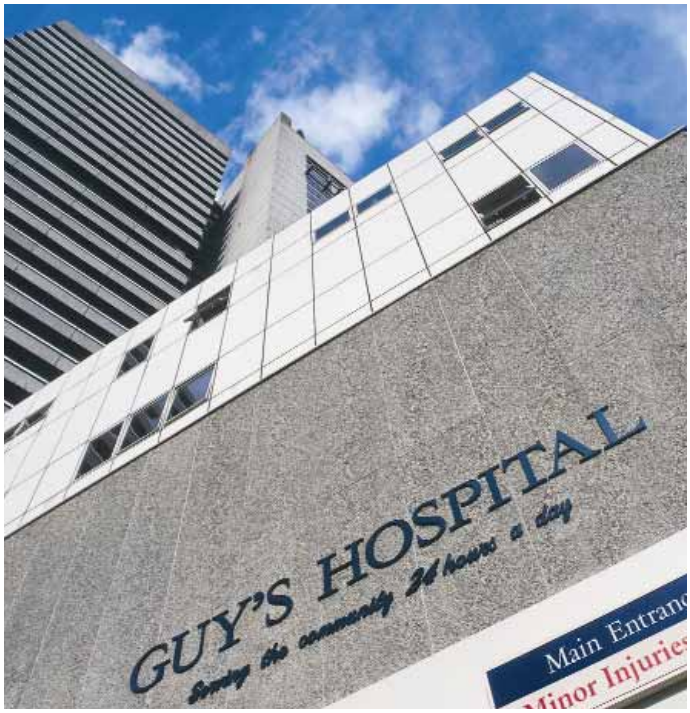

Take cover

Foundation trusts have a duty to remain a going concern and that can mean planning for disasters and the potential loss of income that go beyond the cover provided by the NHS Litigation Authority. Chris Wheal reports

HG WELLS ONCE said: 'History is a race between education and catastrophe'. For NHS foundation trusts trying to buy insurance cover against major losses, that race is at a crucial stage.

The NHS's in-house insurance cover, provided by the NHS Litigation Authority (NHSLA), covers all NHS trusts for the first £1m of damages in the event of, say, a huge fire, disastrous flood or giant building collapse. Anything running up costs of more than £1m – and there has only been one incident in the whole of the UK – requires a special decision at strategic level. That strategic review could decide that different services might be better provided on that site or that services might be better sited elsewhere.

But foundation trusts have a responsibility to their regulator, Monitor, to remain a going concern. Without a commitment that major damages above the £1m mark will be covered, they face the prospect of being wiped out by a catastrophe. Even if the decision were taken to rebuild on site, such delays could prove disastrous. Foundation trusts need to be able to instruct builders to be on site clearing up the mess and starting reconstruction at once.

The alternative for foundation trusts has been to buy insurance from the commercial market, covering not just the reconstruction costs but the loss of income or the additional costs of fulfilling their contracts during the downtime. This is called business interruption.

The experience of the early foundation trusts in securing both this and several other top-up insurance covers they need has proved patchy. Insurers view new and unfamiliar risks with apprehension and cover their own backs by demanding large premiums. For big London trusts in particular, where the perceived risk of catastrophic loss from such incidents as terrorism is considered much higher, premiums have been prohibitive.

In February 2005, Martin Shaw, finance director at Guy's and St Thomas' NHS Foundation Trust, had to recommend to his board not to buy the additional cover it needed. It was estimated that a total loss could cost £892m, substantially more than the £1m cover provided by the NHSLA. Some brokers could not find insurers to quote for the business and others had insurers withdraw quotes at the last minute. The trust was left with a potential annual premium of more than £800,000 just for the buildings cover and more than £250,000 for business interruption cover.

'It's very difficult to proceed. What bit of patient care would you not provide if you paid that premium?' Mr Shaw says. Even finding a quote for a lower, single-loss policy covering just £200m or even £100m proved difficult. Insurers were prepared to offer more attractive pricing, but only by excluding terrorism cover – a big risk.

Unhappy at being unable to get affordable cover and feeling exposed, Mr Shaw wrote to NHS finance director Richard Douglas asking him to step in and help. He has also raised the issue with the

Foundation fears: (l-r) Guy's and St Thomas', Countess of Chester and Chesterfield Royal have all worked hard to find the right insurance cover

NHSLA, so far to little effect. In the meantime, insurers have started to see the risks as more attractive and a few more insurers have entered the market, bringing in competition. Prices have plummeted and Guy's and St Thomas' is currently getting revised quotes to see if it can afford the cover.

Elsewhere in the country, while cover is cheaper, there are still concerns. Ray Thomas, assistant director of finance at the Countess of Chester Hospital NHS Foundation Trust, has been in charge of buying cover. 'All foundation trusts are entirely responsible for managing their own risks and in particular if something goes wrong. There would be serious implications for a board of directors who steered a foundation trust down the toilet,' he explains.

'We wanted to retain control where we could or have our income covered where we couldn't. We don't know what the primary care trust would do in the event of a disaster. Even if we offered to ship in bouncy castle wards on the car park, opened remaining operating theatres 24-hours a day and sub-contracted some work out to other trusts, the PCT may not want us to if, for example, they have an independent sector treatment centre (ISTC) locally that is underused,' says Mr Thomas.

The Countess of Chester secured cover at rates that were about 10% of those faced by Guy's and St Thomas'. 'Our trust is fairly risk-averse,' says Mr Thomas. Yet Countess of Chester has also had to leave gaps in its cover. 'We have not taken out terrorism cover as we believe that in such a catastrophic case the NHS would rally round.'

