BEALE&CO

INSURANCE TRENDS 2025:

ADAPTING TO RISING REGULATION AND EMERGING RISKS

International Construction and Insurance Law Specialists

INTRODUCTION

In our last report we commented on the challenging geopolitical and economic climate that prevailed at the time. Over a year later, the reality is that little has changed.

Armed conflicts, changes of Government, cost of living crises and extreme weather events have all contributed to a state of political and economic uncertainty around the world.

As always, making accurate predictions as to the issues that will impact the market in the coming months is a difficult task. However, as our industry experts across our specialist lines of business have compiled this report, they have identified some continuing and emerging trends that prevail throughout the different areas of the industry.

Key trends

INCREASING REGULATION

There has been close legal and Governmental scrutiny in all sectors, and it is very likely that we will see increased and tighter regulation over the next 12 months or so. Aside from fire and building safety (more on this below), we have seen increasing regulatory intervention across the board, including from the Solicitors Regulation Authority, the Financial Conduct Authority and the Financial Reporting Council. In the coming months we also expect to see more regulation of AI and cyber security in the UK, bringing the country more in line with the approach adopted in the EU. This increased regulatory activity highlights the importance of regulatory insurance cover, already becoming more of a staple offering than it has been in the past.

FIRE AND BUILDING SAFETY

Fire and building safety remain an important concern nearly seven years on from the Grenfell tragedy. The Building Safety Act 2022 (BSA) is now fully in force, with its new provisions around duty-holders and competence, and particular changes for higher-risk buildings. The Grenfell Inquiry final report was published in September 2024 and recommended major change across the construction industry at all levels. We await the Government's response to these proposals in 2025.

INTRODUCTION

At the end of 2024 the Government announced radical action to speed up remediation work on unsafe cladding. As the speed of work ramps up, we expect to see an increase in disputes regarding the apportionment of costs and the quality of work carried out. We are also likely to see cases in the First Tier Tribunal and the Technology and Construction Court relating to the interpretation of BSA provisions, such as the appointment of Accountable Persons and the operation of Building Liability Orders and Remediation Orders.

PIERCING THE CORPORATE VEIL

We have seen a developing trend by both regulators and the courts to 'pierce the corporate veil' and impose personal responsibility on company directors or, in some situations, on parent or associated companies. The BSA, for example, imposes greater levels of personal responsibility and liability on directors and senior managers, by way of the new Principal Accountable Person role and extends its reach through newly created Building Liability and Remediation Orders. Similarly, the new 'failure to prevent fraud' offence under the Economic Crime and Corporate Transparency Act 2023 could potentially attach personal liability to company directors who fail to put in place adequate fraud prevention measures. This, combined with increased shareholder and class action (discussed in the D&O section of this report), is likely to mean an increase in notifications to D&O insurance policies.

AI/DIGITAL TECHNOLOGY

Throughout this report there has been considerable mention of AI as a key trend across all sectors. Whilst the use of AI undoubtedly brings advantages in terms of business speed and efficacy, it adds risk from issues such as model drift, discrimination, hallucination and human error. It also leaves businesses potentially susceptible to cyber-crime. 2025 is likely to see further developments in technology and innovation along with the opportunities and inevitable challenges that brings to all sectors.

Outlook and thanks

THE INSURANCE MARKET

2024 saw a significant softening in most classes of insurance. This has come as a surprise to many, and the speed at which the market has softened has caused concern in many quarters, signalling a return to the unsustainable loss-making days that foreshadowed the capacity restrictions in 2018. A fragmented market has therefore appeared; new start-up MGAs appear to be driving down the prices in an attempt to buy market share, but the more traditional capacity providers have largely stood firm on pricing or reduced their appetite across non-performing classes, preferring to wait for the current instability to pass.

Against that backdrop, it is hard to predict what the rest of the year and beyond might bring; market stability would be the wish of most insurers but, with the prospect of further new entrants and increased capacity flooding in, it is hard to see things bedding down any time soon. Wordings are being amended and extended across the board to cater for new and emerging risks; regulatory cover is starting to become a staple, as is broader fire safety cover. Cyber and D&O are growing exponentially as classes, as the threats of ESG-related litigation and cyber crime loom ever larger. Primary limits are also increasing again, with insurers taking larger lines than they might have been prepared to take during the hard market conditions. Disruption abounds.

There is a feeling of renewed energy across the market, with signs of real growth in an industry that many would accuse of having been overly cautious in recent years. There is, however, still some way to go before one could say it is sustainable. Time will tell.

This report is the culmination of a lot of hard work from a number of my colleagues and I would like to take this opportunity to thank them all for their insightful contributions and time in putting together such a comprehensive look at the market.

Peter Sewell

Peter Sewell,
Partner

EXECUTIVE SUMMARY

Here's a summary of our key insurance trends and predictions across the sectors for the next 12 months.

Click on a market area to read our full analysis.

CONSTRUCTION

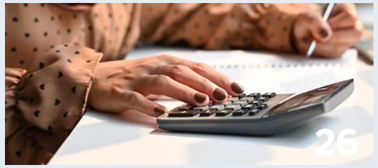
- Rising insolvencies may disrupt projects, leading to disputes.
- Cash flow issues could drive more 'smash and grab' adjudications.
- Fire safety claims now concern maintenance rather than original construction.
- Remediation of buildings over 11m may trigger cost and quality claims.
- Building Safety Regulator shortages may delay new projects.
- The extended limitation period under the Defective Premises Act 1972 may prompt historic claim notifications.
- Case law is expected on the use of Building Liability and Remediation Orders.
- Increased scrutiny on contractual liability caps.
- AI adoption increases cyber risks; firms need strong security measures.
- ESG remains a key issue, with the UK Net Zero Carbon Buildings Standard in effect.
- Litigation over water quality concerns may rise.

SURVEYORS

- A focus on long term affordability means fewer repossessions, and fewer valuer claims.
- RICS minimum terms now require fire safety claim cover for buildings of five storeys or more.
- Cover mandated for the completion of EWS1s and fire risk Appraisals of External Walls for buildings up to 18m if signed off by trained RICS members.
- Extended 30-year limitation period under the Defective Premises Act 1972 may lead to precautionary notifications to PI insurance policies.
- Increased use of AI brings risks of technical errors and cybersecurity vulnerabilities.
- ESG focus intensifies, particularly on energy performance in property valuations.

SOLICITORS

- The solicitors' PI market has softened but should stabilise in 2025.
- AI risks include error in the form of AI 'hallucinations', cybercrime, and data breaches.
- The Building Safety Act will remain a concern for conveyancers as they take responsibility for compliance.
- Stress-related errors highlight the need for increased focus on internal firm culture.
- SRA's focus on anti-money laundering compliance will continue, presenting opportunities for insurers for enhanced regulatory cover.
- Solicitors' Minimum Terms may be modified and we may see an attempt to redress the balance between consumer protection and the viability of the legal profession.
- The SRA faces increased scrutiny following its handling of the Axiom Ince closure, which may impact regulation.



ACCOUNTANTS & AUDITORS

- Common claims regarding missed filed deadlines, tax advice, and errors in filing of tax returns will continue.
- Financial Reporting Council audit investigations and fines expected to rise post-Carillion.
- More audit-related claims likely due to increased corporate insolvencies.
- AI use raises risks of inaccuracies in automated processes and resulting claims.
- Cybercrime remains a key concern, increasing demand for cyber-specific insurance cover.
- Claims over inadequate or inaccurate advice on Research and Development Relief continue to grow.
- Strong risk mitigation through training, diary management, and documented client communication is essential.

EXECUTIVE SUMMARY

INSURANCE BROKERS

- Claims inflation will impact brokers' negligence claims, especially with underinsured clients.
- Brokers must understand changes to Approved Minimum Terms to ensure changed terms are reflected in clients' insurance covers.
- Understanding post-Grenfell building safety laws is critical.
- AI use in underwriting and claims processes must include human verification processes.
- 'Failure to prevent fraud' offence under the Economic Crime and Corporate Transparency Act 2023 may cause debate regarding directors' cover.
- Brokers should clarify cyber policy limitations and recommend standalone cyber policies.
- Increased regulation from the Financial Conduct Authority will affect brokers.

DIRECTORS & OFFICERS

- Directors face growing personal accountability amid growing and widespread regulation.
- Health & Safety remains the top D&O risk due to building and fire safety concerns.
- An increase in insolvencies at the start of 2025 leading to an increase in insolvency related D&O claims.
- Increasing AI risks - model drift, discrimination, hallucination and human error, as well as a focus on AI-washing.
- Insurers must consider whether D&O policies provide 'silent' AI cover.
- Directors face greater fraud liability under The Economic Crime and Corporate Transparency Act 2023.
- More director disqualifications expected over COVID-19 financial support scheme misuse.
- Workplace culture concerns may drive an increase in Health & Safety claims.

EDUCATION

- High Court ruling raises doubts over the viability of student claims for pandemic-era service reductions.
- Universities must make reasonable adjustments for student mental health-related needs following University of Bristol v Abrahart.
- Consumer protection laws increasingly applied to students, with more cases referred to National Trading Standards.
- New harassment and sexual misconduct regulations take effect from 1 August 2025.
- More student protests expected, but universities can legally remove disruptive encampments.
- School mobile phone bans may affect evidence gathering in claims.
- Transgender issues remain a key topic, with schools awaiting Department of Education guidance.
- Special Educational Needs and Disabilities remain a significant issue and fertile ground for claims.
- Sector-wide funding crises could increase complaints and claims.

ENVIRONMENTAL

- With a growing trend of environmental activism, we'll continue to see increased public scrutiny, claims, and protests against fossil fuel projects and climate change.
- Following Finch v Surrey County Council [2024], downstream emissions from developments will face closer legal scrutiny.
- The Manchester Ship Canal Ltd v United Utilities Water [2024] ruling reinforces rights against sewage discharges and will increase pressure on water companies.
- We will see greater regulatory focus on sustainability claims, with scrutiny from consumers and company shareholders.
- Businesses must be aware of stricter penalties for environmental breaches.
- The UK Net Zero Carbon Buildings Standard (Sept 2024) will drive sustainability efforts within the construction industry.
- The new biodiversity/net gain regime may lead to insurance disputes over biodiversity responsibilities.

INDEPENDENT FINANCIAL ADVISERS

- Review of the British Steel Pension Scheme advice continues, with lower-than-expected redress payments due to UK investment performance.
- The monitoring of Appointed Representatives by Principal firms will face greater scrutiny.
- FCA consultations on pension advice and consumer support in retail investments and pensions will launch in 2025.
- The outcome of the FCA consultation on changes to its Enforcement Guide is expected.
- Significant changes to the Financial Ombudsman Service system of redress is expected, including mass redress events (e.g., motor finance claims) and referral rights for Final Determination.
- Increased use of technology and AI will bring risks of error and cyber security considerations.

EXECUTIVE SUMMARY

CYBER

- We expect an increase in cyber crime as the use of AI lowers the barrier of entry to novice cyber criminals.
- There will be debate regarding what constitutes a 'credible' threat under a cyber insurance policy, following the guidance note released in May 2024.
- We anticipate a large-scale review of cover for losses, and an increase in demand for cyber insurance cover, following the CrowdStrike outage in July 2024.
- Further regulation of cyber security in the UK is likely following the EU implementation of the Digital Operational Resilience Act (DORA). The new Cyber Security and Resilience Bill could become law by early 2026.
- Further regulation and legislation regarding cyber security is expected in the Middle East.

ENVIRONMENTAL, SOCIAL & GOVERNANCE

- Following the ClientEarth litigation in 2023, further shareholder litigation against directors is expected.
- Businesses' diversity, inclusion, social value and employment policies will face greater scrutiny.
- AI-driven recruitment processes and the risk of discrimination and bias will continue to pose issues.
- The construction industry will have a stronger emphasis on ESG issues, with sustainability, climate change, ethical supply chains and modern slavery being key considerations for new projects.
- We expect to see a rise in shareholder actions against companies for mismanagement/breach of fiduciary duty arising from issues such as implementation of policies and oversight of social risks.

FINANCIAL INSTITUTIONS

- Cyber security, data privacy and AI will be key risk areas. LockBit ransomware will remain a top threat.
- Companies exaggerating AI capabilities may face regulatory enforcement, or shareholder claims regarding company statements about the use of AI.
- ESG compliance will be a key focus area, particularly regarding diversity and inclusion, social value and employment.
- Fraud risks will continue due to the growing use of digital assets and fintech innovations, prompting stricter transparency rules and investor protections globally.
- Increased scrutiny of the insurance and financial sectors in the UAE will continue, with regulators taking more proactive action.
- Post-Epstein scandal, compliance departments must ensure rigorous due diligence and monitoring of wealthy clients.

WARRANTY & INDEMNITY

- The W&I market expanded significantly in 2024, with a corresponding exponential rise in claims. We have also seen the first W&I claims working their way through the UK courts.
- In 2025, an increased focus on AI and mergers in the pharmaceutical sphere is possible.
- Synthetic W&I are becoming more common – Insures will need to look into these in more detail.
- There will be an increasing focus on ESG. A rise in M&A activity in European jurisdictions may bring more claims around availability of tariffs, consents and planning considerations.
- Insurers will look to cover a wider range of transactional risks and new breaches (those occurring between the signing of documentation and the closing of the deal).

HEALTH AND SAFETY

- 2024 marked 50 years of the Health and Safety at Work Act. Construction remains one of the UK's most hazardous industries, requiring further improvements.
- HSE inspections rose 32% in 2023/24, with 92% of prosecutions leading to convictions. This trend will continue in 2025.
- Work-related illnesses remain a focus, with seven million cases reported in 2023/24.
- Grenfell Phase 2 Report findings will drive more HSE investigations and prosecutions under CDM Regulations 2015.
- Principal Designers will face greater scrutiny under The Building Safety Act 2022's new competence regime.
- The HSE aims to conduct 14,000 inspections in 2025 to assess duty holder compliance.
- Increased HSE focus on individuals may lead to more notifications under professional indemnity and Directors & Officers policies.

CONSTRUCTION

More than a year on from our last report and the construction industry remains under pressure. We have seen signs of increased capacity and a greater risk appetite in the UK construction Professional Indemnity (PI) market, perhaps due to increased industry regulation and/or a perception that adequate reserves are now in place for any post-Grenfell or post-pandemic claims exposure. Whether or not this is the case remains to be seen, but there are continuing vulnerabilities and an evolving legal and regulatory landscape within the industry. We should not be surprised if insurers react to these increasing risks by tightening their underwriting criteria once again.

> *We have seen signs of increased capacity and a greater risk appetite in the UK construction PI market.*

ECONOMIC CLIMATE

In our last report we discussed the effect of the economic downfall on the construction industry, particularly the increase in the number of insolvencies. More than a year on, and the situation has not improved. Insolvency Service statistics reveal that the construction industry accounted for 17% of all insolvencies in England and Wales in the 12 months to October 2024. In the year to October 2024, the total number of construction firms becoming insolvent was 4,208. The data showed that construction ranked among the top five industries that experienced the highest number of insolvencies during that period. The rise in insolvencies is driven by continued increases in materials and energy costs, inflation and pandemic-related debt. The war in Ukraine and material shortages worsen the situation, impacting contractors and their supply chains.

> *The rise in insolvencies further underscores the importance of appropriate due diligence and risk management.*

Contractor insolvencies may disrupt projects or cause wider uncertainty, leading parties to seek to review, suspend or terminate contracts or withhold payments – ripe ground for disputes. The rise in insolvencies further underscores the importance of appropriate due diligence and risk management by those working in the industry to minimise disruption, ensure business continuity and minimise the risk of disputes.

Looking ahead to 2025, with no long-lasting end in sight to the conflict and political instability across the world, it is likely that 2025 will be another difficult year for the construction sector, both at SME level and amongst larger businesses. In these circumstances, with businesses needing to ensure continued cash flow, we could see an increase in "smash and grab" adjudications in 2025.

FIRE AND BUILDING SAFETY

FIRE SAFETY CLAIMS – A THIRD WAVE?

All those working in, or alongside, the construction sector are aware of the fire safety claims that have arisen since the Grenfell Tower fire in June 2017. Those claims have typically involved the design and construction of External Wall Systems on buildings over 18 metres and the design and construction of measures to address internal spread of fire and smoke. These claims then evolved to include allegations relating to structural defects that were discovered when opening-up works took place (as part of the process of remediating the alleged fire safety claims).

Of late, we have been seeing separate allegations regarding water ingress on buildings over 18 metres (alongside the typical fire safety claims and second wave structural claims). Given the typical historic nature of fire safety claims, these new allegations regarding water ingress are likely to raise questions on whether systems have been adequately maintained in the years following Practical Completion (rather than just focusing on whether there are any deficiencies with the original design and construction). These new claims have also generated some interesting coverage issues given the operation of widespread fire safety claims exclusion wording in most PI / D&C policy wordings, as well as risk assessment considerations on renewal.

REMEDIATION WORK

The Grenfell Tower public inquiry's Phase 2 Report, published in September 2024, analysed the circumstances surrounding the fire **[read our article here]** and identified many construction industry failures. The Report proposes recommendations to improve fire

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and building safety and further reform the construction industry. It recommends reviewing the Higher-Risk Building (HRB) definition, which may further impact projects already subject to enhanced safety compliance requirements further down the line. For more information on the key findings of the report and its potential impact on the construction industry, together with specific discipline impact summary notes, **[please see our Digesting the Grenfell Report hub here]**. We have also summarised the Government's response to the report **[here]**.

The Cladding Safety Scheme (CSS) is now fully operational, making Government funding accessible to all medium-rise buildings between 11 and 18 metres high in London and all buildings over 11 metres high outside of London. The CSS will be funded by the £5.1 billion that the Government has allocated to fix dangerous buildings, topped up by revenue generated from the future Building Safety Levy on new

...2025 is therefore likely to see an increase in civil claims, through both the Technology and Construction Court (TCC) and the First Tier Tribunal.

developments (currently anticipated this Autumn). Funding will be made available where the original developer cannot be traced/held responsible or where a fire safety professional has recommended action to address associated life safety fire risks.

The Ministry of Housing, Communities & Local Government's (MHCLG) current costs estimate to fix all cladding deemed unsafe on buildings over 11 metres high in England is around £16.6 billion. The Government's £5.1 billion allowance therefore leaves a significant shortfall. To this end, many developers have signed up to the Government's remediation contract, committing to finance and/or undertake repairs to HRBs developed or refurbished in the 30 years prior to enactment of the Building Safety Act 2022 (BSA). The Department for Levelling-Up, Housing and Communities (DLUHC) has also now started to seek reimbursement directly from contractors for sums advanced under the Building Safety Fund, where remediation works were achieved post completion and there has been an assignment of rights of causes of action.

Of the 9,000 to 12,000 buildings over 11 metres that MHCLG estimates will need remediating, only 4,834 buildings have been identified and included in its portfolio. This leaves up to 60% of affected buildings still to be identified. Of those identified, remediation work has started on only 20% and has completed on around 30%. The pace of remediation works is behind where MHCLG expected it to be.

The Government has recently announced radical action to speed up the removal of unsafe cladding. It is abundantly clear now that the focus is no longer just on buildings over 18 metres in height and the renewed political focus and scrutiny on this issue, following the publication of the Grenfell Tower public inquiry's Phase 2 Report, is likely to lead to a real drive in remediation works on buildings over 11 metres in height throughout 2025.

2025 is therefore likely to see an increase in civil claims, through both the Technology and Construction Court (TCC) and the First Tier Tribunal, regarding apportionment of responsibility for the costs of the works and potential issues as regards the quality of those works. It is possible that we may even get the first English decision dealing with apportionment between main contractor, sub-contractors and the design team. Extensive argument around the cost of implemented or proposed remedial works and whether such works are justified or necessary is also likely to be a key area of focus for fire safety claims that proceed through the Courts.

Putting the onus on developers to pay should help to protect taxpayers' money. However, this approach also creates grounds for lengthy disputes between developers and freeholders over the scope and standard of remediation work required - cue both potential claims and further delays. This will also mean there remains the high likelihood of historic claims from both developers and other parties who hold legal interests in these buildings, against those originally responsible for any alleged defective works.

It is also worth noting the challenges currently faced by the Building Safety Regulator (BSR), in particular reports of the lack of resource (not enough suitably qualified or available personnel to perform the role of the BSR) which is causing significant delays to Gateway Two application approvals. This is having a knock-on effect on both the speed of cladding remediation work, as well as on new projects generally, affecting construction starts and the Government's goal of building 1.5 million homes this Parliament.

Despite recent positive indications from the BSR on improvements and investment, this is likely to continue to cause delays to construction projects starting in 2025 and will require parties to carefully consider and confirm risk allocation for those projects within the enhanced building safety regime. Such risk management measures may include, by way of example, contractual provisions relating to programme and budget/costs, entitlements to extensions of time and/or additional costs, change in law, or grounds for suspension or termination. It is also wise to bear in mind the Grenfell Inquiry's recommendation to review the definition of a HRB, which may expand the scope of additional projects caught by this process in the future.

ADJUDICATION

The Adjudication Society and King's College London released their third and final report, '2024 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform'. Based on surveys conducted in May 2024, the report contains valuable insights on current adjudication trends from the perspective of its main stakeholders and users. Key findings include a record of 2,264 adjudication referrals to adjudication nominating bodies between May 2023 and April 2024 (an increase of 9% on the previous year), with low-value claims (below £125,000) or fast-track equivalent claims comprising nearly 20%. “Smash and grab” adjudications dominated, accounting for 63% of cases, while inadequate contract administration (50%) and lack of contract participant competence (42%) emerged as the leading causes of disputes in construction adjudications.

