Insurance Review 2015

ADVISORY | DISPUTES | TRANSACTIONS

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Introduction

Landmark insurance law reform and dealing with economic recovery which remains gradual

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The fundamentals of insurance contract law were set out over a century ago in the Marine Insurance Act 1906. In 2014, the Parliamentary process for considering the Insurance Contracts Bill 2014 began. The Bill is a landmark in insurance contract law. While much of the Bill consists of a codification and development of existing principles, there are some significant changes to the current law. For example: the insured's duty of disclosure will be clarified – with the basic requirement being a fair presentation of the risk; insurers' rights to avoid in the case of non-disclosure or misrepresentation will be curtailed; warranties will be capable of remedy; and a new regime will be introduced to address fraudulent claims.

The insurance industry as a whole has continued to reflect the slow economic recovery across the financial sector. There remains considerable focus on ensuring efficiency and rigour in the control of processes – across underwriting and claims. That focus naturally extends to insurers' service providers, including their lawyers.

As to those involved in litigating insurance claims, 2014 saw the continued introduction of the Jackson reforms, including the reaction to the case of *Mitchell v News Group Newspapers Ltd*. At the start of 2014, courts were in turmoil as litigants sought to protect themselves against, and take advantage of, the apparent new draconian approach to court deadlines. The courts have since clarified and relaxed their approach, returning a degree of normality to the litigation process.

For RPC, 2014 was a year of growth. Expanding in the UK and Asia, we took on two new Partners in our London Insurance practice with the arrival of Rebecca Hopkirk (who focuses on International Property) and Leigh Williams (who focuses on Energy), while the addition of Steven Wise in Hong Kong further strengthened our Asian capability. London based Legal Director, Geraldine Bourke, transferred to our Singapore office to help build our Political Risks offering, and Richard Breavington and Bristol's Ben Goodier were made up to Partner. The year also saw RPC receive a number of accolades, including being named Law Firm of the Year twice by The Lawyer Awards and the Halsbury Legal Awards. We were also the only law firm up for an award at the British Insurance Awards, winning the Corporate Social Responsibility award for a trio of different strands of work we are doing in the insurance sector.

Looking ahead to 2015, we anticipate the drive towards efficiency in the operation of insurers and their service providers continuing. We also see the potential consolidation of insurers, possibly through an increase in mergers and acquisitions.

Most of all, we hope that 2015 will be a happy and productive year for all of you.

THE LAWYER AWARDS 2014 WINNER LAW FIRM OF THE YEAR

Halsbury Legal Awards 2014 Winner

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Key developments in 2014

Tax mitigation: Tax mitigation issues were never far from the headlines in 2014. Newspapers reported global companies such as Starbucks using offshore jurisdictions to mitigate their tax bill and national celebrities implementing the Liberty tax scheme to generate losses offshore to avoid income tax. Against that backdrop, HMRC was granted increased powers to (1) recover debts direct from bank accounts and (2) issue follower notices and accelerated payment notices (both requiring payment of tax before an appeal is heard). HMRC anticipates that these new powers will affect 43,000 taxpayers over the next two years.

Mehjoo: In March, the Court of Appeal overturned the High Court's decision finding for the accountants, Harben Barker, in Mr Mehjoo's negligence claim. The Court of Appeal's decision helpfully re-emphasised that in order to venture from the content of a professional's written retainer there has to be clear evidence of a course of conduct.

Audits and the Financial Reporting Council (FRC): Many may see 2014 as the year in which the FRC started to show its teeth. We saw the regulator levy a fine on Mazars for £750,000 together with payment of £1.12m to cover the FRC's costs. This followed Deloitte's fine in 2013 of £14m for its audit of MG Rover. There also remain a number of issued FRC complaints and investigations waiting in the wings including PwC's audit of Tesco following its £263m restatement.

What to look out for in 2015

Audits and the FRC: The audit market is set for major reform following the EU's Audit Directive and Audit Regulation published in May and which comes into effect on 17 June 2016. As part of the implementation process we have the FRC's consultation on auditing and ethical standards including consultation on a 70% cap on fees for non-audit services. This coming year should also see the results of Deloitte's appeal against the FRC's £14m fine for its involvement with MG Rover in 2000.

More tax mitigation: We anticipate that with HMRC wielding its new powers we are likely to see continued claims against accountants involved in tax mitigation schemes especially with taxpayers having to find cash to pay HMRC.

Insolvency: This year will see the end of Contingency Fee Arrangements (CFAs) in insolvency cases; so insolvency practitioners can no longer pursue claims on behalf of an insolvent estate with the benefit of a CFA. This is likely to not only lead to a potential last minute rush to put in place CFAs but potentially to claims against insolvency practitioners for failing to consider and put in place a CFA before the April deadline.

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Key developments in 2014

The Monument Men return: Although Nazi-era spoliation remained a recurrent theme, not least with the emergence of further details of Cornelius Gurlitt's collection in Munich and his bequest to the Kunstmuseum Bern, the number of live conflicts today is increasingly giving rise to new issues. These include the destruction and looting of art in Syria and Iraq, some of which is alleged to be funding the armed groups, leading to particular controversy when objects that are suspected of being looted come to public attention.

While efforts are being made to inhibit such looting, including the introduction of export and import controls on Syrian cultural objects in the EU, it is likely to remain a difficult issue for all those involved with ancient art. Even without outright war, changes in the political climate can pose difficult problems, as the Allard Pierson Museum in Amsterdam found when it was left holding objects on loan from museums in Crimea at the time of Crimea's annexation by Russia. Both the Crimean museums and the Ukrainian government claim to be the legal owners of the objects but they remain for now in Amsterdam.

What to look out for in 2015

Cardsharps: On a more domestic front, 2015 will see the handing down of the judgment in the case of *Thwaytes v Sotheby's*, which should give useful guidance on the scope of an auctioneer's duty of care to its clients.

In 2006, Mr Thwaytes sought advice from Sotheby's as to whether an inherited painting depicting *The Cardsharps* by Caravaggio might be an original work. Sotheby's advised that it was a 17th century copy and Mr Thwaytes sold the painting at Sotheby's for £42,000 on that basis. On 12 December 2007, the Daily Telegraph reported under the headline "Caravaggio worth £50m discovered" that the painting had been bought by Sir Denis Mahon and authenticated by him as the predecessor of *The Cardsharps* hanging in the Kimbell Museum in Texas.

In August 2012, Mr Thwaytes issued proceedings against Sotheby's alleging that Sotheby's failed in its duty to research and advise upon the painting, which Sotheby's wholly denied. The case was heard in the Commercial Court in London in late 2014 and judgment is now awaited.

Brokers' Professional Indemnity

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Key developments for 2014

Eurokey: Had the decision in *Eurokey Recycling Limited v Giles Insurance Brokers* not arrived when it did, it is possible that this article, reviewing 2014, would have been a rather depressing read for any brokers considering their future exposure to potential negligence claims. The reality is that the market continues to be soft and the number of claims against brokers has increased by 75% since the start of the recession.

However, before considering the *Eurokey* case, it is perhaps worth looking at what else has happened in 2014. The Financial Conduct Authority (FCA) has continued its review of the way in which brokers work. Its review of broker conflict has been keenly followed and reviewed. Commentators are unsure as to whether it has yet gone far enough. However, our experience is that the review has ensured that brokers think twice about how they are set up, to whom they owe their duties, how Managing General Agents are used and how commission is earned.

Indeed, the FCA Review is likely to have been a factor in the huge amount of M&A activity that we have seen in the broker industry this year. In addition, this activity is also a sign of continued pressure on rates and, quite possibly, of the significant amount of venture capital that is still tied up in the profession.

