

# SOCIETY OF CHARTERED SURVEYORS IRELAND

## PROFESSIONAL INDEMNITY INSURANCE

### OVERVIEW

APRIL 2021

**“You don’t have to be wrong to be sued”**



# **INTRODUCTION AND SESSION OVERVIEW**

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- 1 ➤ SCSl Members – where and how does legal liability arise?**
- 2 ➤ How does a typical Pl policy operate?**
- 3 ➤ Purchasing Pl Insurance – the challenges.**
- 4 ➤ Conclusion**



# WHAT DO WE WANT TO LEARN FROM THIS SESSION?

- ❑ Understand where and how legal liabilities can arise for SCSl members.
- ❑ Illustrate how a PI policy will deal with such legal liabilities.
- ❑ Highlight the key elements of a PI policy that can impact the cover provided.
- ❑ Provide examples of where PI cover can diverge from contractual requirements and other legal obligations that SCSl members have e.g. licencing.
- ❑ Overview of the current PI insurance market.
- ❑ What SCSl members need to do to secure adequate and contractually compliant PI insurance.
- ❑ What is likely to happen with PI insurance over the next few years.



**Where and how does  
legal liability arise?**



## “DUE CARE & SKILL”



*“Any person who practices a profession and holds him/herself out as competent to give advice or assistance in that profession must exercise that degree of care and skill which one would expect from any other competent practitioner in the same profession”.*



# LIABILITY UNDER CONTRACT



*“Professionals regularly sign contracts which impose duties of care and impose conditions such as indemnities etc. that can be onerous and go beyond liability under common law”*



# WHO CAN SUE?

## *Who can sue a Professional?*

- 1 Client in Contract
- 2 Other affected Third Parties in Tort

## *What is vicarious liability?*

The Professional is also responsible for the acts and omissions of his/her employees, agents and subcontractors



**How does a typical  
PI policy operate?**





# PROFESSIONAL INDEMNITY & FINANCIAL LOSS

**PI covers financial loss (without accompanying bodily injury or property damage) from errors in advice, design, specification or failure to perform a professional duty.**



# WHY PUBLIC LIABILITY IS DIFFERENT TO PROFESSIONAL INDEMNITY

*What are the essential ingredients to trigger a Public Liability policy?*

Bodily Injury and/or Property Damage needs to arise.

*Does PL cover financial loss?*

Yes, provided it is consequent upon bodily injury or property damage and does not form part of a policy exclusion.

*Why, therefore does a SCSl member require PI in addition to PL?*

PL excludes liability from errors in advice, design, specification or failure to perform a professional duty.

*PL is generally underwritten on a “claims occurring” basis whilst  
PI is underwritten on a “claims made” basis which is fundamentally different*



# PI IS WRITTEN ON A CLAIMS-MADE BASIS

## *Claims Occurring – PL*

- Policy effected 12 months @ 1/1/10
- Incident Date 1/6/10
- 2010 Policy responds

## *Claims-Made – PI* Policy effected 12 months at 1/1/08

- Incident date 01/6/08
- Claim Made 01/6/10
- 2010 policy responds (subject to retro-active cover applying) unless:
  - Insured aware of incident and reported it in 2008
  - Then 2008 policy responds



# ERROR BUT NO CLAIM?

Q.

*What if a professional becomes aware he/she has made an error but there is no claim i.e. “circumstances” that might give rise to a claim*

A.

Notify – if a claim ultimately transpires it will be treated as a claim for the period during which the notification was made. If not notified Insurer may decline to cover when claim ultimately made for late notification – bigger problem if professional has changed Insurer in the meantime!



# KEY ELEMENTS OF A PI POLICY

- ❑ Precise Business Description.
- ❑ **Limit of Indemnity – separate slide**
- ❑ Any one claim or in the aggregate?
- ❑ Defence costs in addition?
- ❑ **Retro active date – separate slide**
- ❑ Incident / Claim reporting conditions.



# RETROACTIVE COVER

*This is critical to the operation of the policy cover and needs to be fully understood.*

- If there is a specific retroactive date on the policy then no cover will apply for any errors / omissions prior to this date irrespective of when the matter is reported.
- There could be a retroactive date specified as “inception”. This means no matters prior to this date are covered.
- The retroactive date could be some years prior to the inception of a new policy and in this case matters arising from this date are covered.
- If there is no retroactive date specified then any matters arising within the terms of the policy are not date constricted.
- All the above assume that the insured has reported all relevant matters to prior insurers under the terms of the policies in place year to year.



