STEWARTS

The Policyholder Review

2026

Contents

Foreword

Welcome to the second edition of Stewarts' annual The Policyholder Review.

2025 was another busy year for those working in the coverage and claims fields, and the Stewarts Policyholder Disputes team has been no exception. I am delighted that this year's review includes contributions from the whole team, including our new arrivals.

Again, we are honoured to present contributions from some of our key broker partners including Marsh, Howden, Lockton and HWF, alongside detailed discussions of key legal developments from the Stewarts Policyholder Disputes team.

Cyber insurance coverage has assumed renewed prominence this year, with coverage being identified as inadequate or absent in a number of high-profile attacks. With recognition of the existential nature of cyber risks growing, the focus is shifting from data breach liabilities to business interruption coverage, and we consider some of the takeaways and lessons learned from five years of Covid-19 business interruption litigation.

Construction continues to be dominated by fire safety claims, which are still working their way through the courts more than eight years on from the Grenfell disaster. Our team investigates the legislative and regulatory developments over the past year, as well as some key legal decisions.

Financial institutions have fallen under the spotlight this year with the FCA's proposed motor finance commissions redress scheme, following the Supreme Court's decision in three linked appeals. We consider some of the unique coverage issues arising in relation to regulatory redress schemes.

The securities claim regime in the UK may still be some way behind the US and Australia, no doubt primarily down to the lack of an effective 'opt-out' class action mechanism, but significant claims continue to be issued against UK-listed corporations arising from alleged failures in market disclosure. Our **Directors and Officers ("D&O")** article discusses the coverage that may be available to companies and their insured directors for costs and liabilities arising from such claims.

In one of the most significant insurance coverage decisions outside of the BI context last year, Mr Justice Butcher decided in *Aercap v AIG* that a consortium of War Risks insurers was liable to indemnify Aercap and other lessors for over $1.2 billion in respect of their Russian aircraft losses. With over $2 billion of loss left uninsured by the judgment, this does not represent the end of the story. We discuss the judgment and consider next steps in our **war and political risks** section.

Business interruption proved that it still has legs in 2025, with several key decisions in the Commercial Court and Court of Appeal, and permission given by the Supreme Court to appeal the market-critical issue of furlough in February 2026. With limitation looming, but very many claims still unsettled, Stewarts has also led the charge in engaging with the FCA to protect policyholders' positions, alongside UK Hospitality and five other leading industry associations.

Warranty and indemnity continues to grow as a product line and is fast becoming a standard feature of M&A deals in many parts of the world. Following last year's review of two unfavourable decisions for policyholders, our team examines a further decision from Australia which also failed, this time not because there had been no breach of warranty, but because the policyholder could prove no loss caused by the breach. We also consider more recent English authorities, relating to notice of breach and the interaction of indemnities and warranties under the Sale and Purchase Agreement (SPA).

With thanks to all of our contributors, we hope that you will find the richness and diversity of this year's The Policyholder Review a useful reminder of why the London market and English law play such a leading role in the global insurance sector.

Aaron Le Marquer

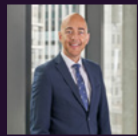
Meet the team

Aaron Le Marquer

Head of Policyholder Disputes

With over twenty years' experience in insurance law on both the policyholder and insurer side, Aaron is a leading advocate for policyholders in diverse sectors including financial services, hospitality and retail, energy and construction, and sports and entertainment. Known for leading a series of high-profile Covid-19 business interruption test case litigation in recent years, he is experienced in all commercial lines of business, including business interruption, directors and officers, professional liability, cyber, environmental risks, and construction. Aaron spent eight years practising in the Asia Pacific region and is particularly experienced at resolving international and reinsurance disputes, often via arbitration.

Aaron has been ranked as a leading insurance practitioner in the Legal 500, Chambers, and Lexology Index (formerly Who's Who Legal) since 2013. He was named as The Times Lawyer of the Week in 2023, and listed in The Lawyer Hot 100 in 2025.



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"Aaron Le Marquer is genuinely outstanding. … A standout name in the market."

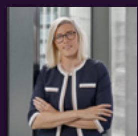
Legal 500 2026

Chloe Derrick

Partner

Chloe specialises in insurance coverage and professional negligence. Having previously acted for insurers, she now acts exclusively for businesses and individuals in high-value disputes against the insurance market and the financial and professional services sectors. Chloe has successfully recovered significant funds for clients across insurance lines, and has represented clients in disputes spanning a number of jurisdictions (including the United States, Canada, South Africa, Mauritius, Gibraltar, and countries across the Channel Islands and Europe).

Before joining Stewarts, Chloe advised Lloyd's and London market insurers on their high-profile market loss exposures and drafted policy wordings for existing and new insurance products. Chloe is ranked by both Chambers and Legal 500.



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"Chloe is wonderful to work with. She has deep expertise in her specialism and is very personable and conscientious. She is able to explain things in a clear way to non-lawyers and lawyers alike."

Chambers 2026

James Breese

Partner

James is ranked by Chambers and Legal 500 as an 'Up and Coming' and 'Next Generation Partner'. He has represented policyholders in the UK and internationally for eight years, having previously acted on the insurer-side. James uses his knowledge of both sides of the market to strategically advance policyholders' complex insurance disputes.

James' clients range from listed companies, private equity houses, asset managers and multinational enterprises, to high-net-worth individuals and directors of companies. He is regularly instructed to resolve coverage disputes under W&I, D&O, cyber, and investment management insurance policies.

Since 2020, James has also represented policyholders in the leading Covid-19 insurance litigation in the Commercial Court and Court of Appeal. James is widely regarded for his strong business interruption insurance expertise having recovered tens of millions from insurers, including for distressed or insolvent businesses.

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"James is easy to work with, pragmatic and clear, and he produces great results."

Chambers 2026

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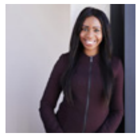

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Policyholder Disputes at Stewarts

We act exclusively for policyholders in high-value, complex insurance disputes.

Our market-leading Policyholder Disputes team represents businesses in insurance coverage disputes, including cyber, financial and professional risks, construction, business interruption and property losses.

We only represent policyholders in disputes against insurers. Our team has experience acting for local and multinational clients in all sectors, including financial services, entertainment, property, construction, hospitality, retail, logistics, manufacturing, energy and sports.

We do not act for London market insurers, and so are free to pursue claims against the insurance market.

We are one of the largest dedicated policyholder teams in the UK market, and all three of our partners are ranked as leading practitioners in the main legal directories. Our team's cases have been listed in The Lawyer's Top 20 Cases and Top 10 Appeals for the last four years consecutively.

Stewarts is a litigation powerhouse, and we leverage the firm's broader resources where subject matter experts are required, including in tax, insolvency and asset recovery, securities, fraud and employment law. Our combined resources in these areas provide a unique one-stop-shop for insured companies and their directors and officers.

We regularly act in English litigation and arbitration for clients based in overseas jurisdictions with insurance placed through the London market. Our team is experienced in handling disputes with a broad international reach with a particular focus on the US, and Middle East and Asia Pacific regions.

Our firm has unrivalled experience in putting together innovative costs arrangements to help with insurance disputes. The use of third-party funding, after-the-event insurance and risk-sharing fee agreements enables our clients to manage risk and litigate from a position of financial strength.

> **Stewarts' insurance team is one of the leading policyholder teams in the country."**
>
> *Legal 500 2026*

> **Stewarts know how to get the best possible results for their clients. The team are extremely knowledgeable and we have complete trust in their ability to handle the most complex insurance matters."**
>
> *Chambers 2026*

About Stewarts

Stewarts is the UK's largest disputes-only law firm acting in some of the most high-profile and ground-breaking cases.

Specialist expertise

We are widely recognised for our innovative and cutting-edge approach to high-value and complex litigation. Clients instruct us when the stakes are high and where genuine disputes experts are needed.

Our strength and depth rivals that of many disputes teams across the elite UK, US and international firms.

Conflict-free status

As a disputes-only firm, we are conflict-free and uniquely placed to advise where other law firms may be conflicted.

Client service

We get to the core of the dispute at hand as well as our clients' underlying commercial and strategic objectives so that our advice is tailored and holistic.

Our lawyers handle a small number of cases to ensure that they give our clients the care and responsiveness they need to go against the most well-resourced opponents.

Reputation

Our reputation is confirmed by our rankings in the leading legal directories as well as The Times Best Law Firms. We are consistently recognised as a "truly client-focused outfit whose calibre and experience is second to none".

International reach

The great majority of our work is international. As an independent law firm, we are free to work with our clients' existing advisers and can also draw on our strategic alliances with leading international law firms. This enables us to work in a global counsel role to coordinate complex multi-jurisdictional

Depth

We have over 200 lawyers, including 90 partners, and 480 staff across our London and Leeds offices.

Clients

We act for corporates and individuals in high-value and complex disputes in the UK and around the globe.

Practices

We have 15 practice areas across Commercial Disputes, Private Client Disputes and Injury Disputes.

Rankings

All of our practices are highly ranked in the Chambers and Legal 500 guides

Cyber

Chloe Derrick and Claudia Seeger

Cyber resilience: A call to action

2025 was an unprecedented year for high-profile cyber incidents, with attacks on several household names hitting headlines nationwide. It has led to continued concern about the UK's ability to withstand increasing cyber threats, and with good reason: the Cyber Security Breaches Survey 2025 reported that in the last year alone, 45% of businesses have experienced a cyber incident.

The wide-ranging financial and operational impact of cyber events means that cyber security is now an enterprise risk, as opposed to an IT risk. Despite this, an overwhelming 57% of businesses are reported to be uninsured for cyber risks[1]. In a recent speech to the Corporation of the City of London, Nikhil Rathi, CEO of the Financial Conduct Authority, voiced his fear that the nation was "massively underinsuring" when it came to cyber risks.

Chloe Derrick
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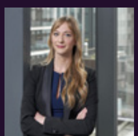
Policyholder Disputes



Claudia Seeger
Associate
Policyholder Disputes

It is unsurprising that against this background, cyber insurance continues its growth trajectory as the fastest-growing global insurance product, with 41% of large enterprises planning to purchase cyber coverage for the first time within the next five years[2]. Cyber coverage, however, remains a relatively new line of business, and the scope of coverage available can vary significantly, particularly on coverage for business interruption, for example. The recent highly publicised attacks on the retail sector have sparked increasing debate around how cyber insurance may respond (if purchased) to cover large-scale business interruption losses. We review some of the developments, with key takeaways for policyholders looking ahead to 2026.

1 Cyber Security Breaches Survey 2025
2 Cyber Insurance Report 2025, Howden

Recap from 2025

Reflections from the retail frontline

Discussion in 2024 centred on lessons for operational cyber resilience and the need to identify single points of failure following the widespread disruption triggered by the CrowdStrike outage. In our 2025 edition of The Policyholder Review, we discussed the key coverage issues arising post-CrowdStrike and a single point of failure loss event, including coverage for non-malicious events, waiting period conditions and potentially relevant exclusions.

Since then, 2025 was rife with malicious attacks by cyber criminals on the retail sector, with a number of household names including Marks & Spencer, Jaguar Land Rover, Harrods and the Co-op on the front line.

In April 2025, the Co-op found itself the target of a sophisticated, large-scale cyber-attack, reported to have cost it £206 million in lost sales. Alongside the operational impact, the Co-op subsequently reported that the personal data of 6.5 million of its members was stolen during the incident. It was reported to have only had limited insurance cover in place for immediate cyber response, rather than back-end losses.

Similarly, another major UK retailer, Marks & Spencer, was hit by a large-scale cyber incident that suspended its online shopping and disrupted operations over the Easter weekend. Online sales only resumed after 46-days of disruption, causing a reported business interruption loss of £300 million, against which it is said to have received a £100 million insurance payment. Customer data was also stolen.

In August 2025, Jaguar Land Rover ("JLR") was targeted by cyber-criminals, forcing it to shut down its computer networks. Vehicle production was suspended for approximately five weeks across major UK plants, causing losses of £50 million per week. The Cyber Monitoring Centre estimates the UK financial impact of the JLR attack to be in the region of £1.9 billion across 5,000 UK organisations, likely making it the most economically damaging cyber incident ever experienced in the UK, with all financial losses arising from operational disruption. The scale of the incident prompted the UK Government to intervene with a £1.5 billion loan guarantee to help stabilise the company and its supply chain. JLR has since reported that sensitive payroll data for its current and former employees was stolen during the attack, potentially putting thousands of staff at risk of identity fraud. In addition to potential data breach claims that may follow, it remains to be seen whether a potential shareholder action might also be pursued against JLR for its decision not to purchase cyber insurance before the breach.

The attack wave on UK retailers continued in September 2025, with cyber criminals infiltrating the IT system of Harrods, stealing the data of over 400,000 customers.

The takeaways? Each of the attacks likely started with sophisticated social engineering attacks, whereby hackers impersonate employees to deceive internal personnel, into resetting passwords or sharing information. This is a risk that will only increase as AI and deep fakes become more sophisticated and widespread.

The lesson learned? Operational disruption poses the biggest cyber risk for most businesses, far outweighing potential losses caused by data breach incidents. Companies should brace themselves for the increased risk of disruptive attacks on their operations. While some industry experts argue that the UK Government should backstop cyber insurance, guarantees such as those provided to JLR are likely to be few and far between, particularly for SMEs. Companies should therefore ensure that not only is cyber insurance in place, but that they are adequately covered for business interruption losses arising out of operational disruption, alongside immediate incident response costs.

From pandemic to cyber panic: lessons in business interruption

As the scope of business interruption coverage in cyber insurance policies comes into increased focus, so does the operation and impact of any exclusions within policy wordings or other limitations on coverage.

Insurance coverage disputes arising from the Covid-19 pandemic have dominated headlines in England and Wales since 2020, with the court providing helpful authority on the scope and application of business interruption insurance.

Our Policyholder Disputes team has been at the forefront of these disputes.

Composite insurance policies

Where there are multiple entities within a corporate group, a business will likely want its insurance policy to protect each individual subsidiary, as each subsidiary would be subject to different losses. This consideration applies equally to Covid-19 business interruption as it does to cyber risks for corporate groups.

Helpfully for policyholders, on behalf of our client, *Bath Racecourse*[3], the Court of Appeal has now confirmed, within the context of Covid-19 business interruption, that composite policies of insurance entitle each of the insured entities to its own separate limits of indemnity, under one policy document, on the basis that a composite policy is a series of insurance contracts. In practice, this means that where different businesses have suffered substantial losses, multiple limits of indemnity will be available to the individual subsidiary within the corporate group. This is an important clarification for group companies that have suffered substantial business interruption losses, particularly where different subsidiaries may operate warehouses or factories in different locations, with separate insurable interests.

Following the Court of Appeal's judgment, policyholders and their brokers should carefully check the wording of composite policies of insurance to ensure that they continue to provide adequate limits of indemnity for a group of insureds. That might include, for example, the following considerations:

1. the presentation of the risk and the definition of "insured" i.e. whether this encompasses just one entity or whether others in the group are additionally listed as insureds;
2. the description of "sums insured" and whether there is express language in the policy stating that the sums insured are to apply to all insureds, on a per insured basis, or with individual limits; and
3. whether any aggregate limit is said to be shared between group companies.

Another key takeaway from *Bath Racecourse* is whether a claim will be subject to a single deductible or to multiple deductibles. In *Bath Racecourse*, the trigger event was the government action that caused different losses from a single government action. Consequently, there was a single trigger event that formed part of a single loss, and so only one deductible applied. The same principle may well apply in the case of a cyber incident: for example, where malware is installed that systematically releases data and/or deletes files. It might be said here that the trigger event is the single entry of the malware, and the "loss" is the multiple immediate consequences of that singular event. As a result, only one deductible may apply, although this is, of course, fact-dependent. The Court of Appeal has provided similar helpful authority to policyholders on the aggregation of losses in *Sky & Mace v Riverstone*[4], which is addressed in our Construction chapter.

Proximate cause

The concept of proximate cause is also an issue that policyholders may need to get to grips with in the context of a cyber claim.

It is possible that some insurers might seek to suggest that a business is not entitled to be indemnified for losses associated with certain customers if a customer's own production was suspended by the same malware (potentially in reliance on principles set out in *Orient Express v Generali*, where it was held that on a "but for" cause of loss analysis, if the insured would have suffered the same loss anyway, as a result of another cause, then the insured loss is not the proximate cause and is not covered). It is important to note that the Supreme Court overturned the decision in *Orient Express* in the FCA Covid-19 business interruption test case, and that it is therefore irrelevant whether there are concurrent proximate causes of the same losses. The fact that business orders might have been cancelled because a customer's production was suspended by the same malware for example, does not mean the cyber-attack on the insured entity was not a concurrent proximate cause of loss. Assuming there is no exclusion language, insurers should not be able to avoid liability.

3 *Bath Racecourse Company Ltd & Ors v (1) Liberty Mutual Insurance Europe SE (2) Allianz Insurance Plc (3) Aviva Insurance Limited* [2024] EWHC 124 (Comm)

4 *Sky UK Ltd & Anr v Riverstone Managing Agency* [2024] EWCA Civ 1567

Cyber Security and Resilience (Network and Information Systems) Bill

On 12 November 2025, the government introduced the Cyber Security and Resilience (Network and Information Systems) Bill (the "Bill") to the House of Commons[5]. In its explanatory notes, the purpose of the Bill is said to be to update the existing Network and Information Systems Regulations (NIS Regulations) by bringing more entities into their scope and equipping regulators with proportionate powers to better fulfil their duties. This is with the overall objective of better protecting the services and other activities that are essential to the day-to-day functioning of society and the UK economy. In discussing the evolving threat picture and the manner in which the technologies relied upon by essential services are changing, the Bill references the 204 cyber incidents in the year preceding September 2025 that were considered by the National Cyber Security Centre (part of GCHQ) as being "nationally significant – meaning that they had a substantial impact on national security, economic stability, or public safety". State-backed foreign actors targeting the UK are notably referenced, including Iran and Russia and a cyber threat group attributed to the People's Republic of China, some of which are reported to be hiding on critical infrastructure networks.

Against that background, the following are some of the key changes proposed by the Bill:

1. **Relevant Managed Service Providers ("RMSPs")** will be regulated by the Information Commissioner (through the Information Commissioner's Office ("ICO")) and will be subject to the same obligations as other relevant digital service providers, such as search engines, online marketplaces, and cloud systems. The definition of an RMSP is broad and will include medium or large-sized businesses that offer the ongoing management of IT systems to third-party customers.
2. **Data centres** are to be classed as regulated "essential services", which is a fitting and perhaps overdue label given that the Bill itself states that data centres underpin almost all economic activity and innovation in the UK. This was seen first-hand with the Amazon AWS outage in October 2025, which caused disruption to online services nationwide, including HMRC.
3. **Designated Critical Suppliers.** Certain high-impact suppliers, being those whose services must be so critical that any issue could cause significant disruption to essential services, can be classified as Designated Critical Suppliers. Designation will be subject to a high threshold, and, consequently, only a small percentage of suppliers will likely be categorised as such, particularly given that it does not include suppliers regulated elsewhere.
4. **Enhanced regulatory powers.** The Bill will provide enhanced monitoring, information gathering and inspection powers to regulators. It introduces a more prescriptive two-stage reporting structure, requiring in-scope entities to submit an initial notification of a serious incident within 24 hours of first awareness, followed by a full report within 72 hours. The government (the Secretary of State) might also give specific directions to individual entities where it considers such directions to be necessary in the interests of national security. The Bill provides an example of the government requiring the operator of an essential service to take specified action to confirm the presence of a hostile state actor on its network and, if necessary, remediate. A failure to comply with a government direction can be subject to a maximum financial penalty of up to £17 million, or 10% of worldwide turnover, if higher.
5. **Extra-territorial reach.** The Bill extends to the whole of the UK and applies whether the relevant goods or services are supplied from within or from outside the UK. If an RMSP has its principal office outside the UK, then it must nominate a UK representative to the Information Commissioner within three months of the Bill coming into force.

The Bill will likely be relevant to all organisations, given the increasing reliance on service providers. While the Bill remains under consideration, one thing is clear: the UK Government is committed to enhancing the nation's cyber security and cyber resilience in the face of an increasingly threatening landscape.

5 *HC Bill 329*

Held hostage: ransomware in the age of digital exploitation

Throughout 2025, ransomware remained the primary cause of cyber loss, impacting business in the UK.

In January 2025, the UK Government launched a consultation that set out its legislative proposals on ransomware payments, including a ban on ransomware payments by all public sector bodies, including local government, and by owners and operators of critical national infrastructure ("CNI"). The government's motivation is clear: to make UK public entities and essential infrastructure unattractive to ransomware gangs by sending a strong message that they simply will not get paid.

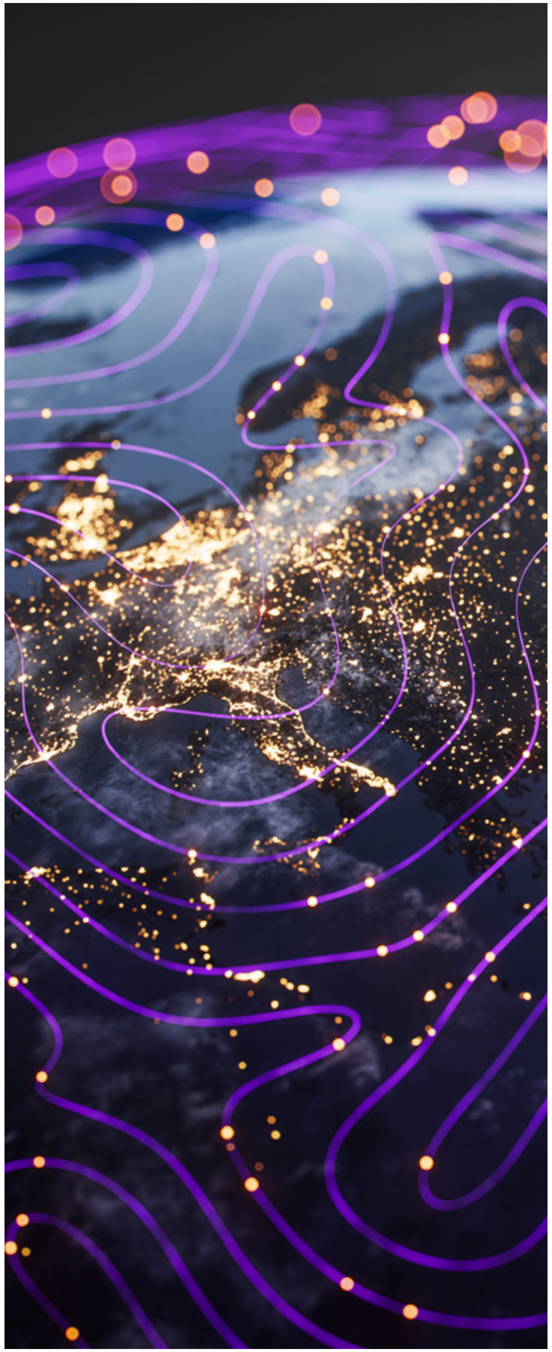
The consultation sets out a three-pronged strategy, including the implementation of:

1. **A targeted ban on ransomware payments for CNI and public sector entities**, with the intention of making it unattractive for cyber criminals to attack those entities.
2. **A ransomware payment prevention regime** that would cover all potential ransomware payments from the UK. In practice, the regime would require a victim to report ransomware to authorities along with their intention to make the payment. On receipt, the UK Government would provide support to discuss "non-payment options" to ascertain whether the payment needed to be blocked, for example, due to UK sanctions. If the conclusion is that the payment does not need to be blocked, then the victim will need to decide whether or not the payment should be made. However, our view remains that this approach will likely face inherent difficulties. The requirement to pay a ransom is often immediate, with losses incurred while payment is outstanding, and the UK Government would need to introduce a targeted rapid-response team to deal with any reports expeditiously, which could be problematic.
3. **A ransomware incident reporting regime** that would be threshold-based. Subject to falling within the threshold, the victim would be required to report a ransom demand, any recovery measures and whether the attacker has been identified.

Ultimately, the broad-brush banning of ransom payments, or mandating reports, is, in our view, unlikely to ensure the safety of organisations. The consultation clearly aims to strike a balance between impactful measures and not creating unreasonable or disproportionate burdens on ordinary individuals and organisations. However, for large incidents, it potentially removes options for speedy remediation that could otherwise reduce significant operational disruption, causing losses (and indemnity payments) to escalate.

There might also be potential difficulties from both a government assessment and a coverage perspective if the ransom wallet is suspected, but not confirmed, to be connected to an individual designated under UK sanctions. Sanctions regimes can evolve rapidly, and the coverage position can become complex, particularly for a global business with a multinational insurance programme. As is clear from *Mamancochet Mining v Aegis*[6], however, it is not simply the case that insurers can refuse to pay a claim in a sweeping reliance upon sanctions. If an insurer wants to rely on a sanctions clause to avoid coverage, it must demonstrate, on the balance of probabilities, that the payment would be prohibited and would breach sanctions, rather than simply expose the insurer to a risk that sanctions would be breached. It is also worth noting here that a sanctions clause simply suspends, rather than extinguishes, an insurer's liability, meaning that the liability revives once the prohibition is lifted.

Overall, it is crucial that businesses continue to focus on developing their cyber resilience, including putting in place any necessary infrastructure and cyber incident response plans. This includes maintaining up-to-date security systems and offline backups, as well as rolling out cyber security defences. In particular, cyber insurance policies typically require multi-factor authentication (MFA) to be implemented across all devices, whether at the employee or executive level. Insureds should be aware of any such policy conditions, and IT teams and employees must work together to ensure compliance. All of that said, even with the best cyber security in place, a business is not immune to loss: 90% of insurance claims involve some form of human error, as demonstrated by the fact that social engineering is being utilised by cyber criminal organisations around the globe.



6 *Mamancochet Mining Limited v Aegis Managing Agency Limited and Ors* [2018] EWHC 2643 (Comm)

When data costs: the rising price of privacy breaches

The extent to which cyber insurance policies may indemnify regulatory fines is an issue that is yet to be determined by the court. Throughout 2025, there were astonishing levels of fines issued by the ICO and the Irish supervisory authority, the Data Protection Commission ("DPC"). Between 2018 and 2025, EU data protection authorities issued fines totalling $5.6 billion.

The sheer size of the fines is attracting worldwide attention and criticism. In early 2025, the Trump administration issued an executive order that criticised regulatory fines and other measures the administration viewed as designed to "plunder" US companies. It is notable that a report by the Centre for Data Innovation has suggested that US companies have accounted for 83% of the $5.6 billion in fines issued.

Overall, the magnitude of General Data Protection Regulation (GDPR) fines means that a business potential exposure to regulatory fines could be higher than a ransom request or business interruption losses after a large-scale cyber incident. In 2023, for example, Capita suffered a cyber security incident, following which the ICO proposed a fine of £45 million for GDPR infringements (albeit reduced to £14 million upon submissions from Capita and after it agreed to a voluntary settlement).

The question, therefore, arises as to whether such fines are indemnifiable, an issue that we discussed in detail in The Policyholder Review 2025. As noted there, some London market policies contain exclusions stating that the insurer will not indemnify any civil or regulatory fines, penalties or sanctions that the business is obliged to pay. There remain, however, numerous policies across the market that do explicitly insure civil fines and penalties, subject to the proviso "to the extent insurable by law". Certain insurers have also expressly confirmed they will provide broader wording or cyber liability extensions that indemnify regulatory costs and fines.

Despite that, a number of insurers continue to adopt a sweeping stance that GDPR fines are not insurable for public policy reasons, on the grounds that an insured cannot benefit from their own wrongful act (the *ex turpi causa* principle), arguably rendering explicit coverage for civil fines by a regulatory agency in the context of a cyber policy illusory.

While we continue to await judicial authority from the English courts as to whether regulatory fines are insurable within the context of GDPR fines, we discussed the existing case authorities in detail in The Policyholder Review 2025. In summary, the key question for any policyholder facing issues around the insurability of a GDPR fine is whether the conduct giving rise to the fine should be uninsurable as a matter of public policy. This is, in our view, a question that is highly fact-dependent. The character of the infringement must be reviewed with regard to whether it was negligent, rather than intentional (or reckless, rather than deliberate). The level of the fine issued might also provide some guidance on its considered severity. Arguably, regulatory fines arising from negligent conduct, where there is no turpitude or act of "wickedness", do not engage the public interest in the same way as a deliberate wrongful act. Consequently, policyholders should resist any suggestion by insurers that GDPR fines and similar penalties are uninsurable as a matter of law.

War risks in a cyber universe

In May 2024, we saw the introduction of Lloyd's second state-backed cyber bulletin (Y5433), which sought to further regulate and refine the scope and extent of cyber coverage written by the market. Additionally, from 1 January 2025, Lloyd's made clear that coverage for state-backed cyber-attacks carried out as part of a conventional war would sit outside the market's standard risk appetite (such that syndicates wishing to write that risk would need to do so with its explicit approval and on a clear and distinct basis, potentially via a separate product).

A year on, where does that leave us? At the time of writing, there are 48 approved versions of Lloyd's cyber war exclusions in circulation, each with different wording and potential issues. Such a lack of standardisation will inevitably lead to uncertainty, and it is an issue that we expect to give rise to coverage disputes.

Attribution

While it is generally straightforward to ascertain whether war was a factual cause of loss in relation to physical loss or property damage (including who the perpetrator was), this question becomes much more complex in the case of a cyber-attack. There is often no formal attribution of a cyber-attack to a government of a state, and investigating and establishing with certainty whether the origin(s) and perpetrator(s) are state-backed is rife with difficulties.

For that reason, the Lloyd's Market Association (LMA) model clauses include a mechanism by which state-backed cyber operations are to be identified primarily on the basis of attribution by another state. Pending any such attribution, insurers are relieved from paying the loss. There are obvious problems with that approach from a coverage perspective.

Generally, it is rare for the victim of a cyber-attack to be able to ascertain with absolute certainty that the perpetrator(s) are state-backed. This is becoming increasingly difficult in circumstances where cyber-criminals are beginning to align with states and there are emerging risks posed by 'state-aligned' adversaries (being non-state backed actors who have expressed a desire to cause a disruptive impact for political reasons). Unless a perpetrator or state expressly states that the cyber-attack can be attributed to a particular state, it will be difficult to prove that cover is triggered. Very rarely are express acknowledgements by states forthcoming, and it may not be unusual for states to manipulate reports of events to suit their own interests at the time of reporting.

Taking the LMA 5564A war exclusion as an example, that exclusion confirms that there is no coverage for loss or damage arising from a cyber operation at the direction or control of a state. In determining attribution to a state, the clause further confirms that "the insured and the insurer will consider such objectively reasonable evidence available to them"; and that evidence may include "formal or official attribution by the government of the state in which the computer system affected by the cyber operation is physically located, to another state". The starting point here is that, as an exclusion clause, the insurer bears the burden of proof.

Commentary by government advisories and industry bodies that suggest a cyber campaign is "most likely" state-linked, would be unlikely to suffice. Even if it could be said that a government had attributed the incident to another state, on the wording of the exclusion, the attribution needs to originate from the government of the state in which the computer system is located physically, to the other state, which would reduce the relevance of commentary by outside administrations, including "tweets". Equally, the policy might define the meaning of a "state" as a "sovereign state", and there may not be consensus as to whether the policy definition of a state is met.

War risks in the English courts

There have been a number of recent case authorities as to the general treatment of war risks in the English courts, including: *University of Exeter v Allianz*[7]; *Hamilton v Afghan Global*[8]; and, perhaps most notably, *AerCap v AIG*[9]. While none of these authorities consider war risks in the context of cyber insurance policies, each is helpful in determining how cyber policies may well be constructed in the event of a cyber-attack.

Firstly, in *University of Exeter v Allianz*, the court determined that the wording "occasioned by war" was equivalent to a test for proximate causation. Consequently, a war that had ended before the property damaged was even built was found to be a concurrent proximate cause of loss. The University of Exeter's entire claim was therefore determined to be excluded on the basis that the relevant policy contained an exclusion for loss occasioned by war, applying the *Wayne Tank* principle. The *Wayne Tank* principle is that where a loss has two concurrent causes and one of them is excluded under the policy, the insurer is not liable for the loss even if the other cause would otherwise be covered.

Similarly, the recent case of *AerCap v AIG*, which is considered in detail in the War and Political Risk chapter provides a helpful examination of political and governmental perils. Unlike *University of Exeter v Allianz*, in *AerCap*, the court rejected arguments of concurrent proximate causation, with Mr Justice Butcher determining that if there were concurrent causes of loss, one of which was an all risks peril and the other a war risks peril, the *Wayne Tank* principle dictated that the exclusion would prevail. That was the case even if it could be demonstrated that each peril operated independently rather than interdependently.

Perhaps most interesting to the consideration of cyber coverage and the issues around attribution is *Hamilton v Afghan Global*. In that case, the claimant reinsurer sought a declaration of non-liability under two reinsurance policies issued to Anham, the owners of a warehouse in Afghanistan. The defendant and Anham had lost possession of the warehouse following seizure by the Taliban. The court was asked to determine, among other issues, whether the exclusion for "loss or damage directly or indirectly caused by a seizure" applied only to a seizure by a "governing authority".

Anham argued that the exclusion only applied to seizure by a "governing authority", which it argued the Taliban was not. The words "by law, order decree or regulation of any governing authority" appeared later in the drafting of the relevant exclusion, and Anham suggested that this therefore qualified the word "seizure". The court rejected this argument. Anham then argued that the meaning of "seizure" should derive its context from the exclusion clause, which included the words "confiscation, nationalisation" etc, which are typically acts of a governing authority. The court also rejected this argument, finding that the exclusion referred to both acts likely to be carried out by a governing authority and those that were not.

Finally, Anham sought to persuade the court that the exclusion was intended to be limited to acts of a governing authority as a matter of commercial purpose, relying on the distinction found in the market as to the risks insured under political risk policies as opposed to political violence policies. The court held that the recognised market practice was not sufficient to rewrite the terms of the exclusion as drafted, and that the policyholder's interpretation of "seizure" failed. Instead, the word "seizure" was found to have its ordinary meaning and was not limited to acts of a legitimate government or a sovereign power. Reinsurers were therefore granted a declaration of non-liability. Albeit an unwelcome judgment for the policyholder, this case may be relevant in a cyber context when considering what a "governing authority" or "state" is for the purposes of attribution.

7 *University of Exeter v Allianz Insurance Plc* [2023] EWCA Civ 1484
8 *Hamilton Corporate Member Ltd v Afghan Global Insurance Ltd* [2024] EWHC 1426 (Comm)
9 *AerCap Ireland Ltd v AIG Europe SA & Ors* [2025] EWHC 1430 (Comm)

Looking ahead to 2026

It is undoubtedly the case that the lack of standardisation across cyber policies will continue to give rise to coverage issues. While the ABI Lloyd's Cyber Working Group has published guidance aimed at creating a framework for insurers to consider when developing their policy wordings, measures to standardise cyber policies are in their infancy.

Ultimately, cyber coverage remains an emerging line of business, and there is a wide variance of coverage available in the market. Not all policies are created equal, and businesses should continue to review their policies carefully to ensure they are comfortable with the coverage provided, including in relation to the scope and limit(s) of any business interruption coverage. Against a landscape of increasing fines, the policy language around regulatory fines and penalties should also continue to be subject to careful review.

Cyber claims: A broker perspective

Marsh

Marsh's UK Cyber Claims and Incident Management team dealt with around 600 notifications in its 2024 retail and wholesale books, and 2025 appears to be tracking to roughly the same number. However, cyber incidents have undoubtedly received greater media attention this past year.

This is due in part to the high-profile attacks by hacking groups Scattered Spider, UNC6040 and ShinyHunters. Although the UK press focus has been on victims in the UK retail sector, no industry has been immune, and we have seen organisations from the insurance, aviation and manufacturing industries affected. These incidents have once again brought to the fore how vital the "human" defence can be, given the use of social engineering as an initial entry point for these attacks or "hacking the human", as it has been described. Their success in duping IT helpdesk staff into resetting accounts quickly, preying on their eagerness to help the end customer and hit the efficiency metrics against which their service has been measured, has been a key to their success.

Though exploiting human vulnerabilities is not new, these incidents were among the first in which threat actors reached out directly to the UK media to "tell their side" of the incident, undoubtedly in a bid to put pressure on their victims. This successfully stoked the media furore and demonstrates that the motivations of threat actor groups are not solely financial. They are also keen to garner kudos for their exploits, so they can promote their success on dark web forums. Notoriety, it appears, is as much a driver as monetary gain.

Marsh's Claims and Incident Management team have not only been supporting clients through live incidents and the end-to-end claims process but also educating them. This focus on education emphasises the importance of cyber incident preparedness. This ranges from reviewing incident response plans and providing access to Marsh Central (an out-of-band communication platform) to sharing intel through webinars and bulletins on everything we have seen and practical tips to reduce cyber risk.

As a team, though Scattered Spider et al stole the headlines, we have continued to see ransomware events perpetrated by numerous threat actor groups using a more scattergun approach with less thought and focus behind their actions. It remains clear that it is not a matter of "if" but "when" in relation to cyber-attacks, so general cyber resilience and preparedness are vital. With government ministers, the National Cyber Security Centre ("NCSC") and the National Crime Agency ("NCA") writing to FTSE 350 boards last October to remind them of their duty to build cyber resilience, it is clear that inaction is not an option.

