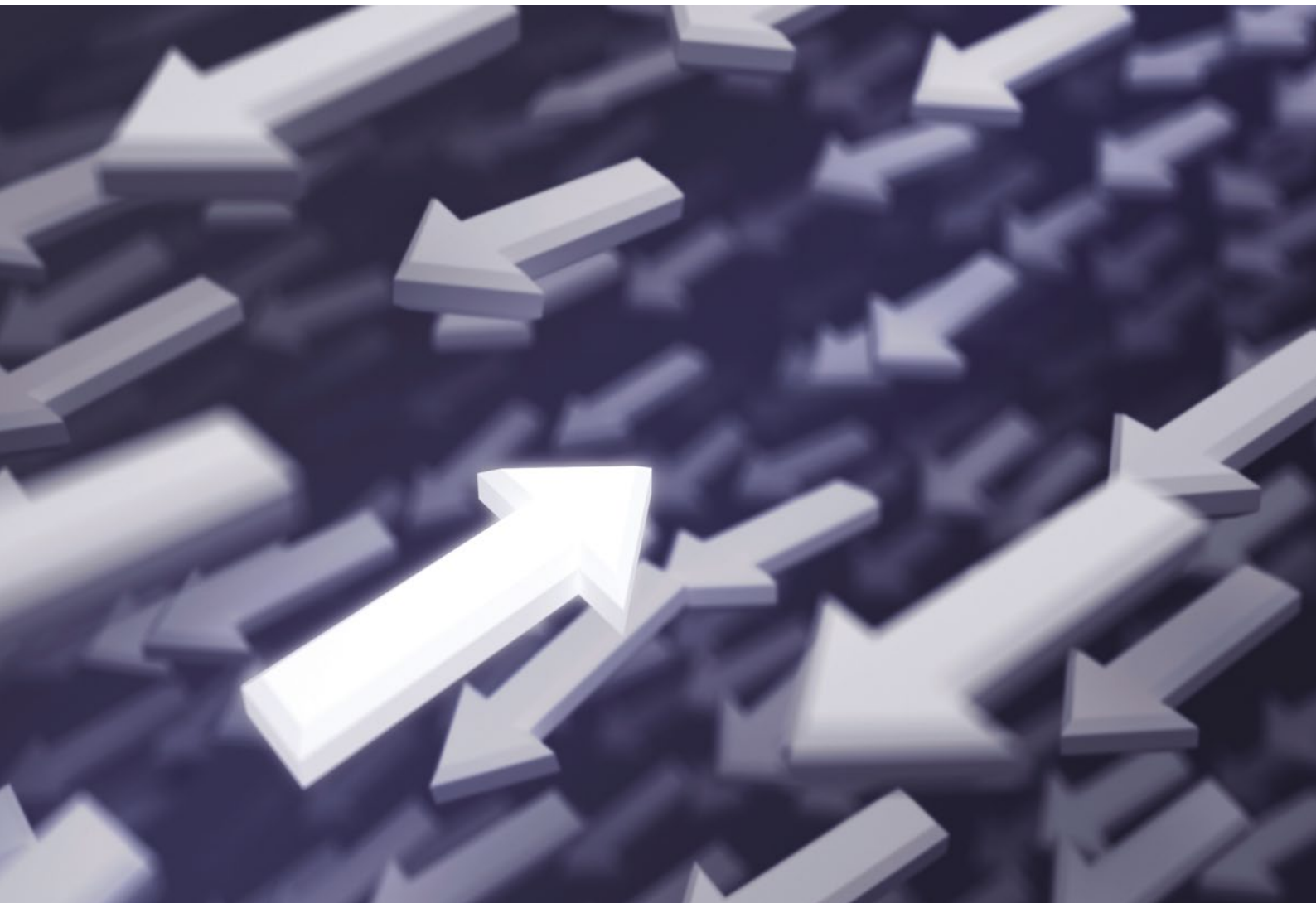




RICS professional guidance, UK

Complaints handling

1st edition, July 2016



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RICS professional guidance

International standards

RICS is at the forefront of developing international standards, working in coalitions with organisations around the world, acting in the public interest to raise standards and increase transparency within markets. International Property Measurement Standards (IPMS – ipmsc.org), International Construction Measurement Standards (ICMS), International Ethics Standards (IES) and others will be published and will be mandatory for RICS members. This information paper links directly to these standards and underpins them. RICS members are advised to make themselves aware of the international standards (see www.rics.org) and the overarching principles with which this information paper complies. Members of RICS are uniquely placed in the market by being trained, qualified and regulated by working to international standards and complying with this information paper.

RICS guidance notes

This is a guidance note. Where recommendations are made for specific professional tasks, these are intended to represent 'best practice', i.e. recommendations that in the opinion of RICS meet a high standard of professional competence.

Although members are not required to follow the recommendations contained in the guidance note, they should take into account the following points.

When an allegation of professional negligence is made against a surveyor, a court or tribunal may take account of the contents of any relevant guidance notes published by RICS in deciding whether or not the member acted with reasonable competence.

In the opinion of RICS, a member conforming to the practices recommended in this guidance note should have at least a partial defence to an allegation of negligence if they have followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.

It is for each member to decide on the appropriate procedure to follow in any professional task. However, where members do not comply with the practice recommended in this guidance note, they should do so only for good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice.

Also, if members have not followed this guidance, and their actions are questioned in an RICS disciplinary case, they will be asked to explain the actions they did take and this may be taken into account by the Panel.

In some cases there may be existing national standards that may take precedence over this guidance note.

National standards can be defined as professional standards that are either prescribed in law or federal/local legislation, or developed in collaboration with other relevant bodies.

In addition, guidance notes are relevant to professional competence in that each member should be up to date and should have knowledge of guidance notes within a reasonable time of their coming into effect.

This guidance note is believed to reflect case law and legislation applicable at its date of publication. It is the member's responsibility to establish if any changes in case law or legislation after the publication date have an impact on the guidance or information in this document.

Document status defined

RICS produces a range of professional guidance and standards documents. These have been defined in the table below. This document is a guidance note.

Publications status

Type of document	Definition	Status
Standard		
International standard	An international high-level principle-based standard developed in collaboration with other relevant bodies.	Mandatory.
Professional statement		
RICS professional statement	A document that provides members with mandatory requirements or a rule that a member or firm is expected to adhere to. This term also encompasses practice statements, Red Book professional standards, global valuation practice statements, regulatory rules, RICS Rules of Conduct and government codes of practice.	Mandatory.
Guidance and information		
RICS code of practice	Document approved by RICS, and endorsed by another professional body/stakeholder, that provides users with recommendations for accepted good practice as followed by conscientious practitioners.	Mandatory or recommended good practice [will be confirmed in the document itself]. Usual principles apply in cases of negligence if best practice is not followed.
RICS guidance note (GN)	Document that provides users with recommendations or approach for accepted good practice as followed by competent and conscientious practitioners.	Recommended best practice. Usual principles apply in cases of negligence if best practice is not followed.
RICS information paper (IP)	Practice-based information that provides users with the latest technical information, knowledge or common findings from regulatory reviews.	Information and/or recommended best practice. Usual principles apply in cases of negligence if technical information is known in the market.
RICS insights	Issues-based input that provides users with the latest information. This term encompasses thought leadership papers, market updates, topical items of interest, white papers, futures, reports and news alerts.	Information only.
RICS economic / market reports	A document usually based on a survey of members, or a document highlighting economic trends.	Information only.
RICS consumer guides	A document designed solely for use by consumers, providing some limited technical advice.	Information only.
Research	An independent peer-reviewed arm's-length research document designed to inform members, market professionals, end users and other stakeholders.	Information only.

Preface

Effective complaint handling is a critical element in the risk management toolkit of all professional firms, both as part of good customer service and also to protect the firm in the event of an unsubstantiated or inflated claim. This guidance note has been produced by the UK Residential Cross Sector Group and RICS as a response to the issues raised in Dr Oonagh McDonald CBE's report *Balancing Risk and Reward: Recommendations for a Sustainable Valuation Profession in the UK*, published in January 2014. In this report, Dr McDonald identifies effective complaint handling and dispute resolution as key to ensuring the long-term sustainability of the valuation profession.

This guidance note pulls together the extensive knowledge gained by the larger residential valuation firms, their insurers and their legal advisers during the challenging years of the financial crisis. Valuers are encouraged to draw on this experience to better understand their legal obligations and to clarify best practice in the event of a complaint being received. The contents supplement, but do not replace, current complaint handling information and requirements from RICS, found at: www.rics.org/uk/regulation1/complaints1/

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1 Scope

1.1 The purpose of this guidance note is to provide residential surveyors and valuers with information to assist in handling complaints and direct them towards more detailed guidance from RICS.

