

Lockton is the world's largest independent insurance brokerage.

8,000⁺

Associates

96%

Client retention
rate

\$38bn

Over \$38 billion
premiums placed

125

Clients in over
125 countries

60,000⁺

Clients

100⁺

Offices worldwide

10.3%

Annual organic
growth since 2000

\$1.8bn

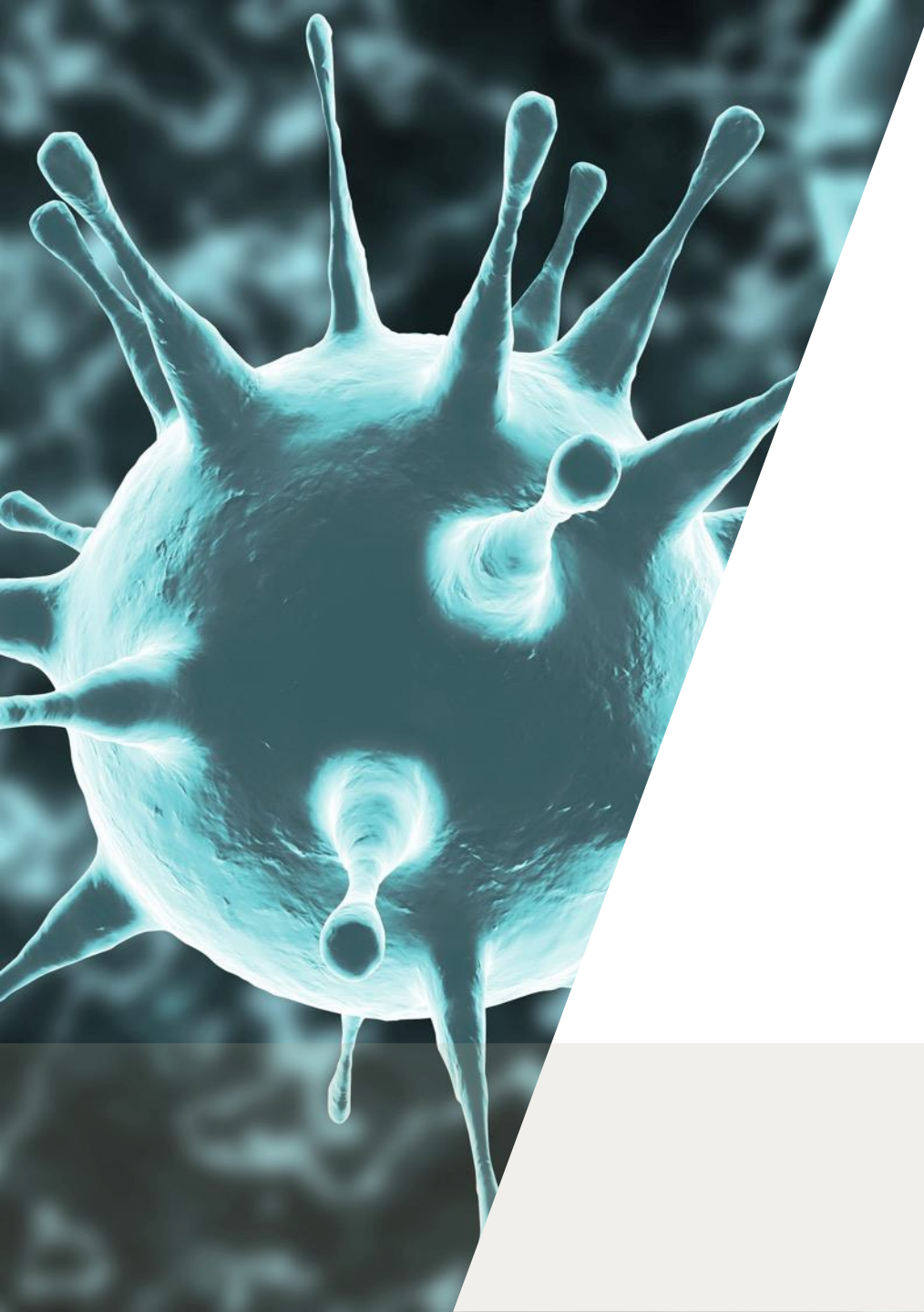
Revenues

90%

Reinvestment due to our
private ownership

Lockton is a global professional services firm with over 8,000 Associates who advise clients on protecting their people, property and reputations. Lockton has grown to become the world's largest privately held, independent insurance broker by helping clients achieve their business objectives. For nine consecutive years, Business Insurance magazine has recognised Lockton as a 'Best Place to Work in Insurance'.

Our 96% client retention rate speaks for itself.



Minimising the risk of Claims against Construction Professionals in an Uncertain World



Sam Moore & Mary Smith
8 October 2020

During the Webinar...

- All participants are automatically muted.
- To ask a question use the chat function.

Today's Speakers...



Sam Moore - Partner at Caytons

Sam specialises in professional indemnity claims and policy coverage disputes. His practice is focused on a diverse range of professionals including architects, engineers, insurance brokers and solicitors as well as building contractors.



Mary Smith – Partner Caytons

Mary specialises in construction and professional liability disputes, acting for all stakeholders including private clients, professionals, Irish and UK insurers and Lloyd's syndicates. Recommended in Legal 500 EMEA 2019 for Construction, she regularly acts for professionals (architects, engineers, assigned certifiers, solicitors, financial advisors, estate agents, surveyors and their insurers in a broad range of claims

Areas for Discussion

