brownejacobson LLP

# Insurance Annual Review 2019-2020


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# Introduction

Welcome to our annual insurance review. As we look back on last year's important legal developments and to the challenges and opportunities that lie ahead, it is once again clear that the market's resilience and ability to embrace change will remain critical to its success.

Brexit, corporate sustainability, diversity and inclusion and digital transformation initiatives will continue to be a priority during 2020. We expect the sector will also face increasing regulatory pressure arising out of the FCA's publication of its Position Statement on pricing and we expect to see the FCA taking investigatory and enforcement work on financial and non-financial misconduct.

In our review, we share updates and insights in relation to the most important issues to help ensure that you are informed and prepared for 2020 and beyond.

If you have any queries or would like more information or support with any of the issues raised in our review, please do not hesitate to contact me or the authors directly; we would be delighted to hear from you.

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# Professional Indemnity

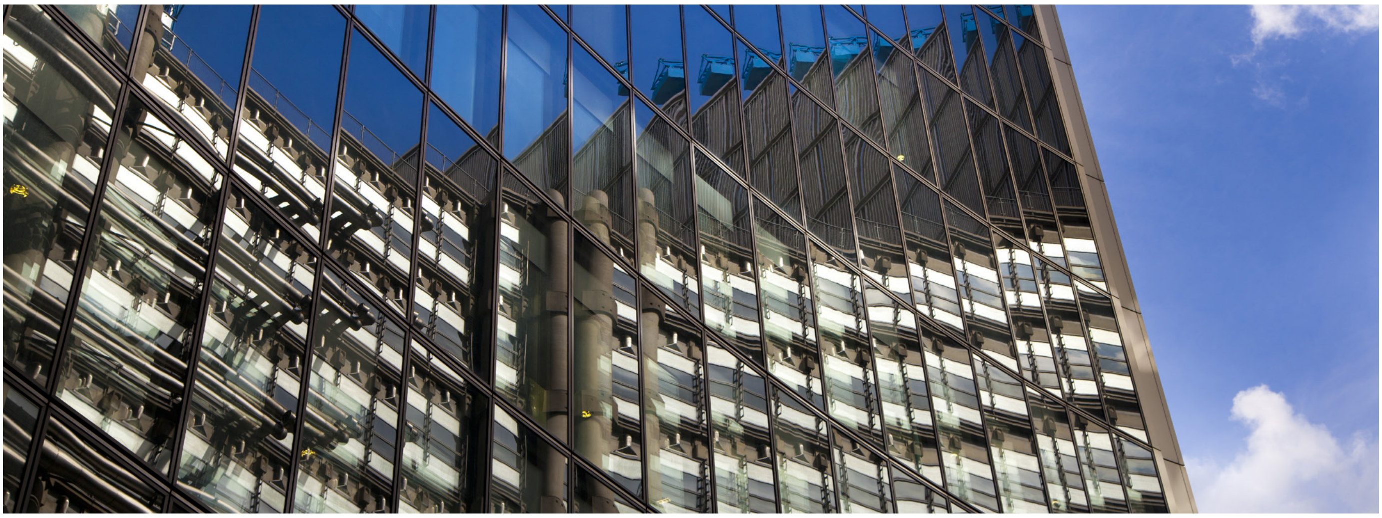
Legal

In 2019 significant changes were made to the regulation of solicitors. The 2019 SRA Standards and Regulations introduced a new Code of Conduct that is much shorter than the previous versions and marks a further shift again towards light touch regulation. The new code focuses on a small number of principles for individual solicitors and separately on management controls for firms.

Individual solicitors are now permitted to provide reserved legal services without the need to be authorised by the SRA as a recognised sole practice. Instead they can be a regulated freelance solicitor. Freelance solicitors cannot hold client money or incorporate but importantly are not required to hold insurance compliant with the Minimum Terms.

In addition solicitors who do not provide reserved legal services will not need to be regulated by the SRA at all. This means there is no requirement for them to hold any insurance at all.

The SRA also decided following its consultation on the Minimum Terms not to make any changes to them, such as reducing the minimum limit of indemnity.



In relation to claims, in 2019 the Courts considered on several occasions the area of loss of chance. A Claimant must show firstly that on the balance of probabilities that if he had been given different advice, he would have pursued his claim. Secondly he then needs to show he had a real and substantial chance of securing a better outcome if he had. That is a very low hurdle which can lead to a recovery of damages on a discounted basis of down to 10% even where the underlying claim was extremely weak.

*Perry v Raleys* concerned the Vibration White Finger Scheme and in issue was whether the Claimant could ho nestly have pursued a claim under it. The trial Judge decided that the Claimant did not pass the first stage test but the Court of Appeal overturned his decision. The Supreme Court disagreed and held that the first stage was not met and the Claimant was not entitled to any recovery.

In *Moda v International Brands Ltd v Gateley LLP* the Claimant had lost the chance to negotiate a profit share with a third party on a joint development of land. The third party gave evidence at trial that they would not have agreed to it. Despite this, the trial Judge held that this was insufficient to deny the Claimant a recovery under the first stage and the quality of that evidence was something that would be factored into the discount under the second stage.

Finally, in yet another VWF claim, in *Edwards v Hugh James Ford Simey,* the Supreme Court had the opportunity to consider the effect of after acquired evidence that was now available but would not have been at the time of the original claim. The Court of Appeal had discouraged the use of such evidence but unfortunately the Supreme Court did not consider it necessary to express a concluded view on the issue, this was due to the nature of the VWF Scheme.

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# Professional Indemnity

## Surveyors & Letting Agents

In 2019, in a major overhaul, the Royal Institute of Chartered Surveyors ("RICS") launched its new Home Survey Standard ("HSS"). For all RICS professionals undertaking residential survey work, the HSS will become the mandatory best practice benchmark with effect from 1 June 2020.

Gone are the confusing old references to Condition Survey, HomeBuyer Survey and Building (or 'full structural') Survey. Consumer clients will simply be offered a survey level 'one', 'two' or 'three' instead.

From a claims perspective, the HSS will be an important framework against which to assess liability. One very topical claims issue concerns the extent to which a surveyor must inspect the subject property's grounds or gardens. This will be particularly relevant to the notorious problems with Japanese knotweed or 'out of control' bamboo.

An unreported case in 2019 dealt with Japanese knotweed and highlighted the difficulties for surveyors; in *Ryb v Conway Chartered Surveyors* the surveyor advised that the property was in excellent condition but the purchaser then identified Japanese knotweed and paid £10,000 for it to be removed. The claimant successfully recovered £50,000 in damages from the surveyors, including for diminution in value. The case is important in illustrating that a property professional's duty of care extends to cover the grounds of a property as well as the property itself; many surveyors continue to explicitly exclude Japanese knotweed from their surveys.

It also illustrates the importance of taking notes and photographs of any inspection; the defendant had not taken any photographs of the garden. Section 4.6 of the HSS, under ‘legal matters’ says that RICS members “... should identify apparent and specific ... features that have possible legal implications ...” and: “... where appropriate, if the situation can be physically resolved, the RICS member will describe what needs to be done (for example ... cutting back an overgrown hedge) ...”. Potentially, therefore, where there are features in the garden that might be a source of neighbour disputes, the HSS will expect surveyors to raise a flag.

2019 reports and studies, including that from the RICS itself, have predicted a drop in both commercial and residential property values; 2020 is likely to see an increase in knock-on claims against valuers and surveyors.

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# Professional Indemnity

## Accountants

The role of auditors continued to be under the spotlight during the year, with further high profile corporate collapses including those of Patisserie Valerie and Thomas Cook. The Financial Reporting Council placed Grant Thornton into special measures as a result of the former and also heavily criticised PWC. It is investigating EY for the latter.

In December 2019 Sir Donald Brydon published his independent report into auditing and made 64 recommendations for reform. Some of these are very significant and include redefining the concept and purpose of an audit, the creation of a new audit profession subject to new principles and the introduction of suspicion into the audit process. We will wait to see whether the Government will implement any of them.

