brownejacobson LLP

Annual Insurance Review 2022

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Welcome

Welcome to our Insurance Annual Review.

In our review of developments in 2021 and analysis of some of the important issues on the horizon in 2022, we share insights that we hope will enable you to rise to the challenges, and make the most of the opportunities, which lie ahead across various sectors and lines of business.

Like last year, the Covid-19 pandemic and Brexit have presented, and will continue to present, many new challenges for insurance markets and financial services generally.

The last 12 months have once again tested business and human resilience, and these extraordinary times are likely to continue to do so. Together with our clients, we are finding new ways to help the industry respond and transform, enhancing firms' stakeholder-centric approach to Environmental, Social and Governance factors.

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

Best wishes

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Professional Liability: Legal Professions

The legal sector, whilst largely buoyant, continues to face serious risks as a result of high workloads being delivered from home with less supervision and increased cyber risks. Below we explore these trends in more detail.

SDLT Holiday claims

Due to unprecedented work levels caused by the Stamp Duty Land Tax ("SDLT") holiday (which for purchases up to £500,000 ran to purchases completing before 30 June 2021) many firms informed clients that, whilst they would work towards beating the deadline, they would not be held liable in the event that this was not possible. However, any such disclaimers will be subject to the swathe of legislation intended to protect consumers and may not be enforceable and the reality is that claims for losses as a result of having to pay SDLT will follow. It is also expected that other claims will be made arising from poor service and negligently handled transactions given the pressures that conveyancers were under.

Ground rent claims

Conveyancers have faced increasing numbers of professional negligence claims for failing to identify onerous and escalating ground rent provisions in leases and/or inadequately advising prospective buyers on the implications of such provisions. Examples include the doubling of ground rent at each anniversary date and the lease unattractive to future buyers. This will continue to be the case for some time, despite the Leasehold Reform (Ground Rent) Bill, which proposes to restrict ground rents on only new long residential leases. The changes will be welcomed by purchasers, but it will be important to anticipate how freeholders react and seek to recoup their losses, for example, by increasing the purchase price or increasing management fees. Conveyancers will need to be alive to these developments and advise their clients accordingly, so that claims arising from ground rent, do not simply transform into claims from other issues.

Cyber-attacks and silent cyber

Law firms and barristers' chambers (a number of whom suffered ransomware attacks last year) hold significant amounts of confidential, sensitive and personal data as well as handling large sums of client money. For these reasons they remain prime targets for cybercrime and will continue to do so for the foreseeable future.

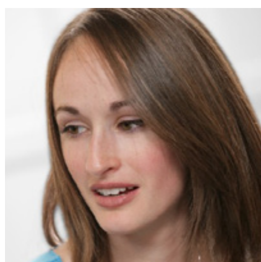
Firms' Risk and Compliance teams continue to spend time and money dealing with data breaches, reporting to the SRA and the Information Commissioner's Office. Firms and their insurers incur often significant losses on account of the continued and serious threat in this area.

The issue of "silent cyber" or no-affirmative cover (where insurance policies inadvertently, rather than expressly, cover cyber losses) has gathered pace over the last few years. Insurers are now seeking clarity around these issues and carefully worded exclusions are being rolled out (e.g. IUA 04 17 – Cyber, Utilities & Data Exclusion). The SRA has recently completed its consultation on changes to the Minimum Terms & Conditions of Professional Indemnity Insurance for solicitors ("MTC") which confirms that it will allow insurers to exclude claims for first party losses (i.e. those suffered by the firm) but will continue to cover losses suffered by third parties (i.e. clients) as a result of cyber-attacks. It is anticipated that this change to the MTC could be effective from the 1 April 2022 renewal. Firms that want watertight protection in this area will therefore need to continue to have not only PII insurance but a separate Cyber policy to cover first party losses.

Litigation

Other key talking points in the year ahead will include:

- The extension of Fixed Recoverable Costs to all civil fast track cases (i.e claims for £10,000 to £25,000) and to "intermediate cases" for damages between £25,000 and £100,000;
- The continuing review of the Pre-Action Protocols by the Civil justice Council;
- The Disclosure Pilot Scheme which has been extended to 31 December 2022; and
- The Civil Justice Council's report into Compulsory ADR which confirmed that parties can be compelled to participate in ADR.



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Professional Liability: Surveyors

With the publication of Alison Levitt QC's 467-page report on corporate governance, 2021 was – to put it mildly - a very unsettling year for Royal Institution of Chartered Surveyors (RICS) members.

2022 brings with it a raft of RICS consultations and 'calls for input'. These reviews could change the landscape of professional liability claims against surveyors quite significantly:

- The Andrew Gooding Review – with all the challenges of the hard market, this review is looking into RICS' professional indemnity insurance requirements in the UK. For the medium term, some radical possibilities are under consideration. Options range from maintaining the current PII model to self-insuring through a mutual, reverting to a master policy and pondering per-project insurance cover.

- The Peter Periera Gray Review – to tighten the rules on property valuation. The RICS Board has accepted all 13 recommendations of this review. The changes include introducing a Valuation Compliance Officer role for RICS regulated firms engaged in valuation work and the issuing of guidance on the culture and behaviour expected of valuation professionals.

- The new RICS Guidance on Japanese Knotweed – Japanese Knotweed has been a very notable area for aims in recent years and the RICS Information Paper, dating back to 2012, was badly in need of updating. The author of the new Guidance, Philip Santo FRICS, has said: "… creating confidence and awareness that knotweed isn't a death sentence for home sales is a key principle behind this guidance – it's certainly not the 'bogey plant' that some make it out to be …" The new Guidance was launched on 26 January and is effective from 23 March 2022.

- RICS Home Survey Standard (HSS) – following its implementation in March 2021, the RICS is asking for feedback from members about the new procedures. The HSS is likely to be a major touchpoint for all surveyor negligence disputes in future. The new provisions have not yet been tested but 2022 is likely to see the first such claims being litigated in Court.

- The Lord Michael Bichard Review – this follows on the heels of the Levitt report and Lord Bichard will make firm recommendations on the RICS's purpose, governance and strategy. The call for evidence has recently closed. Bichard aims to produce his report by June 2022.

- This is only a small selection of the initiatives in the pipeline but they are all likely to be impactful. 2022 will be a dynamic year for the sector and professionals may struggle to stay ahead of the curve.

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Professional Liability: Estate and Lettings Agents

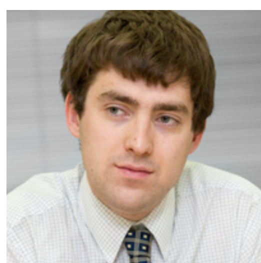
2021 saw a high frequency of professional negligence claims being pursued against letting agents. This owes to the common failure to comply with the requirements for the protection of tenancy deposits as set out in the Housing Act 2004. As many agents will be aware, the Act imposes stringent requirements to ensure tenancy deposits are protected within set timeframes and for prescribed information to be issued. Should these requirements not be met, agents and landlords may be required to compensate tenants at a sum between 1 and 3 times the value of the deposit. Critically, this applies even in the case of purely “technical” breaches of the requirements, even if they have not caused the tenant any loss.

We have also begun to see claims being presented against letting agents by landlord clients owing to the misuse of and/or damage to their rental properties during the course of the Covid-19 pandemic. Since the rules limited travel and social contact, many agents were unable to conduct inspections of rental properties, and thus some tenants have been able to use this time to cause damage to properties – in particular, rental properties being used for the purposes of cultivating cannabis.

This is exemplified by the fact that, in response to the Covid-19 pandemic, the Government introduced various rules which limited a landlord’s ability to evict tenants. As a result, landlords have had to wait longer to regain their properties, and so in cases where rental arrears are present, these arrears have continued to grow. This has led to landlords pursuing higher claims against their agents where they consider the agent was negligent in selecting those tenants.

Therefore, as Covid restrictions ease, we may see landlords beginning to instruct their agents to commence eviction processes on properties where they wish to regain access. Agents will need to ensure that they are continuing to monitor any further changes to the rules on serving eviction notices, given the various amendments that have occurred during the course of the pandemic. An incorrect notice may invalidate attempts at eviction, with landlords again looking to recover any wasted costs and other associated losses from their agents.

