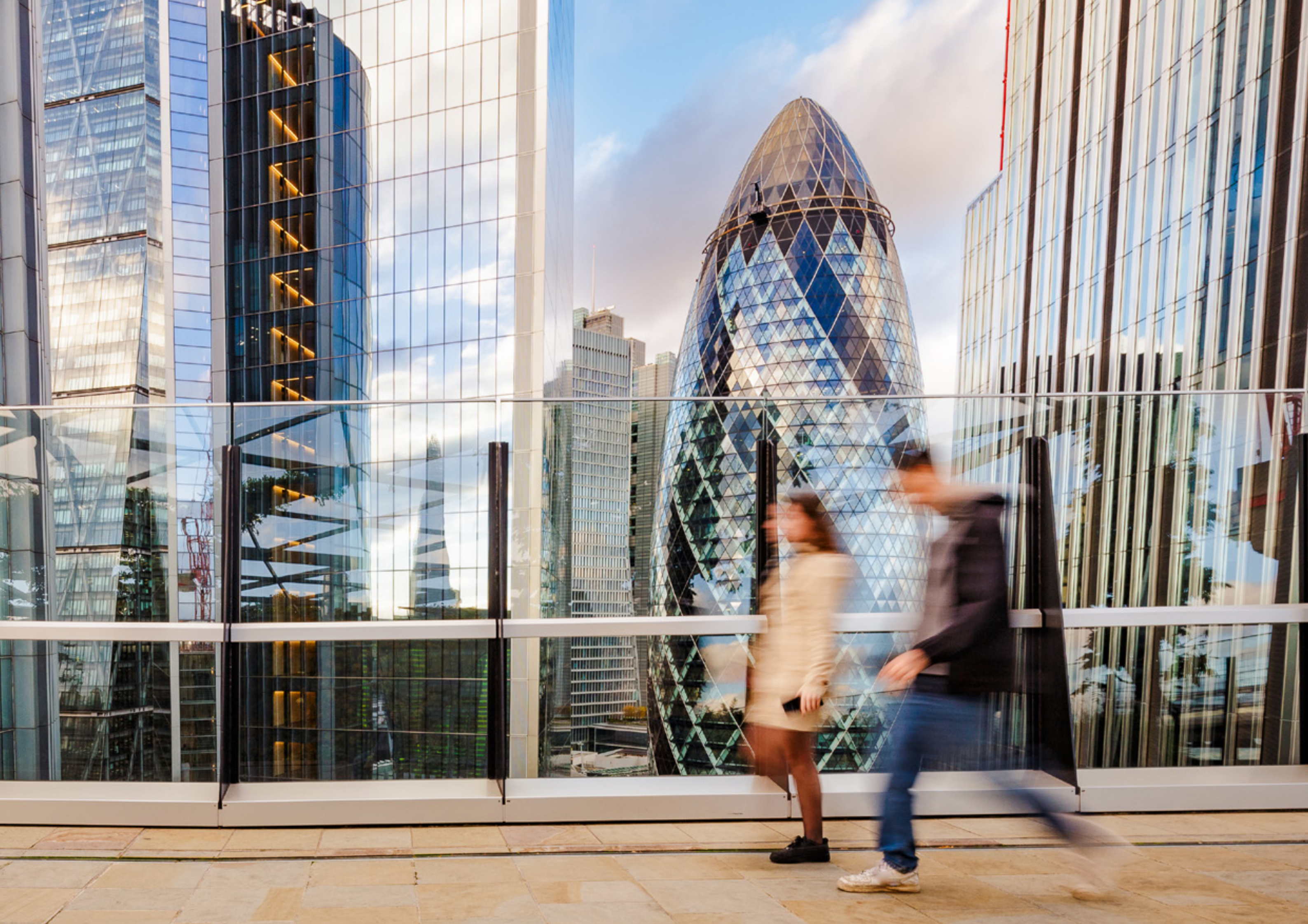

Insurance Insights 2024

Browne Jacobson

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Executive summary
Welcome to our Insurance Insights 2024

2023 was a year of great change and uncertainty, with the ongoing war in Ukraine, hostilities in Israel and Gaza, and the cost-of-living crisis exacerbated by high inflation and increasing mortgage costs. 2023 also saw an unusually high level of severe weather and environmental events with multiple heat records being broken, numerous storm and flood events, earthquakes in Turkey and Japan and volcanic activity in Iceland.

As we move into 2024, the theme of geopolitical and economic change and uncertainty is set to continue. Conflict and volatility around the world will also present challenges for businesses and insurers. These problems will be exacerbated further by the domestic cost-of-living crisis and business adaptability will be imperative to address this appropriately.

It's impossible to avoid the impact that generative AI has had over the last 12 months, whilst the longer-term socio-economic changes it will bring about remain hard to predict. With a lack of precedent upon which decisions can be made, early adopters of generative-AI solutions will have to carefully stress-test outcomes and ensure ongoing operational resilience.

These fast-changing times present significant challenges for all insurance market participants, opportunities will no doubt arise for those who are flexible and able to adapt quickly to the ever-changing risk landscape.

Insurers of UK risks are also likely to be affected by procedural changes to the way in which claims are conducted. In particular, the extension of the Fixed Recoverable Costs regime, the introduction of the Intermediate Track and changes to the amount of recoverable costs are all likely to impact.

These changes, combined with the increased judicial focus on ADR and online justice, present a challenge but also an opportunity for insurers to manage costs.

Regulated firms are also experiencing a continued period of significant regulatory change. 2024 will see the continued bedding in of the FCA Consumer Duty. Many firms will also be impacted by the new FCA rules in relation to buildings insurance for multi-occupancy buildings (and similar risks) and those affecting GAP product value.

In the world of technology, it is impossible to avoid the impact that generative artificial intelligence (AI) has had over the past 12 months, and the even more significant impact it is likely to have in the months and years ahead. AI will undoubtedly influence all aspects of insurance product distribution including risk assessment, document creation and claims resolution. Underwriters will also be mindful of the challenges presented by an increased use of AI by their policyholders, which presents a new risk factor with very little by way of precedent upon which underwriting decisions can be made.

In our introduction to last year's annual insurance review, we noted that 'standing still is never an option'. As the insights above and in this review show, that statement applies just as much now as it did 12 months ago. Whilst these fast-changing times present significant challenges for all insurance market participants, opportunities will no doubt arise for those who are able to adapt quickly.

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Catastrophic losses

Despite the absence of a significant catastrophic event in 2023, it is predicted that the frequency and severity of natural/elemental disasters will continue to plague the insurance market. In particular, total losses exceeding USD 100billion per annum are likely to remain the norm, which could be further fuelled by geo-political challenges, urbanisation and climate change. As the insurance market looks ahead to 2024, below, we explore some of the key trends and challenges it is likely to face.

Increasing frequency and severity of natural disasters

One of the biggest challenges facing insurers is the increasing frequency and severity of natural disasters.

Climate change is causing more frequent and intense weather events, such as hurricanes, floods, and wildfires. Munich Re's analysis shows that the number of natural disasters has increased by 60% over the past four decades. This means that insurers will need to be prepared to handle higher volumes of claims on a more regular basis and to deal with larger losses. It will therefore be critical for insurers to continue to invest in technology and advanced data analytics, including data scientists to better predict and manage the happening of these risks.

Nevertheless, this remains an area of potential underwriting growth for the market. According to Aon's 2023 Weather Climate Catastrophe Insight, only 43 percent of the US$340 billion in damage from natural disasters in 2022 was covered by insurance and of the US$92 billion of economic losses from earthquakes in the first half of 2023, just US$6 billion was insured.

The rise of cyber threats

As businesses continue to rely on technology to operate and store customer/sensitive data, the risk of cyber-attacks and data breaches remains an ever-growing threat to businesses.

This trend is driving demand for cyber insurance, with businesses of all sizes seeking coverage against the financial impacts of cyber-attacks and data breaches. According to Lloyd's of London, a major cyber-attack could result in losses of up to US$121 billion, with the insurance market only able to cover a fraction of these losses. This is seen as a potential area of growth for insurers if they are able to develop new products or services to cover these risks.

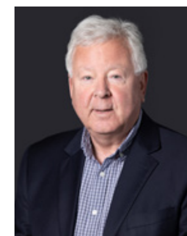
Furthermore, cyber security and ESG considerations have led to heightened reporting requirements along with expectations around D&O duties. There is now an increased scrutiny by regulators and shareholders into how directors/officers have responded in the event of a cyber incident and these issues will remain a high priority for senior executives in 2024 and exposure in this area potentially creates an additional risk for D&O insurers.

The importance of sustainability

Governments are increasingly focused on climate change and may introduce new regulations that impact the insurance sector. For example, the European Union's Sustainable Finance Disclosure Regulation requires insurers to disclose how they are integrating environmental, social, and governance (ESG) factors into their investment decisions. Similar regulations have been replicated and adopted in the UK by the FCA, for example the Sustainability Disclosure Requirements. Insurers will need to be prepared to adapt to these changes and develop new products and services that meet regulatory requirements. Businesses may also face legal challenges if they fail to adopt sustainable practices or take adequate steps to mitigate their business risk of environmental damage.

By remaining proactive and taking steps to mitigate their legal risks and liabilities, businesses can protect themselves against the legal challenges and promote sustainable practices.

Insurers should be prepared to handle more frequent and severe climate disaster claims, develop new products and services to address cyber risks, and be prepared to adapt to regulatory changes. Through additional investment in technology, data analytics, and continuing to build strong relationships with insureds, insurers can navigate these challenges and provide valuable protection to businesses and individuals.



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Construction and engineering

The Building Safety Act

The Building Safety Act (BSA) will continue to have an impact on the industry, both in terms of new buildings and historic claims.

With regard to new buildings, the "gateway regime" introduced by the BSA is now in full force for higher-risk buildings (with some buildings being built under transitional arrangements). In broad terms, this requires building control approval to be obtained from the Regulator before any building work starts. This must demonstrate how:

1. The proposed works comply with Building Regulations.
2. The new duty holder competence, golden thread and mandatory occurrence reporting requirements will be met in relation to the works. We have heard from various clients and contacts that the impact of this has been fewer firms wanting to undertake such work that is subject to the gateway regime. This is because of the lack of certainty as to how the new regime introduced by the BSA will operate in practice, and because of the increased risk of delays to such projects – for example, the new Regulator will have up to six weeks to consider any 'major change' to the design or construction of such a building (and of course may decide not to approve any proposed change). Undoubtedly, the industry will watch with close interest the first few projects that are subject to the new regime.

In any event, it's important that anyone involved in such work reviews their construction contract carefully to make sure that it takes account of the BSA, particularly for higher risk buildings.

With regard to historic claims, the publication of the Phase 2 Grenfell Inquiry report was delayed in 2023 and will not be published "before April" 2024. This will focus on establishing how the Grenfell Tower came to be in a condition that allowed the tragedy to occur, which is likely to be hugely important in terms of the liability of those involved in the construction of the Tower itself. It will also hold significance for many others in the wider industry by reference to the Report's findings about the relevant standards existing at the time of construction, and what responsible professionals knew or should have known. The findings may 'unlock' at least some of the many currently stayed claims in relation to this, and so we anticipate the second half of 2024 may see a return of some long dormant claims.

We also anticipate the publication of the first judgments with regard to some of the new features under the BSA. For example, there are likely to be judgments commenting on the application of the Defective Premises Act (including on the question of who owes what duties, to whose order a dwelling is provided, etc), and on building liability orders. Again, the industry will read those judgments with interest and further satellite litigation may follow.

The impact of insolvencies

There will also be continued consequences arising out of the continued downturn in the economy. In the four quarters ending Q3 2023 the construction industry reported 4,276 cases of insolvency, equating to 18% of all the insolvencies that have recorded an industry when reported to the Insolvency Service.

In addition, according to forecasts published by the International Monetary Fund ("IMF") in October 2023, the UK is likely to have the slowest growing economy amongst the G7 nations in 2024. The IMF is predicting that the UK's GDP will expand by an estimated 0.6% in 2024, down from a previous forecast of 1.0%.

The construction industry is a vital part of the UK economy, contributing significantly to employment and GDP. However, it is well known that the sector has been facing several challenges in recent years, including rising costs, a shortage of skilled workers, increased competition, and the impact of the COVID-19 pandemic. These challenges have put increasing pressure on construction companies and as a result many construction companies are struggling to stay afloat and there have been several high-profile casualties. These pressures, and the IMF's predictions, indicate that high insolvencies in the construction sector are likely to remain a feature in 2024, which will have a ripple effect on the wider economy.