The report confirms adjudication’s popularity and effectiveness, and the high levels of compliance with adjudicators’ decisions – the TCC has issued only 219 enforcement judgments since October 2011, 77% of which fully enforced the adjudicator’s decisions. Out of these reported judgments, jurisdictional objections successfully defeated 15% of decisions, followed by natural justice at 10%, and other grounds (i.e. fraud) at 7%, demonstrating that the TCC will generally seek to enforce adjudication decisions with limited exceptions.

A recent landmark decision, BDW Trading Limited v Ardmore Construction Limited [2024] EWHC 3235, also highlights the evolving role of adjudications in addressing fire safety disputes under the Defective Premises Act 1972 (DPA). This case confirms that adjudicators have jurisdiction to decide DPA claims where the contract provides for disputes “arising under the contract,” effectively aligning adjudication provisions with the broad interpretation established in Fiona Trust. The court’s decision underscores adjudication as a fast and effective forum for resolving such disputes, particularly those arising under the extended limitation periods introduced by the BSA. This ruling is expected to lead to a rise in fire safety disputes being referred to adjudication.

LIMITATION

The extension of the limitation period under the DPA - from six years to 30 years for those claims regarding works completed prior to 28 June 2022 – has opened the door for claims that were previously time-barred. It will concern parties responsible for a building’s design and construction (and their insurers), against whom a claim could now be brought - unless it can successfully be argued that the claim would be a breach of the Convention on Human Rights (probably the right to a fair trial). The extension of the limitation period and consequent risk of historic claims is likely to prompt a large-scale project review. We anticipate continuing precautionary notifications to PI insurers. We also await with interest the Supreme Court decision in URS Corporation v BDW Trading which will consider, amongst other things, the extent to which developers are owed a

duty under section 1(1)(a) of the DPA and whether claims commenced prior to the BSA coming into force are subject to these retrospective extended limitation periods. We will provide an update once the judgment is available. In the meantime, the TCC case of Vainker v Marbank Construction Limited demonstrates how a claim can now be brought under the DPA in circumstances where earlier limitation dates have passed, given the limitation extensions set out in the BSA.

THE BUILDING SAFETY ACT 2022

Building Liability Orders (BLOs)

The BSA introduces much greater accountability for fire safety issues. Claims can now be brought against associated or parent companies if the firm that caused a safety defect is no longer operating, via the imposition of a BLO. This is designed to protect claimants by 'piercing the corporate veil' where developers may have set up corporate structures or special purpose vehicles with few or no assets for the purpose of ringfencing or limiting future claims and have potentially disposed of their interest in a project.

In the case of Willmott Dixon v Prater and others [2024] the TCC dismissed an application to stay BLO claims until after judgment on the main claim. In doing so, the Judge noted that the BSA does not prescribe the specific factors that a court must consider when deciding whether to make a BLO, so they are likely to be fact-specific to each case. However, it is apparent that the courts will look to the policy behind the BSA, in addition to the evidence before it, when considering if it would be 'just and equitable' to make a BLO. The decision shows the Court's willingness to 'pierce the corporate veil' by confirming that a BLO can be brought against any associated company, even if that company was not involved in the original project or even if it did not exist at the relevant time. Whether or not there has been any impropriety linked to attempts to conceal or avoid liability appears to be irrelevant. It is also now clear that, whilst BLOs were assumed to be remedies only available to claimants, it is open to a defendant to seek a BLO against co-defendant group companies by way of contribution.

We saw the first BLO made by the TCC under Section 130(3)(b) of the BSA at the end of last year in 381 Southwark Park Road RTM Company Ltd & Ors v Click St Andrews Ltd & Anor [2024] EWHC 3179 (TCC). The Judge found that there were fire safety breaches which gave rise to a "relevant liability" and were a "building safety risk". According to Section 62 BSA this means "a risk to the safety of people in or about a building arising from" the spread of fire, structural failure, or any other prescribed matter. It was also deemed just and equitable to make a BLO. The decision reinforces that such orders are not confined to fire safety matters and may apply to structural defects or issues. It also confirms the scope and application of the BLOs and their use in piercing the 'corporate veil'.

Remediation Orders (ROs) and Remediation Contribution Orders (RCOs)

The BSA has also changed the power balance between leaseholders and landlords by introducing enforcement methods to compel landlords/developers to carry out and contribute towards remediation works. This could be by way of ROs or RCOs. An RO can require a landlord to remedy specified relevant defects in a specified time on a building. The MHCLG has shown that it is prepared to use ROs if it considers that freeholders are failing to fix building safety defects within suitable timeframes.

An RCO will require a specified body corporate (or partnership) to make payments to a specified person in connection with the remediation of relevant defects (as opposed to all of the costs being passed to leaseholders via the service charge). RCOs seek to reduce instances where landlords take a risk-averse approach to remediation and commission unnecessary work on the basis that they will not be required to fund the works themselves. RCOs can be made against landlords, developers or any person 'associated' with those parties. The latter provision aims to provide a means for leaseholders to obtain contribution for remediation works from a developer's well-capitalised wider group structures, in circumstances where the original developer company involved in the works is wound up and/or has limited financial means. RCOs therefore also provide a means for landlords who have forward funded remedial works, to seek contribution from the original developers of the building. Those original developers can then, in turn, seek a "contribution" to such remedial costs from entities they engaged to design and construct the works in question. This aligns with the BSA's general aim to hold those responsible for fire safety defects to account. A good example of these points in practice is the recent First Tier Tribunal decision in Grey GR Limited Partnership v Edgewater (Stevenage) Limited and others (CAM/26UH/HYI/2023/0003) (known as the Vista Tower decision) where RCOs of just over £13m were made against 76 entities.

A tribunal will make a RCO if it considers it 'just and equitable' to do so, the interpretation of which was considered in the case of Triathlon Homes v SVDP and Get Living [2024]. The Triathlon judgment was heard by the Court of Appeal in March 2025 but, the First Instance judgment indicates that the power to award RCO is discretionary and dependent on "all relevant factors" in each case. The First Instance judgment also suggests that the relevant BSA provisions have retrospective effect, so that costs incurred pre-commencement of the BSA can still be subject to an RCO. The first instance decision also demonstrates that the same position will be adopted in instances where remedial works have already obtained funding, although the court has highlighted that the remedial works position is likely to be relevant where lack of funding is impeding remedial works progress. The judgment following the appeal ought to provide helpful guidance to those applicants hoping to satisfy the 'just and equitable' test in the future.

Duty Holder roles

The new Principal Contractor and Principal Designer roles under the BSA impose onerous new responsibilities. The Principal Contractor must plan, manage and monitor the building work and coordinate matters relevant to it, to ensure that it complies with relevant building regulations. There is also a duty to check 'other work which directly relates to the building work' - potentially imposing a duty to check and verify the work of others where applicable.

The BSA/Building Regulations role of Principal Designer differs to that of the Principal Designer under the Construction (Design and Management Regulations) 2015 (CDM). The new Principal Designer role under the BSA requires the duty holder to plan, manage and monitor all design work during the design phase of a project so that all reasonable steps are taken to ensure that it is compliant with Building Regulations. A consultant can only perform this role if a client is satisfied of its competency to do the appointed role.

Of note is the more onerous obligation placed on the Principal Contractor to ensure that works comply with Building Regulations, whereas the Principal Designer is obliged only to take reasonable steps to ensure such compliance. Following Grenfell, we may see additional requirements on those performing the roles of Principal Contractor and Principal Designer under the BSA/Building Regulations.

The BSA has also created Accountable Person (AP) and Principal Accountable Person (PAP) roles. The AP is responsible for building safety risks when a building is occupied, and can be any person who owns part of the common parts or has responsibility to repair or maintain the common parts of a HRB. It could be a freehold owner or a landlord, or even a property management company. In some cases, there will be more than one AP, in which case each is responsible for the particular part of the building in which they have an interest.

The PAP has certain additional – and potentially onerous – responsibilities over and above those of an AP, including the registration of a HRB, preparing and submitting reports to the BSR and establishing and operating a reporting system to the BSR. This can result in uncertainty and/or disagreements about who should take on the role of PAP, in which case an application can be made to the First Tier Tribunal for a decision to be made. We are starting to see an increasing number of these applications.

PI INSURANCE

2024 saw a continued shift in insurers' increased appetite to take on construction risks. It is perhaps because underwriters are reassured to some extent by increasing industry training and regulation; it may also be that they believe the worst has now passed in relation to exposure for fire safety claims following the block notification of fire safety claims in the aftermath of the Grenfell Tower tragedy.

2024 has also seen an increase of new entrants to the Construction PI market. Particularly MGAs. This presents both opportunities and challenges.

As the insurance market has softened, rates have fallen. Many insurers have started to move away from full fire safety claims exclusions and some are starting to offer a wider scope of cover than has been seen over the last few years. Good news for insureds and brokers but potentially challenging for underwriters to keep existing insureds on competitive terms during the next round of renewals. 2025 will be an interesting year for the Construction PI market as it continues to grapple with the issues set out in this section against a background of an ever-softening market. Given the long tail nature of construction claims, the impact of the current underwriting climate may not be seen/felt for a few years to come.

BALCONY FAILURES

We have seen some claims against developers, contractors and engineers related to the structural failure of balconies (mostly residential), a trend that may continue into 2025. The collapse of a balcony at a Barking housing estate at the end of 2023 resulted in identification of issues with 77 balconies on the same estate. The issue appears to have been the use of plywood better suited for indoor use, held together with weak glue. It will be interesting to see whether similar cases arise in 2025.

CONTRACTUAL ISSUES

STANDARD INDUSTRY CONTRACTS AND JCT 2024 REVISIONS

As covered in previous Beale & Co articles, the JCT Contracts have been updated as part of the 2024 Edition, reflecting ongoing industry trends/modernisation and recent legal developments. Key updates include provisions regarding the email communication of notices and good faith obligations requiring parties to work collaboratively and engage in direct negotiations to resolve disputes.

However, it is worth noting that the decision in Providence Building Services Ltd v Hexagon Housing Association Ltd [2024] may lead to parties seeking bespoke amendments to address the position in clauses 8.4.2 and 8.9.4 (which remain unchanged from the 2016 Edition). In Providence, the Court of Appeal clarified that a contractor could terminate the contract under the clause for a repeated "specified default," even if the earlier notified default was remedied within the relevant cure period. The ruling provides clarity for users of JCT contracts, ensuring consistent interpretation of the standard termination provisions. However, parties may wish to agree alternative drafting if they do not wish for the default position to bite. Additionally, the section of the judgment dealing with "the applicable legal principles" (paragraphs 24-27) considers contractual interpretation points when dealing with industry standard forms, including the extent to which previous versions may be admissible in aiding the Court to construe parties' intentions and the correct construction of the clause(s) in question. We understand that permission to appeal this decision has since been obtained.

We have seen the release of 2024 RIBA Standard, Domestic, Concise, and CDM Regulations Principal Designer Professional Services Contracts. Amongst other changes, the recent amendments require consultants to detail their PI insurance cover for cladding and fire related issues, in addition to material exclusions or restrictions relevant to the project.

CONTRACTUAL LIABILITY CAPS

Recent cases in the TCC have shown how potentially vague terms may result in a different interpretation (leading to unintended financial consequences). Parties should therefore ensure that liability caps are clearly defined and drafted in line with the agreed position to avoid disputes. The importance and value of incorporating these types of clauses (caps on liability and net contribution clauses) into contractual documents at the outset of projects have been reinforced in the context of the current fire safety claims. The value of these claims is typically high and can exceed levels of PI insurance cover (where available); and the historic nature of such claims, together with ongoing scope of insurance cover considerations can also mean that original parties, who may arguably have a degree of culpability, either no longer exist and/or have no (or limited) insurance cover available. It is also important to be wary of seemingly informal or incomplete documents, which can still inadvertently create legally binding obligations.

It is notable that the JCT Design and Build Contract 2024 footnote and updated guidance also includes commentary and suggested drafting for a limit of liability (expressed as a total aggregate limit for contract, tort, negligence or breach of statutory duty, subject to excluded carve-outs), reflecting the industry trend of caps on liability being agreed. This is likely to encourage discussions on this item. Additionally, regularly reviewing any agreed caps under documents which have been agreed, or are in the process of being negotiated, is essential for governance and risk management during projects.

PUBLIC PROCUREMENT ACT 2023 (PA 23)

For certain insurers, the public sector represents an important source of commercial opportunities. Public sector contracts above a certain value need to be awarded through a competitive tender process governed by UK public procurement law. A new statute, the Procurement Act 2023 (PA 23), recently took effect, replacing the Public Contracts Regulations 2015 and Utilities Contracts Regulations 2016, which previously regulated the tendering of most public sector insurance contracts. The PA 23 was due to be implemented in October 2024, but was delayed until February 2025, so that the Government had time to consult on and revise the National Procurement Policy Statement (NPPS), to accompany the PA 23. The NPPS sets out the Government's strategic priorities as regards procurement and will need to be considered by contracting authorities in relation to most procurements governed by the PA 23. The Welsh Ministers have published their own separate procurement policy statement to guide procurement in Wales. The current PA 23 requires contracting authorities to have regard to the importance of delivering value for money, maximising public benefit, providing transparency and sharing information when carrying out relevant procurements. In Beale & Co's response to the consultation process, we have called for the inclusion of public safety as a procurement objective in light of the Grenfell Tower inquiry. There are other important aspects regarding future procurement processes and award of contracts under the PA 23 which are directly relevant to the UK construction industry. For example, the statute toughens up the rules on exclusion from tender processes expanding the grounds on which a supplier's access to tender opportunities can be blocked. It has also led to the creation of a central list of debarred suppliers who will in most cases be ineligible to participate in procurement opportunities. The PA 2023 also requires for most procurements with a contract value over £5 million that suppliers' performance be monitored against KPIs, with failure to hit targets being both a potential implied ground for early termination or even exclusion from future tenders. It is understood that the TCC plans to develop a new procedural framework for managing procurement claims regarding the PA 23.

PRIVATE FINANCE INITIATIVES

A Private Finance Initiative (PFI) is an extended-term agreement between a Government entity and a private party, in which the private sector undertakes the design, construction, financing, and operation or maintenance of a public asset along with associated services. Under a PFI contract, the private party assumes responsibility for the construction, maintenance, and management risks, with remuneration and payment typically tied to performance. Many ongoing PFI projects within the construction sector are currently subject to review and many will undergo considerable scrutiny as they near the handover stage. For some context as to the scale of the handover stage (and potential disputes in relation to it), according to the Infrastructure and Projects Authority's PFI Dashboard, as of 31 March 2024, there were 665 PFI projects with a total capital investment of around £50 billion. Across those projects, it is estimated that there are £136bn of unitary charge payments remaining from the financial year 2024/25 onwards. 11 projects were due to expire in 2024; with an estimated peak of 69 expiries in 2036 and from 2043 there are five or less expiries each year until the final two projects expire in 2048.

Government bodies, such as the Infrastructure and Projects Authority, have previously issued guidance emphasising the importance of parties/stakeholders completing thorough review processes in good time (at least seven years before expiry) to ensure smooth transitions and to mitigate risks associated with asset handbacks. This guidance underscores the risk of disputes or contract termination if the handover process is not managed efficiently. As asset projects such as waste facilities, hospitals, and schools approach their completion and handover stages, the potential for project workshops, discussions, or disputes is anticipated to increase, particularly in scenarios where the condition of assets or adherence to contractual obligations is contested between the interested parties. Further, any actual or perceived misalignment of interests or incentives potentially creates a fertile ground for disputes. In its survey of PFI contracting authorities in June 2020, the National Audit Office reported that 33% of those surveyed consider that disputes near PFI contract end are likely, with 86% of disputes expected to relate to the quantity of rectification work required at handover.

Looking further into 2025, the landscape of PFI in construction may undergo further evolution with the potential introduction of PFI 3.0, a National Wealth Fund, or public/private financing mechanisms. This new iteration is increasingly gaining interest, propelled by Labour's earlier commitments to rejuvenate public infrastructure through innovative financing models. For example, in August this year Chancellor Rachel Reeves was reported in the press as considering seeking private finance to pay for a £9 billion highway and tunnel across the River Thames, in an effort to keep the costs off the Government's books. What PFI 3.0 will look like is somewhat unknown, given that previous iterations of PFI were seen as poor value for money. PFI 3.0 is intended to address criticisms of earlier versions by incorporating lessons learned and enhancing transparency. It will need to be designed to better align private sector incentives with public sector goals, ensuring that projects are completed on time, within budget, and to a high standard. There is also speculation that the new models may involve new contractual/performance provisions or shorter maintenance periods built into the overall pricing model.

However, PFI 3.0 also presents several challenges that may need to be addressed. For instance, the emphasis on sustainability and social value in construction projects, with a focus on long-term benefits for communities and the environment, may result in more stringent requirements and increased scrutiny. This could potentially lead to further contractual negotiations or disputes as stakeholders navigate these new expectations. As the industry adapts, effective communication between the parties, dispute resolution mechanisms and proactive contract administration and risk management will be essential for the success of future PFI projects.

REPORTING ON PAYMENT PRACTICES AND PERFORMANCE

The construction sector now has to grapple with the Reporting on Payment Practices and Performance (Amendment) (No. 2) Regulations 2024, which requires qualifying companies to report the proportion of retention sums withheld from suppliers under "qualifying construction contracts". The requirements aim to improve payment practices and transparency. Companies will be required to disclose amongst other things their standard retention practices, retention rates, and the proportion of money held back from suppliers and by clients. The legislation took effect on 1 March 2025, applying to financial years starting on or after 1 April 2025. Non-compliance will result in sanctions, with the Department for Business and Trade (DBT) encouraging compliance before prosecution. The legislation also falls alongside other measures to tackle late payment, such as the DBT's plans to introduce a Fair Payment Code.

While this may initially affect the negotiation and drafting of contracts and the early stages of projects, the published information has the potential to influence parties' relationships and result in future disputes over payment or wider claims. The requirement to disclose retention practices and rates could lead to disagreements between contractors and suppliers. For instance, if a company fails to disclose or misrepresents its retention practices, suppliers might seek to claim for breach of contract or misrepresentation. Suppliers may also try to pursue legal action against companies for improperly withholding retention sums. Should the reported retention sums be deemed unjustified or excessive, suppliers may attempt to seek recovery of these amounts in certain circumstances. The Regulations mandate that the name of the director approving the information be provided. If the information is later found to be false or misleading, it is possible that directors could face claims for approving inaccurate reports. Further, it remains uncertain to what extent such information will be used by parties in adjudication or other forms of dispute resolution.

ARTIFICIAL INTELLIGENCE (AI) & DIGITAL TECHNOLOGY

The integration of AI and technology in construction continues to grow, bringing with it both opportunities and risks. Construction companies are especially vulnerable to cyber-attacks, which can harm financial margins, project timelines, reputations, and supply chain relationships. This quarter, the National Cyber Security Centre (NCSC) and the Chartered Institute of Building (CIOB) issued guidance to help construction firms defend against such threats. Both the NCSC and CIOB emphasise a multi-layered cybersecurity approach, recommending regular security assessments, employee training to recognise risks and phishing attempts, and robust access controls. Firms are encouraged to create clear information security and incident response plans tailored to their operations, and to keep software and systems updated to prevent exploitation by cybercriminals. Proactively addressing cybersecurity risks helps protect projects and business-sensitive data.

Consultants and contractors should continue to remain vigilant about cybersecurity as they implement new technologies and deliver projects. Compliance with confidentiality, data protection, information security standards and contractual requirements is critical, particularly for infrastructure or asset management projects. Clear contract terms are essential to maintain trust and mitigate the risk of legal or financial repercussions from possible data breaches or issues.

More recently, we have seen the publication of the Government's AI Playbook which further aims to embed AI into public sector operations. For more information, please [read our article here]. We look forward to monitoring the impact of this on the construction industry and contracts moving forward.

Cyber losses do not always arise from cyber-crime or attack, however, and can be the result of technical failure. The July 2024 CrowdStrike outage, which caused disruption to companies across the world, illustrates the significant impact of a total system failure. Losses incurred, most probably from business interruption, are likely to be insured under the systems failure clauses of cyber insurance policies.

ENVIRONMENTAL SOCIAL & GOVERNANCE (ESG) ISSUES

The construction industry is increasingly focusing on ESG issues, driven by growing sustainability and climate change concerns. A key development has been the launch of the UK Net Zero Carbon Buildings Standard in September 2024 [read our article here]. This Standard aims to create a uniform framework for reducing the construction industry's environmental impact and supporting decarbonisation. While voluntary, adopting the standard in contracts enhances compliance and fosters a proactive approach to sustainability in projects. The 2024 Edition of the JCT Design & Build also includes a new clause 2.1.5, dealing with sustainability improvements as an operative requirement, as standard.

Another legislative development is the introduction of the Water (Special Measures) Bill 2024-25, presented to Parliament in September 2024, receiving Royal Assent this year. The Bill seeks to strengthen the powers of water and environmental regulators to improve water quality and address public concerns about the UK water industry, particularly regarding storm overflows and pollution. Labour had pledged to hold water companies accountable, with plans proposing to block bonuses for executives of polluting firms and to enforce criminal charges against persistent offenders. Contractual provisions and indemnities may potentially emerge in response to legal and regulatory changes within the water industry (to the extent that such risks can be linked to the construction supply chain).

The Supreme Court's ruling in Manchester Ship Canal Company Ltd v United Utilities Water Ltd could trigger further environmental activism and litigation, increasing legal risks for water utility companies. The decision upholds rights following unauthorised sewage discharges, pressuring companies to reassess infrastructure and risk management strategies. As environmental groups continue to gain traction, public scrutiny on water companies and other businesses will likely intensify, demanding greater transparency and compliance.

