Insurance Insights 2023

Browne Jacobson

Contents

Executive summary

Welcome to our insurance insight 2023

In this review we reflect on the last year and share our views as to what we see on the horizon for the insurance sector in 2023 across various lines of business. We hope these insights will support you in rising to the challenges and making the most of the opportunities which lie ahead.

These are turbulent times. Just when we thought COVID-19 was in the rear-view mirror and there could be a return to something closer to "as we were", we have double digit inflation, high interest rates, significant recessionary pressures and a cost-of-living crisis. On top of that domestic economic position, the global geo-political landscape is turbulent; war on European soil, increasingly severe weather events, and serious unrest in hotspots and developing countries around the world. Inevitably these conditions give rise to challenges for insurance markets and financial services generally.

In the UK, as with previous recessions, we expect to see claims frequency and severity increase in the coming 12 months. We anticipate increased 'unbundling' of professional services driven by clients' desire to use limited retainers to save costs. That will inevitably create risk for both client and professional, so we expect the nature of financial lines claims will reflect this trend. In dealing with such claims, we anticipate a focus on the extent to which the professional has assumed a wider duty will be a key battleground. In determining that the forensic approach taken in the Court of Appeal decision in Spire Property Development v Withers in 2022 will prove crucial.

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Jonathan Newbold

For property insurers, COVID-19 related business interruption litigation continues in the wake of the Supreme Court's decision in the FCA v Arch test case. Property insurers also have to tackle rising 'claims inflation', with ongoing supply chain delays, skilled labour shortage and rising costs of raw materials all having a considerable effect on the time and cost of reinstatement works.

Increasing litigation and regulation holding companies responsible for their ESG and climate related actions (or inactions) is causing major headaches for boardrooms, and by extension for their liability insurers.

The casualty market continues to grapple with rising social inflation and 'nuclear' jury verdicts in the US, resulting in an exponential growth in awards in the several hundred million of dollars.

Lastly, Russia's invasion of Ukraine and mass seizure of aircraft has led to numerous disputes between aviation leasing companies and their All Risks and/or War Risks insurers/reinsurers, with claims running into the US$ billions.

As our insights show, standing still is never an option – the need to adapt and proactively manage developments will remain crucial. We are committed to supporting you in that endeavour, collaborating with our clients to find new and innovative ways to successfully navigate routes to successful outcomes.

If you have any queries or would like more information on any of the insights shared in this review, please do not hesitate to contact me or any of the authors directly; we would be delighted to hear from you.

Best wishes,

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PI: Legal

All the indications are that the UK will be moving into recession in 2023, with the consequent anticipated fall in property prices and increases in repossessions and insolvencies. At the risk of over-simplification, when the focus of the client is to the money lost rather than money made, there is always the potential for claims against professionals in the legal sector to rise. Below we explore where, moving forward, the challenges will particularly fall.

Property

History (particularly the recession of the early 1990s) tells us that increases in mortgage repossessions puts the spotlight on the professionals involved in the purchase/re-mortgage where there is an equity shortfall. Conveyancers are always in that mix; regrettably, real estate work has always proved fertile ground for claims, but increased repossessions together with a forced sale/ and stuttering market values can mean issues that might otherwise not have led to a claim take on a greater significance. Crucially, the practices of both lenders and legal sector have significantly improved since the crisis of the 1990s; this should impact the volume of claims and a better ability to defend those pursued. That said, slipshod lending and conveyancing practises, where they arise, are much more likely to be exposed.

Insolvencies

The road to insolvency, whether personal or corporate, is rarely linear; often along the way there is that business transaction that didn't go to plan, a property sale or purchase that didn't bear the expected fruit, or a commercial dispute where the outcome didn't meet expectations. The legal sector is generally a cog in the wheel of such activities and when losses are made, legal advisers could face a claim. Increasingly, we're seeing such claims pursued by insolvency practitioners, particularly liquidators taking advantage of the greater availability of third-party funding. The scope of the professional's duty (adopting the principles of the crucial Supreme Court decision in Manchester Building Society v Grant Thornton [2021] UKSC 20) and the approach to loss of opportunity are likely to be key battlegrounds.

Private client

With an ageing population, increasingly complex family structures and ever more intricate estates, legal work in the private client sector faces a multitude of challenges. Add to that the aftermath of COVID-19, together with strained financial circumstances for some potential beneficiaries, and there is an environment in which claims by those disappointed one way, or another can flourish. Vulnerable clients need protection from those with questionable motives. Clients and their beneficiaries will be more inclined to pay close attention to the administration of trusts and estates, together with the tax liability incurred, to maximise returns and pursue claims where this has not been achieved. And overarching all of this will be the constant threat of cyber criminals targeting the funds and data held by the legal sector. There has been improvement in resisting such attacks, but continued vigilance is essential. In difficult financial times, there is little optimism this is a threat going away any time soon.

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PI: Surveyors

Frenzied' must have been one of the most over-used descriptors of the property market in the last two years – usually as a label on buyer activity. According to research by the estate agent Hamptons, of all the homes sold in England and Wales during 2021, an astonishing 31% went for over asking price. Bidding wars became the norm. There was much clamour, too, around so-called "down valuations".

Fast forward a few months and it is a different picture:

- the UK is falling into recession;
- at least one lender, HSBC, has been predicting a raft of forced sales;
- mortgage repossessions are up 91% on the same period last year.

Historically, these factors have provided fertile ground for claims against valuation surveyors.

Some big differentials could soon emerge between:

- valuations reported during the March 2020 to September 2022 period (where contracts were exchanged in a situation of 'frenzy'); and
- 2023 valuations (where the vendor's financial circumstances may mean the sale is a 'forced' one).

The wave of claims against valuers after the early 1990s recession was enormous. Lessons were learnt and a range of risk mitigation strategies were embedded by lenders and professionals alike. As a result, claims after the liquidity crisis that followed the collapse of Lehman brothers in late 2000s were more of a ripple than a wave.

Every recession has new and particular features that affect the claims constituency afterwards. Covid-19 will undoubtedly be in the mix this time around.

Market conditions have been so dynamic at times that valuers may have considered using a 'material uncertainty clause'. We may also find that the margin of error or 'bracket' around non-negligent valuations is widened from the parameters referenced in Blemain Finance Ltd v E.Surv Ltd [2012] EWHC 3654 (TCC) (20 December 2012) (bailii.org).

If we do see a new era of claims in 2023 (or later), lenders could encounter some push-back in the form of allegations of contributory negligence or failure to mitigate. With so many reports delivered in a period as febrile as the one just gone, it may be asked what degree of reliance is reasonable to place on the valuation? Lenders were very well aware, too, of course that the rapidly rising market could not last.

Although the affordability crunch is biting now, there will likely be a lag before any real claims potential starts to take shape.

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PI: Estate and Lettings Agents

Despite the UK falling into recession, given the fact that new homes are not being built in line to keep up with demand and given the impact on household budgets of the cost of living crisis, coupled with the availability and affordability of mortgages, a downturn in the rental market – and therefore, a downturn in claims against Estate and Lettings Agents – is not expected.

The UK rental market saw a 3% increase for the 12 months to June 2022, the largest growth since 2016. (Index of Private Housing Rental Prices, UK – Office for National Statistics (ons.gov.uk).