*Manchester Building Society v Grant Thornton UK LLP* went to the Court of Appeal during the year. Grant Thornton incorrectly advised the Claimant regarding the accounting treatment of long-term interest rate swaps and lifetime mortgages. When Grant Thornton's negligence was identified, Manchester Building Society had to break the long term swaps at a cost of £32.7 million, due to the negative market to market value of the swaps at the time. The trial judge held them not liable as they had not assumed responsibility for such losses.

The Court of Appeal held that that approach was incorrect and SAAMCO principles applied.  This was information and not an advice case.  As such however MBS had to prove that it would have avoided those losses if it had continued to hold the swaps. They alleged that if the advice had been correct they would have held the swaps rather than breaking them when the negligent advice came to light. At the time of trial, the value of the swaps had declined further and the Court held that even on the correct approach they had failed to demonstrate that they would have undertaken steps to offset the losses on them.

In *Evans v PricewaterhouseCoopers LLP* the Court disappointingly refused to strike out a tax advice claim on limitation grounds. Despite strong authorities on the proper approach to “wrong transaction” tax cases, the Claimants argued that this was a purely contingent loss case where time should not begin to run until HMRC issued a closure notice in 2014. The Defendants had argued that time began to run in 2001 when the transaction giving rise to the liability had taken place.

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# Professional Indemnity

## Insurance Brokers

Over the past year, law firms have started to see claims come in from brokers who have been relying less on the traditional, technical presentation of risks and more so on volume-based business, where mistakes are more likely to arise. In 2019, the Commercial Court clarified the law in relation to causation and loss in broker's negligence claims and some key regulatory changes, which impact brokers, have come into force.

Establishing a breach of duty from a broker is generally straightforward if a broker has failed to give advice in respect of a fair presentation, or failed to pass on information. Less predictable is whether a broker took reasonable steps – such as advising on suitable cover and elicit from the client matters which ought to be disclosed. These require a broker to think carefully about the nature of the insured, its priorities, the perils for the cover sought and the likely attitude and concerns of insurers – finding "unknown" unknowns. Where the problem goes to validity of cover, it becomes increasingly complex when the insurer is entitled to deny cover.

What if the broker had not been in breach? This is often a mix of what the insured and insurer would have done, and a question as to what third parties might have done. In *Dalamd v Butterworth Spengler*, insurers' position looked so strong that insurers were not pursued in the first place. Both insurers declined to indemnify on various grounds including disclosure, for which the claimant blamed and then pursued the broker. The claimant then sued the broker in respect of loss of indemnity in respect of both insurers.

The claimant said that the broker had created a "position of uncertainty" where the insurers' defence was reasonably arguable, and that therefore the insured was entitled to leave the insurers and turn to the broker. Mr Justice Butcher claimed that was incorrect. Such an argument is only extended to brokers in respect of a settlement (see the case of *FNCB Ltd v Barnet Devanney* [1999]).

Compared to the claim against insurers, it was held that the broker represented too easy a target. You could have a situation in which insurer and broker are both sued and the broker's liability would be determined on balance of probabilities. The takeaway point from this case is that where there is no settlement, the claimant must show that the insurer would not have been liable for the breach the broker was to be blamed for.

Brokers should also be aware that, from 1 April 2019, the £150,000 jurisdictional limit of the Financial Ombudsman Service ("FOS") increased to £350,000. The definition of "eligible complainants" was also widened so that, amongst others, companies with a turnover below £6.5 million and fewer than 50 employees, or an annual balance sheet below £5 million can now complain to the FOS. These changes are likely to lead to increased referral of claims against brokers to FOS.

In 2019, the Senior Managers Certificate Regime (SMCR) came into force for brokers. The new regime comes amid other regulatory changes such as the Insurance Distribution Directive (IDD) and General Data Protection Regulations (GDPR) which came into force in 2018. Brokers should ensure that they have fully implemented and are adhering to the new SMCR regime given the personal liability that could flow. In the year ahead, the FCA is likely to be focusing upon non-financial misconduct in the insurance market and senior managers within broker businesses must be able to demonstrate that they have robustly tackled such bad behaviour (for more insight on the FCA's focus on this issue, see Jeremy Irving's comments later in this review).

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# Directors’ & Officers’ and Corporate Liability

The landscape for SMEs and their directors has been made increasingly complex by regulatory requirements, increasing demands of investors, personal liabilities and generally meeting expectations.

Claims arising out of fraudulent conduct of individuals continued to feature heavily in the last 12 months. The question which invariably arose surrounded the robustness of corporate’s systems, its culture and the management by its directors. Many directors and senior managers have found themselves in difficulties because of the seriously inadequate checks and balances in place which allow frauds to be perpetrated.

SMEs have been continuing to grapple with the ever changing nature of cyber risks throughout this year as well as struggling to get to grips with the requirements of GDPR, which has left them exposed to data breaches.

In 2019 we saw a significant increase in claims by liquidators against directors of failed companies or claims following planned re-structuring involving voluntary liquidating group companies. We consider this reflected the continued rapid growth of the litigation funding market which has permitted Insolvency Practitioners to pursue more claims. In these cases, coverage issues invariably arise and we would recommend that underwriters carefully review the deliberate and dishonest acts exclusion in D&O policies to ensure they will perform as intended.

What can we expect in 2020? Insurers are more alive to the exposure on their Directors & Officers and CLL books and we expect to see an increase in relationships being built between the policyholders and insurers in an effort to manage their specific exposures pre-loss. Many insurers are inclined to offer services which allow policyholders to obtain legal advice early on as a part of a risk mitigation strategy. We anticipate an increase in broker services to include the education of SME clients in understanding the inherent risks they face.

We expect cyber and reputational damages claims to continue to increase in the next 12 months and with that we anticipate that many policyholders will look to purchase standalone cyber and reputational covers to address their additional needs.

The post-Brexit environment will continue to present challenges for many businesses and their directors. Given the growth of claims by Insolvency Practitioners noted above, those who fail to prepare adequately may find themselves exposed to claims from liquidators in the event of insolvency and perhaps claims as a result.

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# Employment Practices Liability

To cope with economic uncertainties – not least as a result of Brexit – many employers rely on a more flexible workforce, including self-employed contractors and workers, rather than solely relying on employees. But this flexibility can introduce a degree of uncertainty – when is an individual actually self-employed? When is a worker also an employee?

With employment practice liability insurance, status can be determinative of whether insurance cover applies. Whilst many policies technically cover more than just employees (for example, extending to job applicants), there is still often a distinction between employee and workers/self-employed contractors. And even if a wider definition of cover applies extending to workers, then an organisation needs to be in a position to accurately describe its workforce and the relevant categories that apply when seeking insurance.

2019 has seen a continuation of the status case law from 2018 – we ended 2018 with Uber drivers and Addison Lee couriers being held to be workers by the Court of Appeal and Employment Appeal Tribunal respectively, and Deliveroo riders bucking the trend and not being held to be workers. Over the year, we've had status cases for (amongst others) a Great Britain cyclist, foster carers, National Gallery art educators and a GP.

The trend will continue into 2020, with Uber's appeal to the Supreme Court awaiting a hearing date, and the outcome of a referral to the CJEU in respect of the employment status of Yodel couriers outstanding.

We may well also have further legislation introduced to clarify how status should be determined. In December 2018, the Government published its Good Work Plan outlining its proposals for reform of certain aspects of employment law. These included proposals for greater clarity over the determination of status, including aligning the tests for taxation and employment purposes.

There was also support for the recommendations made by Matthew Taylor in his report Good Work, that the tests for status should place more emphasis on control and less on the right to substitute.

The Government's more detailed proposals on how the employment and tax frameworks could be aligned are yet to be set out but it has confirmed that it intends to legislate to improve the clarity of the status tests, as well as improving the guidance and online tools available.

The Government's proposals to shift responsibility for the deductions of income tax and national insurance contribution to medium and large private sector organisations using contractors under the IR35 provisions – which is proposed to come into force in April 2020 – will keep the focus on status and could prompt the Government's more detailed proposals in respect of any changes to the applicable tests. Clearly, any changes to status definitions may well impact on policy wording and the scope of cover.