CONCLUSION

The last year has been one of notable change, with the introduction of further regulation, additional measures to promote cladding remediation work and increased focus on ESG issues and technology. The construction PI market is softening, with a greater number of insurers writing construction risks and providing some level of fire safety cover. There are, however, ongoing areas of claims exposure, especially given the increased focus on holding accountable those responsible for historic defects in building work, as well as increased individual responsibilities under the duty holder provisions of the BSA. As we move further into 2025, we anticipate ongoing focus on building and fire safety, alongside increased levels of scrutiny as regards sustainability and climate change. It will be interesting to see how the industry and the market respond.

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

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SURVEYORS

We previously reported on an improving surveyors' Professional Indemnity (PI) insurance market, with an increase in RICS listed insurers and a stabilisation of policy premiums. As we enter 2025 the market continues to soften, with more providers, greater capacity and more competition.

VALUATION CLAIMS

Lenders will only consider recourse against a valuer where the borrower is unable to service the loan and where the sale of the security property is expected to result in a shortfall on the account. For the substantial number of UK homeowners whose homes are subject to a mortgage, recent years have seen troubling developments in terms of both soaring inflation and a dramatic series of interest rate rises. Whilst the UK Base Rate has now dipped from a recent high of 5.25% to 4.5% (at the time of publication) and with expectations of further modest cuts in 2025, an increasing number of borrowers, already contending with higher living costs, are exiting fixed-term mortgages for much higher rates.

The combination of more responsible lending practices coupled with steady house price growth should reduce the prospect of lenders suffering a shortfall and reduce the likelihood of associated claims against valuers.

However, we are a world away from conditions which precipitated the global financial crisis which witnessed a fall in average UK house prices by 20% in just 16 months in 2008/2009. It is a decade on from the Financial Conduct Authority's Mortgage Market Review conducted in the aftermath of the crisis, and the introduction in 2014 of its Mortgage: Conduct of Business responsible lending rules. The rules set out standards for assessing borrower affordability, requiring applications to be stress tested to ensure borrowers could safely navigate changes in their circumstances, particularly sizeable increases in the borrowing rate (akin to those experienced over the past couple of years).

With a sharper focus on long-term affordability, there are currently far fewer repossessions of owner-occupied properties than there were prior to, and in the aftermath of, the financial crisis of 2008. As we enter 2025, there is cause for modest optimism that most borrowers will weather this storm. Whilst the Autumn Budget may have caused a short-term increase in borrowing costs, the Base Rate is widely expected to be reduced further over the course of 2025, offering some hope for those whose finances have been stretched close to their limit. Looking ahead, in response to Government calls to boost growth, the FCA has indicated its intention to simplify responsible lending and advice rules for mortgages to support home ownership, and to open a "discussion on the balance between access to lending and levels of default." It remains to be seen how that balance will be struck but there is clearly an appetite to soften the rules which have been in place now for a decade.

For now, lenders are therefore expected to have to seek recourse to the value of their security in fewer instances. When they do, the combination of more responsible lending practices coupled with steady house price growth (Knight Frank and Savills have recently predicted house price growth in 2025 of 2.5% and 4% respectively) should reduce the prospect of lenders suffering a shortfall upon resale and, in turn, reduce the likelihood of associated claims against valuers.

We also note that with recent cases such as Hope Capital the courts are putting lenders' practices under more scrutiny and so, even where there are issues with breach, there may be significant discounts for contributory negligence (indications of 50-75%) if the lender can be shown not to have followed its own lending procedures. This is potentially significant as we have seen a rise in Tier 2 and Tier 3 lender claims where processes adopted by lenders are not always as rigorous as they should be.

FIRE SAFETY

In our last report, we covered the new safety obligations imposed on Responsible Persons (encompassing managing agents) under the Fire Safety (England) Regulations 2022. Additional responsibilities were introduced under Section 156 of the Building Safety Act 2022 ("the BSA") which came into force on 1 October 2023. The changes impose greater recording obligations for fire risk assessments and fire safety arrangements and promote collaboration between departing and incoming Responsible Persons. They also increase the level of fines for some Fire Safety Order 2025 offences.

BUILDING AND FIRE SAFETY INSURANCE COVER

As noted above, the surveyors' PI insurance market hardened following the Grenfell tragedy and the resultant fire safety concerns (including the introduction of form EWS1). Changes to the RICS Approved Minimum Wording in 2020 permitted the exclusion of claims relating to fire safety, though the approach relaxed a little in 2021 when insurers were required to provide limited fire safety cover on buildings of up to four storeys. The BSA potentially exposes surveyors to yet more risk (higher levels of scrutiny, expectations and requirements, especially for those working on higher-risk buildings (HRBs)).

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However, 2024 has seen a shift in position. This stems in part from the BSA's systems of robust controls for work on HRBs, including to those permitted to work on such buildings, providing comfort to insurers as to the competence of those engaged in such work. The introduction by the RICS of the External Wall System Assessment Training programme (leading to a new Level 6 Ofqual accredited qualification) for those who carry out EWS assessments has also encouraged insurers that such work is likely to be conducted competently and consistently.

Accordingly, listed insurers from 1 July 2024 are now required to provide prospective fire safety claim cover in the UK and Ireland for professional services carried out on buildings of five storeys or more for negligent act, error omission (not full civil liability). Cover

must also be provided (save in cases of specific dispensation) in respect of the completion of EWS1s and Fire Risk Appraisals of External Walls for buildings up to 18 metres, where the work has been signed off by RICS members who have successfully completed its training programme.

This cover is prospective and applies only to work carried out from 1 July 2024. As such, surveyors remain exposed and potentially uninsured for work carried out on buildings over four storeys prior to that date.

LIMITATION

The continued uninsured exposure to claims for work that predates July 2024 will be of even greater concern given the BSA's extension of the limitation period under the Defective Premises Act 1972 ("DPA"). This is now extended to 30 years for work completed prior to 28 June 2022. The extension of the limitation period will concern insurers, as it applies to all DPA claims, not just those relating to fire safety. We anticipate large-scale project reviews, and potentially a number of precautionary notifications to PI insurance policies. Defending historic claims will be challenging given the lack of older contract/project documentation. We also anticipate some older claims where files have been closed, reopening as claimants realise that they may have this cause of action to pursue, even if their claims in contract or tort are statute barred.

TECHNOLOGY AND AI

As with all professions, greater use of AI and digital technology brings an increased risk. This remains a key area of concern for surveyors and their insurers as technology is being increasingly used for valuations, property management services and building/cost analysis services.

The use of drones or unmanned aerial vehicles (UAV) in the surveying of buildings, land and agricultural management is growing and brings significant advantages in terms of cost, speed and accuracy. In September 2024 the RICS republished its May 2019 Practice Information on the use of drones, which highlighted the importance of compliance with legal and regulatory requirements established by the Civil Aviation Authority (the CAA). UK regulation of drones is constantly changing, and it is therefore important that surveyors ensure adequate systems and training are in place to keep abreast of changes to regulations,

Contractual provisions and terms of engagement will be scrutinised to determine issues of liability for digital error.

improvements in technology and advances in data collection methodologies and analysis. Surveyors must also have a good working knowledge of general aviation rules as well as familiarity with areas of restricted airspace and must take care to ensure that captured data is protected to avoid any breach of General Data Protection Regulations (GDPR).

Technology such as Protech can assist with compliance, collaboration and communication by putting in place procedural processes that are robust, secure and accessible across the entirety of a business. However, firms must ensure that systems are in place for staff education and training so that digital systems are kept up to date with changing regulation and risk climates. Whilst automated processes assist business productivity, it is essential that there are knowledgeable humans in the production chain to minimise risk. Contractual provisions and terms of engagement will be scrutinised to determine issues of liability for digital error; it is important that these documents are carefully reviewed to

Evidence suggests that the difference in value between energy efficient buildings and those that are less energy efficient is starting to become apparent.

adequately protect the surveyor from unwanted responsibility and risk.

Finally, vigilance about cybersecurity is key. Whilst AI is a tool to aid efficiency and productivity, human input remains vital, both as a means of guidance through complex/unusual scenarios but also as a means of quality control, if claims are to be avoided.

SUSTAINABILITY AND ESG

A consistent theme throughout this report has been the importance of environmental, social and governance (ESG) issues. A statement issued by RICS in October 2023 noted that "wherever appropriate, the relevance and significance of sustainability and ESG matters should form an integral part of the valuation approach and reasoning supporting the reported figure". As such, surveyors must ensure that they consider issues such as energy performance, green certification/leases and flood/subsidence risk in every valuation carried out. This is likely to become increasingly important in coming years, potentially impacting property values as well as marketability, and thus lenders' security. Evidence suggests that the difference in value between energy efficient buildings and those that are less energy efficient is starting to become apparent – the so-called 'green premium.' We may start to see lending criteria based on EPC ratings, though for this to happen there will need to be marked improvements in the reliability/accuracy of EPCs, which may naturally occur as the relevant technology evolves.

CYBER

PI policies are increasingly excluding cyber cover under so-called 'non affirmative' clauses. Surveyors, like other professionals, are likely to be seeking standalone cyber insurance to protect themselves from cyber incidents such as data breach, hacking etc.

FINAL THOUGHTS

There are signs that the surveyors' PI market is softening and is favourable to those purchasing PI insurance. Whilst the 2024 changes to the RICS Minimum Approved Wording leave firms exposed to historic claims (pre-July 2024), the improvements represent a subtle shift in favour of the Insured in relation to Fire Safey related claims. They suggest a widening risk appetite on the part of insurers and greater availability and scope of cover. Add to this our cautious optimism as regards a rise in property prices and a resultant drop in overvaluation claims, with some more valuer friendly case law, and there is cause for positivity as we move further into 2025.

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

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SOLICITORS

Our 2023 report focused on tough market conditions for the legal professional indemnity market, with increased premiums causing real difficulties for firms, particularly those considered by the insurance market to have 'high risk' practices, such as conveyancing and wills/probate.

That focus appears to have been well justified; statistics from the Solicitors Regulation Authority (SRA) show that in the year ending 30 June 2024 a total of 102 law firms notified the SRA that they were having serious difficulties obtaining PI insurance cover. In the same period, a total of 21 UK law firms were required to close due to their inability to obtain PI insurance, whilst many others elected to merge so as to be able to obtain economies of scale.

12 months on, and we are seeing a marked difference in trading conditions. Led by a reemergence of MGAs, more carriers have entered the market, increasing available capacity and driving competition on pricing. Reports suggest that the October 2024 renewal season saw double-digit percentage savings on average premiums, with some firms enjoying discounts of upwards of 50% from the cost of their expiring policy.

The rapid softening of the market appears to have been driven more by a desire for market share than by any kind of recognition that lawyers represent an improving risk. As such, there is doubt as to how sustainable the current 'race to the bottom' will be. But what is true is that the volume of recorded claims is dropping, albeit the value of such claims is definitely increasing.

Statistics from the Solicitors Regulation Authority (SRA) show that in the year ending 30 June 2024 a total of 102 law firms notified the SRA that they were having serious difficulties obtaining PI insurance cover.

With continued regulatory challenges (explored further below), we predict that the market will stabilise at around its current level over the next 12 months and that, longer term, a fractured market will emerge, with higher risk firms becoming increasingly difficult to insure, whilst those with good risk management will continue to enjoy significant discounts.

AI

Risks arising from the increasing use of AI have been a pervading theme of this report. Solicitors' PI is no different. Increasing numbers of law firms are using AI technology to provide legal services. SRA figures show that three-quarters of the largest law firms were using AI by the end of 2022, with over 60% of large law firms and one-third of small firms at least considering using AI.

The advantages of AI are obvious: improved administration, quicker drafting and automation of routine and repetitive tasks. There are, however, many risks. Using AI to draft documents

Increasing numbers of law firms are using AI technology to provide legal services.

has been shown to cause so-called AI hallucinations, such as in the US case of Mata v Avianca, where a document produced by ChatGPT cited numerous legal cases that did not in fact exist.

There are also other less obvious risks. Breach of confidentiality in cases where personal data may inadvertently be disclosed is a significant area of possible exposure, as is the risk of breach of intellectual property law in situations where AI is used to produce documentation. Comprehensive staff training and coherent internal policies are vital to mitigate risk, as is careful system monitoring.

The regulation of AI is complicated and likely to be a key area to watch in the coming months and years. There are significant differences between EU and UK law in this area, with the UK currently adopting a principles-based approach to regulation, in contrast to the more stringent rule-based regulation in the EU. You can read more about this in the Cyber section of this report.

For law firms, the use of AI in the UK is regulated by the SRA and follows national guidance. Cautious encouragement appears to be the theme. Firms with cross-border practices must be mindful of jurisdictional differences; if the output of any AI is sent to or used in other jurisdictions, then the regulations applicable in those jurisdictions will apply.

Should a claim ever arise out of the use of AI by a firm, it will always be necessary to consider the scope of the firm's PI cover (likely to respond in cases where a breach of duty arising from the use of AI is alleged) and whether or not a cyber-specific insurance policy (which will respond to issues such as data breach) is in place and would be better to handle such a case. This may give rise to coverage disputes as the types of risk presented by AI continue to emerge.

BUILDING SAFETY

Another key area of focus in this report, is how recent changes to building safety legislation and regulation under the Building Safety Act 2022 (BSA) have had a significant knock-on effect on the legal profession.

The BSA protects 'Qualifying Leaseholders' from having to pay for fire safety remediation work on a 'relevant building' (meaning a building that is over 11 metres tall or more than five storeys high). These provisions are intended to ensure that primary liability for such work falls on the developers, landlords and freeholders of affected leasehold property, and not on the leaseholder themselves. Conveyancing solicitors are required to obtain information relating to the BSA from the sellers of leasehold flats (including a form certifying whether the lease meets the criteria to be a Qualifying Lease) and ensure that the leaseholder Deed of Certificate is served on the landlord. The landlord then has four weeks to return it to the solicitor. Most landlords do not understand the cost and timing issues involved, meaning there is great scope for delay with inevitable cost implications.

Should a claim ever arise out of the use of AI by a firm, it will always be necessary to consider the scope of the firm's PI cover.

A further issue is 'part 2' of the BSA, which requires solicitors to confirm to mortgage lenders that BSA requirements have been met. The difficulty is that solicitors are not surveyors and are therefore ill-equipped to advise on whether a property falls within the definition of a 'relevant building.' The provisions in the BSA are complex, time-consuming to implement and open to interpretation. Giving the required assurances to purchasers or mortgage lenders therefore exposes the solicitor to significant potential risk.

Whilst some improvements were made in the Levelling Up and Regeneration

Act 2023 and clarity was offered in Law Society guidance published in 2024, the BSA remains a cause of concern to solicitors and their PI insurers. The Law Society wants more to be done, and for the onus to be placed on lenders to satisfy themselves that a property is BSA compliant rather than simply relying on conveyancing solicitors. In the meantime, some insurers are advising against taking on BSA-related matters because of the uncertainty and complexity of the legislation. As such, some firms are taking a more selective approach to the work they take on which, whilst good for risk management, is not always good for the balance sheet. As an alternative, firms will be carefully considering their engagement letters and trying to make amendments to limit their exposure (assuming clients will agree).

FIRM CULTURE

In our last report we referred to the SRA's February 2022 publication of its Workplace Culture Thematic Review. This set out the SRA's expectations for how firms should manage their internal culture, and how any cultural problems within firms should be regulated in future (namely by the Solicitors Disciplinary Tribunal (SDT)). Over the intervening period, the SDT has started to see a significant rise in cases involving workplace culture issues, so the SRA was right to focus on this as an area of concern.

Insurers are understandably interested in how law firms manage their culture, as this has a proven impact on the likelihood of claims arising. Whether due to stress, fear of owning up to errors, mental health issues or inadequate supervision, there is a clear link between a poor working environment and PI claims. Insurers are likely to take an interest in firms which have been investigated by the SRA or the SDT in relation to workplace issues and are likely to impose inflated premiums to compensate for the perceived additional risk. We have seen a notable increase in claims arising from errors, missed red flags and communication breakdowns potentially attributable to stress. This can perhaps be attributed to remote or hybrid working which, whilst in some cases obviously contributing to work/life balance, has the disadvantage of little day-to-day human interaction and an isolated working environment. Mental health related issues can easily pass unnoticed.

THE SRA

Recent months have seen intense focus on the SRA and, in particular, the manner in which it handled the closure of law firm Axiom Ince. The firm was shut down by the SRA in October 2023 to protect the interests of clients and former clients following the discovery of a £64million hole in the firm's client account. In October 2024, an independent review commissioned by the Legal Services Board (LSB) found that, in the run up to its closure of Axiom Ince, the SRA "did not act adequately, effectively and efficiently" and "did not take all the steps it could or should have taken". The review concluded that the SRA's actions and omissions "necessitate change in its procedures to mitigate the possibility of a similar situation arising again." The LSB report has caused consternation around the profession, which is now being asked to increase its contribution to the Law Society's Compensation Fund by 200% to enable clients who have lost money through Axiom's collapse to obtain redress. Firms are understandably angry that they are effectively being asked to pay for the SRA's mistakes. Meanwhile, the SRA have dismissed the LSB's findings and have offered no explanation or reassurance to the profession that things will change in future. The ongoing debate is becoming more and more heated; expect more on this issue over the coming months.

There is a clear link between a poor working environment and PI claims.

In February 2024, the SRA launched its consumer protection review, proposing major changes to the account rules and circumstances where law firms can hold client money. The SRA has recently consulted with the profession on this issue, proposing that firms should have a tightly restricted time period within which to return client money at the end of a matter, and that clients should receive all interest that accumulates on their money. It also suggests a more prescriptive measure of the extent of the fee that a firm can request to hold in advance of any work being done. The SRA's proposals have been roundly criticised by the profession, which seems to feel they are little more than a smokescreen to divert attention away from the SRA's own failings elsewhere. The proposals are a 'sledgehammer to crack a nut' and will simply add to the administration and cost of dealing with client affairs, all of which will need to be passed on to the consumer.

More controversial still is the suggestion by the SRA that client money should not be held by law firms at all. The SRA contends that the practice of firms holding client money is inherently risky for the client, on the basis that money can be lost (whether by way of poor systems and processes or by fraud) and that the current system is vulnerable to cybercrime. The SRA has proposed that client money should instead be held in third party (TPMA) accounts, with providers regulated by the Financial Conduct Authority, and has gone so far as to suggest that PI insurance premiums might then fall, on the basis that there would be fewer claims for the loss of client funds.

However, use of TPMAs is not straightforward. The ability to access funds swiftly is one concern, especially for conveyancers who may not be able to complete as many transactions if they are having to use third parties to gain access to client funds. Their ability to offer undertakings in such circumstances may also be affected, thereby risking disruption to established conveyancing norms. It is also questionable whether using TPMAs would in fact reduce the risk of client money being lost, as suggested; the restricted number of TPMA providers would mean that all client money is concentrated among very few accounts, increasing the attraction to criminals and affecting significant numbers of clients across a wide range of firms should something go wrong. And, no doubt, clients would continue to claim against their solicitors in such circumstances; the allegation being that the firm negligently placed their monies in an unreliable location. So, whether the proposed changes would ultimately improve firms' PI insurance premiums is highly doubtful.

As we enter 2025, the SRA's performance is under more scrutiny than ever before. Many argue that the SRA has been 'asleep at the wheel' for too long, focusing on issues that grab headlines whilst failing to act on matters of greater day to day significance. There are growing suggestions that the SRA is no longer fit for purpose, and many have called for those in charge to resign their positions. It will be interesting to see how the SRA stands up to these challenges in the coming months, and whether any fundamental changes to regulation of the legal profession are forthcoming. Expect a turbulent 2025.

AML

In 2024 the SRA took a great interest in anti-money-laundering (AML) and there has been a noticeable crack down on AML non-compliance. The SRA's annual report, published in October 2024, showed that in 2023/24 the SRA took regulatory action against firms in relation to AML breaches in 78 cases (an increase of 47 from the previous year). The most common failing was not having client and matter risk assessments (CMRAs) or firm-wide risk assessments (FWRAs) in place. In that period the SRA issued 44 fines totalling £556,832.

This should ultimately benefit the profession and its insurers by lowering the risk of third-party criminal activity.

In 2024 there were a number of high-profile AML interventions, evidencing the SRA's motivation to address AML non-compliance. The largest fine was delivered to Hill Johnson & Leo and was set at 2% of its turnover, reduced by 15% to reflect the firm's cooperation with the SRA, bringing the total fine to £18,094 plus costs of £600.

The SRA's interest in AML is expected to continue as we move further into 2025. This should ultimately benefit the profession and its insurers by lowering the risk of third-party criminal activity and thereby claims. Insurers might also see an opportunity through offering firms enhanced regulatory cover to guard against the prospect of unwanted SRA attention and its obvious cost.

SOLICITORS' MINIMUM TERMS

As we all know, the MTCs impose extremely onerous obligations on insurers, with very wide mandatory cover and high limits of indemnity, minimal exclusions, and a potentially very long tail in view of the 6-year run-off provisions which kick in automatically if a firm shuts down.

All of the various requirements were designed by the consumer-focused SRA to ensure that clients are ultimately protected and that they receive their due compensation even if the firm has breached its insurance obligations or cannot afford to meet its own financial or general obligations.

But there is constant pressure on the SRA from the insurance market to consider diluting the quality of the MTCs so as to make the cover more appealing to insurers (and ultimately more cost-effective for firms). Such pressure has been consistently resisted, but there are increasing signs – perhaps spurred on by the criticism of the SRA following the Axiom Ince debacle (as discussed above) - that something does need to be done to preserve the open market for solicitors' PI insurance.