# SELECTING A LIMIT OF INDEMNITY

*When considering what the limit of indemnity should be the following should be assessed –*

- ▶ PSRA licencing requirements.
- ▶ Other contractual commitments with clients.
- ▶ Extent and type of work undertaken – essentially considering the potential for litigation.
- ▶ Is the insurer offering the limit on an “each and every claim” basis or “in the aggregate” ?
- ▶ Defence costs in addition to the limit or included in the limit.
- ▶ Work to the maximum available from insurers(cost permitting) not the minimum required by PSRA or clients



# BASIC POLICY SHOULD COVER

- ❑ “Negligent act error or omission” or better still “Full civil liability”
- ❑ Liability for dishonesty of employees
- ❑ Libel/ Slander
- ❑ Liability for loss of documents
- ❑ Inadvertent breach of copyright
- ❑ Inadvertent breach of confidentiality
- ❑ Inadvertent breach of IPR
- ❑ Partners previous businesses
- ❑ Former partners





# COMMON EXCLUSIONS

- ❑ Some of previous slide
- ❑ Pollution- could be important (e.g. Environmental Consultant)
- ❑ Asbestos/Toxic Mould
- ❑ Contractual Liability (Unless etc.)
- ❑ Possibly bodily injury/ property damage (again, could be important e.g. Architect).
- ❑ Circumstances known at inception
- ❑ “Retro Date” – No cover for actions prior to this date.  
(important if changing insurer that same retro cover applies)
- ❑ Consequential Losses – in some cases.



# RETIREEES

*Policy is “claims made” as discussed.*

*What happens if our professional retires for example?*

Must buy run off cover to protect his/her past activities and potential liability. If he/she drops cover then no cover applies for subsequent claims made of which he/she was not previously aware and/or hasn't notified to PI Insurers prior to expiry of cover.



# BUSINESS SOLD?

What happens if our professional sells his/her business?  
This is very important in relation to licensing requirements.

As on the previous slide, “run-off” cover is required but a number of options exist.

- Professional buys own run-off cover
- Cover is provided by purchaser

*Position will ultimately be dictated by Sale Document.*



# INCIDENT / CLAIMS NOTIFICATION

- ▶ Must notify incidents and claims promptly (read policy!)
- ▶ If not done Insurers can avoid claim.
- ▶ Must not attempt to resolve the matter themselves and/or admit liability without permission from Insurers
- ▶ Common problems in PI are disputes over late notification.



# LAPSED RENEWAL?

*What happens if someone fails to renew a PI Policy?*

No cover for claim received after expiry date unless notified to Insurers, and accepted by Insurers as a “circumstance” prior to expiry.



# RUN-OFF COVER

*How long should a SCSl member carry run-off cover for?*

## *Difficult Question*

- ▶ Statute of limitation for Property

*Damage is 6 years*

- ▶ Statute of limitation for Personal

*Injury is 2 years.*

- ▶ Can be overridden in many circumstances e.g. minors

*PSRA requirements currently require purchase of run-off cover for 7 years – see next slide.*



# PSRA LICENCE RUN-OFF COVER

- ❑ This is a statutory requirement so cannot be ignored.
- ❑ Run-Off cover is required for 7 years after expiry of a licence following retirement or a sale of the business.
- ❑ Evidence of this insurance will be required if an application for a new licence is made.
- ❑ Irrespective of any possible future licence application there is a significant residual risk for work done prior to a licence expiring.
- ❑ Current policies have a short reporting period post lapsing for claims to be advised to insurers. After this period the insurer will not accept any claims notifications.
- ❑ Run-Off cover can be purchased annually in most situations but there is no absolute guarantee.



# Purchasing PI Insurance – the Challenges





# PI INSURANCE MARKET OVERVIEW

- ❑ Very challenging at the moment.
- ❑ Cover is being reduced and restricted.
- ❑ Premiums are increasing exponentially.
- ❑ Insurers are exiting the market – some as a result of Brexit.
- ❑ Insurer capacity is reducing – limits of indemnity on offer are coming down and premiums going up!
- ❑ Limits of Indemnity are moving from “any one claim” to “in the aggregate”
- ❑ Cover is being restricted e.g. fire safety (Grenfell), valuations etc.
- ❑ COVID has made insurer communication difficult.
- ❑ Serious divergence in cover offered by insurers from contract and licencing requirements.



# CHANGING INSURERS

**“Clean out cupboards”** – make sure that any incidents that could give rise to a claim are notified prior to expiry/change.

New policy may offer less cover and this must be highlighted and understood – could result in non compliance with contract conditions.



# RATING FACTORS – WHAT INSURERS NEED.

- ❑ Fee/Commission Income for previous year and projected income.
- ❑ Detailed description of activities; including those that you have undertaken previously if none of this work completed in previous year
- ❑ How contracts are managed – is there a formal risk management policy.
- ❑ How “Terms of Business” etc. may limit liability. Can liability be capped?
- ❑ Limit of Indemnity required – see next slide
- ❑ Retro active date.
- ❑ Excess / Deductible.
- ❑ Claims History.



# Conclusion



# CONCLUSION

- ▶ PI Insurance is going to be challenging for some time yet.
- ▶ SCSI members must plan and manage the renewal process from at least 3 months out.
- ▶ Ensure your advisor and / or insurer engages early.
- ▶ Conduct a risk assessment for each contract – do you know where your insurance policy won't operate or provide indemnity?
- ▶ In addition to a completed proposal form have additional information available e.g. activities, contract management, risk management protocols etc.
- ▶ Anticipate restrictions and changes in the cover being offered – be aware of new exclusions and conditions. Will they create non-compliance with contract and licensing requirements.
- ▶ Ensure you are fully conversant with any incidents or claims in the system – what stage are they at and are there any mitigating circumstances?

***PI Insurance is not a limit of your potential liability !!***



# THANK YOU FOR YOUR TIME

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