- 1 – Challenges facing the construction industry / potential claims that may arise.
- 2 – Practical steps that can be taken to navigate the challenges ahead.
- 3 – Terms to be included / not included in a professional's contractual documentation.
- 4 – How to avoid a claim being excluded from the cover provided under a professional indemnity policy.
- 5 – Questions.





Covid-19 challenges presented to professionals working in the construction industry

- Remote working
- Issues on site
- Inspection/Certification v. Covid-19 Restrictions
- Supply Chain instability
- Clients' changing needs

Potential Claims From Covid-19 - Professional negligence claims



- **Negligent advice**
- **Errors in design**
- **Failing to administer the terms of the contract**
- **Duty to warn – impact, delays and cost overruns**
- **Inadequate inspection**
- **Incorrect certification**

Recessionary Claims

- Working below cost and less staff can lead to allegations of a failure to meet required service levels
- Late payment claims met with counterclaims alleging negligence
- Mission Creep - services not properly defined, documented or controlled
- Cost over runs/alleged negligent certification/contract administration
- Contribution claims

Remote Working Risk -Typical claim

- Lack of supervision/IT/Coordination/Communication
- Incomplete/inaccurate design information
- Advising outside expertise
- Missed deadlines
- Negligent design claim causing loss



Risk Minimisation Measures



Communicate consistently



Clarify role requirements



Protocols



Design checks



Document processes and procedures



Collaboration platform



Online coordination meetings



Deadline and finalisation meetings

Site issues – Typical claims



- Failure to administer the contract terms
- Failure to warn and inform
- Failure to manage delay
- Failure to coordinate
- Failure to inspect/identify defects
- Negligent certification



