# Ten Good Habits and Commercial Property Due Diligence

# in Commercial Transactions

- Searches, enquiries and client inspection
- Commercial Leases and ideas for dealing with tenants in the downturn
- Tips and traps for effective reporting on title

## USEFUL WEBSITES

- Property Litigation Association
- Property Protocols
- City of London Law Society
- Modelcommerciallease.co.uk

## 1.GENERAL ISSUES

A number of general issues are worth exploring from the outset –

- Do we identify client objective?

Why is the client buying or selling the target property?

Are there any searches, enquiries or might anything arise on client inspection that is relevant to that objective?

- Have we limited the scope of our retainer?

If we are doing similar work on behalf of clients on a regular basis we can agree on a protocol with a client as to what will be done or not done in connection with transactions rather than agreeing on the scope of our retainer for each transaction. We will consider the retainer in more detail later.

- Have we explained to the client the limitations of due diligence?

Examples of the limitations relating to due diligence include –

Some very basic points

a) A Land Registry Title Plan does not reveal the physical extent of a registered title

b) A search result might be defective and or has limitations

c) Our costs estimate is provided on the basis that at a transaction proceeds normally

d) If our client is using other professional services – valuers, accountants etc who is doing what?

Some less obvious points:

a) Client inspection – a client will have actual notice and is deemed to have constructive or imputed notice of anything a reasonable inspection would reveal.

b) Due diligence may well reveal issues that warrant further investigation.

c) If acting on a purchase of a multi-let building who is going to advise on management issues relating to lettings – managing agents or our firm

d) Who are we reporting to and what is their role?

To avoid claims:

- Do the simple things well
- Explain what you are going to do and what you are not going to do.
- Communicate effectively with clients and explain whether further investigation or enquires are necessary.
- If further investigation is necessary explain why it is necessary and what is necessary.
- If the client does not want additional work to be undertaken record your instructions

## 2.SCOPING THE RETAINER

In a commercial transaction, it is imperative to scope the retainer. A reminder of some of the issues involved were explored in the case of Spire Property Development LLP and Anor v Withers LLP [2022] EWCA Civ 970

In this case, the defendant solicitors, Withers, had acted for the claimant property developers in their purchase of two properties (the "King's Properties") for development in 2012. After the purchases were completed, the claimants discovered extra-high-voltage cables ("HVCs") running across both properties, which rendered it impossible for them to redevelop the properties in the manner they had intended.

The claimants alleged that Withers were negligent in 2012 in failing to carry out a form of search, called a UKPN search, that would have discovered the HVCs before the claimants completed the purchase of the King's Properties. They also alleged further negligence in early 2014, when the claimants, having discovered the HVCs, sought advice from Withers as to their rights as against UK Power Networks (the owners of the HVCs) under the Electricity Act 1989.

At first instance the Court found for the claimants on both counts, finding that Withers was negligent as alleged in both 2012 and 2014 and awarding the claimants substantial damages in respect of each breach.

Summarising the effect of the previous authorities dealing with the scope of a solicitor's duty in the ordinary course of providing services further to a retainer (such as Minkin v Lansberg [2015] EWCA Civ 115 and Lyons v Fox Williams LLP [2018] EWCA Civ 2347) Carr LJ, delivering the main judgment of the court, stated:

The general principle is thus that a retainer solicitor owes no duty to go beyond the scope of their express instructions and give advice in relation to other matters. This is subject to the qualification that the duty extends to giving advice that is 'reasonably incidental'... [57]

Her Ladyship then observed that, in an ordinary case, the retained solicitor will owe a concurrent tortious duty. However, '[w]here there is no retainer, different considerations arise. The concept of assumption of responsibility... remains the foundation of the tortious liability' [59].

In such cases, the questions of whether any responsibility had been assumed and, if so, the 'extent of any such assumption' should be judged 'objectively in context and without the benefit of hindsight' and the 'primary focus' must be on exchanges between the solicitor and client. Therefore, the enquiry in each case was going to be extremely fact-sensitive [60].

It was observed that many of the previous authorities fell into 2 categories: those involving the scope of a solicitor's duty under the retainer, and those involving 'one-off' enquiries from former or prospective clients.

Carr LJ then noted the fact that the Developers had relied heavily on Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20 and Khan v Meadows [2021] UKSC 21 in resisting the appeal; in particular, the 'purpose test' and the analysis suggested by the Supreme Court which involved looking at what risk the duty was supposed to guard against, and whether the loss suffered represented the fruition of that risk. However, on considering this, Carr LJ stated that:

...the purpose test is inapposite to the question arising here, namely the content of the duty owed by the professional as a matter of conduct. By contrast, the purpose test was formulated in order to address the recoverability of damages; to that end it is relevant to ask whether the scope of the professional's duty extended to certain risks in respect of activities which the professional was required to perform. The purpose test addresses the question of scope of duty in law (and the SAAMCO principle) rather than the extent of the duty in the first place. Indeed, the purpose test was formulated for a different exercise and on the assumption that the professional's obligation to advise fell within the scope of the duty... [71]

This is an important distinction. Manchester and Khan were both concerned primarily with whether particular heads of loss fell within the scope of the duty owed by the professional. Of course, there has been a great deal of authority on this point, dating back to SAAMCO. The Court of Appeal in Spire were considering the distinct question: what services, precisely, had the professional agreed to provide? Clearly, where there is a detailed retainer, this will be easily determined. In cases where there is no retainer, or the retainer is less detailed, or in cases such as Spire itself where the retainer has ended, it will be more difficult to answer that question.

