BEALE&CO

INSURANCE TRENDS 2022:

NAVIGATING A HARD MARKET

International Construction and Insurance Law Specialists

INTRODUCTION

As we emerge from the extraordinary series of events we have all faced personally and professionally over the past two years, there is a glimmer of hope that things may finally be returning to normal in whatever guise that will take. Looking ahead to 2022 and beyond, many are anticipating an accelerating economic recovery and the opportunities this will bring.

In this report we set out our latest thoughts on the insurance claims environment as we recover from the pandemic – the issues that are likely to give rise to claims in the short and longer term and how insurers are responding to the potential liabilities arising from what is hopefully a more predictably unpredictable world.

The key trends emerging across all sectors of business include:

- **The Impact of Covid-19** – The full impact of Covid-19 is yet to be understood as support schemes are withdrawn. Recovery is likely to be uneven across different sectors of business with many businesses forced in a very short time to evolve working practices that under normal conditions would have taken years to implement. The issues that arose for many industries arising from the switch to remote working will likely continue to be the source of claims for the short term.
- **Environmental, Social and Corporate Governance (ESG)** – There is growing and multifaceted pressure on businesses to adapt from investors, consumers and regulators alike in relation to ESG issues. 2021 saw a seismic shift in focus on the global climate change agenda. Failure to consider and embed ESG expectations is a huge potential risk for all businesses going forward as we inevitably move to mandatory regulation and legislation.
- **Digitisation** – Businesses reliance on technology accelerated as a result of the pandemic. As discussed in this report, innovation in technology appears to be the key to unlocking many of the current difficulties faced by industries. However, with digitalisation comes huge risk in relation to cyber-attack which has increased extensively across all sectors of business and is a risk factor which cannot be underestimated for the future.
- **Increased regulation** – It is becoming increasingly difficult for businesses to stay on top of the volume and complexity of regulation that impacts their business. The failure to adhere to rules is a continued risk for businesses but with this increased complexity comes the additional costs of compliance and training, which some businesses will struggle to take on.
- **Hard market** – The world economy is finely balanced and current events again prove how true this is. With fewer businesses willing to take risks the hard market we face and have been facing for some years now will prevail. While this particular phase of the cycle continues, we can expect to see the same issues with fewer providers, reduced cover, and rising premiums for insureds.

These trends will have wide ranging implications across the professions and are covered in more detail in this report. Understanding these and the nuances between the professions, how they will be affected and how best to mitigate the risks involved is important. We hope this report will shed some light on the future of the market this year and in the years to come.

Finally, I would like to thank my colleague, Sam Winstanley, who was the main driving force behind this report.

Sheena Sood,
Senior Partner

EXECUTIVE SUMMARY

Here's a summary of our key insurance trends and predictions across the sectors for 2022. Click on a market area to read our full analysis.

CONSTRUCTION 4

- Project delays and labour difficulties fuel a rise in contractual disputes
- Greater accountability proposed by new Building Safety Bill
- Defective cladding, insulation and internal fire separation claims persist
- Firms are adapting to hit new ambitious climate change targets
- Construction sector is still resistant to invest in cyber security

SURVEYORS 7

- Increased insurance costs making adequate, affordable PII hard to find
- The use of non-standard property valuations over the pandemic may see a rise in overvaluation claims
- A building and fire safety focus following new guidance
- A likely reduction in Japanese knotweed claims against surveyors
- Ongoing disputes over cladding

SOLICITORS 10

- Insurers increasing premiums and excesses in response to hard market
- Mergers between firms continue to rise significantly
- A rise in fines expected as the SRA consider increasing fining powers
- A focus on firms delivering ethical legal services
- A rise in contentious probate claims, as Will-making increases

ACCOUNTANTS & AUDITORS 14

- A focus on 'Restoring trust in audit and corporate governance'
- Identifying fraudulent misstatement after updated auditing standards
- Focus on non-financial reporting of environmental performance
- Increased professional negligence claims against accountants
- Investment in digital tools such as open banking solutions

EDUCATION 17

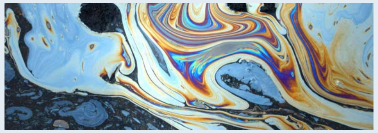
- Positive culture change in universities as new 'Staff to Student' sexual misconduct guidance issued
- An increase in SEN, Disability and inadequate teaching claims registered post COVID-19
- A continuation of Subject Access Requests by parents which disclose personal information about pupils

INSURANCE BROKERS 19

- Brokers unprepared for the hardest insurance market for 20 years
- More businesses likely to be underinsured due to supply chain issues, market volatility and inflation
- An increase in errors and omission claims against brokers
- New rules for insurers to ensure delivering fair value to consumers
- Digital innovation seen as a necessity for the profession's future

DIRECTORS & OFFICERS 21

- Difficult times ahead as high-inflation, market volatility and the conflict in Ukraine hits hard
- Directors of dissolved companies to be put in the spotlight
- Tougher action for failure to follow equality procedures
- Dealing with "return to work protocols" post pandemic
- Ethics and culture related claims continue to increase



ENVIRONMENTAL 25

- New Environmental Act brings greater climate change litigation and regulation of green issues
- Increased investment in environmental risk management and initiatives
- Increased focus on the mis-selling of 'green funds'
- An increase in prosecutions, driven by public's demand for action on environmental issues

IFAS 28

- Potential pressure on insurers to cover defined benefit transfers following British Steel FCA investigation
- Continued low interest rates likely to result in clients seeking higher risk investments
- IFAs could see increased mis-selling of 'green funds' claims following CMA investigation into 'greenwashing'
- Additional protections for vulnerable clients could lead to increased claims

CYBER 30

- A huge rise in Ransomware attacks, cyber scams and data risk claims
- An increased demand for cyber insurance coinciding with a significant rise in cyber claims
- Insurers becoming more selective of risks with rising sub-limits and exclusionary language
- UK Data protection law will be shaped by outcomes of new consultation paper

< RETURN TO EXECUTIVE SUMMARY

CONSTRUCTION

The hard professional indemnity insurance (PII) market is complicating the process of securing coverage for most construction professionals. This coupled with the stresses of the COVID-19 pandemic, Brexit and supply chain shortages has led to considerable financial pressure being placed on the construction industry. In this climate, cash is king, but as many construction firms operate without large capital reserves, projects are in a precarious position and we are already seeing more construction company insolvencies in 2022. Furthermore, we consider we will see fewer new projects initiated in 2022 as a result of these continuing pressures.

The stresses of the COVID-19 pandemic, Brexit and supply chain shortages has led to considerable financial pressure being placed on the construction industry.

As a consequence of the Grenfell tragedy, claims relating to defective cladding, insulation and internal fire separation defects continue to persist. The Building Safety Bill (BSB), has reached committee stage in the House of Lords and is likely to receive royal assent later this year. The BSB will make wide-ranging changes setting out a pathway on how residential buildings should be constructed, maintained and made safe. The proposed changes impose greater obligations on designers, contractors and building control bodies. Although the framework in relation to these enhanced obligations and duties has now been set out, much of the detail is awaited and revisions continue to be made. Keeping on top of the new regulations will be a challenge for businesses in 2022. Whilst theories relating to liability are being discussed and developed, we consider key concerns for professionals and their PII insurers will be in relation to:

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- The increased obligations on 'dutyholders' in relation to "higher-risk buildings". The government has been clear that the introduction of the dutyholder regime is about accountability. The new Building Safety Regulator (BSR) will have wide-ranging enforcement powers over dutyholders and defence costs for BSR intervention will be a key PII concern going forward. Even where there is no cover for regulatory intervention/investigation, where there is accountability for errors and omissions, professional indemnity claims will undoubtedly follow. Mitigation of such claims will be a key concern for insurers and insured practices.
- Claims under s.1 of the Defective Premises Act 1972 (the DPA) – as currently re-drafted, the BSB proposes to extend, retrospectively, the limitation period for claims under s.1 of the DPA from 6 years from the cause of action to 30 years. Of particular concern to professionals and insurers is that any older claims are likely to be much harder to defend on limitation grounds.

- Claims arising under s.38 of the Building Act 1984 (Section 38) – Section 38 has not, as yet been brought into force. It provides a statutory right of action to anyone suffering physical damage caused by a breach of building regulations. Whilst the potential impact on future claims is difficult to gauge, it is clear that Section 38 opens up the type of building (any building, not just residential) in which direct civil claims can be made for breach of building regulation and also expands the nexus of potential claimants (any claimant who has suffered physical damage) who can bring such claims.
- Claims arising from the completion of form EWS1 – as discussed further in our analysis of surveyors' risks.
- We are still in a time of great uncertainty in relation to building safety liability and this has had a major impact on PII cover. In the direct aftermath of the Grenfell tragedy, policies typically excluded cladding exposure and increased applicable excesses. Thereafter the trend became (and continues to be) to impose wider exclusions where any type of liability arising from fire safety was excluded. Government, insurers and industry are working together to try to find a solution so that those in industry upon whom we are all reliant to deliver safe buildings are able to obtain insurance for that work.

Clarity in relation to the funding for remediation of unsafe cladding is urgently needed. On 10 January 2022 the Secretary of State for the Department of Levelling Up, Housing and Communities published a letter to the residential property industry requiring them to make proposals for a fully funded plan of action for cladding remediation on midrise residential buildings (those buildings between 11m-18m, which fall outside the Building Safety Fund). It is clear that developers are firmly in the Government's firing line and will be under great pressure to make contribution to the fund, but we await with great interest to see how the new funding will operate and the proposal's effect on the rest of the construction industry (in particular, whether it may encourage developers to take legal action against contractors for non-compliance to re-coup their losses). Whilst 2022 will see much needed clarity and detail in relation to building safety, it is not until claims start being advanced that we anticipate its true impact will be understood.

Contractual disputes will likely be fuelled by supply and labour difficulties. There has been and will continue to be an increase in adjudications as contractors seek quick recovery of payments to urgently aid cash flow. Adjudication is seen as quicker and more cost efficient than litigation in a time where many clients will be looking to 'tighten their belts'. However, it is not always appropriate, particularly in complex claims, due to the short deadlines required. It is likely that we will in turn see more adjudicator enforcement proceedings throughout 2022.

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As a result of Covid 19, there were extensive project delays in 2020 and 2021 and significant associated additional costs, but these have not created a significant increase in claims. Delay disputes have increased although not necessarily through the courts. Employers have responded by restricting entitlements to extensions of time and loss and expense for periods outside Covid lockdown. Negligence claims as a result of inadequate supervision and remote inspections have seen a modest

uptick in 2021 and it is likely that these types of claims will continue in 2022 as errors materialise.