Site issues - Risk Minimisation Measures



Client's
interests



Own interests



Audit
contracts



New contracts



Communicate



Insurances



Risk register



Records

Inspections— Risk Minimisation Measures



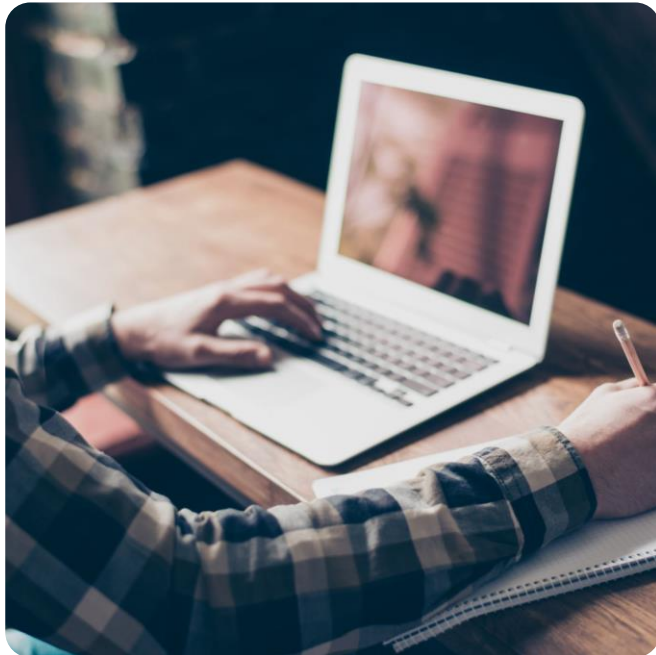
- Review appointments for inspection obligations
- Communicate restrictions
- Make alternative arrangements
- Inspection dates – renegotiate and readjust where necessary
- Record compliance with the contract and/or appointment



RISK REGISTER

- Proactive holistic approach for business and projects
- Identify, analyse and track risks
- Regularly review both government and industry guidance and have the RR reflect this
- Attempt to identify challenges early
- Examine and stress test past decisions made pre-Covid-19 and during lockdown
- Risk questionnaire
- An active and shared document
- Involve key stakeholders

House Keeping: Records



- Have you a well-documented paper trail?
- Have you recorded why decisions were made?
- Have you recorded progress, productivity and obstacles?
- Have you recorded cost and schedule impacts?
- Have you recorded a client's instructions?
- Have you recorded mitigation efforts?
- Have you recorded the contractor's compliance with the contract?
- Have you recorded (including date and time) all requests, inspections and communications regarding the compliance with the contract and/or appointment?
- If in doubt, RECORD RECORD RECORD

The Requirement for a Written Appointment

RIBA

Clause 2.1 of the RIBA Code of Conduct:

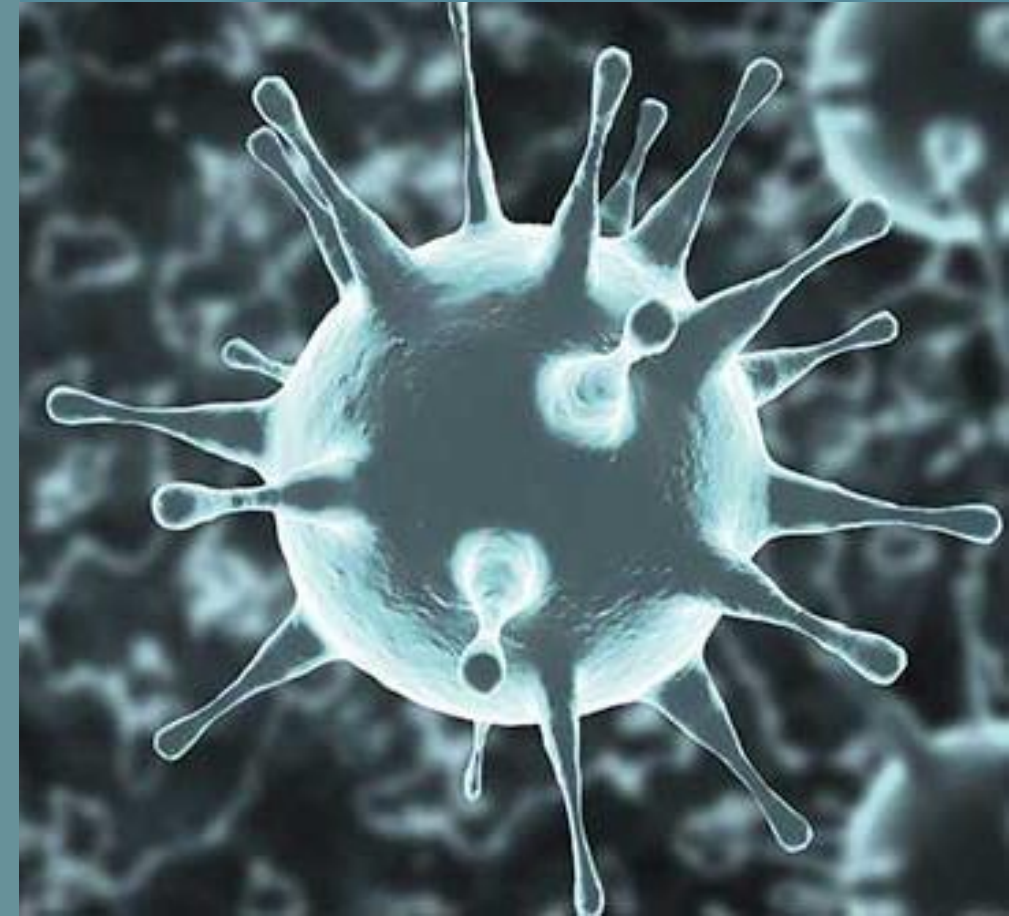
“All terms of appointment between a Member and their client must be clear, agreed and recorded in writing before the commencement of any professional services”

