Browne Jacobson

Financial lines

13 February 2025

Rates in the professional indemnity (PI) and financial institutions (FI) markets remained under significant pressure in 2024, and this trend is expected to continue through 2025. While claims have generally decreased, the broader UK economic outlook for 2025 remains a major cause for concern.

There were significant changes to the Royal Institution of Chartered Surveyors (RICS) and Institute of Chartered Accountants in England and Wales (ICAEW) wording last year, though the ICAEW decided after consultation not to introduce an automatic six-year run off cover. There have been more calls for changes to the Solicitors Regulation Authority (SRA) Minimum Terms due to another very problematic court decision on the grouping of claims. The failings of the SRA in the Axiom Ince affair were exposed and disappointingly, the NatWest survey of law firms found that most firms want to keep operating client accounts.

2024 also saw continued failures of Self-Invested Personal Pension (SIPP) providers, with risky SIPP assets remaining a problem. The Financial Conduct Authority (FCA) raised an issue for brokers in respect of non-admitted insurers and the British Insurance Brokers Association published a guide in this to help raise awareness.

Financial institutions and others are awaiting the Supreme Court hearing in the motor finance commission cases, which is scheduled to take place by 16 April 2025. Lloyds Bank alone could face potential exposure of £4 billion. Meanwhile, firms continue to face challenges with implementing the FCA Consumer Duty. However, the FCA's publication of the Complaints and Root Cause Analysis report in December 2024, along with the findings from the first Consumer Duty Board Reports, provides valuable guidance.

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The Audit Reform and Corporate Governance Bill

Author: Ed Anderson

After being delayed by the last government, the King's Speech on 17 July 2024 confirmed that the Labour government will introduce a draft Audit Reform and Corporate Governance Bill in this session of parliament. This comes after several reports were prepared following the collapse of Carillion in 2018 and years of controversy from other corporate scandals. When the legislation is introduced, it will be the biggest change in the UK's audit profession and in the duties of directors and officers.

Background

The Work and Pensions and Department for Business, Energy and Industrial Strategy (BEIS) select committee, chaired by the current chancellor, reported on the collapse of Carillion on 16 May 2018. They strongly criticised the corporate culture at Carillion and the failures of the audit committee. They found that the Financial Reporting Council (FRC) had been extremely passive and warned of a loss of trust in the audit profession, suggesting the Big Four firms might need to be broken up.

Sir John Kingman then published his review of the FRC on 18 December 2018 and recommended creating a new independent regulator with stronger statutory powers and

objectives, called the Audit, Reporting and Governance Authority (ARGA). He made 83 recommendations for ARGA, including regulating both company directors and auditors. He also suggested broadening the definition of Public Interest Entities (PIEs), which are the companies that ARGA will directly regulate. This would increase the number of companies ARGA regulates by 30%.

The Competition and Markets Authority then reported on the audit sector on 18 April 2019. They found that the Big Four were auditors to 84% of PIEs and had 97% of the FTSE 350 market. Challenger firms were struggling to compete as they lacked the skills, experience and size, and more competition was needed to improve standards. They recommended an operational split of the Big Four rather than a structural break up of them. They also believed that ARGA should require a joint audit regime for certain companies, with a challenger firm being jointly responsible for at least 30% of the audit. Finally, they recommended that ARGA should regulate audit committees.

Finally, Sir Donald Brydon published his report on improving audit quality and effectiveness in December 2019, making 64 recommendations. These included creating a new corporate audit profession with its own professional body and changing the requirement for statutory accounts from ‘true and fair’ to ‘present fairly, in all material respects’. He also proposed a new statutory definition of an audit that recognised the wider public interest, and a ‘SOX lite’ regulatory regime, where company CEOs and CFOs would be required to sign off on an evaluation of internal controls. Most radically, he recommended that International Accounting Standards (IAS) (UK) 240 be amended to make it an obligation for an auditor to detect material fraud in all material respects, with auditors receiving training in forensic accounting and fraud awareness.