However, the good news story for brokers in a professional indemnity context this year was the *Eurokey* case. Eurokey alleged that its broker had provided negligent advice which had resulted in it being significantly underinsured. It claimed for nearly £16m. However, the claim against the broker failed. The judge preferred the evidence of the broker, who held that the broker had given appropriate advice. Specifically, the judge found that the broker only had to explain how Business Interruption should be calculated rather than do the actual calculation itself. In short, whilst a broker still has a higher duty than it did five years ago, the judge in *Eurokey* appears to have made sure that a claim against a broker does not turn into an open goal.

What to look out for in 2015

Regulation, PI, Reforms: Firstly, FCA scrutiny on brokers will continue, with the regulator showing a determination to get to the bottom of the broking industry. Brokers should ensure that they are taking steps to resolve any potential issues, particularly ensuring transparency around how they earn their fees and the basis on which the products they recommend have been selected.

Secondly, the class of business known as "Miscellaneous Professional Indemnity" will continue to grow. Given the fact that most professionals in that "class" are inexperienced purchasers of professional indemnity, they will need more hand holding and brokers are likely to have a higher duty when dealing with those clients. Therefore, we anticipate that this could be an area of exposure for brokers.

And lastly, if the recommendations of the Insurance Law Reforms are implemented, as expected, insurers will only be able to decline claims if the policy breach is materially linked to the loss claims. This will be good news for brokers in terms of exposure to negligence claims.

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Key developments in 2014

Collateral Warranties – try, try and try again: In *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd & Anor* the Technology and Construction Court (TCC) gave further consideration to the circumstances in which it will order a party to obtain collateral warranties which it has agreed to provide under a construction contract.

In this instance, the court ordered Cuddy to obtain the warranties from an insolvent sub-contractor. Central to the court's reasoning was the prospect that the sub-contractor may have had professional indemnity insurance that would respond to claims under the collateral warranties. The decision suggests that the court will go to great lengths to enforce collateral warranty obligations, even where the defendant tries to argue that it has already exercised its best endeavours or where the company obliged to give the warranty is insolvent or dissolved.

The court's decision should be welcomed by employers, who can now have faith that obligations to provide collateral warranties will be robustly enforced by the TCC. It will, however, be a concern to contractors and, in particular, insurers (even of dissolved companies). Contractors would be well advised to ensure that collateral warranty obligations are complied with at the outset of a project, to avoid the prospect of being forced to pursue more reluctant consultants or sub-contractors (or their liquidators) at a later date.

What to look out for in 2015

Green construction claims: We anticipate a rise in the number of green construction claims in 2015. Climate change and carbon emissions are the biggest issues confronting the construction industry and new, green technologies are essential. However, these new technologies and products are not always proven and are less likely than established products to be successful. Companies, particularly start-up companies seeking to exploit the market, may not have sufficient experience to design, inspect or construct the new technologies. Contracts are unlikely to have been tailored to protect contractors against the risks of innovative products that are not guaranteed to work and all of this is set against a background of constantly fluctuating political pressures, guidelines, regulations and subsidies. When claims result, they could be of interest to the media, because of the political interest in climate change.

Corporate Insurance and Regulatory

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Key developments in 2014

FCA Thematic Review: The last year saw the Financial Conduct Authority (FCA) firmly bed in the thematic review as an integral part of its supervisory toolkit. During this period, the FCA published numerous reports on reviews into insurance products and markets, including the much anticipated (if anti-climactic) broker conflicts review. As expected, amongst the FCA's findings were that the common practice of firms or groups fulfilling multiple roles in the distribution chain and acting as agent for both the customer and insurer in the same transaction created significant conflicts of interest, and that intermediaries rely too heavily on disclosures to address conflicts rather than having effective controls to prevent conflicts working against customers' interests.

The year also saw the FCA's first market study, in which it tested how effectively competition was working in the general insurance add-ons market. The FCA found that competition was not working well for consumers, who often purchased products that were of poor value and not what they needed. The FCA proposed various remedies including banning pre-ticked boxes (ie opt-outs) and requiring firms to publish claims ratios, which it will consult on in 2015. In relation to Guaranteed Asset Protection (GAP) insurance sold as an add-on, the FCA consulted on a deferred opt-in period for customers purchasing GAP insurance sold as part of buying a vehicle (the results of which are due to be published in 2015).

Finally, notable by its absence, was the FCA's much delayed policy statement on the strengthening of the client money rules for insurance intermediaries – will it finally surface in 2015?

What to look out for in 2015

Solvency II: European Insurance and Occupational Pensions Authority, the Prudential Regulation Authority (PRA) and Lloyd's of London will continue to develop the detail of the new Solvency II regime, which firms must fully get their heads around prior to implementation in January 2016. This will include some as yet outstanding detail, including the PRA's proposals for (i) transitional measures for the calculation of technical provisions and the application of the Solvency Capital Requirement, (ii) certain Solvency II approvals, including the matching adjustment, "undertaking-specific parameters" when using the standard formula and (iii) certain public disclosure dispensations (consulted on in CP23/14). The PRA's finalised rules and policy statements for Solvency II are due to be published in the first quarter of 2015. We expect firms to be paying close attention to the developing transitional provisions and how best to bring their businesses in line with the regime over the coming years. Capital structures and the disposal or run-off of inefficient business lines will continue to pre-occupy firms.

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Key developments in 2014

No FOS D&O Jurisdiction: D&O insurers let out a huge sigh of relief this year when the Financial Ombudsman Service (FOS) suffered a major defeat in the Administrative Court over its attempt to seize jurisdiction over complaints brought by directors seeking indemnities under commercial D&O policies in respect of their personal liabilities.

D&O insurance is regarded in the market not as a retail but commercial, line of business. However, in the Bluefin case, the FOS sought to argue that a director claiming as an insured under a D&O policy in a personal capacity was, in fact, a consumer and therefore eligible to bring a FOS complaint against insurers. Had the FOS been correct, this might have brought the entire D&O market into the unpredictable hands of FOS jurisdiction. Moreover, FOS argued that the decision as to whether or not a director was a "consumer" was one for FOS to make using its statutory discretion, and not a question for the Administrative Court to determine.

Fortunately, the Administrative Court found against FOS. It held that whether or not a D&O was a "consumer" was an objective issue that can be considered by the courts on each set of facts. Most importantly, FOS found that a director claiming under a D&O policy in respect of a personal liability arising out of his/her activities as a director is not a consumer, and therefore not eligible to bring a complaint before FOS.

What to look out for in 2015

Shareholder Activism: In last year's review we considered the increase of securities actions in the UK to be a key D&O issue to look out for in 2014. The threat of European shareholder class actions is on the rise and we anticipate that there will be further UK claims in 2015 against company directors for publishing untrue or misleading statements in a prospectus under s90 Financial Services and Markets Act 2000 (FSMA).

Shareholders are increasingly more willing to challenge directors in relation to the discharge of their fiduciary duties and the effective deployment of assets. Section 90 FSMA provides a statutory remedy for misstatements or omissions in listing particulars and prospectuses. Royal Bank of Scotland (RBS) has been on the receiving end of two such actions under s90 FSMA, one of which is led by institutional investors, alleging that RBS misled investors by misrepresenting the underlying strength of the bank and omitting key information in its 2008 rights issue prospectus.

In addition to s90 FSMA, we anticipate 2015 will see an inaugural claim brought by aggrieved shareholders under the (yet untested) s90A of FSMA, which makes provision for the liability of issuers of securities to pay compensation to persons who have suffered loss as a result either by a misleading statement or dishonest omission by a "person discharging managerial responsibilities" (ie a director or officer) in certain published information relating to securities (other than in a prospectus), or a dishonest delay in publishing such information. It is widely reported that Tesco Plc may be the subject of a s90A FSMA claim relating to a £250m overstatement of profits.