In particular, the area of aggregation has received significant attention over the past few years. The aggregating provisions in the MTC were introduced back in 2005, at the same time that the SRA increased the mandatory minimum level of cover from £1m to £2m/£3m as it is now. The SRA assured the insurance market that the increased minimum cover would not have a huge impact on loss ratios, as the broad aggregating language would enable insurers to cap their losses more effectively. The recent Court of Appeal decision in Axis Specialty Europe SE v Discovery Land Co LLC [2024] (which follows the uncertainty thrown upon the MTC in the 2020 case of Lord Bishop of Leeds v Dixon Coles & Gill) casts considerable doubt on that logic. In Discovery Land the Court of Appeal rejected Axis' argument that the dishonesty exclusion in the policy should apply (a surprising finding in circumstances where the dishonesty and or/condoning of dishonesty under clause 6.8 of the MTC appeared quite apparent). It also agreed with the trial judge that two separate claims made by Discovery Land against the Insured were not sufficiently 'similar' and could not therefore be aggregated. As a result, insurers were not able to cap their losses, but instead faced potentially open-ended exposure at the hands of the MTC.

The MTCs unyielding rigidity and the claims activity that it has driven has pushed insurers' financial exposure to the point where many have decided to deploy their capital elsewhere. Those that remain are being so selective in their choice of firm – and are demanding such significant premium increases – that many firms are finding themselves uninsurable and have been forced to close or merge as a result.

Something does need to be done to preserve the open market for solicitors' PI insurance.

In September 2020 the International Underwriting Association (IUA) set out its concerns in an open letter to the industry, calling for the MTCs to be changed to include (among other things) a right to cancel cover if premiums remain unpaid (particularly for run-off cover), and for the payment of excesses on a policy to be mandatory. The IUA has said that the credit risk taken on by insurers for the non-payment of solicitors' PI insurance premiums and excesses is shortly likely to become "commercially unacceptable", leading to a further restriction in the provision of insurance "across the board".

The balance between consumer protection and the viability of the legal profession is undoubtedly a hard one to maintain. The SRA appear themselves to have recognised this over the past 12 months, in saying that their approach has led to fewer firms, less competition and higher prices for consumers, none of which plays very well to a consumer-focused agenda. Perhaps the coming year – with all the criticism being levelled at the SRA generally - might eventually see a softening of the MTC wording and an attempt to redress a balance that has, for too long, tipped too far in favour of the consumer.

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ACCOUNTANTS AND AUDITORS

In last year's report we noted how 2022 and 2023 had been critical years for the accounting and auditing industry. Ongoing economic uncertainty in both the UK and abroad, together with still rising inflation, increased insolvencies and a new Government, meant that 2024 was another important year for those working in the profession, and their insurers. 2025 is likely to bring its own set of challenges.

CLAIMS INFLATION

A difficult economic environment with more insolvencies, more unemployment and more debt inevitably means that we will see more claimants seeking to recoup losses from accountants with Professional Indemnity (PI) insurance who are generally perceived to have 'deep pockets'. We expect to see the usual plethora of claims relating to issues such as missed filing deadlines, tax advice, failure to identify material transactions in audit, advice on company structure and personal tax affairs and, of course, errors in preparation and filing of end of year accounts.

REGULATION

In line with increasing regulation in multiple industries, we anticipate increasing numbers of audit investigations by the Financial Reporting Council (FRC) and subsequent large fines. We expect to see a continued increase in historic audit claims as corporate insolvencies increase and accounting records are scrutinised. The FRC Carillion investigation after which (in 2023) the audit firm was fined a record £30m (reduced to £21m due to the firm's cooperation and admissions) has set the precedent for similar sanctions in other cases. Since Carillion, fines have increased rather than stabilised, as the FRC continues to use deterrence as a primary objective. Auditors and their insurers should be mindful of the potential extent of liabilities.

> *As the FRC continues to use deterrence as a primary objective, auditors and their insurers should be mindful of the potential extent of liabilities.*

TRADING LOSS CLAIMS

Claims for trading losses caused by management fraud post Asset Co v Grant Thornton [2019] and Manchester Building Society v Grant Thornton [2021] are also likely to continue. This is in part due to continued challenges in economic conditions and the increase in company insolvencies. Also, we have seen encouragement given to litigation funders by numerous claimant firms successfully running claims under 'no win-no fee' agreements. There is, however, a growing trend for auditors to cap liability in their initial terms, unsurprising given increased regulation and bigger fines imposed by the FRC, as well as a growing number of professional negligence claims. It will be interesting to see, if liability is more often limited, whether the amount of trading loss claims will begin to fall.

AI

We have covered the risks of AI in earlier publications, but the risk has not diminished. Another year on and AI is even more integrated into professional working systems. As the use of AI becomes more pervasive in all industries, so too do the risks. Yes, processes are streamlined and there is much potential for increased revenue. Alongside these advantages, however, are the risks of potential inaccuracies in automated AI processes and resulting claims. All professionals, auditors and accountants included, should ensure that means of human verification are in place to limit such risks.

CYBERCRIME

Alongside AI issues, cybercrime will continue to be a key risk for auditors, accountants, and their insurers. The number of cyber hacks increase, and the hacks become come more sophisticated, every year. Phishing attacks, unsecured remote working and lack of encryption all present significant risks of system paralysis and/or data breach. Securing appropriate cyber cover remains important and is an issue we consider further in the Cyber section of this report.

RESEARCH AND DEVELOPMENT RELIEF CLAIMS

HMRC is continuing its efforts to crack down on fraud and error in historic Research and Development (R&D) tax relief claims. As HMRC attempts to clawback R&D tax credits, it is likely that affected businesses will look to accountants who provided advice on R&D tax relief to recoup any financial losses incurred. We have already seen a number of such claims and anticipate a continued surge in claims alleging inadequate or inaccurate R&D advice, as well as claims where it is alleged the accountant ought to have given advice to claim R&C tax relief but failed to do so.

The increasing use of AI in business systems means that rigorous (human) quality control procedures are paramount to avoid potential claims.

RISK LIMITATION

Important as always is risk mitigation. Efficient diary/case management systems, expedient information gathering and effective and well-recorded communication remain key. Scope of engagement should always be carefully thought through and confirmed in writing. Continued staff training is also important, especially in relation to complex or specialist issues such as R&D tax relief. Finally, the increasing use of AI in business systems means that rigorous (human) quality control procedures are paramount to avoid potential claims.

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INSURANCE BROKERS

Our last report referred to the hard insurance market that prevailed at that time and the resulting reduction in insurance capacity, as insurers narrowed the scope or value of cover and increased premiums. Since then, the market has softened considerably. New carriers have entered the market and there is greater competition for business. In addition, increased regulation and new legislation (such as the Building Safety Act 2023 ("the BSA") have provided insurers with some reassurance as to risk. As such, cover is more readily available and less costly to secure.

CLAIMS INFLATION

We commented in our last report on the UK cost of living crisis and global inflation. Unfortunately, 12 months on, increased prices and rising interest rates are still causing financial pressures for many. Whilst there is a glimmer of hope that the economy might settle in 2025, such improvement is likely to be too little too late in terms of the impact on claims. Claims are increasing in size and volume, with some evidence suggesting that the cost of resolving a claim might now be at least a third more than five years ago. Many clients risk being underinsured for these higher value claims, thus incurring losses that they may seek to pass on to their broker. As such, it is essential that brokers continue to carefully consider every client's coverage requirements and ensure that sufficient cover for both damages and costs is in place.

Many clients risk being underinsured for higher value claims, thus incurring losses that they may seek to pass on to their broker.

APPROVED MINIMUM TERMS

During 2024 the ICAEW and RICS made changes to their professional indemnity insurance requirements. Accountants/auditors now have increased minimum limits of indemnity and must maintain two years run-off cover. Surveyors' PI policies must now provide cover for fire safety claims on buildings five storeys or higher and for fire risk assessment of external walls (ESW1 forms) for buildings up to 18 metres high. Brokers must be careful to ensure that these changes are understood and fully reflected in their clients' insurance covers.

SPECIALIST KNOWLEDGE

In these times of widespread and increased regulation, technological change and AI, insurance is becoming increasingly complex. When advising clients, brokers are expected to have a good understanding of a vast array of policy types. Cyber and D&O insurance, for example, are likely to sit outside the comfort zones of many general insurance broking firms. Important legal/regulatory changes, such as those implemented in the BSA and the Economic Crime and Corporate Transparency Act 2023 ("ECCTA") (see further below) expose brokers' clients to greater levels of risk. Such changes must be considered and understood by brokers so as to prevent gaps in cover and avoid resulting claims for their own errors and omissions.

Not only must brokers avoid 'dabbling', but their increased use of retail distribution into specialist brokers should also be monitored carefully, and not be used as a crutch to fill any gaps in knowledge. The producing broker must know what information to ask

of a client so as to be able to comply with the duty of fair presentation; and if the information passed to the placing broker is poor or incomplete, it will be the producer that ultimately carries the can if the resulting cover is not fit for purpose. Placing brokers should take care in their TOBAs with retail broking houses to ensure that the responsibility for complying with the duty of fair presentation continues to rest with the client and its producing broker.

BUILDING SAFETY

Building safety is one of the most significant areas of legislative and regulatory change in recent years. It is important that brokers have a thorough understanding of developments post Grenfell and the nature and implications of new laws under the BSA, which came into effect in October 2023. The new building control regime was implemented in April 2024. The Act imposes additional liabilities on construction firms, contractors and company directors. Brokers will need to be mindful of clients' potential regulatory responsibilities under the new Principal Designer and Principal Contractor roles, which will raise questions as to whether clients have insurance in place to cover the costs of a regulatory investigation/criminal prosecution. A further issue is the potential for claims against directors personally when they assume the role of Principal Accountable Person (PAP) and/or they give personal sign-offs to confirm the suitability of principal designers and contractors. Brokers will need to ensure that the policy definition of 'the Insured' provides cover for work conducted in the role of PAP and that there are no exclusions for professional service.

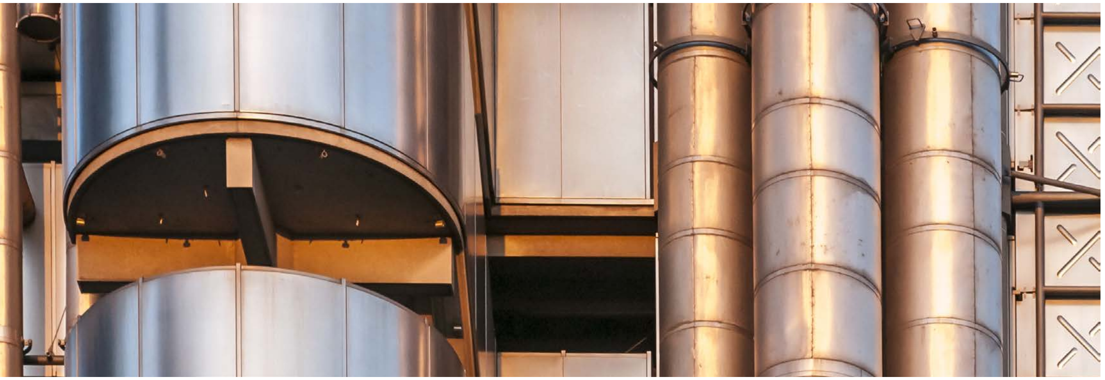
Finally, the impact of the extended limitation period in the Defective Premises Act 1972 must also be considered. The increased 30-year limitation period means that managers/directors and officers can be held responsible for work done on historic projects. Brokers will need to ensure appropriate retroactive cover is in place.

AI

The insurance industry is already benefitting from the use of AI and the ease and efficiency of automated underwriting and claims processes. The sale of insurance is traditionally relationship based so more automated processes – and consequently less client contact – herald a big change. Whilst AI will bring some benefits, such as better recording of advice provided, brokers will need to exercise caution. The gathering of information for disclosure at renewal is key to fully understanding clients' businesses (to recommend types and levels of cover). In person contact means brokers can recognise nuances that may give rise to insurance requirements that are not standard. Less personal interaction and greater reliance on AI, especially at renewal, will add significant claims risk – brokers will need to ensure that there are adequate human verification processes in place.

FRAUD

The Economic Crime and Corporate Transparency Act 2023 (ECCTA), due to come into force fully in September 2025, has introduced a 'failure to prevent fraud' corporate criminal offence. We consider the implications of this further in the D&O section of this report. Some organisations can now be held accountable for the fraud of an



'associated person', where said fraud is for the benefit of the business, even if the organisation was entirely unaware of it taking place.

This new offence forces organisations to take responsibility for not putting in place 'reasonable measures' to mitigate the risk of fraud. We are awaiting Government guidance on what 'reasonable' means. The ECCTA also introduces into legislation the common law 'identification doctrine', whereby a company can be held criminally liable where a senior manager commits an economic offence whilst acting with the actual or apparent authority of the company.

Directors will be seeking cover for failure to prevent fraud liabilities and brokers should be prepared for debate as regards the extent of the cover that D&O policies provide. Clients should be fully briefed as to what the policy will and will not cover and should be warned that fines/penalties are unlikely to be indemnified under the policy Terms and Conditions.

CYBER

Cyber is a growing issue in the modern world and appropriate cover for cyber events (e.g. unauthorised system access, data breach, ransomware) is key. Whilst some Professional Indemnity insurance policies may provide 'silent' cyber cover, clients should be warned of the limitations of such clauses, which can be open to interpretation. Where appropriate, clients should be advised to take out standalone cyber policies to ensure that the required cover is in place. This may swerve a potential allegation of inadequate advice.

MGAS

We are seeing a significant increase in claims against MGAs after capacity was withdrawn following the 2018 Lloyds review. Insurers are clearly auditing the performance of the MGAs to whom they provided capacity and are finding many instances where the MGA has bound the Insurer to risks that fall outside of their delegated underwriting authority. Some of the claims we are seeing are very large, sometimes into the hundreds of millions. Brokers with associated MGAs need to ensure that their operations are adequately covered by their own E&O cover in relation to future claims of this nature, given that the market is softening again, and MGAs are once again coming to the fore. Much care will need to be taken of policies' aggregating provisions, as the claims we are seeing often involve thousands of individual alleged errors which could very easily cause a coverage dispute.

REGULATORY

One of the principal themes throughout this report is increasing and widespread regulation. Brokers too will feel the pressure from the Financial Conduct Authority ("the FCA"), which is clamping down on firms' adherence to Consumer Duty so that customers get 'fair value'. In a report published in August 2024, the FCA noted that many insurers and brokers were not consistently ensuring "good outcomes" for their clients and warned of regulatory action where appropriate. Brokers will need to ensure staff have training and efficient systems to deal with issues such as pricing, claims and complaint handling.

In particular, they should make sure that vulnerable clients are identified and assisted appropriately.

FINALLY...

As always, brokers' mitigation of risk is vital - careful record keeping and making contemporaneous notes is key. It is important that brokers understand the various legislative/regulatory developments such as ECCTA and the BSA and the impact of clients' insurance requirements. This means that quality ongoing training is key, to keep abreast of clients' potential liabilities and to ensure that appropriate cover is in place.

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DIRECTORS AND OFFICERS

Last year's claims trends report highlighted the global economic difficulties and uncertainty encountered throughout 2023, and the resulting increase in both the volume and size of claims against company directors. Unfortunately, 2024 saw an exacerbation of those factors, with claims inflation and increasing legal defence costs (especially in the US – which often leads developments around the world), putting pressure on policy limits of indemnity and policy premiums, as well as the cost of excess layers.

As we look ahead into 2025, we anticipate these pressures will continue, alongside an increasing emphasis on holding directors personally responsible for a multitude of factors and failures – a pervasive theme in recent times and likely to become more so in an environment of increasing and widespread regulation.

INSOLVENCIES WILL CONTINUE TO INCREASE

In last year's report we highlighted the significant increase in insolvencies in the UK. This trend has not abated – continued inflation and high interest rates mean that the number of company insolvencies in England and Wales in 2024 was 23,872, the second highest level since 2009 (the highest being 2023). Insolvency specialists Begbies Traynor estimated more than 47,000 businesses were at risk of collapse at the start of 2024. We expect to see yet another increase at the start of 2025, albeit there is some hope that this figure may slowly start to drop later in 2025 as the economic conditions in the UK hopefully begin to improve, driven by expected falls in interest rates.

As the number of insolvencies continues to rise, so too will insolvency-related D&O claims. Examination of directors' conduct, in particular the adequacy of corporate governance and risk management in the run up to insolvency, will often give rise to claims. Whilst most insolvencies will affect SMEs, larger companies are not exempt – and from their collapse comes serious ramifications. We only need to look back at the collapse of Carillion in 2018 to see the knock-on effect for directors and their insurers. Three executive directors received disqualification orders (eight, eleven and 12.5 years respectively) and five non-executive directors gave undertakings, narrowly avoiding trial.

Also of note is confirmation from the courts (Akkurate Ltd v Richmond [2023]) that directors have ongoing fiduciary duties even after their directorship has ceased (for example where the company has become insolvent) due to their continuing involvement in aspects of the company's management.

INCREASING USE OF AI

The use of AI permeates every industry and continues to have a major impact on businesses of all types and sizes. In our previous claims trends report we highlighted the risks arising from the use of AI and the importance of directors keeping abreast of changes in those risks, and how to mitigate against them. The use of AI continues to be a major consideration for directors and their insurers. The launch of ChatGPT has propelled the use of AI into the heart of many businesses. There are increasing

risks from issues such as model drift (performance degradation over time), discrimination, hallucination (generation of false or inaccurate information) and human error. There is also an increased focus in the US on AI-washing, where companies exaggerate the extent to which they use AI for certain tasks. The Securities and Exchange Commission (SEC) is currently investigating a number of companies for alleged AI-washing and we anticipate that there will be Securities Class Actions arising as a result. It seems likely that this trend will make its way over the Atlantic during the course of the next 12 months or so.

Since our last report, we have seen the introduction of the EU AI Act 2024 (the Act), the first ever comprehensive EU AI regulation for businesses. Whilst UK directors do not need to comply directly with the Act, because the UK is no longer part of the EU, it will be important for UK businesses that operate/sell AI products or services (or have subsidiaries that operate/sell AI products or services) in the EU, particularly if they are deemed to be high-risk or fall within the scope of the Prohibited AI systems detailed in Chapter II, Art 5 of the Act. Those who do not comply with the Act will be subject to large fines of up to £15 million EUR or 7% of a company's annual turnover.

In the UK, regulation of AI was considered in the Government's March 2023 White Paper 'A pro-innovation approach to AI regulation'. Subsequently, the UK Government issued its 'Initial Guidance for Regulators on Implementing the UK's AI Regulatory Principles'. In the UK, the Government is clearly keen to consider further research on the use of AI before introducing legislation on a par with the EU Act and, in the meantime, a more principled – and less rule-based – approach is preferred. Whether this approach will change under the new Labour Government remains to be seen.

From insurers' perspective, AI raises some coverage considerations. Claims might be made against directors by third parties such as employees or customers or by shareholders who may allege, for example, that directors have been remiss in their use of AI in decision making processes (arguing breaches of duty/mismanagement including a failure to exercise independent judgement). We also anticipate claims in relation to senior managers' responsibility for junior colleagues using AI in the business. Whilst affirmative standalone AI policies are becoming more common, many directors will seek to rely on the terms of their D&O insurance policies, arguing that there is 'silent' AI cover. Insurers will need to consider the extent to which they are prepared to provide cover for AI risks and, if so, at what price, or whether they will consider appropriate exclusions.

ECONOMIC CRIME

The Economic Crime and Corporate Transparency Act 2023 ('ECCTA') is due to come into force fully on 1 September 2025 and has provided Companies House with a reformed role and greater powers. It also extends the investigatory powers of the Director of Public Prosecutions, including the ability to serve disclosure notices on individuals or corporate bodies compelling them to co-operate with investigations by producing documents or answering questions.

Perhaps more significantly, ECCTA has introduced a 'failure to prevent fraud' corporate criminal offence. This applies

Insurers will need to consider the extent to which they are prepared to provide cover for AI risks

to large organisations with turnovers of more than £36 million/assets of more than £18 million. Such organisations can now be held accountable for the fraud of an 'associated person', where said fraud is for the benefit of the business, even if the company was entirely unaware of it taking place. Notably, the objective dishonesty test in Ivey v Genting Casinos [2017] means that liability is not contingent on the 'associated person' appreciating that their standard of behaviour would be viewed as dishonest by the objective standards of ordinary reasonable people.

The new offence forces organisations to take responsibility for not putting in place 'reasonable measures' to mitigate the risk of fraud. Recent Government guidance confirms that there is a much greater emphasis on internal fraud prevention measures including procedural checks, staff training, 'whistleblowing' etc.

The ECCTA also introduces into legislation the common law 'identification doctrine', whereby a company can be held criminally liable where a 'senior manager' commits an economic offence whilst acting with the actual or apparent authority of that company. This part of the ECCTA came into force in December 2023 and significantly lowers the previous hurdle of demonstrating that the 'directing mind and will' of the company committed the offence. This is a huge change that applies to almost all companies and partnerships (in contrast to the failure to prevent fraud offence, it is not subject to company size or turnover criteria).

Insurers should expect directors to be seeking cover for failure to prevent fraud liabilities and should carefully consider a company's internal fraud prevention processes and procedures before offering cover and setting premiums. We anticipate extensive debate when claims arise as regards the definition of an 'associated person' and whether they are an 'Insured Person' under the policy terms and conditions. Insurers should also note that the ECCTA does not require dishonesty on the part of the associated person, so any policy conduct exclusions may not apply. Fines (which are unlimited) and penalties are likely to be excluded from cover.

We strongly advise insurers to consider the scope of cover they are willing to provide and review policy wordings prior to full implementation of the ECCTA in 2025.

NON-FINANCIAL MISCONDUCT

The Financial Conduct Authority ("FCA") is demonstrating more appetite in focussing on conduct such as sexual harassment, and other issues which go to the heart of a company's DEI policies, at board level. There has been a reported increase in non-financial misconduct in a number of sectors in the period 2021-2024 and the FCA is keen to seek to clamp down on this in order to maintain the integrity of various market sectors and also to protect consumers.