Finally, the landlord licensing scheme continues to be extended across various local authorities in England, imposing further requirements on landlords before they are able to market rental properties. Letting agents should be taking steps to familiarise themselves with the requirements in their local area, and to ensure that the rental properties they manage are suitably licensed by the landlord, so as to avoid the risk of any potential secondary action being pursued against themselves by local authorities.



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Professional Liability: Accountants

2021 was a bountiful year of reported cases for professional negligence claims against auditors and accountants. The landmark Supreme Court decision on professional negligence and scope of duty in *Manchester Building Society v Grant Thornton,* [2021] UKSC 20 High Court decisions in *Knights Investment Management Ltd v Townsend Harrison Ltd* [2021]EWHC 2563 and *Bonnier Books UK Group Holdings Ltd v Johnson* [2021] EWHC 1789 (QB) are some of those cases.

In Manchester Building Society v Grant Thornton [2021] UKSC 20, the Supreme court held the Defendant, Grant Thornton LLP, ("GT") negligently advised Manchester Building Society ("MBS") that it could apply hedge accounting to provide a potential solution to a regulatory requirement to include the value of swaps on its balance sheet at a fair value. This resulted in MBS deciding to enter long-term interest rate swaps or hedge accounting in the run-up to the 2008 liquidity crisis. Whilst GT was not responsible for the decision to enter into the relevant swaps, the Supreme Court held that the scope of duty of care GT assumed was governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice was being given. The case also provided guidance on the application of the SAAMCO principle including six questions which should be asked in negligence cases. We discuss this case in more detail here.

The scope of duty question continued to dominate the landscape and was also an issue in the case of *Knights Investment Management Ltd v Townsend Harrison Ltd* [2021]EWHC 2563 where the accountants, Townsend Harrison Ltd ("THL") introduced its client, Knights Investment Management Ltd ("KIM") to investments in foreign exchange trading schemes for tax saving purposes. Some of the schemes failed to achieve the desired tax savings and some failed altogether.

KIM argued that THL had breached its duty of care in making introductions to the providers of the tax schemes and had failed to carry out due diligence in respect of the investment schemes. THL's actions had caused KIM to enter into the tax and investment schemes which resulted in a loss. THL denied that any duty of care arose because it had acted as a mere introducer of the schemes and had made it clear in its terms of business and in limitation of liability letters that it was not providing, and could not provide, advice in respect of these.

The court found in favour of THL on the basis that the allegedly negligent advice in relation to the tax schemes was not given, there was no assumption of responsibility regarding the introduction and there was no assumption of responsibility to undertake due diligence and give advice in respect of the investment scheme. The factual finding by HHJ Cawson QC that the THL did not assume any responsibility beyond the mere introduction meant that KIM failed at the second hurdle of the 6 questions set out in Manchester Building Society v Grant Thornton. The case demonstrates the protection a detailed and clear engagement can provide.

Aside for the spotlight which the above cases shone on the accounting profession, the profession also faced the exposure of furlough related claims. These were claims brought about by the sharp deadline which HMRC applied for the submission of Real Time Information ("RTI") numbers in March 2020 when the Chancellor announced the Coronavirus Job Retention Scheme ("the Scheme") and at various intervals thereafter. Accountants found themselves exposed to the rigidity of the Scheme when deadlines were missed and HMRC refused to countenance any appeals which resulted in employers missing out on the 80% of wages which HMRC was offering for furloughed employees.

For 2022, Accountants are likely to continue to find themselves in the firing line as HMRC now seeks to crack down on furlough fraud. In March 2021 the Chancellor created the Taxpayer Protection Taskforce to investigate frauds in relation to furlough claims and other support packages. Some examples of furlough fraud are where claims have been made for non-existent employees or without employees' knowledge. Whilst it is obvious that the directors and officers of companies will be at the centre of any fraud claims, it is also likely that accountants may be required to explain their actions in presenting furlough claims to HMRC.

The ICAEW recognised the increased exposure to fraud in the accounting profession and therefore the Accountancy Sector Fraud Charter was launched in collaboration with the Home Office is expected to take effect in 2022 to raise awareness of fraud amongst other things.

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Professional Liability: Medical Malpractice

Unsurprisingly, the issue of Covid looms large in our review of medical malpractice trends in 2021 and will be a continuing trend in 2022 or beyond:

- A ‘Tsunami’ of Covid claims has been predicted by some commentators where Covid has allegedly been contracted from healthcare professionals, either whilst receiving care as a patient, as a visitor or fellow healthcare professional/employee. The loss of a loved one in a care home, clinic or hospital is very likely to prompt questions about the adequacy of Covid policies and procedures. As well as ‘policy’ reasons for the Courts to push back on claims and publish sympathy for healthcare professionals in general, it may be difficult to prove causation during a widespread pandemic.

- It will be interesting to see how the statutory Vaccine Damage Payment Scheme fares. Whilst it will not be necessary to prove negligence, the Scheme still requires that the vaccine caused a disability that amounts to at least a 60% disablement. It seems likely that there will be disputes over this coming before the Courts.

- In addition, we are seeing a significant number of so-called indirect Covid claims in a variety of forms, for instance where diagnosis or treatment for non-Covid conditions has been delayed due to the effects of the pandemic and healthcare generally. We have seen cases where Claimants have attempted to recover private treatment costs from the NHS instead of waiting for delayed surgery, or where Claimants have received erroneous letters advising them to shield. The government has so far resisted calls for legislation to provide an indemnity for healthcare professionals but an interesting question, that may be answered in 2022, is whether the traditional ‘Bolam’ test for negligence should take into account pandemic conditions where treatment would otherwise be considered malpractice.

- Necessity is said to be the mother of invention, including medical innovation during times of war or crisis. The Covid pandemic has been no exception. Innovations extend to new drugs, new ventilators or PPE, AI software, remote consultations/apps becoming the norm for many patient consultations, new digital or cloud-based platforms (for patient records, drug administration or CPAP monitoring, for example) and even drones delivering medical supplies. We have spoken to a number of tech firms in the healthcare space whose professional liability insurance was limited to Tech E&O (Errors & Omissions), with exclusions for bodily injury exclusions or otherwise, Medmal policies with Product Liability exclusions.

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PI: Insurance Brokers

- **FCA CP21/34: Improving the Appointed Representatives ("AR") regime**

The AR regime was created 35 years ago to enable third party sales personnel to market and distribute financial products without having to be authorised. Brokers have regularly utilised ARs to carry out insurance distribution activities. There are growing concerns about the effectiveness of the AR regime in ensuring regulatory objectives are met: in December 2021 HM treasury issued a Call for Evidence. At the same time, the FCA issued a consultation paper (CP21/34: Improving the Appointed Representatives regime). In particular, the FCA is seeing high levels of complaints and claims about ARs, often as a result of the ARs' authorised principals not carrying out enough due diligence before appointing an AR or from inadequate oversight and control after appointment of the AR. It is possible that the AR regime is made stricter, with greater obligations on authorised firms, which could reduce the usage of ARs and associated PI exposures.

- **The broker market**

2021 saw the continued consolidation of the broker market, with many smaller brokers being acquired and larger high-profile deals such as Howden's acquisition of Aston Lark. This is likely to continue into 2022 presenting both threats and opportunities for the distribution of insurers' products and continued challenges to brokers regarding due diligence on the acquired entities and integration issues.

- **Market capacity**

The hard market continues with rates high across many classes of business and extremely limited new capacity available. Climate change, economic and social inflation continue to weigh on the market's mind in addition to various claims exposures. Whilst things have stabilised somewhat the outlook for 2022 is unlikely to be generally positive.

Lack of comprehensive cover for clients due to pricing and reduced coverage where it is in place remain a challenge for brokers. It continues to be important for brokers to ensure their staff are adequately trained in the challenges presented by a hard market for their own PI exposures.