The urgent need for progress in relation to climate action will take centre stage in 2022. In September 2021, the UK's Infrastructure and Projects Authority (IPA) published the Transforming Infrastructure Performance (TIP): Roadmap to 2030 (the "Roadmap") which outlines the government's vision to drive change, innovation and sustainability in the built environment, alongside the commitment to investing £650bn in the sector over the next decade. The government has set ambitious targets for tackling climate change and the Roadmap makes clear that the construction industry must adapt quickly. Proposed reforms to cut emissions and help meet net zero targets will continue to gather pace in

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2022. Inevitably, innovation and the new approaches that will be required will lead to mistakes and remedial work at the expense of PI insurers. We anticipate the following trends:

- **Development and Innovation –** Technologies are new and relatively untested. Claims against those involved in developing innovative methods of saving energy and reducing our carbon footprint are likely to arise. This impact could be considerable if the mistake is repeated across more than one project.
- **Failure to take account of climate change** – these claims are likely to occur in relation to the design and construction of buildings where professionals have failed to take account more frequent/severe weather, such as floods.
- **Claims for misrepresentation or guarantee in relation to green credentials** – developers will expect carbon neutral guarantees from their designers and contractors. Failure to meet those guarantees will result in claims (liability arising from warranties/guarantees is often, of course, excluded from cover).

A positive that has emerged from the challenges faced by construction in relation to the supply chain, building safety and the new environmental agenda is the impact it has had on innovation within the industry. Digital technologies like 3D digital twins and Building Information Modelling, reduce the impact of unpredictability and are offering a way for contractors to detect potential errors more quickly and be more efficient. Robotics and modular construction are also being utilised to keep projects on budget and overcome supply and labour shortages. Innovation in green building technologies is being rapidly developed to reduce carbon footprint. Whilst innovation in technology appears to be the key to unlocking many of the current difficulties faced by the industry, one concern is that the construction sector is still among the least likely to invest in cyber security, to train staff on cyber issues or to be aware of data regulation. This is a rapidly developing area of which the industry must take heed.

To discuss how any of these issues might affect you, please contact

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< RETURN TO EXECUTIVE SUMMARY

SURVEYORS

The insurance market for surveyors' Professional Indemnity Insurance (PII) has continued to shrink as more insurers announced their withdrawal or reduction in capacity in 2021. Surveyors continue to experience a significant increase in their insurance costs and wider exclusions to cover, making it difficult to find adequate, appropriate, and affordable PII. Although other professions are suffering similarly, the extent of unrealised exposures (those exposures that cannot be underwritten with any level of accuracy or certainty) for surveyors' PII (for example, fire safety and the current uncertainty in relation to the UK property market), mean that the hard market for surveyors is likely to be longer lasting. The Royal Institution of Chartered Surveyors (RICS) has reacted to this and opened a review and consultation (which closed in February 2022) of its PII model in the UK. The RICS has proposed a series of short-term changes to the Minimum Policy Wording for 2022, which include:

- Revising or even removing the maximum level of uninsured excess; and
- Moving to a 'negligence only' coverage basis for secured lending valuations.

Over the next three years, the RICS will also be considering more fundamental structural changes to the PII framework and have mooted self-insurance for part of or the whole of the profession through a mutual. In the meantime, the availability of cover, especially in the realm of fire safety and valuation for secured lending, will continue to be greatly impacted. As more firms struggle to renew their PII, there is likely to be an increase in firms seeking cover from the Assigned Risk Pool in 2022.

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One of insurers' greatest concerns remains in relation to the risk of claims relating to valuations for mortgage lending. The use of Automated Valuation Models (based on historic data), "drive past" valuations and desktop valuations (based on the surveyor's experience and expertise) – all of which have been used more frequently due to lockdown restrictions – may well give rise to an uptick in overvaluation claims this year. 'COVID-19 clauses' in valuation reports will not or are unlikely to assist in the event of a claim. Nevertheless, insurers should find some comfort in relation to upcoming reform in the regulation of property valuation firms, which it is hoped will instil trust and confidence in valuations. In 2021, the RICS commissioned an "independent Review of Real Estate Investment Valuations" ('the Review') which was published in December 2021. The Review proposes major reform to the conduct of valuations including the creation of a dedicated independently led Valuation Regulatory Quality Assurance Panel under the jurisdiction of the RICS Standards and Regulation Board (SRB)

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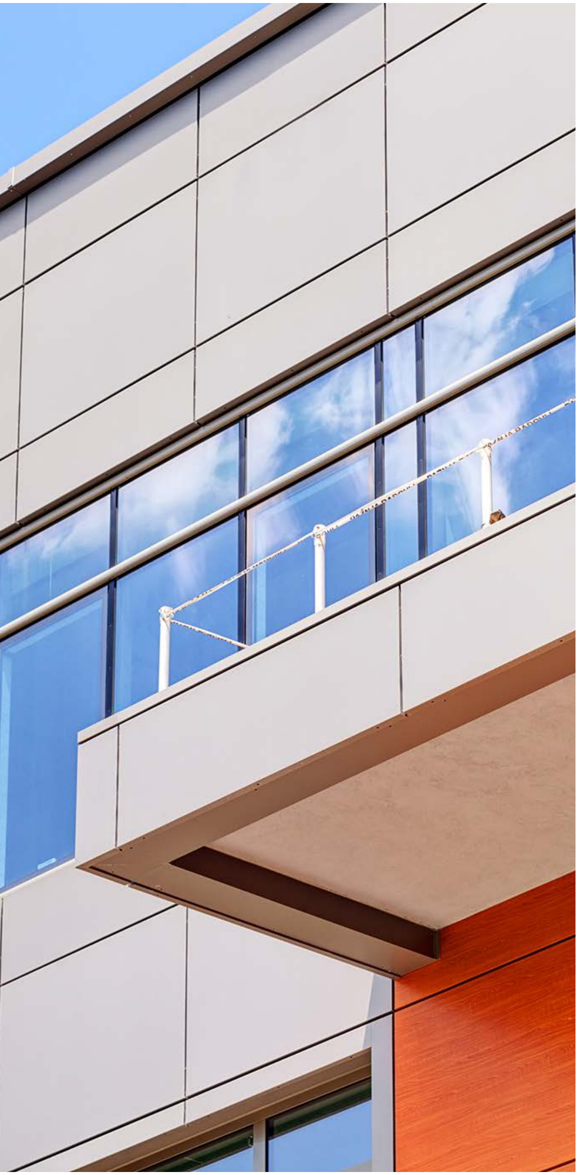
and the creation of a formal Valuation Compliance Officer role within regulated valuation providers. In January 2022 the RICS SRB "unequivocally accepted" all recommendations in the Review. We will wait with interest to see when the recommendations are implemented and the impact they have.

Building and Fire Safety will be key areas of concern for surveyors in 2022. The RICS issued a revised form EWS1 and a new guidance note last year which took effect from 5 April 2021.

Building and Fire Safety will be key areas of concern for surveyors in 2022. The RICS issued a revised form EWS1 and a new guidance note last year which took effect from 5 April 2021. The guidance provided some clarity in relation to when a form EWS1 is required. Further recent comment from the Secretary of State has clarified that EWS1 forms should not be requested for buildings below 18 metres. As such, the guidance and government commentary have started and will continue to have an impact in reducing EWS1 requests from lenders and buyers. The new version of form EWS1 has also made clear that unless otherwise stated, the consultant will have no greater or longer lasting liability under form EWS1 than that which arises under its underlying appointment – a reasonable position for consultants. However, there remain fundamental flaws in EWS1 which we consider will generate claims against surveyors in the future if more substantial changes are not made. For example, there has been no substantial change in the statements that the consultant is required to give under either Option A or B of Form EWS1. These statements present real risks for consultants, who could find themselves walking into a professional indemnity insurance claim as a result of their responses in Form EWS1, if not properly advised. Insurers should note the intended introduction of a government PII scheme to provide cover for surveyors completing form EWS1. The latest update from the government in this respect is that the scheme will be implemented "before Easter".

The main provisions of the Fire Safety Act 2021 are anticipated to come into force within the next few months. The Fire Safety Act widens the scope of the Regulatory Reform (Fire Safety) Order 2005 to external walls and extends the obligations (in particular the duty to provide fire safety information) of those considered a "Responsible Person". The Responsible Person (who may be the owner, landlord and/or the managing agents) will need to take steps to identify and deal with any dangerous



cladding on buildings (regardless of height) to ensure that the building can be occupied safely. Failure to comply in this respect may result in unlimited fines and/or criminal prosecutions. Managing agents may therefore be caught up in ongoing cladding disputes.

In our update last year we discussed the Court of Appeal decision in Large v Hart & Hart [2021] EWCA Civ 24 where the court awarded the claimant all losses flowing from the surveyors' negligence, not just the diminution of value. Since then, we have had the Supreme Court's decision in the professional negligence claim of Manchester Building Society v Grant Thornton [2021] UKSC 20, in which the Court held that the scope of the duty of care assumed by a professional adviser, judged on an objective basis, is governed by the purpose of the duty for which the advice is being given. The Supreme Court stated that in determining the scope of a professional adviser's duty of care, the courts should avoid an overly rigid application of the SAAMCO "advice vs information" and counterfactual tests, which tend to oversimplify the required analysis of duty. Whilst we consider that in most cases the traditional measure of loss for surveyors' negligence remains applicable, diminution in value, will in some cases clearly not go far enough.

It is likely that we will see a downturn in 2022 in Japanese knotweed claims against surveyors for their failure to advise.

The difficultly for defendants and insurers will be assessing whether a different approach to the assessment of loss might apply on the facts when claims are notified. Certainly, where there is a failure to give advice and where, had that advice been given, a transaction would not have gone ahead at all, then diminution in value will unlikely be an appropriate measure of loss. As Large v Hart demonstrates, in such circumstances it is entirely reasonable that the negligent defendant should be responsible for all losses flowing from such a breach.