Whilst landlords retain duties in relation to their tenants, the reality is that where an agent is in the picture, it regularly falls to them to pick up the pieces and pay compensation when things go wrong. It is therefore critical for Lettings and Estate Agents to be alive to the various “technical” pitfalls of the legislation surrounding rental properties.

Failure to protect a tenant’s deposit within 30 days could see the Agent required to return the original deposit plus being penalised for up to three times the sum of a deposit.

Additionally, failure to provide tenants with prescribed information within the same 30 days, can similarly attract a penalty of up to three times the value of the deposit. (Housing Act 2004).

With the cost of living crisis impacting people’s pockets, the possibility of tenants falling into arrears is a real and constant risk which will impact landlords and their agents. This may explain the recent 57% increase in the uptake of rent protection policies as reported by Payment Shield.
The cost of living crisis will not only impact tenants, but also landlords who may to try to keep their costs as low as possible and may result in a failure to comply with their duties to maintain their properties.

Agents often find themselves falling into “technical” pitfalls when trying to evict troublesome tenants. Failure to provide valid EPC and gas certificates, as well as “How to Rent” guides (or failing to serve the guides by the correct method – a tenant’s agreement to accept email service is required) prior to serving s.21 notices is resulting in failed eviction proceedings and costs which are being borne by the agents.

Finally, with the abolition of the s.21 eviction process, landlords and agents face a scary and unknown future having to rely on the tougher, lengthier and costlier s.8 process to remove tenants from their properties. Whilst the government seeks to reassure landlords that amendments will be made to the s.8 process to make it easier to achieve evictions, this remains to be seen.

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PI: Accountants

Scope of Duty

The challenging economic climate is set to continue into next year and perhaps beyond. Accountants will need to pay close attention to the scope of their retainers and resist the temptation to proffer casual, and often incomplete, advice/comments at the behest of their clients. Accountants should be alive to any coyness on the part of directors to shift their own responsibility to creditors (see BTI 2014 LLC v Sequana and other [2022] UKSC 25).

Taxation – Oversees Entities

The Register of Overseas Entities (ROE) launched on 1 August 2022. A failure to register by 31 January 2023 may lead to substantial fines (up to £2,500 a day and potential imprisonment). The information appearing on the register must be verified by a regulated agent such as accountants or legal professionals. This creates an Accountant's duty to ensure that the clients' records are correct. Many companies look to their accountants for such proactive assistance. Accountants must therefore become conversant with the ROE rules and their impact. The ROE also affects any overseas entity that has disposed of UK land or property since 28 February 2022 and therefore accountants should be flagging this to their relevant clients.

Insolvency

Insolvency pressures are on clients due to the highest rates of inflation in 30 years. Many businesses will not be able to keep up with the surging business costs. 60% of business are being affected by the current financial crisis. The high inflation, high energy bills and supply chain issues affecting businesses are likely to see many businesses become insolvent. Unfortunately, many will seek to blame professionals, such as accountants and insolvency practitioners, for their downfall. An example is the case of Evans v Muxworthy [2022] EWHC 2866, where a director unsuccessfully alleged that the accountant and the insolvency practitioner failed to advise him to challenge the unlawfulness of a creditor's decision to place the companies into administration.

Blockchain and Crypto risks for accountants

Blockchain is "a foundational change in how financial records are created, kept and updated", and for accountants this improves efficiency, can help gain clarity over available resources and allows for increase in the scope of services provided to clients. There are three main risks involved for accountants:

Money laundering – understanding the flow of monies, tracking transactions, validating ownership, does the client understand what they are doing?

Corporate fraud – the above and tighter engagement and representation letters, enhancing staff training;

Tax evasion/avoidance and technical guidance – all the above as well as considering varying client approaches, technical aspects and HMRC's approach.

In this new, complicated and evolving area, accountants need to keep a focus on potential money laundering activities and increased risk of corporate fraud, particularly for statutory audit assignments. Accountants should be able to advise on tax aspects and seek external guidance and support where necessary.

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PI: Insurance Brokers

In 2023 we expect that primary trends impacting on professional negligence claims against brokers will concern three main external drivers: the economy; developing risks; and increased regulation. With no doubt some notable exceptions we see those external drivers as having the greatest impact.

The Economy

Assuming the widely predicted global recession hits, it is reasonable to assume an increase in professional negligence claims generally including those against insurance brokers. Equally predictable is an increased focus on the suitability of insurance products should an individual or business need to rely on them, with the inevitable spotlight on the role of the broker. To many working people, a high inflation economy has been a novel but unwelcome development. For the broker this carries its own risks given the possibility that customers may become underinsured – particularly where they have relied on historic valuations. This is likely to become starker in an environment in which property values are falling but – crucially – rebuilding costs are increasing significantly. Further, set against this background are the risks of insurer default and customers wishing to find ways to reduce the cost of insurance, potentially by selecting reduced cover options and / or taking out cover with unrated markets. All these issues create a setting for an increase in claims and a need to demonstrate that both the correct advice was provided and the customer reached an informed decision.

Cyber risk/Crime/Data Breaches

The inexorable rise in criminal activity (by state and non-state actors) and regulation (e.g. concerning data protection) creates ever increasing risks to consumers and businesses. It is likely that in 2023 and beyond there will be an increasing focus on advice regarding insurance for Cyber risk/Crime/Data Breaches and the suitability of any advice given by the broker (or not, as the case may be). In addition to the risk faced by brokers' clients, brokers themselves are likely to continue to present a risk of attack given the extent of confidential and sensitive customer data they hold. This risk is not limited to large firms; smaller firms may be an easier target as they are less likely to have sophisticated IT protections in place.

FCA Consumer Duty July 2023/the rise of regulation v negligence claims

The FCA's new Consumer Duty will be introduced in July 2023 with the intention to set "a higher, clearer standard by requiring firms to ensure their products and services are fit for purpose and offer fair value, and to help consumers make effective choices or act in their interests". For the broker there will be an ever-increasing importance of documenting reasons for advice and recommendations and of informed decisions of the customer.

The Consumer Duty, through the Customer Understanding Objective, also places an increased focus on ensuring customers understand the products they are purchasing. However, once again the FCA has chosen to direct customer complaints arising from this fresh regulation to FOS rather than introduce a distinct claims process. Arguably as a result, the contrast between the detail of FCA regulation and the reasonableness approach of FOS will become more obvious. Further, it is likely that at least in the near future, the common law approach of the courts to professional negligence claims against brokers will continue to appear to be on a separate path to regulatory developments. That said, we foresee that any established failure to comply with the Consumer Duty may be used as evidence of purported negligence on the part of the broker in any civil proceedings.

And finally...

As well as the traditional focus on causation in brokers' claims, we expect the courts in 2023 to grapple with further attempts by businesses to bring claims against brokers in the aftermath of COVID-19 exclusions (perhaps prompted by some of the publicity in 2022 surrounding the group claims being brought by a large number of childcare nurseries against the brokers Pound Gates).

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D&O and Corporate Liability

Pricing

Rates for Director and Officer (D&O) insurance remain high relative to pre-pandemic levels, and this has seemingly prompted existing insurers to grow their books whilst also attracting new entrants to the UK D&O market. Over the last year, this dynamic has made market competition more aggressive than anticipated and policyholders have, in turn, benefited from significant premium reductions throughout the year as well as increased policy limits[1]. The most substantial rate decreases have been for large, multinational clients[2]. We predict that directors and officers face challenging times ahead and it will be interesting to see what impact this has on pricing over the coming year.