1.2 This guidance note applies in the UK. This guidance note specifically covers English legislation; members in other parts of the UK will need to seek advice on legislation specific to their areas of business.

1.3 This first edition guidance note is effective immediately upon publication.

2 Introduction

2.1 The definition of a complaint is any expression of dissatisfaction.

Although no firm likes to receive a complaint, it is inevitable that one will be received at some point and, when this happens, the complaint needs to be handled reasonably and consistently to minimise reputational and financial risk.

If managed well, complaints can also give a firm an opportunity to identify and rectify specific problems with its service and develop its relationship with customers by demonstrating that their concerns are treated seriously.

2.2 RICS imposes specific requirements on its regulated firms and registered valuers with regard to the handling of complaints. Rule 7 of RICS' *Rules of Conduct for Firms* states:

'A Firm shall operate a complaints handling procedure and maintain a complaints log. The complaints handling procedure must include an Alternative Dispute Resolution (ADR) mechanism that is approved by the Regulatory Board.'

2.3 This guidance note recognises that successful complaint handling may have to consider other significant stakeholders, such as providers of Professional Indemnity Insurance (PII) and third party redress schemes.

2.4 The guidance note is not a substitute for taking independent legal advice and all members should seek their own advice upon the matters covered in this document as and when they receive a specific complaint.

3 The value of Terms of Engagement in reducing complaints

3.1 Complaints generally arise when expectations have not been met. Such expectations may relate to the quality, scope, timeliness or understanding of the service or advice to be provided by the surveyor.

3.2 A customer's reasonable expectations should normally be set by the Terms of Engagement shared with them as part of the instruction process. RICS has required members to issue Terms of Engagement for many years, but evidence suggests that some firms do not consistently issue them or ensure that they have been accepted by the client.

Terms of Engagement help to define the circumstance and context in which complaints may be made or managed.

3.3 Not all complaints arise from matters contained within the Terms of Engagement. Such matters might include timeliness of reporting, the appropriateness of the service provided and the client's ability to interpret the information supplied by the surveyor. To minimise the risk of such problems arising, it is generally best practice for the surveyor to have direct dialogue with the client. In the case of RICS branded survey products, this is clearly specified in professional statements, e.g. RICS HomeBuyer Report (Survey & Valuation) 5th edition:

'1.6 Client's understanding of the contract.

The surveyor has a duty to check, before the contract is signed and, where possible, through communication (for example, telephone conversation or email), that the client:

(a) is making the appropriate choice of survey; and

(b) has a clear understanding of the key elements of the service.'

Further understanding of the importance of informing and working closely with potential survey clients can be found in the RICS guidance note *Surveys of residential property*, specifically section 5.1.1.

RICS members can access the guidance note at:

www.rics.org/uk/knowledge/professional-guidance/guidance-notes/surveys-of-residential-property-3rd-edition/

3.4 It is a prerequisite of good complaint management that the basis of the complaint is understood before any attempt is made to seek a resolution. A misunderstanding at such an early stage may cause additional avoidable frustration for all parties.

4 Complaints handling procedures

4.1 While it is a requirement for RICS Regulated Firms to have a published complaints handling procedure (CHP) that meets the requirements of Rule 7, the framework and content of a CHP must be relevant to the scale and scope of the service provided by the firm.

4.2 An effective CHP should:

- be fit for purpose – it should reflect the size and structure of the business
- made available to all staff – a CHP is intended to provide clarity and consistency to staff and clients
- be understood by all staff – keep records of staff training
- readily be shared with complainants or potential complainants – supplying them with a copy should be routine
- be regularly reviewed at a senior level – record evidence of review, to include reviewer details and review date
- be agreed with PII brokers/provider(s) – the CHP should reflect processes that do not compromise PII cover and
- provide details of access to independent redress if the firm cannot resolve the complaint.

Whenever an RICS regulated firm issues Terms of Engagement, it should be made clear to the client that the firm operates a CHP.

RICS has produced an outline complaints handling procedure template that RICS members can access at:

<https://www.rics.org/uk/footer/contact-us/complaints/>

5 Understanding the requirements of your PII policy

5.1 The receipt, management and resolution of complaints must be undertaken in accordance with the specific terms of the current PII policy. Failure to do this may compromise the cover provided by the policy and leave the firm, its employees and clients without the protection intended.

5.2 The terms of PII policies vary between providers and are specific to each period of cover. It is important that at renewal firms understand the details of the proposed new policy and particularly, with the help of their brokers, understand any changes to the requirements for the reporting of complaints and anticipated complaints. Requirements for the notification of a potential liability must be strictly followed, to provide the greatest protection to all stakeholders.

5.3 A firm is normally obliged, under the terms of their PII policy, to advise their insurer about any situation that may give rise to a claim. Providing a client with a copy of a firm's CHP following receipt of a complaint or query should remind the firm to inform its insurer as soon as possible, to ensure compliance with the terms of its PII policy.

5.4 PII brokers can play a crucial part in ensuring that complaints are managed in accordance with the firm's current PII policy. Brokers are agents of the firm and should be used as such. If in doubt about any aspect of the PII policy and how its terms may be fulfilled, the broker can assist if kept in the picture.

6 Why do clients complain?

6.1 Complaints are regularly described as an expression of dissatisfaction and, in general terms, that definition provides a good starting point, but it does not help define the motivation behind specific complaints.

The starting point in resolving a complaint is to establish the root cause of the issue. If a misunderstanding occurs at this early stage, there is scope for avoidable frustration and a more challenging resolution process.

When the basis of a complaint is understood, deciding on a course of action to reach a good outcome is easier to achieve.

6.2 While surveyors should treat all complaints seriously, it is important not to leap to the assumption that there is a major problem.

While surveyors are familiar with their subject, clients are much less likely to have the same degree of familiarisation. A complaint may not be a suggestion of a fundamental error in the work undertaken; it may just reflect a client's lack of understanding of the advice or information provided.

7 Underpinning good complaint handling

7.1 There are four main routes via which complaints may be received – by mail, by email/internet, by telephone or in person – so the firm should have the ability to manage all of these efficiently.

7.2 Ensure that all staff members have access to, and an understanding of, the firm's CHP.

7.3 Carefully record all complaints or potential complaints at the earliest opportunity and ensure that they are appropriately allocated.

7.4 Establish and adhere to a review process to ensure effective management of the issue from receipt to resolution.

7.5 Correspondence from a client may not initially be a complaint, but any query or question has the potential to become one. A prompt and considered review of client correspondence is important. Incorrect initial responses can turn a question into a complaint.

7.6 Where the complainant is a consumer, the firm has to signpost to an approved ADR provider. The Ombudsman can accept a complaint eight weeks after the complaint is made to you.

8 Receiving a complaint – initial actions and responses

8.1 A client may have more than one need when making a complaint. Specific needs relating to the service or advice supplied may be compounded by the needs of an individual to be acknowledged, to be understood, or to be valued. In the case of property transactions, it is not unknown for a client to become angry if a transaction falls through.

8.2 Understanding a complainant's motivation can be a crucial part of resolving their complaint.

- If initial contact is by phone or in person, listen carefully to what the customer has to say, and let them finish.
- When contact is made by letter or email, read the content carefully to ensure a true understanding of the issues and to establish any areas of uncertainty, where clarification may be required.
- Repeat back what you are hearing or reading, to show that you have listened and understood.
- Following a telephone call or face to face conversation, record the details of the complaint promptly and accurately.
- Establish who is in communication with you. Do not assume that it is your client or a party to whom there is a duty of care, e.g. valuations in a divorce case can lead to complaints from a third party.
- Be careful to whom you give information out. Complaints are covered under data protection regulations in the same way as any other data that you hold. Complete your usual identity checks.
- Do not get defensive. The customer is not attacking you personally but has a problem that needs attention and resolution.
- At an early stage apologise for the client's need to complain; this is **not** to admit fault or liability, and you should be careful not to make any such admissions, but merely to establish a degree of empathy.
- Take ownership; give confidence that the matter will be taken seriously.
- Become a partner with the customer in solving the problem; establish what the complainant hopes to achieve.
- Seek to establish the context of the complaint, e.g. has a transaction proceeded to the point where a loss has been sustained or can assistance still be provided to meet the desired outcome and/or avoid a loss occurring?
- Clearly set out the next steps and provide clear timeframes within which they will occur.
- Establish one point of reference for the complainant to communicate with; this provides confidence and

reduces the risk of future confusion.

- In accordance with the CHP, acknowledge receipt of the complaint promptly. Supply the complainant with a copy of the firm's CHP and a nominated contact.
- Evaluate whether the issue is one that should be notified to insurers under the terms of the firm's PII; if in doubt, seek your broker's advice.