It is likely that we will see a downturn in 2022 in Japanese knotweed claims against surveyors for their failure to advise. In late January 2022, the Royal Institution of Chartered Surveyors (RICS) issued its long-awaited Guidance Note on "Japanese knotweed and residential property" ("the Guidance Note"). The Guidance Note makes clear that the assumption that Japanese knotweed automatically poses a risk to buildings within a certain arbitrary distance, has been scrapped. Instead, the focus is on what actual damage the weed is doing and what real effect it has on the use and enjoyment of the garden. If there is no such damage/loss of enjoyment, then no action needs to be taken in terms of any mortgage retention. As such, we consider in most instances any effect on value is likely to be limited to the remediation costs only. In this respect, the Guidance Note is clear that the focus is on "management" and "control" of the problem rather than to "automatically strive for eradication". Arguably, the remediation costs should therefore be fairly limited in most circumstances. We anticipate that as the stigma surrounding knotweed becomes more proportionate (and less profitable for the claim farmers), disputes will in turn reduce.

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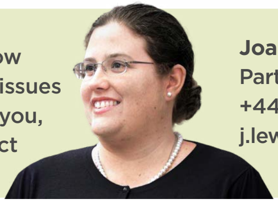

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< RETURN TO EXECUTIVE SUMMARY

SOLICITORS

In the current economic climate, with the likelihood of many firms failing and closing down, insurers are understandably concerned about their potential exposure to claims; and they are raising their prices to match their potential exposure.

The SRA Minimum Terms and Conditions (MTC) provide what is arguably the widest cover for any profession in the world. Aggregation and the ambit of coverage for cyber claims have traditionally been a fertile battle ground for insurers to address imbalance of cover. However, two recent developments will not aid insurers in such disputes going forward. The Court of Appeal's judgment in Baines & Anor -v- Dixon Coles & Gill (A firm) & Ors [2021] EWCA Civ clarified the limited scope of aggregation under the MTCs by confirming a narrow interpretation of the aggregating wording 'related matters or transactions'. In addition, the SRA's recent amendments to the MTC have added a new cyber clause which clarifies that the very wide existing cover for third party claims and defence costs is to remain in place, even if a cyber-related event/trigger is the dominant and proximate cause of the losses claimed by the third party.

As we move into the April 2022 renewal season, the developments in relation to aggregation and cyber will certainly not help ease the current hard market. Those insurers remaining have responded to current conditions by increasing premiums and excesses, but other trends are also developing. Some insurers are demanding that sums in respect of anticipated policy excess payments are paid in advance into escrow accounts. In addition, there is an increasing demand for partners/directors in smaller businesses to provide personal guarantees alongside their PI policies, to ensure that any run-off premium that might fall due can be recovered in the event the firm fails and enters insolvency. In turn the demand for Personal Guarantee Insurance has risen.

As we move into the April 2022 renewal season, the developments in relation to aggregation and cyber will certainly not help ease the current hard market.

The Solicitors Indemnity Fund (SIF) has been extended until 30 September 2022 for claims relating to firms that have closed with no successor. The SRA have been engaging with firms about the long-term future of post six-year run-off cover (PSYROC) and on the affordability of SIF in the longer term. Although the outcome of their deliberations is not yet decided, the SRA has strongly indicated that its preferred outcome would be to close SIF to new claims and bring to an end any regulatory requirement for the ongoing provision of PSYROC. If this is the outcome, it will be interesting to see the offering and take-up of supplementary run-off cover in the future. No doubt it will be costly.

As a result of the hard market and the increasing demands of compliance and operating costs, many independent legal practitioners have chosen to become consultants for larger firms. 2021 also saw a significant increase in the number of mergers between firms and that trend is set to continue this year. There is obviously a spectrum of risk management issues surrounding merger and consultancy roles, and a rushed or incompatible merger or individual appointment can of course cause difficulties further down the line including the increased likelihood of negligence claims and the hiking of future premiums.

2021 also saw a significant increase in the number of mergers between firms and that trend is set to continue this year.

There has, for many years, been a push for more use of alternative dispute resolution (ADR) but 2021 saw increased support from the Ministry of Justice to 'mainstream' such services. Digitisation will continue to take over this space. As most forms of ADR are not reserved activities, we anticipate litigation firms will increasingly feel the pressure of competition from unregulated firms providing ADR services. This disruption will especially be felt at the lower end of the market.

There is also a sea-change coming in relation to an expansion of fixed recoverable costs (FRC), which will again impact litigation firms dealing with lower value claims as well as being welcome news for insurers defending them. The government announced late last year that it intends to implement most of Sir Rupert Jackson's 2017 proposals in his report on FRC. The fast track will be extended for non-complex claims below £100k, with these claims being subject to fixed-costs. There are a few exceptions to the rules but the intention is that most categories of non-complex claims will fall within the new proposals. The Civil Procedure Rule Committee have indicated that implementation is aimed for October 2022.

The SRA have consulted on raising the limit of their fining powers to £25k. The aim of this increase is to allow the SRA to deal with a broader range of disciplinary matters without having to refer them to the Solicitors Disciplinary Tribunal. However, there is concern in the industry that the increase in fining power will disproportionately impact smaller firms, who are less able to negotiate and resist any pressure to accept a higher fine.

One key areas of focus for the SRA this year will be ensuring firms have the right culture and environment for delivering ethical legal services. On 7 February 2022, the SRA issued new guidance for firms "Workplace Environment: risk of failing to support and protect colleagues." The Guidance sets out what is expected of firms in terms of looking after their staff's wellbeing and to protect them from bullying, harassment, discrimination and victimisation. A

One key areas of focus for the SRA this year will be ensuring firms have the right culture and environment for delivering ethical legal services.

further noted area of focus for the SRA this year will be on firms' anti-money laundering compliance (AML) and in turn we expect AML visits will be ramped up. There may be corresponding opportunities for insurers to revisit the scope/cost of any regulatory cover they may be prepared to offer firms as a result of these changes.

Claims arising from private client, litigation and conveyancing retainers, continue to dominate solicitors' professional indemnity claims. Cyber scams and data risk claims have also continued to rise exponentially. The impact of Covid 19 has created nuances in such claims and we consider its impact will continue for the foreseeable future.

1. CYBER SCAMS & DATA RISKS CLAIMS

- As solicitors' firms remain a primary target of cyber-attack, cyber-claims under the MTC will continue to grow in frequency and extent. The new MTC amendments expressly exclude first party losses from PI cover. As such, many firms are likely to purchase standalone cyber cover alongside their PI. This will give rise to issues of double-insurance which increases the likelihood of coverage disputes and disagreements over conduct and control of claims.

- The most common type of cyber-attack against solicitors continues to be phishing. The increased reliance on technology during the pandemic has clearly increased the frequency and success of such attack.

- Ransomware attacks have also increased three-fold during the pandemic. This increase is reflected in the recent ransomware attack on two barristers' chambers. The attack exposed poor cyber-practice in the industry which will be of concern to insurers.

- The potential for compensation claims arising from a data breach continues to be a very significant risk to law firms due to the large amount of data (often sensitive) that they hold and the recent widening of grounds on which data subjects can bring claims since the introduction of GDPR. However, there has been welcome news for data controllers with a spate of court decisions clarifying that (i) merely trivial breaches will not entitle claimants to claim compensation and the court will look dimly on such claims (ii) claimants must establish that they have suffered a material (i.e. a financial loss) or non-material (such as distress) loss as a result of the data breach.

2. PRIVATE CLIENT

- The pandemic saw an increase in the number of Wills being made. Inevitably this has led to an increase in contentious probate claims, and we believe this trend will continue. Covid nuances are likely to exacerbate claims deriving from:

  - **Remote execution** – many Wills during the pandemic were executed remotely, which adds additional risk.

  - **Delay** – given the surge in instructions and the impact on staffing that COVID-19 caused, in many instances instructions may not have been taken quickly enough before a testator died. Claims by disappointed beneficiaries are more likely to follow in such instances.

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- We continue to see claims relating to deficient or incomplete tax advice provided by solicitors. Solicitors tend to consider their remit does not extend to advice in relation to taxation risk unless specifically retained to do so. However, the courts continue to take a dim view of defences in relation to scope of retainer where a risk was clear. The recent case of Manchester Building Society v Grant Thornton will make it even more difficult for firms whose engagement correspondence is anything less than crystal clear to evade liability in this area.

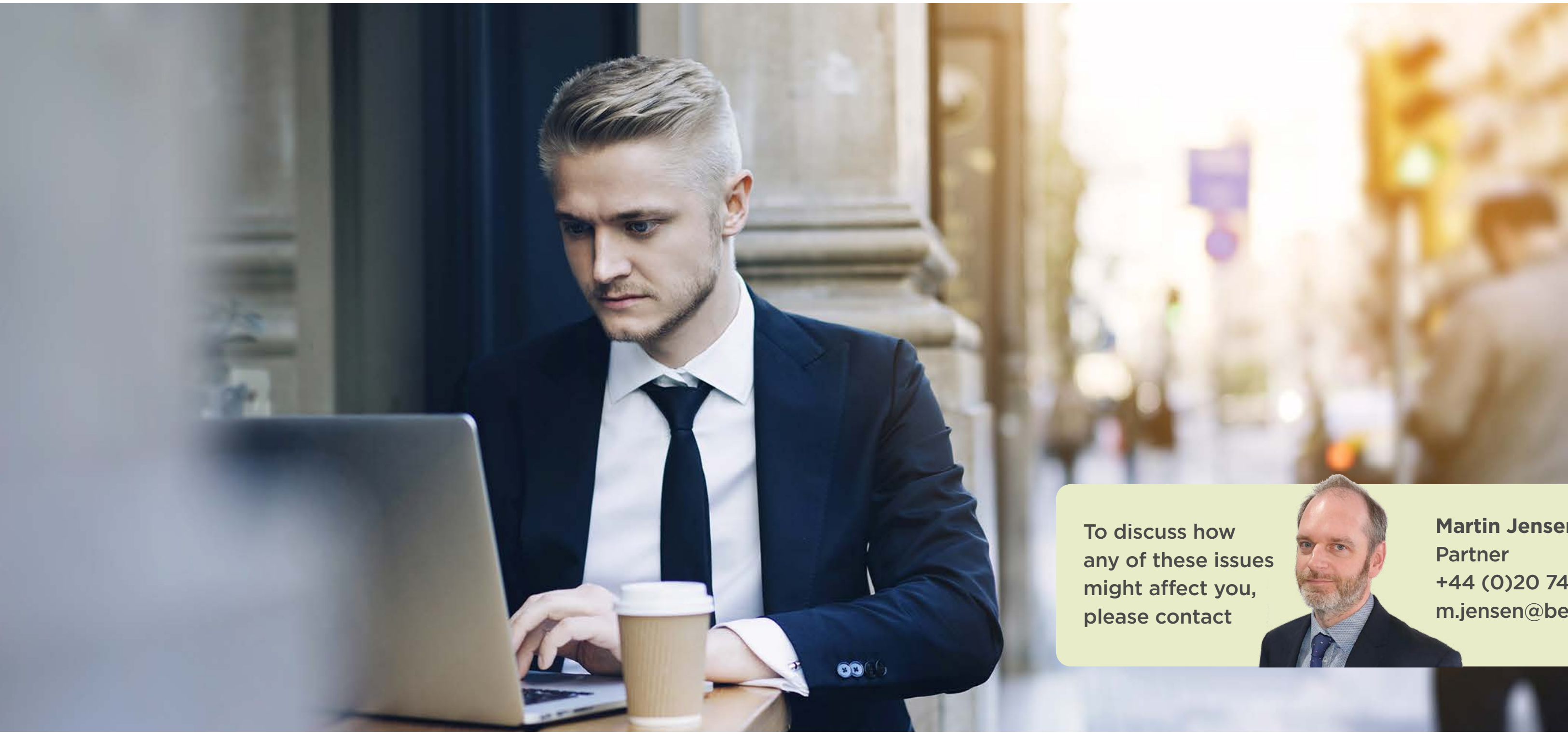
- In addition, claims against solicitors continue to rise where specific tax advice is sought, for example, in relation to a tax avoidance scheme. New 2020 guidance from the Law Society makes clear the high standards that solicitors face when advising on tax. The duty to warn remains far from straight forward in this area and will continue to fuel solicitors' negligence claims going forwards.