A further recommendation in the Taylor Report was that the burden of proof in status claims should be reversed so that the employer has to prove that the individual is not entitled to the relevant employment rights and not the other way round (subject to certain safeguards to discourage vexatious claims). The Government confirmed that it would return to this recommendation after an online tool for employment status had been developed. If implemented, this could well increase the number of individuals seeking to argue that they are employees (as the burden on them would be lower) as well as making it harder for employers to defend such claims.

Even if this change is not brought into effect, workers will gain greater rights and protections from April 2020 with new provisions in respect of the averaging of holiday pay and extending the right to receive a statement of particulars to workers (as well as the content required for such particulars). Employers will therefore need to take steps now to ensure that they are able to comply with these new requirements to avoid claims.

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# Public and Employers' Liability

The significant story over the last 12 months was the much anticipated revision of the discount rate, the rate used to adjust the lump sum award to claimants for future losses in personal injury claims.

The decision arrived in July 2019, with the Lord Chancellor fixing the rate at -0.25%. Although a shift from the previous rate of -0.75%, it remains some distance from the 2.5% that was in place prior to 2017 and fell short of the expectations of many who predicted it would be closer to 1%. The impact on insurers was substantial.

Whether the current rate accurately reflects the return claimants can expect on investment of their damages, or in fact represents a windfall, is for the time being a moot point. There will be the opportunity for further consultation within the five year cycle for review of the rate, but for now there is certainty following a period of uncertainty.

It is of some interest that the option of dual rates was acknowledged by the Lord Chancellor, which would involve a short term rate followed by a higher long term rate after a 'switchover' period (as has been adopted in Jersey). A move to this approach will be considered in subsequent reviews and the fact that it was specifically referenced is perhaps an indication of the likely direction of travel.

**Vicarious liability:**

In the vexed issue of vicarious liability; when an employer is held responsible for the acts of employees acting "in the course of employment" – is an issue which the courts continue to grapple with. We have recently seen contrasting decisions in *Bellman v Northampton Recruitment [2018] and Shelbourne v Cancer Research UK [2019].*

Both cases concerned incidents at Christmas work parties and involved application of the test determined by the Supreme Court in *Mohamud v WM Morrison Supermarkets* [2016]: (i) which functions had been entrusted by the employer to the employee (the "field of activities"), and (ii) whether there was sufficient connection between the position in which the individual was employed and the wrongful conduct.

In *Bellman* it was found the defendant employer was vicariously liable for an assault by the Managing Director of the company who had considered his authority challenged by the claimant. Placing particular emphasis on the standing of the perpetrator in the company, it was accepted that the act fell within the field of activities entrusted to him.

The defendant in *Shelbourne* was not vicariously liable for injuries suffered by the claimant after she was lifted and accidentally dropped by an employee, a visiting scientist. The actions of the employee were not sufficiently closely connected to his employment for it to be fair and just to hold the defendant responsible. He was on a "frolic of his own".

These decisions highlight that much will turn on the specific facts of a case and whilst the principles that underpin vicarious liability are well established, the position continues to develop. We now await the outcome of two notable cases which have recently been heard in the Supreme Court: *Various Claimants v Morrisons*, which concerns disclosure of personal data by an employee and *Various Claimants v Barclays Bank Plc*, where the court has been asked to consider whether the defendant employer is liable for sexual assaults committed by a contracted medical practitioner. The implications of these decisions are potentially wide-reaching and employers and their insurers will await the judgments with interest, as well as some trepidation.

As we look ahead over the next 12 months it seems likely that the immediate focus of the MoJ will be the implementation of the whiplash claims portal and the practical challenges that brings. There will be much for the new government to contend with and the wider MoJ reforms, to include a proposed increase in the small claims limit for employers' liability and public liability claims, may for now take a back seat.

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# Financial Institutions and Regulatory

2019 bolstered three propositions for financial services (FS) business:

- that it is virtually impossible to separate the risk exposures of FS firms and the regulatory framework which governs those firms;
- general insurance - including commercial and 'wholesale' or reinsurance - is not to be regarded as being subject or entitled to a lesser degree of regulatory scrutiny than other FS markets; and
- regulators are taking a holistic view of their requirements for FS firms – a firm and its personnel cannot take a different view of someone being 'good at their job' and meeting (or failing to meet) social, ethical or cultural standards of personal behaviour.

For FS firms, every operational risk (the risk of business activities having unintended adverse outcomes; terms of art such as this are broad terms in this article) translates into a form of 'conduct risk' (the risk of breaching regulatory requirements in relation to firm's dealings with its customers, personnel and third parties); or 'prudential risk' (the risk of breaching capital requirements).

Conduct risk and prudential risk are forms of 'compliance risk' (the risk of coming into dispute with regulators). These can result in the other, as can compliance risk and legal risk (the risk of legal relationships - such as under contracts - or proceedings having unintended adverse outcomes). For instance, an ineffective outsourcing contract could mean that a firm has inadequate capital readily available to manage an immediate problem.

To complete the picture, compliance risk and legal risk can themselves be seen as forms of operational risk.

Because of specific regulatory rules and common law principles that certain forms of regulatory sanction are uninsurable, insurance products specific to FS firms are focused on responding to the legal risk consequences and aspects of compliance risk (primarily, D&O and PI), especially the costs incurred in dealing with such risk.

However, terms in commercial agreements can provide legal mechanisms to transfer a wider range of compliance risk liabilities. In 2019, a dispute on the effectiveness, nature and consequences of such terms arose in *Axa v Genworth*, which related to the allocation between insurance and FS firms of costs arising in handling liabilities to customers from payment protection insurance (PPI) mis-selling.

The case turned on specific points of construction as to whether a liability-sharing clause should be classified as an indemnity, and accordingly give rise to claim handling and subrogation rights similar to those found in insurance policies. The broader point of interest was the court's re-emphasis that construing contracts must focus on the words used in the contract within the broader context of the 'factual matrix' between the parties, rather than first seeking to decide how a clause should be technically classified within the typologies classically used by lawyers.

**Given -**

- the scale of PPI mis-selling and other FS misconduct that has resulted in compliance risk exposures, and
- the need for FS firms to find ways to mitigate those exposures, further liability transfers, and disputes thereon, should be expected.

A key feature of the compliance / operational risk landscape for 2019 and beyond is the Senior Managers & Certification Regime (SMCR). This has the explicit aim of changing the culture of the FS industry, in particular by expanding the personal accountability of senior managers and re-shaping the standards of conduct for all FS firms' personnel.

SMCR is in effect a compliance risk overlay for the effectiveness of operational risk management. It has practical legal risk ramifications for governance (especially reporting lines, management information and conduct of board meetings), HR (especially employment contracts, performance and disciplinary processes, and training) and regulatory notifications, with greater obligations on firms to notify individuals' performance and disciplinary shortcomings.

SMCR has been given added impetus following regulator disquiet about the standards of personal behaviour in the general insurance market. Lloyd's of London published survey data that disclosed widespread bullying, excessive drinking and sexual harassment in the London Market. This publication was followed by a 'Dear CEO' letter from the Prudential Regulation Authority in October 2019 addressing the risks posed to the effective management of insurers from such misconduct. This was followed in early January 2020 by a similar letter from the Financial Conduct Authority as to the implications of improper behaviour for the fitness and propriety of firms' employees to carry out their roles, especially senior managers.

Outsourcing and insurance distribution in a 'soft' market continues to be a pressing consideration for firms and regulators. Lloyd's is revising its internal processes for approving delegated underwriting, which could entail new compliance risks.