Holly Waszak

Head of Cyber Claims

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Business interruption

Many attacks on organisations impact their ability to continue trading, so business interruption has accounted for a large proportion of the claims we have handled. With so many supply chain disruptions, contingent business interruption coverage has received renewed focus, which can cover losses caused by disruptions at critical suppliers.

As a team, we have worked with numerous insureds to obtain reimbursement for business interruption claims (both direct and contingent). Working alongside our forensic accounting colleagues, we have successfully advocated for interim payments during the adjustment phase to ensure clients have a steady cash flow. With threat actor groups now seeking to cause as much chaos as possible, disruption to organisations and business interruption claims remain a trend we expect to continue in 2026.

Why now is a good time to buy cyber insurance

Despite this backdrop of incidents and claims activity, cyber insurance rates are decreasing across the board, creating a buyer-friendly market. We have seen numerous clients increase their limits this year, with 16% of Marsh clients extending their limits in the first quarter of 2025. With an ever-changing threat landscape, it's crucial to check that cyber coverage reflects the current risk environment. A thorough review of an organisation's policy can help identify any gaps in coverage, ensuring it is protected against a wide range of cyber incidents, including data breaches, ransomware attacks and business interruption.

Construction

Chloe Derrick, Jesal Parekh and Zara Okereafor

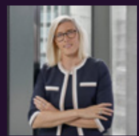
Disputes remain firmly at the forefront and show no signs of slowing down

The construction sector continues to be a focus area for legal and regulatory changes.

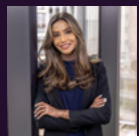
The Building Safety Act 2022 ("BSA") altered the landscape, and the changes in the law introduced have given rise to a significant number of fire and building safety disputes. As we discuss further in this chapter, the Supreme Court has now confirmed that developers have a right under the Defective Premises Act 1972 ("DPA") to recover the costs of remediating buildings from relevant parties in the supply chain and can benefit from the extended limitation periods arising under section 135 of the BSA.

Against a government mantra of swifter fire safety remediation and a 2029 deadline for unsafe cladding removal, the new duties and liabilities introduced under the BSA continue to give rise to significant financial orders against construction businesses, including on a non-fault basis. Additionally, the Remediation Acceleration Plan (RAP) and proposed powers sought under the Remediation Bill, give rise to potentially severe penalties for any failures to remediate buildings within government's timescales.

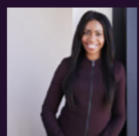
Such a seismic shift in duties, liabilities and remedies has an equivalent impact on the potential for coverage disputes, particularly in areas of unchartered territory.



Chloe Derrick
Partner
Policyholder Disputes



Jesal Parekh
Associate
Policyholder Disputes



Zara Okereafor
Associate
Policyholder Disputes

Key legislative and regulatory developments in 2025

Buildings must be fixed faster

The RAP is the government's central delivery vehicle aimed at fast forwarding the remediation of buildings with unsafe cladding. When first published on 2 December 2024, the RAP highlighted that following the Grenfell tragedy, remediation work had been completed on only 1,436 of the 4,834 unsafe buildings identified at that time.

The government's intention via the RAP is clear. Every building over 11 metres (11m+) with unsafe cladding must be fixed, and buildings must be fixed faster. Avoidance is not an option.

Alongside the RAP objectives first set out in December 2024, on 17 July 2025 the government outlined a range of additional measures aimed at overcoming perceived barriers to remediation. Included in the new measures to be introduced was an outline of the government's intention to bring forward a Remediation Bill as soon as parliamentary time allows, intended to "create a hard 'endpoint' for remediation". The intended Remediation Bill will include a Legal Duty to Remediate which will compel landlords to remediate buildings within fixed timescales or face criminal prosecution. Where landlords fail to fix buildings, new powers are to be introduced, which will include a Remediation Backstop to ensure works are completed.

In tandem with seeking new powers under the Remediation Bill, the government is reviewing Ordnance Survey records to identify relevant 11m+ buildings with potentially unsafe cladding and where necessary, it is contacting relevant parties to review their fire risk assessments and discuss their proposed programme for remediation.

The Legal Duty to Remediate

The government's message to the industry is explicitly stated: avoidance is not an option. By the end of 2029, every 11m+ building with unsafe cladding must either have been remediated, have a date for completion, or its landlords will face strong sanctions and stringent penalties.

Under the Legal Duty to Remediate, the RAP now confirms that:

1. It will be an offence for any person to obstruct another from assessing or remediating an unsafe building 11m+ in height, without a reasonable excuse. Any party "whose actions unreasonably hinder progress" may be subject to financial penalties.
2. By the end of 2029, any landlord who has failed to remediate a building over 18 metres (18m+) "without reasonable excuse", will face criminal prosecution, with unlimited fines and/or imprisonment.
3. For buildings between 11 and 18 metres, those that have not been remediated or scheduled for completion by the end of 2029 will be escalated to the government's regulatory partners "for investigation and enforcement".
4. Local authorities and Homes England will have new Remediation Backstop powers where, if the timeline for completing cladding remediation has passed or if relevant enforcement options have been exhausted, an application may be made to the First-tier Tribunal for such authorities to undertake remedial works themselves directly – with the landlord liable for any costs that would not normally have been covered by government. Of further note, is that, if the landlord does not or cannot pay those costs, then the building may be subject to an enforced sale to fund repayment.
5. There will be a new dedicated Remediation Enforcement Unit within the Building Safety Regulator ("BSR"), to progress the enforcement of 18m+ buildings that are not progressing to the RAP timescales.

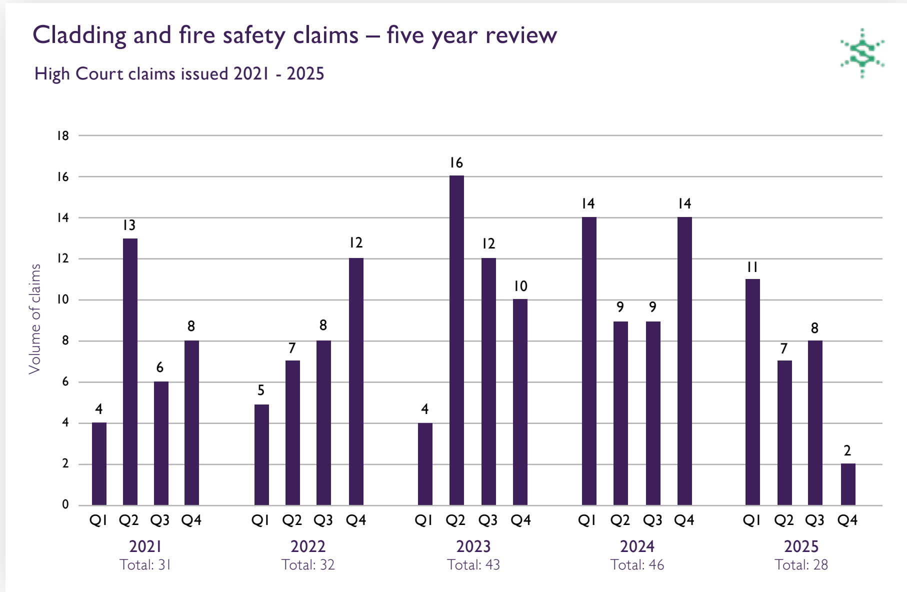
The government's proposals are significant. We address elsewhere in this publication the insurability of fines and penalties (see here).

Against a backdrop of significant sanctions and in advance of the government's deadlines, policyholders will be under significant pressure to push forward remediation works and the insurance industry must engage in resolving any disputes that are slowing down remediation, where indemnities are potentially available.

Policyholders must push forward any unresolved insurance issues, and where appropriate, take further action to resolve coverage disputes. If insurers fail to engage on coverage and remediation is delayed, policyholders should consider claims under Section 13A of the Insurance Act 2015, to seek payment from insurers for any losses that arise because of a delay in paying sums due within a reasonable time.

Cladding and fire safety claims

Analysis from Solomonic confirms that the number of cladding and fire safety claims issued in the High Court has decreased for the first time in five years.



Source: Solomonic App database
Data correct as of 15 December 2025
Excludes Insolvency & Companies List

In conjunction with Solomonic, we have analysed the number of High Court claims issued over the last five years, which relate to cladding and fire safety[1].

Since 2021, there have been 257 such claims issued, with claims peaking in 2023 and 2024, no doubt due to the introduction of the BSA.

For 2025, whilst substantial disputes are ongoing, there has been a significant reduction in the number of High Court claims issued. In circumstances where there are still thousands of buildings to be remediated, that decrease may be the result of the BSA leading parties to seek new remedies in the Property Chamber of the First-tier Tribunal, which are not available in traditional litigation. As we anticipated last year, it is possible that we may see an influx of claims returning to the High Court for determination when disputes arise as to which party should ultimately bear the costs of any Remediation Orders made.

Equally, the reduction in claims issued over the past 12 months might be reflective of the Supreme Court's judgment in *URS v BDW*. Now that construction supply chain professionals face longtail exposures under the DPA, developers may be opting to conduct remediation works first, with recovery actions to be pursued at a later date. If that is the case, we may see a wave of professional indemnity (PI) claims issued by building owners and developers against their third-party supply chain contractors in due course.

1 The Solomonic dataset is produced on claims that contain any of the following topics: Grenfell, cladding, fire safety issues, Defective Premises Act, Building Safety Act or Fire Safety Act.

Building Safety Act 2022 (BSA)

On 28 June 2022, the BSA introduced sweeping legal and regulatory changes, impacting liability and insurance cover. It is a radical piece of legislation which has reshaped building safety and shifted the law. Since its introduction, the construction industry has had to grapple with extended limitation periods, alongside new duties of care and causes of action.

Limitation for Defective Premises Act (DPA) claims (section 135)

As set out in our 2025 edition of The Policyholder Review one of the most widely commented upon shifts in the law following the introduction of the BSA is the significant retrospective extension of the limitation periods that apply to claims pursued under the DPA.

To re-cap, prior to the introduction of the BSA, any cause of action in respect of a breach of duty imposed by the DPA could only be brought within six years from the date the dwelling was completed. As of 28 June 2022 however, the BSA[2] applied the following special time limits for certain actions in respect of building defects:

- For buildings completed after 28 June 2022, claims can be commenced up to 15 years from the date the right of action accrued; and
- For buildings completed prior to 28 June 2022, claims can be commenced up to 30 years from the date the right of action accrued.

Additionally, claims can now be brought under the DPA for defective refurbishment or rectification works to existing dwellings, with an applicable 15-year limitation period. For such "further work" claims, the cause of action (and the start of time running) accrues from the date the further work is finished.

All of this means that claims have been reawakened against developers, contractors and consultants, who prior to June 2022, might reasonably have taken the view that they had no liability exposure on historical projects post-Grenfell.

From an insurance coverage perspective:

- The impact of the new limitation periods continues to give rise to coverage disputes. We are increasingly seeing coverage disputes being resolved on an urgent basis, often as the underlying claim reaches some form of alternative dispute resolution or is subject to a significant litigation step. Additionally, now that building safety claims can be adjudicated following the Technology and Construction Court (TCC) decision in *BDW Trading v Ardmore Construction*[3], the expedited timetables at which adjudicated claims are determined means that policyholders facing building safety claims subject to adjudication are similarly going to be seeking confirmations of coverage much more quickly.
- As to the underlying causes of action, the introduction of the BSA and the DPAs extended limitation periods has given rise to claims against a policyholder which would previously have been statute-barred. Whilst each case will turn on its own facts, exclusions for fire safety have developed over time. Although such exclusions have become the norm, rather than the exception, that has not always been the case. Policyholders should revisit their historic fire-safety claim notifications from 2017 to review whether any coverage declinatures were because of a fire safety exclusion, or some other exclusion (for example a contractual warranty exclusion). If so, the decision may be disputable, if claims are now being advanced under the DPA.
- Similarly, as DPA claims increase in significance due to the renewed limitation periods, policyholders should continue to be alert to potential coverage points being raised around the possibility of whether the DPA imposes strict liability, which would mean that a claimant does not have to prove fault or negligence (with potential implications for professional indemnity cover and whether there is a wrongful act). For policyholders for whom this issue might be relevant, this is a point we raised in The Policyholder Review 2025. At the time of writing, it remains the case that there is no authority from the court which finds that DPA claims are based on a strict liability (fitness for purpose obligation), rather than a duty to use reasonable skill and care. Based on present authority, DPA claims should therefore be indemnifiable under PI policies, as supported by the court's considerations of reasonable skill and care within the context of a DPA claim as, for example, was observed in *Vainker*[4].

2 *BSA*, section 135

3 *BDW Trading Ltd v Ardmore Construction Ltd* [2024] EWHC 3235 (TCC)

4 *Vainker v Marbank Construction Ltd & Ors* [2024] EWHC 667

URS Corporation v BDW Trading

Amidst the ongoing focus on the scope of construction professionals' duties of care, the court is not shying away from setting significant precedents which alter the legal landscape for the construction industry.

In December 2024, seven Supreme Court justices sat to determine a number of points of significance under the BSA and DPA, in *URS Corporation v BDW Trading*[5]. Judgment was handed down on 21 May 2025, with the justices unanimously dismissing URS's appeal on all four grounds.

In this landmark judgment, the Supreme Court reached a decision that supported developers, and sought to progress swifter remediation of fire safety defects by expanding the scope of liability for remediating defects. Developers now have a right under the DPA to recover the costs of remediating buildings from their contractors and consultants. They can also benefit from the extended limitation periods arising under section 135 of the BSA.

Background facts

URS had been retained by BDW (a property developer) as the structural design engineer on the construction of 12 residential tower blocks. The tower blocks contained fire safety defects in the form of inadequate structural designs, although by the time BDW discovered this in 2019, it had sold the premises. Nevertheless, prompted by the Grenfell Tower fire, BDW took it upon itself to carry out the remedial works. As URS was responsible for the alleged negligent design of the tower blocks, BDW sought to recover the remediation costs from URS. In March 2020, given its contractual claim against URS was statute barred, BDW brought a tortious claim alleging that URS had breached its duty to exercise reasonable skill and care.

BDW was successful at first instance, and on appeal to the Court of Appeal where it also obtained permission to amend its pleading to include a DPA claim and contribution claims against URS, given the extended limitation period. The Supreme Court's judgment addressed the following four grounds and in doing so, provided much needed clarity on a consultant's duty of care in defective premises claim.

- **Ground 1 – Scope of duty and the "voluntariness principle":** It was agreed between the parties that URS owed BDW a duty of care in tort to avoid pure economic loss (i.e. avoid the costs of structural repairs). The key question in dispute was whether this duty of care extended to losses that had been "voluntarily" incurred by BDW. URS argued that there was no legal liability for BDW to undertake the remedial works and, therefore, the losses were "voluntary". The Supreme Court rejected this argument, finding that there was no principle in English law that stated that, where a party has incurred losses which it had no legal obligation to assume and which it has incurred voluntarily, it could not seek to recover those losses from another liable third party. Overall, the Supreme Court held that BDW had no "realistic alternative" than to carry out the repair works. Ground 1 was dismissed, finding there was no rule of law that meant the repair costs fell outside the scope of the duty of care or were too remote.
- **Ground 2 – application of section 135 of the BSA:** It was agreed between the parties that section 135 of the BSA applied to a claim brought under section 1 of the DPA. However, URS contended that the retrospective extension should not apply to related claims in negligence, or for contribution. Further, URS's stance was that, as BDW's remedial works were carried out voluntarily and prior to the enactment of the BSA, the extended limitation periods should not apply. In contrast, BDW's position (unsurprisingly) was that the amended limitation periods under the BSA were to be treated as having always been in force. The Supreme Court rejected URS's argument, observing that it would be "legally incoherent" to have differing limitation positions between claims advanced by homeowners against BDW under the DPA, and claims for negligence and/or contribution by BDW against URS. There was no reason to restrict the application of section 135 of the BSA to claims made under the DPA and in line with the purpose of the BSA, it determined that the retrospectivity should extend to claims in negligence and for contributions. In practice, this means that, for buildings completed prior to 28 June 2022, building safety claims pursued by developers against their subcontractors, equally have a potential 30-year limitation period.
- **Appeal Ground 3 – Did URS owe BDW a duty under Section 1(1)(a) of the DPA?:** Section 1(1)(a) imposes a duty on persons building dwellings for work conducted to be carried out in a workmanlike or professional manner and with proper materials, so that the dwelling is fit for habitation. URS contended that this duty did not extend to developers as the purpose of the DPA was to protect the purchasers of new dwellings only and it was not intended to be a recourse for developers against their subcontractors, who could use other avenues to bring claims. Again, the Supreme Court rejected this augment, finding that the DPA was intended to encapsulate first owners including those who order the construction of a dwelling (i.e. developers). Therefore, BDW was owed a duty by URS under the DPA.
- **Appeal Ground 4 - Could BDW bring a claim against URS under section 1 of the Civil Liability (Contribution) Act 1978 ("CLA"):** In the circumstances of this case, no action had been commenced by the homeowners against BDW. Accordingly, URS argued that a right to recover a contribution does not arise until either a judgment, admission of liability, or settlement, are obtained for the same loss. In contrast, BDW's stance was that a right to contribution arose at practical completion, when damage was first suffered by a claimant homeowner. Lord Leggatt rejected both positions – finding instead that the right to recover arises when (i) damage is suffered by the claimant for which two parties are liable ("D1" and "D2"), and (ii) D1 must have paid for, been ordered to pay, or agreed to pay, compensation for such damage. A "payment in kind" by way of carrying out remedial works, is sufficient to establish (ii). It is at this point that a cause of action for contribution is crystallised and the limitation period of two years under the CLA begins.

Further discussion on the decision in *URS v BDW* can be found here.

5 *URS Corporation Ltd v BDW Trading Ltd* [2025] UKSC 21

What does this wider liability for remediating fire safety defects mean for professional indemnity insurance?

An influx of claims against construction professionals?

Many policyholders (and their insurers) had been monitoring the outcome of *URS* to establish whether they owe potential longtail liabilities to developers. The outcome is that liabilities under the DPA are now considerably wider in scope, and there is likely to be a wave of professional indemnity claims by building owners and developers against their third-party supply chain contractors.

In a similar vein, the decision in *URS* also confirmed that developers may bring contribution claims against third parties under the Civil Liability (Contribution Act) 1978 even where no other party is liable and no other claim is brought against the developer. Again, this widens the scope of the supply chain's exposure to developer claims.

Longtail liabilities

As to what this means in practice, construction supply chain professionals now face similar longtail exposures, with limitation periods of up to 30 years under the DPA. Those businesses should also bear in mind that a developer may opt to conduct remediation works on a building unilaterally, and then later launch a recovery action against the third-party contractors.

Is it (finally) time for coverage to crystallise?

While the industry has been seeking to establish who carries potential liabilities for fire safety remediation costs, many construction insureds who have notified large fire safety exposures have received sweeping general reservations of rights from their insurers, pending claims or developments.

Now that the right for developers to pursue third-party contractor claims has been made clear in *URS*, coverage stances must crystallise. We are beginning to see an influx of coverage disputes as a result.

Some of the coverage issues that might arise include:

- **Notification disputes:** potential liabilities where claims are not advanced until sometime later will almost always give rise to insurers considering the notification provisions of the policy and any prior awareness. Many policyholders will have already reviewed their involvement in legacy projects and considered their exposure, but it is important that supply chain businesses now also do so.
- **Legal liability:** whether the remediation costs arose as a result of a legal liability or were incurred "voluntarily" is also a point which may give rise to coverage disputes. The judgment in *URS* provides some helpful analysis for what costs can be considered "truly voluntary" where there is no realistic alternative but for the insured to carry out remedial works. In light of the Supreme Court's judgment, it may also now be easier for policyholders to trigger cover under a policy, given insurers will need to take into consideration the requirement to incur costs on a 'voluntary' basis to achieve building safety. Policyholders should give regard to whether their policy wording provides cover for costs incurred in relation to "compulsory remediation" or costs in relation to "voluntary remediation" and the distinction between both.
- **Policy exclusions:** the scope and application of any policy exclusions (for example, workmanship exclusions) will continue to be a key battleground when seeking to agree the amount of the indemnity due under the policy.

- **Subrogation:** An insurer has a right to bring a claim in an insured's name to recover a loss it has paid under the policy once the insured has been indemnified. For parties able to pursue recovery actions against the construction supply chain, the operation of the policy's subrogation clause will be highly relevant, particularly where the cost of any remediation works exceeds policy limits. It is not unusual for policies to contain differing subrogation provisions (either favouring the insured or insurer). Insureds should consider the subrogation clause's terms at the settlement of the underlying claim if third-party recovery actions are envisaged.

  The judgment in *URS* provides some helpful analysis for what costs can be considered 'truly voluntary' where there is no realistic alternative but for the insured to carry out remedial works.

  Policy exclusions pose a further coverage issue. The scope and application of any policy exclusions, such as workmanship exclusions, will continue to be a key battleground when seeking to agree the amount of indemnity due under the policy.

  Importantly, the decision confirms a duty can be owed to a developer as the first owner of the building and therefore consultants and designers may owe duties 'up the chain' thereby extending the risks for policyholders. This may lead to an increase in contribution claims and policyholders should be prudent in checking whether their policies provide cover for contribution claims.

  An insurer has a right to bring a claim in an insured's name to recover a loss it has paid under the policy once the insured has been indemnified. For parties able to pursue recovery actions against the construction supply chain, the operation of the policy's subrogation clause will be highly relevant, particularly where the cost of any remediation works exceeds policy limits.

  It is not unusual for policies to contain differing subrogation provisions, favouring either the insured or insurer. Insureds should consider the subrogation clause's terms at the settlement of the underlying claim if third-party recovery actions are envisaged.

Remediation Orders (section 123)

Section 123 of the BSA provides the First-tier Tribunal (FTT) with the power and discretion to issue a Remediation Order (RO) against landlords requiring them to remediate defective buildings and/or take specified relevant steps in relation to a defect.

Following the introduction of the BSA, the first RO was granted in 2022 in Kedai[6]. This case provided some helpful insights into how the FTT would assess whether there was a "relevant defect" to be remediated (as defined by section 120 of the BSA). The test to be applied here is whether the relevant defect caused a "building safety risk"[7], applying industry knowledge at the date of the hearing.

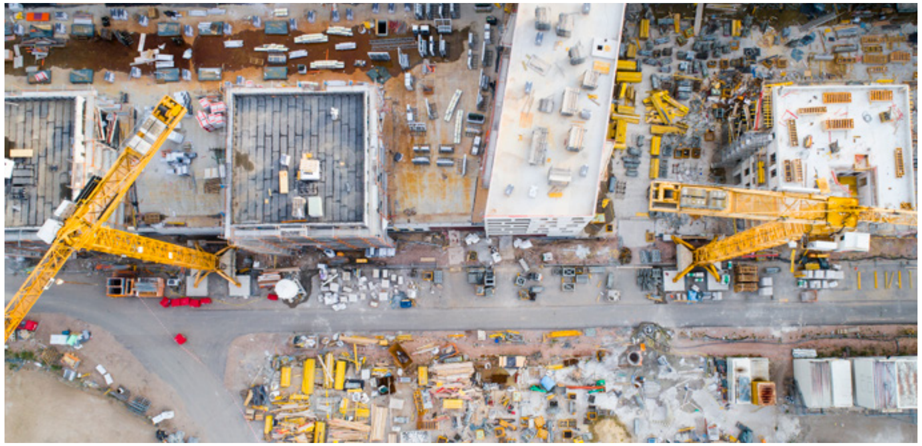
We first considered the scope of ROs in our 2025 edition of The Policyholder Review, which included an analysis of the state of play following the decisions in Grey GR Limited Partnership[8] and Di Bari[9]. Since then, we have seen further new law on the scope and application of ROs, which provides additional clarity for businesses subject to BSA orders.

The Chocolate Box

In 2023, the Secretary of State made an application for an RO against Grey GR Limited Partnership in relation to a building in Bournemouth known as The Chocolate Box[10], a development of 59 residential properties, over 12 storeys. The decision provides a helpful framework of the core threshold requirements under section 123, relevant to the granting of a RO, including that: it must be a "relevant building (section 117(2)); the respondent must be a "relevant landlord or management company" (section 120(5)); and there must be "relevant defects" that cause a building safety risk (section 120(2)).

Importantly, even if each of those thresholds are met, The Chocolate Box confirms that the tribunal retains full discretion, and it is not compelled to make a RO.

Matters have however moved on again since The Chocolate Box, with Empire Square (considered over) providing further guidance on the test for making a RO. The test is not "fair and just" as The Chocolate Box suggested, but rather the FTT has a broader, unfettered, discretion, so long as the decision achieves remediation and is within the range of reasonable decisions.



6 *Waite & others v Kedai Limited* LON/00AY/HYI/2022/0005 & 0016

7 A "Building Safety Risk" as defined by BSA section 120(5): "a risk to the safety if people in or about the building arising from – (a) the spread of fire, or (b) the collapse of the building or any part of it".

8 CAM/26UH/HYI/2022/0004

9 *Di Bari and others v Avon Ground Rents Ltd* LOM/00AP/HYI/2022/0017

10 *Secretary of State for Levelling Up, Homes and Communities v Grey GR Limited Partnership* CHI/00HN/HYI/2023/0008: The Chocolate Box, Bournemouth

Empire Square

On 5 June 2025, the FTT provided its decision for a RO sought by leaseholders against the landlord of *Empire Square*[11], as developed by Berkley Homes. In addition to the RO sought by the leaseholders, the landlord also sought a Remediation Contribution Order (RCO) against Berkley Homes.

The case is a notable one, as it is the first time the FTT considered whether to make a RO in circumstances where the developer, Berkley Homes, was positively asserting that it would remediate the building. In 2022, Berkley Homes had also signed up to the Developer Pledge (a government initiative which required developers to commit to remediate life critical fire safety defects in buildings over 11 metres), although by the time of the hearing in April 2025 works had not commenced.

The FTT granted the RO against the landlord and ordered a RCO against Berkley Homes (albeit both were suspended, on the grounds that this the best way to achieve remediation in the shortest possible time). In relation to the RO:

- There is now a shift from a "fair and just" test to a "purposive approach" – which the FTT explained as a solution focussed, rather than blame focussed, approach.
- The FTT considered that in line with the principal focus of the BSA, non-fault purposive approach to remediating buildings as soon as reasonably possible should be adopted.
- The purpose of a RO is to achieve practical remediation of life-threatening safety defects for the safety of leaseholders (not simply redress for non-compliance) and the FTTs assessment of what the best answer is here is unfettered.
- The FTTs decision must simply be "within a range of reasonable decisions" and its decision is not open to challenge "unless no reasonable decision maker, on the facts known to it, could have come to the same decision".

Importantly, the FTT also confirmed that the landlord's (incurred and continuing) costs in relation to the RO could be recovered from the developer under an RCO, including its legal costs and the costs of expert reports. Additionally, as was the case here, a RO and RCO could be made on suspended terms, to provide the developer with an opportunity to get on with the remediation of the building, failing which the landlord must do so under the RO, with the costs of such action to be recovered from the developer under the RCO. Either way, the FTT's stance was that the developer was the appropriate body, who was going to pay.

2 Hillside

More recently, on 16 September 2025, the FTT handed down another important decision on the interpretation of ROs, in *2 Hillside*, where an application for a RO had been brought by leaseholders against the landlord[12]. The decision provides yet further clarity on the scope and application of ROs in relation to "relevant defects".

Under section 123(2) of the BSA the FTT has now confirmed that, whilst it has the power to specify the "relevant defects" to be remedied, it cannot dictate how those defects should be remedied and "how the landlord goes about remediation must be a matter for it".

Additionally, the remediation works are not "relevant steps" under the BSA. Instead, for the purposes of section 140(4A), "relevant steps" (being the actions necessary to address a "relevant defect") are the mitigation steps, whilst remedial works are being carried out. That is a point which is also made clear in The Leaseholder and Freeholder Reform Act 2024 (LFRA 2024) which inserted the definition of relevant steps into the BSA from 31 October 2024. The LFRA 2024 now confirms that, in law, relevant steps (i.e. interim or temporary measures such as fire sprinklers, waking watches and temporary accommodation) fall within a relevant landlord's responsibility – although a developer or previous landlord can be required to contribute to the costs of remedying or, where applicable, taking such mitigating steps in relation to relevant defects (with such costs recoverable, retrospectively and prospectively, under RCOs).

11 *Robert Zampetti & Others v Fairhold Athena Limited* LON/00BE/HYI/2023/0013.

Analysis

Any landlord seeking to argue against a RO on grounds that it is unfair, will face an uphill battle. Against a mantra of unfettered discretion focused on achieving remediation as quickly as possible, it is clearly going to be very difficult for any landlord to establish that no reasonable decision maker, on the facts known to it, would have come to the same decision.

As we have highlighted previously, an approach that focuses on achieving remediation, rather than assessing whether there is legal culpability challenges well-established legal principles. An outcome-based remedy means that potentially, a policyholder may be liable even if it acted responsibly, which may give rise to coverage disputes around how such remedies fit within the realms of indemnity insurance.

As to resultant claims against developers, we expect that as was the case in *Empire Square*, developers will want to take the opportunity to control and undertake the remediation works in place of the landlord as, in our experience, costs can otherwise spiral significantly, with disputes arising over the reasonableness and scope of the remediation works later down the line. This point increases in significance now that it is confirmed under the LFRA 2024 that it is the landlords' responsibility to undertake the *"relevant steps"*, with such costs recoverable, retrospectively and prospectively, from developers under RCOs. Again, the costs of waking watches, temporary accommodation and expert reports prior to the completion of remedial works can potentially, be very significant – and any delays in carrying out remedial works will only cause such costs to increase.

Against a background of increasing liability, developers will no doubt wish to take control and push their insurers to indemnify the relevant steps, and the remedial works to be conducted, as soon as possible - and action should be taken to crystallise and resolve any ongoing coverage dispute causing a delay.

While we had hoped that we would see more proactive engagement by insurers to seek to resolve coverage issues earlier, under the threat of ROs, so that the insurance funds needed to carry out necessary remediation works are received without delay, our team are instead witnessing an increase in building safety coverage disputes, as the underlying claims move forward or crystallise. Pursuant to section 13A of the Insurance Act 2015, it is an implied term of every insurance contract that the insurer must pay any sums due in respect of the claim within a reasonable time. If, as a result of any delay in payment, policyholders are facing ROs they might not otherwise have been subject to, section 13A claims for losses may follow against insurers as a result. Such losses might include: costs incurred in responding to an application for an RO; and any additional remediation costs that arise when measuring the costs of the remedial works ordered under a RO (assessed by reference to the building regulations in force at the time of the application hearing, rather than the regulations in place at the time of the works), against losses that might flow from claims in contract, tort or under the DPA.

12 LON/00AE/BSA/2024/0503

Remediation Contribution Orders (section 124)

In addition to ROs, section 124 of the BSA makes provision for Remediation Contribution Orders ("RCOs"), pursuant to which the FTT may, on the application of an interested person, make an order that requires a "specified body corporate or partnership" to contribute towards the costs of remedying relevant defects if they are an "associated person". This effectively pierces the corporate veil.

Triathlon Homes

On 19 January 2024, the FTT handed down its first RCO in the case of *Triathlon*[13].

The RCO application concerned five residential building blocks in the former Olympic Village in Stratford, London. Triathlon, who owned the long leaseholds, sought RCOs under section 124 against: the original developer Stratford Village Development Partnership ("SVDP"); SVDP's parent company ("Get Living Plc"); and East Village Management Ltd ("EVML"), a company established by agreement between SVDP and Triathlon, which was contractually responsible for remedying defects in the blocks. EVML had initially funded the remediation works through service charges levied on the leaseholders.

The RCOs were sought to require SVDP and Get Living Plc to pay for Triathlon's share of the remediation works, and to seek reimbursement of historic costs incurred before the BSA came into force. The RCOs ordered by the FTT were subject to appeal.

On 8 July 2025, the Court of Appeal handed down judgment[14] on whether the FTT erred in determining that it was "just and equitable" to make the RCOs; and if RCOs could apply retrospectively and for costs incurred before the BSA was implemented.

13 *Triathlon Homes LLP v Stratford Village Development Partnership*, LON/00BB/HYI/2022/0018-22
14 [2025] EWCA Civ 846

The Court of Appeal unanimously dismissed the appeal and upheld the FTT's decision to grant RCOs against SVDP and Get Living Plc.

- **Just and Equitable:** On Ground one, the court confirmed that the FTT decision was not flawed. It was the underlying policy of the BSA for developers and well-capitalised owners to be held primarily responsible for remediation costs, rather than the public purse; and RCOs are independent and largely non-fault-based remedies which are not contingent on the existence of other claims, such as contractual claims or service charge, or other avenues of redress.
- **Retrospectivity:** On Ground 2, the court similarly agreed with the FTT view that section 124 was intended to have retrospective interpretation, referencing the Supreme Court's decision in *URS v BDW*, as to the retrospective effect of limitation periods under section 135 of the BSA. This will be particularly relevant, for leaseholders who were previously required to pay remediation costs, by way of service charges, prior to the enactment of the BSA. In reliance upon *Triathlon*, leaseholder can now seek to recover those losses on the basis that they are just and equitable (meaning that developers and their group companies may see claims originating out of already remediated buildings, where the works were paid for out of service charges prior to the BSA coming into force on 28 June 2022). A similar stance was reached by the Court of Appeal in *Adriatic Land*[15], albeit subject to appeal.

SDVP and Get Living Plc have successfully obtained permission to appeal Ground 2 (retrospectivity) to the Supreme Court, which will be heard by the same panel considering the appeal in *Adriatic Land*.

The decisions are significant for construction professionals in the context of legacy projects and are a reminder that even where there has been a change in beneficial owner of the developer, as was the case in *Triathlon*, it will not prevent the court from granting an RCO, as the starting position will almost always be whether it is just and equitable for the developer to pay the remediation costs.

Additionally, an RCO's ability to pierce the corporate veil remains a potentially significant issue. Any entity facing an RCO as an "associated" person should consider their policy wording carefully and, if needed, take coverage advice. Subject to the terms of each policy, coverage disputes might arise if the "associated" entity was not a party to the underlying contract(s) or involved in the development at the material point in time.

Equally, rather than a composite policy, the developer and associated entity could feasibly be insured under separate policies with separate insurers and differing terms, which may further complicate the issue.

The polluter pays principle

Alongside *Triathlon*, further guidance and clarity on the application of RCOs was also provided by the FTT in *Empire Square,* which we have discussed. Whilst the original developer in that case, Berkley Homes, had confirmed that it would carry out the remediation works, that did not prevent the FTT from ordering a RCO. The case authorities continue to demonstrate a 'polluter pays principle', which would follow the government's legislative goal under the BSA to ensure that those who conducted the development, pay for the remedial works and the costs arising out of remedial orders where it is "just and equitable" to do so. The FTT decision in *Empire Square* that legal costs incurred in obtaining the RCO would be recoverable from Berkley Homes under section 124(2) is a further illustration of this, and developers remain the focus point.

As we discussed in last year's The Policyholder Review 2025, it appears that boundaries are rapidly blurring between what appeared to have been the original aim of ROs and RCOs - being an alternative and more efficient tool to resolve disputes – and the characteristics of traditional litigation. Overall, the FTT has been granted the power to provide remedies that are far broader than would ordinarily be the case in litigated construction disputes proceeding in the TCC so that applicants can avoid the cost and complexities ordinarily associated with such litigation. The lines here are now blurring even further, and whilst the FTT may be focused on achieving remediation quickly, that does not mean expensive and lengthy litigation ramifications will not be felt by parties in knock-on coverage disputes, or later TCC claims flowing from RCOs.

In the meantime, the burden of pursuing such TCC litigation to recover the costs from the ultimate responsible party is evidently being placed on developers (and their insurers). Given the quantum of building safety claims is often considerable (and typically complicated by insured and non-insured losses), it would be sensible for developers to revisit the subrogation rights and payment waterfall provisions in any relevant insurance policies, to better assess the likely recoveries that might flow from potential third party claims, and who receives the rewards of any third party claim first.

15 *Adriatic Land 5 Limited v Leaseholders of Hippersley Point* [2025] EWCA Civ 856

Building Liability Orders (section 130-132)

In a similar vein to RCOs, another groundbreaking reform introduced by the BSA was the power now provided to the High Court to issue a Building Liability Order ("BLO"), which will make another specified body corporate jointly and severally liable for relevant liability.

In considering whether to grant a BLO, the court will have regard to the facts in each case and what is just and equitable in the circumstances. Different to RCOs, BLOs are secondary remedies and will only be granted where primary liability has been established.

However, BLOs are another enforcement mechanism available to the court to pierce the corporate veil and the challenges posed by special purpose vehicles (SPVs), in extending liability to associates of the original developer or landlord liable under the DPA, section 38 of the Building Act 1984 or as a result of some other widely defined "building safety risk".

This past year has been relatively quiet for BLOs and there remains a limited number of precedents on the application of this secondary remedy (or additional enforcement option) since the introduction of the BSA.