3. LITIGATION

- We continue to see the usual "lost litigation" claims against dispute resolution solicitors. The impact of Covid will likely cause an increase in claims for the following reasons:
  - **Lack of supervision** – the trend in home working is not going to be temporary and we anticipate claims may increase due to related difficulties regarding supervision.
  - **Staff absence** – the associated delays in staff absence may increase claims where deadlines have been missed.
  - **Failure to keep adequate records** - Defence of these claims in relation to breach of duty may also be affected by a firm's failure to keep adequate records because of lack of adequate home working procedures.

4. CONVEYANCING CLAIMS

- The past 18 months have seen a significant increase in the volume of conveyancing transactions and underwriters will want to make sure that any increase has been adequately reflected at renewal presentation. Professional negligence claims linked to Stamp Duty holiday will be one of the top risks for 2022.
- We anticipate claims in relation to failed and fraudulent investment schemes (typically buyer-funded developments) will increase, despite warnings from the SRA.
  The preponderance of these schemes, often linked to lucrative referral arrangements, is a trend which looks set to continue.
- There has been no downturn in relation to Multiple Dwellings Relief (MDR) claims. However, HM Revenue & Customs has just closed a consultation on changes to stamp duty relief for mixed property and multiple dwellings. The effect of the changes, if implemented, will make claiming MDR much more difficult, which will in turn decrease negligence claims against solicitors in this area.



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< RETURN TO EXECUTIVE SUMMARY

ACCOUNTANTS AND AUDITORS

Greater and wider regulation of the industry will be a theme for 2022. The most significant of which relates to audit reform. In Spring 2021 the Department for Business, Energy and Industrial Strategy (BEIS) published its white paper “Restoring trust in audit and corporate governance”. A particular area of focus for the BEIS’ relates to the operations of Public Interest Entities (PIEs). The BEIS proposes to broaden the kinds of companies that would qualify as PIEs. The effect of such a change would be that a significant number of mid-tier audit firms who operate in the PIE market would fall within the regulatory spotlight. We await with interest to see what final reforms will be implemented with the government’s response to the consultation, which is imminently awaited.

The BEIS proposes to broaden the kinds of companies that would qualify as PIEs. The effect of such a change would be that a significant number of mid-tier audit firms who operate in the PIE market would fall within the regulatory spotlight.

The primary focus of audit reform is to ensure that investors and financial markets can depend upon information published by UK companies. Identifying fraudulent misstatement within audits is therefore a key concern. Last year the auditing standard ISA (UK) 240 was updated for the first time in 16 years to clarify the auditor’s role and responsibility in identifying fraud in this respect. The revised standard became effective for audits from 15 December 2021. The amendments introduce several tougher rules particularly around risk assessment. The amendments are broad in nature focussing on changing the mindset of the auditor emphasising that their duties must be carried out with “professional scepticism”. Whilst the audit standard revisions do not alter the fact that the primary responsibility for the prevention and detection of fraud rests with the entity’s management, they do emphasise that UK auditors will be expected to challenge the management’s assessment and audit evidence more robustly (failure to act objectively and maintain independence is of course an allegation seen time and time again in the slew of civil litigation which has followed a number of catastrophic corporate collapses).

The focus on fraud in audit, coupled with the amended standard, may result in more auditors facing enforcement action by the FRC in the future. During the pandemic, many billions of pounds of taxpayers’ money is thought to have been fraudulently claimed from the government’s business support schemes, which will no doubt exasperate the challenges faced by auditors going forward. Claims arising from firms failing to follow the new guidance will not start to come in until 2023. In the meantime 2022 might start to see claims against auditors arising from work carried out (with difficulty given the various lockdowns) by auditors in 2020 – particularly in sectors heavily impacted by the pandemic.

Another focus for the regulators into 2022 and beyond will be non-financial reporting of environmental, social and governance (ESG) performance. Currently the application of non-financial reporting duties depends on the size and nature of the company and vary from being mandatory to voluntary. However, it is certain that the future holds more mandatory rules which will increasingly affect a broader spectrum of businesses. From 6 April this year, in line with the recommendations made by the Taskforce on Climate-related Financial Disclosures, thousands of large UK-registered companies and financial institutions will be required to disclose climate-related financial information on a mandatory basis (in accordance with The Companies (Strategic Report) (Climate -related Financial Disclosure) Regulations 2021). It is likely that within the next few years this requirement will be extended to apply to the majority of UK registered companies (in accordance with the HM Treasury's "A Roadmap towards mandatory climate-related disclosures").

We await the government's response to audit reform as well as any legislation implemented to establish the Audit Reporting and Governance Authority (ARGA) to understand the precise objectives and role of the regulators in developing ESG reporting and assurance

From 6 April this year, thousands of large UK-registered companies and financial institutions will be required to disclose climate-related financial information on a mandatory basis

standards going forward. However, increased regulation is certain in this area. Indeed, the rapidity of societies and the regulators' demand for ESG information cannot be underestimated. Investors and other stakeholders are increasingly calling for assurance over ESG data. By way of example, in November 2021, an investor group wrote a letter to the big four accounting firms stating that they will vote to stop the firms working for the companies they invest in at AGMs from this year, if the audits do not integrate climate risk. There is therefore a big shift within the industry for practitioners to upskill in this respect. There is clearly a growing risk of increased professional negligence claims against auditors in this area if they fail to stay on top of the evolving landscape.

2021 saw the trend in increased regulation extend beyond the delivery of professional services. The writing was on the wall in this respect with the ICAEW's October 2020 revised guidance on the duty to report misconduct, but 2021 saw this convert into a growing number of cases. This trend is likely to continue in 2022.

We consider the stress of a skills shortage coupled with the 'over-night' complications of COVID-19 and Brexit will undoubtedly increase the potential for professional negligence claims this year.

It has been widely reported that the pandemic has led to significant skills shortages across the accounting industry. A further problem faced by the industry is the impact that COVID-19 and Brexit have had on complicating accounting services (for example, COVID-19's effect on payroll and furlough calculations, and Brexit's effect on VAT). We consider the stress of a skills shortage coupled with the 'over-night' complications of COVID-19 and Brexit will undoubtedly increase the potential for professional negligence claims this year.

In 2021 the Supreme Court handed down its landmark judgment in the case of Manchester Building Society v Grant Thornton [2021] UKSC 20. The decision related to the scope of duty that the accountants and auditors owed their client. The significance of the case is its reconsideration and dilution of the SAAMCO principle for assessing the extent of a professional's liability for negligence (where the new test focusses on the scope/purpose of duty assumed by the professional and the nexus between the particular element of the loss for which damages are sought and the scope of that duty). Although any assessment will be fact specific, there is certainly now a greater potential for those pursuing professional negligence claims to seek a larger proportion of their losses under the new test. The recent High Court judgment in Knights v Townsend [2021] EWHC 2563 QB makes it abundantly clear that letters of engagement (whether acting as introducer or advisor) will be highly relevant to the court's objective consideration as to whether there had been an assumption of responsibility by the practitioner. Therefore, professionals should ensure that their terms of engagement are crystal clear on the ambit and purpose of the advice sought and provided.

The last few years have seen a digitisation of the industry and we anticipate that technology will play a big role in helping auditors undertake their duties in relation to the reforms coming.

The last few years have seen a digitisation of the industry and we anticipate that technology will play a big role in helping auditors undertake their duties in relation to the reforms coming. Open banking enabled tools in particular will play a large part in identifying risk and improving audit quality. Like many industries, the Covid 19 pandemic has accelerated digital change. Cloud-based software has transformed the way that day-to-day bookkeeping is administered, reducing the risk of human error. Accountants are also realising that the increasingly complex nature of their client's transactions are better served by utilising process automation and advanced analytics, which free up practitioners' time and also allow them to price their services more accurately and competitively. Organisations that invest in these tools and understand their importance will be ahead of the curve.

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< RETURN TO EXECUTIVE SUMMARY

EDUCATION

On 1 March 2022, the Office of the Independent Adjudicator for Higher Education welcomed guidance issued by Universities UK dealing with Staff to Student sexual misconduct. The guidance is designed to assist Universities in protecting students from harassment and harm, while treating both staff and students fairly. Reports of Sexual Harassment within Universities have been rife over the past few years. Universities have faced criticism for how they have dealt with sexual misconduct complaints so this guidance will be most welcomed by universities and students alike.

Sexual misconduct claims need to be handled delicately and with sensitivity. The guidance places a particular emphasis on effective processes being implemented to ensure that Students are given a fair outcome to any complaint made. Implementation of such processes and complying strictly with any policies which Universities do put in place following this guidance will be essential in helping to prevent claims against universities relating to the handling of sexual misconduct complaints. We hope to see that the guidance results in a positive change of culture in universities such that these types of claims can be minimised or even eliminated.

Also in March 2022, the Office for Students released amendments to their regulatory framework which set out revised quality standards which registered educational providers must follow. The new regulations are designed to address poor quality courses and problems with standards/quality of education. The changes partly follow an increased move towards online delivery of teaching during lockdown which has remained in place even after the COVID-19 restrictions have been lifted.