Next steps and implications

A draft bill will be published by early spring 2025. If the proposals are introduced, they will present both opportunities and threats for underwriters.

The reforms won’t stop corporate fraud but should reduce it. However, if fraud does happen auditors will be more at risk for not spotting it. Auditing standards should improve within a specialised profession, though the difficult question of independence will remain even in operationally separated firms. Audit fees will likely increase significantly, meaning a bigger premium pot and the underwriting of operationally separate firms should be easier. Challenger firms will take on some large joint exposures and the wider use of limited liability agreements will be very important to manage exposure.

The Court of Appeal decision on aggregation under the solicitors’ Minimum Terms

Author: Ed Anderson

The Court of Appeal decision in Axis Specialty Europe SE v Discovery Land Co LLC [2024] EWCA Civ 7 dealt with aggregation under clause 2.5(a)(iv) of the Minimum Terms. It also addressed the findings below concerning the condoning requirement in the dishonesty exclusion found in clause 6.8 of the Minimum Terms.

The facts

Axis provided solicitors’ professional indemnity insurance to Jirehouse LLP. At the time, Mr Jones was the sole member, but in June 2017, Mr Prentice, an employee, was appointed as a partner. By that point, Jirehouse was facing financial difficulties. Mr Prentice had previously given dishonest evidence in court about the firm’s solvency and had also misled another client

regarding missing client funds. Although prior reports had been made to the SRA about Mr Jones, no action had been taken.

In April 2018, Jones was instructed to act for the claimant property investment firm, Discovery Land on the acquisition of Taymouth Castle in Scotland. They transferred $14m to Jirehouse for the acquisition and of this, $9.3m was misappropriated by Jones. As the purchase could not be completed, Jones persuaded the claimants to send another $9.3m, falsely claiming that the original funds could not be used due to money laundering issues.

Following the acquisition in December 2018, the claimants began to complain about not receiving their original money back. In early January 2019, the bank accounts of Jirehouse, Jones and Prentice were frozen. Prentice knew this was likely because of actions taken by the claimants. On 25 January 2019, Prentice was copied into correspondence with the claimants, where they stated that something ‘dodgy’ was going on.

Shortly before that, on 21 January 2019 without the claimants knowing, Jones had obtained a loan of £4.9m against the property. Jones stole that money on 12 February 2019.

Two claims were brought for the misappropriated money on the purchase (‘the surplus funds’) and the fraudulent loan secured against the property (‘the Dragonfly loan’). Insurers sought to decline cover under the dishonesty exclusion in the policy. They argued that (i) Prentice was a sham member/director and (ii) if not, he had condoned the dishonesty of Jones. In the alternative, they sought to combine the two claims as ‘one series of related acts or omissions’ under limb (ii) of the Minimum Terms or as ‘similar acts or omissions, in a series of related matters or transactions’ under limb (iv).

The decision

The trial judge rejected the sham member/director argument on the basis that the evidence presented by Axis was not enough to prove their point. On the condoning point, previous court decisions had taken a broad view on the question of condoning (see for example Zurich Professional Ltd v Karim [2006] EWHC 3355 (QB)). For the exclusion to apply, the condoning in question does not have to be the exact dishonest act that caused the claim. It is sufficient that there is a condoning of behaviour of the same type as the dishonest acts that led to the claim.

There was no evidence that Prentice was aware of the surplus funds theft when it happened (despite having later lied to the King’s Counsel appointed by Axis as to whether he knew about the receipt of the money at all). He also wasn’t aware of the Dragonfly loan. Axis, however, argued that he was guilty of turning a blind eye to Jones’ conduct. For that to be condoning, Prentice would have needed to suspect something was wrong and then chose not to investigate it further. It is also a purely subjective requirement.