9 Evaluating a complaint

- Who is responsible for the review? What does the CHP specify?
- Evaluate the complaint in accordance with the CHP. Failure to do this could have serious consequences. Ensure that required actions have been diarised and recorded.
- The effective evaluation of a complaint requires commitment to review the actions and records held by the firm and, where possible, prompt engagement with the surveyor concerned. The case file, data and correspondence relating to the instruction should be consolidated.
- At the earliest opportunity, evaluate the significance and potential consequences of the complaint. Consequences may be financial and/or reputational.
- Do not attempt to defend the indefensible. To do so is likely to add to costs and cause avoidable frustration and a hardening of the complainant's attitude.
- If a complaint is received from a legal or other professional adviser, the likelihood of there being a need for a notification to insurers almost certainly increases.
- Where appropriate or required, obtain a view from insurers and/or legal advisers.
- If possible, check conclusions and proposed responses with a colleague or your broker; *this may be a requirement under the PII policy.*
- **It is good practice to have an audit process for complaint files in place.**

10 Initial response to the claimant

10.1 Developing a good initial response to a complainant is a crucial step on the route to resolution. A lack of care, empathy, accuracy or reasonableness at this stage is very likely to cause a hardening of a complainant's stance.

10.2 When preparing a response, it is important to:

- Check your insurance policy to establish if you are required to consult the insurer or broker prior to responding to the complainant.
- Respond within the timeframes previously set out to the complainant or contained within the CHP. Stick to the facts.
- Ensure the response addresses the issue raised and the evidence.
- Put yourself in the position of the complainant. Does the draft response directly address their concerns?
- Tailor the tone of the response to the circumstances. If it is directly to the client, the tone may be less formal than to a professional adviser.
- If the complaint is rebutted explain why, referring if appropriate to specific clauses of the Terms of Engagement or to specific circumstances of the inspection or the purpose of the report.
- Where a duty of care has been established, a copy of the CHP should be issued to the customer at the earliest opportunity. Ombudsman service findings suggest that, where the CHP is issued early to consumers and followed, it significantly reduces a client feeling the need to refer to solicitors.
- Your response letter should refer to the availability of ADR and how the client should use this route before pursuing the matter formally. It should also signpost to the Ombudsman service, emphasising that use of this service can bring a quick and effective resolution to complaints.

11 Additional investigations

11.1 If after evaluation the basis of the complaint is unclear, or there is insufficient evidence to form a conclusion, the initial detailed response should propose the next steps to be followed and seek the complainant's agreement to the actions proposed.

11.2 Additional investigations may include a re-inspection of the property by the firm, possibly using another surveyor, or alternatively advice may be sought from independent third parties with relevant skills. There are costs associated with the use of third parties. The basis of settlement for these costs may require agreement with the complainant, and reference to insurers may be required. Note: guidance on information to gather when re-inspecting and how to report will be helpful should a case escalate to solicitors.

11.3 If the use of a third party is proposed, in the interests of transparency there is merit in giving the complainant some element of choice in the party selected. Without such engagement by the complainant, the possibility of the third party's advice being challenged is increased. A mutually agreed third party is both cheaper and potentially less confrontational, although such agreement cannot always be achieved.

11.4 Where additional investigations are proposed or required, it is important that all parties have a clear understanding of the scope of the investigations, their context as related to the original Terms of Engagement and the specifics of the complaint made.

12 Escalation

12.1 While a significant number of complaints or questions can be resolved relatively quickly by a well-managed initial assessment and response, that will not always be the case. Differences of opinion or interpretation may persist or, in the case where a valid cause for complaint is recognised, the proposed resolution may be unacceptable.

12.2 Where escalation or continuing negotiation is necessary, ensure that the processes set out in the CHP continue to be adhered to. Failure to adhere to the CHP processes may not only create mistrust, but may also adversely affect the position of the firm if a referral is subsequently made to a mediator, Ombudsman or RICS Regulation. Failure to adhere to the CHP can lead to penalties, even if the original issue is ultimately discovered to be unfounded.

12.3 If an initial response to a complaint does not lead to closure, it is important to consider whether the first response was appropriate, particularly if additional facts or assertions are introduced by the complainant.

12.4 All firms should have a form of alternative redress provider available to the client if a suitable provider is available. In the UK, redress for consumers should be free. Details of RICS approved redress providers are available at:

<https://www.rics.org/uk/footer/contact-us/complaints/>

12.5 Ensuring the suitability of an Alternative Dispute Resolution (ADR) provider is key, as not all providers cover the same work areas. For example the Ombudsman Service: Property covers building surveying whereas The Property Ombudsman does not.

12.6 When an unresolved complaint becomes the subject of ongoing negotiations, it is important to review the requirements of the firm's PII policy. Depending on the resources and skills within the firm, there may be specific provision or an opportunity to use claim-handling services if offered by the PII broker. While there will be costs associated with this, they will have established claims handling experience and can also introduce a degree of detachment, leaving the firm to focus on its core activities.

12.7 If there is a need for the firm to seek specialist advice from a legal adviser, it is prudent to establish that they have sufficient experience in dealing with the continuing dispute. Issues of liability and the associated PII and regulatory requirements are quite specialist, as is much of the case law. A good broker should be able to offer advice in these circumstances, while ensuring planned actions do not compromise PII cover.

13 Record keeping

13.1 Complaint handling and resolution is a business process rather than an add-on to other activities. Complaints need to be managed as rigorously as any other form of instruction and the rigour regarding file management and record keeping should be of an equal standard. How the required level of rigour can be achieved will vary from business to business, but the underlying principles are universal.

13.2 In an era of multi-channel communication tools, it is important to consider how a complaint is received and by what means you respond to it. The use of email is widespread and it is likely that many complainants will use it. However, email communications need to be retained and managed in the same way as more traditional letters.

13.3 It is important to keep copies of relevant electronic correspondence either by reliance on robust back-up systems or by keeping hard copies in the file. If responding by email, treat replies with the same consideration and formality as a traditional letter. Replies sent as email attachments may be better sent in a fixed format such as pdf.

14 Learning from experience

14.1 Whether or not the firm has a formally structured quality management system, it is good practice to periodically review the impact and outcome of any complaints received. While it is obvious that action should be taken to minimise the repetition of justified complaints, it is also sensible to examine all claims, even if they were agreed to be unjustified.

14.2 Whatever the outcome, complaints have a financial and intellectual cost to the business, as they take time to investigate and resolve. If a complaint is agreed to be unjustified, it would be valid to question why it was received. If there has been a misunderstanding by the client, would it be possible to take actions that might prevent a recurrence of such misunderstandings? Typically in these circumstances there may be scope to improve the process of taking and confirming instructions, including consistency of process among all surveyors and customer facing employees.

14.3 As part of a good management review of complaint management, it is good practice to spend some time reviewing the content of the firm's CHP. Can lessons be learned that will benefit both the customer and the firm, while fulfilling regulatory requirements?

14.4 Although the CHP should be used relatively rarely, its content can have a significant impact on customer satisfaction and the firm's costs. Where there have been complaints escalated to third parties, consider how they have performed and what their costs were. ADR is much favoured today and may offer savings over more traditional options. There are a number of ADR models to consider, and dialogue with your PII broker and/or peers may help establish an appropriate choice.

14.5 The final stage of the procedure will provide the client with access to independent redress. RICS has approved a list of redress providers for firms to use. The list is published and updated from time to time (see 12.4).

15 Identifying training needs

Root cause analysis of complaints is a useful tool for identifying training needs for both surveyors and other customer facing staff. Targeted continuing professional development (CPD) is more valuable to both the individual and the firm than cheap or convenient mass-produced CPD, which ticks the compliance box but does not address specific needs.

16 Next PII renewal

When PII has to be renewed, insurers will form a view as to the risks associated with providing cover to each firm, whether large or small. When seeking to place PII, it is the broker's role to present firms in the most accurate way. Typically, a PII proposal process will include an analysis of the volume, value and risk of the instructions undertaken, to assist in the assessment of a premium. However, the ability to present good evidence of how complaints have been received, recorded, managed and resolved may also influence the premium offered. Sound complaint management and complaint reduction strategies can influence future PII costs and cover.

Appendix A RICS help sheets

There is a wealth of further information available on the RICS website and the wider internet.