The latest statistics released by Gov. UK show an 8% increase in SEN tribunal claims in the academic year 2020/21 compared to the previous year. 2021 saw the highest rate of pupils registered with Special Educational Needs ("SEN"), with 1.4 million school pupils (16%) being registered with SEN and around 326,000 (3.7% of all pupils) having Education Health and Care Plans ("EHCP") in place. The increase in SEN registered pupils may have a direct correlation to the increase in SEN claims registered by parents in the Special Educational Needs and Disability ("SEND") Tribunal.

In November 2021, a Council was ordered to pay a parent nearly £8,000. The payment was ordered by the Local Government and Social Care Ombudsman due to the Council's failure to implement an EHCP resulting in a pupil not having proper access to education for four months.

The increase in SEN registered pupils may have a direct correlation to the increase in SEN claims registered by parents in the Special Educational Needs and Disability ("SEND") Tribunal.

Refusal to secure an EHCP plan formed 27% of claims pursued in the SEND in 2020/2021 demonstrating the importance of schools ensuring that EHCPs are implemented where appropriated and, importantly, that they are followed at all points during the pupil's education.

CLAIMS TRENDS

FAILURE TO PUT IN PLACE AND/OR FOLLOW EDUCATIONAL HEALTH AND CARE PLANS

As above, there has been a significant number of cases pursued in the SEND Tribunal relating to failures in respect of the implementation of EHCP. Whilst the implementation of EHCP is usually the responsibility of the relevant Local Authority, schools do have a duty to co-operate with the Local Authority on implementation and must follow the recommendations set out the plans for the relevant pupils.

This year we expect to see further claims relating to EHCPs being pursued by concerned parents.

DISABILITY DISCRIMINATION CLAIMS

Last year, we saw numerous claims being pursued relating to alleged disability discrimination by Schools and Universities. The complaints made varied from failures to make reasonable adjustments for disabled pupils, to wrongful exclusions which failed to take account of the pupil's disability.

A high proportion of the complaints were successfully defended on the basis that they were out of time. For discrimination claims there is a strict 6-month time period from the date of the alleged discriminatory act for pupils/parents to pursue a claim. Should the trend continue into next year, it is helpful to remember the 6-month limitation period as often claims can quickly be disposed of based upon this limitation period.

SEXUAL MISCONDUCT

It is noted above that new regulation/ guidance has been issued dealing with Staff to Student sexual misconduct. The new guidance will likely see Universities amending their Policies to reflect and implement the guidance. In time, we anticipate that claims will be pursued against universities who incorporate the guidance into their policies, but thereafter fail to comply with their own policies. It is perhaps unlikely that we will see the full effects of the new guidance within the next year.

INADEQUATE TEACHING

There were concerns that the impact of COVID-19 and the new mechanisms of delivering courses online would lead to an increase in complaints of inadequate teaching. Such risks have been identified by the Office for Students who, as above, have published thresholds underpinning the minimum acceptable quality expected.

It remains to be seen whether the new regulation will lead to a decrease in inadequate teaching claims. In theory it ought to as Universities should be working towards providing higher quality courses. It is however possible that we will see an increase in claims driven by universities who are failing to adhere to the higher standards expected.

SUBJECT ACCESS REQUESTS ("SARS") REQUESTS

SARs are requests made requiring educational providers to disclose the personal information it holds concerning the individual. When a request is made, the respondent usually has 1 month from the date of the request to provide the relevant information.

This year we expect to see further claims relating to EHCPs being pursued by concerned parents.

We have seen parents using SARs as a mechanism for gathering information held by schools on pupils in the hope that disclosure of such data will assist them in pursuing a claim against the school.

A failure to comply with SARs can lead to complaints being made to the Information Commissioners Officer ("the ICO"). The ICO have the power to fine bodies who fail to comply with SARs within the relevant time period.

We anticipate that the use of SARs by parents will continue over the coming year. If a SAR is received by a school or other educational provider, it is crucial that the establishment provides a response in accordance with the regulations to avoid complaints to the ICO.

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< RETURN TO EXECUTIVE SUMMARY

INSURANCE BROKERS

In the eyes of the policyholder, the insurance broker will always stand as guarantor when a policy of insurance fails to fully respond. This is perfectly demonstrated by last years' claim- ABN AMRO Bank NV v Royal and Sun Alliance Insurance Plc & Others [2021] EWHC 442 (Comm). Although elements of the decision were successfully appealed, the issue of the broker's liability was not revisited. Mr Justice Jacobs' first instance judgment highlights the very high standard expected from brokers in avoiding any unnecessary risk of litigation and ensuring that the cover meets the client's requirements. More business interruption disputes are expected for 2022 and Insurers are currently dealing with the fallout from a wave of policyholder-friendly judgments in the aftermath of the FCA test case, the latest being Corbin & King v Axa [2022] EWHC 409 (Comm). Whilst each judgment that favours the policyholder averts a potential E&O against the broker that placed the cover, not every Covid-affected business carried BI cover and many that did had a policy which has been shown not to respond. Each one of these is a potential E&O where it is evident from the cases emerging that responsive cover could easily have been recommended or chosen.

> *One of the major changes effecting the industry is the FCAs new rules for General Insurance Pricing Practices (GIPP).*

As discussed at various points elsewhere in this report, numerous industries are facing not only the hardest trading conditions but also the hardest insurance market for over 20 years. Many brokers are unprepared for the challenges of working in such an environment, where risk appetite is at its lowest and even obtaining a quote is quite a challenge, let alone one that is at a commercially attractive level. The hard market has made insurance broking much more difficult with changing insurers on renewals and decreasing availability and scope of policy cover. In addition, supply chain issues, market volatility and inflation increase the likelihood of businesses being underinsured. Finally, there has also been a seismic shift within numerous industries in the way they carry out their business as a result of the Covid-19 pandemic. Many business sectors have experienced 10-year advances in the development of their working practices over the past two years, just to be able to continue trading through the conditions imposed by the pandemic. In the context of this rapidly changing environment and the Courts' approach towards the level of service expected of insurance brokers, it is little wonder that errors and omission (E&O) claims against brokers are increasing.

In BIBA's words (their 2022 manifesto), there has been a "rampant" increase in regulation from the Financial Conduct Authority (FCA) hitting the Insurance sector. One of the major changes effecting the industry is the FCAs new rules for General Insurance Pricing Practices (GIPP). As part of the FCA's wider package of measures to tackle the loyalty penalty (the new "price walking" rules which apply to home and motor insurance and ensure fair value for insurance customers), the FCA has introduced new product governance rules which came into force on 1 October

2021. The new rules apply to firms that either 'manufacture' or 'distribute' insurance products to consider how all products are designed and sold, and whether they deliver fair value to consumers. The rules apply to all non-investment insurance contracts, not only home and motor insurance. However, there is concern that the ambit of their application has been lost on the industry. In a 'Dear CEO letter' to firms dated 18 October 2021, the FCA stated that many brokers were not yet prepared to meet the new enhanced rules and warned that firms who fail to undertake that work risk regulatory action going forward.

Accurate extraction, compilation, and deployment of data is the key to decreasing claims and investigations for brokers going forward.

Recent criticism by Michael Gove, the communities minister, in relation to fair pricing has also hit the industry concerning insurance costs faced by residents in buildings with unsafe cladding. The FCA have responded by opening an investigation and we await with interest its response and any sanctions it has in mind to target enforcement.

In light of the risk of greater claims and regulation, the need to advise very carefully and transparently (with proper record-keeping) has never been greater. However, as with other professions, increased remote working triggered by the pandemic (which is set to continue for the future) leaves brokers more vulnerable to claims on the basis of a lower level of effective supervision and cross-check. In an industry that is so used to face-to-face contact, home working has also created all manner of other practical issues; from business continuity issues (e.g. will brokers be able to ensure that notifications are made to insurers within the policy requirements?) to simple record-keeping (market brokers may not be used to keeping clear and detailed attendance notes of conversations). The general lack of audit trail / proper record-keeping makes it much easier for clients whose insurance fails to respond to a claim, to turn their attention towards their broker with improved prospects of success. In this context, remote working alone is a major risk for increased E&O claims against brokers.

Accurate extraction, compilation, and deployment of data is the key to decreasing claims and investigations for brokers going forward. As stated above, traditionally this is mostly a manual process. There appears to be a sizable gap between technologies utilised by other industries that have not yet been widely deployed by the broking industry, which could solve many of the current challenges. By necessity, that gap will start to close with brokers utilising digitalisation to deal with the inefficiencies within the commercial broking process. For example, Application Programming Interfaces that make connecting systems relatively straightforward, have started to be more widely utilised by the industry and have huge potential to better operations. Bad execution of these technologies has often led to user criticism but that does not detract from the fact that digital innovation is a necessity for the industry going forward.

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DIRECTORS AND OFFICERS

In 2021 there were reported pockets of increased capacity and fresh entrants into the D&O insurance market, and it is believed that trend will continue in 2022. However, for public companies and certain sectors of industry (such as life sciences) the hard market will undoubtedly be much slower to stabilise. Even where there has been some softening of terms, pricing is still significantly higher than it was in 2017 and many companies continue to struggle to obtain the limits they seek.

Insolvency exposures are always a key concern in the D&O market because corporate failure has such a direct impact on increased D&O claims. The predicted wave of company insolvencies in 2021 was much milder than anticipated in the UK and the USA thanks in great part to the extensive support measures the governments put in place during the Covid 19 pandemic. However, the impact of the phasing out of that support (which largely came to an end, at least in the UK, in October 2021) is still an unknown. We anticipate that over the course of the next year, with high-inflation and market volatility as well as the sudden additional impact of the Russia-Ukraine conflict, there will be a difficult time ahead for businesses in 2022. In times of economic strife, it is likely that decisions made by directors and officers will be scrutinised and questioned by administrators and creditors seeking to recoup losses. The costs of such actions, where multiple directors require separate legal representation can escalate very quickly. In addition, such actions frequently involve a regulatory angle, and the Insolvency Service will look to tackle any financial wrongdoing by directors, which further increases defence costs. Where policies are defence costs-inclusive, this might lead to policy limits becoming eroded more quickly.

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From 15 February 2022, in accordance with The Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021, the UK Insolvency Service has been granted new retrospective powers to investigate and disqualify or prosecute former directors of dissolved UK companies, without the need to restore the company to the register first. Misuse of the dissolution process is very likely to have increased during the pandemic with “phoenixism” (where a company is dissolved to escape its debts and liabilities only for a new company to be set up with the same directors/officers and services) on the increase, in an aim to avoid paying back government-backed loans. We anticipate the number of investigations into directors of dissolved companies will grow as a result.