- **Other Professional indemnity exposures**

In addition to the challenges presented by the general market conditions described above and the issue of remote working, there have been a number of E&O notifications in 2021 regarding clients' lack of business interruption cover which would have responded to the COVID-19 pandemic and in light of the Supreme Court decision in FCA v Arch Insurance (UK) Ltd [2021] UKSC 1. More claims are expected from clients who had no cover at all or from those who had wordings which provided limited cover.

The introduction of the IUA 0417 cyber exclusion clause for PI policies is also an added exposure for brokers. The guidance provided by the IUA, which many brokers are following, is very dangerous and a number of professional clients with the endorsement attached are being advised that they will still have cover for a cyber act, system failure or malware when in fact they may not do so on a proper analysis of the law on proximate cause.

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Employment Practices Liability

2021

Employment tribunal claims were on the rise in early 2021, a trend which likely continued throughout the rest of 2021 (although official employment tribunal statistics for the second half of 2021 are not available at the time of going to print). Some tribunals are still struggling to cope with volume, with some significant delays in listing longer-length hearings in person.

We've started to see decisions in the first Covid-19 related employment tribunal claims filter through the employment tribunal system - including a number of claims relying on the health and safety detriment provisions, monetary claims relating to furlough periods, and claims dealing with the interaction between redundancy procedures and the Coronavirus Job Retention Scheme (CJRS) "safety net".

The pandemic has seen an increase in whistleblowing claims - whether relating to "furlough-fraud", inadequate provision of PPE or failures to adhere to social distancing requirements. Given that there is no continuous service required for whistleblowing claims, this increases the risk of unfair dismissal claims from a wider section of the workforce, with compensation uncapped.

Whilst the mass-redundancy predictions following the cessation of the CJRS did not arise, there have still been a number of redundancies made throughout 2021, and some insolvencies have been unavoidable. Whilst redundancy payments may well be excluded under many EPLI policies, claims of an unfair or discriminatory redundancy dismissal would not be; and the risk of the same may be exacerbated where an employer is in financial difficulty and perhaps less inclined (or able) to follow the procedural steps required for a fair dismissal.

As a result of the Court of Appeal's decision in January 2021 in the case of *Irwell Insurance Company Ltd v Watson & Ors*, employment tribunals are now having to grapple with arguments on policy coverage and contractual interpretation of insurance policy wording in order to determine liability for employment-related claims under the Third Parties (Rights Against Insurers) Act 2010. With many of the government measures ceasing at the end of September 2021, or being replaced with tapering measures, we may see an increase in insolvencies and a corresponding increase in the number of claimants seeking to take the benefit of insurance arrangements.

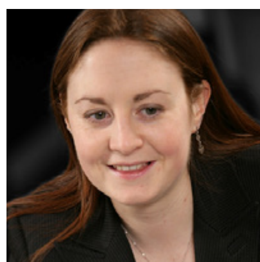
2022

Looking ahead, there a number of significant employment changes proposed by the Government but no specific timeline attached to these - instead, they are to be introduced "when parliamentary time allows". Areas to keep an eye on include the new proposed duty to prevent sexual harassment and expansions to the right to request flexible working.

Even without changes to the statutory flexible working regime, there may well be conflicts which arise between an employee's increased desire for flexibility (such as homeworking) and an employer's desire to return to pre-pandemic norms. As well as potentially leading to disputes and claims, there may also be ancillary impacts - the "Great Resignation", as it has been termed, may lead to the departure of staff who would otherwise have been witnesses in other claims, or place increasing pressure on those "left behind" to meet workloads.

A recent HSE survey indicates half of work-related illnesses are now stress, depression or anxiety, with the pandemic found to be a major contributory factor. Although personal injury claims would sit more neatly within EL policies, mental illnesses may meet the definition for disability, resulting in increased requests (and potential claims) in respect of reasonable adjustments.

Appellate decisions are awaited in respect of a number of significant holiday pay cases which may affect how holiday pay is calculated, and what historic pay can be claimed. Whilst holiday pay may well be excluded under many EPLI policies, costs for defending claims may fall for cover; further, the government is also proposing to introduce a single enforcement body whose remit would include ensuring holiday pay is paid correctly; how this will relate to the existing tribunal system remains unclear.



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D&O and Corporate Liability

The market for Directors' and Officers' (D&O) liability insurance stabilised across the second half of 2021. The supply and demand imbalance eased in relative terms, with some inflow of new markets and increased appetite from existing ones. Although rates have continued to rise there has been a deceleration. According to a UK Pricing update from Marsh JLT Specialty UK D&O rates tracked at 136% in Q1 2021, before reducing to 121% in Q2 and to 61% by the third quarter[1]. Gallagher report an expectation of further new market entrants with diverse strategies and fresh appetites which will lead to rate reductions and stronger returns on underwriting results [2].

Away from pricing, the D&O market has largely escaped the volume of pandemic claims that many underwriters had feared going into 2021, with reports that COVID-19 related claims made up less than 10% of notifications[3]. However, we expect this to increase in 2022 as the effect of government support measures come to an end and with the lifting of the suspension on wrongful trading provisions and winding up petitions introduced by the Corporate Insolvency and Governance Act 2020.

2021 saw a small rise by 1% of in insolvencies in the UK when compared to 2020. Despite this Marsh reported that in the first half of 2021, notifications were at the same levels as that for the whole of 2019, and at more than half the level recorded in 2020[4]. The outlook for 2022 is poor, with the expiry of support measures, which also saw the furlough scheme extended in the UK until the end of September 2021.

As expected, cyber-attacks have continued to be an increasingly prominent threat on the D&O front in 2021. The Government Cyber Security Breaches Survey 2021 reported that 39% of businesses recorded having had cyber security breaches or attacks in the previous 12 months. That figure increased amongst medium sized business (65%) and larger businesses (64%)[5]. The increased costs and frequency of such attacks will continue to put directors and officers increasingly in the spotlight in 2022 over whether they have complied with their duties in ensuring the company had adequate systems and controls in place. This is particularly so at a time where the Government Survey also suggests that fewer businesses are now reported to be deploying security monitoring tools (35%, vs. 40% last year) or undertaking any form of user monitoring (32% vs. 38%).

The challenging economic conditions have also been compounded by increased regulatory scrutiny in 2021. The year saw 3 high profile Deferred Prosecution Agreements being recorded between the Serious Fraud Office and companies. The Chancellor of the Exchequer has also announced that the Government will be funding a £100m Taxpayer Protection Taskforce that will enable HMRC to start to investigate the misuse of support packages for businesses, including "furlough fraud". This will not only target deliberate fraud but also unintentional acts. We anticipate that this increased scrutiny will continue into 2022 and will see a considerable increase in regulatory investigations into companies and their directors and that this will trigger many D&O policies.

1 Marsh – UK Pricing Q3 2021 update
2 Gallagher, Global state of the market report for Directors' and Officers' – January 2022
3 Marsh, UK management liability claims insights 2021 – Half year review
4 Marsh, UK management liability claims insights 2021 – Half year review
5 Government – Official Statistics – Cyber security breaches survey 2021 – 24 March 2021

There has also been rising scrutiny around the environmental social and governance (ESG) performance of companies in 2021, with a broad range of stakeholders including investors and regulators paying much closer attention to the steps that directors are taking to address and mitigate these risks, as well as focusing on instances of "greenwashing". This will continue throughout 2022, as evidenced by the recent Sunday Times report that Aviva Investors would look to remove directors of companies whose commitment to climate change, biodiversity and human rights falls below expectations.

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Injury claims arising from motor, public and employers liability risks

2021

The ongoing Covid-19 pandemic continued to feature heavily throughout the past 12-months in relation to notable claim trends.

Looking back, we have seen a continued decline in claims numbers, a trend which is well demonstrated by the number of claims registered with the Compensation Recovery Unit (DWP) in 2021 when compared to the previous year's figures:

- **Motor claims** are **down 32%** from the previous year, which is due to the reduced number of miles being driven on UK roads during the Covid-19 pandemic;

- **Employers liability claims** are **down 42%** from the previous year's figures, due to reduced manufacturing productivity (i.e. the pandemic, Brexit and the manufacturing challenges, such as the UK car industry computer chip shortages) but also a reduction in general workplace accidents due to, amongst other factors, the furlough scheme and working from home;

- **Public liability claims** are **down 29%**, with many people limiting their exposure to public places, either through personal choice or due to restrictions and/or closures.

