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financial services

Indemnity for Portfolio Transactions

Mason Owen Financial Services (MOFS) is a recognised specialist in the field of property and related insurance.

We are a subsidiary of Mason Owen & Partners who were established in 1967 and are one of the largest independently owned property consultants in the country.

MOFS was established in 1988 and in 2008 we were one of the first 30 brokers in the country to be awarded "Chartered' status by the CII (Chartered Insurance Institute). We continue to retain this title and therefore place a great deal of emphasis on providing the best quality advice.

Our ownership is independent from the insurers with whom we trade, so you can rest assured that as we act as the agent of the client, when we recommend an insurer, we will always put your needs first.

At MOFS we have a team of brokers specifically dealing with legal indemnity enquiries, including two property solicitors each with over twenty years experience in the market. Testament to our service is that we work with individuals from around 25% of the top 100 UK law firms, a number of the national house-builders, developers and lenders.

We provide a comprehensive title indemnity insurance procurement service which assists the legal representative in ensuring compliance with FCA rules whilst providing the most suitable terms for the client.

Our years of experience in this niche area of business, and the amount of premium we place in the market along with the relationships we have with the main insurers gives us flexibility of terms and competitive premiums - benefits we can pass on to our clients.

Portfolio insurance is an area of particular expertise and the following information helps explain its use and the process for obtaining cover.

Portfolio Insurance – Good and Marketable Title and Lack of Search Indemnity

Policies of this nature provide protection against unknown title risks and unexpected third party challenges to title and legal ownership issues.

The policies provide protection and can significantly speed up the disposal, acquisition or re-finance of multiple property assets.

The use of 'Good and Marketable Title' indemnity policies to aid property portfolio transactions has been around for a long time but they have evolved considerably in the past few years.

Originally based on an American concept providing blanket insurance for any defects in title as a non fault cover to back up due diligence rather than only insuring for specific identified known risks.

American owned insurers brought this type of cover into the UK over thirty years ago.

In recent years some of the senior underwriters in the industry moved and obtained capacity with European insurers, subsequently developing similar products with them.

The use of portfolio indemnity insurance saw a sharp increase a few years ago especially during the tail end of the recession, largely because they are particularly useful for distressed asset auction sales where an administrator is involved and no title warranties are given.

Additionally, the work we have done at MOFS has helped structure policies in a more useable format and meant that they are continued to be used today. In 2013 and 2014 we were involved with the disposal of over £2bn of distressed commercial property assets from a major UK commercial lender.

During that time a number of top thirty UK law firms were involved in early discussions regarding policy terms and with our help we negotiated cover levels which we believe are the most comprehensive available in the market. MOFS have also helped arrange a policy structure allowing payment to be staged but cover guaranteed early within the transaction, protecting both vendor and buyer. MOFS has helped arrange cover for numerous portfolios within the last few years totalling several billion pounds.

Policies are flexible in that they can replace the need to do any due diligence on the title of the properties, allow you to report on a limited number dealing with identified defects and underpinning the remaining properties with the full title indemnity protection or a combination, allowing limited checks for certain issues on the title and insuring other aspects. The policy also protects against problems which may not be identifiable during normal due diligence such as fraud, forgery, incapacity by prior owners or boundary issues.

Structure and Process

Cover is divided into two main aspects, Title cover and No Search indemnity. Often we separate these out into two policies due to timing; usually the preference is to have the Title policy in place as soon as possible as it offers protection against a future event, whereas the No Search policy covers any adverse entry which would have been revealed by a search up to the point of policy inception so sometimes the preference is to wait until nearer completion before incepting this element of cover.

However, on larger portfolios insurers have agreed to validate the No Search policy at a later date for no additional cost, meaning that it can be placed early and then endorsed at completion to cover an adverse entry within the period in between the original inception date and completion.

Title Policy

Insurers will want to do a limited amount of their own due diligence. It is different to what the legal representative would normally conduct, they do not list any identified risks and detail any encumbrances, the exercise is so that they can price the policy.

They review a small portion of the titles provided and, amongst other aspects, they will consider the number of which have known defects as a percentage, the type of issue, the age of the entries and how long the current owner has been in occupation of the property.

This information they can compare against their own statistics regarding the average number of properties with defects and the type and percentage of claims to calculate the premium rate.

Where required, we can provide an initial estimation of premium with very basic information about the number of assets, geographical spread and overall value.

The policy is usually placed for the benefit of the buyer of the assets but sometimes we have a first and second insured structure if we are placing cover for a seller and putting the portfolio to auction.

A basic policy, and the most cost effective cover, protects an immediate buyer for their period of ownership. Although it does not pass on to successors, the insured is still protected in future when they sell. If a subsequent purchaser in years to come buys a property from the portfolio it would usually be expected that they conduct detailed due diligence.

If a listed defect is identified it will be covered under the terms of the policy. There could be a situation when a known defect is discovered and the insurer would prefer to legally rectify the issue, for example, a small recent financial charge might be easier to pay than let it accumulate further.