Directors will therefore need to consider the company's policies and also the internal policies regarding the monitoring and reporting of breaches of that internal policy.

If boards of directors are seen not to be promoting an inclusive and healthy workplace culture, then they could face both regulatory investigations and associated civil claims by shareholders and/ or activist employees.

MISUSE OF COVID 19 LOANS

In 2023/24 the number of directors disqualified by the Insolvency Service for unfit conduct was 1162. Of these disqualifications, 831 (71.5%) were for abuse of the COVID 19 financial support scheme. The average length of disqualification for such misconduct was 9.6 years (s.6(4) CDDA 1986 provides a range of 2 – 15 years). It is evident that the misuse of the scheme is being taken very seriously by the Insolvency Service and we expect this to remain an area of concern throughout 2025, with many more disqualifications (and associated D&O policy claims) likely.

There has been a reported increase in non-financial misconduct in a number of sectors in the period 2021-2024.

ONGOING BUILDING SAFETY CONCERNS

Health and Safety is a long-standing source of claims against company directors. Claims relating to the Health and Safety at Work Act 1974 will continue, as will corporate manslaughter charges under the Corporate Manslaughter and Corporate Homicide Act 2007. We will also see the usual range of investigations by the Health and Safety Executive. We expect to see many claims relating to workplace culture, which are likely to allege failure to address employee issues such as stress and burnout, as well as hostile work environments.

The most significant Health and Safety issue in 2025 will still be building safety. Amongst the many building safety reforms under The Building Safety Act 2023 ("BSA"), it imposes a much greater level of personal responsibility and liability on company directors. This includes the Principal Accountable Person role under s161 of the BSA, an onerous role imposing responsibility for assessing and managing structural and fire risks in occupied higher-risk buildings (HRBs) – and subject to criminal sanctions for non-compliance. Building Liability Orders ("BLOs") and Remediation Contribution Order ("RCO") clauses under sections 130 and 123 are widely worded – BLOs extend a "relevant liability" to "associated entities" (giving a claimant the possibility of recovery even where the original entity has no assets e.g. SPVs). "Associated" is also widely defined. RMOs can be made against previous landlords, developers and other companies and directors linked with landlords or developers. All a ripe breeding ground for D&O claims.

It follows that, in the future, we are likely to see much greater scrutiny of directors' actions in relation to building construction. This will include directors' and officers' personal involvement in the construction practices employed on HRBs, which are likely to be carefully reviewed, as is directors' due diligence in the contractor selection process. We consider that recent amendments to the Defective Premises Act 1972, which have increased the limitation period in which claims for defective construction products can be brought to 30 years, are also likely to be key. There is now scope for liability for claims related to older projects which directors might have thought were no longer going to be pursued. We are also likely to see a number of Deferred Prosecution Agreements post-Grenfell, in the ongoing push for directors to accept personal responsibility.

GLOBAL IMPACT

The trends we have identified in this report are not confined to the UK – these are global themes. There are very clear signs, for example, that Middle Eastern regulators (the Dubai Financial Services Authority ("DFSA") and the Abu Dhabi Global Market (ADGM") are wanting to bring regulation of commercial and legal practices more in line with those of their Western counterparts.

The recent and important decision by the DFSA to impose fines on senior managers at The Abraaj Group ("Abraaj") in respect of its failings in respect of deceiving investors is of particular interest. It provides an international example of the pervading theme of directors assuming personal responsibility in cases of bribery/misconduct and 'piercing the corporate veil.'

Such investigations are notifiable under a D&O policy as senior managers involved could be classed as 'Insured Persons'. Both the company and the individual could seek to recover the costs of the investigation under the terms of the policy cover. It will therefore be important for directors and their insurers to consider the precise scope of cover that the policy provides. Timely notification will be important to allow insurers to instruct lawyers to assist with early engagement with relevant authorities to potentially mitigate any future liability.

A D&O policy will cover costs of the investigation, awards and settlements but it may not cover regulatory penalties/fines. Directors and insurers should also be mindful of exclusions for deliberate/reckless misconduct and the possibility that any defence costs may have to be repaid.

Insurers should review risks and consider whether limits of indemnity remain suitable.

Continued economic uncertainty, and the rising number insolvencies (referred to above) will result in continued global claims inflation. We anticipate that this will also bring more US nuclear verdicts (awards of above US$10 million). 2023 saw a record number, awarding more than US$14.5 billion in nuclear verdicts, a 15 year high. In light of this, together with rising defence costs in the USA (which are now reaching up to, and in some cases exceeding, USD$2500 per hour), insurers should review risks and consider whether limits of indemnity remain suitable. Premiums may require adjustment to match the higher levels of potential claims.

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EDUCATION

At the end of 2023, we reported on the rising number of claims against Higher Education Institutions (HEIs) regarding alleged mishandling of complaints of sexual misconduct. Over a year later and this remains an important concern, having recently been addressed by the Office for Students (OfS) in a new registration condition to come into effect later this year, and considered further in the paragraphs below.

In 2024 we had the High Court's judgment in the appeal of the tragic case of Abrahart v University of Bristol. As discussed below, the case offers a degree of protection and reassurance to vulnerable students, but the existence of a duty of care in negligence remains subject to debate.

The use of mobile phones in schools is a topical issue as we move into 2025.

There are a number of trends of which education providers and their insurers should be aware when considering the potential for claims.

In February 2024, the Department of Education introduced guidance stating that schools should prohibit the use of mobile phones. The guidance identifies limited circumstances in which children may need their mobile phones, such as medical reasons or Special Educational Needs and Disabilities (SEND). Overall, however, it is considered that removing mobile phones from schools should reduce disruption in class and the dangers associated with social media and cyber-bullying. Children should be better able to enjoy peer to peer interaction and socialisation, with the associated mental health benefits. Bearing in mind that mobile phone data can be used to strengthen a claim (by providing evidence of location, message exchanges, social media interactions, photos and videos) removing mobile phones from schools may make it harder for claimants to substantiate their claims in future.

The school inspection regime was shaken up in 2024. Ofsted has introduced a number of changes to state school inspections. As of September 2024, a single-word grade for overall effectiveness will no longer be provided, though Ofsted will continue to grade each of the four sub-areas (quality of education, behaviour and attitudes, personal development and leadership and management). It is hoped that removing the single overall grade will encourage schools to consider their strengths and weaknesses and how these interrelate. Importantly, there will be an enhanced focus on SEND, with celebration of schools that support SEND children.

As we look ahead to 2025 and beyond, there are a number of trends of which education providers and their insurers should be aware when considering the potential for claims.

COVID RELATED CLAIMS

In Higher Education we have seen continued attempts to pursue claims for inadequate teaching during the Covid pandemic, fuelled by class action groups such as the 'Student Claim Group.' These claimants argue that tuition fees should be refunded in full or in part to reflect the fact that education during the pandemic was delivered online, at significantly reduced cost to the institutions but without any reduction in tuition fees charged to students.

An important development in 2024 was the High Court's refusal to grant a group litigation order (GLO) to a group of students who studied at University College London between 2017 and 2022. The students sought to recover the difference between the market value of the services promised by UCL (as compared to the reduced services that were in fact provided), as well as damages for distress and disappointment. The court did not believe that a GLO would help to "promote fairness, save costs or allow the claims to be dealt with in a timely and efficient manner" and reasoned that the litigation would be "best resolved by the creative use of the court's existing case management powers". It ordered an immediate cut off for any other claims arising from the same facts and issues, meaning that any new claims will be stayed until judgment in the present case/s. There was a subtle suggestion on the part of the Court that a number of the students may not be able to produce sufficient evidence to support a legal claim. At this point there are doubts not only as to the merits of the claims, but also whether, in the absence of a GLO, the limited value of the individual claims will make it economically viable

An important development in 2024 was the High Court's refusal to grant a group litigation order (GLO) to a group of students.

to pursue them through the courts. We await further developments with interest.

One of the arguments made on behalf of UCL was that the students should have brought their complaints via UCL's internal procedures and then to the Office of the Independent Adjudicator (OIA). This proposal was rejected by the Claimants' solicitors. The OIA has, however, published a number of case summaries that illustrate that it has been prepared to find in students' favour in respect of strike-related litigation. The students might have been better advised to go down the route of the OIA rather than the courts, and we wonder whether students who registered for the group claims may ultimately consider that they were badly advised.

MENTAL HEALTH AND WELLBEING

An important concern in recent years has been the mental health and wellbeing of students given disturbing statistics regarding the suicide of university students (319 deaths by suicide between 2017 and 2020). In 2024, the High Court gave consideration to the existence and scope of the relevant duty of care owed by HEIs to their students, and the duty to make reasonable adjustments for a student with disabilities. In University of Bristol v Abrahart the High Court found that the University of Bristol had discriminated against Natasha Abrahart, who sadly later committed suicide, by failing to make appropriate adjustments for her mental health, and the University was therefore liable under the Equality Act 2010 (the Act). The case emphasises that universities will face legal consequences if they fail to make reasonable adjustments for mental health-related needs, where such needs are sufficiently severe as to give rise to a disability as defined in the Act. The Court emphasised that there should not be over reliance on internal policies and procedures to establish whether adjustments are required. Universities must be proactive in identifying

students who may require reasonable adjustments; what the student says and does may be sufficient to give rise to a duty to make adjustments, even without the need for any independent or expert input.

However, frustratingly for Ms Abrahart's family no doubt, as well as those who support the introduction of such a duty, the High Court did not need to consider (and therefore reached no view on) the question of whether the universities owed a relevant duty of care to students in tort. This remains an important issue that is likely to be considered in the courts at a later date. In the meantime, it has been suggested that there should be legislation in place to define the duty of care owed by a university to its students. If such legislation was to materialise, the impact on HEIs and their insurers could be significant, as students would not then be required to establish the complex elements of claims in discrimination and would avoid the need to comply with the short time limits under the Act. It is likely that there would be an increase in the volume of claims, though it would be interesting to see how claimants would quantify (in financial terms) the extent of the loss incurred.

The ongoing consideration of such issues also raises questions as to whether HEIs should be subject to increased regulation as regards their responsibilities for students' wellbeing, another issue that is likely to come under further review in the coming months and years.

STUDENTS AS CONSUMERS

The growing application of consumer protection law to students is another key trend in 2025. In our last claims trends report we noted the Patents Court's confirmation (in Oxford University Innovation v Oxford Nanoimaging Ltd) that students can be treated as consumers, and have the benefit of consumer legislation, such as the Unfair Terms in Consumer Contract Regulations 1999.

Since 2022, the Office for Students (OfS) has been in partnership with National Trading Standards (NTS) and has been able to refer cases to the NTS where there is a potential breach of consumer protection legislation. In 2024, the OfS published details of the terms and conditions of three higher education providers referred to the NTS, as an example of unfairness and non-compliance with legislation. Of particular concern are contract clauses which attempt to limit liability or restrict remedies available, as well as terms that allow HEIs to vary provisions without sufficient reason or explanation. Contracts must be understandable by students, with unambiguous terms, and should be inclusive of the protections and rights that would be available to any other type of consumer.

We expect to see many more cases referred to the NTS for breaches of consumer law in the coming months and thus a growing public awareness of the issues at stake. It would be prudent for HEIs to review their terms and conditions and consider clarity, fairness and reasonableness to avoid complaints. Insurers will be keen to see a full audit and appropriate changes made to terms and conditions in order to mitigate the risk of notifiable claims arising at a later date.

We expect to see many more cases referred to the NTS for breaches of consumer law in the coming months.

HARASSMENT AND SEXUAL MISCONDUCT

Of further interest as we enter a new year, is the OfS publication of its new ongoing condition of registration in relation to harassment and sexual misconduct, which will be effective as of 1 August 2025. This requires all HEIs to take a number of measures to prevent and address harassment and sexual misconduct, including the publication of a prominently displayed document setting out how the HEI will deal with cases of harassment or sexual misconduct, how such incidents can be reported, and how staff will be trained to ensure that procedures are properly followed. There is also a new ban on HEIs using Non-Disclosure Agreements (NDAs) in cases of harassment and sexual misconduct.

The new condition will require HEIs to undertake a thorough audit of existing policies and procedures to identify changes required, as well as to provide a comprehensive program of training for both students and staff at all levels.

STUDENT PROTESTS

Throughout the last year, there have been pro-Palestinian protests at various universities. In some cases, these have been authorised by the university concerned; in other cases, large numbers of protesters have set up camp in tents without permission and have refused to leave. These 'protest camps' were and remain a significant issue for HEIs to contend with and have implications for the way in which HEIs deal with protests generally.

In July 2024, the High Court made summary possession orders against camps at the University of Birmingham and the University of Nottingham. In doing so, it was necessary to consider the balance between the universities' abilities to conduct their usual business and the protesters' rights to free expression and assembly. The Court concluded that the universities' termination of the protestors' licences to use the land was due to the protestors' conduct and was not because of any beliefs the protesters held.

It seems inevitable that more protests are likely to take place in the future, whether in relation to the Gaza conflict or otherwise. The judgment is reassuring for HEIs, at least as regards their ability to deal with protests that involve misconduct. Indeed, similar arguments were considered more recently in a case involving Queen Mary University of London, when it was again held that the decision to issue possession proceedings was not in breach of the students' right to protest.

Whilst possession proceedings of this nature may be of limited direct relevance to insured risks (although claims for judicial review are possible and can be covered), they highlight the ever-present politicised and activist nature of a proportion of the student population, and we anticipate further debate on issues surrounding freedom of speech given the ongoing political uncertainty and conflict around the world. We are aware of claims having already been brought against HEIs in respect of disciplinary measures taken against students for expressing their political views.

EQUALITY ACT CLAIMS

Transgender issues were a hot topic in 2024 and we anticipate they will remain so for the foreseeable future.

In December 2023, the Department of Education released guidance on gender questioning for schools (the Guidance) for the purpose of consultation. The consultation was concluded in March 2024, but no definitive version of the Guidance was released prior to the change of Government in July 2024.

In May 2024, the Conservative Government passed temporary emergency legislation to ban puberty blockers unless they are being provided as part of an authorised medical trial. This was in response to the Cass Review, a Policy Working Group set up by the NHS to review evidence on the use of puberty blockers and masculinising/ feminising hormones in children with gender dysphoria. The Government felt that the Cass Review supported a change to the law to avoid private and overseas prescriptions being given to children in the UK. The lawfulness of the legislation was upheld when challenged in the High Court in R (TransActual CIC and Anor) v Secretary of State for Health and Social Care and Anor [2024].

Transgender issues were a hot topic in 2024 and we anticipate they will remain so for the foreseeable future.

In 2024, we saw the well-publicised High Court case of Joshua Sutcliffe. In 2023 Mr Sutcliffe, an evangelical Christian with strong views on gender identity and homosexuality, was found guilty of unacceptable professional conduct and of conduct that might bring the teaching profession into disrepute. The High Court upheld a teaching ban resulting from his deliberate misgendering of a transgender pupil in the classroom.

The lawfulness of parts of the Guidance, which addresses the issue of social transition in schools, has been the subject of much commentary and debate. The Guidance states that primary aged school children should only be referred to by their birth sex-based pronouns. For secondary aged school children, the Guidance suggests that schools do not need to specify pronouns and can decline a child's request to change pronouns. The Guidance states that there will be very few situations in which schools will be able to agree to a change in pronouns.

Misgendering pupils may be seen as treating an individual less favourably than others under the terms of the Equality Act. Particular concerns have been raised about a passage of the Guidance stating that "as a default, all children should use the toilets, showers and changing facilities designated for their biological sex unless it will cause distress for them to do so." Concerns have been raised because the Equality Act "does not require a threshold of distress". It is strongly arguable that applying the Guidance would expose schools to the risk of discrimination claims. As such, education providers and their insurers will be keen to see the final version of the Guidance when it is eventually released by the Labour Government. It remains to be seen to what extent the provisions will be amended to reflect concerns that have been raised. In the meantime, schools should remember that the Guidance remains in draft form and does not have to be applied.

SPECIAL EDUCATIONAL NEEDS AND DISABILITIES (SEND)

SEND remains a huge issue for schools and represents fertile ground for potential claims. The First-Tier Tribunal for Special Educational Needs and Disability ('the Tribunal') handles appeals by parents against local authority decisions regarding SEND, as well as claims for disability discrimination. The most recent Tribunal statistics (as at the date of publication) show a 78% increase in appeals in the quarter April to June 2024 as compared with the same period in 2023. This is the biggest quarterly increase ever recorded. The Tribunal system is overwhelmed and there are extensive delays in matters proceeding to final hearing (often many months, sometimes stretching to over a year), even in what ought to be considered urgent cases.

> *The Tribunal system is overwhelmed and there are extensive delays in matters proceeding to final hearing.*

An increase in Tribunal appeals is indicative of increasing discontent with schools' SEND provision. It has been widely reported that the Tribunal finds in favour of the pupil in the vast majority of cases (95% and upwards), so the increase in the number of claims does not reflect an increase in frivolous or unmeritorious complaints. There is greater potential for breach of contract or educational negligence claims against education providers and, to the extent that institutions are independent and insured for such claims, that carries clear risk to insurers of increasing liabilities in this area. A positive outcome in the Tribunal does not necessarily mean that a breach of contract or educational negligence claim would succeed, but a Tribunal decision may be of persuasive value. We have seen a number of recent claims where a Tribunal claim has been made as a precursor to a threatened claim in contract or tort.

FUNDING CRISES

As a final point, the thread joining many of the increasing numbers of different claims together is a lack of resources. There is a well-publicised crisis of funding throughout the education sector, with the change in Government signalling a change in tone but (unsurprisingly) no significant change in the immediate financial position. It is not difficult to see how funding difficulties, whether from a school or HEI perspective, increase the risk of dissatisfied parents, pupils and students, with consequently increased risk of complaints and claims.

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ENVIRONMENTAL

Environmental issues have and continue to be at the forefront of concerns for businesses and the Government in the UK and globally. Key areas of concern are the effects of the fossil fuel industry and the growing renewables industry, along with issues of air quality, biodiversity, waste management and water quality. Concerns about climate change have also been prevalent in recent years. As such, all these areas present important markets for insurers within the specialist environmental field as well as general insurance.

CLIMATE CHANGE LITIGATION

Since publication of our last claims trends report, we have seen a further increase in environmental and climate change class actions around the world. As activist groups grow in size and strength, so too does litigation to raise both awareness of environmental issues, and to put pressure on governments or various commercial and industrial sectors - so-called ‘strategic litigation’. Environmental groups are now much more organised and, whilst they have historically focused on calls for better transparency and engagement with environmental metrics and reporting, greater access to funding and heightened public interest means that they are now able to conduct expensive litigation as well. The pattern is the same in the UK, with a range of key cases attracting much attention in the last year. There is also a clear trend towards other environmental activism, including claims, protests and campaigning, with increasing public scrutiny of fossil fuel projects and the impact on climate change.

Environmental groups are now much more organised and are able to conduct expensive litigation as well.

DOWNSTREAM EMISSIONS

Under UK legislation an Environmental Impact Assessment (EIA) is to be completed and submitted prior to the grant of planning permission for a development project which is likely to have a significant effect on the environment. The EIA has to identify, describe and assess the likely significant effects of the development project upon the environment, including climate impacts such as the nature, extent and magnitude of greenhouse gas emissions. In Finch v Surrey County Council, the Supreme Court considered whether downstream greenhouse gas emissions, such as those arising from the ultimate use and combustion of crude oil as fuel, should be included and assessed in an EIA. It was held that emissions occurring when the extracted oil was combusted elsewhere did fall within the scope of the required EIA. Such emissions could be considered a constituent of significant environmental impacts of a project if causation could be established.

This landmark decision not only has implications for future fossil fuel projects in the UK, but potentially other types of projects with substantial downstream emissions which are capable of assessment or estimation. Professional advisers may now need to consider and advise on downstream (Scope 3) emissions in EIAs for relevant projects, including the extent to which such

The Finch and Whitehaven cases together with the Lincolnshire oil drilling challenge are also suggestive of a wider trend to challenge local or national Government policies and decisions.

effects are quantifiable and should be subject to assessment/reported. Developers will need to understand the requirements on their current and future projects and any EIAs.

Interestingly, the Supreme Court's ruling in Finch has recently been applied by the High Court in the case brought by the South Lakeland Action on Climate Change and Friends of the Earth in respect of a controversial new underground coal mine in Whitehaven, Cumbria. Like Finch, the cases reinforce the need for thorough environmental assessments and consideration of likely downstream emissions, i.e. when fossil fuels are extracted on site and are ultimately burned. The decision re-emphasises that, following Finch, the likely downstream impacts of proposed developments will be closely scrutinised, and could be successfully challenged. Developers will undoubtedly be advised to review how these recent decisions influence future planning policy and legislative requirements, and to maintain information and supporting documentation to demonstrate decisions. Consultants and other professional advisers will need to consider, and may need to advise on, a range of greenhouse gas emissions and environmental impacts on relevant projects, including the extent to which such impacts are quantifiable, and so should be reported, or subject to planning process assessments.

The Finch and Whitehaven cases together with the Lincolnshire oil drilling challenge are also suggestive of a wider trend to challenge local or national Government policies and decisions, including those related to ongoing live or upcoming construction and infrastructure projects. We expect to see more such cases in the coming months.