Despite the fall in EL claims, we have seen an increase in 'stress claims' with many employees continuing to work from home (i.e. anxiety due to isolation and balancing work/home schooling etc). In addition, we have seen a rise in 'desk screen equipment claims' (i.e. neck, back and repetitive strain injuries) due to unsuitable ergonomic conditions and inadequate work equipment.

Other trends that we have seen include a move from public transport towards cycling, motorbikes and electric scooters (again because of Covid-19 risks) and we have seen a rise in large loss/catastrophic injury claims caused by inexperienced riders striking pedestrians.

The pandemic has also brought about certain changes within litigation including remote mediations and Court hearings (including trials). Whilst this has been met with a mixed response, it is something we expect to see much more of in the future.

6 The Sunday Times 23 January 2022 "Aviva to eject company directors if climate goals are not met".

2022

There is a significant risk of claims cost inflation in the year ahead, particularly around loss of earnings and care costs claims. Short term inflation will have a major impact on earnings inflation, and the extent to which this is controlled by interest rate rises remains to be seen. There are also issues around availability of workers in particular markets, which will certainly impact the cost of commercial care. Brexit is one issue in terms of availability of care workers, with low unemployment rates generally being another factor. This will impact the cases that involve prolonged work absence and care more so than lower value volume claims.

Employers and Public liability claim numbers are expected to start to rise slowly and steadily, particularly following the vaccination programme, easing of restrictions and greater public facing confidence.

Historical abuse claims are likely to increase as awareness and media interest grow in historic events.
We may see some Claimant firms trying to package services around Covid risks for transmission of the virus in public or workplace settings, although the evidential burden upon proving where the disease was contracted and that suitable steps above and beyond government guidance may prove difficult barriers to such actions.

Finally, we expect to see consolidation and closure of some smaller Claimant personal injury practises as case volumes decrease and limitation on recovery of costs impact on business models.

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General Insurance Regulation

2021

Beyond the overarching issues of ESG and climate change where regulations are developing across all FS markets, the key themes in general insurance regulation in 2021 were set out in letters from the FCA to London Market CEOs in November 2020 and September 2021. These themes are:

The FCA's willingness to pursue private law action (see: Business interruption insurance | FCA) in order to achieve mass market changes: the FCA successfully pursued a test case in respect of a selection of policy wordings in order to produce claims outcomes more favourable to insureds.

The FCA's view that London Market (and by implication in view of common ownership and distribution arrangements, UK general insurance) firms "have not embraced ... key messages (for example around firm culture and purpose) or kept up with the pace of regulatory change." The essential subject matter of these messages involves:

- "consumers buying products which do not always offer fair [product] value ... demonstrated through ... loss ratios"
- "... undue barriers [on claims] for customers or third party claimants"
- risks to operational resilience including the risk of "inability to service customers in a timely manner, unauthorised losses or disclosure of customer data"
- "ambiguous contract wording or misaligned customer expectations"
- "a significant risk that poor underlying cultures may lead to poor customer outcomes and impact the integrity of the market"
- "lack of diversity and inclusion (D&I) ... firms talk about the importance of attracting diverse talent ... [but] less on the work being done to build an inclusive environment ... most efforts to date have focused on gender diversity, and there is still a long way to go before the London Market becomes a truly diverse and inclusive sector".

2022

Firms should expect significant levels of scrutiny from the FCA of the evidence as to their intentions and methodologies for:

- “ensuring that their products are appropriate for the intended target market and will provide fair value”
- “Where claimants are vulnerable, firms ... ensur[ing] that their processes and approach do not create additional distress or undue barriers to claims”
- “proactively manag[ing] ... increased operational resilience and cyber risks ... including ...[by] investment”
- “simplify[ing] insurance products and improv[ing] contract clarity”
- “firms’ culture, governance and remuneration structures [to be] linked to purpose and drive good behaviours and produce fair outcomes for consumers”
- “... having a diverse workforce at all levels and an inclusive culture, with the view to driv[ing] innovation in the best interest of customers ...”

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FCA Interventions

More and quicker interventions

In 2021, the FCA boldly declared "*we are changing*" when publishing its Business Plan 2021/22, and set a clear ambition to be "*more innovative, more assertive and more adaptive*". In short, more interventionist.

It will necessarily take time for announced changes to take effect, however 2021 has included:

- £567.8 million in fines resulting from the regulator's enforcement actions (see below).
- A Supreme Court judgment in the FCA's business insurance test case against eight insurers, following which over £1.2 billion has been paid out to settle claims made by small businesses.
- The FCA removing approval to undertake financial services from 176 firms, which had not carried on regulatory activity in the last 12 months, under its new 'use it or lose it' approach.
- The FCA reforming its decision-making processes in November 2021 in an effort to "ensure quicker action to protect consumers". Under these changes the regulator's senior managers (rather than the Regulatory Decisions Committee) to make the call on firms' authorisation, on whether to impose requirements, and on whether to begin criminal or civil proceedings.
- Since the end of the transition period following the UK's departure from the EU, the FCA has been undertaking a "*rigorous review of all firms seeking to enter the UK authorisation gateway*", including EEA firms currently accessing the UK markets via the Temporary Permissions Regime. As of June 2021, the FCA had taken action against at least 13 firms, and was looking into removing 120 further firms from the UK's regulated market.
- The FCA setting out its new consumer investment strategy, which will in 2022 lead to a strengthening of the Appointed Representatives Regime and of the financial promotion rules to protect consumers, particularly in relation to 'high risk financial products' including cryptoassets.

FCA fines in 2021: a breakdown

The FCA issued fines of nearly four times the amount levied in 2020.

Enforcement area	Count	Value of fines
Financial crime/ AML	5	£476,730,020
General insurance	1	£90,688,400
Retail conduct	2	£184,300
Unfair treatment of customers	1	£110,000
Market abuse	1	£52,500
Grand Total	**10**	**£567,765,220**

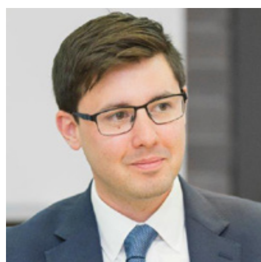
As can be seen, tackling financial crime and money laundering through financial institutions has become a priority for the FCA, including fines of :

- £264.8 million against NatWest;
- £147 million against Credit Suisse;
- £64 million against HSBC
- £820,000 against two inter-dealer brokers involved 'cum/ex' dividend arbitrage trading (Sapien Capital and Sunrise Brokers).

The FCA additionally fined Lloyd's Bank General Insurance Limited over £90 million for communications failings to consumers in respect of home insurance renewals which had not met the 'clear, fair and not misleading' standard.

Acting against financial crime will continue to be a priority in 2022.

The regulator's increasing interventionism is very likely to increase the costs associated with responding to and mitigating such interventions. This increase will in turn affect the demand for, and appetite for the supply of, cover under professional indemnity or D&O insurance.



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Fraud

Fraud Trends

Looking forward, Regulators continue to bear a significant burden of fraud-related complaints and, as a consequence, levels of anxiety over potential investigations and/or legal action in companies is “high” according to a report by Baker McKenzie.

Financial institutions have seen an increase in consumer victims’ complaints about scams - and are not only having to deal with fraudulent activity (and potentially compensate their customers) but also deal with complaints about the institution’s responses. According to the Financial Ombudsman Service, complaints rose by 66% in 2021.

A case in point saw City law firm Mischcon de Reya receive a record fine of £232,500 for breach of AML rules by the Solicitors Regulation Authority, which is likely indicative of a wider trend of Regulators baring their teeth to drive up anti-fraud standards.