Energy

Key developments in 2014

The role of insurance in preventing another Macondo: On 4 September 2014, US District Judge Carl Barbier ruled that oil giant BP acted with gross negligence in relation to the Macondo oil spill. As it stands, this ruling adds $18bn of Clean Water Act penalties to the liabilities BP has already incurred and it is now the recipient of the largest combination of fines and penalties arising out of one incident in corporate history. Macondo could cost BP up to $80bn all told.

It is coming up to five years since this tragedy happened. It is probably worthwhile to reflect on the role that insurance has to play in avoiding another similar disaster.

The consensus amongst economists is that oil companies must be (a) capable of paying for all the costs of a pollution incident from their own resources and (b) compelled to pay all the costs. It is suggested that anything less than either of these two absolutes will result in an oil company not making safety the priority and, in turn, pollution incidents happening more frequently.

Before Macondo, the worst-case scenario in the US system was posited to be a continuous four day spill amounting to 100,000 barrels at most and generating a financial responsibility requirement under the US Oil Pollution Act of $150m. Macondo has demonstrated that this is woefully inadequate.

What to look out for in 2015

Third party monitoring: The economic theory ideal is that an oil company must have enough assets of its own to meet all the costs of a pollution incident and that it should not be allowed to operate if it is dependent on third party assets, such as insurance, to meet its liability in full.

This might suggest that pollution liability insurance is either redundant in terms of promoting policy objectives or an anathema to them. An operator should not need insurance to deal with the consequences of pollution and if it does it should not be operating at all because it is insufficiently incentivised to make safety a priority since it is playing with other people’s money.

However, this view is perhaps rather simplistic. Even if it is not actually needed by an oil major to meet its liabilities, insurance provides a legitimate basis for additional third party monitoring and supervision to supplement state monitoring and supervision. An insurer has a powerful incentive to ensure that steps are taken to avoid the loss of its capital. Indeed, the insurer should be able to afford to engage the best and most experienced supervisors (ie Marine Warranty Surveyors). This additional “third party” supervision can play a very useful role in identifying shortcomings in the safety measures (in terms of equipment, procedures and personnel) employed by the operator at a corporate level and any internal personnel issues that may be hindering the proper application of otherwise sound safety measures and policies that the company has adopted.

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Key developments in 2014

Fixing the barrel of bad apples: Last year saw banks increasingly called to account for the sins of the past, stumping up billions of dollars in fines primarily relating to foreign exchange dealing. One senior Bank of England official was quoted as saying that this is not just a case of a few bad apples – it is actually the barrel in which they are operating that needs to be fixed.

HSBC, Royal Bank of Scotland, UBS, JP Morgan, Citi and Bank of America were fined a total of $4.3bn by US, UK and Swiss regulators to punish them for their role in the forex rate rigging scandal.

In the latest development, JP Morgan has just become the first bank to settle civil lawsuits alleging forex manipulation, agreeing to pay about $100m. The other major banks named in the litigation will now come under pressure to follow suit.

Investors in the UK are also reportedly more optimistic about the chances of winning damages for forex losses, than for LIBOR-related cases. Asset managers believe that the potential losses were much greater and that causation is more straightforward.

A consultation paper published in October by the Fair and Effective Markets Review raises the prospect of tougher penalties on staff who breach internal guidelines, more intrusive electronic surveillance of trading floors and more established procedures for protecting whistleblowers. It also considers harsher regulation and the extension of the UK's bonus claw back rules to non-banks such as asset managers and trading firms.

What to look out for in 2015

Misselling annuities: In December, a two-year Financial Conduct Authority (FCA) inquiry into annuity misselling uncovered evidence of sales failings and concluded that competition "was not working well for consumers". The investigation found that insurers were incentivising call-centre staff to sell annuities to existing customers; also that staff did not explain to customers the benefits of shopping around, or that they could get a better rate if they were in poor health. The FCA has asked providers to establish whether the sale of conventional annuities to people in poor health was "indicative of a more widespread problem". We think there is a substantial risk that retrospective action will be taken against annuity providers, possibly resulting in significant compensation pay-outs. Back in 2012, prior to the March 2014 Budget reforms, more than 400,000 annuities were sold, with a value of £14bn.

In December, following the attack on Sony, banks were warned to be on their guard against cyber-attacks, with the Bank of England commenting that this is "an issue which merits board-level attention given the evolving nature of cyber threats and the key importance of cyber resilience to continuity of financial services."

Finally, the authorities' probes into forex rate rigging are continuing. The US Department of Justice's findings are expected to be published early this year. From April, the FCA will be given new powers formally to police seven UK-based financial benchmarks governing forex contracts, interest rate swaps, and commodities contracts. The final recommendations of the Fair and Effective Markets Review will be published in June.

Financial Professionals

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Key developments in 2014

The Financial Ombudsman (FOS)'s powers: FOS' powers have been a key focus during the last year. In February 2014, *Clark v In Focus* held that a complainant could not accept a final award at FOS and then sue for the balance of their loss. Judicial review applications on the scope of FOS' powers have been quietly rising, with the number of JR claim forms received by FOS in 2013 being more than double the number received in 2011. This pressure intensified in 2014.

In October 2014, the court in *Bluefin* reigned in FOS' attempt to broaden its jurisdiction, saying a director taking out D&O cover was not acting outside his trade, business or profession and so could not be an eligible "consumer".

But December saw *Westcott Financial* serve as a warning of the difficulties in succeeding with judicial review of FOS' powers. FOS refused to stay Keydata complaints pending the outcome of litigation by the Financial Services Compensation Scheme and, since the court could find nothing legally irrational in this decision, the firms lost their application. The risk profile of an investment manager's model portfolio saw this firm win permission to judicially review FOS' findings this year. FOS complaints splitting is also a JR focus for this firm, and we await judgment following our JR of FOS' jurisdiction over tax mitigation complaints.

What to look for in 2015

Complaints handling: Pensions deregulation is the key development for 2015, as seen in the Pensions and Actuaries section of this Annual Review.

Vast change to pension savings withdrawal means a real risk of confusion, and advisers will need to tread carefully to avoid another wave of pension complaints. Tax mitigation complaints are likely to increase under the accelerated payments regime. Due diligence will be in the limelight, with the Financial Conduct Authority (FCA)'s paper due in 2015 and Keydata test cases expected to have something to say on the topic as well. Complaints will stay firmly in the spotlight, but this year it may be firms as well as FOS which feel the pressure. November saw publication of the FCA's report on its review of consumer complaint handling at 15 major retail financial services firms. Hope may be at hand for firms, as this report was gentler than feared and, rather than preparing the ground for a wide-ranging review of historic complaint and redress failings, it focussed on developing solutions to identified barriers to effective complaints handling. The FCA's consultation paper CP14/30 is now out, and firms have until 13 March 2015 to respond. With continued pressure on FOS' powers, and a review of firms' procedures, complaints handling will look different by the end of 2015.

General Liability

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Key developments in 2014

The increase in industrial deafness claims: With the online claims portal for Employers Liability and Professional Liability claims now in full swing, the opportunity for claimants' solicitors to receive a costs windfall in low value personal injury claims has been extinguished, with costs now reduced to fixed levels under CPR45. As a result, some claimants' solicitors and claims management companies are attempting to cash-in on claims for industrial deafness where hourly rates can still readily be obtained. The Association of British Insurers (ABI) has reported that the average legal fee that a claimant's solicitor received for settling an industrial deafness claim last year was £10,500, compared to £500 for a whiplash claim settled through the RTA Claims Portal. Such an incentive has led to some firms participating in aggressive marketing campaigns actively encouraging potential claimants to come forward. This in turn has led to a surge in the number of such claims being presented. Figures released by the Compensation Recovery Unit suggest an increase of 354% in industrial deafness claims in the last four years. Calls are therefore being made for the fixed cost regime to be expanded to cover industrial disease cases to try and prevent the number of claims from continuing to spiral.