Economic, Social and Governance (ESG)

Potential claims in the ESG sphere continue to be one of the biggest emerging risks for directors and their insurers.There are increasing societal pressures for organisations to tackle "big issues" and to recognise their wider corporate and social responsibilities. For example, to name just two, to take steps to mitigate the impact of climate change, and to promote diversity and inclusion.

Class actions and shareholder activism

In addition to possible claims by third parties, failures to respond to societal demands and/or to take advantage of related opportunities, is likely to give rise to claims that directors have breached their duties to promote the success of companies. These risks are heightened by the rise of class actions and shareholder or investor activism, whereby interest groups acquire shareholdings with the aim of holding companies (or more specifically their directors) to account.

Disclosure and reporting

Companies have become subject to a wider range of regulatory and non-financial reporting obligations. This trend is expected to continue with more stringent requirements anticipated to make detailed and clear disclosures in relation to issues such as environmental and sustainability objectives. With media attention having shone a light on "greenwashing" practices, companies, and in turn their directors and officers, should expect to be scrutinised and held to account where those statements prove to be incorrect, or companies fail to meet pledged or required standards.

Insolvencies

Insolvency situations have traditionally been a major source of D&O claims. According to UK National Statistics, company insolvencies were up by 40% in Q3 2022 compared to the same period in 2021. With some predicting long-term economic instability, and greater access to funder options, we anticipate seeing an increase in related D&O claims.

Cyber

Technology and cyber security also continues to pose significant threats to businesses, with UK National Statistics indicating that 39% of businesses suffered a cyber-attack in the last 12 months. Not only do these incidents cause immediate financial losses but they also have the potential to cause longer term reputational damage. With the continued rise in shareholder actions, directors and officers who fail to appropriately manage cyber security are likely to be held to account and face claims by disgruntled shareholders.

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1 *Gallagher Speciality, Management Liability Insurance, Global Market Update, August 2022*

2 *Marsh Global Insurance Market Update, UK Pricing Q3 2022*

Employment Practices Liability

Employment law has always been fast-moving, with frequent developments as a result of both political and social pressures. 2023 looks to be no different:

- The current economic climate – and, in particular, rising inflation, taxation changes and increases to energy and food costs – is already having, and will continue to have, a significant impact on pay negotiations due to the additional pressures/constraints faced by both employers and employees. These pressures significantly increase the potential for industrial action from unionised workforces, bringing the risk of considerable disruption as well as impacting wider employee/union relations. Whilst some insurers may seek to limit the impact of trade union related claims through the use of policy exclusions and endorsements, care will need to be taken in considering the impact and scope of that wording in each individual case.

- Increased financial pressures on businesses (and consumers) is likely to see a rise in redundancies which can result in an increase in employment claims. Whilst many EPLI policies exclude redundancy costs from the scope of cover, defence costs are often still covered. Further, other linked claims – such as asserting that selection was discriminatory – may well be added. The amount of compensation awarded in such claims may increase due to difficulties in securing comparable employment.

- An increase in insolvencies may also see a commensurate increase in the number of claimants seeking to take the benefit of insurance arrangements. Employment tribunals are still getting used to dealing 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.

- Workforce statistics show upward trends in the number of economically inactive people – particularly those who cannot work due to ill-health. Where recruitment is challenging, retention is key – and this in turn can result in lower employment claims. However, ill-health within the workplace – particularly where it arises as a result of longer-term health conditions – needs to be managed properly and getting this wrong could see a rise in absence-management claims, including disability discrimination.

- We continue to see a rise in claims relating to the handling of flexible working requests and, given the reported diverging views between many employers and employees over the benefits of workplace attendance versus homeworking, this trend looks likely to continue. This is particularly the case given the proposals to extend the statutory right to request flexible working so that it is a day-one right.

- Lastly, the Retained EU Law (Revocation and Reform) Bill, if passed, is likely to have considerable ramifications within employment law. There are numerous very significant employment laws that are derived from EU law and made under secondary legislation and which are therefore in scope for "sunsetting". Even if every single piece of employment legislation is expressly preserved in its current form, the wider provisions of the Bill which remove direct effect, EU supremacy and the general principles of EU law will affect how that law is to be interpreted and applied. Such uncertainty is likely to lead to an increase in litigation and, as Employment Tribunal decisions do not set binding precedents, an increase in appeals.

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Public and Employers' Liability

There is a great deal of uncertainty as we approach the year ahead. The indications are that the UK economy is already in recession, inflation has spiralled above 10% (globally and domestically) leading to a cost of living crisis, the war in Ukraine shows no sign of resolution and, lest we forget, the aftermath of Brexit and COVID-19 – all of these factors will impact on personal injury claims in the year ahead. These key themes will develop:

Earnings

Whilst CPI and RPI are around 10%, the latest Annual Survey of Hours and Earnings ('ASHE') figures, published in October 2022, suggest average increase in wages for full time employees are running at around 5-6% depending on the sector. Despite predictions from the Bank of England (BoE) that inflation is expected to fall sharply from the middle of '23, there will be pressure for increased earnings loss awards in the short term across the claims portfolios.

Care and case management costs

Those ASHE figures also suggest an annual rise in the cost of care claims at 6-7%, with case management costs likely to follow a similar path. With catastrophic injury claims being dominated by these and earnings awards, the total cost of an award will come under sustained pressure.

Personal Injury discount rate

The next formal review of the England and Wales discount rate will begin on or before the summer of 2024. The Ministry of Justice (MOJ) has called for evidence about whether to introduce dual discount rates ahead of this next review. At a roundtable meeting with the MOJ and key stake holders in November 2022 on this issue; our sense of the 'mood in the room' was that there was little support for the introduction of a dual discount rate by compensators and their representatives. That said, the MOJ is calling for further evidence, which is likely to run through Q1 in 2023, and an expert panel will be set up to consider this key issue further when the new Discount rate is set. We are hopeful that inflation will be back under control at or around the 2% BoE target at that time, such that returns on investments are able to outpace inflation and lead to a more positive Discount rate outcome.

Increase of potential fraudulent claims

Previous trends have pointed to an increase in fraudulent and/or exaggerated personal injury claims during a downturn in the economy. Heading into 2023, we have additional aggravating factors such as below inflation wage increases and the cost of living crises, etc. As such, compensators and those representing them need to be ever more aware and robust with the screening and validation processing of personal injury claims.

Public liability insurance register

The MOJ has announced that it intends to revisit the feasibility of a public liability (PL) insurance policy register. Should this proceed, the costs are likely to be in the millions annually.

Abuse claims

We are already seeing a broadening of claims beyond sexual abuse to mistreatment, bullying and harassment, with claims for physical and psychological injury. We have seen this as additional claims to employment claims for awards to injury to feelings, and particularly claims against sporting organisations and against coaches.

Post-COVID-19 recovery

Looking to the year ahead we anticipate seeing more claims following increased miles on the road, an increase in manufacturing related EL claims and Claimant firms pushing claims that were somewhat dormant during the lockdown period(s).

E-scooters and drive for lower cost travel

With the surge in demand of e-scooters and related transport, there will inevitably be a rise in the number of collisions with vehicles and pedestrians. We therefore expect there to be further calls for regulatory reforms (i.e. registration, compulsory insurance and/or a manufacture guarantee scheme etc).

