalf to administer the building contract. Of critical importance, it is the CA/EA who certifies the amount and value of work your builder has completed within a given time period, confirms the amount of the payments you should make to the builder and certifies when practical completion of the works has correctly occurred.

By both contract and common law, a CA/EA has a duty to act impartially in relation to certification. Given this critical role, the CA/EA should be an independent experienced consultant who has the requisite qualification and experience, and who you appoint – the CA/EA should not be you, the builder or any of the builder's employees.



# Q9

## Why does my lender need to see my construction documents?

Even if you are not obtaining finance from your lender for the building works, if you have a mortgage with your lender, it has an interest in your property. Therefore, your lender is likely to want to ensure that the building works will be done to a satisfactory level. Their consent for the work is likely to be required as a minimum.

Further, in the unlikely event anything goes wrong, your lender will require the ability to deal with the property and/or development, thereby requiring collateral warranties (CWs) from various of the parties involved in the development.

Since CWs are dependent on the main contract or appointment, your lender will have to be satisfied that the construction documents are properly drafted.



# Q10

## What are collateral warranties and why are they important?

A collateral warranty (CW) is a secondary contract provided by a builder/consultant to a party who has an interest in the development. For example, your lender will want CWs from your builder and your consultants. Also if you sell a buyer will want this too. Just as important, you need CWs from all design sub-contractors. Without a CW, under English law, it is difficult (if not impossible) for a third party to sue a builder/consultant/sub-contractor if there are defects in the builder's/consultant's/sub-contractor's works or their design.

Also, CWs typically give certain beneficiaries like you or your lender rights to '*step-in*' to the position of the employer under the main or sub-contract. These rights are important in the case of insolvency of your builder.



# Q11

## Do I need a performance bond from my builder?

A performance bond is a type of security which provides you protection against non-performance by your builder and/or its insolvency. Typically covering 10% of the contract sum, a bond is provided by a bank or bondsman. Although there is a cost associated with obtaining a bond, provided the correct form of bond is obtained, you will be “compensated” in the event that your builder either does not complete the work or goes bankrupt/insolvent. Therefore, it is highly recommended that a performance bond is obtained for any major development works, such as basements or new builds.



# Q12

## Why do I need works insurance?

Although you might have buildings insurance for your property, such insurance only covers the existing structure: it does not cover the work in progress or any of the construction materials. For example, if you are having a roof extension and there is a fire, your buildings insurance will probably not cover any of the materials used in the extension or the extension itself until the work has been completed. Therefore, works insurance is very important.



# Q13

## Who insures the works and my house if it is only being extended?

Typically, when works are being undertaken on an existing building, it will be your responsibility as employer to insure the works. This means that you will need to obtain the works insurance. There are some specific requirements for this insurance under a standard building contract which typically include having your builder as a joint insured. If you have a mortgage or are getting a loan for the works, your lender will need to be included on the policy, and there may be other provisions required by your lender such as being first loss payee and non-waiver clauses.

You will also need to notify your buildings insurer of the works and ensure that provision is added to your existing buildings insurance policy to cover for any damage caused by the works.

Depending on the type of work being undertaken, other types of insurance may also be required, such as non-negligent insurance (see [Question 22](#)).



# Q14

## When do I need a new build guarantee?

New build warranties/guarantees from providers such as NHBC, BLP and/or Premier Guarantee are a form of insurance policy for newly built homes which provide cover for up to ten (10) years from the start of the policy. Some providers will also provide cover for renovations and/or extensions. The cover provided and how defects are dealt with differs by provider. Therefore it is important to understand the terms of the policy which is to be obtained. Also if your builder is to provide or obtain the warranty, then it needs to be in joint names from the outset.

See [Question 15](#) for more information on new build guarantees.



# Q15

## I thought my new build guarantee covered all defects!

The cover provided by a new build guarantee depends on the provider (i.e. NHBC, BLP, Premier, etc.). However, generally, the cover provided is as follows.

First, where you are exchanging contracts to buy a new build property before it is built, in some (but not all) cases, the warranty may cover reimbursing you for any deposit paid to the vendor if it becomes insolvent/does not complete the building. However, as not all warranties provide this cover, you must ensure you check the policy to ensure that this cover is included.

Once the property is completed, the warranty then provides two periods of cover. For the first two (2) years (known as the defects insurance period) the builder is required to return to fix any defects in its work. If it does not, the warranty provider is likely responsible for remedying the works. Then, from years three (3) to ten (10) (known as the structural insurance period), the warranty only covers major problems with the structure of the property. Examples of such problems are defects in the foundations, roof and/or load-bearing parts of the floors. Policies do have maximum levels of cover, so you need to check it is sufficient to cover the cost of rebuilding if necessary.





As there are different types of cover, (even from a particular insurer such as NHBC), it is imperative that you/your solicitor read the policy documents to understand what cover is provided in your particular case.

