

INSURANCE BASED DUE DILIGENCE SOLUTIONS ALTERNATIVE USES FOR TITLE INSURANCE

INTRODUCTION

At Mason Owen Financial Services Ltd (MOFS) we have particular expertise in specialist legal indemnity problems. In this fact sheet we hope to show how Title Insurance can provide more than cover against a known risk. It can help provide 'Good and Marketable title' helping make the acquisition, disposal or re-finance of property assets faster and safer.

There are some situations when title insurance can play a valuable part in your transactions. Title insurance in the UK is commonly used in situations when a defect in a property title is discovered, and subsequently resolved by an insurance policy as the quickest method of rectification. Globally this is a very small part of the title insurance industry only around 2% of the market. Title insurance is used elsewhere in the world to provide 'good and marketable' title to property assets adding additional security and helping speed up the transaction. There are a couple of UK insurers that offer this type of policy and MOFS has the expertise to arrange these products for you.

ACQUIRING OR DISPOSING OF DISTRESSED PROPERTY ASSETS

The acquisition of repossessed property can be a minefield. In an insolvent situation a purchaser could be walking into many problems with the title they are purchasing. Quite often finding answers to simple questions is difficult if the previous owner is not around and traditionally, an administrator will never provide any warranties on title.

Insurance can replace warranties and provide the following:-

- A title guarantee
- It can help secure lending as many banks are reluctant to provide a loan unless they are completely satisfied that they have 'Good and Marketable' Title.
- We can work with the seller, packaging a portfolio for sale, helping ensuring a smooth transaction and minimalising the 'price chipping' if title problems arise further down the line, as a defect if subsequently found later in the transaction can be added to the policy that has been organised in advance.

For a buyer it helps them purchase in confidence that they are not walking straight into a problem with the title like a dispute with a third party over ownership or boundaries. This type of cover also protects against the following risks, which could conceivably arise even if comprehensive due diligence is completed:-

- Fraud
- Forgery
- Documents not being properly signed
- Boundary disputes

Some insurers are developing a packaged product for distressed property purchase that will also include Environmental/Contaminated land protection and can be a replacement for NHBC guarantees.

BUYING OR SELLING AT AUCTION

If the client is selling it could be helpful to provide a policy as part of the package for sale. No obligation quotations to cover the title can be obtained and the quotation could also incorporate a 'Lack of Search Indemnity' policy to replace the need to do Local Authority or Environmental Desktop searches.

This type of cover is relatively inexpensive, costing around 0.03% – 0.07% when applied to the value of the property for searches and approximately 0.05%- 0.1% of the value for a comprehensive, good and marketable title cover. The latter will allow you to give title warranties in good faith and means a potential buyer can bid in confidence, which may enhance the value of the property.

BULK PROPERTY ACQUISITION OR DISPOSAL

If tight deadlines or a limited cost basis are key to the successful completion of a transaction, there may not be sufficient time to complete a comprehensive due diligence exercise on the property that is to be purchased. In fact, it is often uneconomical to provide full due diligence on each individual title where the acquisition involves the acquisition of multiple property assets, especially those of smaller individual value but high volume like residential or ground-rent portfolios.

In this situation, MOFS can work with a client and their legal team to provide the right balance between pure legal fees and due diligence on the one hand or the alternative of reducing the amount of legal work the lawyer needs to undertake in investigating title backed by a suitable insurance policy. The latter approach can be the difference between the proposed acquisition being profitable, and thus proceeding, and the transaction not proceeding. It ensures that the client can squeeze every penny of profit out of the deal by taking a more pragmatic approach to the acquisition and the due diligence process.

The policy cover is flexible in approach and can be used to replace or compliment the due diligence, allow the client and lawyer to identify and concentrate on assets where there is perhaps a higher risk to the deal so that time then allows for a full investigation. Dependant on the number of assets compared to the value at risk, it can often be a more cost effective approach than obtaining searches.

RE-FINANCING

In a refinance situation it can normally be assumed that the title has already been checked. Many portfolios have been traded or re-financed several times in recent years and each time the new or existing lender will check the title again and update searches.