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General Insurance Regulation

The story of the interactions of the UK's Financial Conduct Authority ("FCA") and Prudential Regulation Authority (Bank of England – "PRA") with the general insurance market specifically (as opposed to the financial services ("FS") markets as a whole) is one of 'old news', relating to initiatives commenced in 2021 and prior. The overall issue for 2023 is how are insurers and intermediaries going to be able to meet regulatory expectations?

In May 2022 the PRA published its Results of the 2021 Climate Biennial Exploratory Scenario ("CBES"). As might reasonably be expected, *"The CBES has shown that UK … insurers are making good progress in some aspects of their climate risk management, and this exercise has spurred on their efforts further. But … insurers still need to do much more to understand and manage their exposure to climate risks. The lack of available data on corporates' current emissions and future transition plans is a collective issue affecting all participating firms …"*

The issue for 2023 and beyond is, how are insurers going to be able to obtain the actionable climate data they need? Can anything realistically be done before the proper integration of environmental (including climate), social and governance ratings agencies into the regulatory perimeter as indicated by the Edinburgh Reforms speech of 9 December 2022?

In December 2022, the FCA published its General insurance ("GI") pricing attestation multi-firm review. *"Overall, the evidence provided indicated that most firms in the review had taken appropriate action to comply with our pricing rules (see PS21/5: including final rules plus subsequent Amendments) when they came into effect on 1 January 2022 …"*

Key findings included:

- *"Larger firms in the market, mainly insurers, were generally able to show that they had taken appropriate actions to comply with [the] … rules, including putting in place an appropriate governance framework for ongoing monitoring and compliance with our pricing rules … However, not all the information that was reported to the person responsible for the attestation was made available to us, in line with the requirements of ICOBS 6B.2.57R.*
- *Many of the smaller firms in the market had few or no records to show how they had complied with our pricing rules. These firms mainly set the price of additional products sold with home or motor insurance, set fees, or give incentives.*
- *Some firms provided a statement or limited information asserting that their pricing model, before our pricing rules came into effect, did not differentiate between new and renewing customers. However, in most cases no evidence or records were provided to substantiate how these firms had satisfied themselves that they were and are on an ongoing basis complying with our pricing rules …"*

The issue for the GI market in 2023 on pricing attestation is governance – and in particular firms' ability to verify that compliance risk is being managed with effective systems and controls, especially documentary evidence.

In terms of the general insurance market being part of FS markets as a whole, the key themes for 2023 and beyond are:

1.
Culture and ESG (Environment/Social/Governance sustainability and responsibility)

In particular, the FCA published its ESG sourcebook, which will become the touchstone for handling ESG issues, starting with climate-related financial disclosures as advised by the TCFD.

2.
The customer-protecting market

The FCA has developed three inter-related initiatives intended to put the fair treatment of customers at the forefront of firm's operations and decision-making. In 2023 firms should expect FCA scrutiny of their implementation of these:

- Consumer Duty
- Operational Resilience
- Vulnerable customers

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FCA Investigations and Enforcement

2022 was a busy year for the FCA's enforcement division. Outcomes were reached in several high-profile cases, demonstrating the FCA's willingness to utilise the full range of enforcement options across the criminal and civil spectrum.

Across financial services, the last 12 months saw the FCA reinforce its commitment to using its criminal powers against individuals. Significant fines were levied on firms for failings in relation to conduct matters, including the management of conflicts of interest and the fair treatment of customers, as well as prudential matters such as anti-money laundering controls. The sole insurance-based enforcement case concerning JLT Specialty Limited is considered in more detail below.

FCA prosecution – JLT Specialty Limited

In June 2022, the FCA published its Final Notice as to JLT Specialty Limited. This was something of a sequel to enforcement proceedings in 2013, during which JLT was fined £1,876,000 for its failure to establish suitable anti-bribery processes relating to introductions by third parties of policyholders to JLT direct, particularly in relation to payments to overseas third parties.

Regrettably JLT failed, over the next four years, to apply, on a comprehensive and group-wide basis, the lessons learned from its previous mistakes. The FCA found that it had failed to adopt suitable processes when third parties were brought into the insurance mediation chain by JLT's associated companies.

A fine was imposed in the sum of £7,881,700. This represented a 30% reduction on the original penalty of £11,259,500, based on JLT's decision to self-report to the FCA in June 2017 and its agreement to settle at an early stage of the investigation. Further JLT provided assistance to the FCA and gave access to relevant documentation; conduct which was accepted as a mitigating factor.

2023 – what next?

Mark Steward, head of enforcement at the FCA, is stepping down in early 2023. During his seven-year tenure, Steward lowered the FCA's internal threshold for referring cases for formal investigation and showed an increased willingness to use the variety of enforcement tools at his disposal. The 2021 prosecution of NatWest for breaches of money laundering regulations, outside the FCA's usual focus, illustrates an increased focus on criminal enforcement. We expect Steward's replacement to continue to spearhead this trend.

Within its 2022/23 Business Plan, the FCA set out its determination to *"take quick and effective action"* in the delivery of its objectives, including *"reducing and preventing serious harm"*. The assertive approach looks set to continue into 2023 and beyond.

The impact on consumers of the cost-of-living crisis, as well as the new Consumer Duty, is likely to dominate the FCA's approach to enforcement in 2023. By now, all firms should have agreed their Duty implementation plans at board level and be able to evidence that those plans are *"deliverable and robust"* enough to meet the new standards. FCA guidance on the Consumer Duty covers how the Duty applies to the insurance distribution chain. Given the direction of travel, we expect to see early enforcement action taken against firms who fail to meet the appropriate implementation milestones, irrespective of whether actual customer harm has occurred.

We anticipate the FCA's increased interest in financial promotions will continue, particularly around the marketing of (currently) unregulated products such as Buy-Now-Pay-Later loans. The future regulation of these products is set to bring increased scrutiny in this space, and we expect significant enforcement action as unauthorised firms struggle to keep pace with the changing requirements.

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ESG

Environmental, social and governance (ESG) issues will continue to be important for our clients in 2023, as regulators continue to develop a wider set of expectations and standards in respect of ESG factors. Below we look at some of the most likely areas of focus within each dimension of ESG in 2023.

Environmental

Alongside the now infamous “mini-budget” in the Autumn of 2022, the Government published its proposed Retained EU Law (Revocation and Reform) Bill 2022 setting out its plans for enabling the Government, via Parliament, to more easily amend, repeal and replace retained EU Law. While the Government has regularly restated its commitment to the environment, the prospect of EU environmental laws being removed wholesale from the statute book has significant implications for a wide range of industries. This potential loss of this stability will impact business certainty, including for the environmental goods and services sector itself, and is also likely to undermine progress on tackling the climate and biodiversity crisis. The most recent U-turn on onshore wind projects taken by the Government means that it is difficult to see where its commitments lie going forward.

Financial services firms should be aware of the Financial Conduct Authority’s (FCA) Sustainability Disclosure Requirements (SDR) and investment labels consultation paper, which aims to reduce and eliminate greenwashing within the financial services sector. The paper includes a proposed ban of specific terms from funds marketed to retail investors where the firm does not qualify for one of the three labels proposed. As such, firms may wish to review their current use of terms which include “ESG”, “net zero”, “sustainable”, “responsible”, “green” and “Paris-aligned” – all of which fall under the proposed prohibited terms outlined in the FCA document.