What to look out for in 2015

The Criminal Justice and Courts Act and "fundamental dishonesty": Figures released by the ABI in May 2014 revealed that the value of fraudulent insurance claims uncovered in 2013 rose to a record £1.3bn, an increase of 18%. As part of this Government's ongoing attempts to combat such fraudulent claims, clause 56 of The Criminal Justice and Courts Bill has been introduced, which should receive Royal Assent in early 2015. At present, following the decision in *Summers v Fairclough Homes*, the courts do have the power to strike out the entirety of a claim where a claimant grossly exaggerates the extent of his injury. However, this power is only to be used in very exceptional circumstances. The new position as a result of clause 56(2) will be that in any personal injury claim where the court finds the claimant is entitled to damages, but is satisfied on the balance of probabilities that they have been fundamentally dishonest in relation to the claim taken as a whole, the court must dismiss the claim in its entirety unless it is satisfied that the claimant would suffer substantial injustice as a result.

It will remain up to the courts to determine fundamental dishonesty. However, the court need only be satisfied on the balance of probabilities that a claimant has been fundamentally dishonest. The Bill is therefore a much more robust approach to dishonesty than that set out in *Summers* and whilst we wait to see how the courts will define a substantial injustice, clause 56 of The Criminal Justice and Courts Bill is a welcome development for insurers in the fight against fraudulent and exaggerated claims since claimants will be forced to come to court with clean hands or risk losing out on damages to which they are genuinely entitled.

Health & Safety

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Key developments in 2014

Corporate manslaughter: The year saw several prosecutions under the Corporate Manslaughter and Corporate Homicide Act 2007, an increase on previous years since the coming into force of the Act in 2008. In 2014, there were three convictions under the Act, the most recent of these resulting in a £500,000 fine against Sterecycle, a waste processing business. However, there were also two acquittals following jury trials.

These were the first examples of not guilty verdicts under the Act. PS & JE Ward Limited was acquitted of the manslaughter charge (though convicted of lesser health and safety offences). MNS Mining and its manager (prosecuted for gross negligence manslaughter) were acquitted of all charges following a trial that lasted three months. Expert evidence was a key component in that case. Strategies for prosecuting and defending cases in this area of law will continue to develop, as will interpretation of the Act itself. Other prosecutions are ongoing or under investigation. All prosecutions to date have been of relatively small organisations, and it is likely to be some time before we see how the 2007 Act will apply to large companies, where the management structure or background facts might be more complicated than in some of the cases already decided.

What to look out for in 2015

Increases in penalties: On 13 November 2014, the Sentencing Council published its consultation paper on sentencing guidelines for health and safety offences, corporate manslaughter and food safety/hygiene offences. The consultation, which remains open until 18 February 2015, was prompted by a lack of consistency amongst magistrates and judges in reaching sentencing decisions, and by the view expressed by some regulators that in some cases fines are too low. The discussion comes at a time when the Court of Appeal has emphasised that fines in cases of this category should deliver a painful message to shareholders and senior corporate officers (see *R v Sellafield and Network Rail*), and where in comparison environmental offences already have guidelines leading to higher fines. Provisions under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 giving magistrates potentially unlimited powers of fine are poised to come into force. The trend in sentencing in recent years towards an increase in the level of fines looks set to continue. The importance of getting the response to a health and safety investigation right has never been greater.

International Arbitration

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Key developments in 2014

Should auld acquaintance be forgot? There was a time when reinsurance was largely transacted within a relatively small circle of industry professionals who knew each other, and where there were ongoing relationships. In this environment, the notion of a less formal approach to arbitration prevailed, exemplified perhaps by the "honourable engagement" clause. As the cost and complexity of reinsurance arbitration has increased, the resolution of disputes by mediation has also increased. Dispute resolution by a more informal process was given a boost by the English court in the case of *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited*. In that case, a dispute resolution clause in a contract which required the parties to seek to resolve a dispute by "friendly discussions" in good faith and within a limited period of time before the dispute could be referred to arbitration was held to be enforceable.

What to look out for in 2015

The Far East: Attention continues to be focussed on business in the Far East and RPC's own offices in Singapore and Hong Kong continue to thrive, providing services to the insurance and reinsurance industry. Arbitration also continues to grow as a means of dispute resolution in the region. Two noteworthy events for 2015 highlight this. First, the China International Economic Trade Arbitration Commission has unveiled its 2015 Arbitration Rules which come into force as from 1 January 2015 to "adapt to the newest developments in international practice". Secondly, the Chartered Institute of Arbitrators celebrates its centenary in Hong Kong in March 2015. RPC will be in attendance in force and we look forward to seeing colleagues and clients at the celebrations.

International Property

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Key developments in 2014

Alternative Capital: As predicted in last year's edition, the anticipated soft international property insurance and reinsurance markets continued throughout 2014 and as we enter 2015, both show no sign of abating.

The continued flow of alternative capital into the market, with investors chasing the attractive investment returns offered by the market in recent years, has resulted in a significant supply/demand imbalance which, combined with another benign year for insured catastrophe losses, strong underwriting results and increased competition and consolidation within the market itself, has created a perfect storm resulting in further downward pressure on rates and a weakening of terms and conditions.

Whilst some market commentators consider the current soft market to be simply part of the normal underwriting cycle, others view the sustained nature of this inflow of capital as heralding a more fundamental shift in the market. What is clear is that the current phase of the underwriting cycle has occurred at a time when underwriting results have been strong and catastrophe losses low. It remains to be seen whether, once faced with an un-modelled catastrophic event or series of events, potentially coinciding with a rise in interest rates and a sustained improvement in the more traditional investment markets, that we will be able to determine whether such a fundamental shift has taken place and that this new form of alternative capital is here to stay.

What to look out for in 2015

Natural catastrophe outlook: Following the unprecedented sequence of devastating natural catastrophes of 2011, the industry has since enjoyed an extended period of relatively low natural catastrophe losses. It is therefore interesting to note that heading into 2015, with some considering the industry is potentially "due" (or even overdue) a major catastrophic event or series of events, demand in the global catastrophe market continues to outstrip supply, rates continue to fall and terms and conditions broaden.

This may, in part, be driven by the recent focus on and improvement in catastrophe event risk modelling, which has resulted in an increased confidence in the industry's ability to handle major catastrophic losses. The events of 2014, whilst unremarkable in terms of losses, are however a reminder that these events are by their very nature unpredictable and sometimes difficult to model. By way of example, one of the largest catastrophe events of 2014 was not an earthquake or flood loss, but a series of major snowstorms in Japan which resulted in estimated insured losses of $2.5bn, whilst another extreme weather event in the form of a hailstorm in Brisbane, Australia resulted in insured losses of almost A$500m. Closer to home, the European windstorms earlier this year were a timely reminder of the increased frequency and severity of these extreme weather events and the fact they are no longer the sole preserve of so called "Nat Cat" hot spots or US hurricane season.

On the basis that 2014 represented a further year without a major market turning event for the industry, the events of 2014 are a useful reminder when looking ahead into 2015 of the importance for the industry to reflect on the current market conditions and to move forward having fully evaluated their potential exposures to these sorts of events.

Legal Practices

Key developments in 2014

Claims from the lenders market: The last year saw the sun finally set on new lenders' claims. Limitation is now likely to prove an insurmountable hurdle for claims arising from lending at the market peak. *AIB v Redler* also, finally, put a nail in the coffin of the more ambitious trust claims advanced by the banks and saw the "common sense" of tort damages triumph over the elaborate equity arguments advanced by lenders. Quantification of loss should now return to being a relatively straightforward exercise.