The first ever BLO

The first BLO under section 130 of the BSA was granted in 381 *Southwark Park Road*[16]. The first defendant, Click St Andrews, was an special purpose vehicle (SPV), which had entered into a freehold purchase agreement ("FPA") with the leaseholders and the right to manage company which required it to carry out some works. The court determined that Click St Andrews breached its obligations under the FPA and the question was whether its "relevant liability"[17], could be extended to its parent, Click Group Holdings Ltd, as an "associated body corporate"[18].

Upon establishing liability, the court held a consequential hearing in December 2024 and determined it was just and equitable to make the BLO given the SPV could not meet the financial liability and the associated company need not be named in the original proceedings for a BLO to be made (although it would be sensible for them to be joined for effective case management).

The case acts as a reminder to developers and the like that forming an "empty shell" of a SPV does not always provide upscale protection. The message following the BSA is that the court will not be reluctant to source alternative funds where SPVs are insolvent. As with RCOs, the court will interpret BLOs narrowly and only in circumstances whereby a "relevant liability" (i.e. circumstances that give rise to a building safety risk being either fire or structurally related) has been established.

BDW v Ardmore[19] also provided some commentary on when a BLO could be issued, suggesting that applicants could seek a BLO even before the relevant liability of the original entity has been established. Again, this represents another potential shift in the court's attitude and approach to company liability – although the court equally acknowledged in that case that applications for information in connection with a BLO (under section 132) "ought… to be short and uncomplicated" and should not "impose on the court any obligation to become embroiled in assessments of the merits of disputed matters", which might mean "that applications for information orders will be made sparingly in cases where liability is in issue".

Policyholders should take care to ensure that there is clear visibility over group structuring before setting up SPVs, as associated and parent companies may face greater. Similar care should be taken in relation to the group's insurance arrangements. Policy terms should be reviewed closely and in particular; consideration should be given to which companies within a group structure fall within the definition of the 'insured'. Providing detailed information to insurers on group company structures during the proposal process would be sensible, and may reduce potential coverage disputes down the line.

16 *381 Southwark Park Road RTM Company Ltd & Ors v Click St Andrews Ltd (in Liquidation) & Anor* [2024] EWHC 3179 (TCC)
17 Under section 130(3)(b) of the *BSA*.
18 Under section 131 of the *BSA*, it was argued that Click Group Holdings Ltd was an "associated body corporate".
19 *BDW Trading Ltd v Ardmore Construction Ltd & Ors* [2025] EWHC 434 (TCC)

Damage and aggregation clarity in Construction All Risks insurance

In December 2024, the Court of Appeal handed down its judgment in *Sky UK Limited v Riverstone Managing Agency*[20].

The case concerned damage to the roof of Sky's global headquarters in London during its construction. The roof, which is the largest flat timber roof in Europe, made up of 472 individual wooden cassettes, suffered extensive water ingress during its construction. Water entered the roof space because the contractor, Mace, had failed to provide protective measures by way of a temporary roof during a period of rainfall. Despite various drying-out attempts, by the time practical completion was achieved on 4 April 2016, the issue had not been rectified. Remedial works are ongoing and expected to complete in 2029.

The policy coverage case concerns the application of key insurance law principles. Sky and Mace were both co-insureds under a 'construction all risks' policy, which covered the period of construction, plus a one year "maintenance period". Both parties sought an indemnity from Insurers under the Construction All Risks (CAR) policy for damage that occurred during the period of insurance, damage that developed thereafter, and the costs of investigating the extent of the damage that had occurred to date. The CAR insurers contended that Sky and Mace were not entitled to any cover for "damage" that occurred after the Period of Insurance, nor for the costs of investigating the extent of the "damage". It was also disputed whether multiple deductibles applied.

The Court of Appeal found in favour of Sky and Mace on several key principles and the whilst the CAR insurers sought permission to appeal, that was refused by the Supreme Court[21].

20 [2024] EWCA Civ 1567
21 UKSC/2025/0026vvzv

The Period of Insurance and developing damage

The insuring clause required insurers to indemnify Sky and Mace against "physical loss or damage to Property Insured, occurring during the Period of Insurance, from any cause whatsoever". Whilst insurers sought to argue that damage occurring after the Period of Insurance was not covered, the Court of Appeal found in favour of Sky and Mace on the following principles:

- In a contract of insurance against damage to a property, an insurer promises to an insured, by way of a warranty, that the damage will not occur. Once the damage has occurred, the insurer is in breach of its primary obligation. The insurer's secondary obligation is to pay damages for breach of its primary obligation.
- Therefore, the measure of recovery in a property insurance claim is governed by common law principles, i.e. to put the innocent party in the same position as if the breach had not occurred.
- The measure of recovery will be subject to express terms in the insurance policy, such as deductibles, limits and exclusions.
- Such modifications and limitations must be achieved by clear wording. The temporal limit in the Insuring Clause (occurring during the Period of Insurance) did not provide the clear wording required to modify the common law principles. It does not purport to define or confine the loss for which the insurer is liable. If the insured damage has caused further damage, then subject to the usual principles of mitigation and remoteness, the insurer is liable for the loss resultant upon suffering that further damage.

Put simply, the costs of remedying the foreseeable deterioration and development damage that occurred after the Period of Insurance, as a result of the insured damage that occurred during the Period of Insurance, were recoverable under the CAR policy. A point Lord Justice Popplewell found was consistent with authorities reaching back to 1850, and with commercial sense.

The meaning of physical 'damage'

It was the insurers' position that, in order to be "damaged" within the meaning of the CAR policy, the timbers would have had to reach a condition requiring "immediate replacement or repair", as anything short of that would not constitute damage. Insurers' case here was that wetting, which could be cured by drying out, was not damage.

Again, the Court of Appeal rejected the insurers' position, finding instead that damage constituted any change to the physical nature of tangible property that impaired its value or usefulness, even if the damage can be remedied.

The application of deductibles

It was disputed between the parties whether a deductible of £150,000 for "any one event" applied once to the whole of the claim, or separately in respect of damage to each cassette - in which case the cover available would be minimal or non-existent.

Finding in favour of the policyholders, the Court of Appeal agreed that the "event" was the cause of the damage, and not the damage suffered to each individual cassette. The decision not to have a temporary roof was a single event. Therefore, a single deductible was applicable.

The recoverability of investigation costs

An issue arose as to whether as to whether investigation costs fell within the policy's Settlement Clause, which required insurers to "indemnify the Insured on the basis of the full cost of repairing, reinstating or replacing property lost or damaged…".

The Court of Appeal favourably determined that the costs of investigating what is reasonably necessary to remedy insured damage, and deterioration and development damage, are self-evidently part of "the full cost of repairing or reinstating" insured damage within the meaning of the Settlement Clause. Investigation costs are therefore recoverable, if they are reasonably incurred, even if no damage is discovered.

What is the impact of Sky & Mace v Riverstone for policyholders?

The decision is a significant win for policyholders of time-relate occurrence policies.

- Damage to a property is interpreted widely and includes any change to the physical nature of tangible property that impairs its value or usefulness, even if it is capable of remedy.
- Damage occurring after a period of insurance that can be shown to have developed from the damage occurring during the period of insurance can, in the absence of any intervening cause, be recoverable under the policy subject to its term. Policyholders (and insurers) in existing disputes should reconsider their positions in light of this. However, if the policy is clearly worded to exclude cover, the courts will be reluctant to step away from that position. This emphasises the importance of closely considering policy wording.
- Reasonable investigation costs incurred in investigating the cause and extent of damage should be recoverable.
- Aggregation clauses that refer to "any one event" relate to the event causing the damage.

Construction: Overview of the market

Howden

The construction professional indemnity insurance (PII) market has continued to soften over the past 12 months. The increase in new insurer entrants to the market has created significant competition, both on renewal lines and new business. Well-run firms, without systemic claims issues and with robust, evidenced risk management procedures, are likely to see significant benefits from this, both in terms of premium and policy coverage.

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HOWDEN

Market update

Overall, the PII market has continued to soften, with several factors exerting downward pressure on price, primarily additional competition from new entrants and increased capacity in existing markets.

Construction, however, is not a singular profession. Therefore, while the market has significantly improved from the 2020-2022 pricing peak, there will inevitably be variation in the savings achieved across the sector.

Coverage

In addition to improvements on premium, there has been a noticeable shift in the coverage being offered by insurers.

During the peak of the hard market, the coverage available was quite restrictive in certain higher-risk areas. Smaller firms had the greatest difficulty in this regard, often being placed on insurers' own wordings (traditionally less generous than broker wordings), which contain more onerous conditions and exclusions.

This appears to have shifted; the market is increasingly willing to adopt broker wordings for architects, engineers and similar professionals. Where it is not possible to adopt a broker wording, improvements can be made to existing wordings, such as removing exclusions and improving coverage.

Fire safety coverage

Up until recently, fire safety and cladding coverage within the market have remained quite restrictive and largely inconsistent, with a great degree of variance from firm to firm and profession to profession. While the standard position has been for insurers to provide cover limited to the cost of rectification only (ie, excluding consequential losses), applying only where such losses arise from a negligent act and with a retroactive date, higher levels of cover are now achievable.

While we would heavily caveat this on the basis that each firm's characteristics, services offered and claims history differ, insurers are increasingly willing to provide fire safety and cladding cover on a simple aggregate basis, without exclusions of consequential loss. Further to this, there is an increased appetite to provide retrospective cover (covering prior work/services), albeit on a more limited basis and subject to sufficient comfort being provided to underwriters during the renewal process.

Areas of concern

Artificial intelligence

From an underwriting perspective, there has been increased focus on artificial intelligence (AI) and its deployment within the industry. This is in tandem with a number of professional bodies, such as the Royal Institute of British Architects (RIBA) and the Royal Institution of Chartered Surveyors (RICS), publishing their views and guidance on the use of AI.

At Howden, we are now seeing underwriters asking firms to provide evidence of their AI policies and procedures, with a key point being the level of oversight the firm maintains over its use. If firms do not already have a written procedure governing the use of AI, it would be advisable to put one in place.

Building Liability Orders

Building Liability Orders (BLOs) are a relatively new remedy introduced by section 130 of the Building Safety Act 2022 (BSA). A BLO effectively allows the courts to hold an associated company (such as a parent company) responsible for another company's liabilities (where the requirements are met).

While relatively new and at present somewhat uncommon, BLOs have the potential to create a number of issues from an insurance perspective:

1. PII policies are intended to cover liability arising out of the performance of the insured's services. By their nature, BLOs can make you liable for work performed by another entity that the policies are not intended to cover, as the other entity may not be an 'insured' under the terms of the policy.
2. There is an increased potential exposure for parent and holding companies. It is important to consider that such firms may not maintain PII and, where they do, it may not be intended to cover construction-type risks. This is particularly the case, for example, where the parent company is a financial institution.
3. There is an increased risk of exposure arising from corporate transactions/mergers and acquisitions.

Given their limited use to date, it is difficult to provide a comprehensive overview of the PII market's response to BLOs. However, firms should actively engage with their broker to ensure that policies are drafted as widely as possible and that underwriters are made aware of any potential liabilities.

Criminal prosecution

The BSA created several new criminal offences. For example, failure to comply with compliance and stop notices is a criminal offence, as is a breach of the Building Regulations 2010. These offences carry a maximum penalty of up to two years' imprisonment and an unlimited fine. Further, the Building Safety Regulator now has the option to prosecute individuals within corporate bodies in certain circumstances.

This poses a number of challenges from an insurance perspective, which firms (and individuals) should consider.

While PII policies are generally not intended to provide cover for criminal prosecutions, it has become increasingly common for them to provide some form of cover for the defence costs associated with a criminal prosecution. This is likely to have arisen following the potential liabilities imposed under the CDM Regulations 2015.

Insurers are, therefore, not new to this exposure. However, not all policies have been updated to reflect the BSA and its liabilities (with many still only covering exposures under the CDM Regulations 2015 and similar legislation). Firms should discuss this with their broker to ensure adequate coverage in this respect.

One key point concerns "personal" liability. There is an important distinction between the liabilities under the BSA and the CDM Regulations 2015. The liabilities under the BSA primarily relate to design, rather than health and safety. Design-related issues may not become known for some time after the original breach. As PII is a "claims made" basis of insurance, it would be the policy in force at the time of the claim/prosecution that would respond. This could create difficulties for individuals who have left a practice or for practices that no longer exist and maintain insurance. This should be a key consideration for individuals.

Competence

The driving theme throughout the BSA, which has flowed through into the underwriting process, is competence. A firm's ability not only to demonstrate competence but also to be competent is key not only to ensuring compliance with the legislation but also to a successful renewal.

Section 11F of the Building Regulations, introduced as part of the broader reforms brought in by the BSA, sets out general competence requirements for the construction industry. Our experience with renewals is that insurers are keen to understand how practices are satisfying these requirements, both at the individual and company levels; they want to see more than just a thin veneer of competence.

Summary

In summary, while there have been significant improvements in the PII market, primarily driven by increased competition, the benefits will be most accessible to well-run firms that can demonstrate robust risk management procedures and competence to insurers as part of their submissions.

Claims overview

Although it has been more than eight years since the Grenfell Tower tragedy, the professional indemnity market is still dealing with its aftermath, as well as the BSA and its implications for the construction profession. These are still being worked through and are still not fully understood in practice. The result is a continued stream of BSA-related claims, with the new addition of BLOs being sought.

Internationally, there continues to be a focus on fire safety within tall buildings. The rectification work conducted over the last four years has reached a stage where recovery is now being sought by government bodies, such as the State of Victoria in Australia, and by contractors/building owners. The recent fires in Hong Kong have also kept the topic high on the agenda for all parties, including insurers.

In addition, there has been a steady rise in high-value, complex professional negligence claims, and the cost of defending them remains high. Independent experts, especially in relation to fire-safety claims, continue to be in demand. This means the cost of expert evidence is increasing, as the conflict between supply and demand favours experts. As a result, additional costs and delays are inevitable.

Given the increasing costs and the high value of claims, we have seen a steady increase in insurers instructing coverage panels to explore ways to reduce their liability and/or avoid it altogether.

Common themes

Continued impact of the Building Safety Act

Although the BSA was rolled out in 2022, the construction industry and the legal profession are still grappling with its impact and reach. As a result, the claims that continue to dominate the professional indemnity market are fire-safety and cladding-related in respect of both historical and recent projects.

These types of claims affect the entire complement of construction professionals, with no single profession singled out. The claims are often high-value and multi-party. However, due to the extended limitation period for residential projects under the Defective Premises Act 1972 (DPA), we have seen poorly particularised and vague claims being received. This is usually because project documentation or information is limited or unavailable, given the length of time since project completion. We continue to see challenges with documentation production for historical projects, which delays the pursuit of these claims and inevitably increases costs. For example, we have even seen a handful of claims being made against firms that had no involvement in the project.

It remains to be seen how the courts will deal with this lack of documentary evidence and arguments under section 135(5) of the BSA, which allows the courts to dismiss a claim brought in reliance on the extended retrospective limitation periods under the DPA, where proceeding with the claim would breach the defendant's right to a fair trial. However, we question how much longer it will be before we start to see judgments on this issue.

As set out above, these claims dominate the market, and we do not expect this to slow down anytime soon, as parties are still exploring their options. The new extended limitation period means we will continue to see these in the construction sphere.

Building Liability Orders (BLOs)

We are now starting to see an increase in claims in which BLOs are being threatened against independent but related entities. This is yet another recovery mechanism for claimants to try when the party that undertook the project is no longer trading or was a special purpose vehicle (SPV), so is effectively a shell company.

BLOs impose joint and several liability on associated companies, allowing relevant liabilities to be extended to related entities. This principle addresses the challenges posed by SPVs and reduces the scope for developers to avoid liability. However, any imposition of liability must be just and equitable. Following the case of *BDW v Ardmore,* claimants and their solicitors have become more confident in their use, and they are now being used more widely.

However, as explained in more detail in our market section above, BLOs do pose some coverage concerns because to be indemnified under a professional indemnity policy, there needs to be an allegation of a breach of the named insured's professional business. A claim under a BLO is an alleged breach against a separate and independent entity. Therefore, BLOs can raise potential coverage issues and lead to uninsured losses.

Insolvency/cashflow

Insolvency remains an issue in the construction market due to increases in the price of materials and supply chain issues. Due to these issues, many construction professionals are experiencing cashflow problems, leading parties to seek creative ways to retain and/or collect payments. It is a longstanding issue in construction that employers use allegations of negligence as a tactic to avoid paying legitimate fees.

However, over the last 12 months, we have seen a significant uptick in claims that an employer has made simply to avoid payment and/or to recoup losses incurred up the chain. This is usually done through the contract's set-off provisions. The allegations are often meritless and/or unsubstantiated, but, given the economic climate, are used to put pressure on and bully cash-strapped parties into agreeing discounts.

Claims to watch

Sustainability and climate control

With climate control and sustainability being major political and client priorities, construction professionals must now be (and should have been) considering how they are designing for a changing global climate. Whether this is designing for temperature fluctuations, energy requirements or more extreme weather, building resilience must be at the forefront of design decisions.

There is a significant risk for construction professionals if buildings designed today are not suitable in the years to come. Although we are not yet seeing claims along these lines, we predict this area could result in a myriad of claims from multiple claimants, including tenants, investors and building owners.

Artificial intelligence

AI is not new, and firms have been using it in everyday practices to analyse building performance, predict project outcomes and provide insights into their operations. This has the potential, if used correctly, to enable firms to become more efficient and profitable, and allow construction professionals more time to focus on their role by removing the administrative burden they often face. However, AI comes with a warning. Without a clear understanding of its limitations and human supervision, there is a high risk of errors. These risks could potentially be replicated on a large scale.

RICS recently announced that it is publishing a global professional standard for the responsible use of artificial intelligence in surveying practice. This attempts to put in place guidance to professionals to minimise the risk noted above. Although this applies to surveyors, the principles apply to all professions. Although we have not yet seen many AI-related claims, we expect these to increase as technology continues to advance and more professions adopt AI into their everyday practices.

Financial Institutions

Aaron Le Marquer

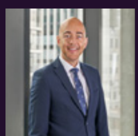
Coverage of regulatory redress schemes

Financial institutions operate in a tightly regulated environment that is fraught with risk at all stages of the regulatory lifecycle. Liability to customers can arise in any number of ways, as most recently demonstrated by the ongoing motor finance commissions investigation. Most, if not all, financial enterprises carry some form of insurance against such exposures in the form of Investment Management Insurance ("IMI"), Financial Institutions Professional Indemnity ("FIPI"), and to a lesser extent Directors and Officers ("D&O") and General Corporate Liability policies.

Each of these types of policy will generally respond to private claims brought against the financial institution for compensation of loss caused by alleged negligence or breaches of statutory obligation. However, the position is less clear in relation to coverage of liabilities arising from regulatory redress schemes imposed by the Financial Conduct Authority (FCA), which may require the financial institution to pay redress to consumers even in the absence of any claim.

Regulatory redress schemes

The statutory framework imposing liability on financial institutions for regulatory breaches and other wrongful acts committed against their consumers is extensive, as demonstrated by the Court of Appeal's judgment in a recent challenge to the FCA's jurisdiction.



Aaron Le Marquer
Partner
Head of Policyholder Disputes

FCA v Bluecrest Capital Management [2024] EWCA Civ 1125

In *Bluecrest*, the insured fund manager sought to challenge the FCA's proposed imposition of a regulatory redress scheme as well as financial penalties in response to alleged failures to manage conflicts of interest, which were considered by the FCA to breach Principle 8 of the FCA Handbook, which provides: "A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client."

The court ultimately concluded that the FCA had acted within the scope of its authority and that the redress scheme and the fines were lawful. In reaching that conclusion, the court conducted a helpful survey of the statutory routes by which customers of authorised firms could obtain redress under the Financial Services and Markets Act 2000 ("FSMA") where breaches of regulatory rules were established.

The first was a civil claim, which s150(1) as originally enacted (now s138D(1)) provided was available as an action for breach for statutory duty for any contravention, at the suit of a private person "who suffers loss as a result of the contravention", subject to s150(2) which provides that rules made by the FCA could disapply s150 to specific provisions of the rules. The rules made by the FCA have always excluded a breach of the Principles as a contravention for which a civil claim lies, and the breach of Principle 8 complained of in the *Bluecrest* case was, therefore, not actionable under s150. However, a breach of any other regulatory rule may, in principle, give rise to a private claim at the initiative of a customer who has suffered loss as a result.

The second route to redress was that pursuant to sections 382 to 384 FSMA, the court and the FCA can make restitution orders if the authorised firm has contravened or been knowingly concerned in the contravention of a "relevant requirement" and "profits have accrued to him as a result of the contravention" or "one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention". In this case, breaches of the Principles will also suffice, as well as breaches of more specific rules. The court or the FCA have broad discretion to order payment of such sum as appears to the court to be just, having regard either to the profits appearing to have accrued, the extent of the loss or other adverse effect, or both.

Thirdly, the FCA is empowered under s404 FSMA to impose a consumer redress scheme, subject to the following conditions: (i) there has been a widespread or regular failure by firms (plural) to comply with rules; (ii) consumers have suffered (or may suffer) loss as a result of the breaches; (iii) the consumer would otherwise be entitled to obtain a remedy or relief if they brought legal proceedings. Section 404, therefore, requires the FCA to establish breach of duty, loss, causation and actionability, and is not available as a mechanism for the imposition of a redress scheme against a single firm.

Finally, pursuant to Part XVI FSMA, the Financial Ombudsman Service ("FOS") is empowered to resolve complaints that relate to an act or omission of a person carrying on a regulated activity. The FOS has jurisdiction to determine complaints on the basis of what, in the opinion of the ombudsman, is "fair and reasonable in all the circumstances of the case". It may make (i) a money award compensating the complainant for financial loss or any other loss or damage; or (ii) a direction that the respondent take such steps in relation to the complainant as the ombudsman considers just and appropriate. The ombudsman's power to grant remedies is expressly not limited to the remedies that would be available to the complainant in civil proceedings, and is, therefore, in principle extremely broad.

The issue in dispute in the *Bluecrest* case was that the FCA sought to impose its redress pursuant to a fifth route: s55L FSMA, which is not expressly stated to relate to redress, but which gives the FCA broad discretion to impose any requirement on an authorised firm as a continuing condition of the firm's authorisation. Bluecrest argued that any right to impose redress against a single firm under s55L must be subject to the same conditions of breach of duty, loss, causation and actionability required by s404.

The court rejected this proposition, finding no support for it in the language of the statute, its explanatory notes or its parliamentary history. The FCA was empowered to impose requirements (which could include consumer redress schemes) if it appeared to the FCA that it is "desirable to exercise the power in order to advance one or more of the FCA's operational objectives", which included the objective to "secure an appropriate degree of protection for consumers".

As a result, there are at least five routes under FSMA by which authorised firms may find themselves liable to consumers as a result of regulatory breaches. It is clear that the FCA has very broad discretion to impose redress schemes on authorised firms, not all of which require evidence of loss suffered by consumers or even clear breaches of regulatory rules.

Motor finance commissions

The latest high-profile redress scheme announced by the FCA relates to motor finance commissions. The proposed redress scheme, yet to be finalised at the time of writing, follows the Supreme Court's decision in the joined appeals of *Hopcraft v Close Brothers* and *Johnson v FirstRand* and *Wrench v FirstRand* UKSC/2024/0159.

The appeals concerned the payment of commission by finance lenders to motor dealers in connection with the provision of finance for the hire purchase of cars, where that commission was either not disclosed or only partly disclosed to the hirers of the cars. Each customer brought proceedings against the lenders, claiming that the commissions amounted to bribes or secret profits received by the dealers as fiduciaries. They claimed payment of an amount equivalent to the commissions from the lenders under the tort of bribery or, in the alternative, compensation from the lenders in equity for dishonest assistance in the dealers' receipt of secret profits. Each customer also attempted to reopen their hire-purchase agreements under section 140A of the Consumer Credit Act 1974 ("CCA"), on the basis that they gave rise to an unfair relationship.

The Supreme Court dismissed all the claims in bribery and dishonest assistance, primarily on the basis that no fiduciary relationship existed between the customer and the motor dealer. However, the Supreme Court found, in one case, that the relationship between the customer (Mr Johnson) and lender (FirstRand) was unfair under section 140A of the CCA and ordered payment of the commission to the customer on that basis.

Having intervened in the Supreme Court appeal, the FCA is now proceeding with the implementation of a redress scheme under s404 FSMA, with the intention of implementing the Supreme Court's conclusions in relation to s140A of the CCA. The case and the scheme serve as a reminder that FSMA is not the only legislation governing the provision of financial services, and breaches giving rise to liability can arise under the common law and a host of other statutory sources.

The scheme, as currently proposed, requires lenders to review all lending agreements entered into since 2007 to establish whether they are unfair by reference to the criteria set down by the FCA following the Supreme Court decision. The FCA estimates that 44% of all agreements (14.2 million in total) will be considered unfair. Importantly, the scheme requires lenders to pay redress to affected customers whether or not any complaint or claim has been made.

Remedies: compensatory, restitutionary or otherwise?

A key question arising in the coverage of regulatory redress liabilities is the legal nature of the remedy and whether such remedies are insured under the policy or indeed insurable as a matter of law. The question is less straightforward than it may seem.

It is clear that a typical third-party liability policy will respond in principle to a claim for damages, i.e., a monetary award, whether made by the court or a regulator, for the purpose of compensating loss suffered by the claimant. However, the coverage is less clear in relation to equitable or restitutionary remedies. These are discretionary remedies that may be awarded when a damages award would be inadequate, and include rescission, account of profits, specific performance and injunctions. These remedies do not provide compensation for loss suffered by the claimant, but instead aim to restore a pre-contractual position or deprive the defendant of monies wrongfully obtained. They may, however, still result in a financial loss to the insured defendant, for which the defendant may seek an indemnity under its policy. Are liabilities for equitable remedies covered?

RSA v Tughans [2023] EWCA Civ 999

The issue was considered by the Court of Appeal in *RSA v Tughans*. In that case, the claimant had paid the insured defendant law firm a success fee of £7.5 million under in relation to a transaction completed in accordance with agreed terms. The claimant subsequently alleged that the retainer was obtained by the fraudulent misrepresentation of one of the firm's partners, and sought the return of the £7.5 million success fee. Tughans claimed under its professional indemnity policy, which provided coverage for "claims made against the Insured… in respect of any civil liability (including liability for claimant's costs and expenses) incurred in connection with the Practice…".

RSA declined coverage of the claim, arguing that because the fee was procured by misrepresentation, Tughans had no right to retain it; and if it was obliged to return it as part of a damages claim, it had not lost something to which, as a matter of substance, it was entitled. RSA's argument turned in part on the submission that the indemnity principle precluded any cover for a liability for fees framed as a restitutionary claim, where the contract had been avoided. There was therefore no logical basis to distinguish the position simply because the claim had been advanced in damages.

The court rejected RSA's case. The firm was contractually entitled to the fee (despite the misrepresentation), had performed the services and had suffered a loss by being ordered to return the fee. Importantly, although not essential to its reasoning, since the claim had been framed as one in damages, the court also considered the position in relation to a claim framed in restitution. Lord Justice Popplewell said in his judgment: *"There is, in my view, nothing in the indemnity principle which would preclude cover where such a claim is framed in unjust enrichment, following rescission, any more than when framed as a damages claim."*

Noting that in this case the claim arose in relation to earned fees, but the previous authorities relied upon by RSA all related to cases where the fees sought to be returned had been unearned, the court also considered the position in those circumstances, with Lord Justice Popplewell saying:

"There is nothing in the indemnity principle itself which dictates that restitutionary claims for unearned fees cannot constitute a loss."

In *Tughans,* the Court of Appeal therefore confirmed (*obiter*) that, under English law, it is perfectly possible to agree an enforceable contract of insurance providing coverage for restitutionary as well as compensatory remedies (regardless of whether fees are earned or unearned), subject to (i) the express terms of the policy; and (ii) public policy considerations and the illegality doctrine.

Sayers v AIG Australia [2025] VSCA 294

A similar conclusion was reached in Australia recently by the Supreme Court of Victoria in *Sayers v AIG Australia*. In that case, Sayers sought indemnity for a settlement concluded in relation to a counterclaim advanced against Sayers, in response to Sayers' own claim for specific performance of a contract for the sale of land owned by the defendant. The settlement involved Sayers agreeing to purchase the land from the defendant for the price of AU$11 million instead of the previously agreed price of AU$8,925,140. Sayers claimed for an alleged loss in the amount of AU$1,971,604, representing the difference in price under its Corporate Liability policy, which provided coverage for any claim "seeking compensation or any other legal remedy".

AIG argued that "claim" could only mean a claim for liability that produces indemnifiable "Loss". It could not extend to non-monetary claims, such as a claim to have a transaction set aside or a claim for injunctive relief that could not result in a liability to pay. Accordingly, the policy did not respond to a settlement of such claims. It was submitted that this construction achieved coherence with the definition of loss as any amount which the insured is legally liable to pay resulting from a "claim". According to AIG, the settlement reached at the mediation had no real connection with the pleaded claims against Sayers, and instead involved a renegotiation of the price paid for the land on a commercial basis.

The court preferred Sayers' proposed construction, which was that any "other legal remedy" included coverage for acts, errors or omissions, whether compensatory or non-compensatory. First, the words "other legal remedy" must mean something other than compensatory remedies in the context of the wording, otherwise they would add nothing to the definition of Loss. Secondly, this was consistent with the claim definition, which extended to criminal proceedings and investigations, which were capable of extending to non-monetary claims.

Although there was no discussion of the indemnity principle per se, the court had no trouble in concluding that such claims were capable of coverage, subject to the express terms of the policy.

There is, therefore, ample authority that third-party liability policies, such as those commonly held by financial institutions, are capable of responding in principle to remedies of a non-compensatory nature.

Regulatory redress – what is the remedy?

As discussed, regulatory redress schemes may arise under a variety of statutory mechanisms, each of which differs in the nature of remedies that may be imposed.

Section 138D FSMA

The right under s138D FSMA for a customer to bring a private claim for any breach of statutory duty is expressly granted to a person "who suffers loss as a result of the contravention". While this would not necessarily preclude a customer seeking a restitutionary remedy as part of any action (depending on the facts), the language appears to raise a presumption that any claim founded on s138D will be at least in part compensatory in nature.

Restitution orders

In contrast, a restitution order, which the FCA is empowered to make under s382 FSMA, may arise purely where profits have accrued to the authorised firm as a result of a contravention, regardless of whether "one or more persons have suffered loss". The FCA may order payment of such sum as appears to the court to be just, having regard to the profits appearing to have accrued. Equivalent provisions are provided where loss has been suffered in addition to or instead of profits accruing, but they are not essential to the right to make an order. Restitution orders (as the name would suggest) may therefore be purely restitutionary in nature, purely compensatory or a combination of both.

s404 redress schemes

At the other end of the spectrum, as described above, the FCA's power to impose a market-wide redress scheme under s404 FSMA is subject to four conditions, one of which is that consumers have suffered (or may suffer) loss as a result of the breaches. Any remedy imposed by the FCA under s404 is, therefore, by definition compensatory.

Financial Ombudsman Service (FOS)

The power of the FOS to resolve complaints is also focused on "compensating the complainant for financial loss or any other loss or damage". FOS awards are, therefore, likely to be primarily compensatory in nature. However, the FOS also has broad discretion to give "a direction that the respondent take such steps in relation to the complainant as the ombudsman considers just and appropriate", which is expressly not limited to steps that a court could order. While any FOS award is likely to be primarily (or at least partly) compensatory, there is clearly scope for the FOS to issue remedies that are restitutionary or otherwise non-compensatory in nature and which may give rise to loss on the part of the authorised firm for which it may seek indemnity.

Section 55L authorisation conditions

Similarly, the FCA's power to impose conditions of authorisation under s55L FSMA, which can include an order to pay redress as established in the *Bluecrest* case, is broad and unfettered, other than by the normal limitations on the exercise of public powers. An order under s55L can clearly encompass both compensatory and restitutionary remedies, as well as other remedies (including fines and penalties).

It is therefore apparent that liability for statutory breaches may give rise to both compensatory and restitutionary remedies and, in many cases, awards may encompass both. Those implemented under s404 FSMA, such as the current proposed motor finance commissions scheme, are, however, by definition, only compensatory in nature.

Policy terms

For the reasons articulated in *RSA v Tughans*, it appears that there is nothing to prevent coverage of non-compensatory remedies as a matter of common law, whether under the indemnity principle or otherwise. The extent of coverage is therefore likely to be determined primarily, if not entirely, by the express terms of the policy.

Unlike the policies considered in the *Tughans* and *Sayers* cases, FIPI policies commonly contain more narrowly drawn insuring clauses or other policy terms that may limit the policy's ability to respond to restitutionary or non-compensatory claims. Aside from the insuring clause itself, which is the natural starting point for considering coverage, the policy definitions are likely to play a significant role in the delineation of cover.

The definition of a claim itself may include a requirement for a demand for compensation or an allegation of having caused loss to a third party. More commonly, however, the Claim definition itself is broad and includes any demand seeking monetary or non-monetary relief. In either case, the definition of Loss (or Third Party Loss or similar), is in many cases determinative of whether the policy is capable of responding to remedies that are partially or wholly non-compensatory.

The loss definition may be expressly limited to compensatory remedies or may include express coverage for restitution orders (within certain specified circumstances). In some cases, "fees, commissions and charges received by the insured" are expressly carved out of the loss definition, which would clearly have a bearing in cases similar to the *Tughans* example discussed above, although it is not clear that such a carve-out would preclude coverage where the claim is framed in damages, as it was in *Tughans*.

It appears, however, in the motor finance context, that the Supreme Court's order to FirstRand to pay the amount of commission to Mr Johnson (plus interest) would not be caught by such a provision, since the commission complained of was not "received by the insured" (nor paid by the claimant), but rather paid by the Insured (i.e. the lender) to the motor dealer. The remedy was not measured by any profit received by the lender, and is not therefore properly characterised as restitutionary in nature.

Definitions and other related policy terms tend to be highly bespoke and interlocking, so it is always important to consider the policy as a whole. The answer to the question will rarely be found by studying a single policy clause in isolation.

For these reasons, when negotiating terms of coverage with insurers, financial institutions should pay particular attention to the key definitions (claim, loss, civil liability, third party loss etc) to ensure that the broadest possible cover is granted, since very minor variations in the drafting of these provisions can make the difference between potentially existential regulatory redress exposures being covered or uncovered. Consideration should be given to whether, taken as a whole, the terms of the policy restrict coverage for remedies that are restitutionary or non-compensatory in nature. If so, a discussion around the scope of the cover being offered by underwriters before the terms are agreed may help to avoid disputes when claims arise after the policy has been issued.

Key takeaways

Financial institutions' insurance policies are rarely purchased off the shelf and tend to be complex and highly negotiated. For the reasons discussed above, a wide degree of variance in policy wordings means that the capability of IMI and similar policy wordings to respond to losses arising from regulatory redress schemes is by no means certain.

Understanding the coverage provided, therefore, requires careful study of express policy terms (in particular, the relevant insuring clause(s) together with their interaction with pertinent policy definitions) against a proper understanding of the relevant common law principles. A review of the authorities cautions against any assumption that certain types of loss either are or are not covered, since in most cases, there is no single overarching principle governing coverage.

The starting point must be a thorough analysis of the legal or statutory basis of the redress, since, as discussed above, certain mechanisms (such as s404 FSMA) are limited to awarding redress for loss suffered by consumers, and must by definition be regarded as compensatory.

Other routes (s384, FOS, s55L) grant broader discretion to award redress in response to profits improperly gained, with no requirement to demonstrate loss to a third party. In that case, the substance of the alleged breaches and the nature and form of redress must be considered to ascertain whether the redress is compensatory, restitutionary or a combination of the two. To the extent that redress is restitutionary, the terms of the policy (in particular the definitions of claim, loss, civil liability and other similar terms) then govern the extent to which coverage may be provided for the firm's liabilities. Subject to the doctrine of illegality prohibiting insurance of liabilities arising from the insured's criminal or intentional acts, there appears to be no general common law principle precluding coverage of such matters.

Limitation that knows no bounds: Has this been given adequate consideration?

Howden

When assessing risk, and in particular when acquiring another company, the exposure to claims arising from historic events should not be overlooked.

Standard longstop protection provided by Section 14B of the 1980 Limitation Act: 'the 15 year rule'

In simple terms a civil claim for damages for negligence cannot be brought 15 years from the date (or, if more than one, from the last of the dates) of that act or omission.

This is in effect to avoid creating indefinite liability.

Henrietta Gordon

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The exceptions to the 15-year rule

There are two key ways that claimants can circumvent the protection afforded to potential defendants by the 15-year rule.

Deliberate concealment

Where there has been 'deliberate concealment' and 'deliberate breach of duty' for the purposes of sections 32(1)(b) and 32(2) of the Limitation Act 1980 a party will not be protected from a civil claim by the 15-year longstop rule.

This risk exposure was brought to the fore in the recent Supreme Court decision handed down in *Hopcraft v Close Brothers Ltd* [2025] UKSC 33 and the FCA motor finance compensation scheme which is proposing to include customers who were treated unfairly as far back as 2007 ie over 15 years ago. The scheme goes beyond 15 years because the Supreme Court found there to have been deliberate concealment as to the commission paid to the broker and the failure to disclose the contractual tie with the lender.