UK Finance noted total fraud losses at £753.9m, which represented an increase in 30% on the previous year. The Government’s Action Plan and record on financial crime will come under scrutiny from the National Audit Office when it presents its study on the Plan’s effectiveness later this year.
Insurance Fraud

Insurance Fraud

The Government introduced (in part) its long-awaited “whiplash reforms” in June 2021 under the Civil Liability Act 2018. This raised the small claims limit to £5,000 for RTAs and removed awards of legal costs below that threshold.

The ABI reported a 10% drop on 2020 levels in detected fraudulent claims, down to 96,000. Notably, this was due in large part to the reduction in workplace attendance and RTAs during the pandemic. However, the value of claims rose by 6%, to £12,000, potentially already signalling a move to higher-value fraudulent or exaggerated liability claims.

Fundamental dishonesty and private prosecutions

In seeking claims dismissals, section 57 of the Criminal Justice and Courts Act 2015 remains a significant weapon in insurers’ armoury. Courts have been grappling with the concept of “fundamental” following LOCOG -v- Sinfield [2018] in 2020/21, with some claims not meeting the threshold.

However, in Roberts -v- Kesson [2020] EWHC 521(QB), the claimant tried to correct an earlier witness statement that had supported a credit hire, vehicle damage and storage claim. Before trial, the first statement was exposed by a second statement to be untrue - the vehicle in question had been repaired.

At first instance, the Recorder found the items unproven but viewed the second statement as evidence of the claimant's truthfulness – in the sense that he had not persisted with his dishonesty at trial. On appeal, Mr Justice Jay found that the Recorder should have considered adopting an holistic approach. This would involve analysing whether the discrepancy went to the root of the claim, rather than being peripheral. As there was no reasonable explanation or supporting evidence for the claimant's false claim, it was fundamentally dishonest. Just as in Sinfield, abandoning or explaining elements of a claim will not necessarily exonerate a claimant or prevent from the claim being dismissed, therefore.

Insurers, ERS, have successfully used the Fraud Act 2006 to secure criminal convictions in an insurance fraud case for the first time. This was against a claimant and two witnesses, who were shown to have lied about an RTA by CCTV footage.

The successful deployment of sanctions, leading to criminal convictions and custodial sentences, is becoming a much more widely-used deterrent in fraudulent insurance claims. However, the ERS case led to a suspended sentence and community orders. In the case of Calderdale and Huddersfield NHS Trust -v- Metcalf [2021] EWHC 611 (QB), a 6-month sentence was handed down for a false claim of £5.7m (ultimately valued at only £350,000), perhaps suggesting some judicial leniency.

Corporate liability

Whilst the Government has declined the introduction of the 6th AML Directive, post-Brexit, HM Treasury has underlined its commitment to maintain FATF's international AML standards despite divergence from the EU.

To this end, the Law Commission is undertaking a review into corporate liability to consider "new" offences, which will allow law enforcement agencies to prosecute more easily crimes such as fraud, money laundering and false accounting. The report is due in the first part of 2022.

Interestingly, the former Lord Chancellor, Robert Buckland, has called for stronger laws to remedy a system that was not fit for purpose - a view endorsed by Lisa Osofsky, CEO of the SFO, who called the UK legal system a "dangerous culture". The Fraud Advisory Panel's response was to suggest the introduction of a "failure to prevent economic crime" offence, to improve corporate behaviours around fraud and other financial crime.

Coronavirus and Furlough Support fraud

An FOI request has revealed that almost 13,000 investigations were underway at HMRC for breaches of the various Covid-19 support schemes. 7,384 related to the furlough job retention scheme and 5,020 to the self-employed income support scheme. HMRC estimates that £3.5 billion may have been claimed fraudulently or mistakenly. In order to avoid potential criminal liability and sanctions (including clawback) under the Finance Act 2020, companies had until October 2020 to notify HMRC of errors.

Furthermore, the Insurance Post revealed that the FCA had yet to close investigations into over half of the reports from Covid whistle-blowers, with the HMRC stating it had received some 1,900 reports in July 2020 alone.

As investigations continue, companies and insurers will be braced for investigation/defence costs and claims on fidelity cover.

Abuse of the voluntary strike-off of companies, to avoid the statutory insolvency regime, was also under scrutiny. This was particularly as a result of suspected furlough fraud, in the Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021 (the Act), which came into force on 15 December 2021.

The Act allows for a review of directors' conduct post-dissolution and may require financial compensation where creditors have suffered a loss. There is likely to be a significant rise in company investigations (and potentially director disqualifications too) as a result.

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Environmental Risks

Overview for 2021

2021 saw climate change take centre stage as the UK hosted the 26th UN Climate Change Conference of the Parties (COP26) in Glasgow. The resulting Glasgow Climate Pact aims to turn the 2020s into a decade of climate action support with a package of agreed actions, including strengthened efforts to build resilience to climate change, curb greenhouse gas emissions and to provide the necessary finance for both.

The commitments made at COP26 may not currently be sufficient to meet the immediate decarbonisation needed to keep the goal of limiting temperature rises to 1.5C in reach. As a result, the pressure to reduce emissions for both organisations and nations remains high and is likely to increase year on year.

Whilst COP26 was ongoing, the Environment Bill received Royal Assent, becoming the Environment Act 2021 (the '2021 Act'). Heralded as 'world leading' and a potential turning point for nature in the UK, the 2021 Act:

- Seeks to provide a framework for environmental governance outside of the European Union, and make provision for improvements to the natural environment;
- Establishes the Office for Environmental Protection; and
- Provides for clear targets in the areas of air quality, biodiversity, water and waste.

One of the big takeaways from the 2021 Act will be mandatory net gains for biodiversity in respect of developments in England. Whilst biodiversity net gain is already provided for in policy, the mandate of a minimum 10% net gain and habitats to be secured for a minimum of 30 years is anticipated to become law in 2023. Over the coming year, developers and planning authorities will be increasingly focused on achieving this gain.

Waste is another area in which we anticipate change as the UK progresses to a more circular economy. Consumer demand has driven producers, suppliers and retailers to reduce waste and the pressure to do so remains. The 2021 Act provides a framework for a Deposit Return Scheme to be introduced in England to improve on the re-use and recycling of plastic – Regulations will provide the detail in due course. Local waste collection authorities will be required to collect food waste separate to general and recyclable waste. This will enable either composting or treatment by anaerobic digestion to create power.

Energy and where it comes from remain high on the agenda in the move towards carbon neutrality. The second phase of the Industrial Energy Transformation Fund has opened and will provide up to £60m of grant funding for feasibility and engineering studies, and for the deployment of industrial energy efficiency and deep decarbonisation projects. A consistent move towards renewable or cleaner forms of energy is to be expected across sectors, with green hydrogen intended to replace the fossil fuels used in power plants, factories and heavy transport.

Meanwhile, with steep increases in energy prices at the end of 2021 and fears of a more significant crisis in 2022, the UK Government is under pressure to find a solution from both an environmental and economic perspective. We can expect to see projects and development in energy storage as well as production.

There will be no reduction in demand for efforts to reach carbon-neutrality and prioritising the environment. The UK's Net Zero Strategy, published in October 2021 is a key starting point for an indication of the technologies that are likely to be backed to deliver decarbonisation. Insurance providers will need to respond, adopt appropriate measures to reduce their own emissions and take steps to align with Government-backed technologies and the organisations delivering them to best position their products.

Overview for 2022

ESG commitments will become a key part of business, mainly due to incoming regulatory measures, consumer, shareholder and investor pressure, and marketing might. Transparency is likely to be demanded from directors and officers, particularly with an eye on greenwashing, with legislation in France and the EU recently coming into effect to address the problem.

This will be the first year that Task Force on Climate-Related Financial Disclosures ("TCFD") obligations will have a practical effect. As of last year, more than 370 investors with around $35 trillion in assets had committed to engage with the world's largest corporate greenhouse gas emitters to strengthen their climate-related disclosures by implementing the TCFD recommendations. This year we are likely to see obligations relating to firms' governance, risk management, data and metrics.

Environmental labelling on food products will become increasingly important, with legislation coming into effect in the UK, Canada, and the EU and the private sector taking the initiative with voluntary schemes elsewhere. There will be debate as to how to formulate such certificates, with non-profit organisations and states taking different approaches to the Life Cycle Assessments of a food product.