The Architects Registration Board

Clause 4.4 of the Architects Registration Board Code of Conduct:

“You are expected to ensure that before you undertake any professional work you have entered into a written agreement with the client.....”

Similar Expectations of Engineers



Net Contribution Clauses

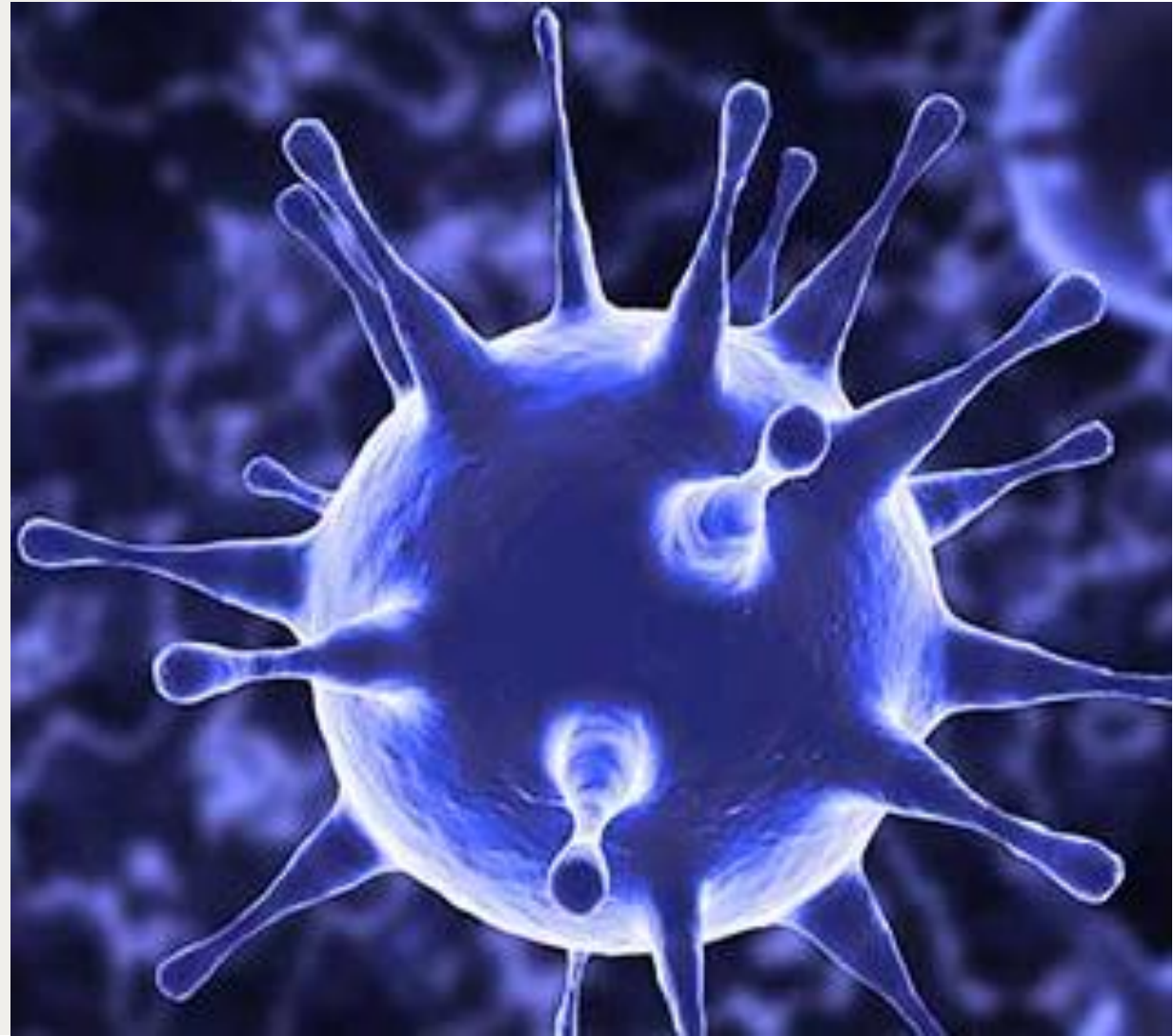
The Problem: Defects caused by two or more different failures i.e. one design and one workmanship. The default position - no proportionate liability. Both designer and contractor 100% liable for the defect.