WATER POLLUTION

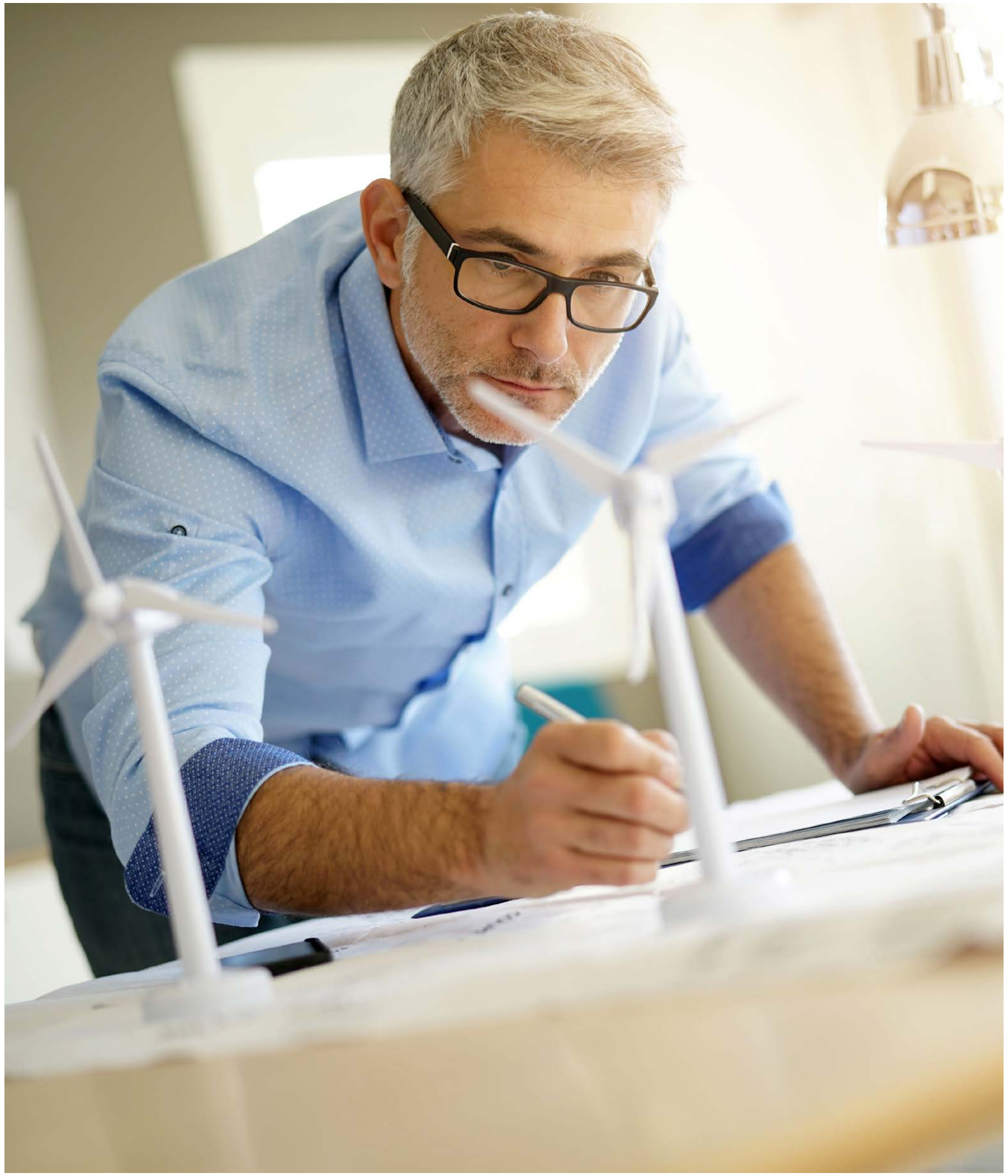
There has been considerable press attention and public and activist anger over the performance of water utility providers in the UK. In July 2023 the Environment Agency published its annual report on the environmental performance of England's nine water and sewerage companies during 2023. This found that the number of serious pollution incidents increased from 44 in 2022 to 47 in 2023, remaining "unacceptably high". In the same year a total of four million hours of raw sewage was discharged into UK waterways, reflecting an increase of 129% from 2022. The impacts are already being felt around the country, where only 14% of English rivers meet good ecological status and 75% pose a serious risk to human health.

One of 2024's key court cases arguably marks the beginning of a rush of future complaints or claims against water utility providers, with commentators warning that the decision may open the proverbial 'floodgates'. In Manchester Ship Canal Company Ltd (MSCC) v United Utilities Water Ltd [2024] the overarching dispute between the parties concerned whether United Utilities required MSCC's consent to discharge foul water into the canal, and to pay a licence fee, or whether it could pollute without consent and free of charge. United Utilities argued that MSCC was unable to bring an action in nuisance as it had been unable to prove negligence or deliberate wrongdoing on the part of United Utilities and as such its claim was excluded by the legislative scheme set out by the Water Industry Act 1991 (WIA).

The increased litigation risk may also require a reassessment of existing and/or potential claims, as well as reviews of the most problematic infrastructure or outfalls.

The Supreme Court concluded that the WIA did not, in principle, prevent MSCC from commencing an action in nuisance and/or trespass when the canal was polluted by foul water discharges by United Utilities, even where there was no negligence or deliberate misconduct. The starting point for the Court's reasoning was MSCC's "fundamental right" to peaceful enjoyment of one's own property. This includes a right to preserve the quality of the water. It reasoned that any statutory interference with that right (including by the WIA) required express language to the contrary, which was missing in this case. This is of course an extremely high hurdle, and it follows that Parliament would not authorise interference with such a fundamental right, if it could be avoided.

The decision has wider significance. It upholds rights following unauthorised sewage discharges and will require companies to reassess infrastructure and risk management strategies. As environmental groups continue to gain traction, public scrutiny on water companies will likely intensify, demanding greater transparency and compliance. With this ruling in mind, utility providers are encouraged to carry out a review of their assets and relevant risk register/s. The increased litigation



risk may also require a reassessment of existing and/or potential claims, as well as reviews of the most problematic infrastructure or outfalls.

Equally, construction consultants and contractors engaged by water companies may face changes to their construction contracts and professional appointments, including ancillary construction documents (such as collateral warranties) as a result. For example, parties may place increased emphasis on the negotiation of contract terms, insurance requirements and, specifically, any obligations or indemnities linked to compliance with statutory/regulatory requirements, pollution, and environmental harm.

Further, there are potential insurance implications in relation to the likely rise in nuisance and trespass claims. Such claims will need to be understood in light of applicable terms in public liability, and/or environmental impairment liability insurance policies as well as other policies providing pollution and contamination indemnities.

There are potential insurance implications in relation to the likely rise in nuisance and trespass claims.

Insurance companies may well now be giving consideration to the extent of insurance cover available.

GREENWASHING

Greenwashing has received much attention in recent years. As demand for sustainability grows, so too does the risk of greenwashing. In simple terms, greenwashing takes place when a company conveys a false impression or provides misleading information about how its products, services or operations are environmentally sound, often to further its ESG profile and targets.

In May 2024, the FCA introduced a new anti-greenwashing rule requiring that any financial services businesses regulated by the FCA ensure that sustainability claims about their products or services are fair, clear and not misleading. This was a response to concerns that some firms may have been making exaggerated, misleading or unsubstantiated sustainability-related claims.

In 2024 we also saw the UK Competition and Markets Authority (CMA) publish a practical compliance guide to greenwashing for the fashion industry, ensuring that it complies with consumer law when making environmental claims about its products. This is on the back of an investigation regarding misleading environmental claims made by Boohoo, Asda and ASOS earlier in 2024. Whilst the latest guidance is aimed at the fashion industry, it builds upon the principles set out in the CMA's Green Claims Code first published in 2021 and should encourage all consumer-facing businesses to carefully consider and review their 'green claims'. This is especially so given that the CMA will soon have increased powers under the Digital Markets, Competition and Consumers Act 2024, due to come into effect in April 2025. These powers will include the ability to fine companies up to 10% of global revenue if they break consumer protection laws.

The attention to greenwashing given by the FCA and the CMA is indicative of a trend towards increasing regulation and, as such, much greater scrutiny of sustainability advertising and statements. It is an area in which we anticipate further changes in the coming months. The high-profile nature of company greenwashing is also likely to give rise to claims from both consumers and company shareholders concerned about the negative impact on the value of their shares.

CRIMINAL LIABILITY

Businesses should be aware of the regulatory and compliance risks that they face, or may face, if they cause environmental damage as we continue to see new legislation and ever-increasing regulation. The 'polluter pays' principle underpins most environmental liability regimes. Increasingly, businesses also face criminal sanctions in multiple jurisdictions for causing or allowing environmental harm. In the UK, amongst others, the Environment Agency and local authorities have the power to impose civil or criminal sanctions for environmental breaches. In Stone & Anor v Environment Agency [2018] the court made clear that the offence of 'knowingly permitting' environmental harm does not require a positive act; it is enough to know that the harmful activity (here, waste disposal) was taking place and doing nothing to prevent it.

The rise in proactive prosecution and the ever-increasing penalties and fines which for some offences can be unlimited creates a need for enhanced protection and environmental risk management as businesses seek to mitigate the potential liabilities which may arise from regulatory criminal and civil sanctions.

CONSTRUCTION

The construction industry, one of the largest consumers of global resources, is increasingly focused on environmental issues. This includes reducing energy and water consumption, using sustainable materials, managing waste and emissions. There have been developments in sustainable materials, including recycled concrete and responsibly obtained timber; and digital systems such as Building Information Modelling (BIM) are also helping to limit the use of resources and waste. Green building standards and certifications, such as LEED and BREEAM, are increasingly being used on a far wider range of construction projects.

A key development has been the launch of the UK Net Zero Carbon Buildings Standard in September 2024. This standard aims to create a uniform framework for reducing the construction industry's environmental impact and supporting decarbonisation. While voluntary, adopting the standard in contracts enhances compliance and fosters a proactive approach to sustainability in projects. The 2024 Edition of the JCT Design & Build also includes a new clause 2.1.5, dealing with sustainability improvements, as standard.

The new Biodiversity/net gain (BNG) regime, which came into limited effect in February 2024 applies to all planning permissions in England. It imposes a requirement on developers to improve the biodiversity of habitat wildlife by at least 10%, and to maintain that gain for a period of 30 years. It will apply to nationally significant infrastructure projects from late 2025. Developers must factor all BNG requirements into the scope of a project at the outset, possibly by instructing an ecology team to measure biodiversity value and design green initiatives, supervise contractors on-site, as well as consider how to obtain the most appropriate materials, and at what cost. It will be important to ensure that contracts to deliver on-site BNG are carefully worded with the allocation of responsibilities clearly set out.

BNG compliance is likely to be an interesting new market for insurers, not only in relation to the scope of the risk being underwritten, but also when considering the possible ramifications for failure to comply with policy terms (in terms of both cost and time) when it comes to rectification works.

From a claims perspective, insurers might expect to see a rise in disputes over responsibility for the designs of

Biodiversity/net gain compliance is likely to be an interesting new market for insurers.

biodiverse developments, which could involve contractors, ecologists and/or landscape architects. Consideration will also need to be given to whether the biodiversity landscape is insured as part of any contract works. This may depend on how biodiverse landscapes are integrated into the fabric of the works, and whether developers select on-site or off-site BNG methods.

As we progress through 2025, there is no doubt that environmental issues and concerns will continue to be a fertile area for legislation, regulatory compliance and disputes. Climate change remains the most pressing area of concern but the difficulties encountered in reaching a climate financing deal at COP29, help illustrate the barriers to agreeing a global response and indeed a global approach to combating climate change. In the UK, we will no doubt see a continuous flow of cases in respect of climate change policy and net zero targets. Additionally, we will also see an increase in other environmental risks being brought before the courts, such as cases concerning PFAS (per-and poly-fluoroalkyl substances – forever chemicals), plastics and biodiversity loss alongside the matters mentioned earlier in this article.

Environmental liability policies are gradually evolving to meet changes in environment responsibility and sustainability requirements. As more stringent environmental legislation comes into force, the potential for regulatory investigation/claims will continue to increase and thus demand for environmental liability cover over the coming years is set for significant growth.

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INDEPENDENT FINANCIAL ADVISERS

Over the last few years there has been a noticeable uptick in claims against Independent Financial Advisers (IFAs), driven by a combination of complex financial products, heightened consumer expectations, and more aggressive claims management practices. The Financial Ombudsman Service (FOS) and the Financial Services Compensation Scheme (FSCS) have seen more claims related to poor advice, mis-selling, and failure to act in a client's best interests. As a result, insurers are facing higher costs when underwriting policies, leading to an increase in premiums for IFAs.

Those who are still underwriting cover for IFAs are imposing more stringent terms and conditions.

Additionally, some claims have been high value, particularly those involving unsuitable advice related to pension transfers or high-risk investments. These types of claims tend to have larger payouts, which can significantly affect the underwriting process and pricing of policies. The impact of major claims, regulatory fines, and the general tightening of underwriting criteria, has resulted in reduced appetite from insurers. Some have exited the market entirely, leaving fewer options for IFAs to choose from. This reduced competition, combined with the increasing risk, has contributed to rising premiums.

Those who are still underwriting cover for IFAs are imposing more stringent terms and conditions, including higher excesses, lower coverage limits, and exclusions for certain types of advice, such as pension transfers or complex structured products. This has created challenges for IFAs seeking affordable and comprehensive cover.

In the UK, the Financial Conduct Authority (FCA) has continued to enhance its focus on protecting consumers, with a particular emphasis on ensuring that IFAs are providing suitable advice. The introduction of new rules around the provision of pensions advice, the FCA's focus on transparency, and the requirement for IFAs to maintain robust records, are all contributing factors to the growing risks in the sector.

THE BRITISH STEEL PENSION SCHEME

In our last Insurance Trends report, we described developments in the FCA's investigation into the restructuring of the British Steel Pension Scheme (BSPS), in the course of which various IFAs advised clients to transfer out of their defined benefit schemes and into personal pensions.

In November 2022 the FCA set up a consumer redress scheme ('the Scheme'), which required firms to identify those clients who were advised to transfer out of the BSPS and to review the suitability of that advice. In cases where the advice was deemed not suitable, firms were required to use an FCA-created measure of loss to establish the level of redress payable. The FCA estimated at that time that the average redress (payable to 1,100 consumers identified as having received unsuitable advice) would be around £45,000 (a total of £49 million). At the time the Scheme was launched in 2022, the FCA issued a 'Dear CEO' letter setting out its expectations of PI providers, including the obligation to provide firms with a prompt 'indication of cover' so as to enable firms to assess their financial resources to meet claims, and to provide a summary of reasons where claims are not expected to be covered. The FCA's view was that confirming that PI policies would respond appropriately was part of the duty on the firm and its Insurers to help ensure that customers received compensation for any losses incurred.

In our 2023 report, we reported on the PI insurance coverage issues that have subsequently arisen, with many policies excluding claims relating to defined benefit pension schemes and/or including low aggregate limits and substantial excesses.

The FCA's latest report on the Scheme, published in July 2024, revealed that over 6,500 former BSPS members have been supported by the FOS, FSCS or through the FCA's redress scheme. 3,958 of those have been found to have received unsuitable advice, with 1,870 of those offered redress amounting to £106 million. That figure comprises £69.7 million from the FSCS (prior to the introduction of the Scheme), £19.3 million from the FCA skilled person review, £8.4 million from the FOS, and £8.7 million under the Scheme. As at

the date of the FCA's report, 32 redress calculations were outstanding and the FSCS still had 217 claims to process. The FSCS has been accepting new BSPS claims since publication of the report, so that number is now expected to be higher, although it is believed many members who transferred out of BSPS have still not made claims.

The measure of loss – to put former members back in the position they would have been in had they remained in the BSPS - has resulted in redress payments that are less than originally expected, hence the overall money paid out under the Scheme (£8.7 million, of which only £3.8 million was paid by firms) is significantly less than the FCA's original £50 million estimate. This is attributable to the reduction in the cost of funding a guaranteed retirement income by way of an annuity having fallen since the Scheme's introduction. It is estimated that 1,744 former BSPS members (approximately half of the 3,958 found to have received unsuitable advice) were not offered redress because they had not actually lost out financially as a result of the advice received.

Alongside its operation of the Scheme, the FCA has been carrying out enforcement action against firms who gave BSPS advice. As at July 2024, 15 individuals had been banned from working in financial services or from holding a specific role.

As there are still some former BSPS members who have not yet had their advice reviewed, it is likely these statistics will change throughout the course of 2025.

REGULATORY TIGHTENING

Our last report covered the new FCA Consumer Duty, which is now fully operational. This is directed towards preventing financial services firms from causing harm or providing poor customer support, and is underpinned by the Consumer Principle, under which firms are required to act to deliver good outcomes for retail customers, and to apply three overarching rules: to act in good faith, to avoid foreseeable harm, and to enable and support retail customers to pursue their financial objectives.

1. APPOINTED REPRESENTATIVES (ARS)

The past 12 months have seen further measures implemented by the FCA to improve outcomes for consumers. In December 2022, the FCA set out good practice and areas for improvement to help principal firms monitor their ARs. This included keeping clear documentation and using a wide range of checks to oversee and monitor their ARs' activities, which the FCA felt was lacking. The extent to which these guidelines have been adopted was reviewed by the FCA in September 2024. The review found that many Principals are still only taking a tick-box approach, or relying on website checks/ self-declarations, to oversee their ARs. It concluded that Principals are still often adopting a 'bare minimum' approach – not regularly reviewing AR agreements or checking whether ARs are acting within the scope of those agreements. The FCA has followed up directly with firms in the review, and we are likely to see more intervention from the FCA where it can see that Principals are not meeting the required standards.

The review found that many Principals are still only taking a tick-box approach, or relying on website checks/ self-declarations, to oversee their ARs.

2. ADVICE GUIDANCE

In December 2023, the Government and FCA put forward proposals for how the public can better access help with their pensions and investments, designed to assist those who struggle to make important financial decisions, especially in retirement. FCA research that found that in 2022 only 8% of adults sought professional financial advice, which suggests many are managing complicated financial affairs on their own.

The proposals focus on targeted support (whereby firms can offer suggestions appropriate to consumers with the same high-level characteristics), simplified advice, and clarification for IFAs of when they can provide support that does not constitute regulated advice. In November 2024, the FCA revealed that its first consultation, in December 2024, would relate to pensions – in particular complex decisions related to defined contribution pension savings. It also announced that it would consult in 2025 on rules for better support for consumers in retail investments and pensions. It will be interesting to observe the outcome of these consultations, and what further action might be taken by the FCA later in 2025. More accessible financial advice for a greater proportion of the population, ought to result in better financial outcomes, although the provision of advice to what may be considered relatively unsophisticated customers, undoubtedly heightens the potential for complaints and claims on the basis that advice was not fully understood, or was provided on the basis of incomplete information as to all the relevant financial circumstances of the particular customer.

3. ENFORCEMENT TRANSPARENCY

In February 2024, the FCA consulted on changes to its Enforcement Guide so as to bring increased focus, pace and transparency to its investigations – the so-called 'Name and Shame Proposals'. The consultation paper set out the FCA's intention to publicly announce details of enforcement investigations at an earlier stage in the investigation process, including publicising the names of businesses subject to investigation, as part of the increasing focus on protecting consumers from harm. The decision whether to announce investigations would be based on a public interest test. The proposals have caused much concern and prompted considerable backlash given the potential reputational and business impact, especially as many FCA investigations result in no action being taken.

The FCA has now released the second phase of its consultation, in which it proposes some "significant changes". These include taking into account the impact that an announcement will have on a firm, and the potential for an announcement to seriously disrupt public confidence in the financial system or the market. The new proposals also include giving firms ten business days' notice of an intended FCA investigation, in which to make representations to the FCA. They also allow a further two business days' notice of publication of an announcement, if the FCA decides to go ahead regardless of any representations that are made, to enable firms to plan communications accordingly.

The proposed revisions go some way towards achieving a balance between the interests of the consumer and the interests of firms. Firms will be pleased, in particular, that the FCA is now proposing at least to consider the negative impact on their business before deciding to make an announcement. However, the overarching principle – that announcements of a firm name can be made at the outset of an investigation, when no wrongdoing has been proven – remains the same. This is likely to be a major part of the feedback provided to the FCA. It remains to be seen whether the FCA will take into account any further feedback and amend its proposals again.

THE FINANCIAL OMBUDSMAN SERVICE (FOS)

November 2024 saw the publication of a consultation by the FOS on modernising its redress system. This was due to concerns about large numbers of complaints arising about the same issues – so-called "mass redress events," often where claims management companies or claimant-friendly law firms are involved. In such scenarios, logistical issues can arise, such as firms not being able to deal with complaints within the requisite eight-week time limit, meaning that complainants can exercise their right to refer their complaints to the FOS. This places a huge burden on FOS resources, clogging up the FOS redress system, as experienced very recently with large volumes of motor finance claims. The consultation goes so far as to suggest that consumer complaints might be an inefficient means of dealing with these mass issues, especially as there is a chance that the FCA could take a different approach, with regulatory solutions to the outcomes that the FOS has arrived at in respect of individual complaints.

FOS may apply different requirements for complaints brought by Professional Representatives (PRs), such as claims management companies.

The consultation proposes both short and long-term options for reform, which include potential changes to the timelines for regulated firms to respond to a claim, and for complainants to make an FOS referral. Also proposed is the re-introduction for regulated firms of a two-stage process for resolving complaints, thus giving a longer period to address complaints prior to complainants having the right to refer their complaint to FOS. This would be a return to the old system that was abolished in 2011.

One of the proposals of concern to firms is the suggestion that, having received a preliminary assessment from an FOS investigator, complainants and respondent firms should only be able to request a final determination from an Ombudsman in certain limited circumstances. This would include the availability of new evidence, a novel issue in dispute, or an alleged factual inaccuracy in the preliminary assessment. Removing the right to request a final Ombudsman's decision is a concern, given the frequency with which determinations reached on preliminary assessment are reversed and especially bearing in mind that the current award limit is now £430,000. This is arguably a high cap for an Ombudsman not obliged to apply the law, so the prospect of a FOS investigator being able to make an effective final determination at such a level will be of real concern.