What to look out for in 2015

Litigation losers – new claims? Insurers and risk managers constantly look out for the next claims trend. With third party litigation funding becoming more prevalent – for cases small and large – claims dealing with liabilities owed to funders is likely to be a key development in 2015. We are already dealing with cases where disappointed funders (who have funded a "litigation loser") have turned on the solicitors acting for the loser and sought damages. What duties are owed in this regard? Does disclaimer language work? Does legal professional privilege help or hinder? All of these questions have yet to be tackled by the courts.

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Key developments in 2014

Medical devices and the regulator: The future of medical device regulation came under scrutiny with the publication of the Stephenson Report in April 2014. The report was commissioned in the wake of the PIP breast implant litigation and the metal on metal hip replacement litigation, both of which have raised questions about the effectiveness of existing regulations. In particular, questions have focussed on the protection of the public and the role of the Medicines and Healthcare Products Regulatory Agency (MHRA) in enforcing those regulations. The report recognises that the medical devices market is changing rapidly and questions how the MHRA should respond.

The report makes 12 recommendations. Some highlights include: elevating the status of medical devices within the MHRA so that they are "taken" as importantly as medicines; improving the reporting of adverse incidents involving medical devices; and increasing the attractiveness of the UK as a location for life sciences investment.

The MHRA has accepted all of the recommendations, which is perhaps not surprising given that its future is currently being reviewed by the Department of Health.

What to look out for in 2015

Expansion and the Jackson reforms: We predict technological and volume expansion in the medical devices market, and this will bring opportunities but increasing challenges for insurers. We highlight below three particular trends to look for in 2015:

1. Increasingly complex medical devices which blur the lines between medicines and devices (a current example is a medicated heart stent)
2. Incorporation of more specialist software within medical devices
3. Increasingly sophisticated medical devices being sold for home use, especially in the field of diagnostics

There could be an increase in the number of claims arising from alleged failures in medical devices. This would be as a result of the perfect storm of increasing use of products (including for cosmetic purposes), increasing complexity of devices, higher consumer expectation, and a large number of claimant's solicitors looking to diversify into new areas as a result of the Jackson reforms.

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Key developments in 2014

Commodity laws: The fall in oil prices and other commodities in 2014 affected Asia's developing economies and the shipping industry. Lower commodity prices led to even lower freight rates with the continued over-capacity in tonnage still depressing earnings. Falling oil prices contributed to the collapse of OW Bunker, a marine fuel supplier, creating numerous claims for P&I Clubs and their members. Owners and charterers faced threats of litigation from OW's trustee in bankruptcy, a bank claiming as assignee and the chain of physical suppliers claiming under retention of title clauses and/or maritime liens.

Problems arose in Qingdao: Steel manufacturers in China had reportedly been using letters of credit to fund iron ore shipments after the government ordered state banks to rein in loans. The credit squeeze exposed frauds whereby certain warehouse receipts had been used as security several times to obtain loans over the same goods. The falling price of the commodity made repayments impossible leading to large scale losses involving traders, banks and underwriters.

According to Lloyd's of London, 2014 saw a significant drop in the number of successful LOF contracts from 55 in 2013 to just 27. While the reduction in the number of casualties may partially account for the drop, there are certainly other factors to consider. The latest incarnation of Lloyd's Open Form (2011) included a number of amendments which were intended to improve perception of the form, particularly from an underwriter's point of view. However, underwriters have voiced concerns regarding award levels and these latest figures appear to indicate a shift towards salvage contracts agreed on commercial terms, to the detriment of LOF.

What to look out for in 2015

Carbon fuelling the future: With no end in sight to the slump in oil prices, margins for owners and charterers remain slim and a rise in litigation can be predicted involving operators attempting to recoup even modest outstanding claims. Market-led cargo claims in which insurers are seen as a "bail-out" option will continue.

Since 1 January 2015, ships trading in designated Emission Control Areas (ECAs) are required to burn fuel oil with a sulphur content not more than 0.1%. While many owners have fitted specialist exhaust scrubbing equipment, allowing vessels to burn standard low-sulphur fuel, the majority of vessels trading within ECAs will have to burn gasoil or a specially developed intermediate fuel oil, which meets the requirements for sulphur content. As well as being relatively expensive, the requirement to burn these specialist fuels is expected to lead to a number of problems for stakeholders.

Concern has been raised around the supply of low-sulphur fuels, particularly at key bunkering ports such as Falmouth (at the edge of the European North Sea ECA). Any delays in supply to vessels proceeding to ports within the ECA would likely lead to curtailment to the vessel's voyage, and subsequently to costly claims for P&I clubs.

Hull underwriters have expressed concern regarding the use of 0.1% low sulphur intermediate fuel oil. Although suitable for combustion in standard marine engines, it has been found that solid waxy particles can form in the fuel if the temperature is allowed to fall below a certain point. Any failure to properly treat the fuel and remove the particles may damage the vessel's machinery and subsequent claims on owners' hull and machinery policy.

Media

Key developments in 2014

Proving harm in defamation: The Defamation Act 2013 came into force on 1 January 2014. A key provision of the Act has been the introduction of a new threshold whereby claimants now have to show they have suffered or are likely to suffer serious harm as a result of the alleged libel. The one decision on the provision so far (*Cooke v MGN*) indicates that the courts will take a narrow view of what constitutes serious harm. That is very much to the benefit of defendants.

A single publication rule has also been introduced which gives online publishers greater protection against libel claims. Whereas online publication was previously considered to be ongoing, such that the one-year limitation defence was effectively irrelevant, the law now provides that the limitation period begins on the date the material is first published online (provided that publication first takes place after 1 January 2014).

What to look out for in 2015

Protecting data: In the face of a more defendant-friendly defamation environment, claimants are beginning to turn to data protection law as a way of strengthening claims against publishers and we expect to see more claims this year based on alleged breaches of the Data Protection Act. As a result of the *Google Spain* decision in the European Court of Justice, internet companies are also now a clear target for such claims.

Data protection law offers a claimant several advantages when trying to control what media organisations publish about them. Under defamation law a claimant must show that they have suffered serious harm as a result of the information published and under privacy law the information published must be private. Under data protection law there are no such thresholds, only that the information must be personal.

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Key developments in 2014

The introduction of publicly available Consultant performance data: Members of the public can now access, via the My NHS search tool, performance data for around 5,000 individual surgeons. The data includes how many times a particular Consultant has performed a procedure, mortality rates, number of revisions, and length of hospital stay. Currently this data is available only in a limited number of surgical areas and procedures, but the trend is for this to increase and widen its scope. The intention is to improve transparency and public confidence. However, surgeons have criticised the usefulness of the data, and have raised concerns that the publication could introduce risk averse behaviour. We expect that claimant's solicitors may seek to use the data to their advantage when allegations are raised in relation to an individual surgeon's performance of a surgical procedure. Insurers may also wish to explore the data surrounding an individual surgeon's past history when considering whether to accept a particular risk, and on what policy terms.

What to look out for in 2015

The duty of candour: This statutory duty will be implemented for independent healthcare providers in April 2015. Following the Francis Inquiry, this new duty is intended to encourage a culture of openness and support. Healthcare providers will be obliged to act following any unintended or unexpected incident that appears to have resulted in moderate harm, severe harm, prolonged psychological harm or the death of a patient. Providers will be expected to act "as soon as reasonably practicable" and notify the relevant person, provide an accurate account of the incident, details of the next steps of the investigation and an apology. It remains to be seen whether this will lead to an increase in claims. In any event this will become an onerous duty for healthcare providers, and the failure to comply will constitute a criminal offence in itself and render the organisation liable to a fine.