Environmental insurers will continue to evaluate their book of business for those industries contributing to climate change. Pollution liability, amongst other lines of business, is expected to rise in premiums.

In the run up to the second part of UN Biodiversity Conference (COP 15), which will take place in April-May 2022 in China, there will be increasing public awareness on the role of biodiversity in environmental initiatives. A new Global Biodiversity Framework will be adopted and a disclosure framework created by the Taskforce on Nature-related Financial Disclosures

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Intellectual Property

In 2021, post-Brexit intellectual property law in the UK was considered extensively through case law and Government consultations. This trend will continue into 2022, with the results of these consultations in numerous key areas expected to have far-reaching consequences.

UK approach on exhaustion to be decided

IP rights are 'exhausted' where goods are placed on the market with the consent of the rightsholder. Once rights are exhausted, the rightsholder may not rely on their IP rights to object to the further distribution of those goods in the territories in which those rights are exhausted. Following Brexit, goods first put on the market in the UK are no longer said to be "exhausted" in the EEA. So, importing UK goods into the EU can now be trade mark infringement. The UK Government has consulted on what the UK's future exhaustion regime should look like, setting out the following options: should rights be exhausted if goods are first put on the market in the EU (as at present); should it only apply to goods first put on the market in the UK (meaning any goods from anywhere else could be infringements); or should be it be expanded to goods first put on the market anywhere in the world? The results of the consultation have yet to be published. The most likely result is that the Government will stick with the status quo.

Court of Appeal guidance on indirect confusion and trade mark infringement

The Court of Appeal affirmed that 'indirect confusion' can be sufficient to give rise to trade mark infringement, even where 'direct confusion' is not likely to occur. Liverpool Gin Distillery v Sazerac Brands concerned the competing 'Eagle Rare' and 'American Eagle' bourbon drinks. Where a sign is identical or similar to a registered trade mark and is used in relation to goods or services which are identical or similar to the goods or services for which that trade mark is registered, the proprietor of that trade mark may object to the use of that sign in trade where its use causes a "likelihood of confusion on the part of the public". Confusion may be 'direct confusion' (consumers would mistake the sign for the trade mark) or 'indirect confusion' (consumers believe the goods or services come from economically linked businesses). The appellant claimed that there could be no likelihood of indirect confusion as there was no likelihood of direct confusion, but the said direct confusion and indirect confusion are "different species of confusion", which may arise independently of each other.

Progress in developing the Online Safety Bill

The EU adopted the Directive on Copyright in the Digital Single Market (DSM Directive) in June 2019 to create "a well-functioning marketplace for copyright" by seeking to further regulate online platforms. Several provisions of the DSM Directive proved controversial, including Article 17, which places the onus on online content sharing platforms (e.g. Youtube, Facebook) to exercise "best efforts" to ensure unauthorised copyright material is not shared on their platforms. The UK Government originally stated that it would not implement the DSM Directive (as the deadline fell post-Brexit). However, it has since published its Draft Online Safety Bill, which is intended to tackle many of the areas covered by the DSM Directive. In December 2021, the joint committee on this Bill recommended extensive amendments to the Bill, including in respect of safeguarding children from harmful content online and further protections for news organisations. As such, it is expected that further amendments will be made to the Bill in 2022, which may impact all entities with an online presence.

Derivation from EU case law in the future?

The departure of the UK from the EU has raised questions on how the UK should apply EU law in the future. "EU-derived domestic legislation" (which includes domestic law imposed to implement EU obligations) was unaffected by Brexit and continues to apply in the UK until repealed or amended. Similarly, "retained EU case law" (judgments of Court of Justice of the European Union) continues to apply in the UK and bind lower UK courts, although the Court of Appeal and Supreme Court have the power to depart from retained EU case law in certain circumstances. TuneIn Inc v Warner Music UK Limited and Sony Music Entertainment UK Limited recently saw the Court of Appeal consider whether it was appropriate to divert from EU copyright law on the question of when a copyright work is "communicated to the public". The Court of Appeal declined to divert for numerous reasons (including that the UK legislation on copyright had not been amended by Parliament post-Brexit), although the Court acknowledged the discrepancies between EU and UK copyright law. Although in this instance the Court refused to divert from EU copyright law, the judgment acknowledges the possibility that future UK courts may choose to break away from EU copyright law.

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Costs

Set Off & QOCS

The ticking timebomb started by the Court of Appeal in Venduct -v- Cartwright Engineering Ltd finally exploded courtesy of the Supreme Court in Ho -v- Adelekun.

Cartwright was a case concerning the circumstances in which the Defendant could enforce a costs order against the Claimant's damages, with the Court of Appeal concluding that the agreement to pay damages must be included in an Order from the Court.

The acceptance of a Part 36 offer (whether this is done in time or done late) does not, of course, give rise to such an Order. However, this in itself was not so much of an issue pending Ho because what a Defendant could not recover in damages they could simply offset in costs.

However, the Supreme Court's decision in Ho leaves numerous Defendants (who have either accepted Part 36 offers or had Part 36 offers accepted out of time) without any Order for damages against which they can enforce their Orders for costs.

To make matters worse, this does not only apply to the substantive litigation but to the costs assessment process too.

What can we expect in 2022? Barring an intervention from the Rules Committee clarifying the Part 36 issues, there is the threat of extensive satellite litigation as to what can and cannot be enforced and how and in what circumstances.

The new landscape will also require Defendants to be savvy about making sure that any agreements as to Claimants' damages are included in an Order, wherever possible.

Increased Hourly Rates

After an 11-year wait, the guideline hourly rates were finally updated in October 2021.

It took a working group of five judges, one silk, three solicitors, one costs lawyer and one legal executive – plus observers and academic advisors – a year to compose a report and consultation. The outcome? Rates were increased roughly by the same as inflation. ates have therefore risen by, on average, 18% - unless you are lucky enough to be a Grade A lawyer in the City of London (25.2%), or unlucky enough to be a trainee in Manchester (6.8%).

The new rates are not supposed to be retrospective (although our experience is that Courts are applying them retrospectively for most cases started after 2018 and heard on assessment post-October 2021).

As ever, the rates are only a starting point and there can be deviations if the Court sees fit.

ADR

New forms of ADR have already begun, with the Queen's Bench Masters deploying early 'judge led' neutral evaluation schemes in a host of cases. Even the Circuit Benches (in places like Winchester and Manchester) are starting to follow suit, lining up ADR settlement meetings alongside PTR hearings.

Fixed Costs

Finally, mention must be made of the Government's intention to extend the fixed costs regime to cases up to £100,000, by increasing the fast track to this level.

In doing so, it is proposed that the 'new' fast track will now likely have 'bands', with the expectation being that most cases - regardless of their category - will fall within them. There are then up to 15 levels of costs payable within each band, increasing each time the case moves on to the next stage.

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Cyber and Data

2021 was another busy year for cyber and data protection.

In recent years, an industry has developed around claims arising from data breaches. Historic and often admitted data breaches have become the source of lengthy and standard pre-action correspondence sent on behalf of claimants. Their solicitors are frequently engaged in ‘no win no fee’ arrangements and backed by after the event (“ATE”) insurance. Changes to the cost recovery rules had prohibited the recovery of ATE premiums in many classes of action but a carve-out existed for breach of confidence and misuse of private information claims. Therefore, in order to ensure a claim stayed within the carve out, claimant firms had to include those privacy grounds as part of any threatened claims. Such claims were often settled on a commercial basis with a compensation payment in the low thousands. However, costs have typically been demanded at five times that amount (or more) plus the ATE premiums, which themselves could be relatively high.

In a decision of the High Court earlier this year, Warren -v- DSG Retail Ltd [2021] EWHC 2168 (QB), it was held that, where a data controller has suffered a cyber-attack, an individual will not be able to establish a cause of action for breach of confidence or misuse of private information, only for breach of the security obligations in the data protection legislation itself. This means that for many data breach cases going forward, the carve-out is no longer available and ATE premiums will not be recoverable costs. It is hoped that this will have a chilling effect on the claimant industry and stem the tide of unmeritorious and exaggerated data breach claims.