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# Intellectual Property

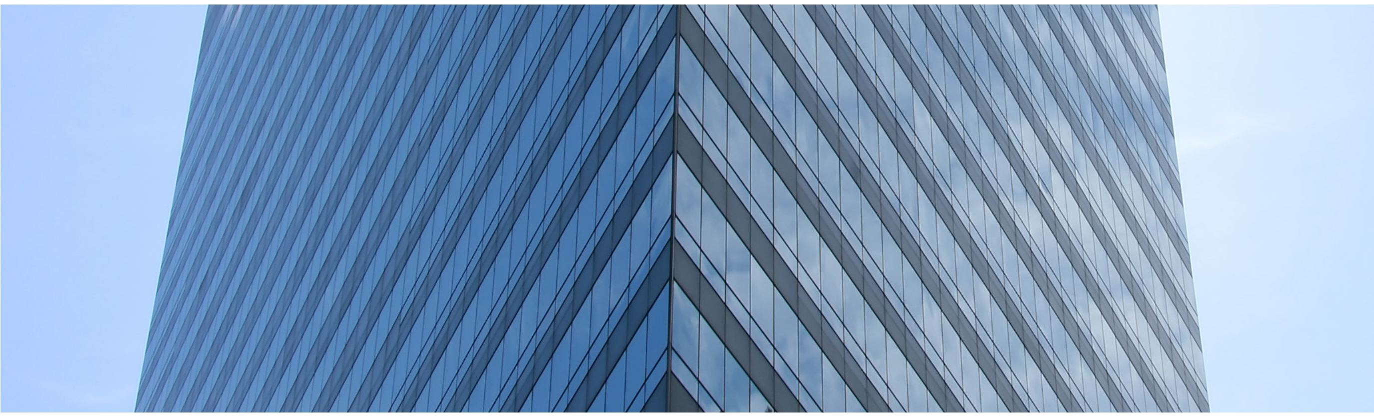
Over the course of 2019, trade mark validity challenges have become easier and more popular.

In *Sky v Skykick*, the Advocate-General said that marks can be invalid if their specifications are so broad that they are contrary to the public interest. For example, he considered terms such as “computer software”, “telecommunications” and “financial services” are too broad and can be challenged. These terms are very common.

Furthermore he stated that if a mark is applied for without intention to use it in relation to the goods or services specified, this can constitute bad faith. However, where bad faith of this kind exists in respect of certain goods or services registered, the mark should only be declared invalid as regards those goods or services.  Whilst most opinions from the Advocate-General are followed by the court, we are expecting their decision in 2020.

In further discussion of bad faith, the European Union Intellectual Property Office Board of Appeal said in the Monopoly decision that “evergreening” a mark can also be bad faith. “Evergreening” means re-applying for a mark when there is already an existing mark. This practice is often used to avoid having to demonstrate use of a mark. This decision has now been appealed to the General Court.

These decisions make it easier to defend trade mark claims, and we are seeing similar arguments in a lot of cases, but they do also add to the cost and complexity.



Copyright protection has been extended and copyright claims are increasingly prevalent.

In *Cofemel*, the Court of Justice of the European Union ruled that copyright subsists in a design if it is its author's own intellectual creation. Portugal was not entitled to deny protection unless other criteria – like artistic value or intent – are met.

It remains to be seen how the English courts will interpret these changes. The ruling does not appear compatible with the wording of the Copyright, Designs and Patents Act 1988, which purports to restrict protection for some works, especially 3D works. However, this expansion of copyright protection is likely to increase litigation and give previously cautious brand-owners more confidence to bring infringement claims.

This aligns with other developments in case law about lookalike products. One notable decision concerned Charlotte Tilbury, which is owned by Islestarr. In *Islestarr v Aldi*, the UK High Court (under the Shorter Trials Scheme) found that Aldi had infringed Islestarr's copyright by producing a lookalike make-up palette. The court found that Islestarr's joint efforts with a design agency on the palette design had created original artistic works, the copyright of which had been validly assigned to Islestarr. The copied features were not unoriginal or commonplace and the similarities were substantial meaning that there had been infringement.

This has previously been difficult for claimants, and passing off claims based on packaging have previously failed *(see Moroccan Israel v Aldi [2014])*.

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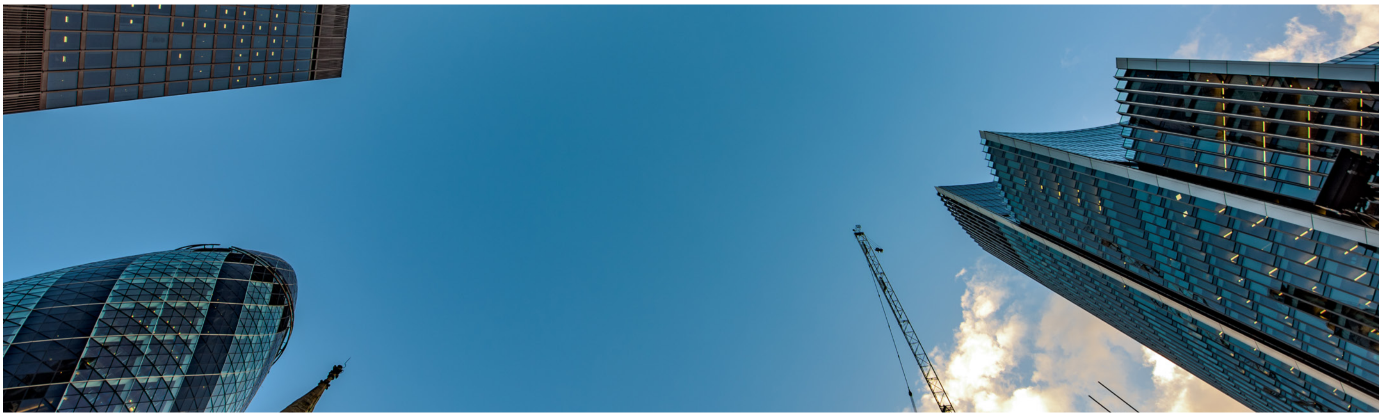
# Fraud

Fraud remains a sizeable burden on insurer resources, and takes up significant judicial time. Even judgment is not the end of the matter. A reversal of Qualified one-way costs shifting leads to additional time and cost in satellite litigation, such as costs enforcement. In appropriate cases parties seek to reinforce the societal impact by pressing for punitive sanctions through contempt proceedings or private prosecutions.

However, the landscape is changing and mostly for the better. Since the decision in *Hayward v Zurich Insurance Co PLC* [2016] the Supreme Court has encouraged parties to a settlement to treat it as final, thereby avoiding further costs and Court time, save where settlement was reached on fraudulent misrepresentation.

This year saw the restatement and underlining of this principle in the case of *Takhar v Gracefield Developments Ltd & Ors* [2019]. When denied the prospect of bringing expert evidence of forgery, through expert evidence on an agreement purporting to transfer property in the first instance Mrs Takhar sought to set aside judgment after trial. She lost after obtaining such evidence. The issue was never tried as she had been deprived the opportunity and it had never been formally raised; and the High Court did not seek to impose upon her the strict test of reasonable diligence in bringing the issue before the Court earlier. The Supreme Court reiterated this as a matter of public policy. This was however subject to two qualifying factors – that the issue had not been expressly raised and dismissed or there was a deliberate decision not to investigate and pursue it.



This is more positive news then for the victims of fraud, where material evidence of dishonesty is discovered even after conclusion of the case.

Interestingly the issue of material evidence has now proved fatal to claims governed by QOCs, where fundamental dishonesty can cause a claim to be dismissed outright or costs awarded pursuant to CPR 44.16.

On appeal before Mr Justice Knowles, in the case of *Haider v DSM Demolition* [2019], Mr Haider was held to be fundamentally dishonest where in a credit hire case he failed to provide material evidence of his creditworthiness. The explanation given by the Claimant in that matter was weak, implausible and not accepted by Judge Knowles.

Deliberate failure to disclose highly material evidence was by inference nothing other than a deliberate attempt to avoid giving full disclosure, which in the circumstances could only be labelled dishonest. The question remained whether such a deliberate dishonest omission could be characterised as fundamental to the claim. Any matters which go to the root of the claim, such as a substantial financial element of the claim, for example credit hire, would be fundamental. This is particularly so where such evidence needed to be supported with a statement of truth.

Applying this decision in the Browne Jacobson case of *Sahota v TTAS Assembly Systems Ltd* (as yet unreported), Deputy District Judge Wyatt held the Claimant to have been fundamentally dishonest in not disclosing his previous relevant medical history to two experts. In this case he was seeking extensive loss of earnings after a workplace injury.