Miscellaneous Professional Indemnity

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Key developments in 2014

Unchartered territory: Claims seen in 2014 highlight how companies in this class can lack experience in dealing with insurance. They are often either new companies (increasingly in fields that did not exist 10 years ago) or in a profession that was either immune to claims (ie expert witnesses) or where claims were extremely rare. There are no "minimum terms" for these professions. Coupled with the lack of insurance knowledge, this increases the duty on brokers, who are expected to get under the skin of the company. Insurers, however, can provide bespoke wording suited to that particular company.

Directors of companies in this class often focus on their product alone. They tend to have limited input into their company accounts. We have seen several examples of accounts being handled by an unqualified accountant and fraud being committed. Insurers should ensure that a director has ultimate responsibility for company accounts and, ideally, that a qualified accountant is employed.

We have also identified a split between companies in this class that are susceptible to "high value low volume" claims and "low value high volume" claims. The former tends to be claims against highly technical advisers (for example, we have seen an enormous claim against a company that diverts rivers). The latter tends to be claims against schools, recruitment consultants, HR consultants; these claims are often loss of chance claims which, even if they have some merit, rarely result in significant payments. Record keeping is key to defending these claims; insurers should check what procedures are in place.

What to look out for in 2015

Changing fast: In 2015, we expect companies within this class of business to continue to evolve quickly. The modern world is about fast change. The definition of professional business is key. What was appropriate for 2014 might not be appropriate for 2015. Even if the product remains the same, the reach of these companies grows due to internet based advertising. Insurers and brokers should consider exactly what activities are being insured and whether the people within the company are properly fit to perform them. This is tricky; there is rarely a trade organisation governing the industry in which the company operates. However, insurers want to be paid for what they are actually insuring and brokers need to avoid criticism for failing to obtain appropriate cover.

This class of business is taking off. The modern world demands it. We are told that 90% of jobs young children might end up doing are still to be invented. Therefore, "new" professions will continue to appear and "old" professions will evolve beyond that which we understand them to be. Sensible, diligent underwriting can make this a profitable book. However, as with all new insurance business, it is fraught with risk and proper care must be taken.

This section features in our Annual Review for the first time. Whilst difficult to define, the disparate professions and companies that fall into this "class" are linked by similarities. We set out above what we have noticed this year and what we anticipate for 2015.

Pensions and Actuaries

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Key developments in 2014

New pension freedoms: The Government announced wholesale changes to how pensioners can access their pension in April 2014. From April 2015, pensioners can draw down their pension entirely in cash or implement a number of other options including income draw down without an upper limit. No doubt as a consequence of these proposed changes, the Financial Ombudsman Services (FOS) saw a 67% increase in complaints relating to annuities.

Self-Invested Pension Plans (SIPPs): Having outlined its concerns back in January 2013 regarding pension transfers to SIPP wrappers, the Financial Conduct Authority (FCA) issued no less than six separate alerts during 2014 on the issue of unsuitable pension transfers aimed at Independent Financial Advisers and wealth managers. The FCA's April alert commented that where a financial adviser recommends a SIPP knowing that the customer will transfer or switch to a SIPP to release funds, then the suitability of the underlying investment must be considered. SIPP administrators were also in the firing line with the FOS finding against a SIPP provider for an investment in an unregulated investment collective scheme only to then "review" that same decision.

What to look out for in 2015

New pension freedoms: The new pensions freedoms are set to take effect from April 2015 and it is anticipated that a host of new products will enter the market to cater for these new freedoms. The FCA plans to continue to consult on the new freedoms including monitoring the market to consider key product risks ahead of April 2015. Although this may not be a repeat of the 1990s pension transfer issues, we anticipate that there will be an increase in claims in relation to those involved with advising on pension issues.

Pensions liberation: The FCA, Pensions Regulator and Serious Fraud Office all took action in 2014 to seek to prevent pensions liberation – accessing a pension before the age of 55. The Pensions Ombudsman has received 140 complaints in relation to this issue and having just issued its first decision, is set to issue a further group of decisions in early January 2013. We anticipate that this will continue to be an area attracting regulatory attention in 2015 and an area for claims against pension providers.

Political Risk and Trade Credit

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Key developments in 2014

Unrest across the world: Without doubt, 2014 has proved another turbulent year. The threat posed by Islamic extremism is still causing conflict and civil unrest: the swift rise of ISIS in Iraq and Syria, the recent school attack in Pakistan, and Boko Haram's continued action in Nigeria to name but a few. The South East Asian region saw anti-Chinese protests in Vietnam in May 2014 and anti-government protests in Thailand, culminating in a military coup in May 2014. In the last few months of the year we have seen civil unrest in Hong Kong, Mexico and the US. The global economic climate has also continued to be turbulent, for example, the Argentina debt default in August 2014 and the recent crash in oil prices. However it is the annexation of Crimea/the ongoing situation in Ukraine and the effect that it has had on Russia's relations with the rest of the world which has caused the biggest impact this year. In particular, sanctions against Russia are now becoming an increasingly significant consideration for (re)insurers operating in the Credit and Political Risk Insurance (CPI) market.

The CPI market has seen the 11th annual successive rise in capacity in 2014 (capacity has more than doubled since the global financial crisis in 2008). In terms of the balance between credit and political risk product appetites, demand created by the continuing economic difficulties globally has led to growth in insurers' trade credit books overtaking the growth in political risk books. The trend for increased capacity in both markets looks set to continue and the new capacity is much in need on large single deals in the trade credit arena.

What to look out for in 2015

Continued civil unrest expected: The violence in Iraq/Syria (with IS) and Ukraine is predicted to continue well into 2015. Relations with Russia will remain strained and it is facing serious economic difficulties. As such we expect insurers to continue to exercise a cautious approach to risks based in the Middle East and Russia/Eastern Europe. It also is expected that civil unrest will continue in the Middle East, North Africa and, in particular, countries affected by Ebola (Guinea, Liberia, Sierra Leone, Nigeria, and Mali). The European Commission has slashed Eurozone growth forecasts and the rise of right wing parties in Europe is causing concern. This is a timely reminder that developed countries are equally as exposed to CPI risk as developing countries. Insurers are reporting rising insolvencies in certain trade sectors and geographic locations, in particular, in South America, Argentina, Brazil and Venezuela are facing varying degrees of economic instability.

The trend in product innovation in the CPI market is set to continue well into 2015. UK Export Finance has just issued a guarantee for an offshore renminbi-denominated loan and plans to guarantee a sukuk bond for the first time early this year. The world's third biggest credit insurer, COFACE, successfully completed its IPO in the summer of 2014 making it a key player to watch in the credit market in 2015. On the private market side, over the coming year, more insurers may start to offer comprehensive non-payment cover for banks making non-trade related loans to corporate borrowers or for project finance lending.

Power

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Key Developments in 2014

Continuing softening markets: Although the energy sector saw the largest loss in 2014 with a fire at a Siberian refinery complex in June (c$800m), the global energy claims loss experience during the year was relatively benign compared to earlier years. The main causes of loss in terms of numbers and values were fire/explosion, machinery breakdown, natural catastrophes and contingent business interruption losses.

There were further increases in capacity in 2014 (with an additional $150m in the upstream sector) and new or alternative capital flowing into the market as traditional investment sources remain depleted. With increased competition amongst insurers both upstream and downstream, the soft market conditions continued with substantial rate reductions across all energy classes, for direct and reinsurance risks alike.

