



White paper:
**LEGAL
INDEMNITIES
INSURANCE**

Whether looking to purchase a property or buy land for development, adverse legal and planning issues can have a profound effect, with serious ramifications for asset value, letting and development potential and your ability to use it as security to raise finance.

All manner of legal issues can arise ranging from lost title documents and the existence of restrictive covenants through to a requirement to contribute to the repair of the chancel of the local church. Planning problems can also present challenges, with developers running up against the risk of judicial review of planning decisions arising out of objections from third parties who may be affected by their building works.

Fall foul of any of these and the implications can be expensive. As well as the legal costs incurred defending a challenge, a property owner could find themselves with a hefty bill to make changes. In extreme cases this could even mean demolishing a property. Abortive and increased costs and the consequences of business interruption can also be incurred.

Growing problem

While the government has taken steps to make the planning process simpler in a bid to encourage more development and stimulate economic growth, the risk of a legal challenge relating to property is on the up.

Property owners and investors are becoming increasingly aware of their private property rights and their ability to enforce them. Additionally, local authorities will continue to ensure they exercise control over property developments via planning and building control regulations.

As an example, the Localism Act 2011, which introduced changes to enforcement actions in April 2012, gives new powers to local authorities regarding breaches of planning permission. Local authorities may now take enforcement action in respect of a lack or breach of planning permission even where the building has been in place for many years and would therefore have previously gained immunity. Valerie Hosty, legal indemnities manager at Zurich Insurance, explains: "If an individual has deliberately concealed the works, the local authority will be able to apply for a planning enforcement order within six months of it becoming aware of the breach, regardless of how long the works have been in place."

A good example of this, which predates the Localism Act and demonstrates the legal wrangling it seeks to address, is the Surrey farmer who built his dream home, a castle complete with ramparts and cannon, in 2002 without planning permission. After hiding it behind straw bales and tarpaulin for four years, he expected the property to be immune from planning enforcement action. However the local authority argued that the removal of the straw bales constituted part of the building operations and the High Court ordered him to demolish it (*Fidler v Secretary of State for Communities and Local Government and Reigate and Banstead Borough Council*).

And this change doesn't only affect those looking to conceal their own building works as Valerie explains: "purchasers will not always be able to establish the full history of works and changes that have been made to a property over the years, so they may not be able to be sure that there aren't any issues regarding concealment."

Insurance solution

While the nature of potential legal and planning challenges is very varied, legal indemnities insurance can protect property owners and developers as well as provide reassurance to lenders. The need for cover is usually identified by a solicitor during the conveyancing process or when a property is being refinanced or redeveloped.

As well as providing protection from losses resulting from legal challenges, cover can also help to ensure a smooth property transaction. Without insurance, the potential risk of third party claims can hold up the property transaction and, in the most serious cases, prevent it altogether.

Common forms of cover

Although property owners and developers can encounter all manner of legal issues, three of the most common are absence of easements (for access or services), defects in title and restrictive covenants. Cover is usually written in perpetuity, covering the current and future property owners as well as any lenders. Due to the nature of the insurance, the insured must not disclose the existence of the policy.

The following examples demonstrate the types of claims that can occur in these areas and where legal indemnity insurance can provide protection.

• Absence of easements

Disputes in this area, which can include rights of way for access or the supply of utilities, are common and can be costly. As well as legal costs in defending a dispute, there can be expenses incurred creating an alternative access or route for services, which can be covered by insurance. Additionally, where alternative access is not possible, the insured can also claim for the resulting loss in the property's market value.

For example, a residential property owner took out a Zurich absence of easements policy to cover their lack of a formal right of way over an unadopted road leading to their property. The owner of the road decided to redevelop their land, including the road, preventing the property owner from using it for access.

Their absence of easements policy responded, picking up their legal costs and paying for the construction of a new driveway as alternative access. It also covered the cost of constructing a new garage as the policyholder's old garage became inaccessible due to prevention of their access.

- **Defects in title**

Where documentary evidence of title to land is not available, a defective title indemnity policy can protect a developer and owner-occupier from future claims.

As an example, in 2002 Zurich issued a defective title indemnity policy to a developer in respect of unregistered land they had bought. The seller of the land was unable to produce documentary evidence of title but could produce a statutory declaration in support of his possession.

Five homes were built on the land with the insurance passing on to the owner-occupiers. After several years they were issued with court proceedings by third party claimants alleging they were the true owners of the land and producing documentary evidence of title in support of their claim. The insured owner-occupiers were at risk of losing their homes but insurers fought their case on their behalf and paid out substantial legal and settlement costs to successfully resolve the claim.