Also, given the ever increasing number of warranty providers in the market, be careful to ensure that the provider is approved by the UK Finance Mortgage Lenders' Handbook otherwise you might have problems selling your home in the future or obtaining a mortgage. It is also recommended that the warranty is provided by an insurer who is regulated by the Financial Conduct Authority (FCA). Many warranties are from insurers who are based overseas and are therefore not covered by the FCA, nor sufficiently capitalised. Further, it is imperative that you check the details of the underlying insurer and, although not a guarantee, it is highly recommend that you should only consider policies underwritten by UK-based insurers which one of the major rating agencies has rated as at least "A" or better. Finally, the policy should be in either your sole name or in the joint names of you and the builder – it should not however be in the sole name of the builder.

For an example of what can go wrong with new build warranties, see <https://www.edwincoe.com/blogs/main/be-sure-to-look-under-the-cover-of-a-new-build-warranty/>.



# Q16

## Why is there so much concern about new basements or basement extensions?

Clearly digging a basement under an existing house is a somewhat risky endeavour. Not only is there a potential for the entire house to collapse if the works are not done correctly, the nature of such works exposes you to a potential claim for damage to your neighbours' property. Also, basements are notorious for having issues with damp and water ingress due to poor waterproofing. As such, it is important to ensure that a properly qualified and experienced professional team and basement builder are used for such work. If the builder does not have sufficient professional indemnity insurance, will not provide a waterproof/tanking guarantee for a minimum of ten (10) years or will not provide your lender with collateral warranties, it is likely the builder does not have the level of experience required for such work.

For an example for what can go wrong with basement works, see <https://www.edwincoe.com/blogs/main/and-it-all-came-tumbling-down-a-salutary-lesson-for-new-basements/>.



# Q17

## Do I need any consents/permission from the adjoining owners before I start my building works?

Depending on the type of works you are doing and the nature of your property, your work may be subject to the Party Wall etc. Act 1996 (PWA). The PWA is a statutory framework that dictates the rules that must be followed when undertaking works where you share a boundary with your neighbour.

The Ministry of Housing, Communities and Local Government publishes a very useful party wall explanatory booklet at <https://www.gov.uk/guidance/party-wall-etc-act-1996-guidance>.

You will need to employ a specialist party wall surveyor to deal with all party wall issues since you will need to compensate your neighbour for any damage to his/her property caused by your works and pay all expenses relating to the works. Also, a neighbour can obtain an injunction to stop any works that occur without a valid party wall award in place.



# Q18

## Is there anything else I need to think about involving third parties or neighbours when doing my building works?

Again, depending on the nature of your property and the works you plan to do, you may need consent from:

- (a) your lender
- (b) your landlord and/or estate owner
- (c) a residents' association
- (d) the local planning authority, and/or
- (e) utility companies.

Further, there may be covenants on the title of your property which limit and/or restrict development. Therefore, you should always seek professional advice prior to commencing any works or entering into any building contracts.



# Q19

## Should I give money to the builder in advance to buy materials or other items before they are installed/delivered?

In short, no, unless you are comfortable with the fact that you might not see the money again. In certain cases your builder may want monies in advance to purchase certain materials. The problem is that until the materials are delivered to your property, there is a risk that you may lose the monies you pay in advance if your builder becomes bankrupt or fails to insure and/or obtain delivery of the items. If there is a need for any substantial payments in advance, it is recommended that you require an advance payment bond (APB) from the builder. An APB is obtained from a bank or bondsman and provides you security for any advance payments in the case the materials/prefabricated goods are not delivered to the property.



# Q20

## What's the difference if the contract/appointment is signed as a deed?

There are different legal requirements and consequences when a document is signed '*under hand*' as a simple contract compared to being '*executed as a deed*'.

The main differences between a simple contract and a deed are:

- deeds must be in writing, whereas a simple contract can be entered into orally or by conduct
- deeds must clearly indicate that they are intended to be a deed
- each party has to demonstrably provide '*consideration*' (i.e. payment for provision of goods/service) for a simple contract to be valid; consideration is not required for a deed
- there are particular legal formalities required to execute a document as a deed. For example, signatures on a deed must be witnessed, and
- the statutory limitation period for simple contracts is six (6) years whereas for a deed it is twelve (12) years.

The difference in the statutory limitation period is an important reason why you should seek to have all building contracts and appointments signed as deeds.



# Q21

## If the builder damages my house, he has to fix it, doesn't he?

Both your contract with the builder and, providing you are an individual homeowner, the Consumer Rights Act 2015 provide you certain protections in the case that your builder damages your property when undertaking the works. That being said, such claims can often be rather difficult, especially if you do not have a written contract with the builder.