Social

Late last year the Director of ESG at the FCA stressed that “social washing” is something that people will hear more about in months to come. This is a practice which is aimed to improve a company’s reputation through social responsibility initiatives that are largely ineffective or, at worst, motivated by economic returns. Firms and investors should be pay close attention to the development of this trend in 2023.

The FCA has also warned that consumers are becoming increasingly vulnerable to scams as a result of the cost-of-living impact. Firms need to remain alert to the changing situation of their customers and should take steps to ensure that their internal compliance training sufficiently covers the change in dynamics relating to fraud and phishing scams.

Governance

Biodiversity is likely to play a bigger role in 2023. The Taskforce on Nature-related Financial Disclosures (TNFD) was established in 2021 in response to the growing appreciation of the need to factor nature in financial and business decisions. The TNFD is adopting an open innovation approach, centred around the release of several beta versions of the framework for feedback and pilot testing with market participants and other stakeholders, and expert input from a wide range of knowledge and implementation partners. The Taskforce is due to release v0.4 of the beta framework in February 2023, before the launch of the final recommendations in September 2023.

This is likely to build upon the outcomes of COP15, the 15th meeting of the Conference of the Parties to the UN Convention on Biological Diversity, is a two-week summit taking place from 7-19 December in Montreal, Canada. Whilst COP27 generated significantly more attention than COP15, there is a growing consensus that both the loss of biodiversity as well as climate change are two of the biggest threats to the planet. Insurer Swiss Re has estimated that over half of global GDP (41.7 trillion US Dollars) is dependent on a healthy natural world. To resign this summit to conservationists and academics would be wrong; decisions made could impact financial services markets for decades to come.

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Regulatory

The HSE published its 10 year strategic plan this year, which informs business of what areas of focus the HSE will have when inspecting and investigating businesses in the years to come (more on that below).

The continuing development of the new regulatory framework to manage the safety of high risk buildings as a response to the tragic events that unfolded at Grenfell Tower in 2017 continues to gain momentum. Further duties created under the Building Safety Act 2022 will take effect in 2023, with preparations necessary for provisions that will come into force at a later today essential.

A raft of new fire safety obligations placed on building owners and managers will take effect in England, very early in 2023, under the Fire Safety Act 2021. All duty holders should be well advanced int their preparations for those new statutory duties or face the risk of enforcement action.

HSE Statistics

The now familiar annual publication by the HSE set out key figures for Great Britain for 2021/22. There were 123 fatal workplace accidents, 565,000 workers sustained a workplace injury, and 61,713 workplace injuries had to be reported to the HSE. In total, 36.8 million working days were lost due to work related illness and injury at a cost of £18.8 million. The figures demonstrate that actively managing risk remains a key priority for all businesses to minimise its exposure to significant financial penalties and insurers risks of liability claims.

HSE Strategy

Perhaps unsurprisingly, the 10 year strategy published by the HSE this summer identify workplace health, and particularly mental health and stress, as a key priority for the HSE in the coming years. Of the 1.8 million workers suffering work-related illnesses in 2021/22, 914,000 suffered with work-related stress, depression and anxiety. The HSE will pay particular attention to the way in which business manage this health risk and businesses should ensure they have applied the same rigour to the way in which they assess this risk and the measures they put in place to manage, mitigate and support their workforce.

Building Safety Act 2022

The Building Safety Regulator (BSR) is well underway with its preparation for the implementation of large sections of the Act. This year, from April 2023, the BSR will open the registration for all existing high rise buildings with the registration closing in October 2023.

In October 2023 the registration for building inspectors and building control approvers will also open and in the same month the BSR will become the new building control approval for high rise buildings.It is important for those involved in the design, build and management of new high rise buildings to remain up to date with the progress of the Act, as a significant amount of work will be required to have in place the systems and processes to manage the new statutory duties in advance of them becoming law. See our construction section below for more details.

Fire Safety Act 2021

On 23 January 2023, under the Fire Safety (England) Regulations 2022, new requirements applying to new and existing high rise buildings will come into force. An emergency information box will have to be installed in the common parts of buildings containing information to aide fire fighters tackle an emergency. If a building is over 11 metres in height, then the responsible person must carry out quarterly checks of the communal fire doors and must use best endeavours to check flat entrance doors every 12 months. Again, further duties are placed on responsible persons for high rise buildings to ensure wayfinding signage is in place to assist fire and rescue crews. There is also a new requirement to provide information to residents relating to the evacuation strategy that apply to all new and existing residential and mixed use buildings. The duties will be enforced under the Regulatory Reform (Fire Safety) Order 2005 by the relevant fire and rescue service.

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Intellectual Property

Trade Marks

Skykick will be heard by the Supreme Court, which will finally settle the long running dispute about whether Sky's trade marks were filed in bad faith. If a trade mark is filed in bad faith it is inherently invalid; this cannot be cured by time or by later good faith, so bad faith can be a powerful tool for a defendant. Skykick allege that Sky's trade mark applications were too broad and so filed in bad faith. The Court of Appeal's decision wasn't particularly helpful to the defendants or to defendants generally, so they have appealed again.

The *Lidl v Tesco* litigation before the Court of Appeal will also consider bad faith.

Combe v Wolff was handed down by the Court of Appeal in November 2022 and is helpful for defendants. It's about acquiescence, and makes it more difficult for trade mark proprietors to enforce rights if they have delayed.

Marks & Spencer's claim against Aldi is being heard in IPEC in December 2022, and the result will be interesting for all the companies involved in copycat products.

Copyright

One of the most interesting cases at the moment is being fought in the US – the Github Copilot litigation. Github, which is owned by Microsoft, is a software development tool and repository. It has functionality called "Copilot" where an AI helps write code. This AI was apparently trained on proprietary code. Machine learning is being used more and more, and it is currently trained on a lot of proprietary data. This litigation could change that.

More generally, US copyright litigation is much more lucrative for successful claimants than UK copyright litigation; expect this to increase (and expect litigation funders to get more interested in it).

In the UK, the IPEC refused to strike out Waterrower's claim for copyright in the shape of a rowing machine. There has for several years been tension between the words of the UK's Copyright, Designs and Patents Act (which limits copyright in 3D objects to sculptures and works of artistic craftsmanship), and CJEU case law (which is not so limited). If Waterrower win, then it will be easier to argue copyright in the shape of cars, lunchboxes and all manner of other 3D objects, and litigation will increase.

Breach of confidence

Remote working appears to have increased the amount of breach of confidence cases we are seeing involving ex-employees.

Procedural

The IPEC costs cap is going up to £60,000. Interestingly, IP claims in the Shorter Trial Scheme may soon be subject to a cap on costs awards of £500,000. The IPLA have proposed this apply to patent cases; the wider IP community seem keen to have it apply to all IP cases. Lord Justice Birss appears receptive.

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Fraud and Cybercrime

The Landscape

According to the ONS Crime Survey for England and Wales (June 2022), there had been no significant change in the number of overall fraud offences since March 2020 (3.7 million) to June 2022 (3.8 million). Bank and credit account offences have increased tenfold to 611,000 offences last year – probably mirroring the move online for many businesses during COVID-19 and our increased reliance on internet shopping and banking. UK Finance saw a 108% rise in offences to 319,311 but, by contrast, Action Fraud saw a significant drop by 23%. According to the House of Lords Report, fraud makes up 41% of all crime against individuals (not including companies) – yet just 1% of law enforcement is focused on tackling economic crime.