- CHP guidance for RICS firms: www.rics.org/uk/regulation1/firm-and-individual-guidance

How complaints to RICS firms are dealt with:

- www.rics.org/uk/regulation1/complaints1/

RICS web references

- www.rics.org/uk/knowledge/small-business-hub/setting-up-in-practice/rics-requirements/
- www.rics.org/uk/regulation1/compliance1/ethics--professional-standards/
- www.citizensadvice.org.uk/law-and-rights/
- www.rics.org/valuerregulation

RICS Regulation references

- www.rics.org/uk/knowledge/professional-guidance/guidance-notes/surveys-of-residential-property-3rd-edition/
- www.rics.org/uk/regulation1/firm-and-individual-guidance/professional-indemnity-insurance-pii/pii-and-valuation-guidance/

Appendix B RICS ethics and professional standards

RICS requires its members to abide by a set of five principles that provide the framework to govern the relationship between its members and their clients. These relationships are potentially under the greatest strain when complaints arise.

All members must demonstrate that they:

- Act with integrity
- Always provide a high standard of service
- Act in a way that promotes trust in the profession
- Treat others with respect
- Take responsibility.

The RICS website provides downloadable documents that explain and explore the context of each of the five principles. While all members should be familiar with the content of these documents, the following extracts have specific relevance to complaint handling. These documents can be found at:

www.rics.org/uk/regulation1/compliance1/ethics--professional-standards/

Each of these short documents includes a series of bullet points entitled 'Some of the key questions that you could ask yourself include'. The following points are considered to have specific relevance to complaints handling:

- Do I treat each person as an individual?
- Do I explain clearly what I promise to do and do I keep to that promise?
- Does my firm or organisation have a clear complaints handling procedure?
- Do I learn from complaints?
- Do I take complaints seriously?
- Would I like to be treated in this way if I were a client?
- What would an independent person think of my actions?
- Would I allow my behaviour or the way I make my decisions to be publicly scrutinised?
- Are my personal feelings, views, prejudices or preferences influencing my business decisions?
- Am I providing a professional service for a professional fee?
- Do I promote professional and ethical standards in all that I do?

While these bullet points are selective extracts from a more exhaustive list, they do reinforce behaviours that contribute towards effective and ethical complaints handling.

Appendix C Life of a claim

All quotes are taken from the pre-action protocols and Civil Procedure Rules (CPR) and all Crown copyright material is reproduced under the Open Government Licence v3.0 for public sector information: www.nationalarchives.gov.uk/doc/open-government-licence/version/3/

Please note: certain aspects of this guidance, particularly concerning time limits and the terms and format of legal proceedings, will be different in other jurisdictions. Members based outside England should be taking separate advice on legal detail. See Appendix D.

C1 Stage 1 – preliminary notification

For most defendant surveyors, the first confirmation of a claim is a **‘letter of notification’** also called a **‘preliminary notice’**.

Where a complaints handling process has been exhausted, it is likely that significant prior investigation has already been carried out, but larger claims (particularly those by lending institutions) may use a preliminary notification as the first indication of a complaint or claim.

A ‘letter of notification’ or ‘preliminary notice’ should be clearly identified as such in the letter heading, and contain a brief outline of the claim under the pre-action protocol of the Civil Procedure Rules (CPR), which specifies as follows:

‘5.1 As soon as the claimant decides there is a reasonable chance that he will bring a claim against a professional, the claimant is encouraged to notify the professional in writing.

5.2 This letter (the “Preliminary Notice”) should contain the following information:

- (a) the identity of the claimant and any other parties;
- (b) a brief outline of the claimant’s grievance against the professional; and
- (c) if possible, a general indication of the financial value of the potential claim

5.3 The Preliminary Notice should be addressed to the professional and should ask the professional to inform his professional indemnity insurers, if any, immediately.

5.4 The Preliminary Notice should be acknowledged in writing within 21 days of receipt. Where the claimant is unrepresented the acknowledgment should enclose a copy of this protocol.

5.5 If, after 6 months from the date of the Preliminary Notice, the claimant has not sent any further correspondence to the professional regarding the claim, the claimant should notify the professional of its intentions with regard to the claim, i.e. whether the claimant is pursuing the claim, has decided not to pursue

it or has yet to reach a decision and, if the latter, when the claimant envisages making a decision.’

The important thing to note here is the word ‘preliminary’; this is a claimants’ opening correspondence, so should be considered as notice that ‘we’re thinking of suing you’.

The preliminary notice rarely contains significant detail, and often not even the amount being claimed. Typical language may include ‘our client has suffered a loss’, and ‘we believe our client has a reasonable chance of recovering damages due to your negligence’.

No matter how alarming the letter context and whatever the demands contained in the letter, the defendant (for that is what you now are) should:

- stay calm and composed
- start a preliminary sweep for file information and
- contact their broker/insurer immediately (the case needs to be notified to insurers, in accordance with the terms of the defendant’s policy).

At this initial notification stage, the only obligation on the defendant is to:

- inform their own broker/insurer straight away and
- provide an acknowledgement letter within 21 days of the date of the preliminary notice, if necessary enclosing a copy of the professional negligence pre-action protocol. The requirement to acknowledge the preliminary notice is mandatory, but the defendant should still seek the approval of its broker/insurer before entering into any correspondence.

Although the pre-action protocol **encourages** early disclosure of relevant information, there is no **obligation** to provide any other information whatsoever at this very early stage: such as files; site notes; comprehensive insurance policy details; and the name of your broker or solicitor. Preliminary notices sometimes contain reference to legislation, protocols and information disclosure requirements; however, they may contain very little (if any) detail about the claim or quantum. For this reason, and in order to reserve your insurer’s position, it is prudent to maintain a measured approach to the notice’s content, and certainly seek advice before you release anything at all to the claimant or their legal adviser. The acknowledgement letter can then be as simple as:

‘We are in receipt of your letter of [date], which is acknowledged. We await a fully compliant Letter of Claim if your clients are intent on pursuing a claim. Any claim will be defended’.

Where the claimant requests details of the defendant’s insurance, there is nothing in the pre-action protocol that

requires a response. However, surveyors are subject to the *Provision of Service Regulations 2009* and are therefore obliged to provide basic details about their insurance. A suggested response to such an enquiry is:

'Pursuant to the Provision of Service Regulations 2009, we can advise that our insurers are [insert name] of [insert address]. Our policy complies with the requirements of RICS and the territorial cover is [state the scope of cover].'

Under no circumstances must the defendant ignore the matter completely; the preliminary notice must be acknowledged within 21 days under the protocol.

Just like a car insurer who does not wish a driver to admit liability for a traffic accident at the roadside, so a PII insurer does not wish you to compromise their position by engaging in direct argument with the claimant at this stage. It is still entirely possible that the claim is totally undeveloped (this is a preliminary notice, after all), so entering into direct dialogue with the claimant or their solicitor may encourage them to progress a claim where they might not otherwise have sufficient information (or resolve) to do so.

It is also possible that a straightforward, blanket rebuttal of all allegations of professional negligence at this stage will have the effect of negating the pre-action protocol by giving the impression that a defendant does not intend to follow due process. In such circumstances it is possible (although admittedly unlikely) that a claimant could move straight to litigation.

It is probable at this stage that you are unrepresented by legal advisers (they are usually instructed later, by insurers), so it is very important that you consult your PII broker, adhere to the pre-action protocol timescales, and then prepare your file to assist their insurer when, or if, the claim develops further.

C2 Stage 2 - letter of claim

At some time after the preliminary notice, a 'letter of claim' may be served if the claimant is intent on pursuing an action (there is no set timescale: indeed, some letters of claim and preliminary notices are served simultaneously, and some claimants issue a letter of claim without ever issuing a preliminary notice). The serving of a letter of claim might be viewed as the claimant saying 'we are definitely intending to sue you'.

The pre-action protocol provides as follows:

'6.1 As soon as the claimant decides there are grounds for a claim against the professional, the claimant should write a detailed Letter of Claim to the professional.

6.2 The Letter of Claim will normally be an open letter (as opposed to being 'without prejudice' [or 'without prejudice save as to costs' – see Appendix C5 for an explanation of these terms]) and should include the following –

(a) The identity of any other parties involved in the dispute or a related dispute.

(b) A clear chronological summary (including key dates) of the facts on which the claim is based. Key documents should be identified, copied and enclosed.

(c) Any reasonable requests which the claimant needs to make for documents relevant to the dispute which are held by the professional.

(d) The allegations against the professional. What has been done wrong or not been done? What should the professional have done acting correctly?

(e) An explanation of how the alleged error has caused the loss claimed. This should include details of what happened as a result of the claimant relying upon what the professional did wrong or omitted to do, and what might have happened if the professional had acted correctly.

(f) An estimate of the financial loss suffered by the claimant and how it is calculated. Supporting documents should be identified, copied and enclosed. If details of the financial loss cannot be supplied, the claimant should explain why and should state when he will be in a position to provide the details. This information should be sent to the professional as soon as reasonably possible. If the claimant is seeking some form of non-financial redress, this should be made clear.

(g) Confirmation whether or not an expert has been appointed. If so, providing the identity and discipline of the expert, together with the date upon which the expert was appointed.