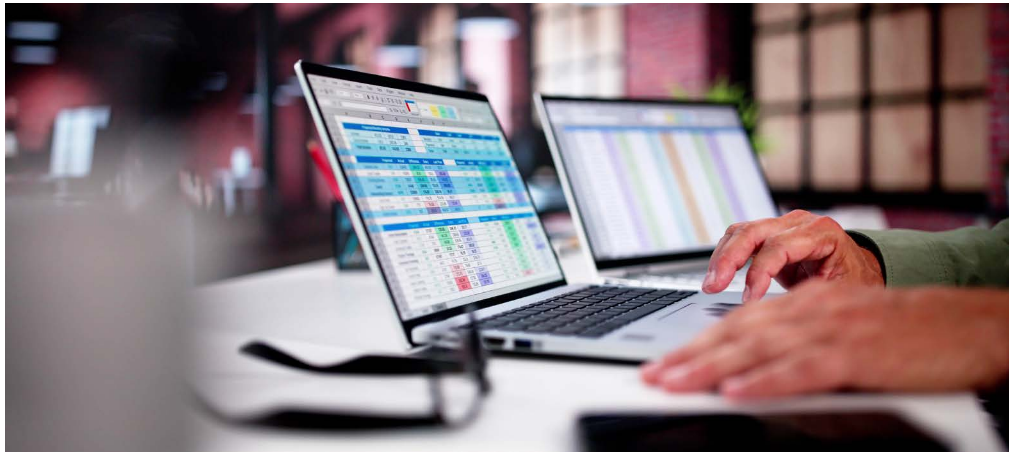
Also interesting is the suggestion that the FOS may apply different requirements for complaints brought by Professional Representatives (PRs), such as claims management companies. This is to avoid the huge amount of spurious and unsubstantiated complaints that are referred to the FOS when mass events occur and will require PRs to properly articulate the complaint in a dedicated form. In a policy statement issued on 7 February, the FOS has confirmed that cases referred to it by PRs as of 1 April 2025 will now be subject to a £250 fee. It is further suggested that the FCA should be able to 'pause' complaints in cases of mass redress events, in order to allow for regulatory investigation and review.

The consultation ended on 30 January 2025. We wait with interest to see how the FCA and the FOS will respond to feedback received. Whilst we cannot at this stage predict the nature or extent of any future change, it seems inevitable that reform of the FOS will come. The impact of such reform on IFAs and their PI insurers will be of key interest in the future - we will provide a further update later in the year.

AI/TECHNOLOGY

As with all industries, AI is playing an increasingly prominent role in financial services, and its impact is also being felt in the professional indemnity insurance market. Automation, digital tools, and the use of artificial intelligence (AI) are reshaping how financial advice is delivered, which in turn affects the risk exposure of IFAs.

The rise of digital advice platforms and robo-advisers, which offer algorithm-driven investment advice to consumers, has changed the traditional role of IFAs. These platforms often use AI to provide recommendations to investors based on



their risk tolerance and financial goals. While these platforms can reduce costs for consumers and improve accessibility to financial advice, they also introduce new risks related to algorithmic errors, system failures, or inappropriate advice generated by these technologies.

As these platforms grow in popularity, the nature of claims against IFAs may shift, potentially involving issues related to the accuracy of advice or system failures. PII policies will need to adapt to cover these emerging risks, with insurers needing to assess the risks associated with digital advice tools. As always, it will be vital for IFAs to ensure that 'human' verification processes are in place to mitigate the risk of error.

Another technology-driven trend that is having a significant impact on the PII market generally is the increasing importance of cybersecurity and data protection. Financial advisers are custodians of highly sensitive personal and financial data, and any data breach, whether through hacking, phishing, or internal mishandling, can lead to significant reputational and financial damage.

Insurers are beginning to place more emphasis on cybersecurity risks when underwriting PII policies. IFAs are being required to demonstrate that they have appropriate data protection protocols in place, including encryption, secure storage, and regular vulnerability assessments. Furthermore, the introduction of the General Data Protection Regulation (GDPR) in the EU has heightened the legal and financial exposure of firms in the event of data breaches, making this an important consideration for PII insurers.

CONCLUSION

The trends in IFA professional indemnity insurance reflect the changing nature of financial advice, from evolving regulatory demands to the increasing impact of technology and the growing complexity of financial products. Rising premiums, greater scrutiny of advice, claims management companies and new risks, such as cybersecurity threats and claims related to digital platforms, are reshaping the PI insurance market. For IFAs, understanding these trends and adapting their business models accordingly will be essential for ensuring adequate protection against potential liabilities and adequate PI insurance cover.

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CYBER

In our last report, we reported on the significant increase in claims on cyber policies resulting from a growing number of cyber attacks. Advancing technology has led to the digitalisation of even more systems and processes, such as the cloud and artificial intelligence, and businesses are increasingly relying on technology. Working remotely remains popular, with more than a quarter of working adults in the UK hybrid working in October 2024. Add to this the still uncertain geopolitical situation (statistics from the NCC show that close to 90% of ransomware attacks are politically motivated), and you have a fertile breeding ground for cybercrime. Statistics show that in 2023 over 3,000 cyber security breaches were reported to the Information Commissioner's Office.

As an increasing number of carriers have entered the cyber insurance market, there is surplus capacity and premiums for specialist cyber cover have reduced. The market is now soft once again and favours the Insured. Cover is more readily available, even for industries previously considered high risk, such as aviation and healthcare.

As we look ahead into 2025, some clear trends in the cyber insurance market are emerging. Cybercrime – especially phishing and ransomware attacks – will continue to increase, assisted by the growing use of AI to facilitate fraud. Businesses will need to consider the risks arising from global outage events such as the CrowdStrike incident in July 2024 and how to mitigate losses from non-malicious, systemic events. Finally, we are starting to see more supervision and regulation of the cyber industry from the UK Government (in line with the EU). It promises to be an interesting year ahead for the cyber insurance market.

ARTIFICIAL INTELLIGENCE (AI)

The last 12 months have seen an explosion in the use of AI. Whilst in many circumstances it is a tool aiding business efficiency and productivity, AI can also be used with negative effect. Cyber criminals can use AI to support the identification of vulnerable targets and assist in the efficiency of their attack. AI makes cloud systems more exposed to data exfiltration and can be used by cybercriminals to gain personal knowledge of victims. Phishing communications and ransom demands can then be tailored to appear genuine. AI generated content – or 'deepfakes' - impersonating company personnel are a growing problem for businesses and are being used to persuade staff to make large fraudulent payments.

Given the increasing use of AI to support cybercrime, it is perhaps no surprise that ransomware activity continues to be the greatest generator of cyber losses. Data from the National Cyber Security Centre (NCSC) shows ransomware attacks increasing by 85% in 2023 as compared to 2022, as AI lowers the barrier of entry to novice cyber criminals. The NCSC has also warned that bad actors are using AI to find and target victims and that the

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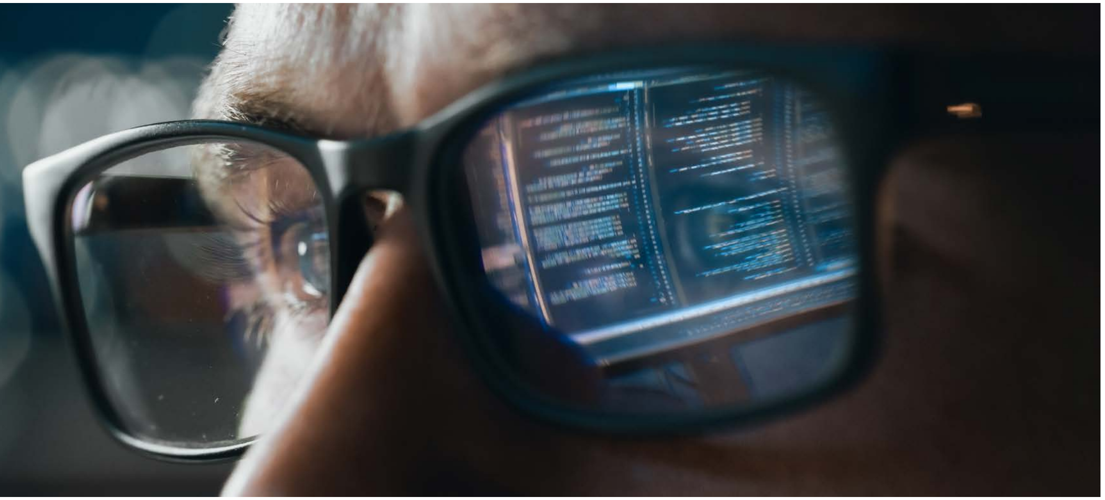

technology will almost certainly increase the volume and impact of cyber attacks in the short term.

In terms of cyber insurance cover, extortion and ransomware policy provisions will often require the threat to be established as 'credible' before cover is engaged. The criteria for assessing the credibility of a threat have until recently been vague; but the NCSC, the Association of British insurers, the British Brokers' Association and the International Underwriting Association have collaborated to produce joint guidance for organisations considering paying a ransom. The guidance note was released on 14 May 2024.

Companies' emphasis should be on ensuring that adequate cyber security protections are in place, with strong risk control systems and crisis management.

Companies' emphasis should be on ensuring that adequate cyber security protections are in place, with strong risk control systems and crisis management. Multi-factor authentication should be commonplace, as should regular staff cyber training for all. Such measures should help protect businesses from extended periods of disruption and more significant financial losses, whilst at the same time ensuring stabilisation of the cyber insurance market and palatable insurance premiums.

OUTAGE LOSSES

The July 2024 global IT outage, caused by a faulty software update from US cyber security firm CrowdStrike, affected around 8.5 million Windows users, with operations of organisations worldwide, including airports and healthcare providers, brought to a grinding halt. The financial losses incurred, believed to be in the region of £1.6 billion, resulted from lost business and cost of rectification, as well as claims from third parties.

Although standard cyber insurance will cover losses attributable to security failure, operational failure or system failure of the Insured's own operations, it typically does not cover losses arising from non-malicious cyber events at a third-party network service provider. Bearing in mind that the CrowdStrike outage could just be the first of similar incidents, as the use of business technology continues to expand, businesses must consider mitigating losses by way of strong Business Continuity and Disaster Recovery plans.

It is likely that, as businesses review insurance policies in light of the outage, there will be increased demand for cyber insurance cover as well as scrutiny of system failure coverage clauses.

UK REGULATION

The CrowdStrike event highlights the importance of robust third-party IT risk management, an issue included in the EU Digital Operational Resilience Act (DORA). This initiative to increase the digital operational resilience of financial entities within the EU became effective from January 2025 for companies in scope. DORA includes comprehensive risk management frameworks such as third-party risk assessments for supply chains. These changes should mean that the vulnerabilities of interconnected digital systems are minimised, which will avoid extensive and widespread disruption from a single fault (as was the case in the CrowdStrike incident).

It should be noted that whilst DORA is EU legislation and only applies to the financial services sector, the UK is following DORA's example in focusing on legislation and regulation to help manage cyber risk. To that end, a new Cyber Security and Resilience Bill has been proposed. This seeks to update the 2018 Network and Information Security Regulations (the Regulations), which implemented the EU NIS 1 Directive. The Regulations introduced a regime (when the UK was part of the EU) to improve cyber and physical security of network and information systems that are deemed critical to national

operations and resilience. A key driver behind the UK Government's plans is a desire to stay broadly aligned with evolving EU legislation, particularly with the significant expansion in scope of the new EU NIS 2 Directive. Once presented to Parliament, the Bill could become law by early 2026.

In a further sign of the UK Government's concerns regarding cyber security, the UK Technology Secretary has recently announced the classification of data centres as Critical National Infrastructure. They will now be subject to higher levels of protection and support in the event of critical incidents such as cyber attack.

These regulatory developments in the UK evidence increasing impetus for companies to adopt strong cyber security measures and ensure that such measures are kept under regular review. There should be careful review of internal processes and the security of third-party relationships.

THE MIDDLE EAST

While the Middle East (ME) is advancing in its digital transformation, it is also facing the complexities and challenges of cyber security. The ME has seen a rise in cyber threats, including ransomware and data breaches. Recently, Kuwait's Ministry of Health (MOH) was subject to a cyber attack where unauthorised third parties accessed its systems by exploiting existing vulnerabilities. While the MOH responded promptly and took immediate action to minimise the impact of the attack by implementing advanced security measures and collaborating with technical teams, this demonstrates that as Government entities and businesses digitalise their operations, they become more attractive targets for cybercriminals. This is one of several examples indicating a rise in cyber attacks in the region.

The ME has seen a rise in cyber threats, including ransomware and data breaches.

Overall, the regulatory landscape around data protection in the ME is becoming more comprehensive, reflecting a growing recognition of the importance of cyber security in safeguarding personal data. We expect that the ME will continue to update and enhance its data protection laws and regulations to effectively respond to the evolving cyber threats. At the same time, we are likely to see a rise in the enforcement of these laws by relevant authorities. The rising frequency and sophistication of cyber attacks underscores this necessity.

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ENVIRONMENTAL, SOCIAL & GOVERNANCE

WHAT IS ESG?

ESG (Environmental, Social and Governance) refers to a set of standards or principles against which an organisation's governance and impact on wider society and the environment is measured or rated, traditionally for investment purposes. Over the last two decades, ESG has become more prominent for insurers and their Insureds due to the climate emergency and greater focus on corporate behaviour, for example in respect of corporate pay, social value or anti-slavery in supply chains.

CLIMATE CHANGE

Historically, the 'E' (Environmental) of ESG has gained the most attention. Recently, we have seen a wealth of shareholder and investor activism in respect of environmental concerns around the world. This has been seen particularly in the US, France (including lawsuits against Coca Cola in the US and Danone in France, both of which relate to those companies' use of plastic in their drinking bottles); and the Netherlands (a derivative claim against KLM for alleged greenwashing relating to the impact that KLM flights have on the environment) where derivative claims tend to be easier to launch. The ClientEarth case referred to in our last report (an action by a minority shareholder in relation to Shell's alleged failure to address and fulfil its climate change strategies) revealed the UK courts' reluctance to allow derivative actions to proceed in the UK unless there is a very good prima facie case at the outset. The ClientEarth case is, however, unlikely to be the end of attempts to hold company directors responsible for climate change issues and we anticipate further class litigation in this domain. Companies' ESG policies will be closely scrutinised, and it will be important that internal company policies (and more importantly, their execution) are sufficient and, for example, in line with net zero ambitions or commitments if litigation is to be avoided.

The ClientEarth case is, however, unlikely to be the end of attempts to hold company directors responsible for climate change issues.

THE 'S' FACTOR

Whilst environmental concerns remain a key issue, as we noted in last year's report there has been more activity centred around the 'S' (Social) in ESG. Insurers and Insureds are becoming increasingly aware of the pervasive nature of the social pillar and businesses' approaches towards issues such as diversity and inclusion, social value and employment. With these issues now attracting so much attention in all walks of life, it is a theme we believe will continue as we progress into 2025.

Cases in recent years show that it can be difficult for businesses to get the 'S' of ESG right – not enough diversity, or a focus on too much diversity, have both caused angst amongst company shareholders and investors in recent times. The 2021 threat of legal action by shareholders against Coca Cola resulted in the company abandoning a new policy promoting diversity when instructing external lawyers. Similarly, the US Supreme Court's 2023 decision in Students for Fair Admissions v Harvard that universities can no longer consider race in admissions decisions will have forced many businesses to reconsider admissions/recruitment policies. These cases highlight growing debate over where to draw the line between acceptable diversity initiatives and company/director illegality. This is likely to be a key issue in coming years – especially with an ESG-sceptical administration in the US.

Another area which highlights the pervasive nature of the 'S' pillar of ESG is a company's use and deployment of AI in various spheres of business. If a company seeks to deploy AI in vetting applicants for jobs, for example, it will require carefully developed and vetted algorithms to avoid discrimination or bias. Equally, the growing use of AI to replace what many might consider to be low-skilled jobs will mean that companies face scrutiny if they begin to make redundant swathes of lower-paid workers.

CONSTRUCTION

The construction industry is increasingly focusing on ESG issues, driven by growing sustainability and climate change concerns. We have discussed in the Construction section of this report the launch of the UK Net Zero Carbon Buildings Standard in September 2024. This Standard aims to create a uniform framework for reducing the construction industry's environmental impact and supporting decarbonisation. This will involve the development of sustainable construction practices and the potential introduction of specific drafting around reducing carbon emissions in construction contracts (so-called "climate" or "green" clauses).

The construction industry is increasingly focusing on ESG issues, driven by growing sustainability and climate change concerns.

In addition, new mandatory rules requiring biodiversity net gains of 10% come into force in 2024, requiring an approach to development that leaves biodiversity in a better state than before.

Social issues – the 'S factor' – are also important in the construction industry, with contracts often now including provisions not only to eliminate modern slavery from supply chains, but also to include some form of social value, be that upskilling people local to projects, contributing to local social projects or employment of local or disadvantaged people. There is increasing focus on swift payment, minimum payment expectations and appropriate use of apprentices.

SHAREHOLDER ACTIVISM

There has been a rise in ESG-related actions brought against companies by shareholders for mismanagement/breach of fiduciary duty, a pattern that we believe will continue. In the early 2003 McDonalds case in the US Delaware courts, the directors of McDonalds were successfully able to defeat a derivative action brought by the shareholders in which it was alleged that some directors had breached their fiduciary duties (by engaging in and failing to respond to systematic issues of sexual misconduct and harassment). The Delaware court held that, as systems and policies were in place to deal with internal issues such as this, there had been no breach of duty. This shows the importance of having policies and oversight in place to counteract social risks, so that there may then be scope to defeat derivative actions brought by shareholders against companies for issues such as failure to oversee staff. It is not clear whether this decision would apply more widely within the US, or whether similar principles would be adopted in the English courts. If the same principles are adopted in England and Wales then, if directors have processes in place to show a proper course of dealing which does not contravene the duty to act in the best interest of the shareholders, and are deemed to have exercised reasonable skill and care, then there is at least a prospect that they might be able to defend a similar claim brought in the UK.

What is clear, however, is that the actions of directors and officers are increasingly under the spotlight as stakeholders (including activist shareholders and employees) in companies look to ensure that their employment interests and investments are protected by those who make business-critical decisions.

CONFLICT

Company directors are of course under a statutory duty to promote the success of the company. This duty will not always sit easily with ESG-related considerations. Any conflict in this regard may increase the potential for claims against the board of directors by investors and other stakeholders. We are likely to see increased shareholder activism in this sphere with shareholders holding the board responsible for any promises made in relation to a company's ESG targets and strategies.

It is important that companies remember that they can be liable for breaches of ESG obligations carried out by their foreign subsidiaries.

INTERNATIONAL LANDSCAPE

It is important, following Fundão Mining case which we considered in our October 2022 article [read our article here], that companies remember that they can be liable for breaches of ESG obligations carried out by their foreign subsidiaries "if it can be shown, or if they have held themselves out, as having substantial supervision or control of those operations." Again, record keeping of board minutes where these issues are discussed will be important to address concerns generally, but also in relation to potential derivative actions from company shareholders.

The Fundão Mining case has opened the floodgates for claims that would not succeed in jurisdictions where the law might not be so favourable to instead be heard in the English courts. We anticipate that this could give rise to more multi-party litigation where classes of claimant are identified overseas, which could relate to social issues such as modern slavery.

FINAL THOUGHTS

Adopting excellent corporate governance processes and ethical business practices and having a clear understanding of the division of responsibilities between senior directors will be critical in the years to come. This is especially so given the increasing tendency of regulators to seek to pin personal responsibility on individuals (a trend which is very much in evidence in the UK – see the D&O section of this report). These include ESG initiatives and policies. Given the increasing reliance on AI in business, it is now even more important for directors to ensure careful human oversight of decisions being made, both in the UK and abroad.

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FINANCIAL INSTITUTIONS

The past year has been another difficult period for Financial Institutions (FIs). Continued conflict in Ukraine and the Middle East, changes of Government in the UK and the US, and the domestic cost of living crisis in the UK, have created an unstable eco-political environment. Whilst there are some signs of the economy stabilising in the UK (with interest rates expected to fall again this year), there seems to be little chance of improvement in the global economy, as conflict around the world continues with the inevitable effects on supply chains and financial markets. The proposals set out in the Labour budget at the end of 2024, should they come to fruition, could also have implications for FIs in the UK. There is the possibility of increased taxation or bank levies, as well as stricter regulation and changes to Financial Services legislation to increase levels of consumer protection. It therefore remains a time of uncertainty and pressure, with continuing challenges for FIs and their insurers.

In our last report we discussed the collapse of US banks Silicon Valley Bank, Signature Bank and Silvergate Bank and predicted wide-ranging and multi-jurisdictional litigation against both the institutions and their directors. Whilst the immediate crisis may have subsided, the longer-term effects are still unfolding. The US banking sector remains under significant pressure from regulatory change and economic uncertainty; interest rates remain high and cautious lending means that credit is not readily available to small or mid-sized businesses. This is likely to have a ripple effect on global financial markets affected by the broader financial uncertainty and the impact on international trade.

CYBER

Increasing reliance on digital services means that cybersecurity and data privacy are key risk areas for FIs, as for most industries and professions. IBMs Cost of Data Breach Report 2024 found that the Financial Services sector was the second most impacted by the cost of cyber incidents in 2023. A report by Marsh in late 2024 revealed that FIs accounted for the highest number of cyber claims (21%).

> *Increasing reliance on digital services means that cybersecurity and data privacy are key risk areas for FIs.*

Claims may arise from data breaches involving personal, financial or health-related information or from insufficient cyber security measures that fail to prevent against hacking, ransomware, or fraud. Ransomware has had a significant impact on FIs, with LockBit ransomware representing the biggest threat. In the last couple of years, we have seen LockBit target Indonesian banking firm Bank Syariah Indonesia (BSI) and Indonesia's National Data Centre, causing disruption to a number of services, including immigration checks and airport services. LockBit was also identified as the attacker on the November 2023 ransomware attack on the US subsidiary of the Industrial and Commercial Bank of China (ICBC).