Solution: Net Contribution. It apportions liability according to responsibility.

Net Contribution Clauses can be met with resistance BUT are included in various standard agreements:

- RIBA Standard Form of Appointment
- ACE Professional Services Agreement
- NEC3 Edition Professional Services Contract
- Various JCT Contracts

Try to include a Net Contribution Clause in your contractual documentation.



Limitation of Liability Clauses

Types of Limitation of Liability Clauses

- Aggregate Cap
- Each and every claim cap
- Specific issue caps

Restrictions on Limitation of Liability Clauses

- The reasonableness requirement
- Unfair Contract Terms Act 1977
- Moore v Yakley (1998) 62 Con LR 76
- Ampleforth v Turner and Townsend [2012] EWHC 2137 (TCC)
- Reasonableness Factors – insurance cover available, fees payable, role of the professional and role of the professional in the context of project as a whole

Is Reliance on the Professional Required – Deemed Reliance Clauses?

- Reliance as a legal requirement for the imposition of legal liability.
- The effect of a deemed reliance clause.
- Hunt & Others v Optima (Cambridge), Strutt & Parker (a firm) & Others [2014] EWCA Civ 714, Clarke LJ at 54-67

“In order to recover in the tort of negligent misstatement the Claimant must show that he relied on the statement in question.....

In the present case the negligent statements relied on were the statements contained in the signed Certificate eventually provided to the relevant Claimant. But the Claimants cannot have relied on such statements in committing themselves to the agreements to purchase because those statements were not then in existence.....

Attractively though this submission was presented, it appears to me to founder on the fact that reliance must follow representation and cannot be retrospective. If the representation is the signed Certificate it cannot be relied on before it comes into existence. A cause cannot postdate its consequence.”