(h) A request that a copy of the Letter of Claim be forwarded immediately to the professional's insurers, if any.

6.3 The Letter of Claim is not intended to have the same formal status as Particulars of Claim. If, however, the Letter of Claim differs materially from the Particulars of Claim issued in subsequent proceedings, the court may decide, in its discretion, to impose sanctions.

6.4 If the claimant has sent other Letters of Claim (or equivalent) to any other party in relation to the same dispute or a related dispute, those letters should be copied to the professional.'

The words 'letter of claim' should be clearly marked in the letter heading, and this is a detailed document outlining the basis of claim against the professional. (At this point, the general scope of the claim must provide a robust basis for future action, although there is scope to advance, amend, or remove arguments in later case statements, once further investigation has been carried out and as the case proceeds.)

The defendant must inform their insurer (and/or broker, and/or lawyer) immediately upon receipt of a letter of claim. If a lawyer has not yet been appointed, the defendant may be asked by their broker/insurer to provide an acknowledgement letter within 21 days under the protocol. If a lawyer is already retained by the defendant/insurer, they will usually issue the acknowledgement. In either scenario, the defendant would be well advised to check and ensure that pre-action protocol timescales are

being satisfied on insurers' behalf.

The submission of a letter of claim signals the start of a three-month investigation period, during which the defendant will be expected to fully assist the appointed lawyer by providing as much information about the claim as possible. From this information, the lawyer will be able to assess the claim, determine whether it has merit, make recommendations on costs reserves, and start to formulate a defence strategy, which may include commencement of settlement negotiations, if appropriate.

The lawyer will also decide what, if any, documents it is appropriate to disclose to the claimant on a voluntary basis at this pre-action stage (full legal disclosure of documents only occurs later, if the claim is litigated, and involves considerable investigation) and what to request from the claimant in return. For over-valuation claims, the claimant's solicitor will usually be keen to obtain site notes and comparables; the defendant will wish to see the lending and repossession files, if permitted.

The pre-action protocol encourages the sharing of information, but information should not be offered without the permission of your insurer. If there is disagreement about the disclosure process, either pre-action or once litigated, an order for specific disclosure can be made under Part 31 of the Civil Procedure Rules (CPR).

During the three-month investigation period, the defendant ought to appoint an **expert witness** (for condition/defect claims this may be a chartered building surveyor or engineer; for valuation claims, this is an experienced valuer) who, while appointed by the defendant, will owe a duty to the court to report fairly and impartially on any matters within their expertise. It is permissible for the defendant (via their lawyer) to provide information to assist the expert, but the report outcome must be entirely independent. It is for the defendant's lawyer to select the expert and their choice is usually based on that expert's known reputation for objectivity and fairness in reporting in defence of what usually amounts to a matter of disputed opinion.

Once the relative supportiveness (or otherwise) of the expert's position has been analysed, the letter of response, settlement proposals, or both, can be structured. Note: the claimant should also appoint an expert witness at the very start of the claims process; the claimant usually structures their claim around an assessment of potential negligence based on expert opinion, which may be obtained many months before the preliminary notice is served. If the claimant issues a letter of claim without the benefit of expert advice, this point should be raised in the letter of response, since no claimant should make allegations of negligence against a professional person without supportive evidence from an expert in that profession. Further, any proceedings issued in the absence of supportive expert evidence may be struck out as an abuse of process.

Occasionally, a court may order the appointment of a single joint expert, usually once the case is in litigation. This expert is agreed by both parties, and effectively offers a 'tie break' opinion. In practice, a court may order the appointment of a single joint expert where a case is

relatively straightforward or of low monetary value. It is very rare for a court to order the appointment of a single joint expert where both parties have already instructed their own experts and have set out their arguments in the Particulars of Claim and the defence, based on the advice they have received from those experts.

Responding to a letter of claim is a specialist task for a lawyer, and involves strategic rebuttal or admission of facts using legal terminology, usually quoting case law. Under the pre-action protocol, the defendant's lawyer provides a 'letter of response' or alternatively a 'letter of settlement' within three months of the date of letter of claim. In practice, this period can be significantly extended by mutual consent, assuming full transparency and an agreement of revised timetable between the parties.

If the letter of response offers a denial of liability that is sufficiently robust, it is possible that the claimant may desist from pursuing the claim in the face of a strong and well-supported defence argument. However, if the claimant refuses to accept the defendant's denial of liability, or feels that the claim still has merit in spite of the defence arguments put forward, the claimant is at liberty to issue proceedings, since the pre-action protocol is considered to be exhausted at this point.

If the defendant is minded to settle the matter, a 'letter of settlement' sets out the suggested basis of reaching settlement of the claim for damages and costs in principle, reflecting any element of contributory negligence by the claimant, and any arguments about the amount of damages recoverable, in accordance with the principles in *South Australia Asset Management Corp v York Montague Ltd* (SAAMCo).

Section 9.4 of the pre-action protocol states:

9.4.1 'If the Letter of Response denies the claim in its entirety and there is no Letter of Settlement, it is open to the claimant to commence court proceedings.'

9.4.2 In any other circumstance, the professional and the claimant should commence negotiations with the aim of resolving the claim within 6 months of the date of the Letter of Acknowledgment (NOT from the date of the Letter of Response).

9.4.3 If the claim cannot be resolved within this period:

(a) The parties should agree within 14 days of the end of the period whether the period should be extended and, if so, by how long.

(b) The parties should seek to identify those issues which are still in dispute and those which can be agreed.

(c) If an extension of time is not agreed it will then be open to the claimant to commence court proceedings.'

In practice, at this stage, the claimant may have provided a Part 36 offer as a basis of settlement, outlining an offer to accept a level of damages to conclude the matter, subject to later negotiation of costs.

C3 Stage 3 – litigation

When the pre-action protocol has been exhausted (or in rare examples, where limitation is expiring), and agreement or settlement cannot be reached, a claimant may move to litigation (i.e. ‘we are definitely suing you’). Paragraph 8 of the practice direction on pre-action conduct within the CPR provides that:

‘Litigation should be a last resort. As part of a relevant pre-action protocol or Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.’

Note: should a claimant litigate prior to the expiry of the three-month response period under protocol – for example to protect their position in limitation – then the case can be stayed to allow time for continued compliance.

A claimant will typically lodge their claim in court, and obtain a date stamp; this is the point at which a claim is **issued**. However, for the claim to become valid, it must be **served** on a defendant within four months of issue.

This is the point where the claim is fully litigated, proceedings have commenced and there is ultimately a real possibility that the case will now move to trial. Timescales vary, and there are several procedural steps before the case reaches court.

C4 Full proceedings

Civil actions are governed by the Civil Procedure Rules (CPR), which state:

‘Before commencing proceedings, the court will expect the parties to have exchanged sufficient information to—

- (a) understand each other’s position;
- (b) make decisions about how to proceed;
- (c) try to settle the issues without proceedings;
- (d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;
- (e) support the efficient management of those proceedings; and
- (f) reduce the costs of resolving the dispute.

If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party’s silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.’

A summary of the entire court process to trial is beyond the scope of this guidance note, not least because there are so many variations of process under the CPR, and the conduct of the claim is entirely in the hands of lawyers and the judge by this point.

Common stages of action under CPR are as follows:

- service of Particulars of Claim
- submission of defence
- legal disclosure
- preparation and submission of witness statements
- exchange of expert witness evidence and
- trial.

However, there are other routes and actions available under CPR, and a judge may also make orders at periodic case management conferences (CMCs), including agreeing costs budgets, and reviews of the case merit as it progresses.

C5 Terminology

- **Service of Particulars of Claim:** this is the point where the claim is served on the defendant and becomes ‘live’. Service must occur within four months of issue of the claim form. The Particulars of Claim (POC) are the detailed statement of the claimant’s case, and should be passed immediately to a lawyer for scrutiny.
- **Acknowledgement of service:** a defendant must acknowledge service within 14 days of receipt of the claim form (the form N9, available on the court website, is straightforward to complete), or the claimant will be entitled to enter judgment in default.
- **Submission of defence:** a defence must be filed within 28 days of service of the Particulars of Claim, although the parties can agree an extension of up to 28 days (or even longer, if the court agrees). The document is usually drafted by a barrister, and this is usually a period of intense activity, and calls for information. A director or partner of the defendant may be asked to sign a statement of truth, to verify that the facts set out in the defence are true.
- **Case management conferences:** periodic meetings in chambers between legal teams and the judge to review the claim and determine timetables, actions (under court order if necessary) and set costs budgets.
- **Legal disclosure:** this is the point at which all documents pertaining to the case must be disclosed under court order, with penalties for those that fail to provide proper disclosure. If they have not already done so, the defendant will need to provide details of site notes, instructions, file contents, and any correspondence, stored archive material, emails and memos. It is a legal expectation that the defendant must supply all evidence, even where prejudicial to their defence. The claimant is likewise expected to disclose all relevant files, including details of repossession, original lending, instructions, and internal memos. Neither party is required to provide correspondence between themselves and their lawyers written for the purposes of obtaining legal advice or in the course of actual or contemplated litigation – such document will be treated as being subject to litigation privilege (see below).