One of the results of this is likely to be an increase in claims under the Third Parties (Rights against Insurers) Act 2010 (the Act). The Act allows third parties to make a claim directly against an insurer when the insured party is insolvent without first having established the liability of the insured, with the insurer in turn being entitled to raise coverage defences that would have been available against the insured (subject to some modifications). Whilst a detailed review of the rights and remedies available under the Act is beyond the scope of this article, it remains the case that there are relatively few reported cases relating to the Act, with the result that numerous issues remain uncertain, including questions relating to limitation, and the obligations under the Act to provide information, all of which is likely to increase the duration, and therefore costs, of such claims.

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Costs

What the Courts took away in 2022, the Rules Committee and Parliament tried to give back in 2023.

Whether they have succeeded, in the author's view, only 2024 will tell.

Fixed Recoverable Costs

In one of the biggest changes in modern legal history, commercial lawyers are suddenly now faced with fixed recoverable costs (FRC) in most cases with a value of up to £100,000.

Under this scheme, cases are to be allocated to a track (fast or intermediate) and then a band (1–4). The minimum renumeration is £0. The maximum is around £100,000 (plus disbursements).

No real guidance is given as to just where each case sits on this spectrum, so for now insurers should expect that every case which can be pleaded at more than £100,000, will be, and where there are multiple parties to claim or be sued, then they will be so.

But when the above arguments start to fail, the best firms will stop doing the work. Expect the market to be overtaken by others used to process driven litigation, often with junior or inexperienced lawyers at the helm.

Those firms are already starting their marketing strategies for that business. Bearing in mind FRC will now apply to any non-injury case issued after 1 October 2023, there are up to 6 years' worth of potential claims waiting in the wings from individuals or organisations who could not afford to bring claims before, but who now can.

For those able to issue in time, behaviours on pre-October 2023 cases are changing. Costs inclusive settlements are fast becoming a thing of the past as lawyers strive to maximise their non-fixed costs work while they still can.

QOCS

Insurers suffered a triple whammy (courtesy of the Supreme Court, Court of Appeal & High Court) in 2021/22 which left them with all but a zero prospect of ever recovering any costs from an opponent unless they happened to chance upon success at trial.

This ultimately concluded on the rather unhappy note of *PME v Scout Association*, which extended those principles to the costs of detailed assessment as well.

However, April 2023 saw some respite. The Rules were changed. Although it has taken 10 years to get there, insurers can now look to recover any costs to which they are entitled from both damages and/or costs owing to the claimant, no matter how the claim is settled.

But inevitably what the Rules Committee gave with one hand they took with the other. These provisions only apply for cases issued after 1 April 2023 and therefore, insurers will have to have different strategies in play depending on when the claim was issued.

The Aftermath

There was, perhaps, an obvious and immediate undesirable consequence arising from the above reforms – a flurry of cases being sent to Court for proceedings to be issued to avoid them.

In personal injury and clinical negligence cases affected by the April 2023 update, satellite litigation is already starting to ensue in live cases with applications for extensions of time being refused and the Court invited to determine whether this should be granted in circumstances where proceedings were not required.

In cases which have settled, the argument as to who should pay for the costs of prematurely issued cases will soon start to be heard on assessment.

It will not be long before these arguments arise in the commercial world too, and insurers should expect them to start to appear in the higher Courts towards the end of 2024 and into the start of 2025.

But the above all being said there is no doubt that the savings from the 2023 changes will eventually be recognised... it just may be a rather busy time in getting there.

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COVID-19 BI litigation

Although we are fast approaching the four-year anniversary of the first nationwide lockdown that brought millions of businesses to a standstill, the litigation arising out of the COVID-19 restrictions continues apace in the Commercial Court. Here we look at some of the key decisions during 2023 and what to look out for in 2024.

London International Exhibition Centre ("ExCel") & Others v RSA & Others

On 16 June 2023, Mr Justice Jacobs handed down his judgment in *London International Exhibition Centre ("ExCel") & Others v RSA & Others* in which he was asked to consider certain preliminary issues in six expedited test cases involving various forms of '**at the premises**' ('ATP') disease wordings.

The judgment represented a considerable victory for policyholders with Mr Justice Jacobs concluding that the Supreme Court test on causation in respect of 'radius' or 'in the vicinity' disease wordings also applied to 'ATP' disease cover. He rejected Insurers' argument that there was a fundamental distinction between a 'radius clause' and an 'ATP' clause, or that the latter was supposed to provide more limited localised cover.

In relation to cases of COVID-19 occurring before 6:15 pm on 5 March 2020 when COVID-19 became a notifiable disease, he found in favour of Insurers. Cases of COVID-19 which occurred (at the premises) before it became a notifiable disease were not capable of falling within the cover.

As for 'Medical Officer for Health of the Public Authority', the Judge held that any reasonable reader of the policy would have concluded that the expression 'Public Authority' was not confined to a local authority and would extend to the UK government's senior medical advisors. He therefore held in favour of policyholders on that issue.

Various Eateries v Allianz / Greggs v Zurich / Stonegate v MS Amlin

These cases were heard by the Commercial Court in 2022 with Mr Justice Butcher giving his judgment on 17 October 2022. All parties involved appealed his decision on various grounds.

The case of *Greggs v Zurich* settled on confidential terms in July 2023.

On 24 November 2023 it was reported that *Stonegate v MS Amlin and Others* had also settled. Stonegate had been seeking £1.1bn from insurers arguing that it was entitled to separate £2.5m limits of cover for each of its 760 premises. Insurers had argued that Stonegate was entitled to one £2.5m limit for the entirety of the group. Mr Justice Butcher rejected Stonegate's arguments on the per premises issue but found that its claim was subject to multiple limits by reference to various Government restrictions. He also held that Stonegate had to give credit for government support payments received during the pandemic, most notably Furlough. As the matter settled, these issues currently remain subject to Mr Justice Butcher's first instance decision, although there are a number of other cases proceeding in 2024 which involve similar issues.

What's happening in 2024?

The Court of Appeal handed down its judgment in the *Various Eateries v Allianz* appeal on 16 January 2024, dismissing both Allianz's appeal and VE's cross appeal. In short, its 'as you were' with the first instance decision of Mr Justice Butcher from October 2022 being endorsed as to number of occurrences, no per premises aggregation, and very limited cover for any losses outside the policy period.

The appeal in *London International Exhibition Centre ("ExCel") & Others v RSA & Others* involving the consolidated '**at the premises**' proceedings has been listed for 18 June 2024.

Arsenal FC & Others v Allianz & Others involves more claims under the Marsh / Resilience Wording as in Stonegate / Greggs / Various Eateriesand a trial is expected to take place in 2025.

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Cyber and data

The explosion of cloud computing, big data, and other cyber related technologies over the past decade have presented huge challenges for the insurance industry. These complex technological advancements have coincided with a huge increase in the regulatory burden imposed on organisations with regard to their management of data processing and other cyber related activities.

During 2024 we expect the insurance sector to build on the experience it has gained in recent years to become more adept at recognising and managing cyber and data related risks in a number of key areas.

Managing cyber breaches

Generally, the insurance industry has taken a cautious approach to providing cover for cyber breaches. These are notoriously difficult to predict or quantify due to the complexity of a constantly evolving cyber threat landscape and the potentially catastrophic nature of a major breach.

Whilst some uncertainty is likely to continue during 2024, we expect to see insurers becoming more confident in their ability to assess the sophistication of different organisations' cyber security controls and, importantly, their ability to contain and respond to breaches quickly as they are able to draw on the experience of previous incidents.

Navigating the regulatory landscape

The introduction of GDPR in 2018 sent shockwaves through the insurance industry with its introduction of eye-watering fines and other punitive sanctions, such as the suspension of data processing activities, for organisations failing meet its requirements.

The regulatory landscape continues to evolve with both new regulations such as the EU's AI Act being introduced, as well as an ever-expanding flow of regulatory guidance and other "soft" regulatory requirements.

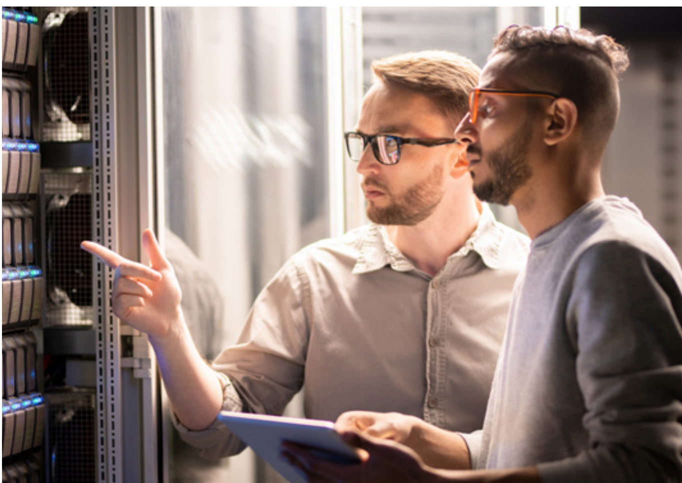
However, there is a growing understanding that in order to navigate this complexity it is vital to apply holistic governance frameworks that integrate the management of legal and regulatory risk with the operational, commercial and other practical considerations.

Adapting to AI and new technologies

Rapid advancements in the power of generative AI have been the focus of much recent discussion. The impact of generative AI on the insurance sector is expected to be huge with the powerful analytical tools it is likely to provide to help predict and manage complex and multifarious risks.

As well as benefitting from its use of AI, the insurance sector will also have to analyse the impact its use might have on risks that it insures. This will be an operational challenge as it requires understanding of complex new technologies. At the same time it gives rise to complex and potentially novel legal issues – such as questions of causation and liability.

As with other cyber and data related risks, the key to successfully managing AI lies in an understanding of new technologies, the environments in which they are deployed, and the overarching legal and regulatory frameworks that govern their use.



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D&O and corporate liability

Pricing

Director & Officer (D&O) insurance pricing has bucked wider trends throughout 2023, with premiums steadily falling throughout the year. The decline has reportedly been in the range of 10% to 15%[1]. Increased capacity, new market entrants and insurers' fears that clients might look to self-insure and/or use captives are some of the factors that have contributed to competition for primary and excess layers and commercial opportunities for buyers. We predict that savings in 2024 may be more modest than those experienced in 2022/2023 and, at some point, we anticipate that the rate fall will flatten.

Economic risks and Insolvency

Economic instability, high inflation around the globe, recession and the job market are just some of the major pressures faced by companies and their management in the current economic climate. Inevitably when a company performs badly, the conduct of its D&Os are scrutinised more carefully and insolvency related exposures are a major source of claims. According to UK National Statistics, the number of company insolvencies in the UK in Q3 of 2023 was 10% higher than Q3 in 2022. The overall number of insolvencies in the UK is also at its highest level since 2009. This is a worrying trend, and we expect more D&O claims to follow as a result.

1 Marsh Global Insurance Market Index – Q3 2023

Economic, Social and Governance (ESG)

Wide ranging ESG issues remain a prominent feature on boardroom agendas. Being able to demonstrate compliance with any relevant regulatory requirements, as well as planning ahead to tackle issues which can be anticipated, is crucial to the success of a business. This has already had an impact on D&O policy risk.

Increasingly, insurers are expecting to see ESG compliance disclosures as part of renewal submissions and failure to provide this is likely to impact the commerciality of the insurance offerings received.

Regulatory and legislative changes

Regulatory compliance and changes (actual or potential) to legislation, including the threat of fines and penalties, remains high on the risk agenda for D&Os. Breaches, poor planning and/or failing to anticipate a change, can have adverse impacts on a business. When those repercussions are felt (directly or indirectly), regulators and other stakeholders are increasingly proactive in scrutinising and holding decision makers to account. This appetite, combined with the expectation of increased regulation, is likely to lead to more claims in this sphere.

Class actions and shareholder activism

Client Earth's efforts (as minority shareholder) to hold the directors of Shell personally liable for the company's failure to satisfy climate comments were dashed by the High Court earlier this year. The outcome may be a source of relief for some D&Os for now. However, shareholder activism and the sophistication, financial backing, and commitment of such interest groups ought not be underestimated going forward.