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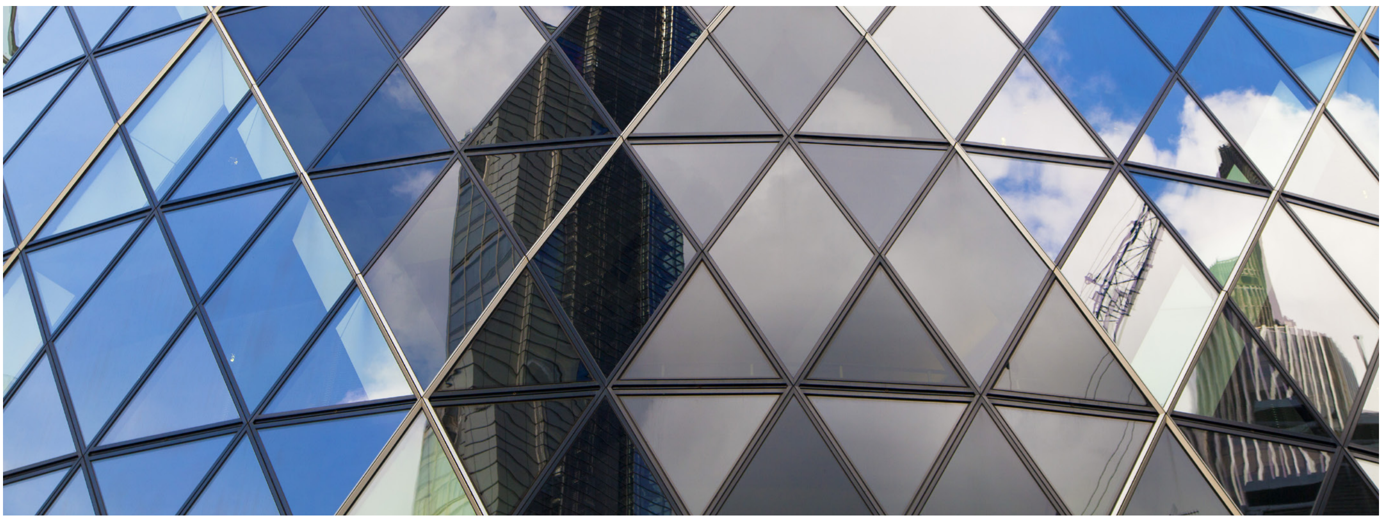
# White Collar Crime and Regulatory

It is well known that fines for health and safety offences have increased very significantly. However two recent judgments of the Court of Appeal provide assistance for organisations and practitioners alike as regard interpretation of the Sentencing Guidelines. In each case fines were notably reduced.

In *R v Faltec* [2019] the company was prosecuted for three offences under s2 and 3 of Health and Safety Act 1974 (two of which related to legionella) leading to a sentence of £1.6m in total.  An important aspect of the sentence imposed by judge in the Crown Court was his analysis of the likelihood of harms arising. Following the principle in the earlier case of *R v Squibb* [2019], the Court of Appeal observed that the assessments of likelihood of a particular level of harm arising should be based on scientific evidence rather than supposition or impression. The Court of Appeal felt that the judge had not approached matters in that way and reduced the total fines by a sum of approximately £420,000. This judgment increases the likelihood of defendants and indeed regulators presenting detailed expert evidence to the court during a sentencing exercise and the likelihood of that evidence being interrogated by the judge. Possibly requiring the experts to give evidence at a hearing to establish the facts upon which a defendant should be sentenced.



In the *Faltec* case, the Court of Appeal also remarked (in sentencing upon the principle) the taking into account of the resources of a linked organisation when considering the financial circumstance of a defendant. However this was explored specifically in *R v Bupa Health Care Homes Ltd* [2019]. The Judge in the Crown Court had imposed a fine of £3million and had relied upon the turnover of the parent company which was in the region of £12 billion and thereby as he saw it had taken into account the "economic" realties of the Bupa group as a whole. The Court of Appeal made clear that in the absence of the "special" factors the mere fact that one company is wholly owned by a parent does not mean that the resources of the parent are to be seen as part of the turnover of the subsidiary. In the Bupa case the defendant company before the court did not delegate its health and safety responsibilities to the parent and was a large profitable organisation in its own right.

Whilst there is no question the sentencing landscape has changed for health and safety offences these cases serve as a reminder that any approach to sentencing must be structured and a reasonable, balanced and logical approach taken at each stage.

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# Costs

The cases of *West v Stockport NHS Foundation Trust* and *Demouilpied v Stockport NHS Foundation Trust*, while on the subject of ATE Premiums, managed to provide some unhelpful guidance on proportionality and how the Court of Appeal may envisage this being dealt with on assessment. This involved the Court taking a line-by-line approach at assessment before taking a step back to determine whether the assessed sum is still disproportionate. If it is, the Court should make further reductions either on specific phases or on the costs as a whole, but exclude any unavoidable costs such as court fees and VAT.

Budgeting continues to thrive with the guidance on Precedent H being updated and a new Precedent R introduced. The key points of note are:

1. 'Incurred costs' are now defined as all costs incurred up to and including the date of the first costs management order;

2. The costs of amending the budget now have to be included in the CMC & PTR phase (where previously they were caught by the 2% allowed in PD 7.2); and

3. Counsel's brief fee is to be included in the Trial Preparation phase, and not the Trial phase.

Finally, HHJ Dight also considered a 'good reason' to depart from a costs budget.

In the case of *Barts Health NHS Trust v Salmon* it was found that in a costs managed case where the receiving party was seeking less per budgeted phase in the inter partes bill at the conclusion of the matter than the budgeted amount, this would be deemed to be a 'good reason'.

It was further found that in this situation, where a good reason to depart had been established, the paying party does not need to establish a further good reason in order to reduce the costs.

Looking forward, there is no doubt that the Government remains concerned about the rising cost of motor insurance premiums and the number of whiplash claims still pursued.

Reforms are already in place through the Civil Liability Act 2018 to cap whiplash compensation payments; ban the settlement of claims without medical evidence; and increase the small claims track limit to £5,000 for RTA cases.

Alongside this, there are plans to extend the Fast Track to cases worth up to £100,000, and capture those cases under a fixed costs regime.

While on the subject of fixed costs it is perhaps unsurprising that Claimants and Defendants failed to agree the level of fixed costs for clinical and medical negligence claims – but that is not of course to say that they won't be implemented – at least in cases of a value of up to £25,000.

The funding of cases also remains high on the agenda with Nicholas Bacon QC and Professor Rachael Mulheron having another look at the Damaged Based Agreement Regulations and whether they can make it work (only 7 years after the first attempt failed).

Finally, it seems that the public are not particularly happy with their Solicitors as the Senior Courts Costs Office reports a significant increase in Solicitor Act assessments (i.e. the solicitors vs their clients). This is, it seems, largely as a result of claimants now having to pay a success fee out of their own damages – particularly when, as in the recent case of *Herbert v HH Law Ltd* 2019, this was set at 100% simply because it was the model the solicitors adopted rather than specific to the risks of the case.

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# Cyber and Data

The scope of what constitutes ‘cyber’ is continually expanding as new virtual and computer based products are brought to market. Gone are the days when cyber simply meant a computer and the cyber risk was a computer virus. Smart phones, Smart White Goods and the elusive ‘cloud’ storage system are all woven into day to day life.

A cyber event can have potential implications for almost all insurance policies including property, motor, contingency, risk/crisis containment, product and public liability policies.

The question is: have insurers and policyholders given proper consideration to the extent of cover for cyber related losses within their non-cyber policies and has this been made clear in the policy? This has been coined the ‘silent cyber’ risk.

For example, does a home insurance policy cover damage caused by hacks (such as fire damage from an exploding smart toaster or a security leak from an Amazon Echo?) What about a ransomware attack on a business: is there cover for first party data loss, third party personal injury claims and damage to reputation? Is there a difference between malicious acts and accidents? Do public liability policies cover claims for distress arising from a data breach? The list of potential scenarios is almost endless.