Title Insurance can provide a far more efficient solution and once insurance has been obtained on a particular portfolio, this negates the need for title checks on any subsequent re-finance. This can make refinancing extremely cost effective as a top up policy can be purchased at a fraction of the cost when compared to the cost of future due diligence.

MEZZANINE LENDING

In particular cases involving multiple assets, the due diligence and checks on title can be repeated several times. Title insurance offers a far more efficient process for a client as the insurer would investigate a selection of assets and base a premium on their findings. Every property that is then the subject of the transaction and each different lender can rely on a policy to cover all aspects of the title. This then negates the need for each party that is involved in the transaction having to do their own separate checks, which often means repeating the same process several times.

SUMMARY

In short, title indemnity insurance can be utilised for many other purposes than just covering known defects in title. At MOFS we possess the necessary expertise to be creative in providing innovative insurance solutions for clients and lawyers alike within the due diligence process. Further information about MOFS can be obtained at www.mofs.co.uk or to obtain a quotation, feel free to contact our legal indemnity team on 0151 255 2603 or e-mail us at mail@mofs.co.uk

INSURANCE BASED DUE DILIGENCE SOLUTIONS DEFECTS IN TITLE AND SPECIALIST RISKS

INTRODUCTION

At Mason Owen Financial Services Ltd (MOFS) we have particular expertise in specialist legal indemnity problems. In this fact sheet we hope to show how Title Insurance can provide cover in some less well known areas where known risks occur.

Alongside the common problems like restrictive covenants, access issues or lack of easements there are many more unusual situations where insurance can play a valuable part and the policy can help to protect the parties to a property transaction. We have covered below some of the more unusual risks in detail, but we can also provide a separate fact sheet containing a more comprehensive list of Insurable Defects in Title.

JUDICIAL REVIEW COVER

In these risk averse times it can be difficult to start work immediately before the end of the 3 months Judicial Review period. Most lenders would like the security of knowing their loan will be protected if work is due to commence immediately that planning consent is obtained and now Developers or Contractors can ensure that their initial outlay is covered, should the planning process be put under Judicial Review. With over 500,000 applications for planning permission each year in the UK, this is a product that has real benefits for private and commercial Developers and Contractors alike.

A typical Judicial Review policy will cover the following:-

- The difference in the market value of the Land with the benefit of the Planning Permission and the value should the Planning Permission be withdrawn upon review.
- Consequential Losses within the policy definition of such loss
- The cost of works completed or under construction
- Professional fees (including architects and surveyors fees)
- Additional loan interest payable during the delay
- Additional expenditure on plant and equipment during any delay (including depreciation, contractual payments or other standing charges incurred if plant and equipment acquired for the works cannot be utilised elsewhere)
- Wages, salaries and other costs of staff engaged solely for the works that cannot be employed elsewhere.

At Mason Owen we will work with the client and their representatives to help provide a fully comprehensive policy that will ensure that the client does not suffer any financial loss should planning consent be subject to a Judicial Review.

CHANCEL REPAIR

The purchase of Chancel Repair policies are on the rise, especially as lenders are covering all aspects of their loan, including areas where they may have taken a view in the past. This is a difficult risk to calculate the exposure of a client as the risk is not completely dependant on the property value, but instead is based on the anticipated amount it would take to repair the Chancel end of a church. This calculation is made harder by the fact there is no standard definition of loss to the Church, only that the Chancel end be wind and water tight.

Most Insurers do not insist on providing cover for the full gross developed value of your property and as such will not include an averaging endorsement in the policy. If cover is required for a risk with a £10 million development value, unless the Chancel in concern is Old Westminster, it is highly unlikely you will need an indemnity limit anywhere near this amount. Some UK law firms have set a maximum level of cover they are comfortable with and they have communicated this to their clients. Insurers will also take a view on the sum to be insured and may be able to provide background and additional guidance.

RIGHTS TO LIGHT

As our cities swell there is increased pressure to generate more living space and maximise land use. Over recent years this has led many developments heading upwards. Buildings are becoming ever taller to accommodate more people on the same spot of land. While modern methods of construction help architects to maximise height, neighbours more frequently find that these constructions maximise their loss of light.