In our 2013 Insurance Review, we predicted there would be a potential increased appetite amongst insurers to write mega-project business in 2014 especially in the Asia-Pac region. Despite the benign loss experience the market did see more claims from large inter-related installations, with increased business interruption claims being a notable feature due to issues such as rising dollar values, complex and concentrated supply chains, cyber attack, new technologies and emerging markets. There was also a continued and sustained focus on the need for insurers to work more closely with their insured clients, to better understand their risk engineering and loss prevention practices and to put in place agreed claims protocols to facilitate the investigation and claims handling processes for large complex cross border energy claims.

What to look out for in 2015

Growth opportunities in emerging markets: Given the current conditions in the energy market, we anticipate there will be further increases in capacity in 2015, including the influx of further new or alternative capital such as cat bonds and other risk linked securities. Underwriters will therefore not see an end to the softening market anytime soon.

(Re)insurers will face a challenging drive into emerging market regions as new technology allows oil and gas companies to access previously inaccessible reserves, and as the demand for insurance cover for new exploration and production risks grows. With emerging markets no longer covering only 'developing' markets, exploration and production locations will become increasingly varied and widespread. (Re)insurers will need to be fully informed about the local socio-economic, political risk and legal systems if they are to provide cover that responds as intended. In particular, they will need to conduct detailed enquiries to ensure wordings are fit for purpose in those regions if there is to be contract certainty and if the potential for disputes is to be minimised.

On the domestic front, the Infrastructure Bill had its third and final reading in the House of Lords in November 2014. Once the Bill is passed in the House of Commons we expect there will be increased investment in hydraulic fracturing (or fracking) in the UK – about half the UK is now available for exploration – and consequential increases in the demand for cover.

Procedure, Damages and Costs

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Key developments in 2014

Zero tolerance in the courts: Last year we predicted a tougher approach to compliance with the Civil Procedure Rules (CPR) and Court Orders in the wake of the Court of Appeal's decision in *Mitchell v News Group Newspapers*. We also expected there to be an increase in claims and potential claims as a result of solicitors failing to meet deadlines. Frankly, we underestimated the zero tolerance adopted by the courts. The first six months of 2014 saw chaos as the decisions piled up in favour of the Court of Appeal's new approach. It reached the stage where solicitors did not think that they could agree any extension of time at all for fear of it being set aside by the court. Co-operation between parties ended. The courts that were already overstretched with the extra time needed for costs case management conferences (CCMC) became clogged with applications to extend deadlines.

Common sense prevailed in the summer. First, an amendment to the CPR was rushed through and became effective on 5 June 2014. Parties can now agree an extension of time of up to 28 days for any Court Order or CPR deadline without involving the court provided that it did not impact adversely upon a hearing. Second, the Court of Appeal heard three cases under the lead case of *Denton v T H White Ltd*. The judgment on 4 July 2014 (less than three weeks after the hearing) clarified the *Mitchell* decision and reined in its excesses. When considering an application for relief from sanctions a court must:

1. Assess the seriousness of the breach;
2. Consider whether there is a good reason for the breach; and
3. Evaluate all the circumstances of the case.

We all breathed a huge sigh of relief. By the close of 2014, we were just about back to normal. However, parties still need to be on their guard and if more time is needed, apply to the court before the deadline expires.

What to look out for in 2015

Cost management: Although we have had cost management since April Fool's Day 2013, it is still bedding in. The scope of cost management has been extended so that it now applies to all multi-track cases commenced on or after 22 April 2014 where the damages claimed do not exceed £10m. It can take several months for a CCMC to be listed, and there is no consistent approach to cost management by Masters and District Judges even within the same court centre. Some courts will scrutinise cost budgets whilst others will take a broad brush approach. One recurring theme is the courts encouraging parties to agree costs, especially given the delay in listing CCMCs. This is expected to continue into 2015. Hopefully some consistency of judicial approach will start to emerge.

The Rules Committee is looking (again) at improving Part 36 but the precise ambit of this is as yet unclear. There remain few actual benefits to defendants making Part 36 offers compared with costs inclusive or Calderbank offers. This is of particular concern to insurers, which tend to be defendants (actual or standing behind) rather than claimants in litigation.

Products

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Key developments in 2014

Consumer clarity: This last year saw welcome clarity for manufacturers on the territorial scope of the Consumer Protection Act 1987 (CPA) and dates to determine the applicable law. The judgment in *Allen & Others v Depuy International Limited*, handed down in March, was welcome news for insurers of manufacturers. Against a backdrop of ever increasing exposure for UK manufacturers to claims from overseas, the case confirmed that claimants cannot sue under the CPA for injuries suffered outside the EU or European Economic Area, even if English law applies. Instead, claimants face the harder task of proving that manufacturers have been negligent.

In this case, the claimants alleged they had been injured by prostheses manufactured by the defendant in England but marketed and supplied abroad. Most claimants were domiciled overseas, where they had also had their operations and suffered their alleged symptoms. The claimants relied on the CPA and sought to argue that English law applied to their claims.

Justice Stewart held that English law was not the applicable law of the claims but even if English law had applied, the claimants would not have had the benefit of the CPA. Nothing in the language of the CPA suggests that it extends to injuries outside the UK/EU/EEA.

For claims in tort, either the Private International Law (Miscellaneous Provisions) Act 1995 or Rome II determines under the applicable law, depending on whether the "events giving rise to damage" occur before or after 11 January 2009. Stewart J held that the date of the relevant "event" in a product liability case is the date of manufacture or circulation.

What to look out for in 2015

Smart technology: This could be the year in which companies make significant strides in launching technology that not only provides users with information before they realise they need it, but also makes decisions for them. Exciting times for consumers but manufacturers need to be careful that they do not expose themselves to liability claims.

Artificial predictive intelligence has so far largely been limited to providing consumers with unsolicited, but potentially useful, information (such as smartphones automatically telling users that a flight is delayed or pointing out local tourist attractions when visiting somewhere new). However, increasingly technology will take unprompted decisions on the consumers' behalf. Anticipatory technology may be used in areas that have largely remained immune to automation, such as the legal and healthcare sectors. Predictive technology could lead to lawyers' computers sifting mountains of data to make decisions over the drafting of documents, hospitals' IT systems deciding on treatment strategies or a fitness enthusiast being told by his smart-watch that he is now well enough to go for a run. In such cases, where something goes wrong, manufacturers of the technology, as well as companies relying on it, could struggle to agree where liability lies: is it the fault of the technology, the way the consumer calibrated it or the user for failing to use common sense and override a computer's decision? Insurers should be aware that the rise of predictive technology may have unpredictable consequences.

Property and Business Interruption

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Key developments in 2014

The two sides to causation: Causation has been a recently recurring theme in property cases. The difficulties which courts face in applying seemingly established principles were shown in *Howmet v Economy Devices*. That case demonstrated the two sides to causation.

Side 1: Establishing causation. The burden is on the claimant to prove that the defendant's breach has caused the loss. In fire cases (such as *Howmet*) where the fire is likely itself to have destroyed key forensic evidence on cause, there might be a number of possible causes, only one (or some) of which would lead to the defendant being liable.

The court found in Howmet that even if one possible cause can be shown to have been more likely than the others, that will not necessarily be the cause in law. It is necessary to show independently that it was the cause on the balance of probabilities. There were three possible causes. The court found one cause to be the most likely, but nevertheless not to have been the cause on the balance of probabilities. This is mathematically conceivable, but instinctively bizarre. It sets a high bar for claimants trying to show that one of a number of causes is the actual cause.

Side 2: Establishing a break in the chain of causation. If the claimant can establish a particular cause, the defendant might argue that a separate action by the claimant broke the chain in causation.