Performance Warranties / Guarantees – Mind the Gap

Policy Coverage

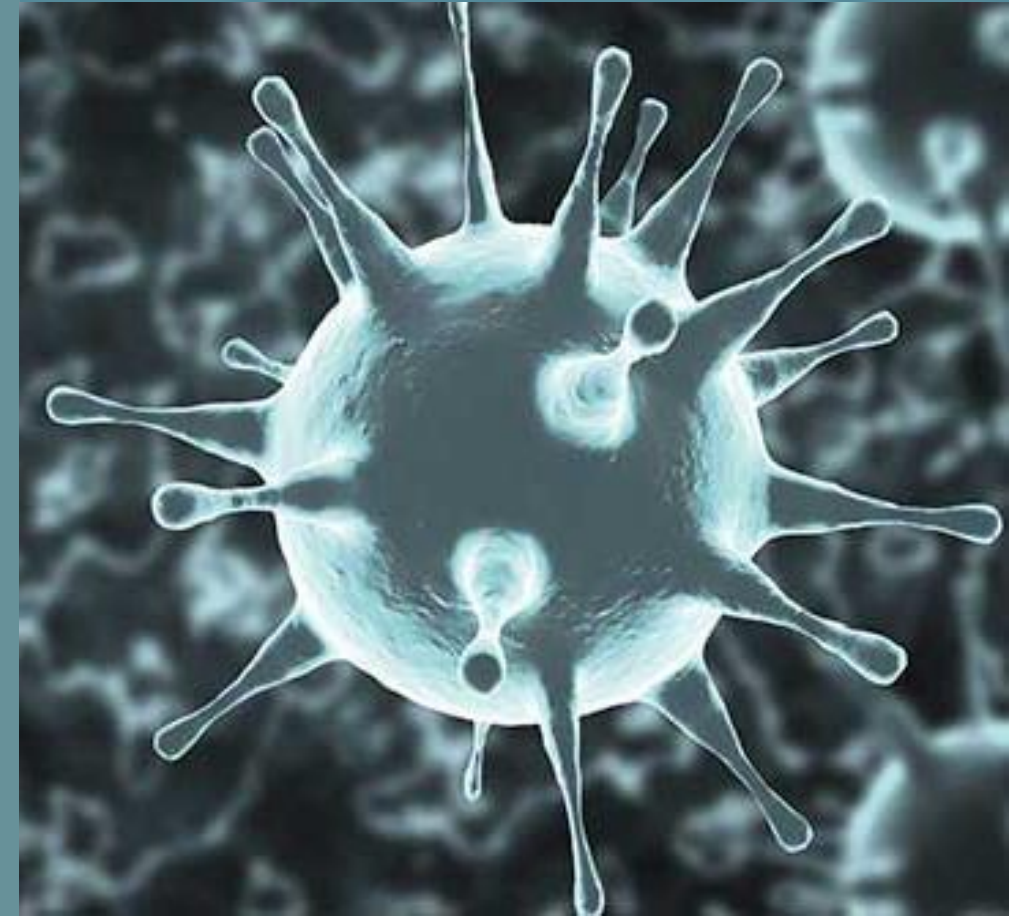
- The cover afforded by a professional indemnity policy – a failure to exercise reasonable skill, care and diligence

Typical Performance Warranties / Guarantees

- Time for performance
- Compliance with employers' requirements
- Compliance with third party agreements