Cyber

Cyber threats including attacks, data breaches and cyber extortion continue to be a major risk for businesses, and they are likely to remain so for many more years to come. Not only do these incidents cause immediate financial losses but they also have potential to cause longer term reputational damage. Policyholders will continue to be judged (by regulators and disgruntled shareholders/stakeholders) on whether the incident could have been avoided but also on the policyholder's resilience and response to such disasters.

New technologies and Artificial Intelligence (AI)

The use of new technologies such as AI present both risks and opportunities for business. AI is a particularly "hot topic" and policyholders that fail to stay abreast of developments risk being left behind and their businesses negatively impacted. However, those that are at the forefront of technological developments risk exposing their organisations to new and/or unforeseen dangers. There are likely to be emerging risks in this field and it will be interesting to see how these present and evolve.

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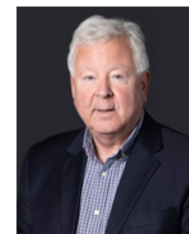

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Employment practices liability

Research published this year conducted by the University of Nottingham and Browne Jacobson provides a comprehensive and unique exploration of participants' lived experiences of Equality Diversity and Inclusion ("EDI") within workplaces in the UK insurance industry.

The ABI, BIBA, CII, GAIN, ISC Group UK, IUA and MGAA actively supported the study by promoting the survey and providing insights into the industry context.

Key findings

- 54% of survey respondents reported that their organisation has a strategic plan for delivering EDI.
- 40% reported that these initiatives have been effective.
- 75% of respondents agree that flexible working helps to advance EDI in their organisation.
- 78% of women respondents reported that they believe there is a gender pay gap at their organisation.
- 68% of women who identify as having ethnic identities other than white, reported that gender and race have combined to adversely affect their career progression.
- 45% of respondents reported that they had experienced or identified behaviour inconsistent with EDI values in their organisation.
- 14% of people who reported an EDI issue felt that the response to their report was "satisfactory".
- The drinking and after-work culture associated with the insurance industry was linked to discriminatory language and practices.

The report includes practical recommendations on how the market can change the narrative around EDI with firms transforming their approach using UK employment law to avoid falling foul of it.

General positive action

Positive discrimination is illegal, but positive action, in particular general positive action, is lawful.

General positive action permits additional help to be provided to groups of people who share one or more statutorily protected characteristic (e.g., race, sex, age), to level the playing field.

A firm can take proportionate action that aims to reduce disadvantage, meet different needs and increase participation.

It can be taken when a firm reasonably believes without requiring in-depth statistical data that any one or more of the following conditions applies:

- Enabling or encouraging people who share the protected characteristic to overcome or minimise a disadvantage connected to that characteristic.
- Meeting that group's needs that are different from the needs of people who do not share that characteristic.
- Enabling or encouraging people who share the protected characteristic to participate in an activity where they are disproportionately underrepresented.

Reporting

14% of people who had reported an EDI issue felt that the response was "satisfactory". Nobody reported that it was "very satisfactory".

Drinking and after-work culture

The drinking and after-work culture associated with the insurance market was linked to discriminatory language and practices by a significant number of survey participants.

Some pointed out that those with caring responsibilities were excluded and regarded as "not committed".

Firms were encouraged to re-evaluate team and client activities that centre on drinking, particularly to excess, and find ways to socialise and build client relationships which don't require excessive drinking.

Training

To improve EDI in their organisation, whatever its size, 60% of participants advocated for unconscious training, 59% for EDI awareness and 57% for bystander training to challenge unacceptable behaviours.

Respondents reported feeling cynical about training as the quality of training was often not evaluated and its completion was not consistently taken seriously.

The full report can be found here.

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Environmental Risks
Choppy waters ahead in the environmental law arena

We predict the following headline environmental law issues affecting the insurance world this year.

Climate change litigation

Climate change is a growing concern for insurers, as it is expected to lead to an increase in extreme weather events and natural disasters. This has led to an increase in climate change litigation, where individuals and organisations seek to hold companies and landowners accountable for their role in contributing to climate change.

Green finance

The UK government has set a target of achieving net-zero greenhouse gas emissions by 2050, and this has led to a growing interest in green finance. This involves investing in projects and companies that are focused on reducing greenhouse gas emissions or adapting to the impacts of climate change. Insurers are involved in green finance by providing funding for these projects or by developing new insurance products that are tailored to the needs of green businesses.

Sustainable investing

There is also a growing interest in sustainable investing, which involves investing in companies that are focused on environmental, social, and governance (ESG) factors. This can be a complex issue, as it often involves determining what constitutes a sustainable investment and how to measure the impact of these investments. Insurers may be asked to write policies to seek to underpin such investments or their underlying operations.

Biodiversity net gain

The regime is expected to enter into force during early 2024 requiring 10% improvement of biodiversity with most planning applications. Insurers are expected to be asked to provide products to help secure the biodiversity enhancement. This is a challenge as the gain is required to be maintained for 30 years.

Offshore power

The government has signalled its intention to achieve 40GW of renewable power in the offshore environment by 2030 – this is a massive level of predominantly wind farms. Meanwhile the government has proposed legislation to require annual North Sea fossil fuel licensing rounds. However this unfolds, there are likely to be opportunities for insurers to cover such energy projects.

Brexit consequences

The UK's departure from the EU has raised a number of environmental law issues for insurers. For example, Westminster and the Devolved Governments are developing their own environmental regulations, differing from those in the EU. This creates uncertainty for insurers operating through the UK and the EU, as they may need to contend with different laws across the jurisdictions.

Overall, these are just a few of the headline environmental law issues affecting the insurance world and expected to arise in the near future. Insurers will need to stay up-to-date on these issues in order to effectively manage their risks and provide the best possible coverage to their customers.

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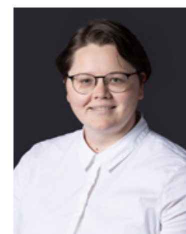

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ESG

2024 seems likely to be the year when 'ESG' is 'given teeth'.

In November 2023, the FCA published PS23/16: Sustainability Disclosure Requirements (SDR) and investment labels (the **"SDR PS"**) which contained rules and guidance to take effect from 31 May 2024.

The SDR PS covers:

- An "anti-greenwashing rule [(**"AGR"**) which] applies to all FCA-authorised firms …".
- Rules as to "investment labels, disclosure, and naming and marketing … [for] UK asset managers …" (**"ESG Labels"**).
- Specific "rules for the distributors of investment products to retail investors in the UK."

The AGR is that:

"A firm must ensure that any reference to the sustainability [("environmental or social")] characteristics of a product or service is: (a) consistent with the sustainability characteristics [thereof] …; and (b) fair, clear and not misleading."

ESG Labels involve prescribed forms and notifications to the FCA.

Distributors must ensure consumers receive up-to-date labelling for products and identify non-UK products which are outside the scope of the SDR.

Between September and December 2023 the FCA consulted on Diversity and inclusion ("D&I") in the financial sector on the basis that:

"… greater levels of [D&I] can improve outcomes for markets and consumers … by helping reduce groupthink, supporting healthy work cultures, improving understanding of and provision for diverse consumer needs and unlocking diverse talent, supporting the competitiveness of the UK's financial services sector."

The FCA's view is that:

- Equality (increasingly referred to as 'equity'), diversity and inclusion are "regulatory concerns".
- There is "more to be done … in the financial sector" so that firms may both promote and benefit from these factors by "recognis[ing] a lack of D&I as a non-financial risk".

The FCA seeks a more explicit approach to addressing discrimination as a form of non-financial misconduct (**"NFM"**), plus (with exceptions for smaller firms) more reporting by firms on D&I strategies and workforce social attributes.

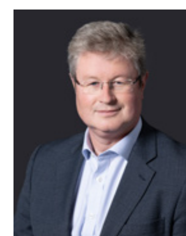
According to the FCA's Regulatory Initiatives Grid at November 2023, a policy statement with rules and guidance will be published in "H2 2024". However, firms should consider that much is already in place for the FCA to take enforcement action now in relation to discrimination as a form of NFM, not least as the FCA has been accruing data in this area for some years.

The above 'hard edged' ESG developments sit in an unfolding context of regulatory encouragement of voluntary action – for instance the Recommendations of the Taskforce on Nature-related Financial Disclosures at September 2023, which are similarly structured to the Recommendations of the Task Force on Climate-Related Financial Disclosures (the latter are now incorporated within the financial reporting requirements specified by the IFRS (International Financial Reporting Standards) Foundation via its International Sustainability Standards Board).

The common features of the above recommendation frameworks are that firms articulate their approach to tackling the applicable sustainability issues (which may, of course, be related) by means of:

- Governance.
- Strategy.
- Risk Management.
- Metrics.

A further important contextual point is the likely continuing rise of ESG-related civil litigation. While ClientEarth ultimately failed in its claim against Shell's directors for alleged breaches of statutory duty for failing to take account of, in short, "a reasonable consensus of scientific opinion" in addressing climate change, the developing matrix of regulatory rules and statements on ESG is likely to form a basis for further private actions.



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FCA investigations

Focus on Financial Crime

Within its Annual Report in April 2023, the FCA announced that it would allocate any additional resources to four of its thirteen priorities; including the reduction and prevention of financial crime. This focus is expected to continue in 2024.

The FCA has strengthened its authorisation process through investment in staff and technology, leading to an increase in rejected applications. 24% of applications in the financial year ending March 2023, up from 21% in the previous year and 7% in the year before that. This is, in part, due to an increase in applications for registration from crypto asset businesses. Only 7% of which were successful in the most recent financial year. The FCA's efforts to reduce illegal crypto activity continue to be high on the agenda.

More staff are now assigned to the investigation and prosecution of financial crime at the FCA. A permanent fraud team has been established with an internal fraud framework to assess firms' anti-fraud systems and controls.

The financial crime drive aligns with the focus of the UK government as set out in the new Economic Crime and Corporate Transparency Act, which received Royal Assent in October 2023. The new failure to prevent fraud offence (to come into force once government guidance has been published) and the widening of the 'identification principle', to allow the guilt of senior managers for economic crimes to be attributed to the companies they work for, suggests that financial crime is likely to be high on the enforcement agenda for all regulators in 2024 and beyond.

Focus on 2023 enforcement – ED&F Man Capital Markets Limited/ Equifax Limited

City broker ED&F Man Capital Markets Ltd (**"ED&F"**) received a fine of £17.2M, the largest ever in a cum-ex trading case, for serious failings in its oversight of such trading. ED&F collected fees for trading strategies which were designed to enable its clients to illegitimately reclaim tax from the Danish authorities. Between February 2012 and March 2015, ED&F enabled significant volumes of dividend arbitrage trading on behalf of clients, allowing clients to make withholding tax (**"WHT"**) reclaims to the Danish tax authority, £20m of which were illegitimate.

ED&F did not have adequate compliance checks and failed to ensure that the trading was legitimate. Steps were not taken to understand the training activities or consider the risks of dividend arbitrage trading.

In October 2023, the FCA imposed a fine of £11.2M on Equifax for significant shortcomings that exposed millions of consumers to financial crime risks. Equifax failed to manage and monitor the security of UK consumer data it had outsourced to its parent company based in the US. A breach allowed hackers to access the personal data of millions of UK consumers. The Information Commissioner's Office (**"ICO"**) had already imposed a penalty of £500,000 on Equifax in 2018 for the breach.

The FCA described the situation as "entirely preventable," highlighting Equifax's failure to promptly notify regulators and its misleading public statements on the impact of the incident on UK consumers, which gave an inaccurate impression of the number of persons affected.

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Fraud

The Government's Fraud Strategy published in May 2023 set a target of reducing the 2019 levels of fraud by 10% by the end of 2024. So what can we expect in the coming 12 months?

Economic Crime and Corporate Transparency Act 2023 (ECCTA)

The big development this year was the Royal Assent in October 2023 for the **Economic Crime and Corporate Transparency Act 2023 (ECCTA).** This builds on the **Economic Crime (Transparency and Enforcement) Act 2022 (ECTE)** a year earlier.

Moving beyond sanctions and protection of UK assets from dirty money (through Unexplained Wealth Orders and bolstering the SFO's powers) the ECCTA enacts various reforms to clean up and reform the much maligned Companies House, empowers the Registrar to become an effective gatekeeper, allows for seizure of crypto assets under the Proceeds of Crime Act 2002, and greater intelligence sharing. It is hoped it will restore the integrity to UK's corporate environment and deter bad actors.