A survey commissioned by the PRA in 2017 revealed that not all insurers had a) identified the extent of cyber cover within their non-cyber policies; and b) modelled their business accordingly.

The PRA is concerned the insurance market has not kept abreast of the cyber impact on traditional insurance lines. This in turn represents a regulatory risk as customers may not know what their policy covers. For insurers, there are clear prudential issues if there has been inadequate consideration of the risks posed by a cyber event, which could translate into inaccurate pricing and insufficient protections against the potential impact of such an event.

Insurers have been warned of their need to assess, identify and clarify what cover is available for losses caused by a cyber event within their non-cyber policies.

The Lloyds Market Association has set a strict timetable for Lloyds' syndicates to engage with the PRA guidance and complete a review of its policies. The first deadline to address silent cyber in many lines of business is January 2020 (see the Y5258 Bulletin for further details). For insurers in the company market there are no specific deadlines for now, but we anticipate further guidance and timetabling will follow. What is clear is that all insurers are expected to actively engage with the guidance on silent cyber risks.

We have set out the key steps to tackling silent cyber risks below:

1. **It Starts At Board Level**
   The PRA has made clear there needs to be a board level consideration on the risk appetite. What do insurers actually want to cover?

2. **Review Your Products**
   Is the policy affirmative or silent on cyber risks?

3. **Clarify Underwriter Intention**
   If it is non-affirmative, what is the intention? Is that clear to the policyholder?

4. **Actions**
   If the policy is not clear on whether cyber risks are covered insurers need to consider amending policy wordings, proposal forms and notify customers with summary change documents to be explicit about the cover and any applicable limits.

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# Medical Malpractice

The decision in *Barclays Bank v Various Claimants* was back before the Supreme Court on 28 November 2019, with a Judgment eagerly anticipated.

This is a landmark case which blew away the previous ‘bright-line’ test for whether an individual is an employee or not and, hence, whether vicarious liability will render the organisation employing or engaging their services liable for negligent acts of omissions. Many healthcare providers (and their insurers) have relied upon a business model based upon commissioning services from medical professionals as ‘independent contractors’ rather than employing them directly, often requiring the medical professionals to hold their own indemnity in the event of a claim.

But in a case decided in 2017 (later upheld by the Court of Appeal) that business model was shown to be unsafe as far as various liability and indemnity arrangements are concerned. Despite this, some health providers have been slow to review their business models including their contractual and indemnity arrangements, for unless the Supreme Court reverses the 2017 decision (which we think is unlikely) it matters little whether the organisation itself, the contract or even the medical professional concerned consider this to be an employment situation. Under the present law, the Court is required to look at 5 key criteria to determine whether the relationship is one of employment or ‘akin to employment’ and, if so, was the tort sufficiently closely connected with that employment or quasi-employment. Those characteristics include:

1. is the organisation more likely than the individual ‘tortfeasor’ to have the means and insurance to compensate the victim;

2. was the tort committed as a result of activity by the individual on behalf of the organisation;

3. was the individual’s activity in reality an integral part of the organisation’s business activity and carried out for the organisation’s benefit;

4. did the organisation, by engaging the individual to carry on the activity, create the risk of the tort committed;

5. was the individual, to a greater or lesser degree, under the control of the organisation, in particular with regard to what the individual does.

This approach is less certain than with a bright-line test. You could often reach opposite answers for the same case depending on how you apply the facts. Whilst these criteria are not ranked or given any formal weighting relative to each other, we would suggest that (1) above may be the 'first among equals', since this decision was doubtless underpinned by a public policy drive to avoid victims (such as the patients of the disgraced surgeon, Ian Paterson) being left without a remedy if the individual medical professional is unable to compensate for the harm that has been caused.

The case for treating a medical professional as akin to an employee will probably be strongest if his/her Medical Defence Organisation exercises its discretion not to indemnify, or if the insurance contains a relevant cap, exclusion or aggregation clause that may otherwise leave the patient uncompensated. This is especially the case where the organisation can be said to have a high degree of oversight over what work was performed and how, enjoyed the main commercial profits and suffered any commercial losses as a result of the relationship. We suggest that any tort committed during a medical consultation or treatment (out of hours or away from the organisation's premises) is almost always likely to be deemed 'sufficiently closely connected', if it passes this first part of the test.

For insurers, depending on how the policy is worded this may mean being on risk for the acts or omissions of individuals it was unaware of and who had never been considered as employees of the insured. Where the policy wording excludes such individuals, the insured can be left having to deal with such claims as uninsured loss. For instance, we are seeing a growing number of cases involving locum, Fly-in, Fly-out foreign doctors or dentists who will probably be deemed akin to employees. In a few cases, although the organisation had made it a contractual requirement for the individual to hold adequate insurance, either the individual was outside the jurisdiction and could not be contacted, the policy (once translated into English) was limited to circa £7,000 costs inclusive, or there was no run-off cover for a claims-made policy after a foreign doctor returned to his home country and did not maintain the insurance.

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# Property

Last year, we predicted a shift from cyber data breach and liability claims to claims involving property damage and business interruption.

Reflecting this, in March 2019 the Norwegian aluminum producer Norsk Hydro became the victim of a ransomware cyber-attack, impacting operations in several business areas. It's 'Extruded Solutions Unit' suffered the most significant operational challenges and losses and was forced to halt some production. Other business areas such as Bauxite & Alumina, Primary Metal, Rolled Products and Energy worked through the attack by increased manual operation.

Norsk Hydro estimated the cost of the attack in the range of Norwegian Krone 550m to 650m (circa US$60m to US$71m). It is said to be covered by its cyber insurance, although reportedly only US$3.6m has been paid out to date.

In April 2019 there was also the first case on 'fair presentation' under the Insurance Act 2015, handed down by the Scottish Court of Session.
In Young v Royal and Sun Alliance Plc [2019] the insured sought an indemnity for £7.2m following a fire at its commercial premises. RSA sought to avoid the policy on the basis of a breach of the duty to make a fair presentation under the 2015 Act. The insured maintained that RSA had waived disclosure of the non-disclosed information.

The dispute centred on the broker's market presentation that the insured had completed in which it was asked whether "…any proposer of the... business… either personally or in any business capacity…been declared bankrupt or insolvent..."

A director of the insured had been a director of four other companies which had been declared insolvent. The insured took the question to refer to the insured company or its directors' personal insolvency.
The insured answered in the negative.

The Scottish court held:

- the 2015 Act did not alter the existing law on waiver;
- waiver arose in one of two ways: (i) where the insured had submitted information that would prompt a reasonably careful insurer to make further enquiries but the insurer didn't do so, or (ii) where the insurer had asked a 'limiting question' so that the insured can reasonably infer that the insurer does not want to know information falling outside the scope of that question;
- waiver is not readily inferred and the insured has the burden of proving waiver;
- the correct test for (ii) above is would a reasonable person reading the proposal form think that the insurer had limited itself from receiving all material information;
- RSA sent an email following the market presentation which indicated that cover was subject to confirmation that the "Insured has never been declared bankrupt". It was clear that the policy was subject to matters going to 'moral hazard'. The reference in the email to 'the insured' clearly included a director acting in his business capacity;
- It was important that RSA had not sent the insured a proposal form. The information in the market presentation was controlled by the broker and insured.

In May 2019 the Commercial Court considered in Sartex Quilts and Textiles Ltd v Endurance Corporate Capital Ltd [2019] EWHC 1103 (Comm) the test for awarding an indemnity on a reinstatement basis under a property policy. Sartex sought an indemnity on a reinstatement basis, even though it had still not reinstated the property 8 years after a fire. Insurers argued the indemnity should be by reference to the market value of the buildings, plant and machinery.

The policy had an express reinstatement clause but it did not apply because the costs of reinstatement had not yet actually been incurred. As a result, the policy provided that the amount payable was ‘the amount which would have been payable in the absence of this condition’.

The Court concluded the insured had intended to reinstate at the time of the fire. Looking at all the circumstances, including events after the fire, that intention continued even though little had been achieved in respect of the reinstatement works 8 years on.  Accordingly, the reinstatement basis applied.