Complaints to the FOS are not restricted by the 15-year rule

A complainant may bring a complaint to the FOS three years from "the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;"

This was not an accident and the longstop is not to be implied. The decision to omit the longstop was a deliberate policy decision.

The decision was also specifically considered in the context of the Financial Advice Market Review FAMR March 2016 which was headed by Tracy McDermott then the head of the FCA.

"Some respondents to the Call for Input felt strongly that the risk of indefinite liability has a negative impact on financial advice businesses… other respondents felt that the introduction of such a longstop would not reflect the reality of financial services advice, where many products sold are very long term and consumers cannot reasonably be expected to realise they have a cause for complaint for many years, because it can be very difficult to assess the quality of advice earlier on."

The FCA had relied on data from the FOS which it said showed comparatively few complaints made in respect of investments from over 15 years ago. The FCA said that as a result the risk of indefinite liability was not so large and that it would not be in the interests of consumers to remove the protection under the FOS rules from the 15-year longstop.

Pensions, loan agreements and mortgages are examples of financial products which could be subject to review many years later.

Obligation to self-report

Insureds are under a regulatory obligation to consider providing appropriate and proportionate redress. It is likely to be reasonable if a regulated entity finds an issue to take a proactive approach.

DISP 1.3.6

Where a *firm* identifies (from its *complaints* or otherwise) recurring or systemic problems in its provision of, or failure to provide, a financial service or *claims management service*, it should (in accordance with *Principle* 6 (Customers' interests) and to the extent that it applies) consider whether it ought to act with regard to the position of *customers* who may have suffered detriment from, or been potentially disadvantaged by, such problems but who have not complained and, if so, take appropriate and proportionate measures to ensure that those *customers* are given appropriate redress or a proper opportunity to obtain it. In particular, the *firm* should:

1. ascertain the scope and severity of the consumer detriment that might have arisen; and
2. consider whether it is fair and reasonable for the *firm* to undertake proactively a redress or remediation exercise, which may include contacting *customers* who have not complained.

The entity is likely to have to look at the standards in practice at the time the advice was given.

Given that no 15-year longstop protection applies this could involve looking back at advice or a service provided 20 years ago.

Another question is not just the overall period for review but how the firm approaches the customers affected. For instance does this obligation involve actively approaching customers and informing them a review is being undertaken or inviting them to respond positively if they wish to have their file reviewed? Such an obligation would be a regulatory responsibility but any legal liability arising should then trigger an insured's PI insurance policy subject of course to terms and conditions.

Quantum and the FOS cap in assessing risk exposure

When calculating the redress payable, consideration should be given to whether any redress payable should be limited to what would have been paid by the FOS and if so would it be the cap at the time the investment advice was provided or the cap which is in place at the time when the redress scheme is being calculated.

Potential Limitation changes on the horizon

The FCA is considering whether to modernise the redress scheme which includes reforming the current limitations rules that allow complaints to the FOS for allegedly negligent advice or services provided over 15 years ago.

Some industry stakeholders have argued the lack of a longstop date creates uncertainty, leading to difficulties securing professional indemnity insurance and potentially deterring investment.

The Treasury is consulting on introducing a 10-year longstop date within which complaints must be brought to the FOS. However the Treasury also proposes to give the FCA limited flexibility to make exceptions to this, where longer timeframes are justified in exceptional circumstances. Consumers would keep the right to bring cases to the courts outside of the longstop, subject to any existing rules and statutory time limitations e.g. a claim based on concealment.

Takeaway

- Ensure that any due diligence carried out has considered the potential risks arising from financial products or services provided to those that could bring a complaint to the FOS because any liability to them is in a sense currently limitless ie.
  - individual customers
  - micro enterprises
  - small businesses; and
  - some charities and trusts.
- Has appropriate consideration been given to whether an acquired company has purchased run off cover and even if they have done with an average life span of 6 years that cover may have expired in any event.
- Be alive to the rear view mirror.

Directors and Officers

James Breese and Arjun Dhar

For policyholders, the landscape of potential risks for directors and officers continues to evolve, including increased use of artificial intelligence tools, environmental and social governance obligations and the new "failure to prevent fraud" law discussed in detail in the latest edition of this Policyholder Review. Directors' and officers' ("D&O") policies, therefore, remain an essential risk management tool but continue to be a fertile ground for coverage disputes.

The current claims environment suggests that insurers are managing this unpredictability by boosting their claims management capabilities and taking a more aggressive approach on claims. It is important that policyholders and their brokers continue to carefully check that their insurance programmes are adequate.

Legal updates – securities litigation

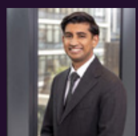
Securities litigation remains an increasingly contentious area and merits close attention. An evolving legal, regulatory and technological landscape means it continues to grow as a likely source of claims under D&O policies.

Securities litigation in the UK has accelerated in recent years. Common law rights of action were supplemented first by statutory rights under s90 of the Financial Services and Markets Act 2000 (FSMA) and subsequently under s90A. Companies are expressly permitted to indemnify directors under ss232(2)(b) and 234(1) Companies Act 2006, and to purchase insurance for them under ss232(2)(c) and 233.

Sections 90 and 90A of FSMA provide a remedy to those who have suffered loss in reliance on untrue or misleading statements in listing particulars, or where any required matters were excluded from those particulars. Stewarts has acted on some of the highest value and high-profile securities litigation in the UK, including the *RBS Rights Issue Litigation.*

With both issuers and their directors and officers exposed to securities claims in the UK, securities claims cover for individuals is included under a typical UK D&O wording under Sides A and B, with cover for the company under Side C usually available at an additional premium. Cover for US claims is often excluded due to the increased exposure.

James Breese
Partner
Policyholder Disputes



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Policyholder Disputes

Current landscape

The acceleration in securities litigation over recent years comes in an environment of heightened shareholder activism, greater availability of litigation funding and artificial intelligence (AI) risks.

The Court of Appeal had to consider for the first time, in *Wirral Council v Indivior Plc* [2025] EWCA Civ 40, whether the representative action procedure (which enables opt-out 'class action'-style group litigation) was appropriate for a securities claim. The court dismissed the appeal, agreeing with the first instance court that the claims should proceed only by way of multi-party proceedings. While this decision may act as an obstacle for book-building claims on behalf of retail investors (whose claims may be more limited in value), it is likely to be temporary. The decision may help potential litigants (and their advisers) navigate a way through the procedural requirements for bringing class action style disputes such as we see in the United States.

For example, across the Atlantic, data from the North American market shows an unmistakable upward trend in securities class action lawsuits, particularly those alleging false or misleading statements related to artificial intelligence.

Frequent themes in these lawsuits are allegations of (i) exaggeration of AI capabilities; (ii) exaggeration of the effect of AI adoption on the companies' bottom lines; (iii) failure to disclose limitations associated with the adoption of AI; and (iv) misleading statements about risks associated with the adoption of AI.

Indeed, data from Law360 shows that in the United States, 2025 is on track to break the record for AI-related securities class action filings. It remains to be seen whether these represent an across-the-board increase in meritorious rather than speculative claims, as the courts' approach to these cases evolves.

The D&O claims environment in the UK often follows the trends seen across the pond. Where the potential defendants to a s90 claim could be any person responsible for the prospectus or listing particulars, an array of insured persons under a D&O policy might be part of the factual matrix for a securities claim, which could conceivably give rise to extensive claims under D&O policies. A key area to monitor will be whether the English courts accommodate the use of the representative action procedure in claims alleging harm from the use of AI tools, which could create a wider exposure that goes beyond potential claims from institutional investors only.

Common issues in D&O claims

International insurance programmes

D&O policies are frequently written as part of global programmes, with a master policy covering claims in a number of jurisdictions, often on a difference-in-conditions basis.

Issues can arise where there are legal or regulatory differences between the law of the state governing the policy and the law of the state in which the insured peril has occurred.

We also see issues arise in cross-border D&O claims where the insured person may be the subject of some civil, criminal or regulatory investigation (or allegations) in another jurisdiction (often the US) and is concerned about providing disclosure of documents to their D&O insurers when that documentation may become disclosable/discoverable at a later stage in the underlying proceedings to which the insured person is subject. This is a complex issue to navigate when, on the one hand, the insured person is concerned to ensure that any privilege over documents is retained, while on the other hand, they are trying to unlock coverage for defence costs that may be essential to defending the underlying allegations.

Allocation

Another common issue arises when D&O claims are made in respect of both covered and uncovered matters or made jointly against covered and uncovered individuals or companies. Establishing the proportion of covered loss in such cases is not straightforward and is referred to as "allocation". It is a common issue for a variety of D&O claims, not just those that arise out of securities litigation or potential litigation.

In *International Energy Group Ltd v Zurich Insurance plc UK Branch (Association of British Insurers and another intervening)* [2015] UKSC 33, the Supreme Court approved and applied the allocation principle established by the Privy Council in *New Zealand Forest Products Ltd v New Zealand Insurance Co Ltd* [1997] 1 WLR 1237. In that case, the insured had incurred defence costs jointly on its own behalf and that of an uninsured defendant. Because the insured was able to demonstrate that the costs actually incurred would have been the same regardless of the representation of the uninsured defendant, the court found that all of the costs were proximately caused by an insured peril and therefore covered in full, notwithstanding that they also benefited an uninsured party.

Many policies now contain express allocation clauses, providing that where claims are made in relation to both covered and uncovered matters, or against both covered and uncovered persons, the insured and insurer agree to use commercially reasonable efforts to agree a fair and reasonable allocation of covered vs uncovered costs, in the absence of which the matter is referred for determination by a third-party expert.

While it will be in insurers' interest to argue that such provisions oust the *New Zealand Forest* principle, it is far from clear that they can do so. It ought to remain fair and reasonable to apply the reasoning set out by the court in that case, as followed by the Supreme Court in *International Energy Group*.

The insured versus insured exclusion

Many policies contain an exclusion of liability for loss flowing from claims brought by one insured against another. The exclusion is by no means included as standard, and its scope is often limited to claims brought by a major shareholder of the insured, claims brought in the USA or collaborative claims. The exclusion derives from public policy and commercial considerations to avoid collusion between insured persons and entities seeking to access an insurer's capital by generating claims against themselves.

Composite policies: update following Bath Racecourse

A typical D&O policy will include, at a minimum, a single corporate entity and its director(s), whose interests under the policy are several and not joint. This can range in complexity, particularly where D&O cover purchased by an investment fund is extended to cover newly acquired subsidiaries/portfolio companies.

The disparate nature of the insureds means that the policy will likely be treated as composite in nature; indeed, it is probably the archetypal example of a composite policy. In other words, the policy is regarded as a single document evidencing a bundle of bilateral contracts between the insurer(s) and each of the insureds, whose respective rights and obligations may be enforced independently.

It is common practice for a parent company to purchase a policy in its own name for the benefit of its subsidiaries and affiliates. The subsidiary companies may be individually named in a policy schedule, incorporated by naming the insured as "XCo plc and its subsidiaries and affiliates", or by defining "insured" or "company" in a similar way. Either method can be effective to ensure that all group companies are insured under the policy, as the Court of Appeal confirmed in *Bath Racecourse v Liberty Mutual SE*. EWCA Civ 153.

The significance of a composite policy is found in the application of the limits and sub-limits of indemnity that are available under such a policy.

Aggregation and limits

In the context of both fidelity and business interruption insurance, the Court of Appeal has found that the composite nature of a policy insuring a group of companies was a decisive factor that led to the specified limit of liability being available to each of the insured companies separately rather than shared between them *(New Hampshire Insurance v MGN* [1997] L.R.L.R. 24, *Bath Racecourse v Liberty Mutual Insurance Europe SE* [2025] EWCA Civ 153).

The basic principle behind establishing how limits of liability apply to insureds under a composite policy is ultimately that it is a matter of policy construction and determining the objective intention of the parties at the time the terms were agreed. The objective intention of the parties in the context of a D&O policy may well be found to produce a different outcome from that in the cases previously decided, given the possible concurrent claims against multiple directors in relation to a single incident and given that the cover is all purchased by the company to cover its employees. However, certainly there can be no presumption that a limit is intended to apply on an aggregate basis in the absence of words to that effect.

Artificial intelligence and D&O cover

We have commented above on some of the risks posed under D&O policies from the perspective of securities litigation borne out of allegations relating to the use of, or commentary on, AI. The increased use of AI can also engage a D&O policy in a traditional way, however, with the volume of claim notifications only likely to rise with over half of the UK's businesses now adopting some form of AI.

On one view, there will be familiar arguments around the extent of 'silent' cover available, such as we saw years ago in relation to cyber risks and the extent to which D&O policies could respond. On the other, on the face of a typical D&O policy and the widely drafted provisions therein, there may be affirmative cover for losses caused by the use and deployment of AI.

Whether there is or is not cover is clearly going to turn on the precise drafting of the policy and the extent of the long list of exclusion clauses that a D&O policy invariably contains. In an evolving area, and with one eye on the nature of AI-related litigation that is already being seen in the US, D&Os and their advisers will do well to think carefully about the scope of cover they require.

Concluding remarks

Between the 2025 and 2026 editions of this Policyholder Review, we have commented on the following risks:

1. The Economic Crime and Corporate Transparency Act 2023.
2. Significant new precedents in relation to directors' duties.
3. Claims arising out of increasing numbers of company insolvencies.
4. Climate change-related risks.
5. Claims arising out of AI, including 'AI-washing', as increasingly seen in the US.
6. Increased regulatory activity (and fines) and accountability for individuals.
7. Increase in securities litigation.

This extensive list speaks volumes about the challenging environment for D&O claims, reflecting the rapidly evolving underlying risk landscape, which will not abate. For the most part, the claims market for these risks in this jurisdiction is in its infancy, but insureds are still at risk through international markets and stakeholders.

Policyholders and their brokers must be increasingly precise about the cover that is required and understand where the gaps in cover may be. There is a myriad of ways that a business and its insured persons could find themselves the subject of unwanted scrutiny by a variety of third parties, which will quickly drain resources if inadequate cover was purchased in the first place and/or if a claim is not appropriately managed from the minute it first arises.

War and Political Risk

Hebe Swain

With global conflicts at historically high levels and political instability driven by an unpredictable US administration, War and Political Risks coverage is more relevant than ever. The factual circumstances in which claims arise are often by their very nature sensitive and contentious, creating fertile ground for coverage disputes in these lines of business. It is unsurprising, then, that War Risks coverage has assumed a high profile in English coverage litigation in 2025.

War Risks cover triggered in the Russian aviation litigation

In our 2025 Annual Policyholder Review, we discussed the "Russian aviation litigation", which considered six claims brought by airline lessors whose aircraft were stranded in Russia following its invasion of Ukraine. The claims were scheduled for a 12-week trial in autumn 2024 and dealt with a number of complex insurance issues, both specific to the aviation insurance market and of wider market importance.

The Commercial Court decision

In June 2025, the Commercial Court handed down its judgment in the initial "mega trial" of claims by airline lessors against the insurers of their hull All Risks and hull War Risks policies. Our detailed review of the Commercial Court decision, published immediately after it was handed down, can be found at page 141 of this Annual Policyholder Review.

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Policyholder Disputes

The decision covered a wide range of issues, including (1) whether the Contingent or Possessed covers under the aircraft hull policies had been triggered, (2) whether the lessors had been permanently deprived of the aircraft and engines stuck in Russia, and (3) whether US or EU sanctions prohibited insurers from paying out under the policy. All these issues are considered in our earlier article.

The fourth key battleground in the case was the critical question of whether the loss of the aircraft and engines fell within the scope of the All Risks cover (which had an exclusion for war risks ("Exclusion AVN48B")) or the War Risks cover (a separate section of the policy designed to provide cover for these excluded losses). The question was important to lessors, as they could seek to recover their losses in full under the All Risks policy, whereas the War Risks cover was sub-limited to a muchlower amount.

For AerCap (the aircraft lessor with the largest claim), the outcome made a difference between receiving indemnity for its full losses, $2.051 billion at the time of trial, or losses up to the War Risks sub-limit of $1.2 billion. For insurers, the decision was even more critical, as the War Risks and All Risks sections of the policies were underwritten by different panels of insurers (so the decision had the potential to determine whether they were liable under the policies at all).

Did the peril fall within the All Risks or War Risks section of the policies?

When considering which cover the losses fell within, the debate focused on the construction of two specific perils set out in Exclusion AVN48B of the All Risks policy:

"Any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional"
(the "Political Peril")

"Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government …"
(the "Government Perils")

If either exclusion was engaged, it was common ground that the All Risks policy would not respond, but the War Risks policy would.

The court considered that the Political Peril was not concerned with acts of the government itself but with acts of individuals relating to a government stance. This was clear from the reference to acts of "one or more persons", which could be juxtaposed with the reference to "any Government" in the Government Perils exclusion. Construing the Political Peril as a whole, the court concluded that the proper interpretation was as follows:

"What is contemplated as covered by the clause as a whole is acts which are in some sense adverse to the government of the place where they happen… I do not think that this adversity needs to be confined to where the ultimate aim pursued is the change of the government or its policy, but can embrace a case in which support for a government or government policy is pursued by unauthorised (for example violent) means."

In view of this interpretation, the clause was not triggered on the facts, since the acts leading to the loss were acts of the government itself.

In relation to the construction of the Government Perils clause, War Risks insurers argued that there must be a formal order or directive from the government for the Government Perils to apply. The court disagreed and concluded that this was not necessary, noting the inclusion of terms such as "seizure" and "detention" within the clause. These terms suggested that the trigger would be based on the practicalities of what had happened, and that there were no strict formal requirements for legislation to be in place underpinning these acts.

Although the court spent time considering the construction of the exclusion, this analysis was somewhat moot as the court found that the 10 March 2022 Russian government Order GR 311, which prohibited the export of foreign aircraft from the country, was, in any case, a relevant action for the purpose of the Government Perils. Order GR 311 was clearly a formal order from the government and amounted to a "restraint" or "detention" for the purposes of the Government Perils.

Having considered the interpretation of Exclusion AVN48B and established that the Government Perils had occurred, the court then had to consider causation. If the loss was proximately caused (solely or concurrently) by Order GR 311, then the Government Perils exclusion would be engaged, and War Risks insurers would be liable.

However, War Risks insurers pushed back on this position, arguing that (despite Order GR 311) the proximate cause of the loss was not the acts of the Russian government, but instead a commercial decision by the Russian airlines not to return the aircraft that were on lease. The court considered a wide range of evidence on this issue, including expert evidence on Russian politics, public policy and economics, as well as on the Russian civil aviation sector. In addition, factual evidence was adduced from various individuals at the aircraft lessors, in the absence of evidence being available from the Russian airlines themselves. The court also considered publicly available information.

Clearly, the evidentiary landscape was unusual in circumstances where the court was being asked to consider the proximate cause of the loss of the aircraft without evidence from the decision-makers in Russia. Similar challenges may arise in other war-related coverage disputes (for example, regarding the application of war exclusions under a cyber policy), given the inherent challenges with accessing information and documents in such circumstances. The range of evidence considered in the Russian aviation litigation and the court's view of this evidence will be instructive for those engaging in similar coverage disputes.

After considering the evidence in detail, the court concluded that Order GR 311 was the sole proximate cause of the loss. The court found, on the evidence, that prior to Order GR 311, there was no clear decision by any of the Russian airlines to keep the aircraft permanently, such that the lessors were permanently deprived of the aircraft. In contrast, Order GR 311 represented an official and legally binding prohibition on the return of aircraft to lessors. Accordingly, the Government Perils exclusion applied, and the War Risks insurers were liable to indemnify the lessors for their losses.

The lessors were, therefore, in each case, limited to an indemnity for the lower sub-limit of liability provided for in the War Risks policy, rather than a full indemnity for their losses.

What next?

While the Commercial Court judgment has now been handed down in the lessor policy claims, it is clear that a significant volume of related litigation remains in play, and we can expect further chapters in the Russian aviation litigation saga well into 2026.

In particular, there are likely to be hearings or decisions relating to the following:

- **Appeals** – Perhaps unsurprisingly, given their significant exposure following the judgment ($1.035 billion plus costs and interest in AerCap's claim alone), War Risks insurers have sought permission to appeal the Commercial Court decision. The Commercial Court denied the insurers permission to appeal at a consequentials hearing held in September 2025; however, War Risks insurers have now filed an application with the Court of Appeal, the outcome of which is awaited.

  Interestingly, while insurers sought to appeal the peril and causation decisions when applying to the Commercial Court, these grounds are not maintained in their application to the Court of Appeal. Instead, insurers have only sought permission to appeal issues around (1) the construction of the contingent cover, (2) whether the aircraft were a total loss, and (3) the treatment of financial recoveries. There is therefore no prospect of shifting the liability back to All Risks insurers (which could result in an increased recovery for the lessors), and the only potential outcome in the Court of Appeal would be a reduction or elimination of War Risks insurers' liability.

- **Interest** – In addition, some of the War Risks insurers have sought permission to appeal the Commercial Court's decision on interest, challenging the date on which interest is calculated as starting to accrue and the applicable rate of interest. The Commercial Court has significant discretion in making an award for interest, and it is an unusual step for parties to appeal such a decision. However, in this case, the interest award was significant.

  In AerCap's case, the Commercial Court held that simple interest should be awarded at the US prime rate (given the judgment was payable in US dollars) from the date AerCap commenced its claim (ie, 9 June 2022). US prime fluctuated substantially during the period, reaching 8.5% at its peak. Accordingly, AerCap is due to receive a sizeable interest payment of $240 million under the Commercial Court decision.

- **Operator Policy claims** – With judgment in the Lessor Policy claims handed down, attention will turn to the Operator Policy claims, where lessors are claiming against the reinsurers of the policies held by the Russian airline operators. Lessors are able to bring these claims directly against the Operator Policy reinsurers by way of (1) being noted as "Additional Insureds" under the underlying policies, and (2) cut-through clauses in the reinsurance policies.

  The Operator Policy claims remain relevant because lessors were only partially indemnified for their losses under the War Risks contingent cover, so they may wish to pursue their uninsured losses under the Operator Policies. The Operator Policies are governed by Russian law, and there is therefore no guarantee that the coverage position under the Operator Policies will be the same as that under the Lessor Policies. In addition, certain War Risks insurers found liable under the Lessor Policies have issued contribution claims against the Operator Policy reinsurers.

- **Costs** – The issue of costs was determined in principle at a consequentials hearing in September 2025, with AerCap being awarded 65% of its costs and All Risks insurers 90% (to be borne 65% by War Risks insurers, and 35% by AerCap). The parties will now move to the assessment process, which could take some time. Given the size of the costs incurred, with AerCap's total costs estimated at £81 million, the court has taken the unusual step of extending the timeframe by which detailed assessment of costs must commence from the usual three months to around six months.

A further 'WIN WIN' for a policyholder claiming under a War and Political Risks policy

This year saw an important Court of Appeal decision in *Delos Shipholding SA & Ors v Allianz Global Corporate and Specialty SE & Ors* ("WIN WIN") [2025] EWCA Civ 1019, which considered the application of an exclusion in a marine War Risks insurance policy.

The insurance claim revolved around the detention of the vessel WIN WIN on 17 February 2019, after it anchored just inside Indonesian territorial waters without permission. The anchorage, near Singapore, had been used by hundreds of vessels for many years. Before February 2019, there had been no known instances of vessels being detained by Indonesian authorities simply for anchoring there. Accordingly, the detention represented a change of practice by the Indonesian authorities; however, their action was in line with applicable law, as the WIN WIN did not have the clearances needed to anchor where it did.

The policy provided War and Political Risks cover for a fleet of vessels, which included the WIN WIN. Under the terms of the policy, the vessel would be treated as a constructive total loss if it was detained for six months or more. Therefore, the claimant sent notices of abandonment to insurers on around 19 August 2019. Insurers declined the notices.

The policy contained a number of exclusions, and one of the key issues for the appeal revolved around the application and interpretation of the following clause:

"This insurance does not cover any loss, damage or expense caused by, resulting from, or incurred as a consequence of: […]

"(e) Arrest, restraint or detainment under customs or quarantine regulations and similar arrests, restraints or detainments not arising from actual or impending hostilities;" ("American Exclusion 1(e)").

In the first instance decision (*Delos Shipholding SA v Allianz Global Corporate and Specialty SE* [2024] EWHC 719 (Comm)), the court concluded that the exclusion would not apply. In part, this decision was based upon a comparison between the American Exclusion 1(e) and a similar exclusion, clause 4.1.5 of the 'English Institute War and Strikes Clauses (1983)' ("English Institute Clause 4.15"). Insurers appealed this decision.

In considering the issue again, the Court of Appeal rejected the High Court's analysis and determined that there was no reason to suppose the parties wanted the American Exclusion 1(e) to have the same effect as English Institute Clause 4.1.5. The clauses had different wordings and different drafting histories. Instead, the Court of Appeal confirmed that each clause should be interpreted on its own terms and that the usual principles of construction would apply. Namely, they confirmed that the clause should be interpreted objectively, taking into account the relevant commercial background.

In considering the clause afresh, the crux of the issue facing the Court of Appeal was around the interpretation of the word "similar" where the exclusion referred to "similar arrests, restraints or detainments". The court had to decide whether this could be interpreted broadly enough to include the circumstances surrounding the arrest of the WIN WIN. The Court of Appeal concluded that it could not. In forming its view, the Court of Appeal stated: "As all arrests are similar in that they place a vessel under the control of the arresting state, it is clear that the similarity with which the clause is concerned is whether the regulation under which the arrest is effected is similar to, or has a similar purpose to, a customs or quarantine regulation."

The Court of Appeal found that "customs regulations" referred to laws regulating the import of goods into the land territory of a state and that "quarantine regulations" referred to laws for the protection of health. Having determined the scope of these regulations, the Court of Appeal considered it "straightforward" that the detention of the WIN WIN for anchoring without permission had little similarity to either. Accordingly, the exclusion did not apply in the circumstances, and the policyholder was able to recover under its war and political risks policy.

The Court of Appeal's decision may prove helpful in future to policyholders seeking to rely on a narrow construction of policy exclusions, both in the war risks context and more generally.

Tariffs, tariffs and more tariffs

One of the watchwords for Political Risk in 2025 has to be "tariffs". The impact of volatile political trade decisions in 2025 has been significant, particularly for businesses with global supply chains.

Most political risk policies deal with political risks affecting tangible property (such as expropriation, political violence and forced abandonment) or currency inconvertibility. For this reason, while wordings should always be checked and policy scopes vary, the majority of political risk policies are unlikely to respond directly to the commercial impact caused by changes to tariffs. Yet, the impact of the numerous global increases in tariffs has been broad and far-reaching, stretching its fingers into many other lines of insurance. We consider three key issues below.

Are policy limits sufficient?

Depending on a policyholder's sector and exposure to international supply chains, tariffs could have a significant impact on the size of potential losses. For the construction sector and property policies in particular, policyholders should be mindful that the costs of goods within global supply chains may have increased significantly over the course of 2025 because of additional import and export tariffs. Accordingly, the cost of replacing or repairing damaged property may have risen substantially since policy inception, placing some policyholders in the unenviable position of having policy limits that are no longer sufficient.

It is important that policyholders liaise with their brokers about economic changes to the risk insured and consider whether mid-term changes may be required to ensure limits are appropriate for the risks they are looking to mitigate. For those managing renewals, a fresh assessment of likely losses is also critical to ensure insurers have received a fair presentation of the risk. If the risk has not been properly presented, policyholders may find themselves facing a proportionate reduction in any payment made for a claim, in response to their breach of the duty of fair presentation.

Could directors and officers face claims?

In view of highly dynamic pricing within global supply chains, optimising business planning to minimise cost has become increasingly important. Issues such as the origin of products, the location of factories and the flow of distribution around the global market are increasingly important decisions for businesses. There may be significant costs associated with such decisions, both positive (implementing changes to global supply chains) and passive (maintaining the status quo, particularly if this is significantly more expensive than viable alternatives). The uncertainty about how long the present high-tariff environment is likely to last makes decisions around investment and change highly challenging for directors and officers. The price of getting it wrong may not only impact the business's bottom line but also lead to personal claims or shareholder claims as these decisions come under increased scrutiny. For that reason, we may yet see directors' and officers' insurance claims increasing as a result of the high tariff environment.

Will trade credit policies assist?

Traditional trade credit policies can be purchased to cover the risk of a counterparty defaulting between one party completing their contractual obligations (eg making a pre-payment) and the other party completing theirs (eg supplying purchased goods). These traditional trade credit policies are unlikely to respond directly to the primary impact of tariffs being imposed, ie, any change in price or reduction in profit margin. However, if an increase in tariffs has a more significant impact on a counterparty's solvency, then trade credit policies could prove a critical port of call for companies impacted by counterparty insolvencies, thereby providing a degree of indirect protection from the risks of a turbulent global trade environment.

A real-world example of this might be seen in the recent insolvency of the US car parts manufacturer First Brands, which the press has linked with a number of financial challenges, including changes in tariff policies. The company is reported to have accumulated nearly $6 billion in traditional debt and billions more in off-balance sheet financing. Its collapse will undoubtedly cause reverberations in the global trade credit markets, with echoes of the fallout from the Greensill Capital insolvency in 2021.

Concluding thoughts

In increasingly turbulent geopolitical times, the English courts' ongoing assessment of coverage under War Risks and Political Risks policies is essential reading for any organisation seeking to mitigate its exposure to global risks.

The decisions also have important potential read-across to other lines of business, in particular cyber, which is increasingly named as the risk of greatest concern to risk managers across all sectors. Against a backdrop of rapid growth in cyber insurance penetration, combined with an exponential increase in ransomware attacks, the market has recently taken steps to cut back coverage for state-sponsored cyber-attacks, which are generally regarded as uninsurable. A plethora of exclusionary wordings abound in the market, none of which have yet been tested in the English courts. In the event of a systemic cyber-attack alleged by insurers to be state-sponsored, the latest War Risks decisions will form an important starting point when seeking to construe the full range of cyber war exclusions now in play in the London market.

Property Damage and Business Interruption

James Breese and Zara Okereafor

Foreword

Over five years on from the start of the pandemic, Covid-19 business interruption insurance claims continue to feature prominently in the courts of England and Wales. Since March 2020, 140 Covid-19 business interruption insurance claims have been issued in the courts. Of those, 65% remain active. 2025 provided more resolutions of Covid-19 business interruption insurance claims than in prior years with seven settlements, one withdrawn case and one judgment. On one view, you would expect to see more resolutions with the passage of time. On the other, these settlements reflect a) the reducing number of the issues in dispute across these claims given the extent of litigation that has now been through the courts and arbitral tribunals; and b) a softening in the market generally this year in relation to these claims.

The softening is unsurprising given the sheer volume of litigation in this area. That litigation has provided helpful clarifications for both sides of the market for difficult construction issues across a variety of wordings.

The end may be in sight for Covid-19 business interruption insurance litigation, particularly with limitation becoming a focus in early 2026, along with the Supreme Court's determination on the treatment of furlough payments in these claims. It will be an exciting start to 2026 in that regard, but we may then start to see these disputes tail off, or at least not require further litigation. However, readers with an eye for detail will appreciate that this is far from the first time that we have made that statement.

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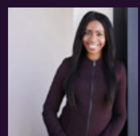

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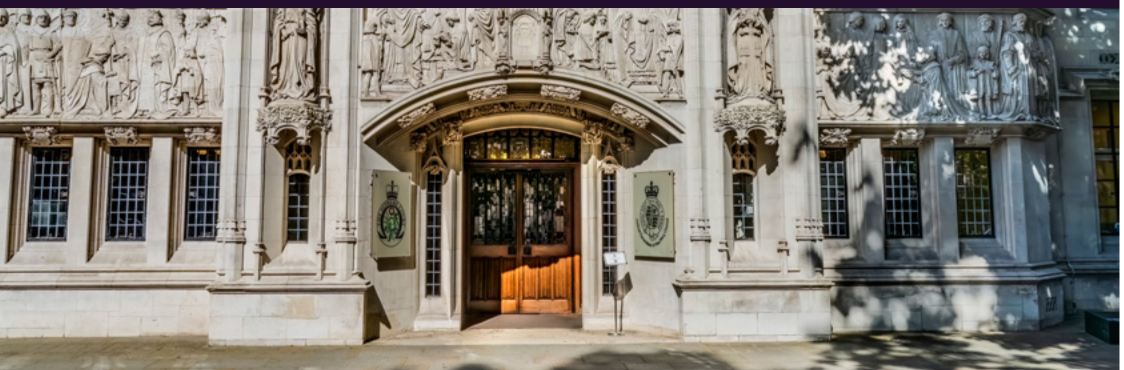


Key 2025 business interruption claim developments

There have been various decisions in *Bath Racecourse Co Ltd & Ors v (1) Liberty Mutual Insurance Europe SE (2) Allianz Insurance Plc Ltd (3) Aviva Insurance Ltd*. Those decisions concern the scope and application of indemnity limits within a composite policy structure, how an "any one loss" wording is to operate and the treatment of furlough payments received by the insureds from the UK government.

Background

Bath Racecourse Co Ltd is one of 22 claimants within the Arena Racing Corporation Ltd. The group collectively owned and operated multiple racecourses, greyhound tracks, golf clubs, hotels and a pub at various locations in England and Wales. These were demonstrably affected by the actions taken by the UK government, the British Horseracing Authority ("BHA") and the Greyhound Board of Great Britain ("GBGB") in response to Covid-19.

The claimants had the benefit of a composite policy and a Denial of Access cover with a £2.5 million sub-limit of indemnity that was available for "any one loss" and would respond to the actions taken by the government or other "competent authorities".

The core contentious issues were:

1. Whether the BHA and GBGB are "competent authorities" within the meaning of this bespoke Bluefin Sport wording.
2. Whether the claimants' composite policy of insurance entitles each separate insured entity to its own limits and sub-limits of indemnity.
3. Whether the "any one loss" wording goes further and entitles each separate insured premises to its own limits and sub-limits of indemnity in circumstances where some insured entities own and operate separate businesses, eg a racecourse and a separate hotel and/or golf course and/or pub.
4. Whether the £2.5 million Denial of Access sub-limit is additionally available separately for each materially different government action, and, if so, which.
5. Whether insurers are to receive credit for the furlough payments the claimants received from the UK government by deducting them from the indemnity owed.

Composite policy limits: The Court of Appeal decision in February 2025

Bath Racecourse succeeded at first instance in 2024, and the Court of Appeal dismissed insurers' appeals in 2025. The Court of Appeal recognised that a composite policy consists of one overarching document containing separate contracts for each insured where a group is insured, ie parent and subsidiaries. Consequently, the policy terms in a composite policy are to be read as applying separately to each policyholder, reflecting what a reasonable policyholder would anticipate, unless there is express wording in the policy that varies that position. While the Court of Appeal said there is no "presumption", in practice it is clear that a composite policy will be approached from the starting position that limits and sub-limits of indemnity are available separately to each insured entity unless there is clear wording in the policy that provides it operates in a different way.

The Court of Appeal was clear that a reasonable policyholder would expect a composite policy to operate in this way. If insurers intended for that not to be the case, the Court of Appeal would expect to see express provisions in the policy confirming that limits and sub-limits operate on an aggregate (or some other) basis. In that case, a separate provision would be required to explain how competing claims between insureds within the same group would then be dealt with.

While this decision is unsurprising to us on the policyholder side of the market, given the decisions that already exist on this issue, including at appellate level, it is nevertheless helpful clarification for the market.

Policyholders and their advisers should carefully review the language in any composite policy being purchased to make sure that it continues to provide the breadth of cover required. We can foresee this being relevant for all commercial lines of insurance, including, for example, where cyber cover is required for an entire group. If there is a large systemic event affecting that group, it may be catastrophic to find that any coverage for potentially large losses could then be aggregated across the group.

Furlough: the Court of Appeal decision in February 2025

The Court of Appeal found against policyholders and agreed with the High Court judge's decision in *Stonegate* in 2022, concluding that insurers were entitled to deduct furlough payments from any indemnity owed. Favouring insurers, the Court of Appeal concluded: "The bottom line at the end of the day is that the insureds did not have to bear the expenses of the wages bill and to that extent, the charges or expenses of the business were reduced."

This issue could be worth billions to insurers, and furlough is estimated to have cost the government (or the taxpayer) in the region of £70 billion.

Policyholders argue that:

a. Furlough payments did not cause the expenses of the business to "cease" or "reduce" within the meaning of the policies.

b. The intention of the UK government's furlough scheme was to support businesses and save jobs, not to subsidise insurers. Policyholders argue that insurers received a 'windfall' from taxpayer funds by claiming the benefit of the furlough payments.

c. The furlough sums received from the UK government were gifts that should not be considered in the indemnity calculation.

d. The furlough payments were not caused by the insured peril. Those payments were received regardless.

In July 2025, the Supreme Court granted *Bath Racecourse & Ors*, as lead matter, permission to appeal this issue, determining that it raises an arguable point of law of public importance. The Supreme Court acknowledges that policyholders have an arguable case.

For policyholders, this represents a final opportunity to challenge the scope of the furlough deductions. It is therefore a critical issue that will be heard in February 2026.