One of the most significant developments under ECCTA is the introduction of the corporate criminal offence of failing to prevent fraud (under s 199 ECCTA) which comes into force on 26 December 2023.

Organisations, which include charities and public bodies with more than 250 employees a turnover of £36 million and more than £18 million in assets face the prospect of unlimited fines where a person associated with the organisation commits one of the prescribed fraud offences to benefit the business or one of their subsidiaries or potential suppliers.

It is irrelevant that the company's management didn't know about or collude in the fraud. As a result of changes to the identification doctrine a rule which had to establish the intention of the guiding mind of the business before prosecution, when bringing corporates to heel for economic crime offences, under the new s 196 it will be sufficient that a "senior manager" who commits or attempts to an offence for the company to be also liable.

We are eagerly awaiting guidance on defences, which include "reasonable" prevention procedures which is likely to be out in the Spring and will probably follow the UK Bribery Act Guidance and its 6 principles. Most organisations will be aiming to ensure its policies, procedures and training are in place well beforehand.

Authorised Push Payments

Changes to the banking sector anticipated in 2024 under the Payment Services Regulators watch, will see losses due to Authorised Push Payment (APP) fraud fully reimbursed to customers (with the exception of gross negligence) as a result of changes in the Financial Services and Markets Act 2023 likely to be in force before the end of February. Losses will be shared between the sending and receiving banks on a 50/50 basis.

Online Safety Act 2023

The Online Safety Act 2023 which came into force in October 2023 now requires platforms to have proportionate measures to prevent users from encountering fraudulent material. Provisions as to monitoring fraudulent advertising, offensive material and transparency on paid for services which are suspected to be fraudulent will hopefully offer greater online protection and security.

Artificial Intelligence

It is likely that AI facilitated fraud will become more of a regular feature of the fraud landscape with voice generation messaging and deep fake video impersonation a clear risk as the technology gains traction and develops greater more sophisticated capability.

Conversely ID verification using algorithmic, or biometric systems, supported by machine learning and automated checks will mean stronger defences will become available to stop fraud and stay ahead of scammers.

As fraud constitutes nearly 40% of all recorded criminal offences in the UK and causes significant anxiety, economic and social harm these are welcome developments to support the stated ambition of reducing fraud.

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General insurance regulation

2024 will likely become the year when the Financial Conduct Authority (**"FCA"**) and Prudential Regulation Authority (**"PRA"**) give potentially harsh lessons on how firms should have met the expectations which regulators set out in 2022 and 2023.

Those years were dominated by the approach and implementation of the Consumer Duty (**"CD"**) and Operational Resilience regimes.

Consumer Duty

The CD rules became effective from 31.07.23 for products which are 'open to sale or renewal', and will be effective for 'closed' products from 31.07.24. Ahead of the 2023 'go live' date, the FCA published specific guidance for the general insurance markets. This included a February 2023 Dear CEO letter, which highlighted an area particular to insurance, claims:

"For consumers, the experience of making a claim will generally be when the product's value and service are put to the test. The 'communication to retail customers' section … is relevant here (PRIN 2A.5) – firms should ensure they support consumer understanding and deliver good outcomes throughout the claim journey, through timely and appropriate communications. We expect firms to ensure customers are at the centre of the claims process, so that unreasonable delays to claims processing are avoided and fair claims settlements are made."

Further guidance on the ramifications of the CD came in September 2023, using 'guaranteed asset protection' ("GAP" – motor vehicle value) insurance as an example:

"… only 6% of the … premiums is paid out in claims … [and] some firms [are] paying out up to 70% of the … premiums in commission to parties in the distribution chain, such as motor dealerships …"

The FCA regards these ratios as unlikely to be compliant with the CD. It is placing the burden of compliance on product manufacturers, and has said "they must take immediate action to prove customers are getting a fair deal, or it will intervene – giving firms a three-month ultimatum."

Operational Reslilience

Similarly, matters may well 'come to a head' in 2024 for a number of firms in relation to their compliance with Operational Resilience.

The PRA noted in its Insurance supervision: 2023 priorities document its concerns that:

"Insurers, particularly those operating in the London Market, will see [non-natural catastrophe risks (**"NNCR"** – eg cyber)] continue to grow and evolve as portfolio composition shifts towards casualty classes …

Firms that are not able to size potential losses from … [such] risks (including emerging risks) or establish commensurate risk management measures are exposed to the risk of outsized losses and may underestimate capital requirements …

Over 2023, we intend to work with the industry to enhance practice and better manage risk in this area."

While it is possible that firms have overcome any PRA concerns in relation to NNCR, the FCA's October 2023 £11m fine of Equifax Limited demonstrates the nature and scale of these risks, even from intra-group activity. A 2017 cybersecurity breach at Equifax Inc in the US exposed the personal data of "[inter alia] approximately 13.8 million individuals in the UK [to the] risk of financial crime … because Equifax Ltd failed to put in place an appropriate framework for monitoring and managing … security of the UK consumer data it had outsourced for processing to Equifax Inc …"

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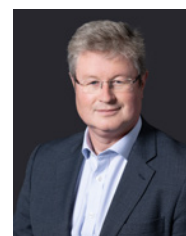

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HSE regulatory

Automated Vehicles Bill

On Tuesday 28 November 2023, members of the House of Lords discussed the primary objectives of the Automated Vehicles Bill.

The Automated Vehicles Bill will implement the recommendations of the four-year review carried out by the Law Commissions of England & Wales and Scotland to set the legal framework for the safe deployment of self-driving vehicles across Great Britain.

During second reading, members considered the main issues in the bill and brought attention to specific areas where they believed amendments (changes) may be needed.

Subjects under discussion included:

- Safety standards of self-driving vehicles.
- Cybersecurity of vehicles with automated systems.
- Accessibility.

Committee stage, the first chance to examine the bill line by line and make changes, is yet to be scheduled.

The UK Product Security and Telecommunications Infrastructure (Product Security) regime

The UK's consumer connectable product security regime will come into effect on 29 April 2024. Businesses involved in the supply chains of these products will need to be compliant with this legislative framework from that date.

The regime will ensure other businesses in the supply chains of internet-connectable and network-connectable products play their role in preventing insecure consumer products from being sold to UK consumers and businesses.

The regime consists of two pieces of legislation:

- Part 1 of the **Product Security and Telecommunications Infrastructure (PSTI) Act 2022**.
- The **Product Security and Telecommunications Infrastructure (Security Requirements for Relevant Connectable Products) Regulations 2023**.

It is the first piece of nationwide consumer protection legislation to be implemented since the UK's departure from the EU.

The countdown is now on for telecoms and technology industries and manufacturers to prepare for the upcoming implementation.

Nutrition and health claims – proposed changes to enforcement regime

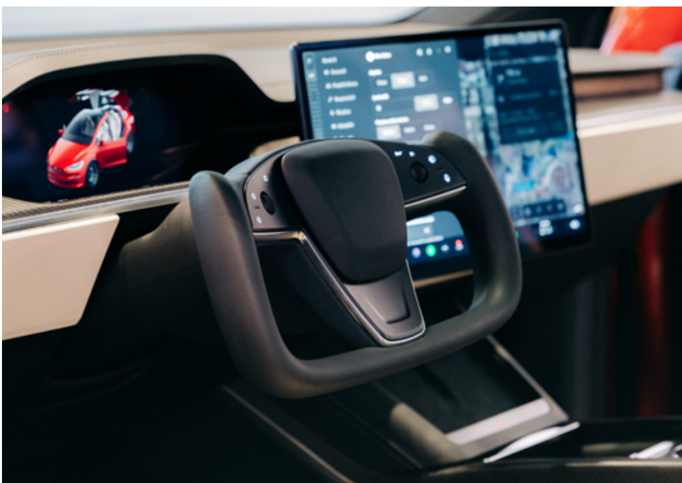
The Government is consulting on reforming the enforcement procedure for nutrition and health claims regulation in England by introducing an improvement notices regime.

The current nutrition and health claims enforcement regime is only enforced by means of a criminal prosecution and it is common knowledge that enforcement authorities can be reluctant to bring a case to court due to costs and resources required.

We also see complaints related to using unauthorised nutrition and health claims submitted to the Advertising Standards Agency (ASA). The ASA can pass information to the prosecuting authorities, however, the reluctance of prosecuting authorities to bring a case to court means many businesses continue to use their unauthorised claims without facing meaningful sanctions, leading to businesses who do comply, facing unfair competition from competitors using unlawful claims.

We anticipate the necessary amending legislation being laid in Parliament in spring 2024 with businesses having 3 months from when the Statutory Instrument is made to prepare for the new enforcement regime.

We recommend acting now to review nutrition and health claims made by your business and revising or removing any claims which do not comply with the law before this new enforcement regime comes into force.



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Intellectual property

Copyright

This year, there has been an explosion in AI copyright litigation. The most prominent UK case so far is *Getty Images v Stability AI*. Stability AI's strike-out application failed, and in December 2023, Mrs Justice Joanna Smith decided that the case would go to trial.

TradeMarks – Bad Faith

We are still awaiting the **Skykick** judgment from the Supreme Court, which will consider whether Skykick's trademarks were filed in bad faith for being too broad. Judgment is expected soon.

The *Lidl v Tesco* appeal will also consider bad faith. It is due to be heard in February 2024 and given the speed with which the Court of Appeal has been delivering judgments, we may hear a result in March.

Retained EU Law

Industrial Cleaning v Intelligent Cleaning is a Court of Appeal decision regarding a technical point of trade mark law, the question being, when does statutory acquiescence start to run? However, it's also a really important judgment for practitioners because the Court of Appeal used the powers from the European Union (Withdrawal) Act 2018 and chose to depart from what would have been binding retained EU case law.

Referential Packaging

In *Marks & Spencer v Aldi*, HHJ Hacon in the IPEC held that Aldi infringed Marks & Spencer's registered designs in gin bottles.

In November 2023, the IPEC heard another case involving Aldi, this time brought by Thatchers, about Aldi's Cloudy Lemon Cider. Judgment is awaited and expected in early 2024.

Honest Concurrent Use

In *Match v Muzmatch* (a case Browne Jacobson acted on), the Court of Appeal gave guidance about honest concurrent use. Lord Justice Arnold held that it was not a separate defence, but rather a factor in the infringement analysis.

This applies more broadly; essentially, there can be no trade mark infringement if there is not an effect on one of the functions of the trade mark.

Copyright in 3D works

The IPEC is due to hand down a decision in *Waterrower v Liking* imminently. This may give some guidance on whether the UK courts will follow the CJEU's case law in **Cofemel** and hold that copyright can protect 3D objects other than works of artistic craftsmanship and sculpture.

Patents – UPC

The biggest news is of course the launch of the **Unified Patent Court (UPC)**. There have been decisions about procedural issues and injunctions. There remains limited access to pleadings but this may change on appeal.

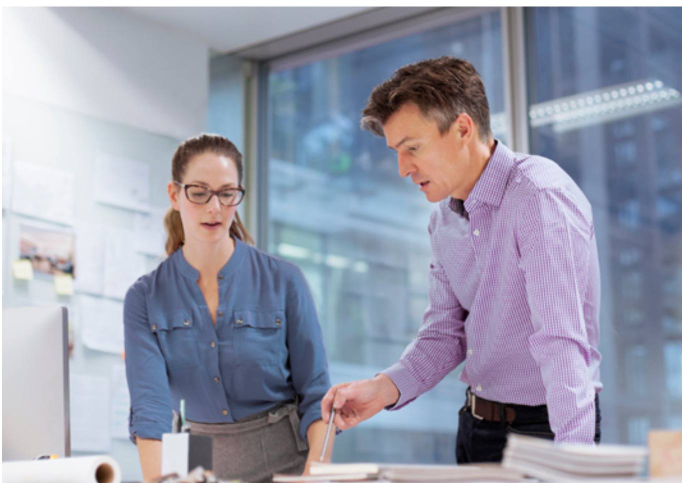
Patents – damages for the NHS under cross-undertakings

One really interesting case where judgment is awaited is the **Pregabalin Damages Inquiry**. This is the first time the NHS has pursued a patentee for damages under a cross-undertaking given in interim proceedings.

It could significantly change the attractiveness of interim injunctions to patentees.