In November 2021, the eagerly-awaited Lloyd -v- Google Supreme Court judgment was handed down. This unanimously overturned the Court of Appeal’s 2019 decision, which allowed the claimant to serve a representative action on Google on behalf of over 4 million iPhone users who were seeking damages for ‘loss of control’ of personal data. The Supreme Court confirmed that compensation in respect of non-trivial breaches of the Data Protection Act 1998 (“DPA 1998”) is only payable to the extent that the data subject has suffered material damage (i.e. financial loss) or mental distress, contrary to the Court of Appeal decision.

This is a welcome clarification in a landscape where we are seeing an increasing number of compensation claims made by individuals against companies for data protection losses without evidence of material damage. It is important to note that the Supreme Court was considering damages available under the DPA 1998 and there was no consideration of the position under the GDPR. Our initial view is that the Court’s reasoning applies equally to the current regime. However, claimant law firms are unlikely to accept this view of the law without testing the issue and further judicial consideration will ultimately be required.

The Supreme Court’s decision in Lloyd -v- Google is of even greater significance to data controllers who are defending data breach claims when read with Rolfe & Ors -v- Veale Wasbrough Vizards LLP [2021] EWHC 2809 (QB) (“Rolfe”). In Rolfe, the High Court dismissed compensation claims under data protection law arising from a data breach where an email containing sensitive personal data was sent to the wrong email address following a typing error. The Court held that such a claim cannot succeed where there is no actual loss or distress above a de minimis level suffered.

The cases referred to above give considerable comfort to data controllers seeking to defend themselves against claims that relate to data breaches based on assertions of damage or distress that are exaggerated, unsubstantiated or bear little relation to the breach itself.

What's next?

2022 brings the arrival of a new UK Information Commissioner, who will work with the government over proposed reforms to the Data Protection Act.

We also expect to see the Information Commissioner's Office finalise the UK standard contractual clauses for international data transfers, which will require organisations to review their international data sharing practices and update their contracts.

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Property Damage

For UK Property insurers, there were some notable court decisions in 2021, in particular in relation to the duty to make a fair presentation of the risk and insurers’ right of avoidance.

In Berkshire Assets (West London) -v- AXA Insurance UK Plc,[2021] EWHC 2689, the Commercial Court handed down the first English court decision considering issues of disclosure and fair presentation under the Insurance Act 2015 (“the Act”). Berkshire Assets was developing a residential property which suffered damage due to a water pipe leak, and so claimed on its Contractor’s All Risks and Business Interruption policy. AXA denied liability on the basis that Berkshire Assets had failed to disclose criminal charges had been filed against one of its directors in Malaysia. AXA argued this was a material fact which ought to have been disclosed at renewal under the duty of fair presentation contained in Section 3(1) of the Insurance Act 2015. Berkshire argued that the criminal charges had not been brought against the director in his personal capacity and that there was no evidence of wrongdoing or dishonesty by the director and in any event, the charges had subsequently been dropped.

The Commercial Court held that it was necessary to approach materiality and inducement from the position of a reasonable underwriter in the position of that of the AXA underwriter at the time of the renewal, had Berkshire given full disclosure. The Judge held that the charges were material circumstances within the meaning of the Act and should have been disclosed. It was not then for the underwriter to determine whether the charges involved deceit or dishonesty. The insurer had an internal practice note in place which indicate that if criminal charges were disclosed then the risk was not acceptable and should be declined. Accordingly, the Judge was satisfied as to inducement and AXA was successful in defending the claim. Berkshire has appealed the decision.

The case highlights the importance of underwriters keeping up to date underwriting guidelines and, importantly, contemporaneous notes to support their underwriting and renewal decisions.

Property damage claims were largely unaffected by Covid-19 because many of the key drivers such as weather, fire, human error, were not directly connected with the pandemic. However, looking ahead, Covid-19 could affect property claims trends as businesses, and in particular major construction projects, restart and ramp up production, or were further lockdowns affect emergency response or supplies and loss mitigation following a loss or catastrophe.

The closure of factories, production facilities or major projects brings with it an increased risk once they are then started up again. In addition, price inflation, shortage of materials or labour due to Covid-19 is likely to increase the cost of property damage claims.

In terms of major construction and engineering projects, a number of trends are likely to continue and increase claims in 2022:

- Ever higher values of projects bring bigger loss impact;
- Fire and explosion remain the top cause of losses;
- Increased exposure to climate related losses;
- Defective design, product and workmanship is on the rise;
- Greater supply chain complexity;
- Political risk and instability in certain regions;
- The growth in renewable energy projects brings with it its own challenges.

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Business Interruption

2020 and 2021 were, of course, dominated by Covid-19 related business interruption claims and the resulting FCA Test Case on non-damage which culminated in the decision of the Supreme Court in January 2021.

Since then, insurers, adjusters, policyholders and the Courts have spent 2021 grappling with applying the Supreme Court's judgment (and where it was not appealed, the earlier decision of the Divisional Court) to the many thousands of claims to be considered.

The latest data from the FCA (as at December 2021) shows that 42,764 policyholders had claims accepted by insurers. Of those, 31,325 had received either an interim or final payment. The data shows that insurers had made initial payments of £308.4m to 3,647 policyholders and had now made final payments of £916.7m to 27,678 policyholders. Accordingly, a total of £1.2bn has been paid out in Covid-19 related BI claims.

Despite the guidance contained in the Supreme Court's decision, it still left ambiguity and plenty of room for argument either as to how the decision was to be applied to a certain set of facts or simply because other wordings had not formed part of the Supreme Court's consideration and could not be easily reconciled by analogy.

Some policies providing disease cover do so by referring to a list of defined diseases as a 'Notifiable Disease'. Given that Covid-19 was a new disease, not surprisingly, it did not appear in such list but that did not stop some policyholders from arguing that terms such as 'plague' or 'acute encephalitis' could encompass Covid-19. Those arguments were dismissed in the case of ***Rockliffe Hall Ltd -v- Travelers Insurance Company Ltd [2021] EWHC 412 (Comm)***.

A further decision was that of ***Policyholders v China Taiping Insurance (UK) Co Ltd (Ad hoc arbitration under the English Arbitration Act 1996) (10 September 2021)***. Unusually, this was an arbitration award of Lord Mance dated 10 September 2021 but which the parties had agreed could, and should, be made public. In it, China Taiping successfully defended the Covid-BI claim brought by a large group of insureds comprising restaurants, cafes, bars and pubs. In the award, Lord Mance (sitting as sole arbitrator) accepted China Taiping's submissions that the UK Government was not a 'competent local authority' for the purposes of a denial of access extension which provided cover for the instructions, actions or advice of "the Police or other competent local authority". Significantly, Lord Mance refused to give the words 'competent local authority' the same broad meaning given to them by the Divisional Court in the FCA Test Case in the context of an Ecclesiastical wording. Lord Mance held that the issue that arose and the wording in the Ecclesiastical policies were different in material respects from the China Taiping policies before him. As a result, the decision of the Divisional Court could be, and ought to be, distinguished in favour of giving "competent local authority" in the China Taiping policies their natural and ordinary meaning.

The decision in China Tai Ping emphasises once again the importance of context and the need to consider each wording in the context of its own policy and against the particular factual background of the claim.

A number of cases are being contested between policyholders and insurers and are likely to produce further important decisions during 2022.

In ***Corbin & King Ltd and Others v AXA Insurance UK Plc*** the owner of a chain of well- known London restaurants, including The Wolseley, Delaunay and Brasserie Zedel, is suing AXA for almost £6m under its denial-of-access cover. AXA maintains that the cover is limited to localised incidents of actions taken by the police or any statutory authority in response to a danger or disturbance at the insured premises or within a one-mile radius, and not actions taken at national level by the UK Government. Corbin & King also allege that each government restriction constituted a separate incident under the policy, such that each of their eight restaurants should have received the sum insured of £250,000 and for each occasion. The case is due to be heard in the Commercial Court towards the end of January 2022.