Aggregation and "any one loss": the Commercial Court decision in July 2025

In July 2025, the Commercial Court handed down a further judgment in *Bath Racecourse* in which it addressed:

1. The meaning of "competent authority".
2. How the "any one loss" wording operates.
3. How many materially different government actions there may be.
4. The operation of the arbitration clause in the policy.

The meaning of "competent authority"

One of the key issues before the Commercial Court was whether the BHA and GBGB could be treated as "competent authorities" under the denial of access extension. The court confirmed that they could, explaining that, although both are private bodies, their suspension directives carried regulatory force extending beyond ordinary commercial activity. In doing so, the court clarified that "authority" does not necessarily mean a public or state body, confirming that industry regulators can trigger Non-Damage Denial of Access (NDDA) cover where their directions materially affect business operations.

The operation of "any one loss"

The court was asked to decide whether the "any one loss" sub-limit of indemnity applied separately to each *Bath Racecourse* claimant individually per relevant measure or action, per premises and/or per affected race. The court confirmed that the sub-limit applies per materially different action and per insured premises or facility (but not per affected race), allowing separate recoverable losses for each intervention and each premises or facility. This means that every materially different action can trigger a fresh sub-limit of indemnity, and that sub-limit is available separately to each premises operated by each insured entity.

For policyholders with multiple premises or facilities, this decision provides clarity on how sub-limits of indemnity operate. The determination in relation to this "any one loss" wording can materially increase potential recoveries for insured groups with multiple premises or facilities that experienced distinct interruptions at different locations as a result of materially different actions. While earlier decisions, such as *Various Eateries, Greggs and Stonegate*, addressed aggregation issues under different policy wordings, crucially, this decision is positive for policyholders with an "any one loss" wording.

Materially different actions

So, what constitutes a materially different action? The court examined measures or actions that imposed, or materially increased, restrictions on the use of the *Bath Racecourse* claimants' facilities, concluding that "there would only be a new risk trigger, and a fresh loss calculation, if the action of the authority imposed an **increased** restriction". Measures that merely maintained existing limitations or reduced them were not treated as triggering a fresh loss. Examples of materially different actions included instructions from the government and from the BHA and GBGB, as competent authorities, such as the prime minister's 16 March 2020 stay-at-home instruction, the BHA's closure instruction from 18 March 2020, and subsequent changes to regional tier restrictions later in 2020. By contrast, the court confirmed that instructions allowing racing behind closed doors after closure did not constitute a materially different action.

The decision is being appealed to the Court of Appeal, so more on this to come in 2026.

The operation of the arbitration clause in the policy

The court confirmed that the policy's arbitration clause applies only after its preconditions are met; until then, either party may pursue court proceedings. Insurers cannot require claims to pause after liability issues are resolved for a separate arbitration to follow. The *Bath Racecourse* claimants were entitled to seek payment of the indemnity under the policy, and the clause could not block the court from providing a final determination.

Since judgment was handed down in July 2025, the claimants have been granted permission to appeal the finding in relation to what constitutes a materially different government action, and insurers have been granted permission to appeal the finding in relation to the application of the "any one loss" mechanism.

Closed disease lists: Carbis Bay Hotel v AIG (2025)

In the broader landscape of Covid-19 business interruption litigation, the decision in *Carbis Bay Hotel v AIG* confirms the scope of coverage in closed disease lists. In this case, the court considered a closed list of 33 specified diseases within an infectious disease extension, which provided cover for business interruption or interference as a result of closure due to "any human infectious or human contagious Disease (excluding Acquired Immune Deficiency Syndrome [AIDS] or an AIDS-related condition)". The term "Infectious Diseases" was not defined, whereas "Disease" was defined by reference to a closed list of 33 diseases.

The court clarified that closed disease lists must be interpreted strictly and held that insurers were not obliged to pay any indemnity under that clause because Covid-19 did not feature on that list. While this narrows the scope of cover in certain cases, it nonetheless provides useful clarification of the boundaries of disease clauses and is consistent with the earlier decision in *Rockcliffe Hall v Travelers.*

Reinsurance developments

The Court of Appeal handed down judgment in *UnipolSai Assicurazioni SpA v Covéa Insurance Plc* in late 2024, clarifying key issues in excess of loss reinsurance disputes arising from the Covid-19 pandemic. Covéa had provided cover to policyholders such as nurseries and childcare facilities affected by government-mandated closures under its standard 'NurseryCare' policy wording, which included non-damage business interruption cover triggered by enforced closures. Covéa sought recovery from its reinsurer, UnipolSai, under a property catastrophe excess of loss reinsurance policy.

The dispute arose after UnipolSai declined cover on two grounds. The first ground concerned whether the Covid-19 pandemic constituted a "catastrophe" under the policy, with UnipolSai arguing it was merely a prolonged "state of affairs" and Covéa asserting that it was a single catastrophic occurrence. This was a key issue because UnipolSai agreed to indemnify Covea under the policy for each and every "Loss Occurrence", defined as "all individual losses arising out of and directly occasioned by one catastrophe". If the pandemic were not considered a catastrophe and merely a prolonged "state of affairs", Covéa would not be entitled to recover its losses, which were significant. The second ground related to the 168-hour "hours clause", which limited the measurement period for losses. UnipolSai contended that only losses occurring within this window were recoverable, potentially excluding significant losses that unfolded over a longer period.

An arbitration tribunal had previously ruled in favour of Covéa. The Court of Appeal confirmed this decision by clarifying that the Covid-19 pandemic, despite its extended duration, constituted a single catastrophic occurrence under the policy, establishing that large-scale, sustained events can trigger coverage. Importantly, the Court of Appeal also clarified that UnipolSai's interpretation was too narrow: losses that first occur within the 168-hour period can continue beyond it and still be treated as part of the same loss. This confirms the correct interpretation of the clause, which does not unduly restrict coverage where losses unfold over an extended timeframe, providing practical guidance for calculating and aggregating claims.

For a detailed analysis of the decision and further commentary, <u>see our earlier article.</u>

Another reinsurance dispute that may provide clarity on reinsurance cover for Covid-19 business interruption losses is the case of *WRBC Corporate Member Ltd v AXA XL Syndicate Ltd and others* concerning multi-line excess of loss treaties. The claimant, WRBC Corporate Member, seeks indemnity from multiple reinsurers for contingency losses arising from the cancellation or postponement of insured events (such as trade shows, conferences and other organised events) in the UK and the US during 2020-2021. The central issues include whether losses across multiple events and jurisdictions can be aggregated, how key terms such as "any one event" should be interpreted in the treaties and how reinsurance interacts with settlements at the primary insurance level. A preliminary issue hearing was refused in June 2025, and the full trial is scheduled for January 2026.

The outcome may provide important guidance on the treatment of complex, multi-layered Covid-19 claims under reinsurance agreements.

The journey of Covid-19-related insurance litigation is illustrated in this timeline, in which we have analysed all the key decisions.

Covid-19 and business interruption: a timeline

15 September 2020
Divisional Court hands down first instance judgment following Financial Conduct Authority's test case. Partial success for policyholders. Leapfrog appeal to the Supreme Court is ordered.

15 October 2020
Commercial Court hands down judgment in *TKC v Allianz*, in which it was found that Covid-19 did not cause loss of property.

15 January 2021
Supreme Court finds in favour of policyholders in the FCA test case; provides significant ruling on causation that paves the way for further wordings to respond to cover Covid-19 losses.

25 February 2021
Judgment handed down in *Rockliffe Hall v Travelers* in which Covid-19 was found not to be 'plague', such that the specified disease cover would not respond as it expressly covers certain diseases, of which Covid-19 was not one.

10 September 2021
Lord Mance hands down public award in China Taiping Arbitration; considers that the Supreme Court's findings on causation may have a wider application than just the disease wordings considered by the Supreme Court.

25 February 2022
Judgment handed down in *Corbin & King v Axa*. Mrs Justice Cockerill finds in favour of policyholders on coverage and aggregation. Policyholders with a non-damage denial of access wording entitled to recover on the basis of the Supreme Court's findings on causation. Their composite policy and 'any one claim' wording entitle the policyholders to separate limits of indemnity per insured entity and per premises. Axa did not appeal.

17 October 2022
First instance judgments in *Stonegate v MS Amlin & Ors, Greggs v Zurich and Various Eateries v Allianz*. Court finds that losses do not aggregate to a single occurrence, paving the way for policyholders to recover multiple limits of indemnity; but denies policyholders a 'per premises' recovery. Mr Justice Butcher considered that insurers are entitled to deduct from indemnity the 'furlough' payments that policyholders received from the government.

26 May 2023
Aggregation decision in *Pizza Express v Liberty Mutual*. Pizza Express was not entitled to a per premises recovery due to the construction of its 'occurrence'-based wording. Permission to appeal was denied.

16 June 2023
Commercial Court rules in favour of policyholders in 'At the Premises' test case, *London International Exhibition Centre Plc v RSA & Ors*. Mr Justice Butcher found that the Supreme Court's ruling on causation in the FCA test case also applies to this additional category of disease wordings.

24 October 2023
Further test case, *Gatwick Investments*, including other groups of policyholders such as *Liberty Retail* and Bath Racecourse in which policyholders sought to argue that the Supreme Court's findings on causation can also extend to Liberty Mutual's prevention of access (non damage) wording, and that multiple limits were available pursuant to composite policies of insurance.

November 2023
Stonegate settles its dispute with MS Amlin & Ors shortly before appeal is to be heard. This leaves first instance decision on furlough undisturbed, and which favours insurers.

28 November 2023
Various Eateries v Allianz appeal is heard. The furlough issue is not live, but Court of Appeal is asked to reconsider the key aggregation issues; namely whether losses aggregate to a single occurrence or whether multiple limits of indemnity are available.

16 January 2024
Court of Appeal hands down judgment in *Various Eateries v Allianz*. All appeals and cross-appeals dismissed.

26 January 2024
Court rules in favour of policyholders on the key issues in the *Gatwick Investments* test case. However, furlough is again decided in favour of insurers as Mr Justice Butcher's judgment in Stonegate is followed. Permission to appeal is granted on most issues including furlough.

26 January 2024
Court finds against International Entertainment Holdings in its claim against Allianz under its 'policing authority' wording. The government is not considered to be a 'policing authority' so the policyholder is not entitled to cover.

31 January 2024
Sir Richard Aikens hands down public arbitration award in relation to *Salon Gold policyholders v Canopius*. Supreme Court's analysis on causation against applied in favour of policyholders with a non-damage denial of access wording, and which responds to an insured peril within the 'vicinity' of the premises.

19 February 2024
Mrs Justice Cockerill grants Flat Iron and Wahaca summary judgment against QIC in relation to its non-damage denial of access wording that responds to a danger within the 'immediate vicinity'. Permission to appeal granted but both policyholders settled their disputes later in 2024.

30 April 2024
Court of Appeal says no cover for Covid-19 losses under damaged-based policy wording in *Bellini v Brit*.

6 September 2024
Court of Appeal upholds 'At the Premises' ruling in favour of policyholders.

30 September 2024
Court of Appeal determines pandemic was a "catastrophe" under reinsurance contract.

28 October 2024
Court of Appeal determines Covid-19 is an "incident likely to endanger life" in *International Entertainment Holdings Ltd v Allianz.*

December 2024
Supreme Court denies insurers permission to appeal in 'At the Premises' test case, meaning the Court of Appeal's policyholder favourable decision is final.

21 – 24 January 2025
Bath Racecourse defends insurers' appeals in relation to Commercial Court ruling in favour of policyholders in relation to the 'composite policy issue', ie that policyholders with multiple insured entities under a composite policy are entitled to their own limits of indemnity. Causation also again the subject of appeal.

28 – 29 January 2025
Bath Racecourse appeals the insurer-favourable decision on furlough. This is the first time that the Court of Appeal is asked to examine the issue.

21 February 2025
Bath Racecourse Court of Appeal confirms that under a composite policy, each insured entity is entitled to its own separate limits of indemnity.

Court of Appeal upholds the decision on furlough, concluding insurers are entitled to deduct furlough payments from indemnity calculations.

9 May 2025
Commercial Court in *Carbis Bay Hotel v AIG* provides clarity on the scope of coverage in closed disease lists determining that closed lists must be interpreted strictly.

2 July 2025
Supreme Court grants policyholders permission to appeal on furlough issue in *Bath Racecourse* following the insurer-friendly Court of Appeal decision in February 2025

22 July 2025
Commercial Court hands down judgment in *Bath Racecourse* on outstanding issues and confirms that decisions made by sporting authorities were to be regarded as decisions of a "competent authority". Additionally, the insureds' "any one loss" wording provides separate limits sub-limits of indemnity for each insured premises or facility.

Property damage update

The Supreme Court's refusal in April 2025 to grant permission to appeal in *Sky UK Ltd v Riverstone Managing Agency* confirms the first-instance and Court of Appeal rulings as leading authority on property damage claims under Construction All Risk (CAR) policies. The Court of Appeal had previously held that physical damage giving rise to deterioration over time remains recoverable, even where the progressive nature of the loss extends beyond the initial defect. This judgment provides clarity for policyholders by affirming that insurers cannot confine coverage solely to the immediate point of impact and that consequential deterioration and associated reinstatement costs necessary to restore the property to its pre-loss condition may properly fall within the scope of cover.

Further detailed analysis of *Sky UK Ltd v Riverstone Managing Agency* and its implications for CAR policies, reinstatement obligations and defect exclusions is provided in the 'Construction' chapter.

Looking ahead to 2026

In January 2026, we will have the trial in *WRBC*, which will provide further useful commentary on the treatment of these issues in reinsurance disputes.

Next up, the Supreme Court will hear the *Bath Racecourse* appeal in February 2026 to address with finality the position regarding furlough deductions. The issue is of exceptional financial significance. For insureds, this appeal represents the final opportunity to overturn the position on furlough and ensure those sums are recovered via their business interruption claims and not handed to insurers for the benefit of their balance sheets.

The longer it takes for Covid-19 business interruption insurance disputes to resolve, the more likely it is that we will eventually have a decision on section 13A of the Insurance Act 2015 in the context of Covid-19. This is particularly the case where we have seen a rise in insolvencies in the years following Covid-19. The facts underlying those insolvencies, including unpaid Covid-19 business interruption claims, may support a section 13A claim.

Limitation will be a key driver for developments in early 2026, with the six-year anniversary of the pandemic approaching in March 2026. Policyholders may be under pressure to issue proceedings on unresolved or underpaid claims in the absence of any agreement with insurers or FCA intervention regarding the limitation date.

Policyholders who have been awaiting further developments are encouraged to revisit their Covid-19 coverage positions urgently, reassess prior coverage denials or decisions not to pursue a claim in light of evolving case law, and obtain updated legal advice. Brokers are also urged to support their policyholders in this regard to avoid being criticised if legitimate but dormant Covid-19 claims become time-barred due to limitation. Policyholders may not be on top of the extensive developments in the past six years, and the position may have changed demonstrably. Inaction is unlikely to be a credible defence for a policyholder losing the opportunity to realise potentially substantial assets.

From 'Die Hard' to deadly hacks: When cyber threats get physical

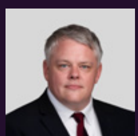
Lockton

Back in 2007, few insurance professionals would have looked to Bruce Willis's Die Hard franchise for industry insight, perhaps save for the importance of purchasing broad active assailant and denial of access cover when looking to insure Nakatomi Plaza. With Bruce limbering up for his fourth and penultimate outing in 'Live Free or Die Hard' at the arguably over-ripe age of 52, some cynical detractors suggested that there were no threats left for John McClane to face. Why, John had already blown his way through an international band of terrorists, a treacherous US special forces unit, a Colombian drug lord and, latterly, a team of East German mercenaries. They said there were no threats left. They were wrong. In 'Live Free or Die Hard', John McClane had to save the world from… nerdy computer hackers.

Those watching John avoid certain death, repeatedly, were treated to a storyline in which the primary villain, Thomas Gabriel, launched an attack on US computer infrastructure. This cyber event – and we can assure you, it was an 'event' – led to more than a few explosions and myriad destruction. As exciting as this was for the audience, experts were quick to point out that while Gabriel's choice of targets was realistic (oil refineries, power stations, military infrastructure, etc.), the prospect of a hacker causing actual physical damage was something reserved for the writers' room. It couldn't happen in the real world, they said. Again, they were wrong.

Just three years after 'Live Free or Die Hard' had achieved surprisingly good results at the box office, young programmer Sergey Ulasen was sitting at his desk at VirusBlokAda, a local anti-virus vendor in Belarus. A team leader and experienced threat analyst, Sergey was used to examining the code of the most serious malware threats reported by the firm's customers. However, this day was to present a particularly unusual challenge. Contacted by his technical support team to assist an Iranian client whose computers were repeatedly crashing, he began to review the preliminary system scan reports.

"My very first impression was that the anomalies found were due to some Windows misconfiguration or were the result of a conflict between installed applications," says Sergey. But soon, after further analysis with colleagues, he realised "this malware was a fearsome beast with nothing else like it in the world". What Sergey had found was Stuxnet, the first known computer virus designed specifically with the objective of causing catastrophic property damage.



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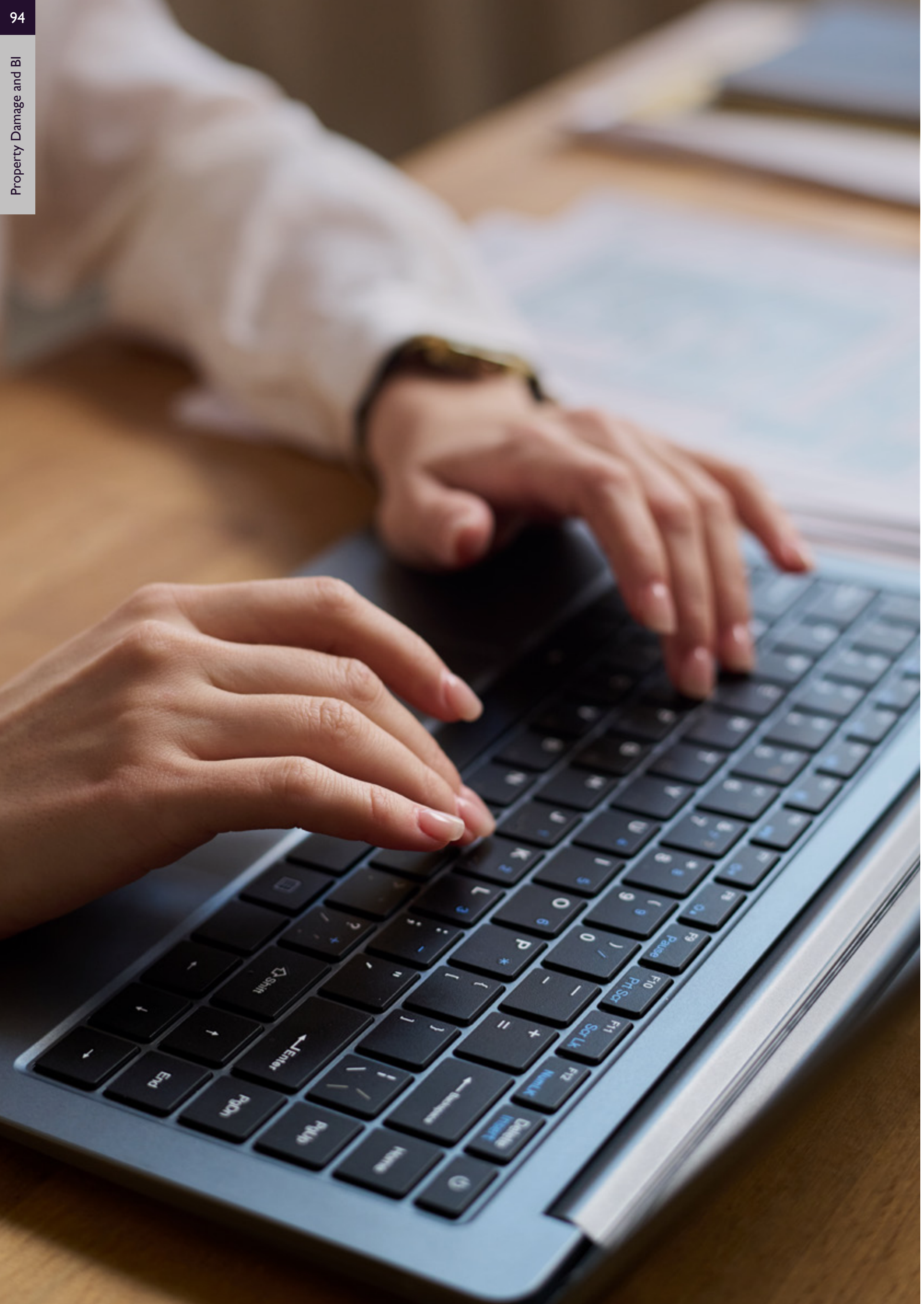
Stuxnet, a highly sophisticated computer worm, was found, under analysis by some of the world's leading cyber threat specialists, to be directed at supervisory control and data acquisition (SCADA) systems, specifically Siemens Step 7 PLCs (Programmable Logic Controllers). The purported target was the notorious Iranian nuclear facility in Natanz, buried deep underground and thought to be Iran's primary uranium enrichment facility (now supposedly destroyed by US airstrikes in June 2025).

It was thought that Iran used stolen Siemens PLCs to control the centrifuges that played a key role in the enrichment process. Stuxnet was specifically designed to cause these centrifuges to speed up and slow down to levels beyond their operating capacity, reportedly destroying over 1,000 devices and reducing Iran's enrichment capacity by around 10–20%. Found to contain four separate 'zero-day' exploits, vulnerabilities in a computer's code of which even the developer is unaware, along with two stolen digital certificates used to guarantee deployment safety, Kaspersky Lab (a leading global cyber security organisation) concluded that Stuxnet could only have been conducted "with nation-state support". Neither the US nor Israel have ever accepted any involvement, despite numerous leaks and anonymous sources suggesting otherwise.

Stuxnet was only the beginning. Further evidence of the risk of cyber-related property damage emerged in 2014 from a less widely reported attack on an unnamed German steel mill. The details of this attack, kept private for security reasons and addressed only in a report by the Bundesamt für Sicherheit in der Informationstechnik (BSI), Germany's Federal Office for Information Security, suggest threat actors had gained access using a spear phishing attack, managing to stop a blast furnace from shutting down and causing massive resulting physical damage.



In December 2017, it was reported that Triton, malicious code apparently created by a state entity, had been discovered in the safety systems of a Saudi power station. Attacking the plant's safety instrumented systems (SIS), effectively the last defence against industrial accidents, reports suggested that the attack had caused the power station to go offline in June 2017. Further examination suggested that a flaw in the code had allowed for quick detection. However, the threat actors could have used the malware to cause explosions or the release of toxic hydrogen sulphide gas. One investigator noted worryingly: "Even with Stuxnet and other malware, there was never a blatant, flat-out intent to hurt people."

Further examples of the potential for cyber-attacks to lead to physical damage are available, but it is reasonable to say that for corporates, this risk is still considered to be in its infancy. Physical damage resulting from a cyber-attack is generally excluded in property damage and business interruption (PDBI) policies, and cover under a dedicated cyber policy does not ordinarily extend to property damage or bodily injury. Many markets, including London, have imposed broad restrictive cyber property damage language, with the 2020 LMA5400 and LMA5401 exclusions effectively barring claims resulting from "an unauthorised, malicious or criminal act… regardless of time and place… involving access to, processing of, use of or operation of any Computer System". "Computer System" extends to any electronic device.

For concerned risk managers, there are options available to write the cover back in, but these extensions and standalone policies are not yet generally considered a critical part of the renewal cycle. One reason is perhaps the perceived complexity required to undertake such attacks at the present time, with the handful of widely reported examples largely being tied to state sponsorship (for example, the reported attacks on the Ukrainian power grid in 2015). Furthermore, because we don't know what we don't know, the prevalence of these events is likely under-reported. Victims will be keen to achieve anonymity, given that such matters are highly commercially sensitive or subject to national security considerations. Furthermore, in some instances, the damage caused by the attack may have, or may serve to, destroy the evidence proving that a cyber incursion was the proximate cause.

Ultimately, however, reluctant buyers would be well advised to heed the words of President John F Kennedy that while "there are risks and costs to a program of action, they are far less than the long range risks and costs of comfortable inaction". Even those steadfastly sitting in the coverage gap should comprehensively assess and monitor the risk posed by (and the measures that can be taken to address) operations and control system interactivity. It is reported that in 2025 the industrial Internet of Things (IoT) market (essentially digitally connected infrastructure and control systems) will be worth a staggering US$1.06 trillion, with an expected value of US$1.68 trillion in 2030.

For comparison, the global property damage insurance industry is valued at $843 billion. By 2030, it is estimated that over 39 billion connected IoT devices will be in operation globally. Given the efficiencies promised, it is hardly surprising that key safety and control systems will become more and more integrated and potentially accessible to those desirous of causing harm. Investment in AI-driven technologies will inevitably filter down to threat actors, making the creation of potentially catastrophic malware code simpler and less costly. As more IoT devices come online, the risk of wider systemic impacts increases. The potential targets are also vast and not solely limited to industry. In 2015, Wired.com reported how hackers had remotely accessed a Jeep's IoT systems to demonstrate how it could be shut down while being driven at 70mph on a highway. IoT systems are being more broadly deployed in the healthcare, agriculture, logistics and energy sectors.

Whether it is the risk of the malicious opening of a dam, crop destruction through the hacking of a pesticide drone or a fire being remotely ignited by a hacked, overheating server, this is one risk that comes straight from Hollywood.

In an environment where cyber threats increasingly have the potential to trigger real world property damage and significant business interruption, organisations can no longer afford to treat cyber and property risks as separate conversations. The convergence of these exposures demands a more resilient and forward thinking insurance strategy, one that recognises the evolving threat landscape and ensures balance sheet protection when digital disruption results in physical loss. At Lockton, we work closely with clients to navigate these complexities and offer specialist products designed to close the gaps between traditional property cover and emerging cyber driven perils. With the right guidance and solutions in place, businesses can strengthen their defences and stay ahead of this evolving risk.

Warranty and Indemnity

James Breese and Arjun Dhar

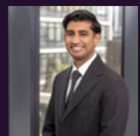
The W&I claims that we have been instructed on in 2025 are hard fought by insurers with some underlying coverage issues that are common across those disputes. Resolving those issues is increasingly challenging, particularly where there is limited public case law on W&I disputes. This likely reflects the realities that such disputes are largely resolved before proceedings are commenced (as HWF's market data may indicate) and that when disputes do arise, they are arbitrated.

For policyholders, a challenging claims environment continues to develop. In the last edition of this Policyholder Review we referred to recent decisions from the courts in this jurisdiction (*Finsbury Food Group Plc v Axis Corporate Capital UK Limited & Ors* [2023] EWHC 1559 (Comm) and *Project Angel Bidco Ltd (In Administration) v Axis Managing Agency Ltd & Ors* [2023] EWHC 2649 and [2024] EWCA Civ 446). Both cases were decided in favour of insurers, albeit both were very fact specific.

That trend has continued in favour of insurers globally. We refer below, for example, to the decision of the court of the Supreme Court in New South Wales, Australia, in *DTZ Worldwide Limited v AIG Australia Limited* [2025] NSWSC 12.

In circumstances where a) claims notification data from HWF shows that notifications continue to increase year-on-year; and b) only half those notifications resulted in paid claims in 2025, we expect that the landscape for W&I claims will become increasingly contested.

James Breese
Partner
Policyholder Disputes



Arjun Dhar
Associate
Policyholder Disputes

Case Law – Insurance

***DTZ Worldwide Limited v AIG Australia Limited* [2025] NSWSC 12**

In a case of the Supreme Court of New South Wales, Australia, the plaintiff, DTZ, agreed to buy a group of companies from UGL, the seller. The dispute revolved around one company, Premas, which had a facilities management contract (the "**FM Contract**") with the Singapore Sports Hub. The FM Contract turned out to be lossmaking, and DTZ claimed losses of AUD 234 million plus interest, for breaches of warranties in the sale agreement.

The buyer alleged that the seller had breached accounting warranties by making various accounting errors and failing to record the FM Contract as an 'onerous contract'. The buyer also alleged that the seller had breached disclosure warranties by (i) failing to disclose that the FM contract was shortly to become lossmaking; and (ii) stating that the FM Contract would contribute AUD 16 million to incremental revenue, which, without qualification, implied that the contract would contribute significantly to EBIT.

The 'onerous contract' issue was also relevant to the disclosure warranty as DTZ argued that the seller failed to disclose the problems with the FM Contract.

The purchase was insured under a W&I tower of insurance with a primary layer insured by the defendant, AIG, and eight excess layers. The claimant had undertaken in the sale agreement not to make any claim for a breach of warranty against the seller directly, but against the insurers directly. Shortly before trial, DTZ settled with AIG (as primary) and certain insurers in the excess layers but the claim proceeded against some insurers.

Breach of accounting warranties

The court was asked to consider extensive accounting, finance and valuation evidence. It approached the question as to whether accounting principles had been breached by considering this evidence, the (incomplete) factual evidence and usual commercial practice.

The court's decision that there was no breach of accounting warranties is fact-specific, as we have seen with previous decisions in this area. Nonetheless, policyholders should note the extensive evidence that the court required to reach a decision, and that the exercise is made considerably more challenging where there are gaps in documentary evidence.

The 'Onerous contract' issue

In relation to whether the FM Contract should have been designated an 'onerous contract', the court undertook an analysis of accounting principles, and the sellers' approach to other known onerous contracts. It held that the FM Contract should have been recorded as an 'onerous contract' only if it was more probable than not that the costs of discharging the contract exceeded the economic benefits expected to be received under the contract, and if the amount by which the costs exceeded the economic benefits could be reliably estimated. The court then concluded that the sellers did not have sufficient information to conclude this. It concluded, therefore, that there had been no breach of the accounting or disclosure warranties in failing to classify the FM Contract as an 'onerous contract'.

Breach of disclosure warranties

The buyer's alternative case was that misleading information had been included, and relevant information excluded from, the Disclosure Materials, rendering them misleading.

The court held that there had been a breach of this warranty. The documents disclosed gave the impression that all significant issues with the FM Contract had been disclosed, when they had not been. The court also found that the impression conveyed by the sellers' answers to a particular question was that the expected benefits of the FM Contract would be achieved. When the sellers became aware that this was not the case, they should have, but failed, to correct their answers.

The court therefore found that there had been a breach of the disclosure warranties.

Assessment of damages

DTZ's primary argument was for damages to be assessed based on the value of the losses arising from the FM Contract at the time of the breach. In the alternative, DTZ sought damages based on the difference between the purchase price and a hypothetical purchase price if the facts pertaining to the FM Contract were known.

The court rejected this approach as 'convoluted', and suggested that it confused the assessment of damages for breach of warranty with the assessment of damages for misleading and deceptive conduct.

In assessing damages, the court outlined various key authorities for valuing the buyers' loss. In particular, the court quoted the recent English case of *Decision Inc Holdings Proprietary Ltd v Garbett* [2023] EWHC 588 (Ch) for its finding that unless the parties had agreed a basis for valuation, the court would have to select an appropriate basis of valuation.

In doing so, the court considered that a reasonable approach would be to assess the present-day value of the difference between the forecasted earnings and the loss due to the breach. The court preferred an orthodox approach to the assessment of damages and dismissed DTZ's more complex approaches that were to some extent based on hypotheticals.

On the court's assessment of damages, there was no recoverable loss.

Takeaways

This case highlights the challenges for disputes relating to alleged breaches of accounting and financial warranties. Policyholders will be required to clearly and persuasively evidence the breach of accounting misstatements and illustrate how the breach is causative of loss. Gaps in evidence will present risks to policyholders if litigation arises.

There are also lessons to be learned for buyers and sellers when it comes to disclosure warranties. For sellers, it is imperative that all relevant material is disclosed. For buyers, some comfort may be taken from this decision given that the court found that there had been a breach on these facts despite there being some partial, albeit misleading, disclosure. In our experience, fraught disputes arise under buy-side W&I policies where at least some disclosure has been provided by the sellers, as W&I insurers will (rightly) seek to explore the extent of that disclosure including what is and is not represented by it, and what the buyer understood from it, or could have understood from it.

Case Law – Non-Insurance

***Inspired Education Online Ltd v Tom Crombie* [2025] EWHC 1236 (Ch)**

Last year's Policyholder Review spotlighted the Scottish case of *Drax Smart Generation Holdco Ltd v Scottish Power Retail Holdings Ltd* [2024] EWCA Civ 477, which highlighted the importance of paying attention to time limits, notification provisions and other procedural obligations in the Sale and Purchase Agreement ("**SPA**") and other key contractual documents. This case is a reminder of the same principles.

In this case, the defendant, Tom Crombie, sold his education business to an established group of companies. The parties had agreed that the purchase price would be calculated by reference to the completion accounts, enabling the parties to adjust the total agreed amount payable under the contract based on the company's financial performance at the time of closing.

The buyer claimed against Mr Crombie for breach of warranty arising from his conduct in emails. The seller counterclaimed against the buyer for failing to pay additional sums due under the completion accounts calculations.

The seller had challenged the buyer's completion account calculations via email. The core issue was whether the seller had fulfilled the notice requirements specified in the contract. The buyer never responded to this email, instead indicating in its letter of claim that the completion accounts were deemed agreed because the buyer's communication failed to comply with the notice requirements under the SPA.

The court rejected the buyer's argument, holding that there was a difference between the formal requirements for "any notice" given under the SPA, and the requirement to "notify" the purchaser of any dispute over the preparation of the Completion Accounts.

Learning Curve (NE) Group Limited v Richard Huw Lewis and Anor [2025] EWHC 1889 (Comm)

This was a case around the sale of AP Cymru Limited, a company that provided education and training to young people, particularly through military training and apprenticeship courses.

The key issue was that after the purchase, the purchaser discovered that APC had overclaimed more than £1 million in funding from the Education and Skills Funding Agency ("ESFA"). The purchaser claimed damages for breaches of various warranties, including a warranty that APC had compiled in all material respects with funding rules.

The key issue in this case was whether the purchasers could claim damages for breaches of warranty despite the existence of a specific indemnity under the contract to enable a clawback of overclaimed sums from the ESFA.

The court rejected the sellers' argument that the existence of a specific indemnity implied a term that precluded the purchaser from claiming for a breach of warranty. It did so as a matter of construction, holding that, among other reasons, the terms were comprehensive and negotiated, leaving no room for implying a term. As a result, the buyers were not restricted from bringing a claim either for breach of warranty or indemnity, though they were, of course, unable to recover more than the actual loss.

Comment

We commenced this chapter by referring to some of the market dynamics that may affect the handling of W&I claims over the coming years. Data from HWF Partners arguably supports the view that it is becoming an increasingly contested market, and the case law does not make the position easier.

Policyholders will therefore be well-advised to take note of the authorities that are directly or indirectly relevant to the issues that arise in W&I claims. There is an expanding list of common law authorities that have been decided in favour of insurers, but these at least provide useful lessons for policyholders and their advisers to learn from when presenting new claims to insurers. There is clear insight as to the approach that the courts are likely to take when determining coverage under a W&I policy, even though each claim will obviously turn on its own facts and the strength of the evidence.

It is also important that provisions in the SPA are clear as to the requirements of the parties, and what is intended by those provisions. While this is unsurprising, the cases above demonstrate the importance of ensuring that the SPA achieves this to avoid the risk of issues arising. Policyholders under W&I policies risk even greater difficulties where coverage under a W&I policy will turn on the construction and interpretation of the policy alongside the provisions in the SPA.

W&I Claims Study 2025

Hemsley Wynne Furlonge

HWF are the only insurance broker to canvass the entire W&I insurance market to provide clients with an authoritative picture on W&I claims. Their data covers multiple European insurers with appetites across all areas of the transactional risk market, providing a comprehensive overview of W&I claims. The report covers a **nine-year look-back**, drawing on data from **24 insurers and 18,563 policies.**

Key takeaways from their 2025 Claims Study include:

- **Notification levels grow year on year, with nearly half of notified claims resulting in a payment**

The Study shows that 12.46% of policies receive a claims notification, compared with 11.64% in last year's edition, indicating a consistent and mature claims environment. Of those notified claims, 48.51% ultimately result in a paid claim, demonstrating that notifications are substantive and that W&I insurance continues to deliver real recoveries for insureds.

- **Claims continue to arise from risks that cannot be diligenced.**

  The Study shows that **47.81% of claims arise from seller fraud, non-disclosure and third-party claims.** These are, by definition, unknown or unforeseen risks and sit outside the scope of even the most robust diligence process. This finding reinforces the core value of W&I insurance as protection against residual risk, rather than a substitute for diligence.

- **Financial sponsors derive a disproportionate share of claims value, reflecting their influence in the market.**

  49.83% of claims are brought by financial sponsors (or their portfolio companies), yet they receive 60.31% of total claims payments. This imbalance highlights the commercial leverage that repeat users of the W&I product can exert and reflects the competitive dynamics of the insurance market, where scale, experience and repeat business translate into stronger claims outcomes.