The judge found Prentice to have been dishonest in many respects. Despite that, he took a charitable view of his evidence that he had not suspected previous theft by Jones and rejected Axis’s argument that he was guilty of condoning the dishonest conduct of Jones.

On aggregation under limb (ii), the judge followed the earlier decision in Lord Bishop of Leeds v Dixon Coles & Gill [2021] EWCA Civ 1211 and decided that the claims couldn’t be combined into one. The two acts did not together result in each of the claims and the thefts were brought about separately. The creation of a false charge in the Dragonfly loan claim was not connected to the surplus funds claim. On the other hand, at the time of the surplus funds claim, there was no firm intent by the claimants to later mortgage the property.

Regarding the rule for combining claims, known as limb (iv), there are two conditions that need to be met. Firstly, the acts or omissions must be ‘similar’ and secondly, they must be in ‘related’ transactions. The judge took a strict view of what acts could be similar, even though he accepted that the degree of similarity must be real or substantial as opposed to superficial. He decided that the simple theft of the surplus funds for the property acquisition was not a similar act to the creation of the Dragonfly loan documents and the theft of that money.

He also found that the transactions were not related. The standard for deciding this comes from the Supreme Court case AIG v Woodman [2017] UKSC 18, which says the requirement is quite broad and there just needs to be ‘some inter-connection’ between the transactions and that ‘they must in some way fit together’. While acknowledging that purchase and loan transactions would often be related, in this case, they were not.

The Court of Appeal

The Court of Appeal decided not to overturn the original decision about whether Prentice was guilty of condoning Jones’ dishonesty. There was more than enough evidence to support this decision and the court recognised that a different judge may have made the same decision. However, it is exceptionally difficult to appeal findings of fact as the trial judge is best placed to make them, having had the benefit of hearing all the evidence, which the Court of Appeal does not. They will only interfere if the findings are clearly wrong and no reasonable judge could have reached them. In their view, this case did not meet that strict requirement. On aggregation, the Court of Appeal recognised that the question of aggregation always depends on the specific details of the case. However, they agreed that these claims should not aggregate.

Regarding whether actions were ‘similar’, they agreed the degree of similarity must be real and substantial and not fanciful. They looked at the details very closely rather than, in their view, superficially. It was not enough to say that both acts were theft, as that was viewing it too generally. When looking at the specifics, one involved the simple misappropriation of client funds entrusted to the solicitor, whereas the other involved the fraudulent creation of loan documents, the drawing down of that loan and then the theft of that money. They were not sufficiently similar.

Regarding whether the transactions were related, the Court of Appeal decided that they were not connected even though the requirements in AIG v Woodman seemed easy to meet. They found that there was no interconnection or link between them, as there might have been if the purchase and loan had been planned as part of a series of events. By the time the Dragonfly loan happened, the purchase was already complete, and the client had neither planned for it nor knew about it, making them completely separate events. The fact that the transactions involved the same property and the same clients did not suffice and nor did the fact that the purchase of the castle provided Jones the opportunity to steal money on both occasions.

Commentary

The decision highlights how challenging it can be to address major coverage points under the Minimum Terms. However, these issues are highly fact-sensitive, and outcomes often depend on the specific judge or arbitrator and the emphasis they place on the fact that one of the key purposes of the Minimum Terms is public protection. Even aggregation can be very challenging and, in our view, the decision is another demonstration of the fact that the aggregation of claims is not operating as intended and is unfairly affecting the primary layer market.

Loss of chance in insurance broker E&O claims

Author: Jason Nash

In **Norman Hay Plc v Marsh [2024] EWHC 1039 (Comm)**, Marsh applied to strike out an E&O claim made against it.

The claimant company settled a claim for $5.5m arising from a road traffic accident in the US, allegedly caused by an employee of one of its subsidiaries. They had been driving a hire vehicle but their insurance programme failed to provide cover for the driving of hire cars. The claimant pursued Marsh for negligence for failing to ensure cover was available for an accident in these circumstances.