Patentability of AI

In *Emotional Perception v Comptroller-General*, the High Court held that inventions involving neural nets do not fall within the "program for a computer" exclusion. This makes it easier to patent AI-related inventions. The UKIPO has now updated its examination guidance in relation to AI.



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Medical malpractice

Claims inflation

The Guideline Hourly Rates increased in January 2024 by over 6%.

The cost of care continues to rise as a consequence of the shortage of carers. We are now routinely seeing claims for agency care rather than directly employed care.

The Lord Chancellor is due to begin a review of the Personal Injury Discount Rate by 15 July 2024. Insurers would no doubt like to think that the Government might follow the example set by the Isle of Man where the rate increased from minus 0.25% to +1% on 10 November 2023. This was apparently in recognition of a significant change to market conditions. The Government Actuary Department supported the Isle of Man review so there may be some optimism amongst compensators for a similar move in England and Wales in 2024.

Fixed Recoverable Costs

We expect to see satellite litigation around issues such as vulnerability, which allows additional costs to be recovered. There is an incentive for claimants to get their cases into the highest complexity banding and to move through the stages as quickly as possible to maximise costs recovery. Allocation hearings are likely to become a key battleground given the impact on the level of recoverable costs.

There are various stages that attract bolt-on fees regardless of whether the work is reasonably required. We expect that claimant firms will use this system to maximise the cost revenue available for each file, regardless of the reasonableness of the work undertaken.

Discretionary Cover, Clinical Negligence Indemnity Arrangements and the Aesthetics and Beauty industry

Following the Paterson Inquiry's concerns regarding the risks presented by regulated healthcare professionals holding discretionary indemnity cover that might potentially leave injured patients without a remedy, the Government consulted on what appropriate cover should look like.

The Consultation response suggests that the insurance option rather than a state scheme or a discretionary indemnity arrangement, received the most support. Surprisingly, we await further news regarding the proposed next steps.

The recent announcement that the Welsh Government is considering mandatory insurance as part of a licencing scheme for acupuncture, body piercing, electrolysis and tattooing suggests that the issue remains in governments' thoughts.

The UK Government's consultation of non-surgical cosmetic activities licensing (under the Health and Care Act 2022) closed in October 2023. We expect further details early in the new year as to how the aesthetics and beauty industry will be licensed. Given the claims activity concerning this area, we await this with interest.

Consent

In July 2023 the Supreme Court rejected an attempt to extend the Montgomery principle confirming that:

- A doctor has a duty of care to inform a patient of the "reasonable alternative treatments", in addition to the treatment recommended.
- The Bolam test determines what the "reasonable alternative treatments" were.

Secondary victim claims

On 11 January 2024 the Supreme Court handed down judgment in *Paul and another v Royal Wolverhampton NHS Trust* where we acted for the Defendant Trust.

The court ruled that doctors do not owe a duty of care to relatives of their patients to protect them against the risk of illness from witnessing the death or other medical crisis arising from the doctor's negligence. This will now make it very difficult for secondary victim claims to succeed in a healthcare setting.

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PI: Accountants

Scope of Duty

2023 presented a challenging economic climate which created fertile ground for litigation against accountants.

The old discussion of the scope of an accountant's retainer and the extent to which this could be limited by a Bannerman clause rumbled on. The High Court decision in *Amathus Drinks Plc v EAGK LLP [2023] EWHC 2312 (Ch)* in September 2023 signalled the continuation of this debate into 2024. In Amathus, the claimants alleged that they overpaid for shares they purchased in a company for which the defendants prepared statutory accounts and completion accounts. The defendants sought summary judgment on the basis that they owed no duty to the claimants in reliance on a schedule to their engagement letter that stated there was no assumption of responsibility by the defendants for their audit work to anyone other than the company and its members as a body (Bannerman clause).

The High Court dismissed the defendants' application and held that the Bannerman clause did not present a barrier to the claimants' claim. The court took note of the fact that the defendants communicated with the claimants' solicitors in relation to the completion account.

This case is set to be determined in 2024 unless there is a settlement. However, claims relating to the assumption of responsibilities by accountants, particularly in relation to share purchase transactions, will remain a risk area for accountants and their insurers.

Reporting Scrutiny

The Financial Reporting Council (FRC) demonstrated throughout 2023 that its scrutiny of financial reporting by companies will become more stringent as it continues its drive to strengthen auditing requirements.

Although changes to the UK Corporate Governance Code are expected to apply from 01 January 2025, the FRC's **Annual Review of Corporate Reporting 2022/23, issued on 5 October 2023**, disclosed its increased monitoring activities. For example, 112 of 263 companies were required to respond to questions about their accounts and 25 companies were required to restate aspects of their accounts following enquiries.

The risk for accountant and auditors will inevitably concern any failings to raise concerns and document explanations given by the corporate clients.

Digitisation

Accountants are used to software solutions such as SAGE or QuickBooks, however 2024 promises a drive towards cloud-based tools and services. With this comes the requirements for improved cyber security.

The ICAEW allows for policies to exclude first party loss arising out of cyber act or failure of any computer systems, but this is not the same for third party losses. Therefore, the risk of third-party claims will increase this year and beyond as smaller accounting practices follow the lead of the big four into cloud-based services.

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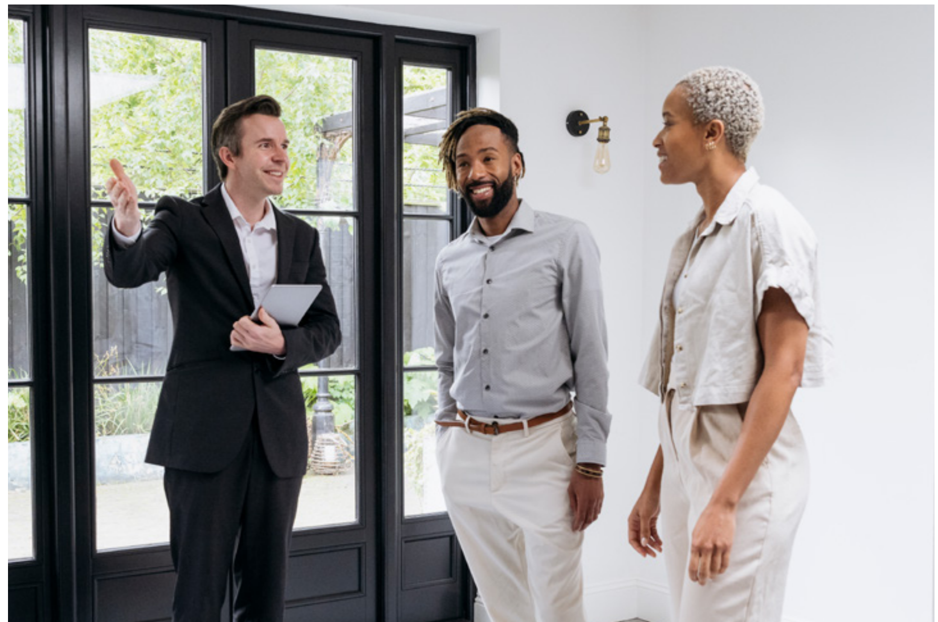
PI: Estate and lettings agents

In recent years, there has been a decrease in the number of rental properties resulting in an increase in rent. For example, over the 12 months to October 2023, rents increased by 5.7% outside of London – Office for National Statistics (ons.gov.uk). This decline is set against a backdrop of wages stagnating and the general cost of living going up. The result, unsurprisingly, is no let-up in claims against Estate and Lettings Agents.

Despite this, Landlords have recently been granted a relative stay of execution with the much-anticipated abolition of the 'no fault' section 21 eviction process being delayed pending Court reforms. The required reforms, which include digitising the courts process, improving bailiff recruitment, and strengthening mediation services are likely to be lengthy and no new date has currently been proposed. This news has been welcomed by landlords who had been facing an unknown and costlier future under the section 8 process when seeking removal of tenants from their properties.

A word of warning when it comes to the potentially costly pitfalls of the deposit regulations which Landlords are still falling foul of. It must be remembered that when an Assured Shorthold Tenancy becomes a periodic tenancy, the Landlord is deemed to have received the deposit monies anew and must re-protect the deposit.



Failing to do so may leave the Landlord facing a nasty surprise as they could be penalised up to three times the deposit if they fail to protect the assured shorthold tenancy deposit and 3 times the deposit for failing to protect when the tenancy converted to a statutory periodic!

Further expenses could be incurred where "churns" are involved. A "churn" occurs where a group of tenants move into a property jointly paying the deposit and each thereafter paying their share of the monthly rent. After some time one of them leaves and finds a replacement tenant who takes over payment of the monthly rent and pays the departing tenant their share of the deposit. This may take place until none of the original tenants remain in the property.

This changeover is known as a "churn" and occurs with little to no input from the Landlord. Should the Landlord have to re-protect the deposit after each churn, despite not actually receiving any funds from the new tenants? Whilst it may seem unfair, the answer is yes. The Landlord is treated as having been "paid" by each new tenant and a failure to protect the deposit could be costly with a potential penalty for every subsequent failure.

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PI: Insurance brokers

Consolidation

The last few years have seen high levels of M&A activity in the broker sector. We anticipate that will continue through 2024. Large scale consolidation presents challenges from a risk management perspective. In addition, as we now begin to see earn out periods ending, we foresee a potential rise in disputes between sellers and buyers.

We anticipate that the market generally will continue to soften as new entrants and capital emerge. Retention rates will likely also decrease.

Consumer Duty

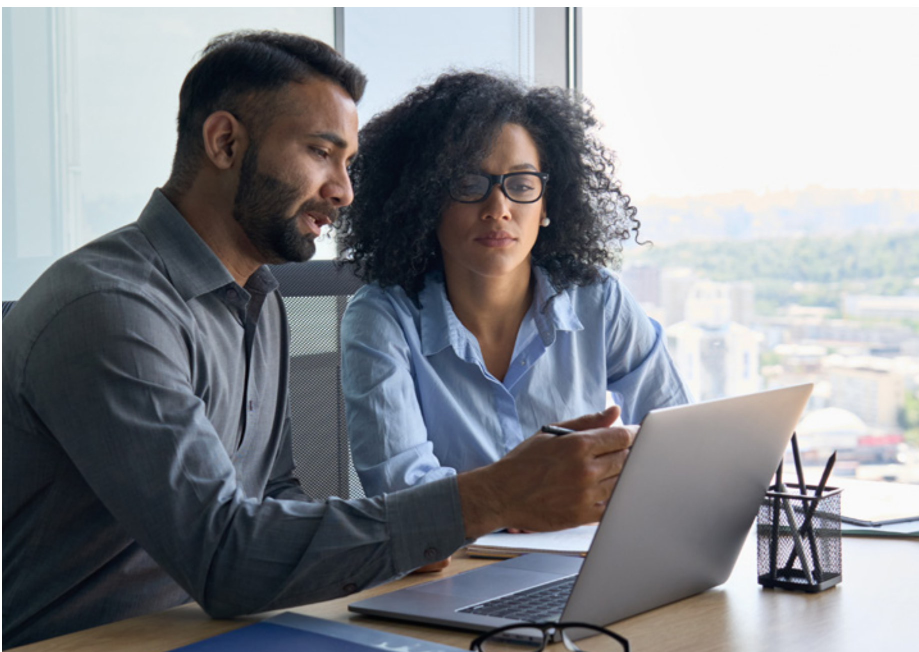
Brokers will continue to embed the new FCA Consumer Duty, which came into force on 31 July 2023, into their businesses.

The new over-arching consumer principle establishes that firms must act to deliver good outcomes for retail clients. There are 3 cross-cutting rules that require firms to act in good faith towards retail customers, avoid foreseeable harm to them, and enable them to pursue their financial objectives. Finally, there is a focus on 4 key outcomes, namely communications, products and services, customer service, and price/value.

We consider that the focus on communications and products/services will have beneficial effects on brokers' risk management. We also believe the cross-cutting rule on good faith and the focus on price/value may well impact on some distribution channels that exist in the market.

Under-insurance

We expect that claims relating to under-insurance will continue given the inflationary environment.
As evidenced in the recent decision in *Infinity Reliance Limited (trading as My 1st Years) v Heath Crawford Limited [2023] EWHC 3022* (Comm) brokers need to do better in explaining the application of average and in spending more time understanding clients' businesses on renewals.