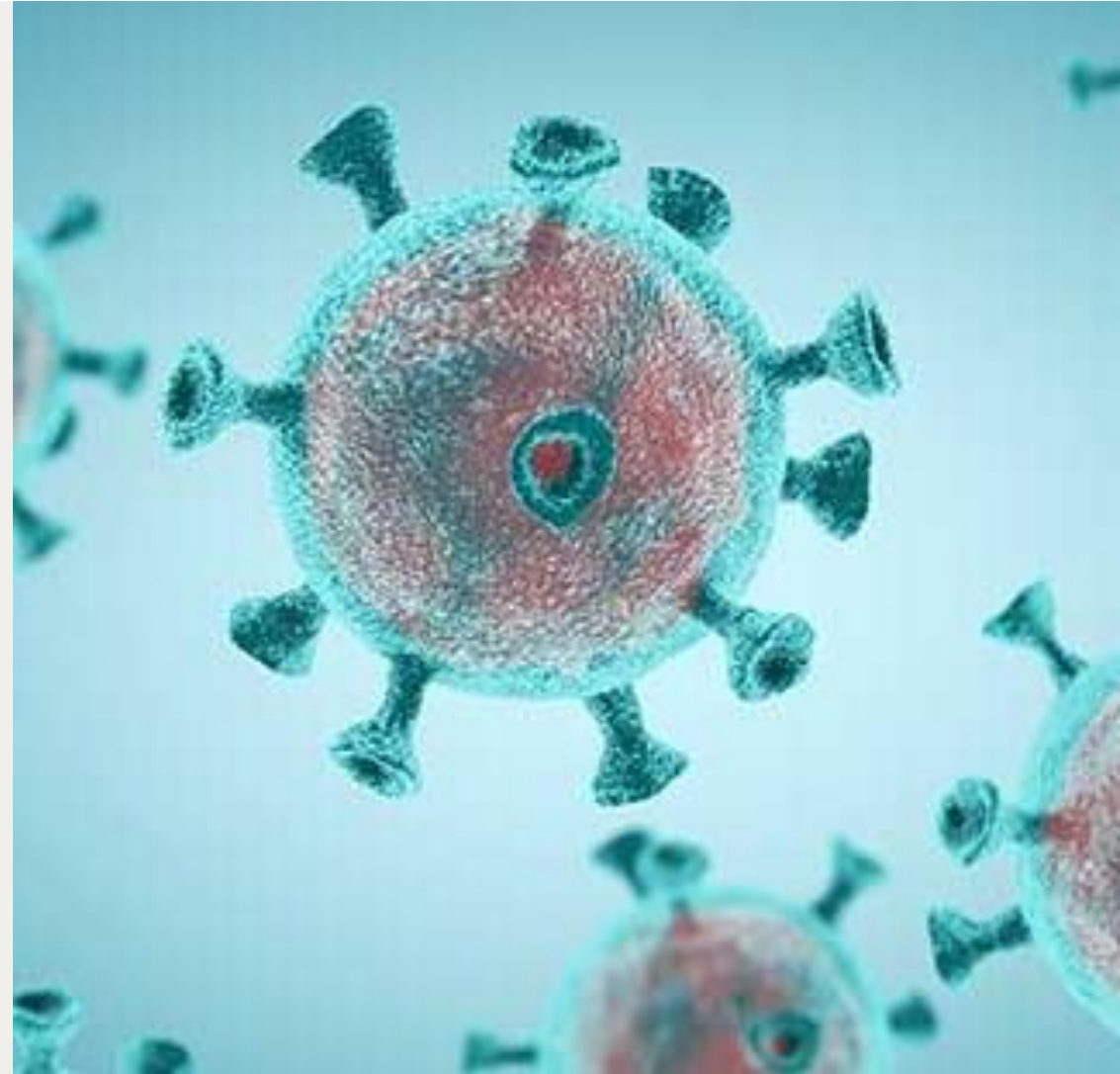
The Gap and How to Avoid it

- The effect of the gap
- Qualifying Terms Appropriately



Other Matters

- **Assignment Provisions**
- **Insurance Requirements**
- **Sub-Consultants – Back-to-Back Insurance**





Take Aways:

- Review your contracts – avoid scope creep and know your limitations
- Liaise with your brokers (and through them insurers)
- Ongoing engagement - poor communication can be a key driver of claims
- Effective detailed record keeping
- Maintain, review and update a risk register
- Be wary of waiving any rights, or promising to deliver when you may not be able to do so
- Stay up to date with the relevant changes and guidance
- Regulatory and professional bodies have been quick to respond to the crisis and support businesses – liaise with them



Further Information

This presentation should not be treated as specific advice in relation to a particular matter as other considerations may apply. Therefore, no liability is accepted for reliance on this presentation.

If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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