The burden is on the defendant. The test has been confirmed as generally being one of recklessness. The claimant must have known of the risk and chosen to take it – or not cared whether it was taken. Put another way, the claimant's conduct must "obliterate" the original cause. This is a high bar, particularly given the potential uncertainty in attributing employee's knowledge and conduct to the claimant corporate entity. In practice, it is likely to require a crushing cross-examination of claimant witnesses.

Even where the Courts have heavily criticised the claimant, they continue to prefer to find substantial contributory negligence (for example, 75% in *Cadbury v ADT and Howmet*).

What to look out for in 2015

The meaning of "attendance": The Court of Appeal will decide on the meaning in *Milton v Brit*. At first instance, the judge held that mere presence (in this case, being asleep at the Premises) was sufficient to constitute "in attendance". This is a significant issue for insurers as the term "attended/attendance" applies not only in relation to alarms but also industrial processes, for example, "do not leave newly dried laundry unattended". The case will be heard by the Court of Appeal in March 2015. In the meantime, insurers may wish to update policies to define attendance.

Riots: Having given leave to appeal to insurers, the Supreme Court will consider whether business interruption losses are recoverable under the Riot Damages Act which will determine whether insurers will be able to recover those losses from the police.

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Key developments in 2014

Continued capital availability and consolidation: This has been a mixed year for the market. On the one hand there have been very few major losses, only a handful of reported cases and a very limited number of arbitrations. On the other, conditions are difficult with ample capacity, low prices and a number of the traditionally bigger buyers trimming their programmes and their spend. One resulting focus has been on making effective use of the capital available through innovative and non-traditional reinsurance structure. There have been some instances of large value reinsurance structuring to allow reinsureds increased use of capital.

One way of differentiating from the rest of the market and to consolidate in a position in a soft market is to grow. At the end of 2014, the market was awash with rumours of acquisitions. The expectation among market commentaries is that this will continue into 2015.

What to look out for in 2015

Reinsurance recoveries in respect of mesothelioma claims: In the early part of the New Year, the Supreme Court is due to hand down its decision in *IEG v Zurich*. The case concerns recovery under Employers' Liability (EL) insurance in respect of liability for mesothelioma claims. The issue was whether insurers should be joint and severally liable for the losses. Put another way, would EL insurers be liable just for the proportion of their period of cover set against the employees' overall period of exposure or could an EL insurer be liable for the full amount of the loss, even if other insurers were on risk during the period of overall exposure? It was held by the Court of Appeal that the claim against insurers was joint and several. This meant that recovery in respect of the full loss could be made from an EL insurer, even if that insurer was only on risk for a small proportion of the overall period of underlying exposure of the employee to asbestos. This is being tested in the Supreme Court.

An interesting issue which will follow is whether it will be possible for EL insurers to recover for the full amount of the loss from reinsurers, even if the period of reinsurance is only a small proportion of the underlying period of exposure. Given the significant value of mesothelioma claims and the potential application of deductibles under the reinsurances, there could be considerable money turning on the issue. We will be provide an update on this once the decision of the Supreme Court is available.

Restructuring and Insolvency

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Key developments in 2014

Insurance run-off and restructuring: We have witnessed a mixed scene of stress and buoyancy in the insurance run-off and restructuring sector. As predicted last year, we have seen a number of groups amongst both brokers and risk carriers, eg Tower and Towergate, suffering from contracting and ever competitive markets coupled with the continued low interest rate environment.

The historic trend of heavy competition for run-off purchases continued with a string of acquisitions in the public eye such as the Enstar/Stonepoint acquisition of Torus and Catalina's acquisitions of PX Re and Sparta.

We are also seeing solvent closure in the area of life insurance with some funds speeding up an otherwise natural end.

What to look out for in 2015

Risk exposure in annuities: We predict further restructuring in the life field where developments in annuities legislation and competition in the bulk annuities area has prompted a number of long-term insurers to assess their exposure to longevity risk. This would involve closures of business and/or divestitures of affected divisions.

Secondly, resolution planning for (re)insurers continues apace. With insurers now sandwiched between the general requirement to prepare for resolution in an "orderly manner" and extensive requirements for Global Systemically Important Insurers being developed by the International Association of Insurance Supervisers, it is safe to assume a further layer of regulation will shortly preoccupy compliance departments, big and small. Solvency II will be implemented on 1 January 2016, meaning that 2015 is the last calendar year before it goes live. There will be some last minute moves to avoid its effects or, more likely, some smaller businesses may decide to stop operations altogether and exit, if necessary by winding up.

Surveyors

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Key developments in 2014

Restricting duties: This was a good year for those defending claims against surveyors as the courts pulled in the reins on decisions affecting surveyors' liability. Both *Matthews v Ashdown Lyons & Maldoom* and *Mavis Russell v (1) Walker & Co (2) Robert Chisnall & Others* saw the court reject claims brought against valuers personally, where the original surveyor firm had gone into administration. In both cases, the judges distinguished between the facts in the 2001 *Merrett v Babb* case, providing some welcome clarity on when a *Merrett* finding of personal liability might arise. Special care was taken to emphasise the public policy thinking behind the *Merrett* decision. As at the date of writing, the *Mavis Russell* case has gone to appeal and we await the Court of Appeal's judgment.

Hubbard Hubbard v Bank of Scotland Plc (t/a Birmingham Midshires) also delivered some welcome news for surveyors and their insurers. The court recognised, firstly, that duties owed under mortgage valuation reports will be limited and the terms of a surveyor's retainer will be particularly important in establishing the scope. Secondly, the court found that a valuer is under a duty to report on defects which could have a material effect on value only and is not under a duty to recommend further investigations unless there is sufficient evidence at the time to require them reasonably to do so.

What to look out for in 2015

Securitised Loans: Looking ahead to next year, all eyes are likely to be on whether the court grants permission to appeal the recent decision in *Titan Europe 2006-3 plc v Colliers International UK plc (in liquidation)*. This case was the first time a UK court had dealt with a negligence claim against a valuer brought by a Special Purpose Vehicle (SPV) set up for the purposes of a loan to be secured against a portfolio of commercial properties. The decision – and any future appeal court ruling – could have huge significance for all those involved in claims relating to commercial mortgage-backed securities (CMBS).

As well as numerous valuation issues going to liability, the court looked at issues of loss and reliance in circumstances where the loan had been securitised and concluded that the claimant SPV, Titan, was entitled to pursue the claim, in spite of the fact that it had suffered no loss and, according to its own witness, had not relied on the valuation.

Technology and Cyber Risks

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Key developments in 2014

Interconnecting systems: One of the main trends to emerge in 2014 was the arrival of the "internet of things" a serious issue for insurers.

The interconnectivity of systems, from personal devices to complex industrial SCADA control systems, increases the risk that a cyber event can have severe physical consequences in addition to the traditional business continuity and data security issues.

This has led to the continued evolution of dedicated cyber insurance products to extend coverage from the practical and regulatory costs of a data loss or breach and attendant business interruption to addressing the exposures from physical injury or damage arising from a cyber event. The increased prospects of physical loss and damage arising from a cyber event has also led underwriters of traditional public liability and property coverages to revisit the extent to which their policies are susceptible to "cyber leakage" and the aggregation risk of cyber events causing multiple losses over several different classes of coverage.

What to look out for in 2015

Ramping up data security: The long anticipated EU General Data Protection Regulation (the Regulation) has survived European Parliamentary Elections and a new EU Commission and will, barring last minute hitches, stagger over the legislative finishing line in 2015. Although there is a two year implementation period, the Regulation, when it arrives will fundamentally change the data protection landscape in the UK imposing significant new regulatory burdens and eye-catching fines of up to €100m or 5% of turnover.

This will move data security further up to board agendas of all significant companies and further drive the focus on managing data risks by methods such as increased cyber security, cyber insurance and the use of full service breach response products (such as RPC's ReSecure service).

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