Marsh applied for strike out and/or summary judgment, arguing that it could not be held liable to the claimant, as it was simply a holding company. They asserted that there was no valid claim against any insurer because the company could not be legally liable to the third party, having not been the employer of the driver. Marsh's position relied heavily on the earlier decision in *Dalamd v Butterworth Spengler* [2018] EWHC 2558 (Comm) and argued that the court should decide based on the evidence whether the claimant would have had a valid claim on the hypothetical policy.

The decision

The court refused to strike out the claim. Dalamd was distinguishable because in that case insurers had declined cover and the claimant had proceeded directly against the broker instead of challenging the insurers' position first. In those circumstances, it was right to decide based on the evidence whether the insurers had been correct to decline or not. However, this situation was different because the effect of the broker's alleged negligence was to deprive the client of the opportunity to bring any insurance claim at all. The question of what would have happened therefore had to involve the loss of chance basis.

Commentary

An interesting attempt to defeat a broker's claim using the authority in Dalamd and where the real mischief may be that the wrong claimant entity settled the underlying claim. The decision is being appealed by Marsh.

Contribution claims under the Civil Liability (Contribution) Act 1978

Author: Claire Cornish

In **Riedweg v HCC [2024] 11 WLUK 139,** HCC applied to the court to join a third party in proceedings.

The claimant alleged negligence against the valuers, Goldstar, for overvaluing a property she had contracted to buy for £8 million. Unable to complete the purchase, the seller sold the property for £5.5 million, leaving the claimant liable for the shortfall. With Goldstar having gone insolvent, the claimant pursued proceedings directly against Goldstar's professional indemnity insurers, HCC, under the Third Party (Rights Against Insurers) Act 2010.

HCC applied to join the claimant's solicitors, Forsters, to the proceedings under the Civil Liability (Contribution) Act 1978, arguing they were liable for the 'same damage'. The application was heard by a master.

The decision

The court reviewed the various relevant authorities on what amounted to the same damage, including the leading case of **Royal Brompton Hospital NHS Trust v Hammond [2002] 1 WLR 1397**. It was accepted by all parties that if the claim had been brought against Goldstar, then Forsters would have been potentially liable for the same damage and permission to join them would have been given.

However, Goldstar were not the defendant, HCC were. According to S.2(2) of the Third Party (Rights Against Insurers) Act 2010, a claimant can only pursue the insurers of a bankrupt insured party. In those proceedings, the court can declare both the insured's underlying liability to a claimant and the insurer's liability to the insured under the policy. However, this doesn't disguise the fact that HCC could only inflict damage to their policyholder if they refused to meet their obligations under the policy. They could not be liable for the damage inflicted on the claimant by their policyholder. Permission to join Forsters was therefore refused.

Commentary

Although the master granted permission, any appeal against the decision would be extremely challenging. There is no easy solution for insurers in this position if they wish to raise a defence to the underlying claim, argue policy points, and tactically join a third party in proceedings. In theory, they could try to join their insured into an action but would then face difficulties in persuading the court to allow that action to proceed, given the statutory moratoriums that can apply or in persuading a liquidator to then join a Part 20 defendant. The only alternatives are to exercise their rights of subrogation or take an assignment from a claimant. Unfortunately, both of those options require the claim to be paid first. Appropriate discounts can still be sought for any coverage issues but in terms of a third party's fair contribution, that share will have to be paid by insurers first and then recovered.

Court of Appeal ruling on solicitor liability for legal helpline advice

Author: Gary Oldroyd

In **Miller v Irwin Mitchell [2024] EWCA Civ 53** the Court of Appeal considered how much responsibility a solicitor has when operating a legal helpline.