Despite these outliers, the overarching impression is of a return to pre-pandemic levels of fraudulent activity, but with increased risks to digital assets. Computer misuse – which involves hacking (malware) and theft of personal data – doubled in the past year via large scale global data breaches and email and social media account compromises. In summary, this signified that some 61% of all fraud incidents were cyber-related. It is expected this will be a continuing trend for 2023.

There's clearly a serious imbalance and a recognition that intervention is required. Look out for the debate and call on an introduction of a "failure to prevent" fraud offence.

Cyber-related fraud

Despite the advent in 2016 of the voluntary Contingent Reimbursement Model authorised push payments (APP) fraud (where a payer is deceived into paying a criminal), cyber-enabled fraud recoveries still remain problematic. In line with the Government Consultation in 2022 expect a ramping up of measures to protect business and consumers as the incidence of these claims increases and the Payment Services Regulator publishes its findings in 2023. Decisions such as the evolution of the Quincecare duty on banks in Philipp v Barclays Bank UK PLC [2022] will potentially mean more successful claims against banks where, on inquiry of a potential fraud, they fail to take steps to protect customers.

Commercial Fraud & Crypto

The COVID-19 loan scheme frauds perhaps signalled the most significant attack on the UKs finances for generations. It is regrettable that it took the war in Ukraine, sanctions on Russia and the abuse of Companies House to lead to the Economic Crime and Corporate Transparency Bill being introduced to Parliament. It is still in its early stages. The Bill contains reforms to Companies House procedures and company governance, including powers for law enforcement agencies to obtain documents, and changes to the register of overseas entities, money laundering regulations and crypto assets recovery under POCA.

Methods to identify the whereabouts and prevent dissipation of assets (especially crypto currencies) are continuing apace since *AA v Persons Unknown* and *Ion Science*. Following the key decision in Fetch.ai Ltd, not only will Courts be willing to grant far reaching Banker's Trust Orders, but also permit service outside of the jurisdiction following Amendment to PD 6B of the CPR and, thanks to *Jones v Persons Unknown*, make orders for delivery up of crypto from an exchange in the Seychelles permitted by service of the orders on the fraudsters (whoever and where ever they may be) by an air-drop of a non-fungible token into the exchanges wallet. Such innovative approaches are likely to see the Commercial Courts in England and Wales at the forefront of online fraud involving digital assets.

Insurance fraud

Some key decisions of the Courts in the past 12 months have seen greater technical challenges to the compensation claims which involve allegations of Fundamental Dishonesty (FD) under the Criminal Justice and Courts Act 2015 (CJCA). We expect these to continue into 2023.

The value of claims suspected to be dishonest and grossly exaggerated is on the rise. Increased focus will be on using intelligence tools and conventional surveillance to prove the dishonesty in these cases. The two examples from 2022 of significant exaggeration were in complex clinical negligence and quasi-industrial disease cases: *Murphy v Wye Valley NHS Trust* (clinical negligence elbow) and *Muyepa v Ministry of Defence* (non-freezing cold injury). Based on the surveillance evidence the courts assessed the "true value" of damages to amount to 0.85% and 5.5% respectively of the claimed amounts before dismissing the claims for FD, ordering costs and repayment of substantial interim payments.

Committals for contempt also continue to play a big part in the armoury of insurers and will continue to do so as more egregious acts of fraud are uncovered.

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Costs

Macro-economic pressures, specifically the impact of inflation, continue to be a theme across the legal sector as we head into 2023, and it is no different in the world of costs. The Civil Justice Council's costs consultation has recently concluded with the committee's report due by the start of the New Year, while the implementation of the much-anticipated expansion of the Fixed Costs Regime has been delayed again and is now widely expected to be fully implemented in October 2023.

The CJC's Report is unlikely to lead to any sudden procedural changes, instead setting the wheels in motion for improvements to costs budgeting, more certainty and continuity of both the review and implementation of the guideline hourly rates, and an increased role (both in terms of use and importance) of the Pre-Action Protocols and online Portals in the litigation process.

Unlike the CJC report, which will be largely advisory, one can expect behavioural, procedural, and practical change claims valued at up to £100,000.

What we can expect, if the 2013 changes to the personal injury landscape are anything to go by, are a few years of disruption and argument as the scope and any exceptions to the regime are tested.

To some degree, markers are already being drawn across the Claimant and Defendant industries with lobbying from the Claimant factions for mechanisms to tie the Fixed Costs Regime to inflation, and for the allowances on the previous fixed costs schemes to be increased.

On a day-to-day level, one is likely to see a lot of the larger commercial law organisations move away from the lower value 'fixed costs' cases, only to be replaced by 'high volume, low cost' process driven firms who do not always possess the necessary experience or knowledge of the subject area for there to be a sensible discussion on the merits, with such firms instead geared to take the case as far through the motions as possible before even considering resolution.

Alternatively, one can perhaps expect a rise in litigants and companies running cases themselves (under a significantly reduced costs risk), which in turn brings its own issues whether they are an opponent or an insured if they do not possess the knowledge to do so.

As daunting as this may be, on a more positive note this does tend to lead to the conclusion that there continues to be a will within the Government to retain an affordable Court system, which is recognised needs to be brought in line with modern technology, while continuing to provide increased certainty and consistency for all parties engaged in litigation.

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Medical Malpractice

In claims against medical professionals the system remains under pressure and our general prediction is that everything will take longer and claims will cost more to resolve.

The Fixed Recoverable Costs bubble?

The government is still considering the introduction of FRC for clinical negligence claims worth up to £25,000. Initially it appeared that this would be introduced in April; it has now been put back to October 2023.

We await the final proposals, but of interest is how the scheme will be implemented. Current alternatives are based on the date of incident or date of notification of the claim on or after the FRC implementation date (the latter being the preferred option). If adopted, it is likely claimant firms will accelerate existing claims to avoid them being caught by FRC resulting in a bubble of low-value claims.

QOCS, Part 36 and benefits down the track for insurers

Decisions of the Court of Appeal in Cartwright and Supreme Court in Ho prompted the government to launch a consultation in May 2022 proposing amendments to the Civil Procedure Rules relating to QOCS. The consultation paper acknowledges the combined outcome of Cartwright and Ho undermines the effectiveness of QOCS and Part 36 in resolving disputes; proposals are aimed at making QOCS provision fairer.

Late 2022 saw the Court of Appeal decide the important case of *Harrison v University Hospitals of Derby & Burton NHS Foundation Trust* [2022] EWCA Civ 1660 where we acted for the Trust. The claimant accepted a Part 36 offer (equating to 7% of her claim) outside the 21 day "relevant period" following service of surveillance evidence. The resulting judgment provides much welcomed clarity on the interplay of QOCS and Part 36 and in doing so has highlighted the ongoing consultation.

Whilst the outcome of the consultation is awaited, we expect significant changes to how QOCS applies, benefiting insurers in their legal cost spend. It is anticipated these changes will come into force in either April or October 2023 and mean insurers can offset costs against damages and costs (significantly expanding the "pot" of money that can be offset and the circumstances where it is applicable) where an offer is accepted outside the relevant period without order of the court.

Claims inflation

The value of claims is likely to keep rising. Costs have increased as courts are regularly allowing a 30% uplift on Guideline Hourly Rates; despite rates remaining under review it would be surprising to see any significant reduction. For compensators FRC seems like the best long-term route to controlling legal costs.