There is a growing trend in regulation and legislation to target and sanction individuals at the heart of a wrongdoing entity. As directors and officers are at the frontline in managing risk, they are facing direct claims and investigations in relation to their failure to meet legal

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and regulatory obligations on behalf of their companies with more regularity. For example, The Senior Managers and Certification Regime (SM&CR) now applies to all solo-regulated firms and the first assessment of the fitness and propriety of certified persons regulated by the Financial Conduct Authority should have taken place by 31 March 2021. By way of example, 2021 saw the Financial Conduct Authority issue the highest number of fines for six years and a stark increase in the volume of criminal prosecutions instigated. Criminal investigations/prosecutions are of course often very protracted, complex and incredibility costly. Something else to be aware of for 2022 is the Law Commission's report on the expansion of corporate criminal liability, which is imminently awaited. It is likely that the suggested reforms will make it easier for the Serious Fraud Office to pursue companies by reference to the criminal conduct of individuals/directors. The reforms, if made, are likely to have an impact by way of increased regulatory enforcement activity against directors and officers.

In spring 2021 the Department for Business, Energy and Industrial Strategy (BEIS) published its white paper "Restoring trust in audit and corporate governance". There is a proposed shift from collective board responsibility to personal liability for individual directors for new reporting and attestation requirements. We await with interest to see what final reforms will be implemented with the government's response to the consultation due very soon. Whilst the impact on these future reforms is currently unclear, even spurious claims and investigations in relation to alleged failures could be very significant in relation to defence costs spend for insurers.

In Market Bulletin LMA21-035-PD dated 24 September 2021, the Lloyd's Market Association made clear that if Directors' and Officers' insurers do not want to cover claims proximately caused by cyber losses, they will need to specifically exclude them. The Covid 19 Pandemic has undoubtably increased companies' reliance on technology and IT infrastructure. In 2022 it is likely that the exponential rise in 'impersonation fraud' and ransomware attacks will continue. Claims in relation to failure or breach of IT infrastructure are in turn increasing and often will result in third party "wrongful act" claims against

2021 saw the Financial Conduct Authority issue the highest number of fines for six years and a stark increase in the volume of criminal prosecutions instigated.

directors and officers in their failure to manage the risk and ensure proper controls are put in place. Similarly, the regulators are demonstrating that they see such failures the responsibly of the board, and fines under GDPR (and the DPA 2018) have significantly increased in this respect. Whilst regulatory intervention will undoubtedly increase in this sphere in 2022 and beyond, data class actions took a serious hit last year with the Supreme Court decision in Lloyd v Google, which provides very welcome news for data controllers and their insurers.

Directors are increasingly exposed to employment related risks in relation to ethics and culture. Such claims are on the rise due to society's changing attitudes and the rise of social media movements such as #MeToo. We anticipate claims will continue to increase in relation to sexual misconduct allegations (against the perpetrator but also against those responsible for their management and appointment). We have seen, in particular, a marked increase in relation to employer-related tortious claims arising from sexual harassment. It is worth noting that even where a D&O Policy does not contain a specific Employment Practices Liability extension, where no specific exclusion is in place, the wide cover afforded by a "wrongful act" wording means that D&O policies often respond to such claims, regardless of the underwriters' intention. In July 2021 the government confirmed that it will introduce a new duty on employers to pro-actively prevent sexual harassment following its response to the 2019 Consultation on sexual harassment in the workplace. We await the detail of the legal framework and guidance for this new duty. In July 2021, the FCA published a discussion paper on diversity and inclusion entitled "Working together to drive change". Regulatory action against directors and officers for their failure to engage with, or put in place, equality procedures is likely to be an increasing area of focus in 2022 and beyond.

The Covid 19 pandemic and the return to work also brings with it a focus on the culture of a company and how directors and officers deal with "return to work protocols" is likely to come under the spotlight. How directors deal with vaccination requirements amongst employees, and how employees are expected to work in light of the "new normal" is likely to spark claims by employees and potentially shareholders. Another area in which directors are facing increasing scrutiny amongst shareholders is what the US has termed "the great resignation". The pandemic has given rise to employees looking to more supportive workplaces and the search for better pay and conditions. How directors deal with the unique pressures of returning to the office following the uncertain times of the last two years are likely to present D&O insurers with new and interesting challenges.

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Linked to diversity and inclusion issues is of course environmental, social and governance (ESG). There is growing and multifaceted pressure on businesses to adapt from investors, consumers and regulators alike in relation to ESG issues. Company directors are under a statutory duty to promote the success of the company. This decision-making process can often become blurred where there might be a trade-off between financial gain with ESG-related factors. The blurring of these lines clearly increases the potential for claims against the board of directors by investors and other stakeholders. There is a growing pressure from the Better Business Coalition to change the focus from the promotion of the success of the company (under section 172 of The Companies Act 2006) to a more general duty "to advance the purpose of the company" taking into account the realities that ESG challenges present modern-day companies in arriving at the correct balance between people, planet and profit.

The biggest shift in 2021 was undoubtably the focus on the global climate change agenda. Businesses will require monumental transformation and adaption in the future for the transition to a lower carbon economy. There are obviously numerous claim risks against D&Os in this sphere. Although the number of environmental related claims against companies and their directors and officers are currently relatively small, such claims are likely to rapidly accelerate as incentives to comply and penalties for failure come into effect. In this respect, the UK government is leading the way in relation to developing a climate related reporting framework for companies. On 28 October 2021, the government published its response to its public consultation to introduce mandatory climate-related financial disclosures by public companies and large private companies and LLPs. These requirements will be brought into law from 6 April 2022. The disclosure requirements are intended to be closely aligned with the recommendations of the Task Force on Climate-related Financial Disclosures. It is likely that by the end of 2023 mandatory climate-related disclosures will apply to the majority of UK registered companies (as reported by HM Treasury's "A Roadmap towards mandatory climate-related disclosures").

The mandatory disclosures are likely to have significant impact on potential claims against directors and officers. If a company fails to comply with its duty in this respect, directors may be in the firing line for regulatory action and/or shareholder and derivative claims. It is interesting to note how insurers have responded to this emerging threat. Exclusions always have a place, but it is clear they are not a panacea. The burden of proof that an exclusion applies is on insurers and the diverse nature of claims/investigations that arise in this sphere will not likely be easily excluded. As such, many insurers are taking a more holistic approach seeking more in-depth information on a company's current and future strategies and rewarding preferential terms to those businesses that perform well against ESG metrics. Again, the challenge in this respect is ensuring that the data provided is reliable.

The unfortunate events in Ukraine will most likely give rise to scrutiny over directors' decisions to make investments in Russia or Ukraine over the last few years. As sanctions are placed by governments around the world on individuals and companies linked to the Russian regime it seems almost inevitable that shareholders will seek to apportion blame to board rooms which have embraced investment in and from Russia and Russian companies. We expect to see a rise in claims alleging breaches of, in particular, section 172 of the Companies Act 2006, in this regard.

Moving away from the political climate, the recent rise in Special Purpose Acquisition Vehicles ("SPACs") and de-SPACS (which is the merger of the SPAC company, a buying entity and a private company) is likely to provide fertile ground for claims against directors and officers. There were over 600 SPAC Management Buy-Outs ("MBOs") in 2021 and typically de-SPAC transactions take place 18-24 months after the Initial Public Offering ("IPO"). We expect that there will be increases in Securities Class Actions in the US and derivative actions in the UK and the US as a result, as regulators and investors look carefully at the way the transactions are structured. The swift nature of transactions mean that due diligence can often be overlooked which increases the risk to directors who drive the transactions.

Finally, one issue to keep an eye on in the US is the Biden administration's more proactive approach towards regulation. The new Chair of the Securities and Exchange Commission ("SEC"), Gary Gensler, is reported to be gearing up for a more aggressive approach to punishing corporate crimes. In particular, the SEC is looking to crack down on issues such as SPACs, Cryptocurrencies and digital assets, executive compensation and expenses, insider trading and ESG measures. The SEC's Director of the Division of Enforcement, Gurbir Grewal, recently announced that the SEC will no longer accept settlements on a no admission of liability basis in certain matters, particularly where heightened accountability and acceptance of responsibility are in the public interest, and where there is wider market misconduct. This means that litigation, primarily Securities Class Actions is highly likely to follow regulatory investigations because admissions of liability will strengthen claimants' resolve to pursue directors in the civil courts and to rely upon those admissions. In addition, it is likely to cause issues in insurance coverage as a result.

Whereas this is a potential US development, it is one on which we need to keep a close eye in the UK as the UK often follows the US's lead in relation to regulatory reform. If similar measures are introduced in the UK, insurers will be faced with new challenges around the scope of cover available to directors and officers in circumstances where they have been forced to admit liability in a regulatory investigation.

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< RETURN TO EXECUTIVE SUMMARY

ENVIRONMENTAL

It has been an interesting and, in some ways, pivotal year for environmental law in the UK and indeed on a global basis. Domestically, we have seen the establishment of the new Environmental Act, although admittedly it was repeatedly delayed, together with the formal establishment of the Office for Environmental Protection. Globally, climate change was thrust to centre stage, by COP 26 which took place in Glasgow, together with an acceleration in climate change litigation and concern for the regulation of green issues, generally. COP26 has also highlighted the role of business in environmental issues and the increasing pressure to act in a sustainable manner. We have seen increasing investment in environmental, social and governance (ESG) initiatives, and this is set to continue. ESG can now be a key value in business value and transactions, and greenwashing has caused several headlines concerning how companies have misled stakeholders and consumers.

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CLIMATE CHANGE

It is becoming increasingly likely that the insurance market, will face increasing litigation as a result of climate change. There have already been some notable successes, including the "Urgenda" claim where the Dutch government was successfully pursued on the basis that should be required to take more ambitious steps in curbing emissions. The German courts have made a similar ruling and last year in May 2021 the Dutch court ordered Shell to achieve a 45% reduction off its net CO2 emissions by 2030 to avoid breaching his duty of care to the country's citizens. This case is under appeal, but the imminent claim to be pursued by Friends of the Earth against Shell in the UK, suggests that these cases are set to accelerate, and it won't be long before these types of claim trickle down to more modest businesses, rather than solely against the multinationals.