It is apparent that, to minimise the risk of attack, organisations need to continually assess and strengthen their cyber security measures. There should be adequate security in place, as well as regular data breach assessments and comprehensive staff training on how to identify and deal with a ransomware attack. A 'no blame' culture will also encourage employees to speak up if they have inadvertently caused a data breach. The recent cyber-attack against Kuwait's Ministry of Health (MOH), provides a good example. The commonly used Sachel healthcare application, which allows thousands of Kuwaitis to access health services, book appointments, and manage medical records, and on which significant personal data is stored, was targeted, causing widespread disruption in hospitals. The MOH responded promptly and took immediate action to minimise the impact of the attack by implementing its internal incident response plan (IRP), a predefined policy that outlines specific steps that an organisation must follow when a cyber-attack occurs, enabling teams to act immediately and decisively. The comprehensive IRP and the speed at which it was implemented was instrumental in mitigating the losses incurred and serves as a good lesson to all FIs to ensure that they have adopted a comprehensive approach to cyber risk. This should integrate preventative measures, incident response and cyber insurance so that an organisation can handle breaches effectively. This minimises the risk of a breach, ensures compliance with legal and regulatory requirements, and offers financial protection.

Failure to promptly notify can result in denied claims or limited coverage, increasing financial and reputational risks for an organisation.

It is also important that organisations notify cyber insurers as soon as a breach is identified, as delays in notification may impact an organisation's ability to claim coverage for breach-related costs and losses. Compliance with notification requirements is often a condition for coverage under a policy, and failure to promptly notify can result in denied claims or limited coverage, increasing financial and reputational risks for an organisation.

The use of AI, whilst assisting speed and productivity, can pose additional risks. AI systems rely heavily on vast amounts of sensitive data which, if not properly secured, could leave an organisation vulnerable to cyber attack, data breach or misuse. AI can also unintentionally perpetuate bias, leading to discriminatory outcomes in areas like lending, credit scoring or hiring. Examples include Amazon's AI system which "taught itself that male candidates were preferable" and China's iTutorGroup's agreement to pay $365,000 in compensation after its AI software automatically screened out women aged 55 or older and men aged 60 and older.

A new trend is companies making over-inflated claims about their use of AI, a concept dubbed 'AI washing.' The risk of AI-washing arises where companies make misleading claims emphasising AI to seek investors and purchasers. It could involve claiming to use AI when in fact it is not being used, exaggerating what an AI system can do, or claiming that AI is being used in a way that it is not. As an example, Amazon faced criticism in 2024 when it emerged that its AI powered 'Just Walk Out' system (enabling customers at Amazon Fresh and Amazon Go shops to simply pick up their items and leave) in fact needed around 100,000 workers in India to manually check almost three quarters of the transactions. The risks associated with AI washing are regulatory enforcement action (possibly under the Consumer Protection Regulations 2008, considered elsewhere in this report) or, potentially, claims from investors/shareholders relating to exaggerated claims made about the use of AI.

ESG

Environmental, Social and Governance (ESG) responsibilities are, as considered elsewhere in this report, becoming of increasing importance as commitment to climate change has increased. Environmental activism and climate-related litigation have been key features of the last 12 months. The ClientEarth case referred to elsewhere in this report (an action by shareholders in relation to Shell's alleged failure to address climate change strategies) shows how company ESG policies will be closely scrutinised. It will be important that internal company policies are sufficient and in line with net zero ambitions if litigation is to be avoided. Investors may bring derivative actions if they believe that a company has failed to adequately consider climate risk in its business strategy or investment portfolio. Organisations must be wary of failures to disclose or misrepresent ESG related risks in their portfolios or business operations and should be mindful of investments in controversial industries such as fossil fuels or tobacco. There is also likely to be increased scrutiny of ESG-related practices such as greenwashing.

Whilst environmental concerns remain a key issue, there has been increasing focus on approaches towards issues such as diversity and inclusion, social

value and employment. The 2021 threat of legal action by shareholders against Coca Cola resulted in the company abandoning a new policy promoting diversity when instructing external lawyers. Similarly, the US Supreme Court's 2023 decision in Students for Fair Admissions v Harvard that universities can no longer consider race in admissions decisions will have forced many businesses to reconsider admissions/recruitment policies. The cases highlight growing debate over where to draw the line between acceptable diversity initiatives and company/director illegality, likely to be a key issue in coming years.

With these issues now attracting so much attention in all walks of life, it is a theme we believe will continue as we move into 2025.

The Fundão Mining case which we considered in our October 2022 article [read our article here], established that a UK parent company can be responsible for acts of company subsidiaries based abroad. It has opened the floodgates for claims that would not succeed in jurisdictions where the law might not be so favourable to instead be heard in the English courts. This may lead to more multi-party litigation where classes of claimant are identified overseas.

FRAUD

As global economic conditions continue to fluctuate, FIs may be exposed to fraud or misconduct in trading, investment management or advisory services, leading to client claims.

The growing use of digital assets (cryptocurrencies, blockchain etc) and fintech innovations may bring new legal challenges. There may be regulatory uncertainties and legal ambiguities surrounding digital asset trading and custody, as well as fraud and management in financial platforms or exchanges. Class actions related to the volatility and loss of investments in digital assets are also likely. In 2022 we saw these issues lead to the collapse of FTX (a cryptocurrency trading platform) due to reckless mismanagement and major online fraud. This had a huge impact on other cryptocurrency exchanges as investors withdrew following FTX's collapse. FTX's collapse has built support for the regulation of crypto providers, as Governments and financial regulators worldwide seek to address the risks and challenges posed by the growing crypto market. We are likely to see tightening rules around transparency, investor protections and systemic risks, with coordinated global efforts to create consistent standards.

VEHICLE FINANCE

There is an increased chance of claims arising against lenders of vehicle finance. Following the outlawing of Discretionary Commission Arrangements in 2021, there have emerged claims from consumers dating to before the ban. The Supreme Court is due to consider potential consumer redress at a hearing taking place between 1 and 3 April 2025 and the FCA has confirmed that it will follow the Court in relation to its plans for consumer redress for discretionary commission arrangements in vehicle finance schemes.

In addition, the FOS has been upholding complaints against these lenders and one of those decisions has recently been the subject of Judicial Review proceedings and the outcome of this is awaited as it is likely to affect complaints made by customers to lenders.

Whilst we are still in the dark as to the outcome of the Supreme Court hearing and FCA's response, the situation does raise some questions. For example, what effect will there be on limitation periods if a consumer redress scheme is introduced and will there be a tension between the redress scheme and companies' obligations under the Consumer Duty (for companies subject to FCA regulation)?

POTENTIAL DEREGULATION?

The FCA also appears intent on rowing back from plans to "name and shame" companies which have breached FCA regulations. It seems that the FCA will only name and shame in "exceptional circumstances" (with limited guidance as to what those exceptional circumstances might be) rather than the planned expansion to allow naming and shaming when it was in the public interest. There also appears to be a move away from greater DEI proposals and a delay in bringing in penalties for non-financial mismanagement, which appears to be a trend in favour of US-style deregulation.

REGULATORY SCRUTINY IN THE UAE

The transparency and integrity of the insurance sector and the UAE financial system is of paramount importance as the UAE continues to bring its regulatory functions in line with the rest of the world. A facet of this drive is a greater scrutiny on regulation. Regulators in the region are becoming far more dynamic in acting when there are perceived abuses. The UAE Central Bank (CBUAE) has recently taken action against an insurer and an insurance broker for regulatory violations which may also have significant impacts in the future, in one case revoking the license of a Dubai-based insurance broker due to the broker's weak compliance framework and failure to meet regulatory obligations. The action should serve as a wake-up call for insurers and brokers operating in the UAE, who should review and enhance their policies and procedures to prevent similar action being taken. These actions align with the broader trend of increased regulation in the region, following the release of the New Insurance Law in 2023, and demonstrate the CBUAE's growing confidence in its ability to enforce compliance.

It is likely that brokers in the region will need to delve deeper into their clients' practices to ensure that sufficient cover is in place.

This should alert those in other industries beyond insurance to ensure that they have sufficient and relevant cover in the event of similar action by the CBUAE or other regulators. The action is indicative of the increasing global trend of regulation that we have considered in previous publications.

Insurers writing D&O and FI policies in the region will need to consider what questions are asked of their prospective insureds to determine whether they have sufficiently robust policies in place to stand up to regulatory scrutiny. It is likely that brokers in the region will need to delve deeper into their clients' practices to ensure that sufficient cover is in place, particularly relating to extensions for regulatory investigations which are becoming more important in the current climate.

REPUTATIONAL ISSUES

The fallout from the Jeffrey Epstein scandal has highlighted the challenges of banking wealthy and potentially high-risks clients for FIs. JPMorgan Chase, Deutsche Bank and Barclays have faced considerable criticism and penalties for continuing to keep Epstein as a client for many years after he was convicted of serious sexual offences against a child. The case has highlighted that FIs cannot afford to 'turn a blind eye' to red flags in order to keep hold of a wealthy client. Compliance departments will need to ensure careful monitoring of such clients. Senior management will be required to consider compliance recommendations regardless of a client's net worth or potential use to the business.

THE INSURANCE MARKET

As we look to 2025, we can tentatively say that the FI insurance market is stabilising, with more Insurer competition and lower premiums. In this softening market insurers will be keen to monitor existing and developing trends to ensure they take on appropriate risks given the more favourable market conditions.

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

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WARRANTY & INDEMNITY

The use of Warranty & Indemnity insurance (W&I) has become a lot more commonplace in corporate merger and acquisition transactions (M&A). More and more sellers are looking to secure W&I insurance to provide cover for commercial and tax warranties they are required to provide to the buyer in a transaction.

A warranty is a statement of fact about a business and its financial position as at the date of the completion of the transaction. It provided a purchaser with the contractual right to bring a claim for breach of warranty should the buyer suffer a loss as a result of those warranties turning out to be untrue.

The buyer therefore looks to secure as many warranties as possible to safeguard its position in the transactions, whereas the seller will wish to limit the number of warranties it gives and also build in limitations of liability.

In these transactions there is potentially a clear imbalance as to the allocation of risk and this leads to heated negotiations, fallings out and sometimes the abortion of the transaction itself.

W&I insurance is designed to provide cover against loss which might arise from a breach of warranty or tax indemnity in the M&A transaction and can be a useful tool to align the buyer's and the seller's expectations around post-completion liability.

The last few years have seen an increasing trend towards purchasers also taking out W&I policies.

WHEN IS W&I INSURANCE MOST COMMONLY USED?

W&I policies may be buy-side or sell-side, although they were first brought to market as sell-side products to provide sellers with some comfort when exiting companies. The last few years have seen an increasing trend towards purchasers also taking out policies. Responsibility for payment of the premium will usually be a source of debate between the parties to the transaction.

A purchaser might wish to consider a policy where, for example:

- the seller makes it a condition of the deal;
- there is a tender process, and the buyer might wish to offer a policy as being a point of difference to its bid;
- where the transaction documents provide little or limited recourse against the seller; or
- where representatives of the seller are due to stay with the business after completion, so there is an incentive for the buyer to preserve the relationship.

A seller might look to incept a policy where, for example:

- they are individuals who wish to use the proceeds of sale immediately upon, or shortly after, the sale is completed. The existence of the policy provides them with more comfort to proceed on that basis;
- where a buyer has refused to incept a policy; or

- where the seller is to be wound up post-acquisition (so as to minimise the risk of personal liabilities to the directors and officers of the seller).

The use of W&I policies has expanded into new jurisdictions. Traditionally they were used in the US, the UK and Australia but now they are a truly global policy and used increasingly in Africa and Asia.

It is the greater security offered to purchasers which has stimulated this increased interest in taking out such policies.

KEY DEVELOPMENTS IN RECENT YEARS

In the period mid-2022 to mid-2023 there was a steady decline in global M&A activity following a boom after the global Covid pandemic. There was a reduction in global deal values and also the volume of deals which were being completed globally.

Having said that, however, global M&A activity grew steadily in the second half of 2023 and throughout 2024, particularly in the small to mid-level market. This was despite fears of a global recession, rising interest rates and inflation and a very unpredictable geopolitical environment, particularly in the Middle East and Eastern Europe with the conflicts between Israel and Palestine and Ukraine and Russia affecting investor confidence. At the same time the W&I market has continued to expand, and we have seen lots of activity in Asia and Latin America. With this, we have seen an exponential rise in the number of claims for indemnity under W&I policies in 2023 and 2024.

This was a good result in the courts for insurers, because they successfully defended the claim on every basis.

Over the last couple of years, we have also seen the first W&I claims working their way through the UK Courts. For example, the High Court handed down its judgment in Finsbury Foods v Axis. This was a claim arising from the acquisition of a bakery business where the buyer alleged that a price and recipe change was not disclosed before completion. This was a good result in the courts for insurers, because they successfully defended the claim on every basis. In 2023 there was also the case of Project Angel Bidco Ltd v Axis which dealt with corruption-related losses linked to the buyout of a construction firm.

The firm subsequently collapsed due to allegations of bribery in the hierarchy. Again, the Court dismissed the claim and insurers were successful.

LIKELY DEVELOPMENTS IN 2025

Whilst it is yet to be seen what effect the recent re-election of Donald Trump in the US might have on global M&A activity, generally speaking, M&A activity is expected to show steady improvement as market conditions continue to stabilise. There is potential for an increased focus on AI and mergers in the pharmaceutical sphere. Of course, transactions of that nature may be susceptible to claims, particularly around the scope of due diligence carried out by the buyers.

Synthetic W&I (which are warranties in their entirety, or in part, being negotiated directly between the buyer and the W&I Insurer without being reflected in the transaction documents) are becoming more commonplace and this is something into which W&I insurers need to look in more detail.

There is also a growing use of AI in M&A transactions. As with the deployment of AI across a number of lines of business this brings with it both risk and opportunities. It is doubtless that AI is likely to give rise to more efficient due diligence, however, vendors, purchasers and insurers alike will need to satisfy themselves as to the robustness of the AI-generated due diligence to ensure the information produced remains accurate and comprehensive.

Finally, ESG continues to be more and more at front and centre of considerations. There is likely to be an increase in M&A activity in European jurisdictions and this may well bring about claims around the availability of tariffs, consents and planning considerations.

Insurers are also looking to cover a wider range of transactional risks. This includes specific covers for intellectual property risks and tax risks which might otherwise have represented a deal breaker in the negotiations between the seller and the buyer. These are issues into which insurers need to look and appropriate risk assessments should be carried out. There has also been a growth in the coverage of new breaches, which are those incurring between the signing of any documentation and the closing of the deal. Traditionally these were not covered by W&I policies, but insurers are now looking to be more willing to cover such eventualities and risks.

CONCLUSIONS

As activity around the world continues to increase, inevitably there will be more pressure placed on W&I insurers and more claims made against policies. It is important that insurers get to grips with the due diligence processes carried out by Insureds before entering into the policies. If transactions involve high risk areas, such as pharmaceutical or AI, then the queries raised by Underwriters before writing the policy come into greater focus.

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HEALTH AND SAFETY

2024 marked the 50th anniversary of the Health and Safety at Work etc. Act ("HSWA") 1974. The HSWA 1974 is the primary legislation which provides occupational health and safety in the UK. The Health and Safety Executive ("HSE") is the body responsible for enforcing the Act to ensure that employers and persons in control of premises operate safe systems of work for their employees and members of the public. Since the HSWA 1974 was established, the HSE have reported a reduction of 85% in the numbers of employee fatalities in the workplace.

Sections 2 to 6 of the HSWA 1974 outline general duties that are owed by employers or persons in control of premises. Where the HSE finds that an employer or person has contravened a general duty under HSWA 1974, it can prosecute the relevant entity or individual. Section 7 of the HSWA 1974 requires employees to take reasonable care for the health and safety of themselves and others who will be affected by their acts or omissions whilst at work. This section of the HSWA 1974 is relevant where the HSE find that the employer has taken all the necessary steps to control and minimise risks within the workplace but find that an employee has committed a breach that warrants enforcement action.

Under section 33 of the HSWA 1974, it is an offence to intentionally obstruct a HSE investigation or an inspector in the exercise or performance of their powers or duties. Obstruction pursuant to section 33 of the Act includes preventing or attempting to prevent any person from appearing before an inspector or from answering questions posed under section 20(2) of the HSWA 1974, providing an inspector with a known false or a reckless statement or intentionally falsifying documents or records with intent to deceive inspectors. Where the HSE find that a section 33 offence has occurred, the Courts have powers to impose fines and/or periods of imprisonment on the relevant person. The maximum penalties that can be imposed on a defendant for a breach of section 33 of the Act in a particular case are determined by the application of the sentencing guidelines.

Whilst one of the main objectives of the HSE is to prevent work related death, injury and ill-health, in instances where legislation has been breached inspectors can and will take enforcement action. The HSE's Enforcement Policy Statement provides that any enforcement action taken must be proportionate, targeted, consistent, transparent and accountable. This is particularly relevant within the construction industry which remains one of the most hazardous industries in the UK. The HSE views prosecution as an essential part of enforcement to ensure those in breach of the law are held to account. In the event of breaches committed by individuals, the potential outcome includes disqualification, fines and custodial sentences, where deemed appropriate.

On 1 February 2016, the Sentencing Guidelines for Health and Safety and Corporate Manslaughter were

The HSE views prosecution as an essential part of enforcement to ensure those in breach of the law are held to account.

introduced to implement a fair, proportionate and consistent approach to sentencing. Within the construction industry, the likelihood of harm arising from a breach of health and safety regulations can outweigh the level of culpability due to the inherent risks within the industry's workplace. For offences committed on and after 12 March 2015, the maximum penalty in the Magistrates' court is an unlimited fine or imprisonment for a term not exceeding six months, or both. In the Crown Court, the maximum penalty is an unlimited fine or imprisonment not exceeding two years or both. Alongside the likelihood of harm, the sentencing guidelines consider the size of an organisation by reference to its annual turnover to determine the starting point for a fine. The sizes include 'Micro', 'Large' and 'Very Large' organisations.

KEY TRENDS

On 20 November 2024, the HSE published its statistics on work related ill-health and workplace injuries for 2023/24. Although Great Britain is one of the safest places in the world to work today, the HSE has stressed that there remains room for further improvement with an estimated 33.7 million working days lost in 2023/24 due to self-reported work-related ill health or injury. The HSE reported seven million cases of work-related illness, 776,000 of which were owing to mental health and 543,000 as a result of physical health.

Even though the mental health illnesses reported in 2023/24 are higher than the pre-pandemic level, the HSE's 2024/25 business plan focuses on improving physical health within the construction industry to reduce illnesses associated with asbestos, musculoskeletal disorders and noise. Further, despite a reduction in the total number of inspections completed in 2022/23 from 16,800 to 14,700, the construction industry saw a 32% increase in inspections during 2023/24. Moreover, in 2023/24 the HSE completed 248 prosecutions of which 92% resulted in conviction.

The appetite for prosecution is also reflected in the increased fines and the larger penalties.

Following the Grenfell Tower Inquiry, the HSE is looking beyond organisations at individuals as well as organisations in their investigations to pierce the corporate veil where individuals in duty holder roles are failing to meet their responsibilities under the CDM Regulations 2015. This is reflected in the HSE's inspection plan for 2024/25 which has set a target of 14,000 inspections to focus on health priorities to confirm duty holder compliance with management of physical health risks within the workplace. The appetite for prosecution is also reflected in the increased fines and the larger penalties that have been enforced against companies under the Sentencing Guidelines. There has also been an upturn in custodial sentences against individuals in instances where a fatality has not occurred. This demonstrates the HSE's focus on the seriousness of risks posed in construction irrespective of the actual harm suffered, which was previously the principal factor behind the level of enforcement imposed.

Despite the increase in HSE action in 2024, we note that the prosecution of Principal Designers remains low compared to those of Principal Contractors. In light of the HSE's increased investigations and the new competence regime for duty holders under the Building Safety Act 2022, there is greater focus on the entire lifecycle of construction projects, which signifies greater responsibility and risk for those performing duty holder roles.

The Grenfell Phase 2 Report criticised the industry-wide lack of understanding in respect of the roles under the CDM Regulations 2015 which exist to limit the health and safety risks in the design of construction projects. This criticism suggests that there may be an overall increase in enforcement action in 2025 against duty holders including Principal Designers as the HSE scrutinise those in duty holder roles in greater detail.

2025

In Autumn 2024, the Sentencing Council's consultation included proposals to clarify guidance on sentencing 'Very Large' organisations. It is anticipated that guidance will be released with a view to facilitating the distinction between 'Large' and 'Very Large' organisations for sentencing purposes. The impact of such guidance could result in an increased number of organisations being captured by the 'Very Large' organisation definition, against which a sentencing judge can impose an unlimited fine on an organisation.

Further, in light of the increasing HSE investigations and prosecutions, we expect an increase in claims and notifications under professional indemnity policies. The HSE's focus on duty holder compliance may translate to an increase in claims for Principal Designers, therefore, it is important that organisations undertaking duty holder roles ensure that they have a good understanding of their statutory responsibilities. It is also expected that the HSE's focus on individuals will result in an increase in notifications under Directors & Officers policies.

Insurance policies will not cover fines for health and safety breaches, however, defence costs and in our experience prosecution costs will be.

It is important to note that insurance policies will not cover fines for health and safety breaches, however, defence costs and in our experience prosecution costs will be covered. This includes the costs of preparing for and attending police interviews. In addition, due to the nature of health and safety investigations, conflicts of interest may arise where an organisation and individuals within the company are being prosecuted in respect of the same incident. In these instances, insurers may need to seek advice as to whether separate lawyers will be required to support a company and its individuals during a HSE investigation.

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