Accommodation claims have been impacted by significant claims inflation due to a lack of materials and labour. Many claimants have found that builders engaged to adapt properties have sought to renegotiate terms to reflect increased costs.

There is an increase in the level of care costs claimed (both as to increased hourly rates of pay and bonuses) given the shortage of available carers. Robust investigation and assessment of evidence is essential to determine the extent to which these issues genuinely impact compensation levels.

At your discretion?

Finally the government response to the Paterson inquiry is still moving at a glacial pace in consideration of the ongoing role of unregulated discretionary indemnity where patient claims are made within the independent healthcare sector. Preliminary views were released in December 2022 which explored possible options moving forward but reached no concluded view. A further update including proposals is expected in 2023 and will be crucial for the healthcare sector operating outside of state indemnity schemes.

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Property Damage and Business Interruption

Inflation/supply chain

Over recent years, various factors have combined to increase considerably the cost of property claims settlements, 'claims inflation', and which in turn is also impacting premiums businesses are paying for their insurance and possibly also leading to under-insurance by policyholders.

Factors that have increased costs include Brexit, the COVID-19 pandemic, the war in Ukraine, rising energy costs and labour shortage. The considerable increase in gas and electricity costs has meant that many businesses have been forced to pass these on to customers in the price of replacement items. The UK-EU trading rules have caused complexity, delays and increased costs. Staff absences and staff movement/shortages have all reduced manufacturing capacity. There are now extended time periods for replacement of many building and raw materials, at increased cost, and contractors. Transportation costs and delays continue to hamper the transport, haulage and shipping industry.

They have all considerably increased the time and costs for property insurers in dealing with rebuilding or reinstatement claims and this is likely to continue throughout 2023.

The above factors, which have developed rapidly in the last 12 months, also mean that many reinstatement/rebuild sums insured which might have been accurate at inception of a policy have now become out of date during the life of the policy, such that the insured is at risk of having an inadequate sum insured and possibly being under-insured.

It may be that where policies do include index-linked provisions, the index being used needs to be re-considered as to whether it is currently an accurate gauge of the increased reinstatement/remedial costs in the particular sector in which the insured operates or whether a different barometer is more appropriate. In addition, mid-term reviews of asset values and reinstatement/remedial costs is probably advisable.

It's important that insureds and their brokers consider actions to help reduce the risk and impact of claims inflation. Make sure that buildings and other assets are regularly re-valued so as to ensure that their asset value and their re-build costs properly reflects current increasing prices. Review the insured's supply and remedial chain to ensure that they are aware of current prices and waiting times for replacement items. Take pro-active risk management steps to prevent any loss from happening or mitigate immediate response.

This could include a review of property/machinery maintenance, security arrangements, working practices, waste removal etc. Lastly, make sure that insurers are aware, via the broker, of all the steps that are being taken to reduce the risk.

COVID-19 BI

As with 2020 and 2021, 2022 continued to be affected by further COVID-19 BI claims (albeit not to the same extent).

The recent judgments of Mr Justice Butcher in the Commercial Court actions involving *Stonegate Pub Company v MS Amlin*, *Liberty and Zurich*, *Greggs v Zurich*, and *Various Eateries Trading Ltd v Allianz Insurance Plc* largely went in favour of insurers, but are subject to appeal in the second half of 2023 to the Court of Appeal and possibly even beyond to the Supreme Court. They involve issues of market importance involving furlough, causation and aggregation.

In addition, Mr Justice Jacobs has recently ordered the consolidation of several actions involving 'human notifiable infectious/contagious disease ... at the premises' type wordings to be taken forward to preliminary issues hearing in April 2023. The consolidated proceedings involve: *Pizza Express v Liberty/AXA; Kaizen Cuisine v HDI Global; London International Exhibition Centre (ExCel) v Allianz & Others; and Mayfair Banqueting v AXA*. Again, the outcome is likely to be of significance for those insurers with similar wordings.

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Environmental Risks

The effects of the climate emergency have been shown more clearly than ever in 2022. Extreme weather events, including the floods submerging a third of Pakistan and extreme heatwave across China, Europe and the US have been devastating. Environment protests and global climate strikes have been a regular occurrence and more positively the COP27 Climate Summit in Egypt made headlines with a climate fund breakthrough.

Net Zero Policy

Continuing into 2023, net zero policy will no doubt remain high on the Government agenda. In 2022, the Government's Net Zero Strategy was successfully challenged in the High Court. It was found to be unlawful as it failed to comply with the obligation in section 14(1) of the Climate Change Act 2008 in respect of proposals and policies for meeting carbon budgets. The decision has not been appealed and the Government must lay a report which is compliant with the 2008 Act before parliament prior to the end of March 2023.

An economic review of the UK's net zero strategy undertaken by Former Energy Minister Chris Skidmore was published on 13 January 2023 with recommendations in relation to (amongst others) infrastructure, governance, business incentives, housing and local action to take the opportunities offered by net zero.

Climate Change Adaptation

Before COP28, the UK must consider what it can do to support climate change adaptation – detail is expected in its National Adaptation Programme which is also expected to be published in 2023. At COP27, there was debate on extending the current commitment to phase down the use of coal (agreed at COP26 in Glasgow) to all fossil fuels. Ultimately the resolution remained consistent to that agreed in Glasgow but goes to highlight the potential fall out of the controversial decision from communities secretary Michael Gove to approve planning permission for a new coal mine in West Cumbria – a legal challenge is anticipated early this year.

Changes to the Planning Regime

Change is also expected in the planning regime. Consultation on changes to the National Planning Policy Framework, including significant reform in respect of onshore wind, remains ongoing following publication at the end of 2022. Consultation on the Levelling Up and Regeneration Bill is also anticipated in the coming months as the Bill progresses through parliament. It currently contains significant reform to the environmental impact assessment and strategic environmental assessment regimes.

Mandatory Biodiversity Net Gain

In England, the planning policy expectation of a minimum 10% net gain in biodiversity with habitats to be secured for a minimum of 30 years will gain legal backing as the provisions of the Environment Act 2021 are planned to come into force in November this year. We may well see biodiversity coming to the global fore alongside policy on Net Zero. Indeed, ambitious targets on biodiversity were agreed in December 2022 at the COP15 biodiversity summit after more than four years of negotiations and delays due to the COVID-19 Pandemic. The agreement reached includes targets to conserve at least 30% of land and oceans by 2030 and, restoration of 30% of terrestrial and marine ecosystems and the halving of global food waste. Whilst not legally binding, the commitment is a landmark in addressing biodiversity loss globally – work will need to begin immediately to meet this decade's targets with national biodiversity plans due in 2024.

The pace and scale of change in the environmental field is exceptional and insurance providers should continue to ensure that as far as possible they are able to respond to evolving environmental policies, developing technologies and inevitable risks resulting from environmental change.

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Construction and Engineering

More disputes – again

Whilst the downturn in tenders did not come as early or bite as hard as most predicted, that downturn has now arrived (albeit London's status as a separate, more resilient economy than the rest of the UK , is still evident), and will continue throughout 2023, and when combined with the wider economic picture (stalled UK economic growth, declining confidence, public sector spending restraint (save for major infrastructure projects) and private housing starting to weaken), the new year promises yet more disputes, with many of those issues that bubbled under in 2022 likely to boil over in the new year, with claims likely arising at every point in the supply chain. Where these claims arise, they will to a certain degree involve the professionals involved in construction projects and their insurers.