In ***Various Eateries Trading Ltd v Allianz Insurance Plc*** a chain of restaurants is suing Allianz for almost £16.4m on the basis that Allianz is wrong to classify the Covid-19 outbreak and subsequent Government restrictions as one event. Various Eateries argues that each lockdown and each set of restrictions are separate events under the policy.

In ***Stonegate Pub Company v MS Amlin, Liberty and Zurich*** the owners of pub chains including Slug & Lettuce, Walkabout and Be At One with 760 locations have brought an action, backed by private equity house TDR Capital, claiming £845m in losses. The defendant insurers argue that their liability under the policy is limited to £17.5m, of which £14.5m has already been paid out. The issues in dispute relate to aggregation of Stonegate's losses across its various locations, application of the indemnity period under the policy, application of the Increased Costs of Working coverage, and whether Government support (including Coronavirus Job Retentions Scheme payments or "furlough" payments, and Business Rates Relief) is to be taken into account for the insurers' benefit when calculating any Business Interruption Loss and/or other sums recoverable under the policy.

Similarly, in ***Greggs v Zurich*** the British bakery chain is seeking up to £100m from insurer Zurich for Covid-19 BI losses suffered at its 2,200 stores due to the pandemic. Zurich is understood to argue that the policy is limited to £2.5m in coverage because the pandemic and resulting Government restrictions amounts to one event under the policy, whereas Greggs argues that each lockdown or set of restrictions amounts to a separate insured event under separate heads of BI cover under the policy.

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Construction and Engineering

Increased disputes because of labour and materials shortages

Materials and labour shortages were a notable feature of 2021, and will continue into 2022. These issues have various effects, including extended lead times and sharp cost rises for some imported products, and supressing construction output. There is some evidence that, at the height of the pandemic, contractors were bidding low for work to ensure turnover, meaning that jobs that were already on a razor-edge are now well into the red.

From a legal perspective, one way of addressing this in future contracts is to include so-called rise and fall clauses, setting out the way in which price fluctuations will be dealt with. However, these are – generally – resisted, with employers requiring or preferring price certainty. Without such clauses (and even with them), any contractor who faces a potential significant hit to margins will look to address this upstream with the employer and/or with firms lower down in the supply chain. This means more disputes.

Skilled labour shortages will also create problems. We know from experience that boom times in construction can cause issues, with contractors struggling to put the requisite quality of staff onto jobs. This in turn leads to an increase in defective work on projects. Some defects will be discovered during the project, causing disputes prior to completion, as contractors seek to avoid the need for rework (and the LADs that will almost certainly follow).

Other defects will not be discovered, causing disputes years down the line (which may well prove more expensive / problematic given the potential for this to add in claims for business interruption).

Cladding

Various disputes continue as a result of the issues uncovered following the Grenfell tragedy in 2017, with parties still debating the extent to which the design and/or construction of cladding complies with the Building Regulations in place at the time of practical completion. However, despite the huge focus on this issue over the past four and a half years, issues remain. Many such issues have been highlighted by the ongoing Phase 2 of the Grenfell Inquiry, including (1) the remaining lack of clarity in the Building Regulations, which continues not only to muddy sign-off of cladding on new buildings or refurbishments but of course makes resolution of disputes difficult; (2) maybe more concerning, there is still a lack of awareness of the existence of the Regulations themselves(!); and (3) more widely, there remains a focus on cost over quality and safety, which has long been a problem in the industry at both supplier and employer level and – fire safety aside – a traditional cause of disputes.

The Building Safety Bill

The new draft Building Safety Bill (the Draft Bill) will continue its progress through Parliament. It is due to take full effect until 2023 and will introduce new - enhanced - regulatory regimes for building safety in England and Wales, and for construction products throughout the UK. It will also make related changes to fire safety regulation for all buildings in England and Wales. The government has described the reforms as *"the biggest changes to building safety regulation in a generation"* and says that the Draft Bill *"will set out a clear pathway for the future on how residential buildings should be constructed and maintained"*.

The Draft Bill introduces a new Building Safety Regulator, who will implement and oversee a new, more stringent regulatory regime with particular emphasis on “higher-risk buildings” (being either (a) at least 18 metres in height or having at least 7 storeys; or (b) as specified in regulations made by the Secretary of State). It also creates various new obligations and requirements: (1) applying throughout a building's life cycle; (2) relating to the competence of those involved with buildings (including residents); and (3) providing means of enforcement for breach, including criminal sanctions, together with an extension of the limitation period for civil actions; and relating to the financing of construction, being a developer levy that must be paid before construction begins.

The Draft Bill also provides some – limited – protection for leaseholders in terms of their liability for the cost of remedial work. However, it is debatable as to whether or not the Draft Bill goes far enough in this regard (e.g., the well-publicised changes to the limitation date do not in fact address the underlying problem of leaseholders not having the money to fund legal actions in the first place). Accordingly, whilst the Draft Bill is undoubtedly important, and is perhaps the beginning of much needed wider reform, it seems that changes are likely, partly because recent evidence demonstrates that the present government is happy to introduce important changes at the last minute, but also in light of Michael Gove having signalled that he is ‘coming for developers’, and we do not yet know what that will mean in practice.

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International: Political Risks

2021 – Reflections

- Withdrawal from Afghanistan led to predictions that UK terrorists would be further "emboldened" in both the short and long term. The UK's Martyn's Law (the Protect Duty), expected soon on the statute books, recognises the risk of terrorism to the public and places a higher duty of care on businesses with significant public footfall such as retailers. This will likely lead to an expansion of terrorism insurance lines.

- Covid-19 continued to have devastating economic impacts, with healthcare systems at breaking point, country-wide lockdowns and unprecedented levels of state intervention.

- The last few years have seen a rise in popular protests and in strikes, riots and civil commotion (SRCC) losses globally: in 2021, Hong Kong and Chile were cited as the world's riskiest countries. Whilst property carriers are increasingly excluding SRCC from their policies, the resulting gap in coverage can be addressed through political risk/violence insurance.

- The G7 summit in Cornwall's Carbis Bay failed to deliver on its promise to channel $100 billion a year to developing nations coping with climate change. The announcement of ending coal finance for poorer countries, however, was hailed as a success, and the G7 committed to phase out coal at home. This is unlikely to encourage China to follow suit.

- COP26 dominated world politics and signalled the incremental progress of international and national legislation transitioning to net zero. Governments are taking a deeper look at phasing out carbon-intensive sources which will expand emerging markets such as electric cars and renewables.

2022 – Predictions

- In November this year, Republicans are likely to win back majority control of the House of Representatives. Republicans will see victory as further evidence of 2020 election fraud and public trust in American political institutions will take an even larger hit.

- Asia's top risk will be US-China relations over Taiwan. Beijing sees any move by Washington on Taiwan as negative or infringing on its interests and has the potential to develop into a "Cold War 2" type situation. President Biden has signed the National Defense Authorization Act for fiscal year 2022, which includes a Pacific Deterrence Initiative that sets aside $7.1 billion; this legislation is likely to erode relations between the two countries further.

- Capacity for China, Brazil, Turkey, Peru, Argentina, Chile and Belarus appears to be tightening due to political unrest. Chile's election in December 2021 signalled a break from three decades of a two-coalition system with centrists parties and is likely to lead to capital outflows and depreciation of the Chilean currency. Unrest in Belarus has triggered concerns about a possible Russian intervention, whilst Peru elected a leftist president, attributed largely to the high Covid-19 death toll (the highest per capita in the world) and to increasing inequality.

- It is likely that around 6.5 billion Covid-19 vaccines will be administered globally this year. Whilst policymakers have taken very different approaches to vaccine requirements, passports, and restrictions (the city of Melbourne was locked down for 262 days in 2021) we will see further uncertainty for particular economies, with countries heavily reliant upon services spending hit hardest. Developing countries reliant upon tourism are likely to lose out the most.

- Energy prices in the UK could rise by as much as 30% in 2022 which is indicative of global trends. This, along with tax rises to deal with the effects of Covid-19, is likely to give rise to a “cost-of-living catastrophe” and may lead to consumer reluctance to purchase optional insurance products.

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