- **Litigation privilege:** in terms of evidence, litigation privilege relates to a legal right of the 'holder of privilege' to withhold disclosure of documents that were produced as part of the process of putting forward, or responding to, a claim. Where any document is created in the contemplation of litigation, that document is excluded from the usual requirements for legal disclosure. A common example would be legal advice between a client and their solicitor, advising on the merits of a claim.
- **Without prejudice:** this phrase is often found at the head of legal correspondence, where its intention is to render the contents inadmissible as evidence. This is a form of privilege enabling genuine and open dialogue between parties attempting to settle disputes without the process then being disclosed in evidence, in the event that those discussions fail to resolve the dispute. An example might include a case where X writes to Y offering to accept a quick discounted settlement to resolve the dispute at an early stage; if Y rejects the offer, X can still attempt to obtain the full amount via due process without Y being able to use the rejected lower offer against them later at trial. Note: it is not permitted to mark correspondence 'without prejudice' in an attempt to conceal evidence; the document must either contain a settlement offer or form part of a course of correspondence intended to assist the parties to reach a settlement of a dispute in order to be treated as 'without prejudice' and remain non-disclosable.
- **Without prejudice save as to costs:** this term enables content to remain confidential until after damages are awarded, but to then become disclosable in the assessment of costs. This enables a party who made reasonable earlier offers to settle to bring those offers to the court's attention on the issue of costs, even if that party loses the claim. An example may be where X makes an early offer of settlement to Y in a letter marked 'without prejudice save as to costs' in a genuine attempt to resolve a dispute, but Y declines and proceeds to trial, to be awarded similar or less in damages. In such circumstances, the judge may decide that Y is unable to recover any costs from X after the offer was made, on the basis that it was unreasonable for Y to decline X's offer (note: if the earlier offer letter was only marked 'without prejudice', it would remain inadmissible even at costs assessment).
- **Witness statements:** a statement is obtained from witnesses of fact. These witnesses are usually the original valuer/surveyor, the claimant or their professional representative (for example a lender's underwriter), and other relevant parties as agreed by the court. Witness statements are exchanged by a specified date, and can be subject to follow-up questions under court order.
- **Expert witness evidence:** this is usually exchanged later, and sometimes subsequent to a meeting between the experts, if the court orders them to discuss the case to seek to reach a consensus. Expert

witnesses may be engaged to provide valuation evidence or specialist lending evidence ('lending expert'), or indeed any other expert opinion on a specialist matter agreed by the judge.

- **Trial:** undoubtedly the most daunting stage of the entire process. A trial 'window' will be set early in the litigation process by the judge, with the dates finalised as the claim 'matures'. Typically, a valuation trial follows this sequence of events:
 - opening submissions by each party, starting with the claimant
 - cross examination of the claimant's factual witnesses, followed by any necessary re-examination
 - cross examination of the claimant's expert witnesses, followed by any necessary re-examination
 - cross examination of the defendant's factual witnesses, followed by any necessary re-examination
 - cross examination of the defendant's expert witnesses, followed by any necessary re-examination and
 - closing submissions.
- **Judgment:** or part-judgment, may be given during the trial (usually at the conclusion of the final day for a fully heard case), or reserved until a later date.

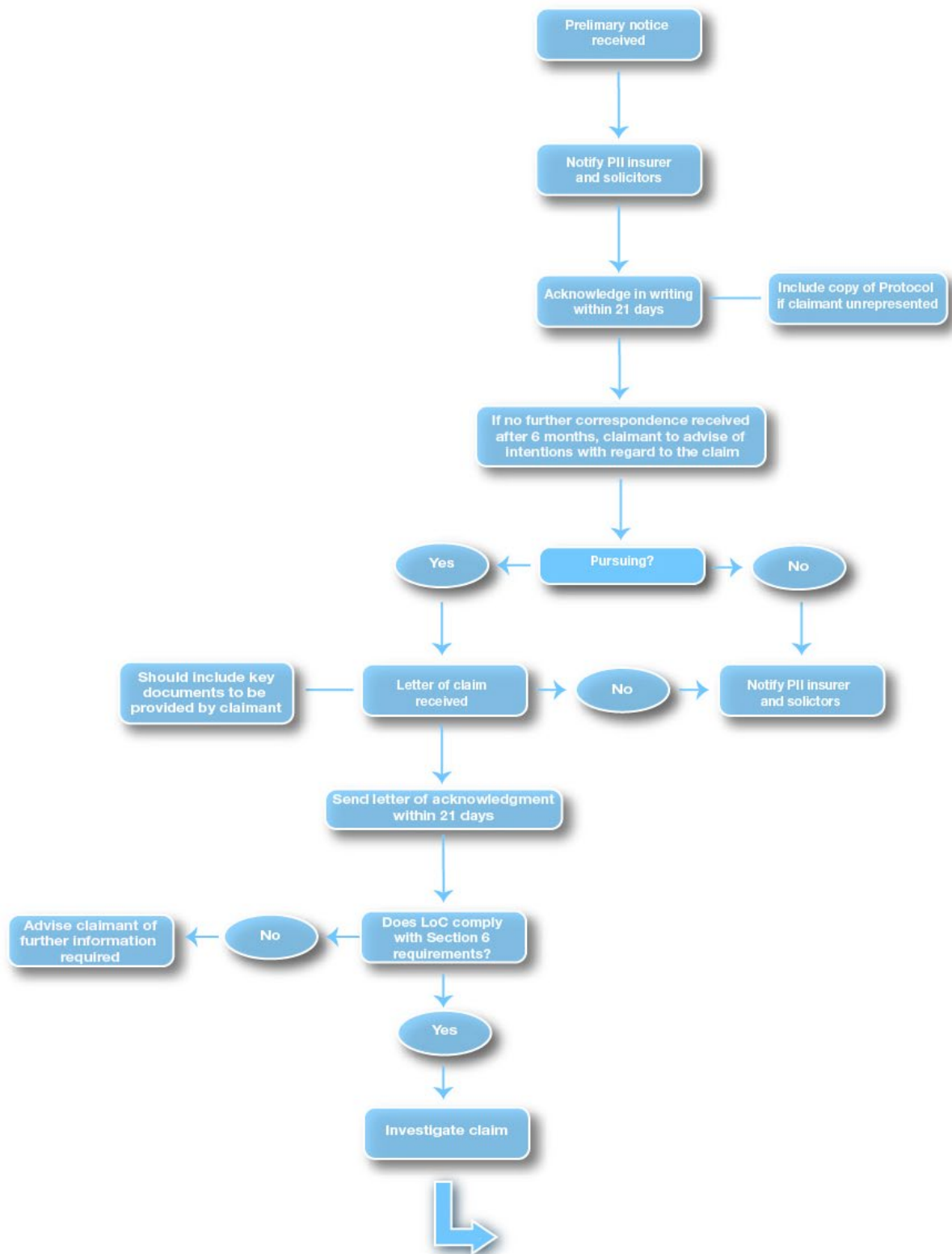
There are of course many different variations in timetabling and outcomes: some trials are settled 'on the court steps' and never proceed into the courtroom. Some claims may be heard on a 'fast track' basis (perhaps over one or two days). Some trials over-run due to weight of evidence or delay, becoming 'part-heard', and have to be reconvened at a later date.