But there is no way of knowing whether the NHS would rally round or not. It is another example of where foundation trusts could benefit from some clarity and joined-up thinking from government, regulators and insurance providers. The potential is there.

WHAT INSURANCE DO FTs HAVE?

Foundation trusts have to buy an array of insurances, many of which are ideally suited to the private sector and cause few problems. **Motor**, for example, covering fleet and any staff vehicles, has to be covered. Any **travel insurance** required for staff trips abroad can be bought cheaply. **Engineering inspections and engineering cover** to meet legal requirements and repair or replace complex machinery is often best suited to experts.

Other **specialist policies** may also be needed from time to time. Chesterfield Royal Hospital NHS Foundation Trust (pictured left), for example, has been using a house in the town for running children's services. The house has a covenant on it preventing certain commercial uses. As a precaution, the foundation trust insured against any legal action alleging its use breached that covenant.

Building and business interruption cover is a sticking point. The NHSLA scheme now covers up to £1m of property damage. From 1 April, this is irrespective of the trust size. And while most of the NHS assumes that further funding would be provided centrally in the event of a huge loss, including a terrorist attack, foundation trusts have a legal obligation to remain a going concern and to maintain the operational capacity to deliver their mandatory goods and service, so cannot rely on 'assumption'. Insurance is the only way they can guarantee survival. Foundation trusts also need to insure against the extra costs of fulfilling both their NHS and any commercial contracts, such as by hiring temporary accommodation or subcontracting work out. If they cannot fulfil a contract they will, alternatively, need insurance cover to replace the **lost income**.

The NHSLA's **directors and officers'** (D&O) insurance scheme does not cover selling off assets or entering certain contracts. It also ceases to be effective if a foundation trust is insolvent (which is just when claims are likely). Commercial D&O policies can cover these.

A Liverpool-based broker to many foundation trusts is Griffiths and Armour, which has identified another area for insurance. Foundation trusts have begun entering commercial construction contracts that effectively put the total risks of the construction work on the their shoulders. They can cover these with **contracts works policies** but may better off not signing these types of contracts in the first place.

Special insurance arrangements also need to be put in place for any **private finance initiative** contracts because these will not be covered under the NHSLA schemes.

Steve Walker is chief executive of the NHSLA, an organisation that was set up to stop so much money leaching out of the NHS into the pockets of insurers. The situation with foundation trusts is reversing that trend and Mr Walker is clear that if there were a political will to direct the NHSLA to cover some of foundation trusts' needs, the regulations could be changed to enable him to do so.

'If there were a perceived need, it would be relatively easy to get our governing regulations amended,' Mr Walker says. 'It may take time but it is not hard. There may be activities that our sponsor, the Department of Health, would not wish to cover, but changes have happened to enable us to cover social enterprise bodies and to accommodate ISTCs. We can be accommodating but we are a creature of statute – we're like foundation trusts in that we don't have complete freedom.'

He says he could go further. Even with wider coverage from the NHSLA, there would still be commercial activities that foundation

trusts would need commercial cover for, but Mr Walker says he has offered to become the NHS's broker for such insurance.

'We could probably give them much more independent advice than insurance brokers who want to sell product and we have had discussions about becoming a broker and buying the commercial insurances for all foundation trusts much cheaper,' says Mr Walker. 'So far those discussions have been inconclusive.'

In terms of buildings and business interruption cover, Mr Walker points out that his scheme was designed to give the then regional offices control over funding major rebuilds in the event of disasters or total losses at an individual NHS trust. No NHS trusts have asked for changes to that regime.

'We know our solution (£1m limit) is hopelessly inadequate but it was designed to be. The Department of Health has no intention of changing that,' Mr Walker says.

But as more – and eventually the majority – of trusts become foundation trusts and the emphasis swings increasingly to meeting the needs of foundation trusts, he can see the need for some widening of existing cover.

There are going to be stumbling blocks. For example, foundation trusts also have to buy commercial directors and officers (D&O) insurance because the NHSLA policy has gaps in it. Certain commercial activities are not covered, such as selling buildings and entering some contracts. But also, in the worst case scenario, if a foundation trust went bust and ceased to exist, the directors and officers would no longer be covered.

'If the FT is not an existent body, then that presents problems to us,' says Mr Walker. The possibility was not considered when the policy was drawn up.

Some of these anomalies could be included in an NHSLA scheme if Monitor could clarify what would result in a foundation trust's closure, for example. But Mr Walker insists many commercial dealings could not be covered by the NHSLA's own schemes, which will always be restricted to covering the public sector only. It could, however, broker a better deal for foundation trusts with commercial providers for the rest.

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Steve Walker, NHSLA (above)

Mr Shaw, who also chairs the HFMA's Foundation Trust Finance special interest group, would welcome such a move. 'When you look at the decision the NHS took to self-insure and you see the amount of NHS money going out of the NHS to commercial insurers, it makes sense to look again at it. I would welcome some initiative on this,' he says. 'I don't see why the NHSLA shouldn't do it. If you are looking for best value for the taxpayer, either the NHSLA should cover it or the NHSLA should negotiate the premiums with the insurers.'

That would mean education had beaten catastrophe. And the new political administration may give an opportunity for changing the approach to foundation trust insurance. As Mr Walker says: 'The stakes are high. The NHS always looks phenomenally attractive to the private sector. Everyone wants a piece of the action. Whether that will continue under the new prime minister is another question.'

Chris Wheal is a freelance journalist