Some recommended practices to help avoid any prolonged disputes include:

- undertake sufficient due diligence prior to hiring a builder
- seek recommendations and references for the builder and inspect the builder's previous work
- obtain more than one (1) quote for the work
- do not always accept the cheapest quote – you do get what you pay for
- if possible, carry out a credit check on the builder
- ensure that the builder has sufficient insurance (including PII, public liability, employer's liability and contractor's all risk insurance) by asking for copies of these policy documents





- ensure that you have adequate works insurance and have notified your buildings insurer about the works
- do not make advance payments in relation to any works – payments should only be made for work that has been completed
- stipulate a defects liability period (being the timeframe after practical completion that the builder must come back and remedy defects – see **Question 24**) of no less than 12 months
- seek a retention (see **Question 24**) of no less than 3% (the standard is 5%) of the contract sum, and
- require a performance bond from the builder for its obligations.



# Q22

## What happens if the builder damages my neighbour's house?

Given the risky nature of construction projects, it is important to ensure that both you and your builder have adequate insurance cover.

When looking at damage to neighbouring property, there are various types of insurance which may be invoked including public liability and non-negligent or third party insurance.

In any event, it is imperative that, prior to commencing any construction project or entering into a building contract, you seek the advice of a specialist insurance broker. Your normal house insurance broker may not be familiar with the specialist nature of insurance for building works and in particular the insurance terms in various standard form contracts and appointments. Therefore, you should speak with your solicitor for details of a specialist construction insurance broker.



# Q23

## What do I do if the builder doesn't finish the job?

Provided that your building contract has a specific completion date and provision for liquidated damages (LDs) (sometimes also known as liquidated and ascertained damages or LADs), the builder will need to complete all the works by the specified completion date. However, there may be valid reasons for delays when the builder can claim extensions of time (see [Question 25](#)); if there are not, where the builder does not complete the works by the completion date, you can claim LDs.

Typically determined on a weekly basis, LDs are used to regulate the amount of damages which you will suffer due to the delay. For example, this can include the cost of rental accommodation, additional interest on a loan, etc.

If your contract does not make provision for LDs but there is a completion date, in the event of a delay, you will have to sue the builder for breach of contract to get damages which can be costly and take time. Therefore, you should ensure your contract stipulates an appropriate amount for LDs which represent a reasonable assessment of your losses in the event of late completion.



# Q24

## How can I make the builder fix defects?

Under a building contract, there is a period following completion known as either the rectification period or the defects liability period (DLP). It is both recommended and standard practice for this period to be no less than 12 months after practical completion of the works.

During the DLP, your builder has a contractual obligation to return and remedy certain defects without cost to you. A retention is used to help motivate the builder to undertake such works.

Typically 5% of the contract sum, retentions are an amount you withhold from each payment made to the builder. The money still belongs to the builder (therefore you should keep it in a separate bank account), and half of the retention has to be paid to the builder at practical completion. You hold the other half of the retention until the end of the DLP.



# Q25

## But the builder said it would only cost £x!

Although you may have agreed a fixed, lump sum for the building works, there are times when your builder will be entitled to additional money as a result of circumstances that are either within your control or for which you have taken the risk. For example, if the original quote was based on a certain type of materials or certain ground conditions, in the event that either you request different materials or the ground conditions were not as expected, these may be legitimate variations/changes to the works which entitle the builder to more money and more time to complete the works.

Where you disagree with the amount of one of your builder's invoices, your contract might require you to officially notify the builder of such disagreement. It is therefore important that you have a professional Contract Administrator/Employer's Agent to advise you on matters such as extensions of time, loss and expense claims and the payment provisions within your contract. If you miss any deadline to notify the builder of your disagreement, you may lose the chance to challenge a payment.



# Q26

## It's been X years and the builder still isn't done!!

As mentioned previously in [Question 25](#), there can be legitimate reasons why a builder can be entitled to more time to complete the works than originally expected. That being said, often there are delays which are the builder's fault. Therefore, the building contract should make provision for you to claim damages in such cases. See [Question 23](#) above for further details on liquidated damages.

Another option may be to terminate the building contract. However, as terminating a contract incorrectly can have serious repercussions, you should always seek legal advice before terminating the contract with your builder.



# Q27

## My builder has gone bankrupt – now what?

Care must be taken if you suspect that your builder might be going or has gone bankrupt/insolvent as you must ensure that you do not undertake any actions which may place you in breach of contract, yet you must also protect your position.

If you receive formal notification that your builder has become bankrupt or gone into administration/liquidation, or you suspect it has or may happen, you should immediately seek legal advice.

Of utmost importance, you should not make any payments directly to a sub-contractor and/or supplier as such are not legitimate payments under the building contract, and these might also be deemed to be a '*preference*' under insolvency law, with the impact that you may be liable to make the same payment twice.



# Q28

## Why does my lender not accept the 'noting' of its interest on my insurance?

Previously, within the insurance industry there was an agreement with the Association of British Insurers (ABI) whereby having a Bank's interest 'noted' on an insurance policy meant insurers would give notice of a policy cancellation/ amendment. However, this practice ended a number of years ago. Accordingly noting of an interest now offers no protection to a lender.

Therefore, given your lender's interest in your property, it needs to be named as composite insured as this gives your lender a separate and proper interest on your policy.



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