

Legal Indemnity Insurance

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Legal indemnity insurance: a panacea?

Legal indemnity insurance has gained a firm foothold in the UK conveyancing market since it arrived in the UK from the USA several decades ago. It's estimated that about 20% of all residential property transactions now involve the purchase of at least one legal indemnity policy. In commercial property transactions legal indemnity insurance is often critical to unlocking commercial development sites, allowing a developer to obtain funding in order to proceed with the project. Twenty years ago indemnity insurance used to be the exception rather than the rule. Now it has become the rule; a panacea for title defects.

As well as this change in the landscape of conveyancing we are witnessing a gradual shifting of risk away from the professional indemnity policies of solicitors onto legal indemnity products. A wide range of legal indemnity products are available to solicitors and straightforward cover can be arranged with a stroke of a pen or a few clicks of the mouse. Indemnity insurance is simple, efficient and underwrites the value of property investments. However, there are some points of good practice that solicitors must consider when arranging legal indemnity insurance, in order to provide good advice to clients and protection for themselves. Set out below are some of the issues that we come across when handling claims against legal indemnity policies.

Duty of fair presentation

The Insurance Act 2015 contains imposes a duty of fair presentation on a person making an insurance proposal. This is an obligation to disclose every material circumstance which would influence the judgment of a prudent insurer. Legal advisers usually prepare the proposal and either submit this to the underwriters directly or via the client's broker. It is vital that careful consideration is given to the content of the proposal. Where the failure to make a fair presentation of the risk is deliberate, reckless or negligent this may result in the policy being avoided.

Managing clients' expectations

Busy property lawyers may not always take the time to read indemnity policies and explain the cover to their clients. An important point to note is that a claim is made against a legal indemnity policy may not result in the insured defect being 'fixed'. Instead it may result in a payment of money to a property owner to compensate them for losses sustained as a result of the defect. A policy is not a magic wand and insured property owners have a duty to mitigate their loss. Insurers will not usually fund litigation unless the value of the claim warrants it. Clients who are facing disputes affecting title to their home may find this particularly difficult to accept.

Buy the right policy

This may sound obvious but we have seen plenty of cases where solicitors have purchased the wrong type of legal indemnity policy. Legal advisers need to take particular care when arranging policies to cover risks relating to access. It is important to think about whether a right of access is really what is required. If the policy benefits a property owner or developer who will be carrying out works to the access they will probably need cover for ownership of the access: a defective title policy rather than an absence of easement policy.

Where a property owner will be carrying out works to the property, a straightforward continued use policy will not be appropriate. A development and change of use policy will provide additional cover including the cost of abortive works and professional fees.

When policy changes are needed

Most legal indemnity policies last indefinitely until the risk they cover has been discharged. Solicitors advising clients who rely on a policy need to check that the cover remains appropriate. Cover is capped at a defined limit of indemnity which will normally be the current market value of a house or the gross development value of a development site. If an increased limit is required you should contact underwriters to request a policy endorsement in return for an additional premium.

The Insured Use definition is also key. Post-planning cover for development is often tied to a specific planning consent. If the client obtains a revised planning consent or varies the original planning consent you will need to update the underwriters and obtain an endorsement to cover

Making a claim

When an event occurs that triggers a claim against an indemnity policy a client may turn to its legal advisers for advice. The first thing to do is read the policy. Claims must be notified promptly to avoid possible prejudice to insurers. Communication with claimants must be kept to a minimum without insurers' prior approval. Most importantly, the existence of the policy must never be disclosed. Most legal indemnity policies contain a non-disclosure condition and breach of the condition may mean that cover is declined.

Legal indemnity insurance has streamlined the conveyancing procedure and taken some of the risk away from property lawyers. As we move towards a conveyancing model where indemnity insurance becomes ever more prevalent it's important that property lawyers do not get complacent. If in doubt, speak to the underwriter.

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