It is established law that we all have a right to receive daylight through the windows of our homes and offices. A right accrues in a number of ways, being either expressly granted when the building was first built, or accumulated over time. When compared with other property rights, there have been relatively few high-profile attempts to enforce rights to light but rulings in a number of reported cases have highlighted the right to receive light.

This is good news for the individual; many of us are oblivious to our ancient property rights until they receive publicity in the daily paper. But for developers, high-profile rulings of this nature are problematic; they risk hampering ambitious and well intended regeneration schemes by providing ammunition for potential objection from the local community.

The rulings in these cases reassert that an injunction is the proper remedy for someone who's light is affected. A developer who interferes with the right to light of another, faces the prospect of having to down tools or, in the worst-case scenario, bring down an offending building so as to re-establish the light.

This draconian injunction has always been the normal means by which the courts will protect an individual's property rights. However, in legal circles it was felt there had been a shift in the courts favouring compensation as a remedy, unless the interference with an individual's light was so severe that injunction was the only realistic remedy. Some felt that the courts were beginning to acknowledge that developers play an important role in the regeneration of our towns and cities. In fact, the courts have clarified that unless a developer has acted entirely unreasonably throughout a project, they will not necessarily be held accountable. Developers will, however, not be allowed to prevail over individuals' rights to light by assuming that the court will allow developers to pay for the interference post facto with compensation.

Therefore, quite often without regard for the greater good served by a development or, perhaps worse for the developer, ransoming their hard-earned profits and bringing uncertainty to an investment, the individual can cause severe upheaval for a developer. So can insurance help?

MOFS is currently working with one insurer who can provide a bespoke approach to this type of cover. We work with the client and their legal team, the insurer and the professional surveying team to tailor a policy that provides a balance between initial compensation you may have to pay and the ongoing liability. This approach ultimately lets the developer get on with the project without getting bogged down with protracted negotiation with potential claimants. Speak to MOFS to find out how we can save you or your client considerable time and often expense if this issue arises.

SUMMARY

In short, title indemnity insurance can be utilised for many known defects in title. We have listed overleaf some of the more familiar risks and some that are not so familiar. At MOFS we possess the necessary expertise to be creative in providing innovative insurance solutions for clients and lawyers alike within the due diligence process. Further information about MOFS can be obtained at www.mofs.co.uk or to obtain a quotation, feel free to contact our legal indemnity team on 0151 255 2603 or e-mail us at mail@mofs.co.uk

COMMON INSURABLE EXAMPLES OF DEFECTS IN TITLE AND SPECIALIST RISKS

INTRODUCTION

At Mason Owen Financial Services Ltd (MOFS) we have particular expertise in specialist legal indemnity problems. In this fact sheet we have listed some examples of Insurable known defects in title.

INSURABLE RISKS

- Judicial Review
- Village Green/Commons Registration
- Rights To Light
- Search Indemnity (including or excluding Lack Of Environmental Search Indemnity)
- Chancel Repair
- Adverse Possession
- Absentee Landlord
- Breach Of Trust
- Flying/Creeping Freehold
- Deed Of Postponement
- Forfeiture Of Head Lease Or Forfeiture Of Lease
- Improvement Grant Liability
- Insolvency Act
- Lack Of Good Root Of Title
- Lack Of Building Consent, Planning Permission And/Or Building Regulations
- Lost Documents Or Lost Title Deeds
- Manorial Rights
- Mineral Rights
- Obstruction Of Right Of Way
- Outstanding Leasehold Interest
- Outstanding Mortgage Interest
- Outstanding Rights Of Common
- Rent Charges Indemnity
- Reversion Risk
- Reverter Of Sites Act or separately School Sites Act
- Road Charges Indemnity
- Sewer Indemnity And Unknown Rights And Easements
- Missing Beneficiary Indemnity

At MOFS we can also provide cover for the assets owned by Property Owners including, Liability Insurance, Environmental/Contaminated Land, Latent Defect and various other specialist Construction risks. You can visit www.mofs.co.uk for more details or contact us on 0151 255 2603 or mail@mofs.co.uk