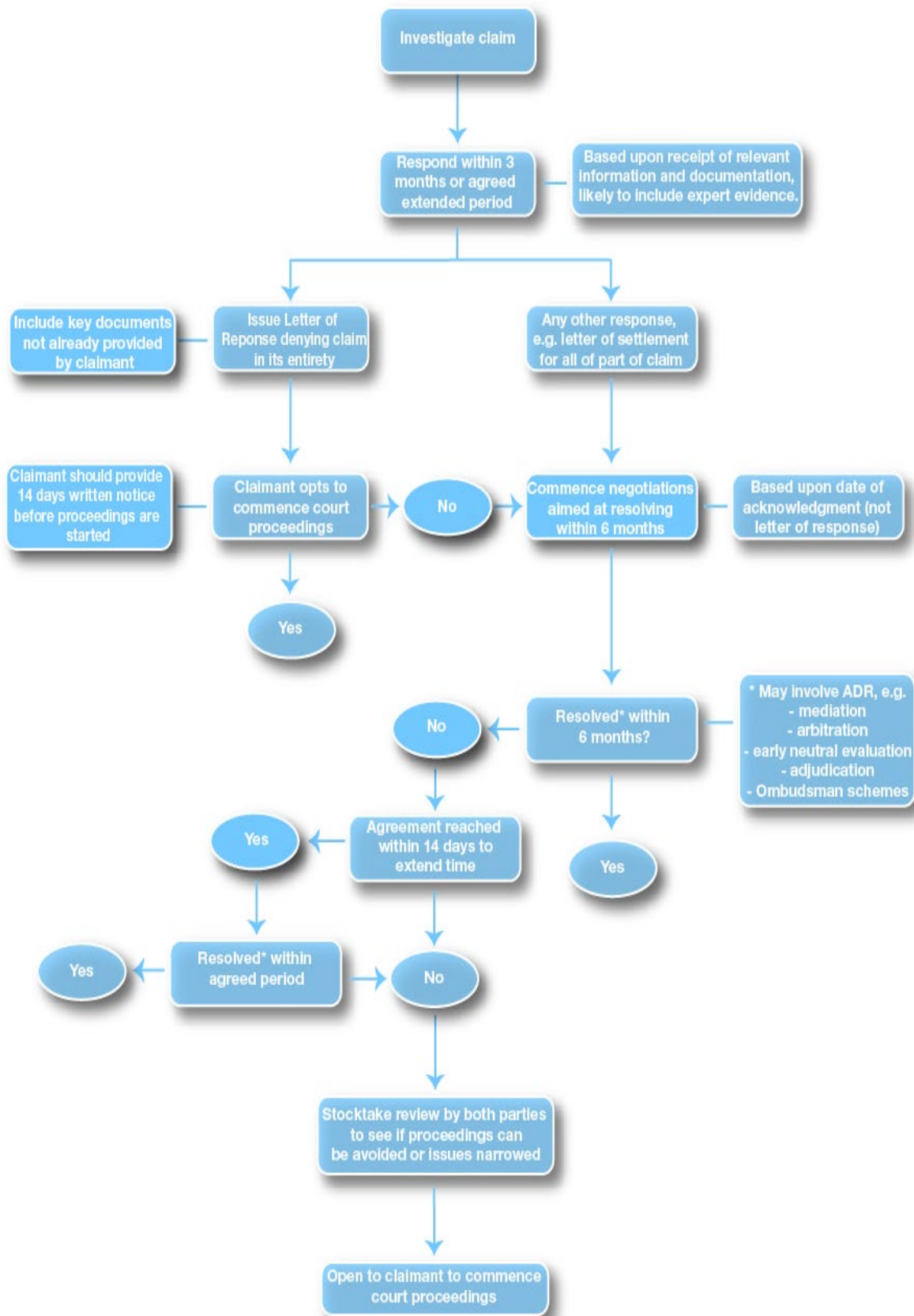
Pre-trial hearings may also be convened (to hear particular matters of legal fact, such as limitation or 'title to sue' arguments) before a main trial.

In the event that damages are agreed but legal costs are disputed, a separate 'costs hearing' may also be convened, to assess a suitable costs judgment. This involves further instruction of specialist costs draughtsmen, costs barristers and costs judges. This process in itself incurs extra cost which that may not be fully recouped, so careful consideration should be given to the efficacy of proceeding to a costs hearing.

Trials involve considerable numbers of people (solicitors and barristers for each side, court clerks, a judge, witness time and travel) and are very expensive. There is limited certainty of outcome so 'litigation risk' (i.e. the prospect of defeat) should be a serious consideration for both parties. A court room is therefore not a place that most insurers, defendants or indeed claimants should enter lightly.

C6 Life of a claim flowchart





Appendix D Other legal jurisdictions

D1 Scotland and Northern Ireland

While the basic principles of initial claims handling apply throughout the UK, Scotland and Northern Ireland operate under different jurisdiction and different legal process.

Under Scottish law, pre-action protocols are optional, subject to agreement by both parties. However, they offer a cost-effective route to resolution, as in England and Wales. The alternative is a non-protocol approach, involving full legal process.

Scottish civil cases are heard in Sherriff's Court, or the Outer House of the Court of Sessions for high value cases. The legal steps are broadly similar in effect, but have different names and slightly different rules, particularly regarding timetabling and Statute of Limitation, where the primary limitation period (known as the prescription period) is only five years, as opposed to six years in England and Wales.

In Northern Ireland, the court system more closely mirrors the structures in England and Wales, although court timetables are different and can be quite extended.

In both jurisdictions, alternative dispute resolution processes are available for cost-effective determination.

Further information on the differing court systems can be found on the Citizens Advice website at:

www.citizensadvice.org.uk/law-and-rights/

D2 Which jurisdiction?

Occasionally, the question of appropriate jurisdiction arises, and this can become highly pertinent where differences exist, particularly between English, Northern Irish and Scottish law.

An example may be a claim brought for alleged over-valuation of an English property by a Scottish client, attempted under Scottish law. Legal advice should be obtained on jurisdiction at the earliest opportunity, as legal defences, particularly in respect of limitation issues, can be affected. In all questions of jurisdiction, seek professional legal advice, via your insurer as necessary, as this is a complex legal issue.

Appendix E PII and liability

E1 Introduction

It is the responsibility of RICS to ensure that the UK market for residential property survey and valuation is healthy and robust and that members are protected, where possible, through the employment of effective risk management processes and appropriate contractual terms.

Additionally, RICS encourages members to engage proactively with clients and stresses that it is essential for firms to take their own legal advice. This guidance note seeks to direct members to more detailed advice and to outline the high-level principles that will protect them and help to reduce insurance costs.

The below information is based on English law. Valuers in other jurisdictions are advised to take specialist advice on issues applicable to their area.

E2 What are RICS requirements for PII?

Members who undertake residential valuation work must be familiar with the requirements laid down in the current version of the *RICS Valuation – professional standards* (Red Book). For members who undertake survey work, they should also comply with the guidance set out in *Surveys of residential property*.

In addition, members who undertake any written valuation work to which VPS 1 Minimum terms of engagement, VPS 2 Inspections and investigations, and VPS 3 Valuation reports apply, must join RICS' Valuer Registration (VR), which can be found at: www.rics.org/valuerregulation

All regulated firms must hold adequate and appropriate PII in line with:

- Rule 9 of *RICS Rules of Conduct for Firms* and
- RICS Minimum Terms.

E3 Understanding PII

E3.1 PII limit

The PII limit that applies to a firm is laid down in its insurance policy and is a fixed amount agreed at the time the PII is taken out. The limit is the maximum amount the insurer will pay out for any one claim.

E3.2 Liability caps

A liability cap is entirely different from the PII limit. It is a contractual agreement between the member and the client, restricting the amount of damages that can be claimed to an agreed amount. The use of a liability cap is a tool in the management of risk within survey and valuation work.

RICS strongly recommends that members incorporate liability caps into their client contracts where it is legal to do so and where the cap can be considered 'reasonable' and appropriate. It is suggested that members consider the level of the cap carefully, particularly where the client is a consumer, in order to avoid falling foul of the *Consumer Rights Act 2015*. A correctly employed liability cap will apply, even if the surveyor/valuer is proven to be negligent.

Liability caps should not be set at a sum greater than the insurance policy limit, and are generally agreed at a level somewhat lower than the PII limit.

The legal test of a liability cap will rest on:

- Was the liability cap properly and prominently incorporated in the contract?
- Is the level at which the cap is set 'reasonable'?
- Is the clause clear and unambiguous?
- Was the client fully aware of the clause prior to committing to instructing the valuer or surveyor?

Where contracts have been freely negotiated and are between commercial parties an agreed cap is generally deemed to be reasonable, but care must be taken when agreeing a cap with an individual client who could be deemed to lack bargaining power or a full understanding of the implications of an agreement.

Any cap set out in a contract or terms of engagement letter must be clearly detailed (not buried in small print) and pointed out to the client, to ensure that they are aware (particularly if this is the first time that a cap has been employed with that customer), preferably in writing to provide a clear audit trail. Where the firm employs standard terms and conditions, consideration of the level at which the cap is set should be given to ensure that it will meet the requirements of 'reasonableness' (which may not be the same for every property). In addition, where terms of engagement cover the valuation of several properties it must be made clear if the proposed cap will apply to all properties, surveys or valuations.

The level at which the cap is set should take the following into consideration:

- the potential liability that can be incurred if the cap were absent
- the purpose, scope and complexity of the instruction
- the nature and value of the property that is being valued
- the parties to the contract
- the level of fee paid for the work and
- the PII limit applied to the cover held by the firm.