COP26

The 26th conference of the parties (COP) about global climate issues took place in Glasgow, late last year. The idea being that countries will coordinate in order to resolve issues arising from the UN framework convention on climate change, the Kyoto protocol, and the Paris Agreement. The main aim of COP is to "secure global net zero by mid-century and keep 1.5 degrees within reach". The second focus is the reduction of carbon emissions (and therefore temperature acceleration) by adapting to "protect communities and natural habitats". Finally, the additional goal of immobilising international finance to pay for the transition away from a carbon intensive society. We think it is fair to say that despite lots of "chatter" COP26 at best, has been a qualified success. However, it was certainly successful in highlighting the necessity of reducing carbon emissions and provided encouragement for industry and business to put the attainment of net-zero at the centre of their business plans.

Throughout 2022, we are likely to see an increasing focus on "greenwashing", and we have already seen two key regulators publish Green Claims Codes.

GREENWASHING

Throughout 2022, we are likely to see an increasing focus on "greenwashing", and we have already seen two key regulators, the Advertising Standard Agency and the Competition of Markets Authority (CMA) publish Green Claims Codes. The purpose of the codes is to explain how businesses can confirm and show that their environmental claims are genuine. Whist complaints about greenwashing are not new, there is not an increased focus on miscreants being held to account and the increased global concern about "green" issues, suggests that other regulators and industries will take an increased focus in this area. The CMA has announced that it will carry out a full review of "green claims" both on and off line this year, and it is expected that this will lead to increased litigation and regulatory prosecution, particularly in the areas of textiles, travel and transport, and of course fastmoving consumer goods such as beauty goods and cleaning products. These types of claims and "greenwashing "generally, will be of growing concern to directors and officers of companies who are likely to be called to account and possibly prosecuted if their public profile on environmental issues does not match their actual performance.

ENVIRONMENTAL ACT 2021

Alongside COP 26, we saw the addition of the Environment Act 2021 to the statute book. The Act sets clear statutory targets in a number of key areas. The reduction of air pollution, restoration of habitats, increasing biodiversity, and the reduction of waste, combined with better use of resources. In some ways, it is an attempt to provide a "one stop shop" for environmental issues.

The government is obliged to provide its long-term targets before the end of 2022 with also the provision of interim targets intended to increase accountability. It therefore appears inevitable that we are going to see an increase in domestic environmental litigation and regulation enforcement as pressure to set and meet targets mounts. The Act's focus on clean air, waste and water, which have always been significant areas of prosecution, suggests that there is a real desire to deliver on the government's expectations for environmental improvement. We are also likely to see secondary legislation in 2022 to fully enact these changes. The Act is a major milestone for the UK, and businesses will have to grapple with the wide-ranging changes and the impact on their businesses in order to ensure compliance.

OFFICE FOR ENVIRONMENTAL PROTECTION

The Environmental Act has also established a new body, the Office for Environmental Protection (OEP). The OEP will hold government and public bodies to account in respect of their obligations. The need for the OEP has arisen out of the UK leaving the EU, which formerly held the UK government to account on environmental issues. The OEP's principal objective is to contribute to environmental protection and improvement of the natural environment. Notably, one of its governance roles is to monitor the progress of enforcement of breaches of environmental laws by public authorities.

CONCLUSION

There is no doubt that environmental issues and concerns are now central to many businesses and the changing landscape suggests that this is set to continue. New legislation and increasing enforcement suggests that we will see increased litigation and money spent on environmental risk management. Climate change and "greenwashing" are central to the debate. If there was any doubt, the £90million penalty imposed on Southern Water in July 2021, as a result of Southern Water pleading guilty to 51 sewage discharge offences confirms the seriousness of environmental breaches. The Environment Agency brought the landmark case to court following a 5-year investigation. The fine was substantial and amounted to almost 40% of Southern Water's recently recorded profits of £230million. Such a fine is unprecedented, albeit corporations do face unlimited fines for some environmental offences. However, the most interesting aspect of this fine is that it threatened the viability of the company. The Court of Appeal addressed this matter by stating that in some cases where the cases are so serious, that the defendant ought not to be in business. Whilst this is fine it is of course exceptional; it shows the court's willingness to impose fines that threaten the viability of companies in appropriate cases and also a more stringent approach in relation to the punishment of environmental offences. Whilst cases such as this will be unusual, there is no doubt that aligned with the Environmental Act, there is likely to be an increase in prosecutions, driven by the public's desire for a greener environment.

New legislation and increasing enforcement suggests that we will see increased litigation and money spent on environmental risk management.

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INDEPENDENT FINANCIAL ADVISERS

The main risk to IFAs at the moment arises from the ongoing investigation by the Financial Conduct Authority ("FCA") into the restructuring of the British Steel Pension Scheme ("British Steel") in 2017/2018. During this time, many IFAs advised individuals to transfer out of their defined benefit schemes into personal pension schemes. The FCA has stated that it considers that at least 50% of the advice provided in respect of those transfers was inappropriate (c3,500 individuals). It is likely that the FCA will try to implement a redress scheme to compensate individuals it considers will have received negligent advice. A redress scheme would force IFAs to carry out a review of the advice they provided to British Steel members and pay compensation where advice was inappropriate.

The threat of regulatory consequences for uninsured losses is likely to push IFAs to formally challenge declinatures so they can demonstrate that they have done everything possible to ensure cover is in place.

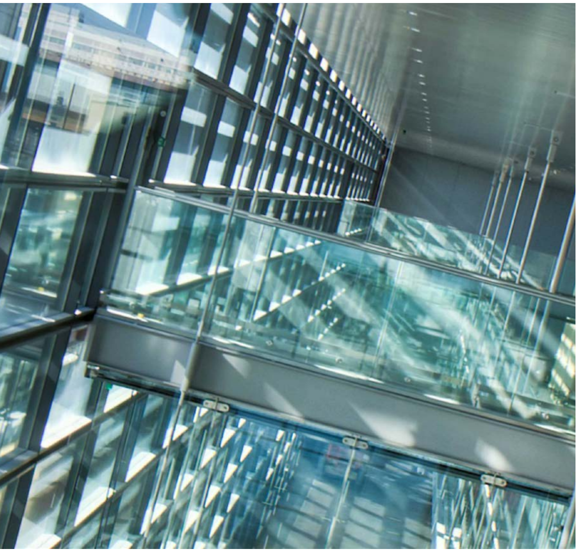
On 22 December 2021 the FCA issued a 'Dear CEO' letter to IFAs setting out that it was considering whether to implement a redress scheme. The letter warned IFAs that:

1. They should hold sufficient insurance in the event of claims arising from their advice in respect of British Steel.
2. They were under a regulatory obligation to ensure that they have financial resources appropriate for the risk of harm and complexity of their business, including claims from negligent advice.
3. They should not enter liquidation without first notifying the FCA and should not transfer assets outside the firm unless this is in the ordinary course of the firm's business.

Defined benefit transfers are routinely excluded under current professional indemnity policies. Many insurers have refused to accept the 'Dear CEO' letter as a notifiable circumstance under an IFA's policy, and this therefore presents an immediate risk for IFAs seeking cover in 2022/2023. It is also likely to put pressure on insurers and brokers to offer policies which provide cover for defined benefit transfers. It is not yet clear how any redress scheme would operate and we understand that the FCA expects to consult by the end of this month (March 2022), however there are opportunities for insurers wishing to enter the IFA market where they are willing to extend the scope of cover to claims arising from defined benefit transfers (perhaps with an increased excess).

Where those transactions are covered by the policy, then we expect to see an increase in the number of aggregation points raised by insurers/policy holders. The way in which these arguments are raised will depend on the number and value of claims, the limit of indemnity and the level of excess under the Policy (FCA regulation currently allows firms to hold whatever excess they like, subject to holding 'additional own funds').

The FCA has issued further guidance in January 2022 outlining that it will take assertive action against IFAs and their management teams if it considers that an



IFA is attempting to limit their liability to unfairly benefit the firm at the expense of their clients (including the use of 'Scheme of Arrangements' and insolvency procedures). The FCA's threats are a tacit acceptance that at least some IFAs will be responsible for redress payments in circumstances where they are uninsured for those types of claims. The threat of regulatory consequences for uninsured losses is likely to push IFAs to formally challenge declinatures so they can demonstrate that they have done everything possible to ensure cover is in place. Notwithstanding the FCA's threats, it is likely that at least some IFAs will not be able to continue trading in their current form.

In terms of more general risks, we note that the continued low interest rates will likely result in clients seeking higher risk and more volatile investments irrespective of their risk profile. The sharp increase in inflation following Covid 19 and the war in Ukraine is unlikely to buck this trend. Whilst commercial property portfolios are likely to have taken a hit in the period 2020/2021, we expect that any losses will have been cushioned by the swift recovery and bull market following March 2020. We do not expect to see a significant number of claims arising out of the dip in the market following Covid 19.

Elsewhere the Competition and Markets Authority ("CMA") has begun an investigation into potential 'greenwashing': "falsifying or overstating the green credentials of a product, service, brand or process without adequate substantiation". According to the CMA, up to 40% of all green claims online could be misleading. This investigation is likely to extend to 'sustainable' and 'ethical' funds traded in the UK which last year accounted for almost a third of overall industry sales.

There is no standard approach towards ethical investing: with some funds taking a far more pro-active approach than others. We suspect that IFAs may begin to see an uptick in claims relating to mis-selling for 'green funds' which turn out not to be as green as their glossy portfolios represented. This is particularly where those 'greener' funds end up outperforming the market.

The onus is likely to be on IFAs to ensure that the 'green' funds they recommend meet their client's expectations. In circumstances where IFAs have not updated their standard forms to cover approaches towards these types of investments then there is a significant risk that there will be no record of this having been discussed. It will be worth keeping an eye on the outcome of the CMA investigation as this could quickly become a catalyst for further claims, particularly if it is picked up by one of the claimant firms previously specialising in PPI or other similar mis-selling scandals.

Finally, if adopted in July 2022, we expect that the additional protections for vulnerable clients will lead to an increase in claims from elderly clients or their estates, particularly where investments have not been reviewed timeously following significant changes in the global investment outlook.

Given the regulatory threats for uninsured firms, there is likely to be an increased focus on the level of cover offered by insurers.

All of the above presents a challenging few years ahead for IFAs, however this is nothing the industry has not already weathered before. We expect that IFAs will look to refine their terms and conditions, engagement letters and automated review services with their brokers to ensure they have sufficient protections in place (insofar as possible). Given the regulatory threats for uninsured firms, there is likely to be an increased focus on the level of cover offered by insurers.

