

SIGNS OF A HARDENING PROFESSIONAL INDEMNITY INSURANCE MARKET?

- ▶ In 2018 some brokers were predicting a hardening of the professional indemnity insurance market.
- ▶ We are starting to see signs that the market is indeed hardening.
- ▶ What impact will this have on the construction industry?

What's it about?

For a long time now we have enjoyed a soft insurance market, with low premium increases and good availability of cover. We are now seeing signs that this is starting to change. For a while now brokers and commentators have been concerned about a potential hardening of the market, resulting from a number of factors including a depletion of insurers' reserves through both worldwide natural disasters (which have an effect throughout the insurance market as they affect the major international reinsurers who underpin the global insurance markets) and UK construction specific issues – such as under-performing technology in waste to energy projects and concerns about losses relating to building cladding. Other factors affecting the market include a reduction in capacity arising from the exit of some insurers from the market and the amalgamation of others; poor investment returns; insolvencies in the construction industry; and increased risks arising from onerous contract terms and tight margins. Now we are starting to see insurers taking steps to seek to manage future exposures.

Why does it matter?

The effects of a hardening market are likely to be felt throughout the industry and include:

- ▶ increases in premiums and in excesses (either across the board or for specific types of projects);
- ▶ changes in the basis of cover – perhaps a withdrawal of each and every claim insurance or a restriction on round the clock reinstatements; and
- ▶ changes to insurance terms including additional exclusions from cover, the removal of existing extensions (such as fitness for purpose coverage) and more onerous conditions (eg re notification of claims).

We are aware of a number of instances of consultants and design and build contractors who have not been able to obtain "each and every claim" coverage on renewal, despite good claims records and this seems likely to continue. This has been attributed to the hardening of insurance market conditions applicable to the "Design and Construct" professional indemnity sector.

We are also starting to see increased levels of concern amongst consultants in agreeing to absolute obligations. This includes obligations which traditionally have been (and should be) absolute as they are not covered by professional indemnity insurance in any event, as they do not relate to the performance of the consultant's professional activities and duties.

Decisions, such as that in the case of *MT Hoejgaard A/S v E.On Renewables UK Robin Rigg East Ltd* [2017] UKSC 59 are also likely to prompt greater emphasis on reviewing the detail of the technical documents for onerous obligations or obligations which are not qualified by the obligation to exercise reasonable skill and care.

What now?

As we move into harder market conditions insurance will become more expensive and more restrictive. Whilst contractors and consultants will bear the brunt of increased premiums these are likely ultimately to be passed on to their clients.

Employers may need to become more flexible in terms of what insurance cover they will accept from consultants and contractors and may turn to alternative covers. Ultimately the best protection for an employer is to select an experienced and reputable consultant/contractor and to institute management procedures which help to minimise the risk of errors being made and maximise early detection of any problems. Adoption of new technologies, such as BIM, should also assist.

Looking at contract terms, it is likely to become harder to secure acceptance of fitness for purpose and strict liability obligations, with existing fitness for purpose extensions potentially being withdrawn in a hardening market. Employers also need to be wary of insisting on obligations which may (in extreme cases) void cover under the professional indemnity policy.

It is also important to remember that as professional indemnity insurance is a "claims made" insurance the key factor is the scope of insurance available at the time that the claim is made, rather than when the contract is entered into or the default occurs.

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