Caps can be agreed on the following basis:

- a multiple of the agreed fee

- a percentage of the valuation of the property to be reported on; or
- a percentage of the amount to be loaned on the property.

There are some circumstances in which the use of a liability cap is prohibited by law, including in relation to death or personal injury. In situations where there is doubt, members are advised to seek specialist legal advice.

Suggested wording for a liability cap is as follows:

'The Royal Institution of Chartered Surveyors (RICS) recommends the use of liability caps to members as a way in which to manage the risk in survey and valuation work. Our aggregate liability arising out of, or in connection with this survey/valuation, whether arising from negligence, breach of contract, or any other cause whatsoever, shall in no event exceed [x]. This clause shall not exclude or limit our liability for actual fraud, and shall not limit our liability for death or personal injury caused by our negligence.'

E3.3 Third party reliance

In recent years valuers have increasingly been asked to agree to allow third parties (who were not a party to the original contract) to rely on their reports. This is particularly prevalent in the sphere of secured lending.

With the exception of agreements between firms and their lender clients, RICS recommends that members do not permit third party reliance and that this is detailed in the terms and conditions. Any decision to accept third party reliance should be subject to full scrutiny to consider the risks involved and must be detailed clearly in the contract to avoid opening up access beyond that which was originally intended. This risk extends to any contract that permits a third party to have a sight of a report or have it disclosed to them. In this event, there is a risk that the allowance of disclosure is also an acceptance that reliance on the report is permitted. This risk must be addressed by making it clear in the contract that no assumption of legal liability to third parties is accepted.

The risks associated with allowing third party reliance are:

- exposure to the risk of regulatory investigation
- potential legal liability to third parties located in different jurisdictions and subject to different legal regimes. To address this risk the following words can be used in the contract:

'Our contract with you for the provision of this survey/valuation is subject to English law. Any dispute in relation to this contract, or any aspect of the valuation, shall be subject to the exclusive jurisdiction of the courts of England and Wales, and shall be determined by the application of English law, regardless of who initiates proceedings in relation to the valuation.'

- claims being outside your agreed PII restrictions – it is common for PII policies to apply conditions on third party reliance, which may exclude indemnity

- contractual agreements (such as liability caps) not being binding on third parties
- pertinent contextual communications not being passed on to the third party and
- exposure to claims of a different type than first permitted.

It is suggested that members use the following wording to prevent third party reliance:

'Our survey/valuation is provided for your benefit alone and solely for the purposes of the instruction to which it relates. Our survey/valuation may not, without our written consent, be used or relied upon by any third party, even if that third party pays all or part of our fees, or is permitted to see a copy of our report. If we do provide written consent to a third party relying on our survey/valuation, any such third party is deemed to have accepted the terms of our engagement.'

Where members agree to third party reliance they should address the following:

- the third party must be bound by the terms and conditions of the original contract (including any liability cap)
- the third party must be made fully aware that a fresh survey or valuation has not been undertaken and the date on which the original valuation was undertaken applies and
- the third party must be made aware of the purpose for which the original survey or valuation was completed.

Member firms are advised to take specialist legal and insurer advice when considering whether to allow third party reliance, in order that they fully understand the legal and PII implications.

E3.4 Proportionate liability

Proportionate liability differs from a liability cap and effectively limits a member's liability to the loss that was sustained as a direct result of the member's negligence.

This applies in particular where a number of professionals are working alongside each other and against whom a customer may choose to claim. A proportionate liability clause is particularly applicable where there is a risk that other professionals may not be able to pay their share of a loss and the client may wish to seek redress for the full loss from the surveyor or valuer.

A suggested proportionate liability clause is as follows:

'If you suffer loss as a result of our breach of contract or negligence, our liability shall be limited to a just and equitable proportion of your loss having regard to the extent of responsibility of any other party. Our liability shall not increase by reason of a shortfall in recovery from any other party, whether that shortfall arises from an agreement between you and them, your difficulty in enforcement, or any other cause.'

E3.5 Personal liability

It is important that members protect themselves from becoming personally liable for work that they completed in the course of their employment by a firm. To this end, any engagement letter agreed with a client should include a clause that prevents any of the firm's partners or employees from being named as a defendant in any claim brought relating to the survey or valuation.

The following is an example of the wording that can be used:

'None of our employees, partners or consultants individually has a contract with you or owes you a duty of care or personal responsibility. You agree that you will not bring any claim against any such individuals personally in connection with our services.'

E3.6 Contractual terms

The contract between the member firm and client, as laid out in the terms of engagement letter, is the most effective risk management tool available to members.

In addition to the clauses and risks outlined above, the following should be considered:

- Is it appropriate to accept an instruction where the obligations being faced by the member are not in balance with the fee being offered?
- Where a client has standard terms of engagement these should be read carefully and, where appropriate, can still be subject to negotiation.
- All contracts should set out the full scope of the work, the fee and the liability to which the member will be exposed.
- All terms of engagement for valuation work are subject to the rules laid down in the *RICS Valuation – Professional Standards* (Red Book).
- Consider if any contractual term you propose that imposes a monetary excess, below which a consumer client cannot make a claim, can be considered to be fair in terms of the *Consumer Rights Act 2015*.

E3.7 Tips on obtaining PII

Insurance is a key element of risk management for a firm. In seeking cover and agreeing the terms of a PII policy, the following should be considered:

- The availability and cost of PII can change rapidly, which could leave you struggling to secure cover just a few days ahead of the renewal date. Do your best to stay informed about what is happening in the professional indemnity market through talking to your peers and specialist PII brokers. This should at least enable you to factor in any likely difficulties with renewal by starting the process early and should assist with budgeting.
- Start the renewal process at least two months in advance of your renewal date. This will allow your broker to develop a strong understanding of your business, accurately respond to queries from insurers and resolve any outstanding uncertainties regarding the claims position.
- Ensure you fill out the proposal form accurately and neatly. Neither insurance brokers nor insurers like dealing with firms who submit illegible or inaccurate information. Furthermore, if you fail to provide an accurate account of your business and claims history, insurers could, at a later date, choose to void the policy for non-disclosure.
- Keep a detailed and accurate log of any complaints, notifications or claims that your business suffers. This will not only show insurers that you take a disciplined approach to risk management, it will assist in the completion of the proposal form and it will help to ensure the ongoing accuracy of insurers own records.
- Insurers do not expect all firms to be free of claims or notifications but they do like firms to be able to evidence that they have learned from their mistakes. If you have been the subject of an allegation of negligence (settled or otherwise) be prepared to explain to insurers that you understand why the situation arose and that you have taken steps to prevent it happening again.
- Take time to explain, in a covering letter, the history and culture of your business and your approach to risk management.
- Take time to understand how the PII renewal process works and how to work with your broker to achieve the best result at renewal.
- Ensure you understand what your policy covers, what it does not cover and precisely what process you have to follow in the event of a claim.
- Loyalty to insurers and brokers can pay dividends, particularly in the event of a tricky claim or a need to secure renewal terms in a challenging insurance market, so give careful consideration before changing providers.
- PII for valuation work generally runs on a 'claims made' basis, with cover for this year paying for claims made in this year, regardless of when the work was done. If you allow your insurance to lapse you will have no cover for any future claims based on work you are currently doing. For this reason, if you cease undertaking valuation work or stop trading, it is essential to take out run-off cover for a minimum of six years to protect both you and your customers. This is an RICS requirement.
- Ensure you are aware of, and have an appropriate, uninsured excess, limit to single claims and maximum amount payable in any one year. Take care to check for 'sub limits' that can apply to certain types of claims.
- Ensure all partners are aware of and understand the firm's PII so that the firm can fully comply with the requirements.
- Notify all claims (or circumstances that could give rise to a claim) to the insurer promptly.

- Ensure the level and scope of cover you opt for is consistent with the practice undertaken by your firm and is proportionate to the risks posed by this.

Always consult with specialist insurance brokers when arranging your PII cover. For full details and further guidance, refer to RICS guidance *PII risk liability and insurance in valuation work* 2013, which can be found at:

www.rics.org/uk/regulation1/firm-and-individual-guidance/professional-indemnity-insurance-pii/pii-and-valuation-guidance/



Confidence through professional standards

RICS promotes and enforces the highest professional qualifications and standards in the development and management of land, real estate, construction and infrastructure. Our name promises the consistent delivery of standards – bringing confidence to the markets we serve.

We accredit 118,000 professionals and any individual or firm registered with RICS is subject to our quality assurance. Their expertise covers property, asset valuation and real estate management; the costing and leadership of construction projects; the development of infrastructure; and the management of natural resources, such as mining, farms and woodland. From environmental assessments and building controls to negotiating land rights in an emerging economy; if our members are involved the same professional standards and ethics apply.

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