Whilst insurers will also want to revisit their exclusions, endorsements at issue and proposal forms – largely to ensure that cover does not extend beyond what has been anticipated – we expect that many of the existing terms will already offer sufficient protection.

To discuss how any of these issues might affect you, please contact

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< RETURN TO EXECUTIVE SUMMARY

CYBER

The importance of cyber insurance is growing worldwide. Recent predictions in the market estimate that the gross written premiums worldwide for cyber policies in 2025 will be approximately $20.6bn. In 2020 the total worldwide was $7bn. Against this background the number of UK organisations that purchase cover has risen year on year, however, the overall number of UK companies purchasing standalone cyber cover remains lower than in other territories around the world. It is estimated that UK companies account for only between 5% and 10% of the global market.

As discussed elsewhere in this report, the digital transformation of industries, and how they react to technological and political change is of fundamental importance to their survival in the future, and the growth of cyber insurance is certainly likely to continue in 2022 and beyond.

In January 2019, the Prudential Regulatory Authority required insurers to put in place an action plan to reduce unintended cyber exposures. Similarly, Lloyd's of London mandated that all Insurance policies underwritten by its syndicates should provide clarity as to whether cyber claims/losses are included or excluded (the roll out for various classes of business being staggered). Cyber incidents being covered by other insurance policies are therefore becoming less frequent, which will push up demand for standalone cover. Something to look out for in the future will be whether regulatory bodies start to demand mandatory standalone cyber cover for their members. By way of example, at the beginning of this year, the Council for Licensed Conveyancers in the UK consulted on whether standalone cyber insurance should be mandated for conveyancers.

Ransomware attacks increased exponentially in 2021. These attacks are likely to continue to grow in 2022 with broken relations between Russia and the West probably increasing the severity and frequency of cyber-attacks.

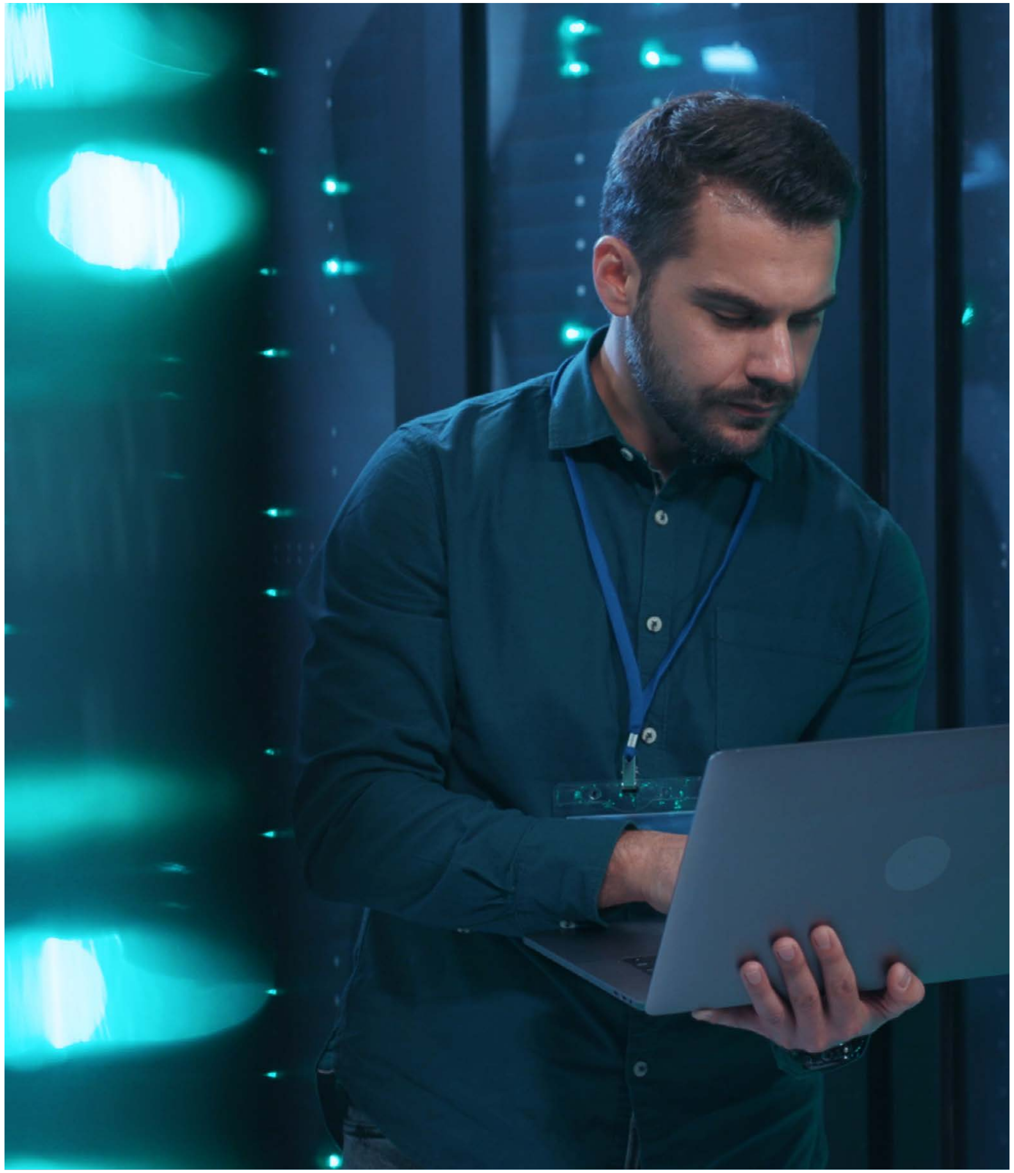
The COVID-19 pandemic and requirement to work from home has meant that many firms have had to transfer quickly to remote working, often at short notice and without as much IT pre-planning and preparation as would usually precede such a significant transformation in working location and environment. As such, there are often weaknesses in the deployed systems which have inevitably led to infiltration by cyber criminals intent on exploiting such vulnerabilities. Alarmingly, a recent survey by the British Chambers of Commerce and IT company, Cisco, found that one in 10 firms said they had been the victim of a cyber-attack in the last year. The rise in the demand for cyber insurance has therefore coincided with a significant rise in the frequency and severity of cyber claims.

Ransomware attacks increased exponentially in 2021, generating the largest cyber losses. These attacks are likely to continue to grow in 2022 with broken relations between Russia and the West probably increasing the severity and frequency of cyber-attacks. Increased hostilities have led to the Lloyd's Market Association responding. In recent months it has released four new model exclusions which effectively exclude both physical acts and state-backed cyber-attacks from cover in stand-alone cyber policies. It will be interesting to see the extent to which these clauses are adopted in cyber policies and where there might be potential coverage disputes in the future.

Insurers are becoming much more selective of risks with rising sub-limits and exclusionary language.

Growing losses have meant a hardening of the market with large rate increases and much greater underwriting scrutiny. Insurers are becoming much more selective of risks with rising sub-limits and exclusionary language. Insurers are also demanding more detail from insureds around data security and what systems and controls are in place (particularly for ransomware prevention and mitigation). Increased rates and underwriting scrutiny are expected to continue in 2022, as well as lower limits of indemnity in policies and higher deductible excesses.

Legislation and regulation to strengthen and enforce better resilience in relation to cyber-attack will increase globally. By way of example, on 19 January 2022 the UK's Department for Digital, Culture, Media & Sport (DCMS) published its consultation "Proposal for legislation to improve the UK's cyber resilience". The plans form part of the wider package of proposed reforms in line with the Government's commitments in its 2022 National Cyber Strategy published on 15 December 2021. The Network and Information Systems Regulations (NIS) is an enforcement regime that applies to operators of essential services and imposes duties and reporting requirements to ensure they manage risks to their network and information systems. There are large fines for non-compliance. One of the Government's concerns outlined in its proposal relates to outsourced IT services which are not within the scope of the NIS. The Government proposes to expand the scope of digital service providers. The Government also propose clearer and more onerous reporting obligations for critical digital service providers to demonstrate compliance to the Information Commissioner's Office (ICO) and expanded enforcement powers for the ICO. We await with interest the results of the consultation.



In September 2021, the DCMS published a consultation paper about the future of data protection law in the UK in a post-Brexit world. The DCMS' proposals will reform the UK GDPR and are intended to be more flexible and business friendly. Some of the proposed reforms would certainly be welcomed by data controllers (for example data subject rights and data transfers appear to be far less burdensome). However, not all the proposals are clear and some are replaced with equally problematic burdens. Data protection will be shaped by the outcome of the consultation and businesses will need to keep abreast of the developments this year.

Certainly, a positive development for UK data controllers is that litigation in relation to data breaches took a serious knock in 2021 with the Supreme Court's decision in Lloyd v Google LLC [2021] UKSC 50 (see our article here for implications for insurers). The result of the case is that Claimants cannot claim compensation for "loss of control" of personal data in data breach claims under the Data Protection Act 1998 and likely cannot under GDPR. Claims are restricted to financial losses, personal injury and distress. There will likely be a dramatic decline in class actions for mass data breaches as a result, and the potential for opt-out class actions for mass data breaches is likely dead. Claims for "misuse of private information" in individual data breach claims survive, but recent caselaw developments (Warren v DSG Retail Ltd [2021] EWHC 2168 (QB) and WM Morrison Supermarkets plc v Various Claimants [2020] UKSC 12) mean only in limited circumstances, if at all. As such, the tide has very much turned in favour of defendants and their insurers in the battle against frivolous data breach claims.

As stated above, insurers are demanding more detail from insureds around data security and what systems and controls are in place. Underwriters now seek actual evidence that security measures are in place, rather than relying upon prospective insureds' representations in the proposal forms. This scrutiny will most likely encourage better cyber security practices. In addition, positive change will no doubt come with the Government's 2022 Cyber Strategy which proposes to raise awareness and incentivise good cyber security practices. In its '2022 cyber security incentives and regulation review', the Government states that it is working to develop, and make available "impact information" (the costs to an organisation of a cyber event) to make a stronger case to businesses to prioritise and invest in cyber security. Of interest to insurers is the Government's commitment to engage with cyber insurers in relation to gaining better access to data and impact information gathered. One of the major problems with cyber is the lack of historical data in respect of risks and insurers will no doubt welcome and engage with the Government's proposals in this respect.

...the tide has very much turned in favour of defendants and their insurers in the battle against frivolous data breach claims.

To discuss how any of these issues might affect you, please contact

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