- **Restrictive covenants**

Restrictive covenant indemnity insurance enables a property owner or developer to manage the risk of the enforcement of a restrictive covenant which could prevent them from using or developing land for their required purpose.

Where a restrictive covenant is, or may be in place, this cover can be used to complete the conveyancing process without the need for lengthy negotiations regarding the release of covenants as well as protecting the insured from future challenges.

As an example of how this works, a developer took out a restrictive covenant policy in respect of a proposed development of an estate of new houses. Local residents issued a writ in an attempt to obtain an injunction to prevent the development. Insurers negotiated and paid for an out of court settlement with the third party claimants as well as picking up the developer's legal costs. As a result the development was able to proceed.

Legal evolution

While many of the laws relating to property have been in place for many years, legislation and case law evolves over time to present new challenges. The following are examples of some current developments.

• Chancel repair liability

Due to archaic law dating back hundreds of years, property owners can find themselves liable for the cost of repairs to the chancel of their local church. Because the liability relates to the land, both old buildings and more recent developments can be affected.

Where there is a liability, repair bills can be significant, for example a Warwickshire farmer was charged £95,260 for repairs to his village church. These losses can be addressed through chancel repair insurance, which covers the charge for repairs as well as potential loss in market value following a claim. To further add to the complexities, although searches can be undertaken to find out whether a property is or may be subject to a potential liability, there is no single search that can be made to be absolutely sure.

But this situation is set to change. Because of the uncertainty around establishing liability, the government legislated to bring about changes with effect from 13 October 2013. This will affect property owners in a number of ways. For anyone buying a property after 13 October 2013 the situation will be much more clear cut. They will only be liable for repairs if the Church of England has registered the liability against the title to their property.

But, ambiguity for existing property owners will remain. Regardless of whether the Church has registered notice of it against the property, existing owners could still face a liability. Further, these changes have led to an increased incidence of registered liabilities. Where an interest has been registered the certainty around this could affect a property owner's ability to sell the property.

Insuring both existing and future property owners against both registered and unregistered potential liability will still be an option.

• Rights of light

Property developers can fall foul of another long established right - the right to light. This is most commonly gained automatically after light has been coming through a window for at least 20 years and enables the property owner to prevent anyone from putting up a building that would restrict this

right. As the right is gained by prescription (i.e. by passage of time) it is often difficult for a developer to evaluate whether their proposed works will be challenged.

Where a claim is made the remedy can be particularly draconian, potentially involving the demolition of the works to restore the right to light.

For example, in the case of *HKRUK II (CHC) Ltd v Heaney*, the developer was ordered to demolish parts of the top two floors of its building after it infringed the right to light of a neighbouring property.

But the situation could be about to change. In February 2013 the Law Commission published a consultation paper to attempt to strike 'an appropriate balance between the important interests of landowners and the need to facilitate the appropriate development of land'.

As such, it proposes that, in the future, property owners will not be able to acquire rights to light by prescription; that a time limit should be introduced in which property owners can protect their rights; and a new test is introduced to determine when damages should be awarded or building works stopped or demolished.

A final report and draft bill are unlikely until late 2014. In the meantime however, insurance remains a practical option in many instances where developers run the risk of infringing other property owners' rights to light.

Legal indemnities insurance opportunities

The growing risk of legal challenges relating to property have created increased opportunities within the legal indemnities insurance market. Although the need for insurance is usually identified by a solicitor during the conveyancing process, many property lawyers prefer to work with a broker when it comes to arranging cover for their clients. Similarly many commercial clients use their broker instead of their lawyer to source the cover they need.

A range of insurance products are available to provide protection for a variety of property-related issues. In addition, flexible solutions are often required to ensure appropriate cover is arranged. "There are various common legal indemnity or contingency problems we encounter on a daily basis which can be addressed through one of many different standard legal indemnity insurance products," explains Heidi Pflieger, solicitor and senior legal indemnities underwriter at Zurich Insurance. "But, we regularly see cases which are more unusual or complex, and for which it is necessary to produce a bespoke insurance solution to protect the property owner's interests.

Zurich Insurance plc

A public limited company incorporated in Ireland.

Registration No. 13460.

Registered Office: Zurich House, Ballsbridge Park, Dublin 4, Ireland.

UK Branch registered in England and Wales Registration No. BR7985.

UK Branch Head Office: The Zurich Centre, 3000 Parkway, Whiteley, Fareham, Hampshire PO15 7JZ.

Authorised by the Central Bank of Ireland and subject to limited regulation by the Financial Conduct Authority. Details about the extent of our regulation by the Financial Conduct Authority are available from us on request. These details can be checked on the FCA's Financial Services Register via their website www.fca.org.uk or by contacting them on 0800 111 6768. Our FCA Firm Reference Number is 203093.