For BI cover, brokers should more strongly recommend cover on a declaration linked basis.

Artificial intelligence

The increased use of artificial intelligence may especially impact the broker market, which we think is ideally suited to the opportunities that are presented by the new technology.

Many claims against brokers arise from the same shortcomings in advice or failure to properly document it and artificial intelligence could assist greatly in ensuring that all options are considered with clients and that it is documented.

Particular risk areas for brokers at present include the use of inappropriate reliance letters. For example, too many firms agree to sign such letters that use the Loan Market Association (LMA) standard template and which assumes far greater potential liabilities for the incumbent broker than is appropriate on financial transactions.

We also have concerns about advice being given on the IUA 04-017 silent cyber clause for professional indemnity policies and whether clients fully understand the range of claims that will in fact be excluded by this.

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PI: Legal

It has been a challenging few years for the legal profession and the PII market in general.

PI: Legal

It has been a challenging few years for the legal profession and the PII market in general.

Economic climate

COVID-19 came with the fear of a dramatic rise in claims arising from working from home and the pressures everyone faced as a consequence of enforced lock downs. Almost as soon as that fear had subsided, a recession was forecast rapidly followed by the cost of living crisis. On top of these concerns, the solicitors PI market had hardened at an almost unprecedented rate.

All of these factors suggested that many firms would not be able to survive the combined effect of these additional burdens.

However, despite the ongoing fear of recession and the rise in interest rates it seems that many small and mid-sized firms are managing not only to survive but to grow profitably. This will be assisted by reports that the PII market is now softening and there are new entrants into the market after a few quiet years on that front. There is a significant degree of optimism that well run firms of all sizes will be able to continue to trade profitably for the foreseeable future.

Law firm failures and the SRA

In the last 12 months there have also been some well reported law firm failures, with Axiom Ince being the most high profile. If the SRA carries out its promise to levy the profession to meet the claims that have arisen, that will add to the burden on law firms.

Cyber risks

On the claims side, conveyancing remains the culprit for the highest volume of claims but for the future we predict that cyber attacks will continue to rise as the methods to gain access to law firms IT systems become more and more sophisticated. The recent problems encountered by CTS demonstrate that even outsourcing to an IT expert does not necessarily mean one is immune from attack.

Despite the recent rule changes on cyber added to the minimum terms and conditions it is surprising to discover that even by July 2023 more than seven out of ten law firms were still without specific cyber insurance. Whilst the MTC protect clients from losses suffered as a result of cyber crime, incidents like the one encountered by those firms using a CTS system will have costs law firms significant sums in terms of lost revenue and management time dealing with the loss of client data. Without specific cyber cover these losses are not insured.

Artificial intelligence

On a related topic is the surge in the use and general awareness of AI. It cannot be ignored, but law firms need to be cautious and carefully explore its benefits and potential limitations when considering a significant investment in AI technology that is still in its infancy. AI will inevitably be part of every business in a few years, but not everyone agrees with Elon Musk's prediction that AI will take over all our jobs at some point in the foreseeable future.

M&A

For the last twelve months some corporate lawyers reported a decline in transactional instructions and predict that in Q2 2024 more businesses will go into receivership. That might mean a tough year ahead for law firms generally, especially if the recession does finally hit.

However, as noted at the start of this article, commentators predicted that COVID-19 would lead to a surge in claims and so far that has not come to pass. The profession is resilient to these market forces and no doubt will continue to thrive.

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PI: Surveyors

Hope Capital Ltd v. Alexander Reece Thomson was surely the most notable surveyor's negligence decision of 2023. September's judgment displayed a myriad of interesting issues.

The case concerned Cedar House, a prominent Grade II listed property in Cobham, Surrey.

The defendant (surveyors) valued the property at £4m in February 2018. The claimant (lender) claimed that the 'true' value was only £2.15m.

The defendant eventually admitted that its valuation was negligent and indefensible – but this admission only seeped out after the trial had already started.

The Judge found that the 'true' Open Market Value at the relevant date was £2.75m. In other words, a negligent overvaluation of 45%.

Notwithstanding the admitted breach of duty, the claim was defeated in the end and no damages were awarded. This was because the claimant could not prove that they had suffered any actionable loss.

To rub salt in the wound, it transpires that the claimant turned down an offer from the defendant (made about six weeks before trial) to pay £1.15m in full and final settlement.

Lots of features leap out from the judgment. Not least the section on the appropriate band of tolerance around the Property's 'true' value. Interestingly, the experts in the case agreed that "in the context of the unusual and, indeed, unique nature of [Cedar House]" the bracket was 20%.

However, irrespective of the consensus between the experts – and whilst acknowledging that Cedar House was, an "uncommon type of property" and "challenging" to value in 2018 – the Judge concluded that the bracket was no more extensive than plus or minus 15%.

The Judge pointed out that a 20% bracket:

"...would have – in the context of a valuation of (say) £3m – permitted a non-negligent range from £2.4m to £3.6m, i.e., a range of £1.2m. I consider (not least without any specific and express warning drawing this to the attention of the party retaining the valuer) that the recipient of expert, specialist valuation advice in respect of what was, after all, a property with an intended mainstream commercial use would be justifiably surprised with such a large, non-negligent tolerance..."

Another interesting feature was the impact of the lender's conduct in all this. If it had been necessary for him to reach a finding then, the Judge would have assessed the contributory negligence of the lender at 50%, which is high. It is a weighing exercise. As the Judge put it, the Court has to:

"... balance blameworthiness and culpability with causative potency. In this regard, I would certainly have in mind that the negligence of the Defendant by reference to the extent to which the valuation was overstated was significant. However, balanced against that on the Claimants' side were acts of imprudence which led, in terms of causation, to the security being incapable of swift realisation, the very risk a prudent lender would take reasonable steps to avoid..."

The claimant sought permission to appeal the September decision, but that application was refused. There is some speculation that the claimant is now re-directing its application to the Court of Appeal. We await to see whether permission will be granted.

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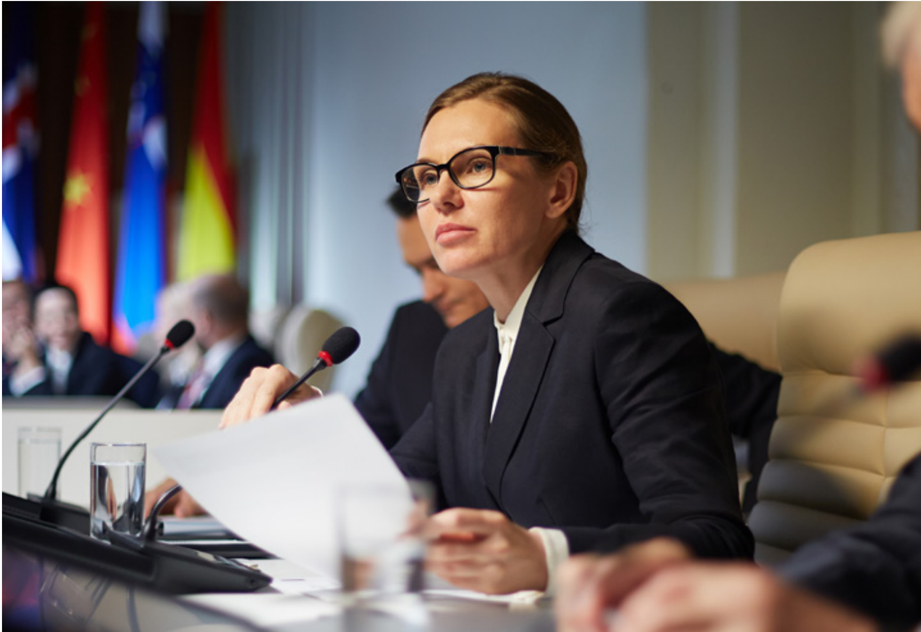
Political risks



2023 saw continued geopolitical unrest which presented insurers with challenges. The war between Russia and Ukraine sees no sign of resolution, and sanctions and restrictions on insurance coverage persist. The more recent resurgence of the Israeli-Palestinian conflict is drawing on tensions with supporters on each side across the world. 2023 has also seen continued labour strikes across Europe relating to pay and working conditions, which interrupts business across all sectors.

What to expect in 2024? The existing international conflicts will continue to cause devastating loss of life and humanitarian conflict, and problems for businesses and their insurers. For insurers of political risk, these conflicts see a range of claims including business interruption, contract frustration, property damage losses, confiscation and more.

The war in Russia and Ukraine continues to change the international energy landscape and impact upon food and commodities markets. In 2023, EU leaders sought to phase out dependence on Russian fossil fuels. Europe sought imports from other nations including, the US but also looked to diversify into other energy sources and cut back on gas consumption.

Disruption of this sort, whilst it may encourage increased appeal towards and use of renewable energy sources, also increases pressure on pricing which is made worse by high interest rates and inflation across the world. Those companies which operate in large chains of oil and gas production and distribution from Russia (and neighbouring countries) to the rest of the world, will continue to face challenges. National governments continue to intervene in order to try and achieve stability, to varying degrees of success.

With continued sanctions against Russia and countersanctions, huge amounts of Western investment are "stuck" in Russia, such as aircraft.

The continuing Gaza conflict will produce problems for the insurance market. If the conflict spreads, as per recent events in Lebanon and the Red Sea, then the impact will also spread for insurers and the cover they give. Marine insurers will be concerned about the situation within the Red Sea and how it develops. Many may already be looking to add war risk exclusions.

Within the insurance market there will be continuing debate around the differences in cover provided by conventional political risk and political violence policies, especially with regard to how the exclusions are to operate, such as the SRCC exclusion.

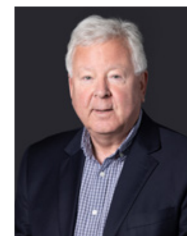
In 2024, a total of 64 elections are set to take place across the world including the US, South Africa and Taiwan. In the short and medium term, there will be uncertainty regarding regulations and policies due to this. As a result of the US elections in particular, the global business environment will be significantly affected by the contrasting perspectives on international relationships and economic policies held by the respective US election candidates.

Businesses face the risk that any existing government contracts will be frustrated or rescinded.

In terms of property damage losses, we only need to look back to the resulting violence following the 2020 US elections to be reminded of the risks to local businesses in election years.

The volume of elections across the world will likely increase demand for political risk insurance this year.

In December 2023, COP28 took place in Dubai. Governments continue to introduce climate regulations which affect businesses in all sectors in order to work towards net-zero targets. It is uncertain whether Government support for such targets can bridge the gap for many businesses.



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Property damage and business interruption

UK storm and flood claims

Sadly, the recent effects of storms Babet, Ciaran, Gerrit and Henk look like making the end of 2023 and start of 2024 a very difficult time for many homes and businesses across the UK. As a result, the start of 2024 will also be a challenging time for insurers, loss adjusters and contractors as they deal with a surge of claims, often in recurring bad weather. During such surge events the pressure will be on to minimise delays in repairing and reinstating.

Co-ordination and communication is key, between insurers and their third party suppliers, and between insurers, brokers and the policyholder. The ability to assess and authorise claims quickly is important, as is prompt payment to contractors to ensure labour, materials and equipment is procured and on site as soon as possible. Sympathetic yet realistic timeframes, which will often be subject to change, need to be properly explained to policyholder.

Inflation/supply chain

In last year's edition of 'Insurance Insights' we looked at various 'claims inflation' factors that had combined to increase considerably the cost of property damage reinstatement, and resulting business interruption claims settlements, and how insurers, insureds and brokers could address those factors. Although the effects of some of those factors, such as the COVID-19 pandemic, Brexit and the spike in energy may be lessening, unfortunately some of the factors will persist in 2024 and have been added to by new inflationary pressures.

Wage and raw material (steel, bricks, and concrete) cost pressures continue, as do long lead in times for sourcing and securing replacement items, and labour shortages. Increased interest rates on borrowing, the continued war in Ukraine, war in Gaza, and repeated attacks by Houthi rebels in the Red Sea, all add to uncertainty, increased costs, difficulties and delays. These factors continue to create real challenges for property claims teams and their loss adjusters during 2024. Erosion of the sums insured, risking under-insurance, and an increase in claims lifecycle will not be uncommon. Longer reinstatement periods will only serve to continue to increase costs. Increase alternative accommodation claims may also result. All of this makes reserving problematic. It also makes premium increases almost inevitable.