To access the full report, please visit hwfpartners.com

HWF are a market-leading transactional risk insurance brokerage with extensive experience from providing advisory services on over 5,800 transactions. They enhance the client offering through expert-led claims advocacy capabilities. Their claims team is fully integrated into our business, working alongside our brokers in structuring policies from the outset to include insured friendly provisions and to mitigate any risk of non-recovery in the event of an actionable breach.

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HWF

Warranty and Indemnity

Costs and Funding

Julian Chamberlayne

Litigation funding enables consumers, business owners and insolvent practitioners to bring litigation they would otherwise not have the means to bring. There was a great deal of debate in this area in 2025, notably relating to the Civil Justice Council's Final Report on litigation funding. However, there remains significant uncertainty within the sector and calls for urgent legislation to reverse the impact of the Supreme Court's judgment in *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)* [2023] UKSC 28 ("PACCAR") have not yet stirred the Ministry of Justice (MoJ) into action.

CJC's Final Report

Following a wide-ranging review assimilating views from 84 respondents, in June 2025, the Civil Justice Council ("CJC") published its Final Report on third-party funding ("TPF") of civil litigation. We were pleased to see that the CJC adopted so many of the proposals made in Stewarts' response to its Interim Report. Some key points from the report are addressed below.

Reversal of *PACCAR*

The CJC Final Report recommends that legislation be introduced as soon as possible to reverse the effect of the controversial Supreme Court judgment in *PACCAR*. In doing so, it makes clear that TPF should not be viewed as a form of damages-based agreement ("DBA"). The Final Report makes a clear distinction between the differing regulatory requirements and regimes that are suitable for funding provided by commercial litigation funders on the one hand, and conditional or contingency agreements provided by a party's legal representative on the other.

PACCAR has brought significant uncertainty to the TPF market and satellite litigation in funded claims, some of which remains ongoing. In keeping with the pre-election Litigation Funding (Enforceability) Bill, the CJC's proposal are both prospective and retrospective in effect. Once implemented, this will likely resolve ongoing *PACCAR*-related challenges, disputes and uncertainty more generally. From our discussions with funders, we understand that they view this as simply restoring the commercial bargain that they and the funded parties in question thought they had entered into pre-*PACCAR*.

In October 2025, Stewarts, along with the Collective Redress Lawyers Association (CORLA) and 18 other law firms, wrote to the Lord Chancellor and Justice Secretary, David Lammy, calling for clarity around litigation funding. The Financial Times reported on the letter, which asks the government to legislate to resolve the uncertainty around litigation funding regulation to ensure access to justice. However, the MoJ appear to have reservations both about the retrospective aspect of the proposal and the concept of legislating on this ahead of finalising a broader regulatory regime for litigation funding.

Julian Chamberlayne
Head of Aviation and International Injury
Risk and Funding Partner
Compliance Officer for Legal Practice

"Light touch" regulation of TPF

In its report, the CJC recommends a "light touch" regulatory regime for third-party litigation funding, tailored to the type of funded party.

The proposed Litigation Funding Regulations (LFRs), in line with European Law Institute principles of third party funding, would introduce case-specific capital adequacy requirements, codify existing restrictions on funders controlling litigation and mandate disclosure of funding arrangements, including funder identity and ultimate source, though the latter may spark debate.

The report recommends that an independent, binding dispute resolution process be established to resolve disputes between funders and funded parties.

The report also recommends that certain breaches of LFRs would render funding agreements unenforceable. This carries significant risk for funders, albeit mitigated by the proposal for parties to be able to apply to the court to effectively waive any such breaches.

The CJC report acknowledges that TPF has outgrown self-regulation but does not recommend regulation by the FCA "at this stage". Instead, it suggests that the Lord Chancellor regulate TPF, assisted by a new standing committee of the Civil Procedure Rules Committee, with a review in five years' time.

Rejection of caps on funder returns

The CJC Final Report rejects introducing caps on funders' returns, aligning with Stewarts' position. Imposing blanket caps would make many cases economically unattractive, potentially driving funders away from certain case types or the England and Wales market as a whole.

Similarly, the report advises against caps on success fees for legal representatives under conditional fee agreements (CFAs) or DBAs when clients are commercial parties, as these clients are typically sophisticated and have access to legal advice. Caps would unnecessarily restrict funding options.

Reform of DBAs and CFAs

One of the CJC's most significant proposals is to replace the current CFA and DBA legislation with a single, simplified legislative contingency fee regime. This would incorporate long-overdue DBA reforms, including clarification that hybrid DBAs allowing partial payment during proceedings or if the claim fails are permissible. The move to unify and simplify the regime is widely welcomed. However, we wonder how long it may take to turn this bold ambition into reality.

The CJC also recommends that responsibility for drafting and issuing any new regulations be transferred from the Ministry of Justice to the Civil Procedure Rule Committee, to ensure that any future remedial or reform measures are carried out promptly.

Irrespective of whether this single regulatory regime is introduced, the CJC recommends that the indemnity principle be abrogated for contingency fee agreements. Under the indemnity principle, the losing party is not required to pay more than the amount the successful party is required to pay their solicitor. This has posed significant challenges in many cost disputes over the years. The CJC also sensibly recommends that the court should have discretion to enable non-compliant contingency agreements to be enforceable, modifying the draconian operation of the DBA Regulations since 2013. This would minimise the risk of a repeat of the CFA cost wars that plagued the early years after the CFA regulations were introduced in 2000.

Conclusion

Once implemented the CJC's key proposals, including a new DBA regime, the reversal of *PACCAR* by legislation, the rejection of caps on litigation funders' returns and the rejection of state-level regulation of funding in arbitration, will provide much needed stability and strengthen England's reputation as a leading jurisdiction for dispute resolution.

However, there is a risk that both the legal sector's excellent reputation and its major contribution to GDP will be diminished unless the government acts quickly. We are concerned that the necessarily lengthier deliberations, for the careful consideration of the detail for the Litigation Funding Regulations, could take years. They may even end up shelved as seen in relation to the Voss proposals for EU wide regulation late in 2025, 4 years after they were proposed. Consequently, we call upon the government to put the reversal of PACCAR and implementation of DBA reform on the legislative agenda early in 2026.

Further insight from our Policyholder Disputes team from 2025

The distinction between representations and warranties in insurance policies, and the importance of differentiating them

Royal & Sun Alliance Insurance Limited and Ors v Equitas Insurance Limited [2025] EWHC 2704 (Comm)

Third party unable to establish specific claim over insurance payout after defendant enters voluntary liquidation

Insureds' breaches of conditions precedent preclude third parties recovering from insurers

New clarity on double insurance and the limits of "other insurance" clauses

Cyber

Ransomware's risk to businesses may be growing more complex

Construction

Why is building safety litigation on the rise?

Supreme Court confirms consultant's duty of care in defective premises claim: URS Corporation Ltd v BDW Trading Ltd

Directors and Officers

Employment practices liability insurance – what does it cover and what are the common pitfalls?

What insurance coverage might be available to companies facing OECD?

War and Political Risk

Commercial Court hands down judgment in Russian aircraft insurance claims case

The distinction between representations and warranties in insurance policies, and the importance of differentiating them

Hebe Swain

While a disappointing outcome for the policyholder, a recent Court of Appeal ("CoA") decision provides helpful guidance on the interpretation of policy terms and the application of the Insurance Act 2015.

The CoA has overturned the High Court's ("HC") decision in its recent judgment of *Lonham Group Ltd v. Scotbeef Ltd* [2025] EWCA Civ 203, finding that the insurer was not liable to indemnify the policyholder. In particular, it considers the distinction between representations and warranties in an insurance policy and the interpretation of clauses containing a mix of both. Senior associate Hebe Swain reviews the judgment and its significance.

Background

The underlying claim relates to a contract between a meat producer, Scotbeef Ltd ("Scotbeef"), and the company it contracted to blast freeze and store its meat, D&S Storage Ltd ("D&S").

In October 2019, over 100 tonnes of Scotbeef's meat was found to be contaminated with mould and unfit for consumption. Scotbeef claimed against D&S for damages resulting from its spoiled meat. Initially, D&S sought to rely on the Food Storage and Distribution Federation's terms ("FSDF Terms") to limit its liability. These terms contained a nine-month limitation period and a per tonne cap on liability.

In the first preliminary issues trial between Scotbeef and D&S, the HC considered whether these terms had been incorporated into the contract. The HC found they had not. Scotbeef and D&S had initially contracted on UK Warehousing Association terms; invoices subsequently referenced the FSDF Terms, but this was not sufficient to incorporate the new FSDF Terms into the contract.

Following the preliminary issues hearing, D&S went into liquidation. Lonham Group Ltd ("Lonham"), D&S's liability insurer, was joined to the action pursuant to the Third Party (Rights against Insurers) Act 2010, and Scotbeef pursued its claim against Lonham directly.

Policy terms in dispute

A second preliminary issues trial was held in October 2023 to consider whether Scotbeef's losses would be indemnifiable under D&S's policy (the "Policy"). The issue of indemnity centred around the interpretation of a "Duty of Assured Clause", which read as follows:

"DUTY OF ASSURED CLAUSE"

It is a condition precedent to the liability of Underwriters hereunder:-

I. that the Assured makes a full declaration of all current trading conditions at inception of the policy period;

II. that during the currency of this policy the Assured continuously trades under the conditions declared and approved by Underwriters in writing;

III. that the Assured shall take all reasonable and practicable steps to ensure that their trading conditions are incorporated in all contracts entered into by the Assured. Reasonable steps are considered by Underwriters to be the following, but not limited to same:

* the Assured makes specific reference to their trading conditions in job quotations to their customers;

* if "own conditions" are used, i.e. not industry standard trading conditions such as BIFA or RHA, a copy of those conditions should be made available to the insured's customers at the time of contracting;

* the Assured specifies their trading conditions on all invoices and written communications to their customers.

If a claim arises in respect of a contract into which the Assured have failed to incorporate the above mentioned conditions the Assured's right to be indemnified under this policy in respect of such a claim shall not be prejudiced providing that the Assured has taken all and practicable steps to incorporate the above conditions into contracts.

The Policy schedule described the "Trading Conditions" as "FSDF Terms and Conditions at GPB250.00 per tonne". As a result of the decision in the first preliminary issue trial, it was common ground that D&S had breached the Duty of Assured Clause The issue in dispute was the effect of the breach and the remedy available to the insurers as a result.

The parties' key arguments

Claimant: Scotbeef put forward various arguments in support of its claim, including as follows:

- The Duty of Assured Clause was a representation, and pursuant to Section 9(2) of the Insurance Act 2015 (the "2015 Act") could not be converted into a warranty.
- Since the clause contained representations, any breach should be considered in accordance with the rules governing breaches of the duty of fair presentation (as set out in Section 8 and Schedule 1 of the 2015 Act).
- Since D&S's breach was innocent (not deliberate or reckless), the insurance policy would continue either (1) on the same terms, or (2) on amended terms if Lonham could show it would have contracted on different terms had there been no breach.
- If the clause were a condition precedent, the effect of a breach would be more disadvantageous to the policyholder than the effect of the remedies set out in the 2015 Act. Accordingly, Lonham would be contracting out of the 2015 Act and would need to meet the transparency requirements set out in Section 17.

Defendant: Lonham argued that no cover was available as D&S was in breach of the condition precedent clearly set out in the Duty of Assured Clause to trade on FSDF Terms. The requirement to trade on FSDF Terms was a warranty under the policy, and D&S was in breach of warranty when contracting with Scotbeef on alternative terms. Accordingly, Lonham could avoid the claim and no cover was available to the policyholder.

First instance decision

The HC found in favour of Scotbeef.

The HC construed the Duty of Assured Clause as one single clause where subsections (i), (ii) and (iii) each had to be read together. Since subsection (i) was a pre-contractual representation regarding D&S's trading terms, the clause should be construed as a representation and no part of it was capable of being converted into a warranty (pursuant to section 9(2) of the 2015 Act) or having the effect of a condition precedent.

Accordingly, D&S's breach should be considered as a breach relating to a representation and the rules around breach of duty of fair presentation would apply. The HC found no evidence that Lonham would have amended the terms of the Policy had D&S's trading terms been properly presented. Accordingly, D&S's breach of the duty of fair presentation had no effect, and Lonham was required to indemnify Scotbeef under the policy.

Lonham appealed this decision.

Decision of the Court of Appeal

In its recent judgment, the CoA overruled the HC decision, finding in favour of Lonham.

The CoA disagreed with both the HC's approach of construing the Duty of Assured Clause collectively and the HC's conclusion that unless all three subsections could be warranties, none of them would be. It stated this was an "error in law".

The CoA noted that the clause included "a number of different duties that arise at different times" and held that each subsection should be considered in its own right.

The CoA agreed with the HC that subsection (i) was a representation regarding the trading terms in place at inception of the Policy. In contrast, it held that subsections (ii) and (iii) did not deal with issues for pre-policy disclosure but instead related to future trading conditions and accordingly were "future warranties".

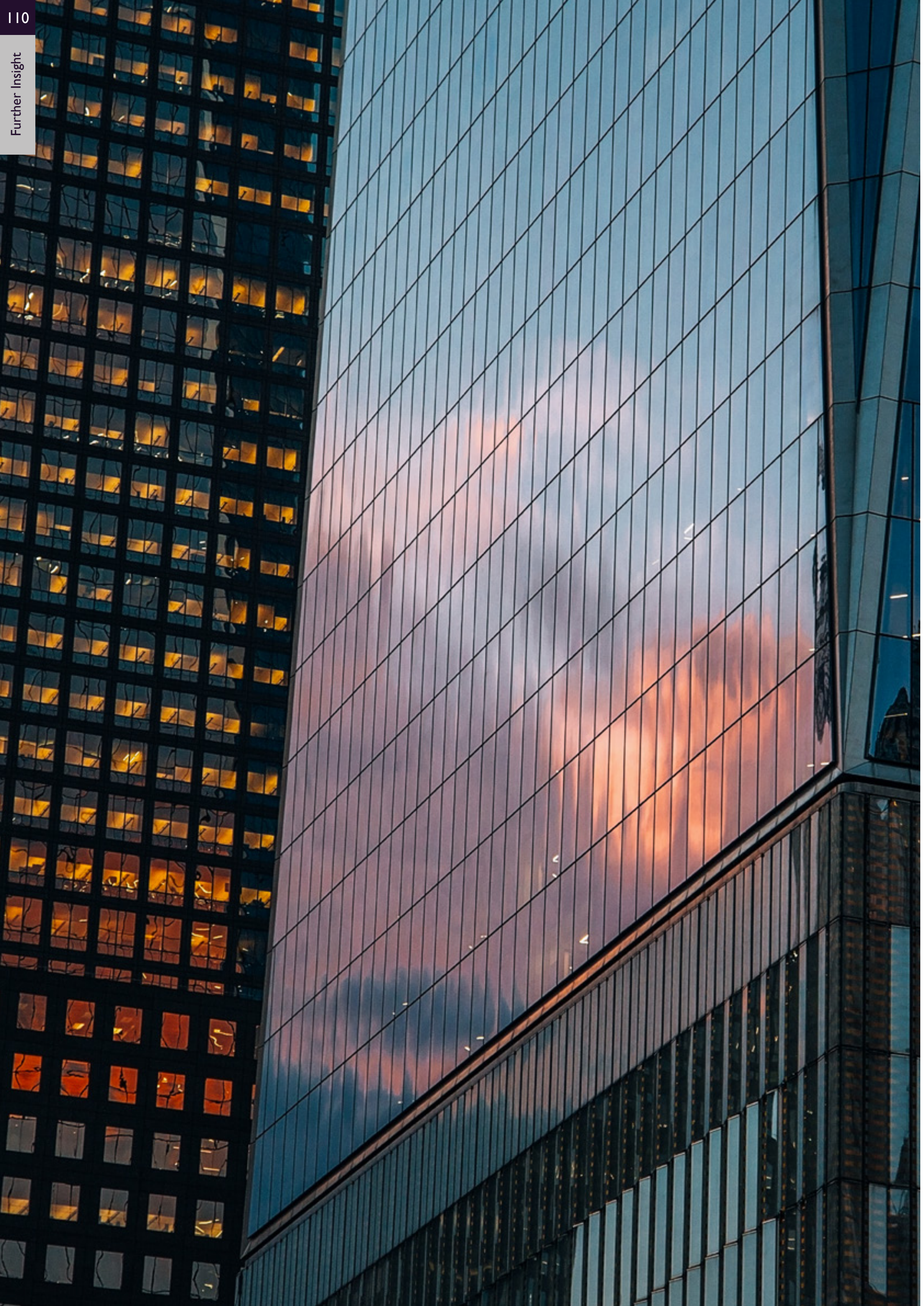
Further, the CoA held that subsections (ii) and (iii) would have the effect of conditions precedent, with Lord Justice Fraser (in the leading judgment) stating: "In my judgment, they are warranties … They are also clearly conditions precedent. This is for the following simple reason. The clear wording of the policy states that they are."

Accordingly, as either or both of the warranties had been breached, section 10(2) of the 2015 Act provided that Lonham had no liability to indemnify Scotbeef.

Comment

The decision shows the CoA taking a more straightforward approach to the interpretation of the Duty of Assured Clause. Rather than forcing a combined approach where the majority of the clause is required to fall in line with the minority, the CoA looked at each subsection of the clause on its own merits. It also took a straightforward approach to the application of the condition precedent; the policy stated the clause acted as a condition precedent, so it did.

It is notable that (in a world where there are still very few decisions under the 2015 Act), the CoA's method of considering each subsection on its own merits differs from that taken by the HC in the recent case of *Mok Petro v Argo*. In *Mok Petro v Argo*, the HC held that a warranty with two separable subsections had to be considered as a whole (with a rather unhelpful outcome for the policyholder). It will be interesting to see whether the precedent value of this CoA decision in *Lonham v Scotbeef* reduces the extent to which *Mok Petro v Argo* is relied on going forward.



Royal & Sun Alliance Insurance Limited and Ors v Equitas Insurance Limited [2025] EWHC 2704 (Comm)

James Breese and Arjun Dhar

James Breese and Arjun Dhar of Stewarts' Policyholder Disputes team review the recent High Court decision in *Royal & Sun Alliance Insurance Limited and Ors v Equitas Insurance Limited* [2025] EWHC 2704 (Comm) ("Equitas"), which raises important issues of reinsurance and considers the extent to which (re)insureds may claim interest in addition to the indemnity owed.

Summary

In *Equitas*:

- the court held that a 'claims co-operation clause' did not limit the insurer's ability to bind the reinsurer to settlements made pursuant to a 'follow settlements clause', and
- the High Court confirmed that the courts will take a restrictive approach to disallowing interest under insurance policies. The court also clarified the legal principles to apply in an award of interest and the burden of proof that a (re) insured must discharge to justify an award of compound interest.

Reinsureds and reinsurers whose policies contain both a 'claims co-operation clause' and a 'follow settlements clause' should note that there is no universal rule specifying how they will interact with each other. The courts will construe such clauses on their own terms in accordance with conventional contractual principles.

On the question of the (re)insured's entitlement to interest, *Equitas* is one of a number of recent judgments containing helpful clarifications and confirming that interest is available to policyholders as a matter of principle. Policyholders and their advisers should not overlook the likely entitlement to claim interest, particularly in claims that are taking time to resolve.

Equitas – the facts

RSA insured BOC Group Plc for worldwide third-party liability under a set of global master policies from October 1981 to September 1985. From the mid-1980s, BOC was subject to toxic tort claims in the USA, causing it to incur extensive defence costs and pay out substantial sums in damages. Some of these sums were successfully claimed under the RSA master policies.

RSA purchased five excess of loss reinsurance policies on a facultative basis. These were back-to-back policies, meaning that the requirements for liability in the reinsurance policies mirrored those in the master policies. These reinsurance policies were transferred by the original insurers to the defendant, Equitas.

RSA claimed under the reinsurance policies for sums it had paid out under the global master policies. A dispute arose between the parties over the following issues:

- The **"Defence Costs Erosion Issue"**. Equitas argued that a £4 million retention had been eroded by indemnity payments only, not by both indemnity and defence costs payments. RSA argued the opposite.
- The **"Claims Co-operation Clause Issue"**. There were two apparently conflicting clauses in the policy. First, a claims co-operation clause (which required insurers, in the event of an occurrence that may be the subject of a claim, to give notice to reinsurers as soon as possible, and to furnish all available information). Secondly, a follow settlements clause (which obliged reinsurers to accept liability for any settlements under the master policies). Equitas argued that the existence of the claims co-operation clause restricted RSA from relying on the follow settlements clause to make settlements binding on Equitas.
- The **"Proper and Businesslike Steps Issue"**. Equitas claimed that it was not bound to follow RSA's settlement because, in making payments pursuant to a "Toxic Torts Settlement Agreement", RSA had not taken "all proper and businesslike steps". (The Toxic Torts Settlement Agreement was an agreement entered into on 30 March 2001 by BOC and its insurers relating to claims against BOC entities for bodily injury alleged to have been caused by exposures to certain toxic products manufactured, sold, designed or distributed by BOC entities.)
- The **"Interest Issue"**. RSA claimed compound interest at common law on all sums awarded to it or, alternatively, simple interest under section 35A of the Senior Courts Act 1981. Equitas resisted this claim, arguing that RSA had delayed in particularising and pursuing the claim and that compound interest was an inappropriate remedy in this case.

The reinsurance issues

The issues discussed below are largely specific to the wordings considered, and so the extent to which they have wider implications may be limited.

Nevertheless, reinsurance disputes are often arbitrated to enable the parties to preserve confidentiality over the outcome. It is therefore interesting to see a reinsurance decision from the commercial court in this jurisdiction and the analysis that it applied.

Defence Costs Erosion Issue

The judge approached this issue as a matter of contractual interpretation. In the policy, an excess of £4 million was stated directly underneath a limit of liability of £16 million in the reinsurance policies and was stated to apply to losses arising out of occurrences for third-party liability. As the judge had interpreted the £16 million limit as applying only to the duty of indemnity and not the duty to pay defence costs, he concluded that the same must be true for the excess.

Therefore, he found in favour of Equitas that the defence costs expended did not erode the excess of £4 million under the reinsurance policies.

Claims Co-operation Clause Issue

This was a dispute over the interaction between a follow settlements clause and a claims co-operation clause. Counsel for Equitas argued that the interaction of the clauses circumscribed RSA's power to make settlements binding on Equitas, such that Equitas was required to follow settlements only where the adopted course of settlement had been agreed between the insurers and reinsurers.

The judge considered the Court of Appeal decision in *The Insurance Co. of Africa v Scor (UK) Reinsurance Co. Ltd* [1985] 1 Lloyd's Rep. 312, in which the same issue had arisen. The majority had found that the follow settlements clause had to be construed to mean that the reinsurers were only obliged to follow settlements that were authorised by the policy.

However, the judge distinguished this case from *Scor.* He did so on the basis that in Scor, the two clauses could not be read consistently, and the court had no choice but to adopt an interpretation that left the follow settlements clause in place but took away its practical force. In this policy, the wording of the two clauses made it possible to read them consistently with each other.

He construed the two clauses on their own terms, holding that the clauses could be read as intended to circumscribe RSA's freedom to *litigate* without the reinsurer's consent, not its freedom to settle.

He therefore found in favour of the insurer, concluding that the reinsurers were bound by the follow settlements clause.

The Proper and Businesslike Steps Issue

It is an established principle that reinsurers can resist liability under a reinsurance contract if they can establish that insurers had failed to act honestly and take all proper and businesslike steps in making a settlement. Such a defence is, in essence, an allegation of professional negligence against insurers, and the judge observed that the principle was intended to protect reinsurers against prejudicial settlements.

Equitas argued that RSA's entrance into the Toxic Torts Settlement Agreement ("TTSA") involved an unreasonable interpretation of New Jersey law and a failure to obtain information relevant to decisions regarding settlement. It argued that RSA fell short of its obligations to take all proper and businesslike steps in making the settlement and, consequently, bore an unreasonably high proportion of the losses.

The judge heard factual evidence from a New Jersey lawyer who had advised RSA as coverage counsel on the BOC claims before the TTSA was entered into. He also heard expert evidence from two experienced New Jersey attorneys.

On the facts, he concluded that Equitas had not proven that RSA had failed to take proper and businesslike steps and ruled in RSA's favour.

Interest issue – the decision in *Equitas*

The judge held that a restrictive approach must be taken to disallowing interest.

He stressed that the basic rule that interest runs from the date of the loss is, as a principle, neither arbitrary nor technical. Instead, it reflects the fact that the insurer has, in an insurance contract, undertaken an obligation to hold the insured harmless against the loss and is in breach by failing to pay as at the date of the loss. He also pointed out that an award of interest is compensatory, not penal.

The defendant reinsurer made two key arguments that the judge rejected:

1. First, it argued that if there was to be an award of interest, then it should not run from before RSA had properly particularised the quantum of its claim. The judge applied analysis from existing case law that a court should disallow interest only where the claimant's fault had displaced the defendant's fault as the "predominant cause" of the claimant being kept out of their money.

   In this case, (i) Equitas had opposed an award of interest on principle, and (ii) had neither asserted nor proved that the reason it had not paid RSA was a lack of knowledge of the amount due. Therefore, it could not be said that any failure by RSA to particularise the quantum of its claim was the "predominant cause" of Equitas's non-payment.

2. Second, Equitas argued that interest should not be awarded for the period between 1997 and 2017 during which the parties had agreed a standstill. In doing so, it implied that reinsurers had been altruistic in agreeing to the standstill, and to award interest would demonstrate that no good deed goes unpunished. The judge rejected this argument, branding it "jocular". He pointed out that in that period, reinsurers retained the use of monies that would otherwise have been paid to their insured.

The judge concluded that an award of interest was appropriate.

Compound interest

There was a further issue as to whether RSA was entitled to simple or compound interest.

The judge reviewed key cases in the development of this area of law, including quoting from *Equitas Ltd v Walsham Brothers & Co Ltd,* in which Mr Justice Males described an award of compound interest as an appropriate component of measuring damages in circumstances where, in an attempt to mitigate a claim, a claimant had to resort to commercial borrowing to replace the money lost.

The judge held that there was no default rule for compound interest in a commercial case. However, compound interest would be awarded if the facts pleaded and proved were sufficient to justify the inference that such an award reflected the claimant's actual loss.

He cited *Walsham*, in which it had been shown that cash flow was critical to the claimant. The claimant had been under considerable pressure to ensure prompt collection of claims and to fund claims where payments had not yet been made by reinsurers.

In this case, RSA pleaded no facts in support of its claim for compound interest. RSA sought to rely solely on its position as an insurer and general market mechanics.

The judge held that this was an insufficient basis to claim compound interest. Instead, he awarded simple interest at 2% above the Bank of England base rate from the date of each respective loss.

While compound interest was not awarded in this case, this appears to be only because RSA did not plead a factual basis that would allow the court to make such a finding. The decision is nevertheless useful for demonstrating how (re)insureds may recover compound interest.

Other authorities

In *Equitas*, the judge reviewed the key authorities on the entitlement to interest, outlining various important principles on the subject.

BP Exploration v Hunt (No. 2) [1979] 1 WLR 783:

- The basic principle is that interest will be awarded from the date of loss.
- Insurance contracts are treated in law as contracts to hold the insured harmless against liability or the loss insured against. Therefore, insurers are, in the absence of contrary provision, in breach of contract as soon as the insured liability or loss occurs.
- Although the sums become due from the date of the loss, it does not follow that the court will award interest from that date in every case.
- There are many examples in insurance claims that are unusual or not straightforward, where a court will exercise its discretion on the basis that it is proper to allow insurers some time to consider the claim. This can vary depending on the nature of the loss, how the claim is presented and the circumstances requiring investigation. The court will always have regard to the circumstances specific to that claim.

The Athenian Harmony [1998] 2 Lloyd's Rep 425:

- In cases where the delay and degree of fault are so substantial that the predominant cause of the plaintiff being out of his money can be seen to be his own failure to prosecute the claim, rather than the defendant's maintenance of his defence, then a successful plaintiff should not be compensated for loss of use of the money.
- However, in order for it to be said that the plaintiff's fault has displaced the defendant's fault as the predominant cause of the plaintiff being kept out of his money, the delay in question would have to be very substantial and not merely relatively short periods of weeks or months. The plaintiff's fault would have to be very substantial, as where an action has inexcusably been allowed to go to sleep for years.

Other recent case law

AerCap Ireland Limited v AIG Europe SA and Others [2025] EWHC 2529

Equitas is not the only recent case reinforcing legal principles on the entitlement to interest. In *AerCap Ireland Limited*, Mr Justice Butcher was presented with similar issues and applied a closely analogous approach.

While Mr Justice Butcher affirmed the position that a court usually exercises its discretion to allow insurers some time to consider their position after a loss, he also said "that should not in the present case in my view, be a very extensive time". In particular, he held that the nature of the insurance and circumstances of the loss were factors that might mean that "the insured could reasonably expect promptitude from insurers". He gave the insurers just under six weeks' respite to account for a reasonable time to consider the loss.

Mr Justice Butcher also considered a nearly identical issue on whether simple or compound interest should be paid to the insureds and arrived at an almost identical conclusion. He held that it was not the practice of the court, even in a commercial context, to award pre-judgment interest on a compound basis unless it was pleaded and proved. As in *Equitas*, Mr Justice Butcher found the insured's submissions inadequate and awarded interest on a simple rather than a compound basis.

Sagicor Bank Jamaica Ltd v Seaton [2023] 1 WLR 1759

This was a decision of the Privy Council, with Lord Hodge delivering the court's judgment. In this case, the court similarly reviewed relevant case law on whether an award of compound interest was appropriate. The court held, applying the judgment of the House of Lords in *Sempra Metals Ltd v Inland Revenue Comrs* [2008] AC 561, that compound interest could be awarded as damages for breach of contract.

In short, the court's analysis is that compound interest can be claimed as damages or part of the calculation for loss only if it can be shown that the claimant actually suffered such loss.

Key takeaways

(Re)insureds should not overlook a claim for simple or compound interest when pursuing indemnity from their (re)insurers. The authorities clearly support the view that re(insureds) are entitled to interest on their claims for indemnity on the basis that they will have been left without their funds, potentially for a considerable period while the claim is resolved. As a matter of principle, (re)insurers should not be disallowing interest, save where the facts clearly entitle them to.

Even an award of simple interest can be significant, particularly when interest rates have been higher in recent years. The courts clearly consider it reasonable that (re)insureds should be compensated for being without the funds to which they were entitled. A typical simple interest award of 2% above the Bank of England base rate will add a material sum to high-value claims.

When (re)insureds make a claim for compound interest, however, they must properly plead the claim, armed with proof that it is an appropriate measure of damages for their losses.

This may be an important tool for policyholders who have been waiting for their claims to be resolved but do not have viable claims for additional damages for late payment pursuant to Section 13A of the Insurance Act 2015. While the implementation of Section 13A in 2016 was supposed to encourage claims to be paid quickly and provide policyholders with an additional remedy for claims that took an unreasonable time to be paid, the limited case law in this area suggests that it will be a high bar to overcome.

The only decisions on Section 13A so far (*Quadra Commodities S.A. v XL Insurance Company SE and Ors* [2022] EWHC 431 (Comm) and *Delos Shipholding S.A. and Ors v Allianz Global Corporate and Specialty S.E. and Ors* [2024] EWHC 719) both went against policyholders. However, in those cases and in the cases referred to above, the courts have helpfully articulated how claims for damages for late payment and compound interest could succeed, subject to the facts. Attention should therefore be paid to these authorities when such claims are being advanced, so that (re)insureds put themselves in the best position to succeed.

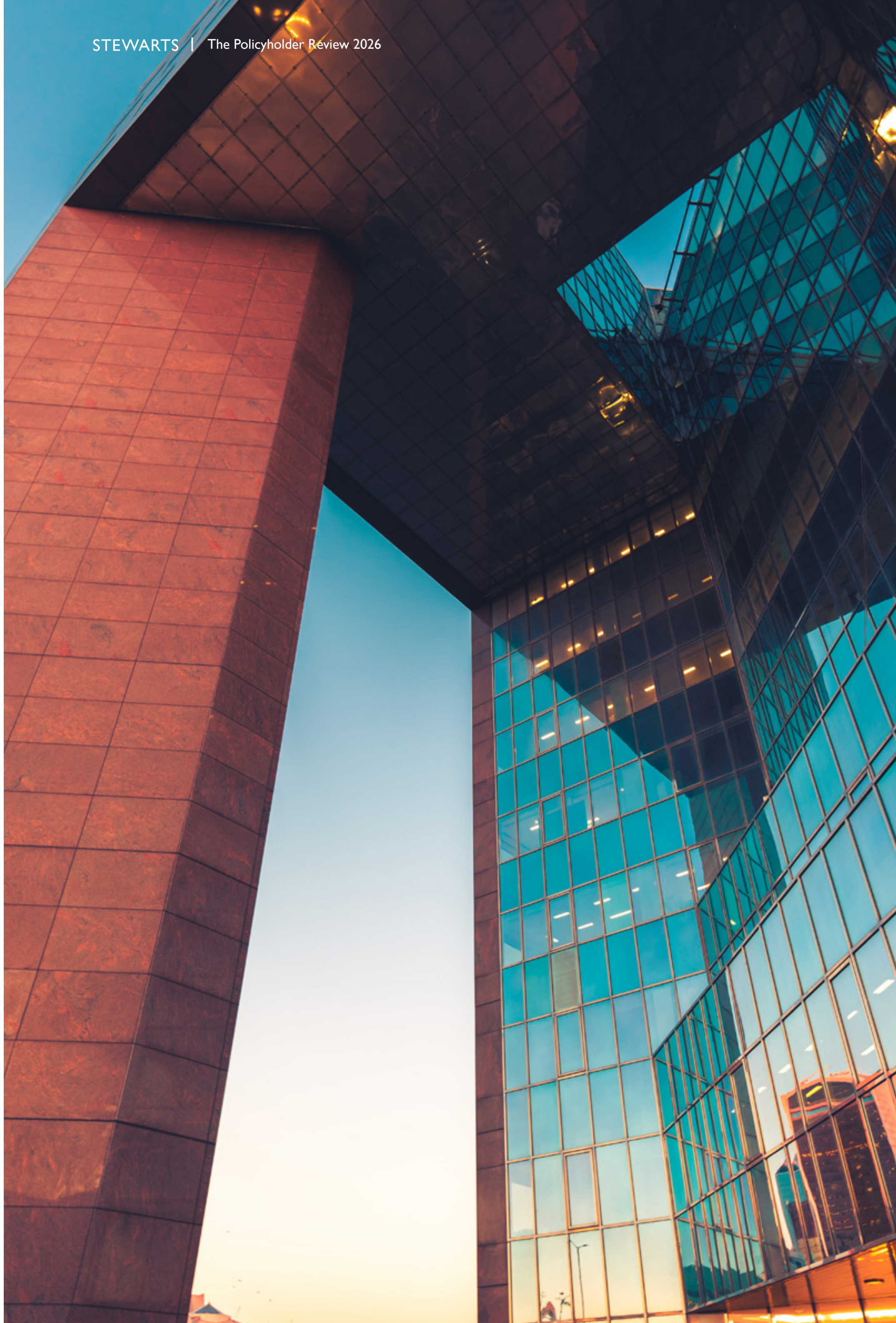
For (re)insurers, the recent decisions in *Aercap* and *Equitas* may not come as a surprise for many, but we do still see arguments arise as to a (re) insured's entitlement to interest. The law is settled. (Re)insurers would therefore do well to consider whether interim payments are due to stop or reduce the interest accruing.

Inflation-adjusted damages: a possibility?

The principles underpinning the courts' firm support for awarding interest in insurance claims raise the question of how a court would treat a claim for inflation-adjusted damages. This has been a pertinent question for many policyholders in recent years, given the high-inflation environment of the early 2020s. It is a striking reality that a policyholder who made a claim in 2020 but received the requested indemnity in full in 2025 would receive funds with substantially less purchasing power than they would have had if the payment had been made in 2020, ie, at the date of the loss. The same compensatory principles that underpin an award of interest also militate in favour of adjusting the value of the damages.

There is support for this in the case law. In *Pickett v British Rail Engineering Ltd* [1980] AC 136, Lord Wilberforce said: "Increase for inflation is designed to preserve the 'real' value of money: interest to compensate for being kept out of that 'real' value. The one has no relation to the other. If the damages claimed remained nominally the same because there was no inflation, interest would normally be given. The same should follow if the damages remain in real terms the same."

Therefore, while there is precedent for an adjustment for inflation (including recent precedent in a personal injury context), it has yet to be tested in an insurance claim. It remains to be seen whether the courts would apply these principles in insurance claims and include adjustment for inflation as another tool alongside compound interest and damages under Section 13A of the Insurance Act 2015 for late payment.



Third party unable to establish specific claim over insurance payout after defendant enters voluntary liquidation

Hebe Swain

In the recent case of *Desai v Wood* [2025] EWCA Civ 906, the Court of Appeal considered the treatment of insurance proceeds paid to an insolvent policyholder under a professional indemnity policy. The insurance proceeds related to an underlying claim by third-party claimants. The policyholder company went into voluntary liquidation following receipt of the insurance proceeds, but before liability had been established by the claimants or the money passed on by way of settlement. Although the proceeds related solely to the claimants' claim and were not paid in respect of defence costs incurred, the insurance proceeds became a general asset in the insolvent estate, and the claimants were unable to establish any specific right over the funds.