Insurers have appealed and the appeal will be heard on 21 or 22 January 2020.

Sadly as the current bushfires in New South Wales and Victoria in Australia demonstrate, natural catastrophes will continue to play a major part in property damage losses in 2020 and beyond. Whether it be wildfires in Australia or California, hurricanes in the Caribbean or Gulf Coast, or flooding in the UK and Europe, severe weather now impacts property in all parts of the world on a regular basis.

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# Environmental

Environmental concerns are more high profile than ever before and it appears this is set to continue in 2020. The public attitude has significantly changed over the past year which is putting pressure on corporations and government to take positive steps to effect environmental change. The trend for more environmentally focused government policy and the pressure for organisations to be greener will inevitably impact on insurers and the insurance market.

On 15 October 2019 the Government announced they were preparing to introduce a Landmark Bill "to tackle the biggest environmental priorities of our time". The Bill is set to put the environment at the heart of all future government policy. It obliges policy makers to "have due regard" to environmental principles when choosing policy options.

We are set to see legally binding improvement targets that will be reviewed every 5 years. The focus of the Bill is on air and water quality, plastic pollution and restoring and enhancing natural habitats. A new public body will be established - the Office for Environmental Protection who will act as the government's own domestic watchdog – intended to replace the role currently discharged by the European Commission. New environmental obligations to be created by the Bill present opportunities for insurers to cover the risk of non-compliance with these obligations.

With regards to the impending Brexit deadline, as much as two thirds of current UK environmental law is derived from EU law. This is to be carried forward on Brexit day by the plethora of EU Exit statutory instruments. The big issue is the extent to which, in the future, there may be departures from those EU derived regimes.

Key issues for insurers are:

- Devolution of environmental issues means that there could be divergence of environmental law across the UK devolved administrations – leading to complexity and potentially the need to create separate approaches for insurance policies in different UK countries;
- Issues such as flooding have been impacted by EU measures such as the Water Framework Directive and insurers will need to monitor the manner in which water and flood management policy develops post Brexit;

- Brexit has little or no effect upon the English and Wales common law principles which often found key environmental law issues for insurers;

The Climate Change Act 2008 has been amended to require the UK to reach net zero emissions by 2050. The target recommended by the Committee on Climate Change is heavily reliant upon legislation and government policy to effect the change.

A reduction in human-induced global warming may influence a reduction in extreme weather conditions. Last year the UK suffered major flooding which affected a considerable number of properties and in 2018 the heatwave led to wild fires in parts of the UK. The impact of such events can have a devastating impact on the lives of individuals, smaller businesses and infrastructure.  If such events occur more frequently in the future then they will have a significant effect upon insurers.

The UK is a global leader in the finance and insurance sector making it well placed to take the lead in developing products to finance low-carbon investment. Developing these products will be important in helping to meet the 2050 target.

In April 2019 the Prudential Regulation Authority published Policy Statement PS11/19 and Supervisory Statement SS3/19 which set out the PRA's expectation that firms must enhance their approaches to managing financial risks arising from climate change and the transition to a carbon neutral economy.

In addition to the financial risks, insurers themselves will be expected to place their own operations into more sustainable and low carbon delivery mechanisms. Home working, electric vehicles and the use of public transport are basic measures which are likely to feature.

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# Construction and Engineering

Unsurprisingly, the shadow of Brexit hung over the UK construction industry for much of 2019. Combined with uncertainty in relation to key projects such as HS2 and Heathrow, and the political inertia prior to the Christmas election, construction output suffered, with projects being shelved and investment plans reined in.

However, the picture was not as bleak as many had predicted, and many firms maintained a steady stream of work. In London, some larger projects were resurrected as foreign investors capitalised on lower construction costs due to a weaker pound, and Boris Johnson becoming prime minister in the summer increased the positive sentiment given his promises to boost infrastructure.

The uncertainty had some noticeable results:

- Contractors trying to include “Brexit clauses” in their contracts to protect against further instability. Such clauses were typically rejected by employers, resulting in contractors pricing in the risk.

- More claims, likely caused by the lack of new opportunities and the squeeze on main contractor cash flow. Whilst a recent study identified a decline in the number of disputes progressing to formal dispute resolution processes by almost 50%, this reflected a shift in strategy only, with parties seeking advice regarding dispute avoidance and being willing to compromise to avoid formal conflicts.

In other trends, as a result of Grenfell and Carillion, insurance became an issue for many contractors, with increased premiums and deductibles. Some companies elected to self-insure in some areas, accept insurance on restricted terms.

A lack of skilled labour continues to be a real issue. Many firms remain concerned regarding future immigration policy, which may result in their EU workforce being deemed not skilled enough to work in the UK. The risk of these issues causing problems which give rise to insured liabilities is impossible to ignore.

The right of companies in liquidation to adjudicate was reviewed in *Bresco Electrical Services Ltd v Michael J Lonsdale Ltd* and *Meadowside Building Developments Ltd v 12-18 Hill Street Management Company Ltd* The Court of Appeal held in Bresco that whilst the right to adjudicate is not automatically lost when a party goes into liquidation and there may be a cross claim, it was “an exercise in futility” to allow an adjudication to continue as the courts would not enforce any decision, and would grant an injunction to prevent the adjudication from continuing. However, the Court envisaged that exceptional circumstances may arise, and Meadowside clarified that they would likely exist where: (1) the adjudication deals with a final net position between the parties under the contract; (2) satisfactory security is provided in respect of any (a) sum awarded in the adjudication and (b) adverse costs order against the insolvent company; (3) it is a question of fact what “satisfactory security” is and may involve a liquidator undertaking to ring-fence the adjudication sum so that it cannot be distributed / a third party providing a guarantee / bond / ATE insurance; and (4) any funding agreement or security put in place is not an abuse of process.

The Hackitt review into building regulations and fire safety continues to impact the industry, with the launch of a government consultation in June. Proposals included placing new responsibilities for high-risk residential building safety onto designers, contractors and clients and a new building safety regulator to police them. Some experts are concerned these proposals could bring projects to a halt and create a two-tier building control system with all the expertise centred on high-rise residential buildings.

What's on the horizon for 2020? Given the Conservative's 80-seat majority, and the certainty that the UK will leave the EU at the end of January, contractor and housebuilder share prices have rocketed with the restored confidence in the market. However, the industry wants a soft Brexit, and it's not clear if Mr Johnson will deliver this.

Finally, we expect to see the construction industry use engineering, technology and design to minimise emissions and maximise sustainability. This may include buildings facing higher environmental standards, requirements to switch to lower carbon heating, and support for modular construction (the government has turned to this in order to help meet its ambitious pledge that 300,000 new homes will be built every year by the mid-2020s).

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# International

The international insurance market has seen continued rate increases and reductions in capacity throughout 2019 and buyers worldwide are facing a hardening market for many risks. Trends to look out for include the impact of natural disasters, political turbulence and high-tech consumer insurance on the market in the months ahead.

**Natural Disasters**

The frequency and severity of catastrophic events in 2019 has had an impact on insurance losses globally. These are not limited to claims for “pure” residential property loss and its effects; over 50 per cent of claims resulting from the Chilean earthquake were claims for business interruption. Many carriers have had huge exposure as a result of the Californian and Australian wildfires.

When it comes to adaptation of policies, 2020 is likely to see more catastrophe-related add-ons; wildfire, for example, is no longer a “throw-in” when it comes to US property policies. Without sufficient data to accurately predict such catastrophic events, smaller insurers are likely to exit unprofitable areas where exclusions cannot be applied. Those who can afford “big data” will be able to exploit information for better pricing, underwriting and loss control.

**Political Risk**

The frequency of natural disasters coupled with increased political risk made 2019 a difficult market for insurers. Political risk has not just been evident in developing countries, but also in the United Kingdom where the instability of having a national referendum and three General Elections over the past four and a half years has contributed to uncertainty within the market. Insurers, like other companies, have spent significant resources on Brexit preparation, including making policies “Brexit-proof” after the UK’s departure.