Assessing and settling claims quickly is even more important in the light of such inflationary pressures. The use of technology to quickly assess, record and agree the extent of damage, and the use of cash settlements should be considered where appropriate. It's important that policyholders and their brokers take actions to reduce the risk and impact of claims inflation. Where policies include index-linked provisions, re-consider whether the index being used is currently an accurate gauge of the increased reinstatement/remedial costs in the sector in which the policy holder operates. Mid-term reviews of asset values and reinstatement/remedial costs are advisable. Make sure that buildings and other assets are regularly, and professionally, re-valued to ensure that their asset value and their re-build costs properly reflect current increasing prices. Review each policyholder's supply and remedial chain to ensure that they are aware of current prices and waiting times for replacement items. Take pro-active risk management steps to prevent any loss from happening or mitigate immediate response.

Proximate cause/ concurrent causes

Lastly, 2023 saw some developments regarding the law on causation and 'proximate cause'.

At the start of the year the Court of Appeal in *Brian Leighton (Garages) Ltd v Allianz* handed down its judgment, reversing the decision at first instance, as to the meaning of a pollution or contamination exclusion in an All Risks policy. The Court of Appeal held that the exclusion only applied if the excluded peril in question was a proximate cause of the loss and that in this instance damage to an underground fuel pipe was the proximate cause of the loss, not the resulting fuel leak and pollution/contamination itself.

Then in December in *University of Exeter v Allianz* the Court of Appeal dismissed the University's appeal and ruled that damage following the controlled detonation of a previously unexploded WWII bomb did fall within the policy's war exclusion clause because the initial dropping of the bomb by German forces was a concurrent cause of the loss. The Court of Appeal applied the established principle in *Wayne Tank and Pump Co Ltd v Employer's Liability Assurance Corp* that where there are multiple causes which are equally dominant, and where one of those causes is excluded, then the exclusion bites to override the insured peril.

Both decisions, albeit with different outcomes for insurers, confirm the importance of determining the proximate cause, the scope of the words 'caused by' as opposed to say 'directly or indirectly caused by', and the effect of two or more concurrent causes. Insurers must remember to examine the true proximate cause, not just the closest in time, to establish the efficient and effective cause. If an insurer wants an exclusion to be construed more widely, then this needs to be stated clearly in the policy language.

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Public and employers' liability

Economic and environmental challenges will have an increasing influence on personal injury claims in 2024 with the continued impact of claims inflation and threat of climate related litigation on the horizon.

Procedural change will offer greater certainty to insurers on costs exposure but it is likely to prompt a move away from more traditional causes of action to niche areas of injury litigation.

Expansion of the fixed recoverable costs regime

Whilst the impact of the extended fixed cost regime, and introduction of the Intermediate Track (capturing the majority of cases valued between £25,000 – £100,000) will be gradual, insurers would be well served by taking the initiative and developing strategies now. For personal injury cases, the new regime will apply to accidents that occur after 1 October 2023 or in disease claims where the letter of claim is sent after 1 October 2023. We can expect the allocation of cases to one of four complexity bands within both the Fast and Intermediate Tracks to prove particularly contentious, with assignment to a higher band attracting enhanced fixed recoverable costs.

Insurers and those representing them should consider if there are opportunities to narrow issues prior to litigation and certainly before allocation, in order to manage complexity and benefit from assignment to a lower band.

Climate change litigation

Air pollution is described by Public Health England as "the biggest environmental threat to health in the UK". Although the emphasis of climate change litigation to date has been to drive forward measures to reduce emissions, we expect to see a shift in direction with greater scrutiny of the procedures that organisations have in place and an appetite for civil claims brought in tort where there are clear deficiencies.

The more immediate threat of climate related litigation is in an employer's liability context following occupational exposure to air pollution – the link between exposure and respiratory conditions is well established and any employer will be expected to assess, and where necessary mitigate risk, particularly for "higher risk occupations" (for example employees working outside in the vicinity of road networks).

As we all become more attuned to the risks of air pollution, the importance of tackling the issue will intensify and those organisations who are behind the curve in implementing measures will not only place employees at greater risk but are also likely to be faced with challenges, civil claims, and reputational damage.

The changing face of data breach claims

A number of high-profile decisions in the appeal courts have significantly restricted the ability of claimants to successfully pursue data breach claims and stemmed the tide of group actions. Whilst welcome news to defendants, we are now seeing an increasing number of claims brought for psychiatric injury following a data breach, with reliance placed upon supporting expert medical evidence.

It is well established that the UK data protection legislation provides an individual with a right to compensation for non-material damage (to include distress), but the introduction of expert evidence and alleged psychiatric injury brings with it the risk of a significant escalation in value. The trend for claims of this nature being pursued is expected to continue.

Personal Injury Discount Rate

As we approach the five-year cycle for review of the Personal Injury Discount Rate (PIDR) in July 2024, there remains significant uncertainty as to how the Lord Chancellor will tackle the vexed issue of setting the rate in an uncertain economic climate.

All options remain open following a call for evidence by the Ministry of Justice in early 2023, with the possibility of dual or multiple rates under consideration (which would involve a lower short-term rate followed by a higher longer-term rate after a 'switchover' period). The position is complicated by the current rate of inflation, which although falling remains stubbornly above the 2% Bank of England target. Setting a PIDR that will ensure seriously injured claimants are adequately compensated whilst not representing a windfall is a challenge the Lord chancellor will have to grapple with.

It may be that the status quo is maintained and the current rate of -0.25% is preserved for now, but insurers will need to react quickly to any change in approach to ensure reserves remain adequate and settlement strategies appropriate. We will undoubtedly see a flurry of activity on the part of both claimants and defendants involved in cases which include future losses.

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Regulatory considerations for distributors

Horizon scanning - important considerations for product distributors in 2024

Mind the GAP – FCA warning on GAP insurance

In September 2023 the FCA issued a warning to all GAP and motor excess protection insurers that urgent action must be taking to ensure that such products provided fair value to customers. Matt Brewis, Director of Insurance at the FCA specifically warned that:

“If firms are unable to prove they're providing fair value to their customers, they should expect further action from the regulator”.

The warning came after FCA data revealed that for GAP add-on products only 4% of premium payments were ultimately paid out in claims, which rose to only 7% for standalone GAP policies. The three month period to review products expired on December 2023, so we shall see whether the threatened further action from the regulator comes to pass.

Insurers who have not already reviewed their GAP products should do so as a matter of urgency.

Multi-occupancy building insurance (“MOBI”)

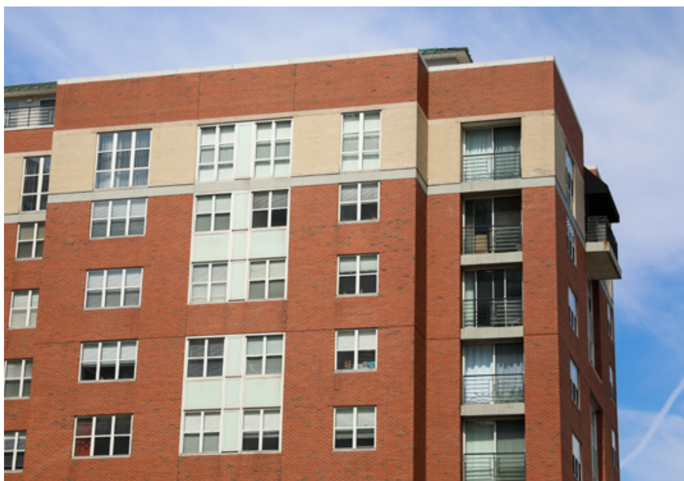
At the end of December 2023 the MOBI regulations came into force, after a period of consultation by the FCA. The MOBI regulations apply to distributors of insurance where the policyholder is the landlord or manging company or agent of a multi-occupancy property where the premiums for such insurance are charged to the occupiers via a service charge or similar. The FCA has been concerned by historic practices in relation to the sale of such policies, in relation to which the beneficiaries who indirectly pay for the cover (i.e. the occupiers/tenants) have very few rights under the policy and are rarely provided with information about the product before inception.

The MOBI regulations impose a number of obligations, including:

- A requirement to consider the occupiers when undertaking the product fair value assessment.
- An obligation on the distributor to provide information about the policy (and other policies that are not recommended but which have been considered) to the occupiers.
- An obligation to make a full disclosure of all remuneration relating to the arrangement of the product, including details of any payment made to the freeholder or managing agent.
- A specific requirement to consider the needs of the occupiers and to respond to queries they may have about the product.

The MOBI Regs also apply to any analogous products where those paying for and benefitting from the product are not the principal policyholder and may have historically had little involvement in the decision to buy the product. Such products are automatically caught by the Consumer Duty even where they would otherwise be exempt as contracts of large risk.

All insurers and distributors should consider whether any of their products are caught by the MOBI Regs, and ensure they have systems and controls in place to ensure compliance.



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Underwriting considerations

Horizon scanning - important considerations for underwriters in 2024

In this section of our review, we consider some incoming legal and regulatory changes that underwriters should be aware of.

Automated Vehicles (AVs)

2023 saw the first readings of the Automated Vehicles Bill ("**the Bill**"). The Bill will look to address the issue of information sharing between insurers and AV manufacturers for the purpose of claims resolution. However, there is some concern that such information sharing could end up being used be used for commercial purposes such as setting premiums. We can therefore expect to see further revisions to the Bill as it passes through Parliament.

The Bill's passing (assuming it does) is likely to be the final legal step required to pave the way for increased use of AVs in the UK, meaning motor insurers are much more likely to start seeing claims involving AVs. One key issue is how the law will deal with claims where there is no fault on the part of the 'driver'. This situation is governed by the Automated and Electric Vehicles Act 2018 ("**the Act**"), which stipulates that the motor insurer of the 'driver' is liable to compensate an injured accident victim, regardless of whether the 'driver' or the AV was at fault. If injuries are caused by a fault with the AV, insurers may bring a recovery claim against the manufacturer.

Insurers should start thinking about their preparedness to deal with claims involving AVs. Insurers should also consider their wordings and whether they match their risk appetite. For example, if insurers provide 'driving other cars' cover, they should consider whether they are content to provide such cover if the other car is an AV.

AI – opportunity or threat (or both!)

During the last 12 months, the use of AI has progressed at almost unimaginable pace. This pace of change is likely to continue (and probably speed up!) during 2024 and beyond.

The use of AI in underwriting

There are a number of potential uses of AI for underwriters, in particular for quickly gathering information about risks. AI can even be used to assess risks against underwriting criteria and to apply a rating to a risk. There are a number of risk factors which must be assessed before insurers consider using AI as part of its underwriting process, including:

- Inconsistent outputs – AI will not necessarily produce the same output when responding to the same inputs, creating a conduct risk.
- Operational resilience – insurers must ensure that any AI is sufficiently robust and that suitable levels of operational continuity can be assured.
- Material outsourcing – where AI is operated by a third party, insurers must comply with regulatory requirements relating to material outsourcing.
- AI errors – AI is not infallible (see below)! Insurers should ensure there are sufficient checks and balances in place to guard against inaccuracies.
- Bias – AI is usually based on historic datasets, which often include biases. Insurers need to be satisfied that this does not result in insureds experiencing discrimination.

Use of AI by insureds

In addition to using AI in its underwriting processes, insurers are increasingly likely to find their insureds using AI as part of their business processes. The use of AI is likely to be a new risk factor for consideration by insurers, with very little historic information being available for underwriting decisions to based on.

As mentioned above, AI is not infallible. Most readers will be aware of the well-publicised case of a lawyer in the US making a submission to court which included reference to fictitious cases, which arose as the lawyer failed to check the output of their AI. Insurers should consider whether their proposal forms are sufficient to capture the extent to which proposers are using AI and what (if any) steps are taken to guard against the risks of doing so.

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We are delighted to include guest articles from colleagues in member firms in Australia, Texas (USA) and California (USA).

Notification of facts in cladding claims

The Federal Court of Australia decision in *MS Amlin Corporate Member Limited v LU Simon Builders Pty Ltd* [2023] FCA 581 gives direction for insurers dealing with bulk notifications of the use of aluminum composite panel (**ACP**) products under Australian insurance policies.