Cladding/fire safety

Cladding and fire safety was another issue that both dominated the news in 2022 and will do so again in 2023. Many insurers have sought to exclude these claims from cover, but it seems inevitable that the insurance market is going to continue to be impacted to some extent by cladding issues, and there is some talk that the market is starting to soften in some areas.

Whilst in the longer term, we are hopeful that the regime imposed on new higher risk buildings by the Building Safety Act (BSA) will assist the construction industry with general regulatory compliance, for now the industry is still getting to grips with the BSA, and you can read about the issues in more detail in our articles here.

By reference to the government's previously provided timetable, 2023 will mark the coming into force of (1) the 'golden thread'; and (2) the Gateway regime for higher risk buildings, with the current government timetable indicating that this will take effect from October 2023 onwards. There is some evidence of a rush to break ground before that date, with contractors and employers seeking to avoid being guinea pigs of the new requirements and the new Building Safety Regulator.

2022 saw the first applications for Remediation Orders under the BSA, requiring a landlord to remedy what are called "relevant defects" at a Property, and Remediation Contribution Orders (designed to ensure that landlords, developers and "associated" persons contribute towards the cost of remediation work in relation to relevant defects) will doubtless follow.

We may also see the first applications for Building Liability Orders as claimants seek to recover monies from the companies ultimately responsible for the SPVs that built faulty buildings (for more details, see our "Building Liability Orders" article here).

Finally, we still await the details of some of the secondary legislation that will put the meat onto the bones of the BSA, for example in relation to the duty holder regime and the role of the "accountable person".

New technology/new methods of working

2023 will continue the trend of new technology being introduced to the market, most obviously arising out of: (1) industry and government's continuing focus on sustainability (e.g. work towards carbon net zero targets, and continued focus on renewable (or at least greener) sources of energy); and (2) the opportunities offered by digital evolution and disruptive technologies.

However, new technology does not always work, either as well as it should or in the timetable promised (or sometimes at all!), leading to employers looking at their rights and remedies under their contracts, ranging from obvious matters such as liquidated damages, through de-scoping work from a contractor, to rights of termination, all of which creates a lot of project management, with employers needing to consider carefully issues arising in relation to waiver by election, the extent to which any de-scoped work can be carried out by third parties (bearing in mind the difficulty created by implied terms in English law in this area), through to the considerable risk termination of any contract carries, including most obviously that the party terminating a contract has no right to do so.

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International: Political Risks

Both 2022 and going forward into 2023 the geo-political landscape has presented insurers with various problems and challenges which will continue.

In particular, the war between Russia and Ukraine has led to a devastating loss of life and its impact is felt globally. The war has also had far reaching economic consequences, particularly for insurers.

Both nations, particularly Ukraine, have suffered wide-spread property damage. Businesses in the region have also been forced to abandon their properties. If certain businesses cannot operate remotely then their operations may have to cease altogether causing significant business interruption losses.

The Russian government has closed the foreign exchange for many companies which restricts their operation, including for example paying off loans or paying dividends.

Sanctions have been imposed against Russia, who have threatened countersanctions for companies that withdraw from the Russian market, including seizure of company assets. Sanctions have had a major impact on the insurance market and particularly the marine market (because of war risks and sanctions) and also credit risk exposures. Companies whose supply chain relies on commodities from Russia or Ukraine may also suffer losses recoverable under political risk insurance.

Whilst no new policies are being written for Russia and Belarus at present, the conflict does increase the demand for political risk insurance.

The ongoing tensions between China and Taiwan/ US are a risk factor that will concern political risk insurers.

Throughout 2022 China has promised to bring Taiwan under Chinese control, which poses the risk of conflict and economic instability. The US Government have stated that if China take certain steps to take control of Taiwan, then the US will retaliate.

US Sanctions imposed on Chinese companies exacerbate trade tensions between US and China.

All of these geo-political issues present ongoing risks to underwriters insuring various types of trade that will be impacted by any conflict and in particular political risk, credit risk along with marine risks.
Separately, at the outset of the pandemic, China appeared to handle the spread of the virus well compared to the rest of the world and reported low numbers of cases. Xi Jinping has announced that foreign travel will re-open in 2023. However, with concerns that numbers of covid-19 cases in China are currently high, various nations including the UK have brought in specific testing measures for anyone travelling from China.

Ongoing covid-19 regulations and restrictions may impact on risks which are insured under political risk policies and if such claims occur, they are likely to impact within 2023 underwriting year.

2022 has seen some of the largest labour strikes in the UK, spread across a variety of sectors. 2023 has started with no sign of labour strikes easing.

This will impact on trade and is known to have economic consequences, some of which will impact on insured risks and may impact political risk policies along with credit risk exposures. Strikes of this volume have caused significant interruption to business and loss of revenue.

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International: Catastrophic Losses

Many of the challenges faced in 2022 are anticipated to continue into 2023. We have seen inflation soar, supply chain issues, geo-political challenges and the continued unpredictability of natural climate disasters has led to premiums rising by 10% across all product lines from 2020-2021 levels, but insurers also had to contend with a substantial increase in operating costs.

We explore below, the challenges which are likely to affect the Casualty market in the year ahead.

Increase in Credit Risk and D&O claims

The difficult macro-economic conditions of 2022 are unlikely to dissipate in the year ahead. The ongoing energy crisis and supply chain issues, which have been exacerbated by the Ukraine war, are likely to result in further pressure on company financial results. There has been a noticeable rise in D&O claims and Credit Risk claims and this trend is likely to continue into 2023.

With the continued economic uncertainty and a global recession on the horizon, these are conditions which typically lead to an increase in D&O claims. It is predicted that corporate insolvencies are expected to increase by 19% next year, this is likely to lead to an increase in litigation against companies and their directors by shareholders, insolvency practitioners and employees

Cyber security and ESG considerations have led to heightened reporting requirements and expectations around D&O duties. There is now an increased scrutiny by regulators and shareholders into how directors have responded in the event of a cyber incident and these issues will remain a high priority for senior executives going into 2023 and exposure in this area potentially creates an increased risk for D&O insurers.

Social Inflation

Despite 'nuclear verdicts' not being a new phenomenon, this is only likely to escalate in 2023 and large public companies are especially vulnerable. On the casualty side, 'nuclear verdicts' are largely being fueled by social inflation which continues to push the defence costs higher. However, insurers have been dealing with these factors for some time now, and by setting premiums appropriately, it is possible that we may see a turn in the market in the future, with premium reductions being a possibility.

In the meantime, combatting social inflation will mean companies will need to remain at the forefront of litigation risks by retaining appropriate counsel to reduce the risk of a 'nuclear verdict' and setting a realistic and practical defence budget to focus on substantial trial and witness preparation.

Natural Disasters and Environmental litigation

It is predicted that one of the largest macro factors for the casualty industry in 2022 and 2023 will be the continued increase in natural catastrophe loss activity. The impact of Hurricane Ian is estimated to cost an insured loss of $50-65 billion and natural catastrophes globally has resulted in an estimated $115 billion of insured losses in 2022. Extreme weather is now affecting every continent, including areas which were previously not considered to be disaster prone zones.

There is also likely to be more litigation against corporates in relation to the use of "forever" chemicals such as PFAs and microplastics, particularly for insureds in the manufacturing, textiles, cosmetics and other retail sectors who are under increased pressure to abandon the use of these chemicals.

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