Hebe Swain analyses the decision and the implications for third parties claiming against insured defendants in a precarious financial position.

Background

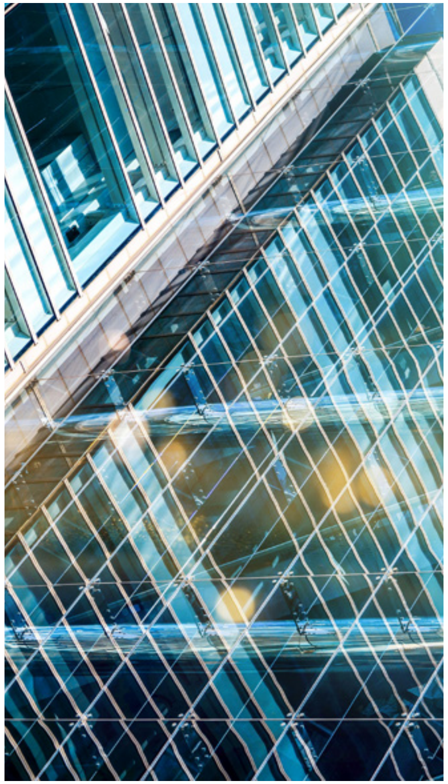
Dilip Desai and Paresh Shah (the "Appellants") engaged the services of an interior design company, Boscolo Ltd ("Boscolo"), to design a refurbishment scheme for an apartment. The Appellants were advised that Listed Buildings Consent was not required for the refurbishment. The Appellants alleged that this advice was negligent and that they had suffered loss as a result. No finding on liability had been made, nor had any settlement been agreed.

The design contract between the Appellants and Boscolo required Boscolo to maintain professional indemnity insurance. Boscolo held a professional indemnity policy with Royal & Sun Alliance Ltd ("RSA"), which had a limit of indemnity of £250,000 inclusive of defence costs (the "Policy"). The policy contained a provision allowing RSA to elect to pay out the full limit of indemnity to Boscolo and thereby relinquish any liability for defence costs and control of the claim.

In August 2021, after a letter of complaint had been sent by the Appellants but before any formal proceedings had been issued, RSA chose to exercise its power under this provision and paid Boscolo the full limit of indemnity (£250,000).

The Appellants issued proceedings against Boscolo and RSA in October 2021, claiming over £700,000. A couple of weeks later, Boscolo entered creditors' voluntary liquidation, and the statement of affairs listed what remained of the insurance proceeds (£246,000) as Boscolo's only material asset. Boscolo had a number of liabilities in addition to its alleged liability to the Appellants.

The Third Parties (Rights Against Insurers) Act 2010 (the "Act") did not apply, as RSA had paid the full indemnity and compromised the insurance claim prior to Boscolo entering liquidation. Therefore, Boscolo had no remaining rights under the Policy that would have transferred to the Appellants by operation of the Act.



High Court decision

At first instance, the Appellants argued that it was either an express or implied term of the design contract that the insurance proceeds should be held on trust for them. The Appellants also argued that there was a constructive trust in their favour over the insurance proceeds because either (1) it would be unconscionable for Boscolo to benefit from the insurance proceeds in the circumstances, or (2) a constructive trust was necessary to prevent Boscolo from being unjustly enriched. All arguments were rejected.

Court of Appeal decision

On appeal, the Appellants put forward more nuanced arguments around the alleged implied terms in the design contract. In summary, they argued that the design contract contained two implied terms that meant Boscolo should not dissipate the insurance proceeds or use them to pay other creditors if they had reasonable grounds to believe they would not otherwise be able to meet the Appellants' claim. Instead, the proceeds should be used for the purpose for which the insurance was (compulsorily) purchased, ie to ensure Boscolo was financially able to compensate the Appellants.

In view of these implied terms, the Appellants argued that Boscolo held the insurance proceeds on an implied trust and should not be used except to satisfy the Appellants' claim or for funding Boscolo's defence.

The Court of Appeal considered both points, but noted that the critical question was whether the facts gave rise to a trust in favour of the Appellants. Establishing that the implied terms existed without establishing a trust would be of limited benefit to the Appellants, as they would only have a contractual claim and would be treated as general creditors of Boscolo. In contrast, if a trust could be established, this would ringfence the sums in favour of the Appellants.

For a term to be implied into the contract, it was uncontroversial between the parties that:

1. the term must be necessary to give the contract business efficacy and/or be so obvious that it goes without saying, and
2. the term must be capable of being formulated with sufficient clarity and precision.

The Court of Appeal considered these points and concluded that the test had not been met for a number of reasons, including the following:

- It may be of benefit to the Appellants that Boscolo's liability insurance existed, but implying a term to ringfence the proceeds was not necessary to make the design contract work.
- There was significant uncertainty as to what the implied term would say. For example, in what financial circumstances would the clause be triggered, and what state of mind was required of the directors? A range of options could apply.
- The imposition of a trust would have important and onerous consequences on directors and anyone handling the proceeds, including the potential for personal liability. It was not clear that the parties would have intended to impose such obligations without defining their scope in precise terms.
- The Appellants agreed that Boscolo would be permitted to use the proceeds to fund its defence, but there was uncertainty around the scope of this permitted use.
- It was unclear what the position would be around the ringfencing of funds if more than one party were claiming against Boscolo and eroding the same limit of indemnity.

Given these uncertainties, the Court of Appeal considered it impossible to say what the scope of any implied term(s) would be.

Further, the Court of Appeal noted that a trust would only arise where there was certainty of intention, subject matter and object. The points above were relevant again. In addition, the Appellants' agreement that Boscolo could use the proceeds to fund its defence gave rise to an inconsistency because it would allow the supposed trustee (Boscolo) to use the proceeds for its own purposes, which were directly opposed to those of the supposed beneficiaries (the Appellants). Further, Boscolo would be permitted to use the proceeds to their extinction, meaning the subject matter of the trust could not be certain.

Comment

It was established law prior to the handing down of this judgment that any insurance proceeds paid in relation to a third-party claim are an asset of the policyholder and that a third party claimant does not have a beneficial interest over these sums. This decision confirms that the same principle applies even when a third party's contract with the policyholder requires them to hold the insurance under which the proceeds were paid. However, the decision also expressly confirms that it is not impossible for a trust to exist if the parties agree to the third party having a proprietary right or security interest over any relevant insurance proceeds.

In this case, the particular challenge for the Appellants was that Boscolo was on the brink of insolvency but had not yet entered an insolvency process when the insurance payment was made. Ironically, the Appellants would have been in a better position if Boscolo had entered an insolvency process prior to the payment being made, as they would have been able to claim directly against the insurer under the Third Parties (Rights Against Insurers) Act 2010.

Although this is an unappealing decision for claimants against insolvent defendants, third parties should draw comfort from the fact that the circumstances leading to this decision are relatively rare. The decision is only applicable where:

(1) insurance proceeds relating to a third-party claim are paid by an insurer to the policyholder (rather than to the third party or their solicitor), pursuant to a relevant term in the policy, and

(2) the policyholder enters an insolvency process after those funds have been paid but before they have been transferred to the third party.

Arguably, provisions in insurance policies allowing insurers to pay the limit of liability to an insured defendant before liability has been established work unfairly to the disadvantage of the claimants who are intended to be protected by the provision of the insurance. However, there is at present nothing precluding insurers from including and exercising such provisions in liability policies they issue.

Insureds' breaches of conditions precedent preclude third parties recovering from insurers

Hebe Swain

The purpose of the Third Parties (Rights Against Insurers) Act 2010 (TPRAIA 2010) is to facilitate third parties recovering from insurers where they are unable to recover from insolvent insureds. However, two recent cases highlight continuing limitations for third parties who, subject to policy terms, can find their ability to recover remains dependent on an insured defendant taking certain actions.

In *Archer v R 'N' F Catering Limited* and *Makin v Protec Security Group Limited*, both brought under the TPRAIA 2010, the court found that the claimants were unable to recover from the defendants' insurers because the defendants had breached the notification provisions in their insurance policies. Hebe Swain analyses the decisions and the consequences of the insureds' non-compliance with policy terms.

Why are these cases significant?

These decisions have had severe consequences for the claimants, limiting their ability to recover sums following breaches by insurers over which the claimants had no control.

Both decisions involved underlying claims for personal injury brought by individuals against companies. The claims were unconnected. In each case, the defendant company entered an insolvency process some years following the incident on which the personal injury claim was based. Following the insolvency, each of the companies' insurers became additional defendants to the personal injury claims in accordance with the provisions of the TPRAIA 2010. However, due to the defendant companies' non-compliance with policy terms, the insurers were not required to provide indemnity, and the individuals were unable to recover.

Third Parties (Rights Against Insurers) Act 2010

TPRAIA 2010 enables a claimant to bring a claim directly against a defendant's insurer if the defendant is subject to an insolvency process. TPRAIA 2010 allows the claimant to step into the shoes of the defendant and acquire its rights to indemnity under the defendant's policy.

For a claimant bringing a claim under TPRAIA 2010, there will be two limbs for recovery:

1. the claimant must prove they would have succeeded in their claim against the insured, and
2. they must show that under the terms of the policy, the insurer would be liable to indemnify the insured for its liability to the claimant.

The two cases listed below consider limb (2) and the extent to which the insurers remained liable following a defendant's non-compliance with policy terms.

Archer v R 'N' F Catering Limited and ors

The claim was brought by Miss Archer initially against R 'N' F Catering Limited (t/a Biplob Restaurant) (the first defendant) and subsequently also against Riverstone Insurance (Malta) SE (the second defendant), the successor in title to the first defendant's insurer. Miss Archer sought damages after experiencing severe gastrointestinal illness after a trip to the first defendant's restaurant, following which she had significant sections of her bowel removed and now uses a stoma bag.

The hearing proceeded on the basis of assumed facts regarding the underlying liability and dealt with the following preliminary issues:

i. Can the second defendant prove that the first defendant is not entitled to an indemnity under the policy?

ii. Does section 9(2) of the TPRAI Act 2010 assist the claimant to render the second defendant potentially liable to the claimant on proof of the first defendant's liability?

Section 9(2) TPRAIA 2010 states "Anything done by the third party which, if done by the insured, would have amounted to or contributed to fulfilment of the condition is to be treated as if done by the insured."

TPRAIA 2010 provides that insurers can rely on any defences against the claimant that they could have relied on if the claim had been brought by the insured (section 2(4) TPRAIA 2010). In accordance with the Act, the insurer's primary defence was that the notification provisions in the policy had been breached by the insured and, accordingly, it was not liable to the claimant.

The insurers alleged that the policy contained various conditions precedent to cover, including that the insured must "as soon as reasonably possible give notice to the Insurer" following "any event or circumstance which could give rise to a claim". Insurers argued that these provisions had been breached, describing the first defendant's attitude to addressing the claimant's claim and notifying insurers as 'burying its head in the sand' for months and indeed years, before coming up with a 'dog ate my homework' series of excuses". The claimant did not challenge the insurer's assertion that these provisions were conditions precedent. On the facts, the court agreed that the notification provisions were conditions precedent and that these had been breached.

As a second line of attack, the claimant argued that despite the insured's breach, it should not be precluded from recovering from insurers since it would have been impossible for it to have complied with the conditions precedent. The insurer's rights only vested in the claimant upon the insurer entering into an insolvency process, which was over three years after the incident and the claimant first making her claim. Accordingly, it was impossible for the claimant to have complied with the term requiring notification to be made "as soon as reasonably possible".

Insurers disagreed, noting that taken to an extreme, the claimant's position would lead to an absurd result: "If an insured company defended a claim without notifying its insurer and lost the claim at trial after, say, three years of litigation, a claimant may seek to wind up the insured when it could not pay the judgment liabilities. Applying the claimant's logic, on the winding up of the company, the claimant in the example could then seek to rely on s.9(2) to provide a first notification of the claim to the insurer at that stage. Such an approach would make a mockery of an insurer's contractual rights to be notified of a possible claim as soon as reasonably possible."

The court agreed with the insurer, stating that the claimant's argument would require the court to find that any conditions precedent the claimant was subject to were fundamentally different (as to timescale for compliance) from any conditions precedent the restaurant would have been subject to. The court did not accept this position. Accordingly, the court found that the claimant's ability to recover was lost when the defendant insured breached the notification conditions.

Makin v Protec Security Group Limited and ors

The decision in *Archer v R 'N' F Catering Limited* (handed down in June) followed hot on the heels of the April decision in *Makin v Protec Security Group Limited*, which considered similar issues around breach of condition precedent. The court similarly found that the policyholder was unable to recover damages from the insurer.

Mr Makin sadly had a stroke in 2017 after being forced to the ground and held in a headlock by door supervisors of a bar and restaurant in Oldham. Mr Makin was left with serious neurological disability following the stroke. Mr Makin initially brought his claim against the operator of the bar (subsequently discontinued) and Protec Security Group Limited ("Protec"), the alleged employer of the door supervisors. Joint liquidators were appointed over Protec the day before the trial of Mr Makin's claim, and Protec was absent from the hearing. In its absence, the court found that it was vicariously liable for Mr Makin's injuries. Subsequently, Protec's public liability insurer, QBE, was added to the claim under TPRAIA 2010.

The insurer refused indemnity on the basis that the insured had breached conditions precedent relating to notification. The court was asked to consider four issues:

i. Was the second defendant (Protech) in breach of the claims conditions under the policy?

ii. If the second defendant was in breach of the claims conditions, was the result that the third defendant (the insurer) was entitled to refuse cover as of right for the breach of a condition precedent, or did it limit the third defendant to exercising a discretion to refuse cover?

iii. If the second defendant was in breach of the claims conditions but that breach did not automatically entitle the third defendant to refuse cover, was it entitled to refuse cover on the facts of the case?

iv. Is the judgment of His Honour Judge Sephton KC on preliminary issues of breach of duty on the part of the second defendant and causation of injury binding on the third defendant for all purposes?

The claims condition in the policy required:

"You or any other party insured by your policy must inform [claims handler]:

- immediately you have knowledge of any impending prosecution, inquest or inquiry in connection with any accident or disease, which may be the subject of claim, give notice in writing and give us any further information and assistance we may require (Condition 3.1) …
- within as soon as practical but in any event within thirty (30) days in the case of any other damage, bodily injury, incident, accident or occurrence, that may give rise to a claim under any your policy but not separate specified above" (Condition 3.5)."

In relation to these and other conditions, the policy stated that "breach of these conditions will entitle us to refuse to deal with the relevant claim". In view of these terms, the insurer asserted that immediate notification or notification within 30 days was a condition precedent to cover.

On the facts, the court considered that the insured would not have been required to notify insurers immediately after the incident, as Mr Makin walked away from the scene and took a taxi home. There was no suggestion that a claim was likely to arise. Further, at that time, the sole director of the company was on holiday and unaware of the incident.

In the month following the incident, the police carried out an investigation during the course of which the insured's director returned from leave. The court considered that the duty to notify arose during this time, and notification was not made in a timely manner. Indeed, the court stated that there was no evidence of the insurers having been told until around three years after the incident occurred, when it received an email from the claimant's solicitors. In view of the delay, the court concluded that the insured was in breach of this condition.

The court then turned to issue (ii), namely, whether the claims condition listed above was a condition precedent. The clause was not described as such, although other clauses in the policy were. The claimant argued that when construing the policy as a whole, the effect of this clause was ambiguous and the *contra proferentum* rule should apply, ie the ambiguity should be construed in the claimant's favour. The insurer disagreed, arguing the clause was a condition precedent: the policy expressly provided that breach would "entitle [insurers] to refuse to deal with the relevant claim". The court agreed with insurers. It found the effect of the clause was sufficiently clear and that it was a condition precedent.

In view of the court's position on issue (ii), issue (iii) fell away. However, on a positive note for policyholders, the court commented that if the notification provisions had been found to be bare conditions, insurers would not have been able to avoid cover on the basis of the late notification.

Finally, on issue (iv), the court commented that if there had been cover under the policy, the judgment in the underlying claim would have been binding on the insurer. Even though the insured did not attend the trial, the judgment is binding on them, and it would be binding on insurers in the same way.

The decision is being appealed and is listed to be heard by April 2026.

Summary

The outcome of these cases has been severe for both claimants as they have been unable to recover damages from insurers following significant injuries.

In both cases, the failure of the defendant companies to properly notify their claims to insurers had significant consequences for the claimants, although the claimants were not at fault for the breaches themselves. In *Archer*, the court expressed "significant sympathy" for Miss Archer in its judgment and was alive to the impact the decision would have. In *Makin*, the court noted, "one must have considerable sympathy for the claimant, but that cannot by itself mean that he has a good legal case". In both cases, the court considered itself bound by the policy terms and the provisions of the TPRAIA 2010, and unable to impose on the insurers a liability broader than that they had agreed to take on.

Both cases were perhaps particularly challenging for the claimants because:

- The notification provisions in the policies were conditions precedent, and as a consequence, non-compliance entitled the insurer to refuse all indemnity, with no requirement to demonstrate any prejudice. In cases where notification provisions are bare conditions (rather than conditions precedent), the consequence of non-compliance may be less severe.
- There was a lag of many years between the incidents and the defendant companies entering insolvency proceedings. During this time, the claimants did not have a right to claim under the policy and the company, in the usual way, retained responsibility for notifying and updating its insurers. If the insolvencies had occurred earlier (eg shortly after the incidents or around the time the claims were made), the claimant may have been able to step into the shoes of the insured in sufficient time to ensure the policy terms were complied with.

The decision serves as an important reminder for all policyholders about the risks associated with entering into policies that include conditions precedent in their notification provisions, and the importance of being aware of and complying with notification clauses.

For individuals claiming against companies, particularly those perceived as being at risk of insolvency, steps should be taken to interrogate the insurance position and seek confirmation from defendants that claims and potential claims have been notified to insurers at the earliest opportunity. Where insurers' details are available to claimants, it would be prudent for claimants to notify insurers of the claims as an additional safety measure.

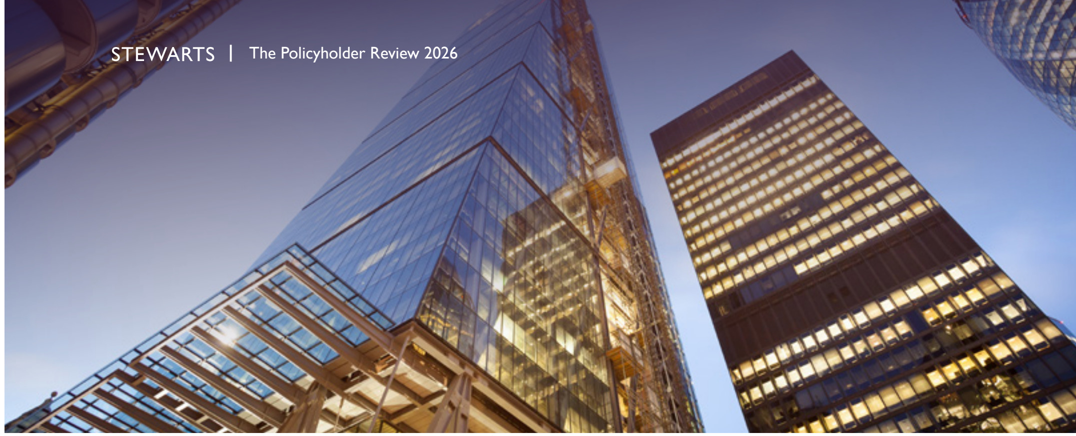
Final thoughts

Dan Herman, Head of the Personal Injury team at Stewarts acting for claimants with life-changing injuries, offers his perspective:

"In cases where the very acts that give rise to a claim are also potential grounds for an insurer refusing indemnity under a policy of employers or public liability, we need to think carefully about the specific allegations we make and also do all we can to ensure we put the defendant's insurer on notice of the potential claim. We also need to think creatively about whether any other party with effective insurance could also be considered liable to compensate the claimant.

Sadly, we have been involved in cases in which, as a consequence of the defendant's acts or omissions, we either been unable to find someone to satisfy a judgment secured on behalf of a claimant or have had to discontinue cases because it became clear any judgment would almost certainly go unsatisfied.

For some time we have argued that the government should establish an Employers' Liability Insurance Bureau which, like the Motor Insurers Bureau, would act as the insurer of last resort and pay any judgments which, for reasons beyond the injured employee's control, are not satisfied by their employer or its insurer."



New clarity on double insurance and the limits of "other insurance" clauses

Arjun Dhar

While the problem of conflicting "other insurance" clauses is not new, the Commercial Court has confirmed in a recent ruling that when each policy attempts to act only in excess of the others (thereby depriving the insured of any primary cover), those clauses will effectively cancel one another out. The case offers valuable clarification on how courts approach overlapping insurance policies and "other insurance" clauses that attempt to convert primary policies into excess cover where other insurance exists.

Arjun Dhar reviews the Commercial Court's policyholder-friendly decision in *Watford Community Housing Trust v Arthur J Gallagher Insurance Brokers Ltd* [2025] EWHC 743 (Comm). The ruling also confirms that an insured is generally free to choose which policy to claim on unless a rateable contribution clause alters that position.

Double insurance and "other insurance" clauses

Double insurance arises when two or more policies respond to the same loss. While once treated with suspicion due to concerns about double recovery, the law recognises that it is proper and can be a commercially prudent guard against insurer insolvency. In practice, overlap can also arise inadvertently, especially where the insured has policies with different insurers.

In addition, many policies now include an "other insurance" clause designed to avoid or reduce the indemnity payable if liability is triggered under a separate policy. A common variant is a type of clause that seeks to make the policy respond only in excess of other available cover. As the judge noted, citing the judgment of Gavin Kealey KC, sitting as a Deputy High Court Judge in *The National Farmers Union Mutual Insurance Society Limited v HSBC Insurance (UK) Limited* [2011] Lloyd's Rep. 86, at [27], "other insurance" clauses generally fall into three main classes:

- "escape" clauses, which exclude liability altogether if other insurance is available,
- "rateable proportion" clauses, which limit liability to a share of the loss; and
- "excess" clauses, which make the policy respond only after other cover is exhausted.

Final thoughts

Watford Community Housing Trust suffered a data breach and held three insurance policies that could respond:

- a cyber policy underwritten by various Lloyd's syndicates, with a limit of £1 million,
- a combined policy underwritten by QBE, with a limit of £5 million, and
- a professional indemnity (PI) policy underwritten by Hiscox, also with a limit of £5 million.

Notification was made under the cyber policy, but the defendant broker failed to notify the insurers of the combined and PI policies, who, consequently, refused to indemnify the insured. QBE subsequently agreed to accept coverage under the combined policy, meaning that a total of £6 million in indemnity was available to the insured. However, Hiscox maintained its declinature based on late notification, meaning the insured was not covered for its losses over £6 million.

The insured brought a negligence claim against the broker concerning its failure to notify under the Hiscox policy. In response, the broker argued that due to the interaction of the "other insurance" clauses, the maximum total indemnity to which the claimant would have been entitled under all three policies was £5 million. According to the broker, the insured had, therefore, suffered no net loss.

Key issues

1. "Other insurance" clauses: did the provisions in each policy successfully convert them into excess layer policies, or did they cancel each other out?
2. Rateable contribution: if all three policies formed a horizontal primary layer, was the insured limited to recovering on a proportionate basis from each insurer?

Summary of the decision

Deputy High Court Judge David Bailey KC held that the "other insurance" clauses in each policy effectively neutralised one another. Applying *Weddell v Road Transport & General Insurance Co Ltd* [1932] 2 KB 563, he affirmed that in a double insurance situation, where the "other insurance" clauses would deprive the insured of any primary cover on account of their coexistence, those clauses are to be treated as cancelling each other out. Adopting the now well-established interpretive viewpoint of the reasonable policyholder rather than a pedantic lawyer, each policy was therefore to be treated as a primary policy providing cover to the insured.

In this case, that meant the insured had the benefit of triple insurance against its losses from the data breach under a horizontal layer of primary insurance providing £1 million of cover under the cyber policy, £5 million of cover under the combined policy and a further £5 million of cover under the PI policy.

The court went on to confirm the orthodox common law position. In the absence of an express rateable contribution clause, the insured is entitled to claim for its loss up against whichever insurer it chooses up to the limit provided by that insurer, subject to not being entitled to recover in excess of the actual loss suffered. There is no obligation to claim proportionately or sequentially. The paying insurer is free to seek contributions from others but not to require the insured to claim only against it in proportion to the cover it offered.

Unresolved questions

The court expressly left unresolved a complex question: where an insured has multiple primary policies forming a horizontal layer followed by an excess policy above, must the entire horizontal layer be exhausted before the excess policy responds?

Deputy High Court Judge David Bailey KC said on this issue: "I appreciate that consequential issues of some complexity may arise from this approach in cases where an insured has both a horizontal layer of two or more primary policies combined with a vertical tower of one or more excess policies (such as whether the whole of the primary layer must be exhausted before the excess policies attach) which have vexed and divided the American courts, but since no such issues arise in this case I need not attempt to resolve them here. They are better addressed if and when they arise."

This uncertainty may continue to trouble insureds and brokers who structure their cover in layers.

Practical guidance for policyholders and brokers

- Do not rely on the boilerplate: not all "other insurance" clauses will achieve what they claim. Where several policies defer to each other, they may all be liable.
- Freedom of choice: in the absence of a rateable contribution clause, the insured is entitled to choose whom to claim against and in what amount.
- Notifications matter: a policy that could respond in law may not do so in fact if notification conditions are not met.
- Reassess layering strategies: where policies are intended to sit in tiers (eg primary and excess), review whether the wording delivers this structure.
- Broker advice: brokers should take care when advising on policy interaction, especially where "other insurance" clauses are present. Failure to anticipate mutual cancellation may expose them to negligence claims.

Conclusion

The decision in *Watford* reaffirms the core principles of double insurance. It offers clarity around conflicting "other insurance" clauses but stops short of resolving the challenges that arise when horizontal and vertical coverages interact.

Given the acknowledgement that this question has arisen in other jurisdictions, it will likely return before the English courts. Until then, parties should review their policies closely. In a market where every clause competes for primacy, *Watford* reminds us that escape routes can lead nowhere.

Ransomware's risk to businesses may be growing more complex

Chloe Derrick

Any business that uses IT and computer systems faces a multitude of cyber risks including the threat of ransomware – bad actors blocking use of systems until the victim pays a ransom. New analysis by research firm Chainalysis has indicated that the total global value of ransomware payments last year fell from a record US$1.2 billion in 2023, to US$813 million in 2024.

Policyholder Disputes partner Chloe Derrick comments on how far we can read into a decline in the total value of monies extorted by ransomware attacks, why ransomware still remains a paramount cause of concern for businesses, and what this could mean for cyber insurance disputes in future.

Threat of ransomware should not be minimised

Last year's fall in the total value of attacks must be put into context, as it comes after a peak for ransomware activity in 2023. Industry commentators noted increases on various metrics including the proportion of new ransomware variants and a "significant rise in posts on data leak sites" according to analysis by cybersecurity firm Mandiant. Its report also suggested that, in almost one third of incidents, attackers had deployed ransomware within only 48 hours of gaining access to the business's systems.

Against that backdrop, the news that the total value of ransomware payments made globally during 2024 had decreased, when compared with earlier years, will be welcomed by businesses. However, it is important a distinction is drawn between the collective payments made and the number of attacks taking place.

Unfortunately for businesses, ransomware remains a persistent cyber risk and whilst the market is witnessing ransom demands that are not at headline grabbing levels, even lower ransom requests can still be business-critical risks for small and mid-size companies.

What would legislation to block ransomware payments mean in practice?

Cyber insurance continues its upward growth trajectory as the fastest-growing global insurance product. Prompted by rising global cyber threats, an increasing number of businesses worldwide across industry sectors are either purchasing standalone cyber coverage for the first time, or broadening the scope of their existing coverage.

Ransomware is only one element of this trend: the cyber market is understandably becoming increasingly wary of the national or global damage that a systemic cyber event might cause. The recent global CrowdStrike outage brought to the forefront market-wide queries around how cyber insurance might respond to cover the estimated billions of dollars of business interruption losses in that instance.

Why is building safety litigation on the rise?

Chloe Derrick

Writing for Construction News, Policyholder Disputes partner Chloe Derrick explained how recently introduced laws around building safety risk are set to lead to a surge in disputes, and the insurance implications for businesses.

The construction sector has been subject to a significant liability shift, following a wholesale review of building regulation and practice after the Grenfell Tower fire in June 2017.

Legal claims for cladding and fire safety losses continue to rise following Grenfell, with claims issued in the Technology and Construction Court (TCC) over the past six years now exceeding £640 million in total value. Additionally, we have seen a recent influx of fire safety related applications in the Property Chamber of the First-tier Tribunal (FTT).

So what is causing the ongoing surge in construction litigation, and what do developers and construction professionals need to know?

Cause and effect

The introduction of the Building Safety Act 2022 (BSA) altered the landscape for construction professionals and introduced sweeping legal and regulatory changes. It is undoubtedly one of the most radical pieces of legislation introduced in recent times.

One of the most widely commented-on shifts in the law is the significant, retrospective extension of the limitation periods that apply to claims pursued under the Defective Premises Act 1972 (DPA). Claims can now be commenced up to 30 years from the date the right of action accrued, reawakening potential long-tail liabilities for works completed as far back as the early 1990s. That is significant for parties facing DPA claims.

Judgment from the Supreme Court is also awaited (in *URS Corporation v BDW Trading*) on whether commercial parties can seek to pursue their own DPA claim. Ultimately, as DPA claims increase against developers and other construction professionals, concurrent coverage disputes are also increasing.

Groundbreaking remedies

The BSA also introduced several new duties and liabilities, alongside a handful of groundbreaking new remedies that can give rise to significant liability orders against professionals. The FTT now has unfettered discretion to issue Remediation Orders against landlords, which requires them to remediate defective buildings. Similarly, Remediation Contribution Orders and Building Liability Orders allow the FTT to make financial orders against non-contracting parties, potentially piercing the corporate veil.

The remedies introduced are far broader than would ordinarily be the case and it is possible we will see disputes arising around how orders under the new remedies fit.

According to government estimates, there are thousands of buildings awaiting fire safety remediation works, or where 'unsafe' cladding is yet to be identified. In an effort to reduce remediation delays, the government has published a Remediation Acceleration Plan, which requires certain works or steps to have been taken on high-rise and tall buildings by the end of 2029, with landlords placed under threat of "severe penalties" if they do not comply.

The government has also now largely accepted the recommendations set out in the Grenfell Tower Inquiry's phase two Report, albeit with some caveats.

Under the inquiry recommendations, a new single construction regulator will be established and there will likely be additional statutory requirements on fire engineers, architects and contractors under an umbrella objective of stricter accountability. It remains to be seen what impact this will have on professional indemnity insurance, which should be monitored closely, although the inquiry's recommendation as to sweeping personal undertakings from principal designers (which generated some concern among the insurance market) has favourably been watered down.

Professional indemnity insurance

Under professional indemnity policies, businesses with multiple high-risk buildings will want to bear in mind the policy's aggregation clauses and how those might apply to policy limits and deductibles, together with policy attachment. It might be possible to obtain multiple limits of indemnity under different policy years, for example, depending on each claim's circumstances.

Businesses should also carefully consider their policy wording and any arguments raised by insurers to extinguish or reduce cover; for example, reliance on workmanship and contractual warranty exclusions, or other late notification or fair presentation stances. In our experience, counter arguments can often be raised to secure coverage.

Supreme Court confirms consultant's duty of care in defective premises claim: *URS Corporation Ltd v BDW Trading Ltd*

Jesal Parekh

In what appears to be a milestone judgment for the construction industry, for the first time, the Supreme Court has considered claims arising under the Building Safety Act 2022 ("BSA 2022") alongside statutory duties owed to developers under the Defective Premises Act 1972 ("DPA 1972").

The Supreme Court has handed down its long-awaited landmark judgment in *URS Corporation Ltd v BDW Trading Ltd* [2025] UKSC 21, in which a panel of seven justices unanimously dismissed URS's appeal on all four grounds.

The judgment also provides guidance on the extent to which losses that have been incurred by developers "voluntarily" are recoverable from their subcontractors on the basis that they fall within their duty of care.

Jesal Parekh considers the key outcomes of the judgment and its wider implications against the backdrop of the BSA 2022, which holds those responsible for building safety defects to account.

Background facts

The developer, BDW Trading Ltd ("BDW"), appointed URS Corporation Ltd ("URS") to provide structural design services for the construction of two residential developments, Capital East and Freemens Meadow, which reached practical completion by March 2007 and February 2005 to October 2021 respectively.

Following the Grenfell Tower disaster in June 2017, BDW undertook widespread investigations of its developments. Following the identification of structural integrity issues in other developments designed by URS, a review was carried out of Capital East and Freemens Meadow.

Although the blocks at Capital East and Freemens Meadow did not exhibit cracking of the type identified at other developments, the investigations showed they had been built to dangerously inadequate structural designs.

Notably, by the time the defects came to light in 2019, BDW no longer owned or had any proprietary interest in the relevant buildings. However, as a responsible developer, BDW took it upon itself to carry out the remedial works. As URS was responsible for the inadequate structural designs, BDW sought to recover the remediation costs from URS.

In March 2020, given that its contractual claim against URS was statute barred, BDW brought a tortious claim alleging that URS had breached its duty to exercise reasonable skill and care.

The interplay between the DPA 1972 and the BSA 2022

Section 1 of the DPA 1972 allows homeowners to pursue a claim against those responsible for constructing a new dwelling not fit for habitation upon completion, such as developers and contractors.

Previously, the time for pursuing such claims was six years from the date of practical completion of the dwelling. Section 135 of the BSA 2022 extended this time limit to:

- 15 years for all claims arising after 28 June 2022, when the BSA came into force, and
- 30 years retrospectively for any causes of action that have arisen within 30 years of the BSA coming into force.

The first instance and Court of Appeal decisions

Various legal issues were considered at first instance and by the Court of Appeal ("CoA").

Following the introduction of the BSA 2022, BDW sought permission to amend its pleading and include a claim under Section 1 of the DPA 1972 and contribution claims under the Civil Liability (Contribution) Act 1978 ("CLA 1978").

BDW was granted permission to amend its pleading, and the first instance judge found that the scope of URS's duty extended to the claimed losses even though BDW no longer had any proprietary interest in the developments. However, the judge held that the scope of losses did not include "reputational damage". The judge also held that BDW's cause of action against URS accrued no later than practical completion of the developments.

URS appealed both the preliminary issues and the permission granted to BDW.

In the CoA, URS contended the losses fell outside of its duty of care, and BDW never suffered any actionable damage because either:

- BDW sold the buildings before the defects came to light and no longer owned them, and/or
- BDW was not required to carry out the remedial works as it had a complete limitation defence to any claim brought against it by the purchasers.

The CoA rejected this argument and confirmed the losses were within the scope of URS's duty of care, which protected BDW against economic loss resulting from a defective structure of a building. It was irrelevant whether BDW had a proprietary interest in the developments.

In relation to when the cause of action in tort accrued, BDW argued the cause of action started when the developments achieved practical completion, whereas URS argued it accrued when the defects were found in 2019.

In considering the authorities, the CoA decided the timing of when the cause of action accrues depends on whether there has been physical damage. BDW's claim was for economic loss, and therefore, there was no requirement for there to be physical damage. As such, it was held the cause of action accrues (at the latest) upon practical completion.

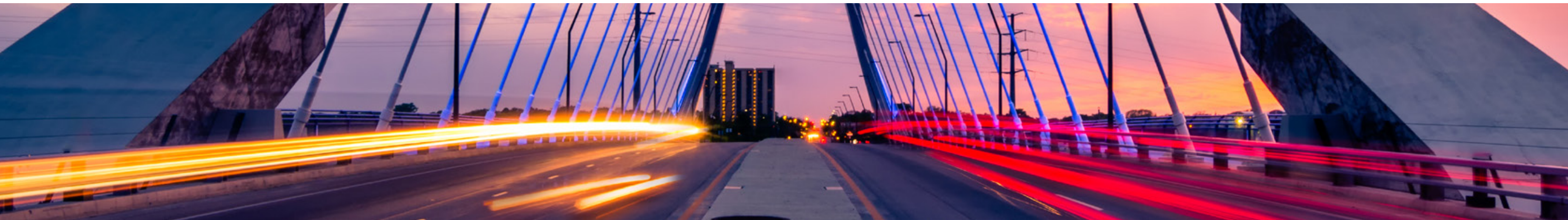
In relation to URS's appeal of the court's decision to grant permission to BDW to amend its pleading, URS contended the following:

- Even though BDW owed duties under Section 1(1) of the DPA 1972, it was not owed any such duty by other parties.
- The longer retrospective limitation periods imposed by the BSA 2022 could not apply to proceedings that were ongoing when the legislation was enacted.
- No claim had been made by the owners against BDW; therefore, BDW had no legal right to pursue third party claims under the CLA.

The CoA dismissed URS's appeal on the basis that URS did owe BDW a duty and the interpretation of the DPA 1972 was not limited to individuals. Moreover, it determined that section 135 of the BSA 2022 did have retrospective effect, and there was nothing excluding its application to ongoing litigation.