The decision concerned whether LU Simon Builders Pty Ltd and LU Simon Builders (Management) Pty Ltd (**Insureds**) gave sufficient notification of facts concerning the use of combustible ACP cladding on the 36-storey Atlantis Towers (**Atlantis Claims**) to engage section 40(3) of the **Insurance Contracts Act 1984** (Cth) and trigger cover for claims made after the expiry of the insurance policy. Section 40(3) acts as a statutory deeming clause which essentially treats the claim as being made in the period in which circumstances are notified.

The Insureds primarily relied on two notifications made during the policy period:

- The first referred to a press release regarding an investigation into the Insureds by the Victorian Building Authority (**VBA**) for the use of combustible cladding material following the Lacrosse fire.
- The second attached a document with comments from the Metropolitan Fire Brigade (**MFB**) which raised concern with the compliance and combustibility of ACP products generally.

Judgment

Justice Jackman found that the notifications were sufficient to notify of a wider problem concerning the non-compliant ACP products used by the Insureds and engage section 40(3). In his decision, his Honour:

- Endorsed the decision in *P&S Kauter Investments v Arch* [2021] NSWCA 136, including that a notification of "facts" be of objective matters that bear on the possibility of a claim being made, rather than matters of belief or opinion as to that possibility.
- Disagreed with the decision of *Uniting Church v Allianz* [2023] FCA 190 that expert opinion cannot be a "fact" that might give rise to a claim under section 40(3).
- Considered that where "opinion is given by a person in a position of public authority, such as the MFB or MBS, the publication of that opinion may well be a most important fact that might itself give rise to a claim".
- The opinion formed by the MBS that ACPs cladding indicated a real and tangible risk of the MBS taking a similar stance in relation to other buildings which used ACPs (such as the Atlantis Towers).

Implications

The key takeaways for insurers following this judgment are:

- Expert opinion can be considered as "facts" that might give rise to a claim.
- Notifications can be supplemented and should be considered together.
- It does not matter that potential claimants are not identified.
- The insured may not need to intend to notify facts for a notification to be valid.

The judgment did not rely on overseas authorities relating to a "hornet's nest" notification, but relied on Australian authorities, indicating that future judgments may be less reliant on overseas decisions as the body of law on section 40(3) develops. The decision is currently under appeal.

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Sailing for Uniformity: SCOTUS to decide choice-of-law in marine insurance contracts

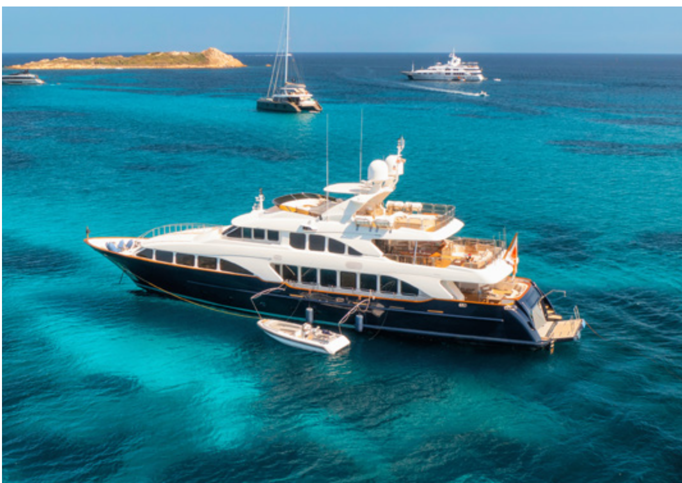
It has been 68 years since **Wilburn Boat**, the last time the Supreme Court of the United States considered a marine insurance contract case. **Wilburn** held that state law, rather than federal admiralty law, should govern marine insurance contracts. Over the ensuing decades, there has been an erosion of this holding via utilization of choice-of-law and forum-selection clauses in marine insurance contracts.

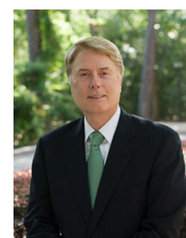
The U.S. Supreme Court heard oral arguments in the case of *Great Lakes Insurance SE, Petitioner v. Raiders Retreat Realty Co., LLC* this past October. A ruling is expected before SCOTUS concludes its term in late June or early July of 2024. This case has the potential to reshape the evaluation of the enforceability of choice-of-law clauses not only in maritime cases, but generally in federal courts. Notably, the Supreme Court has never established a definitive test for determining when these provisions should be upheld as a matter of federal law.

Great Lakes involves Raiders, a Pennsylvania yacht owner, who purchased insurance coverage through GLI, based in the UK. The yacht ran aground and sustained significant damage in Florida. GLI denied the claim, alleging misrepresentation by Raiders regarding its failure to re-certify fire-extinguishing equipment—even though this had nothing to do with the grounding. The marine insurance contract included a choice-of-law clause stating that if federal maritime law did not apply, the substantive laws of the State of New York would apply.

GLI sought a declaratory judgment in a Pennsylvania District Court, arguing that the policy was void due to the misrepresentations of the owner. GLI further argued that the choice-of-law provision rendered certain counterclaims by Raiders, based on Pennsylvania statutes that would invalidate the coverage denial, unviable under New York law. The district court ruled in favor of GLI, holding that Pennsylvania public policy could not override the presumptive validity, under federal maritime choice-of-law principles, of the provisions of the marine insurance contract. On appeal, the Third Circuit overturned the decision, holding that a choice-of-law clause might be unenforceable if contrary to the public policy of the state where the suit is brought.

The significance of this case lies in the potential for the U.S. Supreme Court to articulate a uniform federal test for the enforceability of choice-of-law clauses. A decision that could extend beyond maritime cases. At stake is the resulting uncertainty to insurers' risk assessment if state law can play a larger role in marine insurance disputes. At oral argument, most of the justices appeared to be aligned with the position of GLI and leaning toward upholding choice-of-law clauses in marine insurance policies. Regardless of the outcome, the decision will have a significant impact on the marine insurance industry.





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California's insurance policy-limit demand statute enacted to prevent "bad faith" set-ups

It has been a year since the new California Code of Civil Procedure § 999 was enacted. It governs claimants' demands that an at-fault party's liability insurer pay the limits of its policy to settle the claims against an at-fault party by a specific deadline. This new statute governs time-limited policy-limit demands made **before** the filing of a lawsuit or a demand for arbitration and will apply to demands issued on or after January 1, 2023. The new law is intended to reduce bad faith set-ups of insurers by providing a more robust framework for insurers, insureds, and claimants, to issue and respond to time-limited policy-limit demands. This section will apply to causes of action and claims covered under automobile, mobile vehicle, homeowner, or commercial premises liability insurance policies for property damage, personal or bodily injury, and wrongful death claims.

In order to satisfy the new statutory provision, a claimant's demand must:

1. Be written.
2. Be labeled as a time-limited demand (or reference the statute).
3. Provide at least 30 days to accept if the demand is transmitted by email, or 33 days to accept if transmitted by mail.
4. Include a clear and unequivocal offer to settle all claims within the policy limits, including the satisfaction of all liens.
5. Offer for complete release from the claimant for the liability insurer's insured from all present and future liability for the occurrence.
6. Provide the date of the loss, the location of the loss, and the claim number, if known.
7. Provide a description of all known injuries sustained by the claimant.
8. Provide reasonable proof of the claim and damages, which may include, if applicable, medical records or bills sufficient to support the claim. (*Cal. Civ. Pro.* §999.1.).

Under the new statute, once an insurer receives a §999 demand, they may:

- Accept the demand by providing written acceptance of the material terms outlined in §999.1 in their entirety.
- **OR** Reject the demand by notifying the claimant in writing prior to the expiration of the demand, and providing the basis for the insured's decision to reject the demand.
- **OR** Seek clarification, additional information, or request an extension due to the need for further information made prior to the expiration of the demand. Crucially, the new law explicitly provides that such a request for more information "shall not, in and of itself, be deemed a counteroffer or rejection of the demand." (*Cal. Civ. Pro.* §999.3(b).)

The California legislature is trying to create a more level playing field for all parties with this new statute, with the goal that insurers can now give more attention to cases that merit early resolution based on the facts and evidence. For years, litigators in California could easily set up insurance carriers for bad-faith claims by issuing policy-limit demand letters seeking the maximum recovery available while providing scant factual detail in support of their demand. With the barest factual information to go on, this would leave insurers with little choice other than to reject the demand. Indeed, such a rejection would often be the claimant's goal. If the case were to go to trial, and the claimant obtained a verdict against the defendant insured in excess of the policy limits, the insured (or the claimant via assignment) can then claim that the insurer's rejection of the policy-limit demand was in bad faith. At that point, it will be argued that the insurer is liable for the entire verdict, including the amount in excess of the original policy limit.

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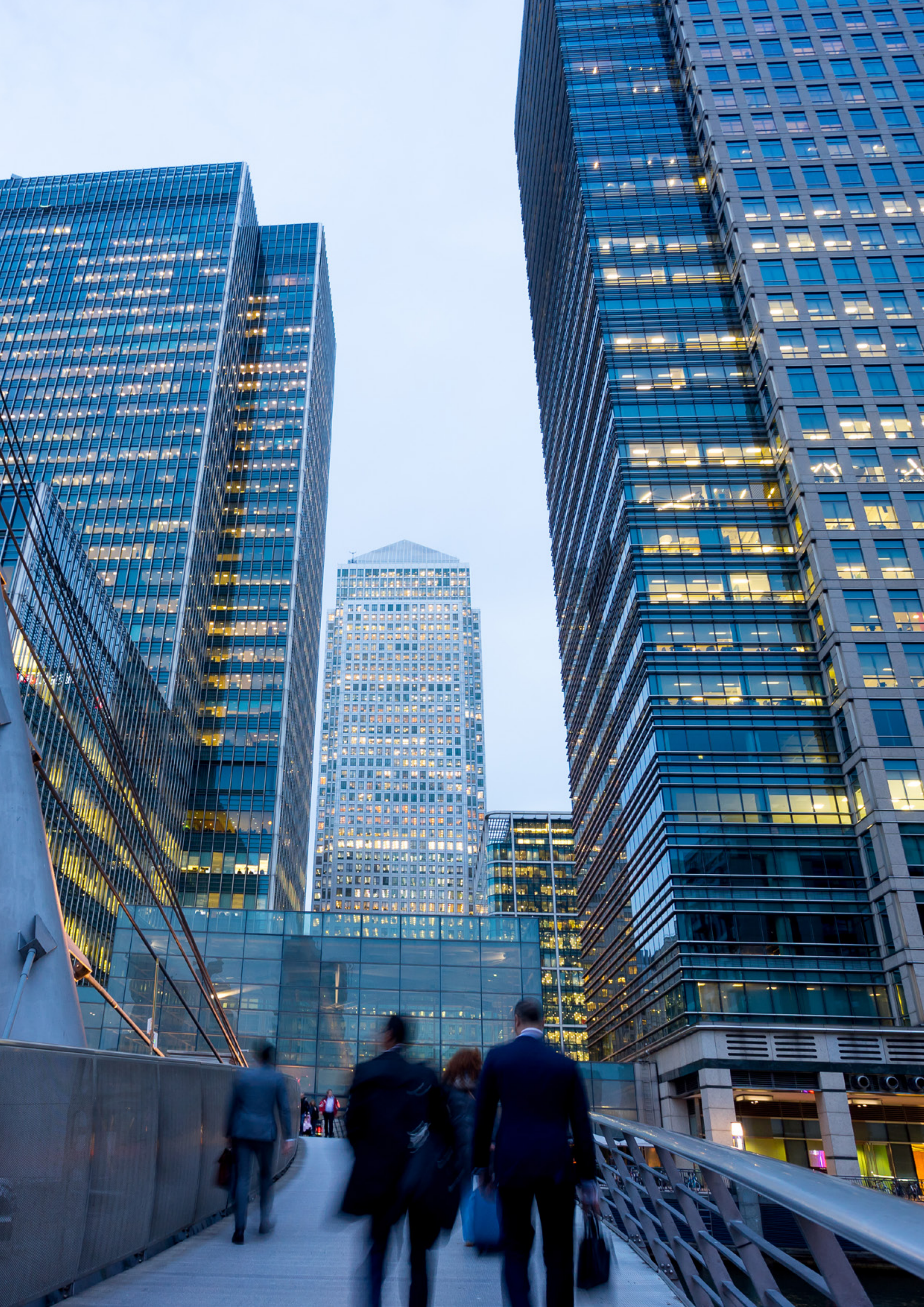

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