Tensions between the US and Iran are at an all-time high, especially with the recent drone strike resulting in the death of the Iranian General Qasem Soleimani. In Hong Kong, protests are ongoing in relation to the extradition of criminals to mainland China and in South Korea, tensions are high after a joint Russian-Chinese air patrol encroached South Korean airspace.

Perhaps unsurprisingly, however, it is not protests or electoral uncertainties which cause the most severe disruptions, but politically motivated cyber-attacks. Only a quarter of firms buy political risk insurance; we are likely to see this as an area of growth in 2020, given that political events continue to dominate.

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# Australasia

The Federal Court of Australia recently published the first judgment by an Australian Court in a securities class action in *TPT Patrol Pty Ltd v Myer Holdings Limited* [2019].

Whilst the Court held that the class suffered no loss even though defendant had contravened its continuous disclosure obligations, the judgment highlights the need for listed entities to comply with continuous disclosure obligations.

Myer Holdings Limited (Myer), an ASX listed company, together with its subsidiaries, operates Australia's largest department store. On 11 September 2014, Myer's CEO forecasted that Myer's net profit after tax (NPAT) for the 2015 financial year (FY15) would exceed the $98.5 million net profit achieved in the 2014 financial year.

On 19 March 2015, in an ASX announcement, Myer revised its FY15 NPAT forecast to be $75 – $80 million.In bringing proceedings in the Federal Court of Australia, the class alleged Myer had contravened its continuous disclosure obligations and engaged in misleading or deceptive conduct under the ASX Listing Rules and the Corporations Act 2001 (Cth) (Corporations Act) by failing to make any corrective disclosure prior to 19 March 2015. Myer was subject to the continuous disclosure obligations under section 674 of the Corporations Act and listing rule 3.1 of the ASX Listing Rules. Listing rule 3.1 states that once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.

Justice Beach found that Myer had the opportunity to correct its original FY15 forecast before its corrective announcement on 19 March 2015, but failed to do so in breach of the Corporations Act and ASX Listing Rule 3.1.

However, his Honour went on to find that Myer's contraventions did not cause the class any loss because the 'hard-edged scepticism of market analysts and market makers at the time of the contraventions' had already factored into the price of Myer shares an NPAT that was well below the $98.5 million figure originally represented by Myer's CEO.

Therefore, any corrective statement Myer made before 19 March 2015 would likely have had no effect or no material effect on Myer's share price.
Perhaps, most significantly, his Honour endorsed indirect or market-based causation theory, by which the class was required to prove only that there was non-disclosure or misleading information which caused the share price of securities to be inflated and the class purchased those securities at that inflated price.

The endorsement will be seen as a major victory for litigation funders and class applicants as it supports the notion that class members need not individually demonstrate that they relied on any misleading representations.

**Implications**

Given this is the first judgment in an Australian securities class action, it has not unexpectedly given further guidance on a range of elements, including:

- how a listed entity's disclosure obligations will be assessed, particularly on how the materiality of information will be assessed and limitations around ASX Listing Rule exceptions;
- the amenability of Courts to accept market- based causation in class actions, albeit qualified to some degree by his Honour's further comments that individual class members may still need to satisfy an onus to give direction causation evidence; and

Further, while the 'no loss' decision was favourable to Myer in this instance, the implications of the decision are unlikely to make an already difficult D&O insurance market any easier for businesses, particularly in relation to side C cover.

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# Europe

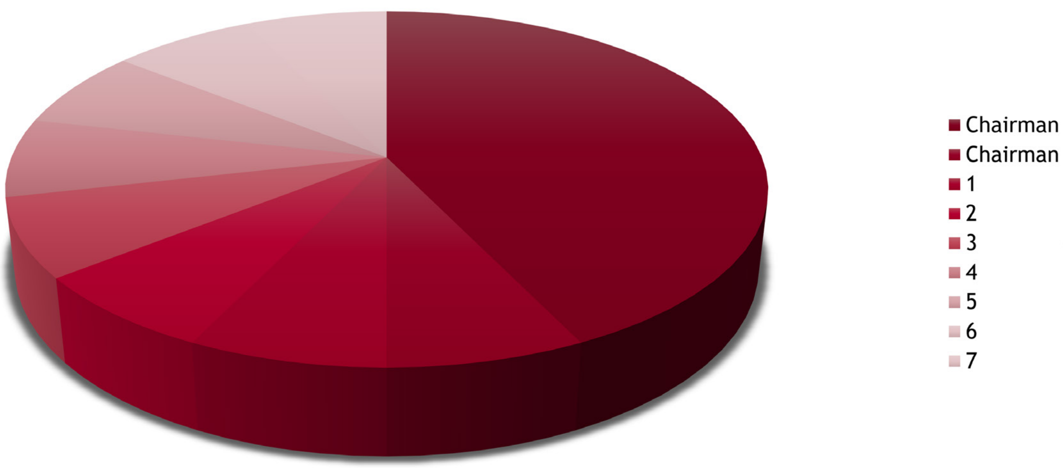
In recent years, managerial responsibility for members of the board and the management in Danish banks has resulted in a number of lawsuits in Denmark. Initially, these cases were focusing on personal liability for damages relating to operation beyond despair. However, the cases have been processed in such a way that the rulings have focused on liability for damages relating to single operations. These “bank cases” have led to renewed focus on the need to take out D&O insurance.

The latest ruling related to a situation where only one member of the management out of 11 defendants had taken out D&O insurance. The insurance amount (DKK 100,000,000) was not sufficient to cover the claim of DKK 225,000,000 (approx. EUR 30,000,000).

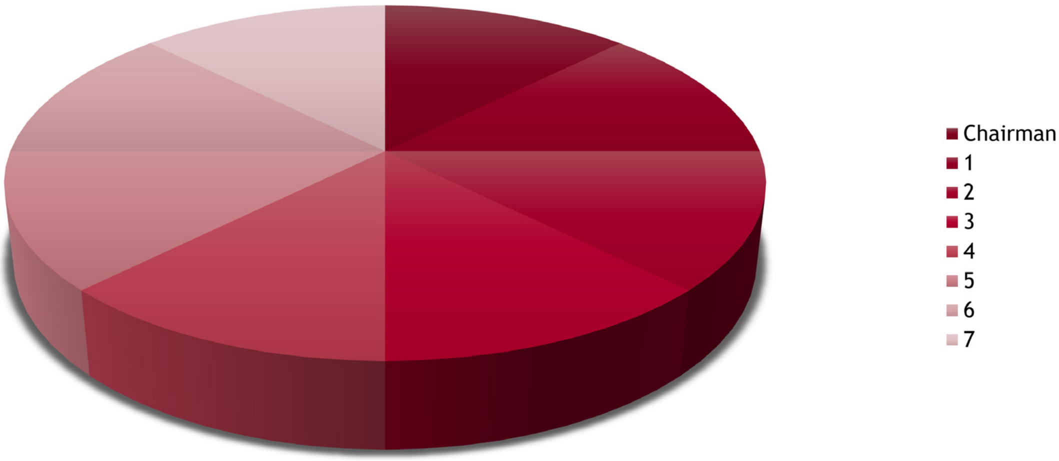
Eight out of 11 former members of the management were ordered jointly and severally to pay compensation of DKK 225 million with the addition of interest and costs.

In allocating the mutual responsibilities, the High Court attached importance to any existing insurance. The chairman of the board had taken out a D&O insurance at an amount of DKK 100 million. In the grounds, the High Court took into account that if there was insurance cover, the chairman should indemnify the other board members who were found to be liable.

Consequently, the mutual responsibilities were divided as follows between the chairman and board members 1 - 7:



If coverage had been denied (or a D&O insurance had not been taken out), the mutual responsibilities would have been divided as follows:




The judgment may be interpreted as an increase in managerial responsibility, as the High Court set aside the assessment of the management which was based on advice procured.

There are two key points to be derived from this. The Danish courts have shown a tendency that may increase managerial responsibility for members of the management – at least in boards of directors in banks. Secondly, the latest case law shows an increased need for D&O insurance, in particular for insurance taken out for a joint board of directors.

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IS-PD-0149