The insurer can also rectify the issue by providing a separate policy (up to the property value apportioned on the original policy) to protect against the defect. Some insurers will agree to add a clause within the original policy confirming that they will provide additional indemnity at the market rate without further underwriting in future.

That means that if the property is being sold at a greater value the level of cover can be increased at reasonable cost.

We can create a policy on outset which will pass on to successors in years to come for a small additional charge which can be useful if the client intends to sell the whole portfolio or tranches of properties in future rather than individual assets. Some insurers restrict the ability to pass the benefit of the 'good and marketable' title cover to a few years.

Deposit premium – Staged Payment Policy

Dependent on the structure of the transaction we can consider a staged premium payment. This has worked particularly well for distressed asset disposals when we are acting for the lender or administrator selling but equally useful for any transaction between exchange and completion.

An insurer has agreed to place the policy on risk for a small up front deposit so the client does not have to pay a large initial premium with the concern that the transaction, for whatever reason, may not complete. In an auction sale it means that cover is in force at an early stage for a low initial outlay fully protecting the seller if the buyer discovers a problem.

The buyer benefitting from the policy does not need to conduct any due diligence on the titles of the property they are buying, however you can't stop them if they do investigate title.

The purposes of the policy being in force in that situation is to help maintain the value of the portfolio and if anything did arise then a) both seller and buyer were protected immediately and b) the buyer could not try to chip the agreed price on the basis that they had discovered a title risk.

No Search policy

If we are acting for the buyer then the No Search policy is often placed at completion but increasingly we are seeing transactions where the preference is to place them at exchange. We would always recommend at exchange if acting for the seller.

If there is a long time before completion then the buyer may not like to have to rely on a policy which protects against an adverse entry up to the point of policy inception, if that inception date is a few months old, similar to the way you would usually only rely on a search up to three months.

In that situation as previously mentioned, one of the insurers we work with has offered to endorse the policy at completion (up to six months after inception) bringing the date to protect against an adverse entry up to the completion date (effectively providing search validation cover to the new date) for no additional cost.

The level of cover provided by a No Search policy has been one of the biggest changes in recent years. Standard policies protect against the lack of a local authority search covering Local Authority Land Charges, Water Service Company and/or Coal Authority registers in accordance with forms LLC1 and CON 29/29R/29DW.

Some insurers will extend the cover to protect against the full Con29 optional questions and include additional searches such as desktop environmental, chancel and utilities.

Residential property or ground rent portfolios

Insurance is based on the indemnity level rather than the number of individual assets. For portfolios of numerous small value assets insurance can often provide a substantial cost saving in comparison to traditional methods and obtaining searches.

We fully appreciate that a prudent buyer will want to conduct some due diligence to ascertain what they are purchasing but often it is only based on sampling a percentage anyway. Insurance can allow a smaller sample to be assessed and the transaction completed within a shorter time period but safe in the knowledge that protection is provided for all of the assets.

Information required

To enable us to approach the market and provide quotations we need a list of individual properties, their values and addresses. We also need the client details for our own compliance purposes but for the purposes of an initial indication we are under no obligation to inform insurers if their details are confidential.

MOFS and most insurers we work with are happy to sign a NDA if required. We can obtain a sample wording and an initial indication from basic information.

A schedule of properties with individual values and addresses on an excel spreadsheet is the most useful format as it allows simple identification of the higher value assets and calculation of the total amount.

To obtain a firm indication we need to provide insurers with access to the title information for the properties so they can take their own sample. Providing the insurers and MOFS access to a dataroom is the easiest method, we can view it and insurers can take their own random selection. However, we also have our own secure online storage system.

If the client is not happy granting access to their dataroom you can upload the title information only to ours which is much easier than sending numerous emails. To short cut further, sometimes insurers will agree to choose properties from a schedule at random for the purposes of their sampling exercise and we just need to forward title documentation for those properties.

All the insurers we use are financially strong with an A rating or higher from the main rating agencies such as Standard and Poor's or AM Best.

MOFS have a considerable amount of experience placing portfolio insurance. We have arranged cover for lots of different types of property.
Many of which have risks which can be specific to a particular type of asset or business.
Our previous experience and knowledge of the market means we can place the most appropriate cover with the most suitable insurer for each transaction.

Key aspects of portfolio insurance include:

- Insurance is significantly quicker and can be used to speed up the acquisition/sale process by removing the need for lengthy title due diligence
- Facilitate a clean exit strategy – sell with benefit of a title guarantee and avoid title related contingent liabilities on the sale
- Policies can be arranged to extend cover to the first or second purchaser within an agreed timescale to assist in a future onward sale by replacing onward seller representations and warranties
- If full due diligence is conducted in future (often when the insured subsequently sells) and a defect identified, the insurance protects the original insured party and successor as appropriate by resolving the problem or providing cover for the known defect.

Contact: li@mofs.co.uk **Tel:** 0151 255 2600