In relation to the claim for contribution, the CoA ruled that a claim and/or judgment did not need to be commenced against BDW for it to seek a contribution from a third party.

This point was developed further by the Supreme Court and is discussed below.



Supreme Court's decision

Ground 1 – Scope of duty and the "voluntariness principle"

It was an agreed fact between the parties that URS owed BDW a duty of care in tort to avoid pure economic loss, ie, avoid the costs of structural repairs.

The key question was whether this duty of care extended to losses that had been "voluntarily" incurred by BDW. URS argued that there was no legal liability for BDW to undertake the remedial works and, therefore, the losses were "voluntary".

The Supreme Court rejected URS's analysis of "voluntariness" and remoteness. It said there is no principle in English law that states that where a party has incurred losses which they had no legal obligation to assume and which were incurred voluntarily, they cannot seek to recover those losses from another liable third party.

However, Lord Leggatt emphasised the concept of "voluntariness" is relevant to issues of legal causation and mitigation, which are issues reserved for trial.

In any event, the Supreme Court found that it is "strongly arguable" that BDW was not acting voluntarily in paying for the repairs to be carried out on the following basis:

- If BDW did not carry out the repairs, there was a risk the defects could cause personal injury, for which BDW would have been liable under the DPA 1972 or in contract, such claims not being statute barred.
- Irrespective of whether the homeowner's claims were time barred, BDW had a legal liability under the DPA 1972, and a limitation defence does not extinguish this.
- It was in BDW's commercial interests to carry out the works to prevent reputational damage. Also, in light of the moral climate in the construction industry at the time, it was in the public interest to carry out the repairs.

The interplay between reputational damages (which Mr Justice Fraser excluded from BDW's claimable losses at first instance and which was upheld by the later courts) and the point taken by the Supreme Court regarding commercial interests is interesting.

We anticipate the Supreme Court's stance that it is irrelevant whether BDW can recover "reputational damages" when considering whether the losses were incurred "voluntarily" is likely to cause some debate in the context of mitigation and causation considerations.

Overall, the Supreme Court held that BDW had no "realistic alternative" than to carry out the repair works. Ground 1 was dismissed, given there is no rule of law that meant the repair costs fell outside the scope of the duty of care or were too remote.

Was Pirelli correct? – accrual of the cause of action

Pirelli General Cable Works Ltd v Oscar Faber & Partners [1983] 2 AC 1 ("Pirelli") considered the accrual of a cause of action in negligence, particularly in the context of latent damage. In Pirelli, the House of Lords held that a cause of action accrues when the damage occurs and not when it is discovered.

To recap, URS contended that BDW's cause of action in tort had already accrued at the time it sold the developments. However, the CoA held BDW's cause of action in tort accrued at the latest at the date of practical completion.

The panel of seven justices anticipated whether they would need to consider whether *Pirelli* would need to be overruled. However, given it was determined that even if BDW's decision to pay for the remedial works was "voluntary", this did not mean the losses could not be claimed. Thus, the point about when the cause of action accrued fell away.

The Supreme Court decided this was not the appropriate arena to address the shortcomings of *Pirelli*.

Ground 2 – application of section 135 of the BSA 2022

It was agreed that section 135 of the BSA applies to a claim brought under section 1 of the DPA. However, URS contended that the retrospective extension should not apply to related claims in negligence or for contribution. Further, URS's position was that the remedial works were carried out voluntarily and prior to the enactment of the BSA 2022 and, therefore, the extended limitation periods should not apply.

BDW's position was that the amended limitation periods are to be treated "as always having been in force".

The question was whether the retrospectivity of section 135 of the BSA 2022 applies to claims that are dependent on the time limit under the DPA 1972 but are not actually claims brought under the DPA 1972.

The court noted that it would be "legally incoherent" to have differing limitation positions between claims advanced by homeowners against BDW under the DPA 1972 and claims for negligence and/or contribution by BDW against URS.

The Supreme Court rejected URS's argument. It stated there was no reason to restrict the application of section 135 of the BSA 2022 to claims made under the DPA 1972. In line with the purpose of the BSA, it determined that the retrospectivity should extend to claims in negligence and for contributions that are dependent on the limitation period applicable to section 1 DPA claims.

In practice, this means the 30-year limitation period will apply to claims for negligence and contribution for building safety defects by developers against their subcontractors.

Ground 3 – did URS owe BDW a duty under Section 1(1)(a) of the DPA 1972 and the losses recoverable

Section 1 of the DPA 1972 states:

"1. Duty to build dwellings properly

(1) A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty -

(a) if the dwelling is provided to the order of any person, to that person; and

(b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;

to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed."

URS contended the duty does not extend to developers, and the purpose of the DPA 1972 was to protect purchasers of new dwellings. It was not intended to be a recourse for developers, who can instead use avenues of contract and tort for protection.

Unsurprisingly, the Supreme Court rejected this submission on the basis that under section 1(1)(b) of the DPA 1972, the duty is owed to every person "who acquires an interest in the dwelling" and section 1(1)(a) applies to persons other than purchasers of a dwelling, who "order" the construction of the dwelling.

This was intended to encapsulate first owners, ie developers, and therefore, BDW was owed a duty by URS under the DPA 1972.

Ground 4 – can BDW bring a claim against URS under section 1 of the CLA 1978?

The CLA 1978 provides a statutory right for liable parties to seek to recover contributions from one another for losses arising from the same damage.

URS's position was that BDW could not bring a claim for contribution against it because a right to recover contribution does not arise until a judgment, an admission of liability or a settlement has been reached in respect of the loss. Given no claims have been advanced by the homeowners against BDW and were unlikely to be advanced as BDW had already undertaken the remedial works, no contribution claim could be advanced.

BDW argued that the right to recover arises when damage is suffered by a claimant, ie when the damage was suffered by the homeowners at practical completion.

Lord Leggatt rejected both positions and provided useful clarification, finding that the right to recover arises when (i) damage is suffered by the claimant for which two parties are liable (called "D1" and "D2" by Lord Leggatt), and (ii) D1 must have paid for, been ordered to pay or agreed to pay compensation for such damage. It was noted that a "payment in kind" by way of carrying out remedial works, is sufficient for the second limb.

It is at this point a cause of action for contribution is crystallised and the limitation period of two years under the CLA 1978 begins.

Key takeaways and comments

The judgment follows a clear line of recent building safety authorities in respect of the BSA 2022, which aim to bring those responsible for building safety defects to justice. It demonstrates the courts' robust approach and is in line with public policy.

For policyholder developers, this should be a welcome judgment as it confirms they are owed statutory duties under the DPA 1972. Notably, these duties will not be limited by provisions such as limitation of liability clauses in contractual documents.

In light of the court's approach to voluntary losses, developers can feel some ease that remediation costs will potentially be recoverable from subcontractors downstream and will be treated the same by the courts as costs for which a developer has been found to be liable. This is particularly relevant for construction developers who have signed up to the "government pledge" (which is a commitment by developers to address fire safety defects in buildings they developed or refurbished), or who have agreed to carry out remedial works without certainty as to which losses will be recoverable.

Furthermore, the clarification provided on the requirements to bring a contribution claim and the inclusion of "payments in kind" (which can be valued in monetary terms) will essentially allow construction developers to bring contribution claims earlier rather than later.

Employment practices liability insurance – what does it cover and what are the common pitfalls?

Hebe Swain

Employment practices liability insurance ("EPL Insurance") is designed to protect companies against claims brought by employees and prospective employees for employment-related wrongs. EPL Insurance is becoming increasingly prevalent in management liability insurance programmes.

Senior Associate Hebe Swain in Stewarts' Policyholder Disputes team examines the scope of cover and common coverage challenges.

What is EPL Insurance?

EPL Insurance is typically written on a "claims made" basis, meaning it covers claims made during the policy period, regardless of when the wrongful act that led to the claim occurred.

The definition of "claim" is generally broad and typically includes demands for monetary or non-monetary relief, as well as the instigation of formal litigation. Policies will typically be triggered when an employee makes a demand for relief following an alleged employment-related wrong.

EPL Insurance typically covers claims for discrimination, harassment, unfair dismissal, victimisation or data privacy breaches. Policies cover both defence costs and underlying liabilities, subject to policy terms and exclusions.

Cover is typically purchased by a company, but EPL Insurance will sometimes cover individuals who are named in an employment-related claim.

Why is EPL Insurance topical?

Companies have always faced exposure to employment-related claims; however, there are a number of reasons why this cover is currently topical:

- Employment Rights Bill – Following the government's introduction of the Employment Rights Bill, the UK is anticipating significant changes to employment law in 2026 and 2027. The new law is expected to bolster employee rights, which may lead to an uptick in employment-related claims.
- Fair Work Agency – As part of the Employment Rights Bill, the government has proposed the introduction of a new regulatory body, the "Fair Work Agency" ("FWA"). The FWA will have powers to investigate, inspect and take action against businesses that breach employment laws. While much of the detail about how the FWA will work is still being considered, its introduction may lead to an increase in regulatory activity and/or claims faced by employers.
- The soft D&O market – EPL Insurance is frequently bought alongside or as part of directors' and officers' ("D&O") insurance, either as an additional section of a D&O policy or as a part of a broader management liability insurance programme. Given the soft D&O market, many companies will be considering whether to purchase new or broader insurance cover, which may include expanding a programme to include new or improved EPL Insurance.
- Diversity, equity and inclusion – There has been an increase in discussion about diversity, equity and inclusion ("DEI") in recent years. This heightened awareness and engagement, while positive for society, presents challenges for companies. Many argue that DEI-focused changes are not being implemented as quickly or widely as they should be, meaning the continued disadvantage of individuals with protected characteristics. On the other hand, companies are also facing the effects of the much-discussed "DEI backlash", particularly where they have exposure to US operations. Companies facing increased DEI engagement and stakeholders with incompatible positions may see an increase in discrimination claims, which may include allegations that a company's promotion of DEI principles is itself discriminatory.
- Increased use of artificial intelligence (AI) – The use of AI is rapidly increasing across multiple sectors and roles. AI is now regularly used in processes such as pre-employment screening, salary reviews and the payment of bonuses. Further, the increased use of AI across the board is often cited as a potential trigger for workforce changes or reductions. Accordingly, AI may lead to new employment-related claims, including: (1) discrimination claims arising from perceived algorithmic bias, (2) data protection and privacy claims arising due to concerns around transparency and how data is being used, and (3) the increased use of AI leading to redundancies and associated claims.

What are the common coverage challenges with EPL Insurance?

EPL Insurance is a helpful risk mitigation tool for companies facing employment claims. However, coverage may be limited due to policy exclusions and conditions.

- Contractual Liability – EPL Insurance does not generally cover contractual sums expressly or impliedly due under an employment contract, for example, unpaid wages, top-up sums following an employer's failure to pay minimum wage or holiday pay or payment in lieu of notice. Instead, EPL Insurance is designed to cover unexpected sums arising from employment-related wrongful acts, such as discrimination or harassment. Given the contractual liability exclusion, it is not uncommon for an allocation exercise to occur following an employment tribunal award, to determine which aspects are indemnifiable and which are not. It is worth noting that although these underlying contractual liabilities will not be indemnifiable, related defence costs may be.
- Prior Acts / Claim First Made – One of the most frequent issues faced by policyholders relates to late notification. EPL Insurance is written on a claims-made basis, with a broad definition of "claim". Policy wording and definitions will be crucial, but it is important for policyholders to be aware that policies can be triggered at an early stage if employees raise grievances that meet the definition of a claim. If a claim has been made, steps should be taken to ensure insurers are notified. It is not uncommon for policyholders to fail to notify employment-related grievances or disputes. This is perhaps because they consider them to be insubstantial, have little merit, or are waiting to receive a formal tribunal claim. However, policyholders should be mindful that a "claim" within the meaning of the policy may occur well before an employment tribunal claim is filed, and the insurance could be triggered at that early stage. In addition, it's important to note that even unmeritorious claims can be costly to defend. It is always prudent to make a notification even if there is no expectation that a claim will develop.
- Bodily Injury – EPL Insurance policies will frequently exclude losses arising from bodily injury, which are more typically dealt with under employers' liability insurance policies than EPL Insurance policies. These exclusions frequently contain carve-backs where claims are made for mental anguish or emotional distress. This is helpful for policyholders, as it is not unusual to see these types of claims included in discrimination and harassment claims.
- Trade Union Activity – EPL Insurance policies typically contain an exclusion for trade union activity. Trade union activity generally targets broader business decisions made by companies, rather than specific wrongful acts committed against employees. In addition, any activity involving large classes of employees may result in a significant aggregate exposure, which insurers are reluctant to take on. For this reason, insurers generally exclude losses relating to trade union or collective action from cover.
- Claims Handling and Insurer Consent – Policyholders should be mindful of policy conditions relating to claims handling and the extent to which insurers should be involved in the conduct and defence of any claim. It is rare nowadays for policies to impose a duty on insurers to defend claims. However, policies will frequently provide for insurers to be kept updated on progress, merits and settlement strategy. Insurers' consent to the defence costs and settlement strategy is frequently required for these sums to be indemnifiable by insurers.

Does EPL Insurance offer useful extensions to cover?

EPL Insurance often includes helpful extensions for policyholders defending employment claims. In particular, we recommend that policyholders consider whether the following extensions are present and would be of assistance:

- Public relations (PR) costs – Although relatively rare, employment claims can become high-profile, and companies may engage public relations specialists to help manage PR risks. Most commonly, this occurs (1) where claims involve serious allegations of discrimination or harassment, like the claims which arose during the #MeToo movement, or (2) with widespread claims involving multiple claimants or with sector-wide impact, such as the retailer equal pay litigation.
- Regulatory investigations costs – For regulated companies, employment claims may trigger or necessitate parallel regulatory investigations. In particular, this may apply to financial services firms whose senior individuals are subject to "fit and proper" tests. If employment claims contain allegations of discrimination or harassment by those individuals, companies may be required to report to regulators or respond to regulatory investigations.
- Sensitivity training costs – In addition to monetary awards, employment tribunals can order companies to carry out training and education, frequently in the form of discrimination prevention programmes. Some EPL Insurance policies will cover the costs of such training.

Top tips for policyholders

For all policyholders buying or renewing EPL Insurance, the following top tips should be front of mind:

- Inception / Renewal – Consider carefully the claims and potential claims that employees might make. Seemingly minor grievances can escalate into large claims and should not be overlooked. It may be helpful to include HR teams in renewal discussions to ensure insurers receive a fair presentation of the risk.
- Notification – Ensure claims and circumstances are notified promptly. Don't overlook early-stage grievances or low-value, unmeritorious claims. Even small claims can be costly to defend, and underlying values frequently increase when claimants are required to fully articulate their claims or prepare schedules of loss.
- Claims Handling – Insurers should be kept informed about the progress of claims and their merits. Employment claims are frequently settled outside of court, and depending on policy terms, insurers' consent is likely to be required. Settlement discussions may slow or stall if insurers are only asked or able to assess the merits of any settlement strategy after offers are made, as they will need time to consider the reasonableness of any settlement.

Conclusion: what do employers need to know?

Joseph Lappin, Head of Employment at Stewarts, comments: "In a rapidly evolving employment landscape, EPL Insurance is a helpful strategic safeguard. Employers must stay alert to legal reforms, social shifts and technological risks, ensuring their cover is not only current but comprehensive.

It should also be noted that while EPL Insurance can be a vital tool, it is not a full safeguard. Robust HR practices and a clear understanding of how evolving risks can translate into costly claims are equally essential."

What insurance coverage might be available to companies facing OECD complaints?

Hebe Swain

In recent years, there has been a rise in environmental, social and governance (ESG) related actions, including parties increasingly participating in non-legal processes to promote behavioural change by companies. One tool in affected parties' toolboxes is to raise Organisation for Economic Cooperation and Development (OECD) complaints.

Hebe Swain considers the scope and process for making and responding to OECD complaints and what insurance cover companies could turn to when faced with an OECD complaint.

What is the OECD?

The Organisation for Economic Cooperation and Development is an international organisation comprising 38 member countries, which works to improve international policies and standards relating to environmental, social and economic challenges. The OECD publishes guidelines, policy papers and reports dealing with these issues.

What are the 'OECD Guidelines for Multinational Enterprises on Responsible Business Conduct'?

A key publication by the OECD is its 'Guidelines for Multinational Enterprises on Responsible Business Conduct' (the 'MERBC Guidelines'), the most recent version of which was published in 2023. All 38 OECD countries and 14 additional countries are signed up to these guidelines, which set out expected standards for responsible business for companies operating in their countries.

The MERBC Guidelines cover a range of issues, such as:

- due diligence and disclosure
- human rights
- employment issues
- environmental impact
- bribery and corruption
- consumer rights and interests
- energy transition
- fair markets and competition

The MERBC Guidelines are not binding on companies, but instead are binding on subscribing governments, who have a duty to ensure they are implemented and observed.

What are OECD complaints?

To encourage adherence to the MERBC Guidelines, the OECD provides a complaints process. If a multinational enterprise operating in a country subscribed to the MERBC Guidelines breaches the guidelines, an interested party may make a complaint. Complaints are made to National Contact Points (NCPs). In the UK, the NCP is part of the Department of Business and Trade.

Complaints may be made by any interested party regardless of the jurisdiction in which they are located. For example, this might include a community affected by the company's activities, contract counterparties or consumers, employees or their trade unions, shareholders or non-governmental organisations.

Complaints are tracked on the OECD Watch website. By way of illustration, in 2024, five complaints were made to the UK NCP with the following alleged issues:

- Several banks' links to human rights impacts through their investments in US private prison operations.
- A mining company's involvement in forced displacement and human rights abuses in the Democratic Republic of Congo.
- ESG indexes' investments in companies linked to human rights abuses in Myanmar.
- A bank's contribution to human rights harms caused by coal power plants in the Philippines.
- Adverse impacts of an energy project on local communities in Senegal.

The OECD complaints process is arguably an attractive forum for complainants as they will bear less cost risk than conducting traditional litigation. In addition, the complaints process may offer a wider range of non-monetary solutions.

What is the complaints process?

The process has broadly five stages:

1. Claim filing. The interested party collects evidence to demonstrate the harm and build its claim. Evidence may include witness statements, company policies, scientific test results, journalistic articles or reports. The evidence is accompanied by a written complaint and filed with the relevant NCP(s).
2. Initial Assessment. The NCP carries out an initial assessment of the merits of the claim to determine whether the complaint should be accepted and how best to proceed. The multinational enterprise may decide to participate in this process, in which case it may provide a response or clarificatory information.
3. Mediation. If the NCP accepts the claim, it will facilitate a mediation/conciliation process to help the parties resolve the issues. Companies can choose whether or not to engage in this process, which may take several months.
4. Final Statement. Following the mediation, the NCP will publish a final statement setting out (1) the issues raised, (2) determinations regarding whether the multinational enterprise met the standards of the MERBC Guidelines, and (3) non-binding recommendations for the multinational enterprise to better align its actions to the MERBC Guidelines going forward.
5. Follow up. NCPs often publish follow-up statements 12 months after the final statement commenting on whether the multinational enterprise is complying with any agreements reached or recommendations.

How could insurance help?

Although the OECD complaints process is a non-binding, non-legal process, it has a number of similarities to a legal claim. Parties may need to prepare advocacy statements, witness statements, and scientific reports, as well as potentially attend multiple rounds of mediation. Accordingly, the process is likely to be expensive. A key early consideration should be whether there might be insurance cover for the costs of responding to a complaint and implementing a solution (if required).

Several policies may respond to OECD complaints. In particular, we would advise policyholders to consider the following covers:

- Professional indemnity: where complaints relate to actions carried out in the course of professional duties
- Side A and B directors' and officers' (D&O): where complaints are being brought against directors and officers of the company
- Side C D&O: where complaints are being brought by shareholders or investors
- Employment practices liability: where complaints relate to employment matters
- Public and products liability: where complaints relate to injuries caused by business activities or products
- Environmental liability: where complaints relate to damage caused by environmental accidents
- General corporate liability and commercial combined, and
- Any industry-specific policies purchased by the policyholder.

The scope of cover available will always be specific to the policy wording. However, it is worth a multinational enterprise involved in an OECD complaint considering whether the costs of responding to complaints would fall within the scope of:

- Defence costs. The complaint is likely to allege a wrongful act in the form of an act, error or omission by the company or one of its directors, officers or employees and seek relief (monetary or non-monetary). It is quite possible an OECD complaint could fall within the scope of a 'claim' under a liability policy and there may be cover for the costs of defending that claim.
- Investigation costs. Investigation costs cover is often triggered where there is an investigation by a regulatory or other public authority. There may well be cover for investigations by an NCP.
- Mitigation costs. Mitigation costs may be available where a company takes action to mitigate financial consequences resulting from an alleged wrongful act. Engaging in an OECD process may be seen as a form of mitigation, as it may prevent a complaint from developing into potentially expensive litigation and resolve issues with an affected community more promptly.

For many liability policies, cover may not extend to the costs of implementing a solution or paying damages since the OECD process is a non-legal process and determining legal liability is often required to trigger cover for damages under liability policies. Therefore, for policyholders with mitigation costs cover, this section of a policy may be particularly helpful in providing cover for costs associated with implementing a solution, as mitigation costs can be covered without a finding of legal liability. Defence costs would usually fall separately within the main sections of cover.

Finally, policyholders should always consider what policy exclusions and extensions may apply. In particular, pollution exclusions are common across a broad range of policies and may exclude cover relating to environmental liabilities. Similarly, employment-related liabilities are largely excluded outside employment practices liability policies. In contrast, extensions may well prove helpful. In particular, a common extension in liability policies is cover for public relations costs, which may assist if dealing with the impact of adverse media.

Conclusion

The key takeaway for policyholders is to be aware that they may well have cover for the costs of responding to complaints that fall outside the traditional legal process but which arise from the activities of the company and/or its executives that were intended to be insured. Therefore, a holistic review of the insured's corporate insurance programme should be conducted when facing such complaints to ensure that the cover purchased and paid for is fully utilised.

Commercial Court hands down judgment in Russian aircraft insurance claims case

Aaron Le Marquer

The latest insurance coverage decision to be issued in the Commercial Court relates to a 'mega trial' of claims brought in respect of aviation losses arising from the Russia-Ukraine conflict. The decision has important implications for insurers and policyholders alike. Partner and Head of Policyholder Disputes Aaron Le Marquer discusses the judgment in *Aercap v AIG*.

Background

In March 2022, in response to the initial wave of sanctions imposed by the West in response to Russia's invasion of Ukraine, the president of Russia, Vladimir Putin, signed a new law entitling Russian airlines to retain and operate aircraft rented from foreign lessors that were forced to sever ties with their Russian counterparties due to the sanctions.

Total estimates of the number of lost aircraft ranged between 400-600, with a commercial value of between $10-$13 billion. Lessors turned to their insurance policies (which tend to be a highly bespoke form of cover specific to the industry) in search of indemnification, which has resulted in multiple sets of coverage proceedings in different jurisdictions.

In one of the largest claims brought against two panels of insurers, led respectively by AIG and two Lloyd's syndicates, Aercap and other lessors within its group sought recovery of their full losses in respect of 116 lost aircraft and 15 standalone engines. The claims were brought under policies referred to as "Contingent" and "Possessed" or "Lessor Policies". Aercap's Contingent and Possessed sections of the policy each provided All Risks ("AR") cover to the full value of the aircraft and a separate War Risks ("WR") cover, which provided a lower aggregate limit of liability of $1.2 billion. The AR and WR sections of each policy were underwritten by different panels of insurers (the "AR Insurers" and "WR Insurers").

Aercap claimed the full agreed value of the aircraft, amounting to nearly $3.5 billion. Its claims were joined with five other sets of similar proceedings initiated by other lessors against their insurers (the "LP Claims"). In the period between issuing its claim and the commencement of trial, Aercap reached settlements with various Russian lessees and insurers, meaning that the total indemnity sought in the LP Claims was reduced to $2.051 billion.

Both the AR Insurers and WR Insurers denied liability for the claims on various bases, including that (i) neither the Contingent nor Possessed covers were engaged, (ii) the lessors had not suffered a permanent deprivation of property, (iii) any loss was excluded under the AR cover or not covered under the WR cover, and (iv) US and EU sanctions prohibited them from paying the claims.

In parallel, Aercap and other lessors have also sought indemnity for the same losses directly from the UK reinsurers of policies issued locally in Russia to the lessees of the aircraft (the "Operator Policies" or "OP Claims"). The Operator Policies and associated reinsurance policies contained 'cut through' clauses that enabled the lessors to claim directly for their losses from the reinsurers. In March 2024, the Commercial Court determined that it had jurisdiction to hear the dispute over coverage under the Operator Policies, which is now listed for trial in late 2026 (and which will be subject to Russian law).

Aercap v AIG judgment

Trial of the LP Claims took place in the English Commercial Court between October 2024 and January 2025, and on 11 June 2025, Mr Justice Butcher handed down a 230-page judgment concluding that:

- The claimants had suffered a covered loss on 10 March 2022.
- The claimants were entitled to recover under the Contingent covers and not under the Possessed covers of their insurances.
- The loss was caused by an excluded peril under the AR cover, and only the WR Insurers were, therefore, liable, subject to the lower limit of $1.2 billion in Aercap's case.
- The insurers were not prevented by US or EU sanctions from paying the claims.

This conclusion was reached on the basis of submissions and evidence from over 50 counsel, 13 legal teams, 24 witnesses and 14 experts, who presented a wide range of positions on a host of issues. As such, the judgment is complex, and not all rulings on all issues are applicable to all parties. However, the reasoning and conclusions on the key issues are discussed below.

Contingent or Possessed cover

Each of the relevant policies contained two relevant covers in broadly similar (but not identical) terms. The first, a Contingent cover, covered the lessor for loss when the aircraft was not in its care, custody or control and where the lessor had not been indemnified under the relevant Operator Policy. The second, a Possessed cover, responded broadly where the aircraft was in the custody or control of the insured, including in the course of repossession.

The first issue considered by the judge was whether (subject to the outcome on the issues of loss, insured peril and causation, discussed below) there could be cover for the loss of the aircraft under either section.

The lessors advanced different cases on this issue, with Aercap arguing that the Contingent cover responded, while the other lessors sought cover under the Possessed cover or were neutral. The insurers marshalled a raft of arguments in each case to deny that the relevant cover was engaged.

The judge considered each of the competing cases in detail, meaning that the issue was examined from all possible angles. Importantly, he found that "not indemnified" meant, in the context of the Contingent cover, that the lessor had not been paid under the relevant Operator Policy (subject to having submitted a claim) rather than "not entitled to an indemnity", as the insurers argued. The fact that the lessors had outstanding claims under the Operator Policies was, therefore, no bar to recovery under the Contingent cover. He also found that "in the course of repossession" required some overt act to physically repossess the aircraft, not just a plan to do so. The Possessed cover was not, therefore, engaged. As a result, he concluded that Aercap was right on this issue and that each of the lessors was entitled to claim under the Contingent cover under their policy if they could establish a loss caused by a covered peril during the policy period.

1. Loss

Having considered whether the Contingent or Possessed cover was capable of responding, the judge turned to the fundamental interlinked issues of (i) whether there had been a loss (and if so, when), (ii) what insured (or excluded) perils were operating, and (iii) which of those was the proximate cause of loss.

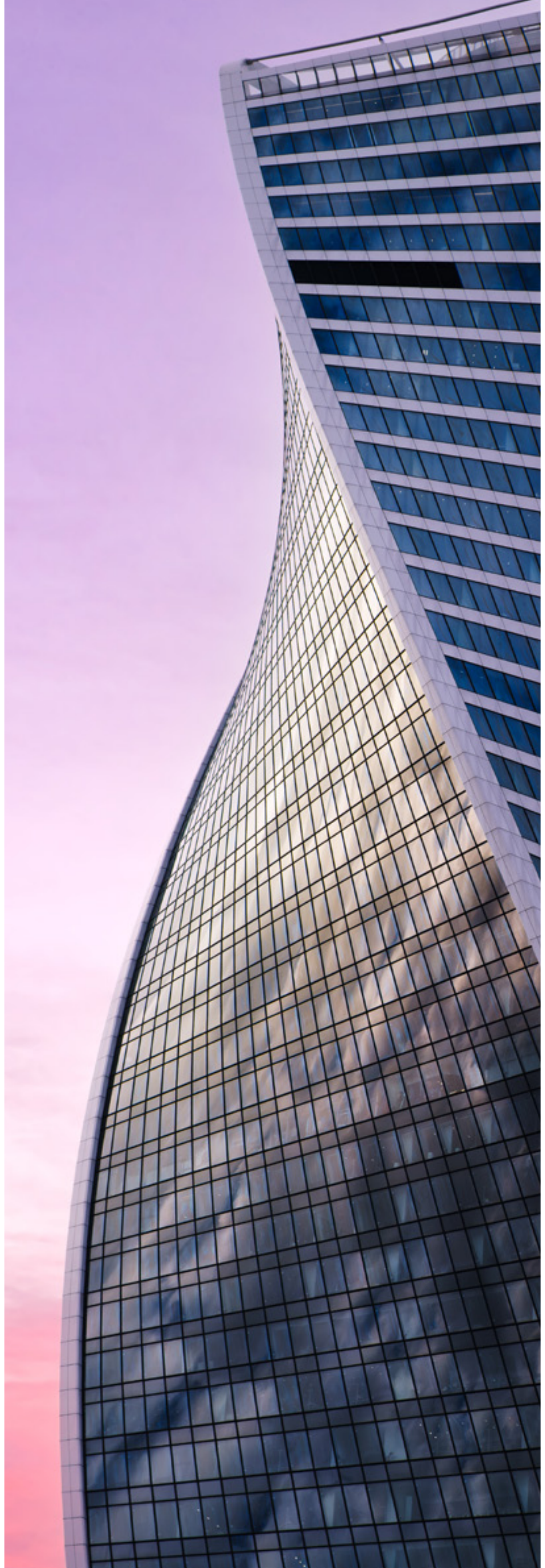
The lessors claimed for the loss of their aircraft under an insuring clause covering "physical loss or damage". It was common ground that permanent loss of possession would constitute "physical loss", but whether, how and when the lessors could demonstrate such permanent loss was disputed.

Aercap's position was that it was only required to show that, on a given date, on the balance of probabilities, the deprivation was permanent, and it would be sufficient to show that recovery of the property was a "mere chance". Further, where the situation is uncertain at the time of deprivation, it may be appropriate to "wait and see" before deciding if the test has been met. The other lessors advanced variants of Aercap's case.

The WR Insurers denied that there had been a loss of the aircraft by permanent deprivation on the basis that the appropriate test was that there was no realistic prospect of recovering the aircraft at any time within the commercial lifetime of the aircraft, which they said had not been met.

The AR Insurers did not deny that there had been a loss of the aircraft (by operation of a WR peril).

Mr Justice Butcher approached the issue, as did the parties, by reference to a body of case law stretching back for more than 100 years. He concluded that Aercap's case was preferable to the more restrictive approach advocated by the WR Insurers and that the lessors only needed to establish whether, as of any given date, deprivation of possession was, on the balance of probabilities, permanent. In carrying out this assessment, the court will look at the facts at that time, but the court may have regard to what happened after that date. Examining the facts in this case, Mr Justice Butcher found that the lessors had suffered a permanent loss of possession on 10 March 2022 when Russian government Order 311 had been implemented prohibiting the export of foreign aircraft from the country.



2. Peril and causation

Having established that there had been a loss that was capable of forming a claim under the policy, it was necessary to consider whether any insured (or excluded) perils were operating and, if so, whether they were the (or a) proximate cause of the loss.

It was common ground that a loss would be covered under the AR section unless caused by any of the excluded perils listed in exclusion clause "AVN 48B WAR, HI-JACKING AND OTHER PERILS EXCLUSION CLAUSE (Aviation)". In that case, cover would expressly be provided under the WR section but (in Aercap's case) subject to a much lower limit of liability of $1.2 billion.

This issue was, therefore, central to the extent of cover to which Aercap was entitled. Aercap and the WR Insurers' primary case was that Aercap's losses were not caused by an excluded peril and that it was entitled to full cover under the AR cover. Alternatively, it claimed its losses under the WR cover, subject to the lower limit. AR Insurers argued that any loss was caused by an excluded peril.

The debate focused first on the construction of two specific perils set out in exclusion clause AVN48B:

- "Any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional (the "Political Peril")."
- "Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government… (the "Government Perils")."

Examining the facts and evidence presented, the judge found that the Political Peril was not concerned with acts of the government itself but with acts that are in some sense adverse to the government of the place where they happen. The Political Peril was not, therefore, engaged in this case. However, the direction given by the Russian government to the Aeroflot group on 26 March 2022, a Russian Federal Air Transport Agency (FATA) information message of 5 March 2022 and Russian government Order GR 311 on 10 March 2022 all amounted to "restraints" or "detentions" for the purposes of establishing the Government Perils. It did not matter, in this case, whether the Russian lessees had no intention of returning the aircraft anyway.

The question then became whether any or all of these could be said to be the proximate cause of loss, in which case the claim was excluded under the AR cover but expressly covered under the WR cover. If the Government Perils were not the proximate cause of loss on 10 March 2022, it was agreed that the airlines' decisions to retain the aircraft in their own interest constituted AR perils and that the AR cover was capable of responding.

Rejecting arguments of concurrent proximate causation, Mr Justice Butcher found that order GR 311 was the sole proximate cause of loss. Alternatively, if there were concurrent causes of loss, one of which was an AR peril and the other a WR peril, the *Wayne Tank* principle dictated that the exclusion would prevail. The result would be the same, ie coverage would be restricted to the WR cover. This was the case even if it could be demonstrated that each peril operated independently rather than interdependently.

As a result, the lessor's claims were excluded from cover under the AR cover and covered under the WR cover. In Aercap's case, this meant that it was entitled to an indemnity from the WR insurers but subject to a lower limit of liability of $1.2 billion rather than the full limits available under the AR cover.

3. "Grip of the peril"

In light of Mr Justice Butcher's findings on the cause and timing of the loss, a further issue arose in relation to the claims by certain lessors other than Aercap. The WR covers in those lessors' policies contained provisions to review the geographical limits of the policies, which were exercised by the insurers, so that in some cases, cover in Russia was terminated prior to 10 March 2022. In those cases, the WR insurers argued that there was no cover for the loss since it had occurred after the expiry of the relevant policy period.

The lessors argued in response that the loss flowed from a peril that was operative prior to the end of the period of insurance, invoking the established concepts of "death blow" and "grip of the peril" to argue that there was cover notwithstanding that the total loss of the aircraft occurred outside the relevant policy period.

Setting out a helpful examination of the line of authorities on this doctrine (including the Court of Appeal's recent decision in *Sky v Riverstone*), Mr Justice Butcher clarified that the relevant principle is that "if an insured is, within the policy period, deprived of possession of the relevant property by the operation of a peril insured against and, in circumstances which the insured cannot reasonably prevent, that deprivation of possession develops after the end of the policy period into a permanent deprivation by way of a sequence of events following in the ordinary course from the peril insured against which has operated during the policy period, then the insured is entitled to an indemnity under the policy".

In this case, he concluded that there were operative restraints or detentions prior to 10 March 2022 (namely of Aeroflot's aircraft from 26 February 2022 onwards) and that the loss of the aircraft on 10 March 2022 arose in a sequence of events that followed in the ordinary course from those restraints or detentions. Therefore, he found that the aircraft were in the grip of the peril by the time the relevant policies were terminated (which in all cases was after 26 February 2022) and that the lessors were entitled to cover despite the fact that the loss itself had occurred after the end of the policy period.

Outcome

Dealing with two further issues of sanctions and recoveries, Mr Justice Butcher dismissed the insurers' arguments that (i) they were prohibited from paying the claims by US and EU sanctions, and (ii) amounts received by way of maintenance reserves, security deposits and letters of credit were to be set off against the sum claimed.

The combined effect of his decisions on the issues of Contingent versus Possessed, loss, insured peril and causation was that each of the lessors was entitled to recover its losses, subject to limits, under the WR cover in its Contingent policy.

Comment

It remains to be seen whether Aercap and/or the WR insurers will seek permission to appeal Mr Justice Butcher's ruling.

In the meantime, the judgment provides a number of important takeaways for insurance coverage professionals and insureds within and outside the aviation sector:

- The discussion of the extent and nature of contingent cover is important for aviation lessors to understand. While this aspect of the decision may appear to have limited application outside of the aviation context, Mr Justice Butcher's consideration of exactly what is meant by "not indemnified" could find relevance in a ranger of other situations, most notably directors' and officers' (D&O) insurance.
- Mr Justice Butcher's discussion and conclusion on what is required to establish a loss by way of permanent deprivation of property will be important across a broad spread of business lines, including political risk, political violence, aviation, marine, energy and general property policies.
- Given the central nature of causation to so many insurance coverage disputes, the discussion and further clarification of causation principles merits close attention, in particular, Mr Justice Butcher's confirmation that the *Wayne Tank* principle applies to **independent** concurrent proximate causes as well as **interdependent**
- His investigation and elucidation of the "grip of the peril" principle (building upon his own decision in *Stonegate v MS Amlin* and the Court of Appeal's recent decision in *Sky v Riverstone*) is also valuable and likely to be relied upon by policyholders going forward.

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