In May 2014, the claimant suffered an open fracture after falling down some stairs at her hotel while on holiday. Following surgery, the leg became infected and, despite further treatment, had to be amputated in November 2015. On 19 May 2014, after seeing a television advert, she contacted the defendant solicitors' legal helpline. They gave her some high-level advice on bringing a claim against her holiday company, including what the relevant limitation period was. The defendant's legal adviser had a checklist of matters to discuss to guide conversations with prospective clients. This included checking whether the company responsible for the claim had been notified. However, this particular issue was not discussed during the call.

After the call, the defendant wrote to the claimant asking for additional information, including whether she had put the target company on notice of a claim. Despite chasers, the claimant did not respond until April 2015. In January 2016 the claim was ready to be progressed and a letter of claim was sent to Lowcostholidays in February 2016. They had failed to notify their insurers, HCC, of the incident leading to HCC rejecting cover correctly. Lowcostholidays then entered administration.

The claimant alleged that the defendant was negligent for failing to advise her to put Lowcostholidays on notice of the claim and to ask them to notify their insurer.

The judge at first instance decided that there was no formal or implied agreement for services (retainer) between the claimant and defendant until January 2016. The judge also found that the defendant did not have a duty of care towards the claimant under common law until that date either. The claimant appealed the findings on the implied retainer and the common law duty of care owed.

The decision

The Court of Appeal rejected the argument that an implied contract of retainer existed. The documents showed that the defendant had made clear that they would only decide whether to take her case on once they had received the relevant documents.

They also rejected the appeal on the common law duty of care owed. Although the advice was provided for free, the defendant had assumed a duty of care in providing that advice, but this was limited to the advice that was actually given. Although they had advised on the limitation period, they had not assumed a wider duty of care to advise on all possible ways her position might be protected. Previous authority, which suggested that a solicitor should adopt a broader view of the scope of their duty, applied only in situations where a retainer was in place.

Finally, when considering the scope of the duty assumed by the defendant in May 2014, it was significant that at the time, it appeared to be a modest claim and one which might have been expected to fall within the insurance policy excess anyway.

Commentary

This example shows the Court of Appeal taking a narrow view of the scope of duty in a solicitor's case, even though they showed sympathy towards the claimant. It's helpful to use as a reference against other cases where the courts have taken much less charitable approaches to the questions of (i) the existence of a retainer and (ii) the scope of the duty of care.

Changes to ICAEW Professional Indemnity Insurance requirements

Author: Marlene Henderson

The ICAEW reviewed their PII requirements. Following a consultation period, the updated regulations came into effect on 1 September 2024. There is a transitional period and new requirements will apply to all firms from 1 September 2025.

In summary, the main changes are:

- The minimum limit of indemnity will increase from £1.5m to £2m.
- For firms with a gross fee income below £800,000, the limit will be two and a half times the firm's gross fee income, subject to a minimum of £250,000 (this is an increase from £100,000).
- Larger firms with gross fee income over £50m will not be required to put in place 'qualifying insurance' but must have in place appropriate arrangements which will be monitored (currently this approach is available to firms with 50+ principals).
- For firms that will be required to put qualifying insurance in place, the maximum aggregate excess should not exceed the higher of £3,000 or 3% of a firm's gross fee income.

Changes to the RICS Minimum Terms

Author: Nik Carle

RICS also made several key changes to their Minimum Terms effective from 1 July 2024 as follows:

- In the UK and Ireland, fire safety cover is now mandatory for buildings that are five storeys or taller. The cover is on a negligent act, error, or omission basis rather than full civil liability and there is also a retroactive date of 1 July 2024 permitted. An annual aggregate limit is also allowed, to include defence costs.
- For the UK, cover is now also mandatory for claims involving external wall systems (EWS) and fire risk appraisal of external walls (FRAEW) in respect of buildings up to 18 metres high, provided the work is undertaken or signed off by someone who has passed the RICS External Wall Systems Assessment Training Programme.
- Underwriters are now permitted to apply the IUA 04 017 cyber clause.

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