Ignorance is bliss - or is it?

Insurance No-search policies can be an attractive alternative to carrying out conveyancing searches. However, they are not a panacea, as Sarah Quy explains

No-search insurance is an umbrella term. It covers a range of policies that are used when an owner or buyer of land insures against the risk of loss from issues that would have been disclosed by the searches and enquiries that a prudent buyer would have made before entering into a contract.

Search delay insurance is useful where a buyer has applied for searches but the results have not been received before completion. This was used particularly in the 1990s, when local authority searches could take several weeks, but it has been less popular since the introduction of NLIS online searches. A similar type of policy – search validation – found a niche in the residential market in the HIPs era because searches in an information pack were often out of date before exchange of contracts, so insurance was put in place instead of repeating the searches.

Today, a no-search policy is sometimes obtained in connection with refinancing transactions because it is quicker to buy the policy than to carry out the usual searches, and the borrower already knows a fair amount about the property. The policy can also be cheaper than searches; this is particularly attractive where individual properties are of low value, such as those in residential portfolios owned by housing associations.

Main issues

Although a buyer or borrower may carry out some searches, it may decide rather than investigating a particular risk to insure against it instead. For example, in the case of chancel repairs, some practitioners prefer to insure against the possibility of a risk arising and being enforced rather than commissioning a personal search, in case this uncovers something that would render insurance impossible or prohibitively expensive.

Environmental risks can be included in general no-search policies for a slightly increased premium, but are usually covered under a separate specialist policy (*EG* 16 October, p121).

One area in which no-search insurance is rarely used is development work. Such policies are difficult to obtain and are expensive. Moreover, the owner or developer of such sites needs to know as much as possible of the history, planning position, availability of utilities, environmental aspects and third-party rights that affect the land so as to decide whether to proceed with the deal and, if so, at what price and how to accommodate such issues. Insurance cannot assist much in these issues.

In a residential context, the CML's *Lenders' Handbook* allows each lender to specify whether it will accept insurance in lieu of search results. Many will do so, but with qualifications: the borrower may have to agree to bear the risk or carry out Land Registry searches; its solicitor may have to give an unqualified certificate of title, and/or confirm that the insurance policy adequately protects the lender.

Lenders tend to be cautious about such policies (particularly in uncertain times) in respect of commercial transactions. This means that they are most prevalent in deals with little or no third-party financing.

Limited due diligence exercises are common with regard to commercial property portfolios. Buyers sometimes consider a random sample of titles. Alternatively, they may divide the portfolio into tranches and investigate title to only the most valuable or operationally significant properties, do nothing in respect of those of lowest value to the business and insure those in between.

A buyer may choose not to carry out any investigations and instead insure the entire portfolio against both title defects and search risks. This approach tends to be used where there is insufficient time to undertake meaningful due diligence, where due diligence is not cost-effective because of the low value of the properties, or in deals such as pre-pack administrations where there is too little information to allow for meaningful due diligence. The point to bear in mind is that the insurer will still require basic information on the properties (such as title numbers, owners' names and the details of any third-party consents needed for the sale) in order to carry out a sampling exercise to assess the overall level of risk.

A typical policy will indemnify the insurer against: a reduction in value of the property following the disclosure of an insured matter; insurer's costs in dealing with a problem; and any other costs directly incurred by the insured with the insurer's consent arising from the incumbrance.

The cost of the policy will depend on how recently any searches were carried out, how long the premises have been in the present owner's hands, the nature of the land use both before and after the deal and the number of properties in the portfolio.

When choosing a policy, a client should consider whether it needs to cater for the interests of a lender or other third party, the duration of the policy and whether to include an escalator clause to factor in a rise in the value of the property over the lifetime of the policy.

A key feature of the policies is that they can include cover for issues that arise on a subsequent sale of the property. When the present buyer sells, the future buyer might decide to conduct searches and enquiries. If it discovers something of concern, the policy will cover it.

The problem with insurance is that a financial payout is not always an adequate remedy

Looking to the future

Conveyancers are often accused of clinging to old ways. However, the problem with the insurance solution is that it assumes that a financial payout is an adequate remedy for every issue that would have been revealed by investigation.

If, for instance, a property is subject to a right of way, the buyer that chooses insurance over searches would be compensated for the reduction in value of the land, but this would not address the aggravation of living with a footpath through the garden or being unable to proceed with a development plan.

Developers and buyers that retain a long-term interest in a property after a transaction, such as those that hold and manage investment properties, will continue to carry out the usual searches and enquiries.

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