On the facts, Carr LJ stated that the 'basis of any liability' would be an assumption of responsibility by Withers, as there was no contractual duty to advise. The 'central question', therefore, was the 'scope of the assumption of responsibility on the facts' [72].

This was to be determined on an objective construction of the relevant exchanges between the Developers and Withers. Whilst the court noted that these were 'not to be read as if they were formal legal documents, and must be considered in the context that they were exchanges between a solicitor and former client who were familiar to each other and involved in ongoing professional relationships', the Developers were 'both highly experienced and well-resourced and a party 'whose communications and any requests Withers was entitled to take at face value [73].

Carr LJ reviewed the communication and concluded that:

1. From the very outset, there was 'implicit criticism of Withers', and an objective interpretation of the communications was 'guarded and restrictive' rather than 'open and expansive' [77].
2. Though the Developers' email raised the possibility that they were considering the possibility of having the cables moved at someone else's expense, Withers were 'not asked to (and did not) comment, let alone advise, at any stage on that possibility [80].
3. In fact, the Developers only questions related to what had happened at the time of the purchase. The queries raised, and Withers' answers 'had all been backward, not forward, looking' [84].

Objectively, therefore, in answering the Developers' queries, Withers had not assumed responsibility 'for anything going beyond answering those three questions' [91] and Withers were not to be taken as having assumed a duty to advise on the wider rights and remedies that the Developers may have had. This conclusion was also reinforced by the wider context that, at the time of the communication, neither the Developers nor Withers knew what legal authority the utility companies had for laying and maintaining the cables.

The case is an important one where the question is precisely what extra-contractual duty a solicitor has assumed and will be of interest to litigants in similar cases; either in the directly comparable scenario of questions being posed to a solicitor sometime after the retainer has ended, or more generally, where a solicitor is asked to advise on something outside the scope of the agreed retainer.

The following points can be distilled from Spire:

1. Where the query/advice is outside the scope of the retainer, the question to be

determined is what the solicitors have assumed responsibility for.

2. This is a highly fact-sensitive exercise and must be judged objectively by reference to the communications passing between the solicitor and client, and to the context in which those communications were made.

3. For that reason, the extent to which previous authorities will apply by analogy will be limited. In that sense, courts will have similar latitude in determining the scope of the solicitor's assumption of responsibility as they do when interpreting contracts. Therefore, unfortunately, it may be difficult to predict the likely outcome of litigation with any great certainty; something that ought to be stressed to clients.

4. However, there are factors that may be likely to influence the court's approach. In Spire, Carr LJ specifically pointed out that the Developers were sophisticated clients, and therefore Withers were entitled to take their communication at face-value.

Spire does appear to suggest that, at least in the case of sophisticated clients, the court will require them to be explicit if they wish for advice on a particular topic and will be hesitant to impose wide-ranging obligations on solicitors to advise if the request itself was equivocal.

In scoping the retainer the conveyancer can deal with a number of issues –

- Reduce or eliminate liability to the buyer client for loss sustained as a result of a breach of contract.
- Limit liability for claims arising from the negligent provision of information to the loss sustained arising from the information provided being wrong.
- Highlighting what work the conveyancer will be doing on behalf of the client.
- Highlighting what work the conveyancer will not be doing

- Emphasising where the conveyancer will be reliant on third parties including the buyer client during the conveyancing process.
- More generally the provision of information to the buyer client as to the conveyancing process, the duties and obligations owed by the seller and buyer, the risks associated with the conveyancing process and how those risks can be identified and assessed.

Some basic issues are worthy of repetition –

1. The retainer should be in writing (although there is no formal requirement) as it will form the basis of the contractual relationship between the conveyancer and the client.

2. The contract is made expressly and the terms of the retainer are incorporated into the contract by the client signing a copy of the conveyancer's retainer letter, the conveyancer's engagement letter and or the conveyancer's standard terms of business. It can be implied by the client acknowledging receipt of the retainer letter or standard terms of business and then instructing the conveyancer to proceed.

3. A failure to record the retainer in writing will place the conveyancer at a disadvantage. For a scary example of the consequences remember the case of Griffiths v Evans [1953 2AllER1364 . In this case, the parties disputed the terms on which the solicitor had been engaged, and in particular as to the scope of the duty undertaken by and entrusted to the solicitor as regards advising the client.
   The Court of Appeal held that where there is a dispute between a solicitor and the client about the existence or the terms of an oral retainer the Court may give some preference to the client's evidence.
   Denning LJ, dissenting, said: 'On this question of retainer, I would observe that where there is a difference between a solicitor and his client upon it, the courts have said, for the last 100 years or more, that the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it. The reason is plain. It is because the client is ignorant and the solicitor is or should be, learned. If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences.' 'The general principle is that 'a solicitor is the agent of his client in all matters that may reasonably be expected to arise for decision in the cause".

4. A key component in a negligence claim against a conveyancer is the duty of care owed between the conveyancer and the client. Establishing that a duty of care exists between a professional and their client is therefore essential. The lack of clarity around what the professional was instructed to do and whether in acting for their client there has been a breach of their duty of care becomes difficult to determine without a clear and precise retainer. Where a negligence claim is being considered by a client or former client a key document for the claimant to rely upon is the retainer or engagement letter. Where a clear, written letter of engagement or retainer setting out the scope of the services is provided to the client and is agreed upon with the client the task of identifying whether a duty of care is owed becomes clearer.

5. The retainer or engagement letter in addition to informing the client what is to be done should also clearly state what is not to be done. As we shall see it is prudent for a conveyancer to state clearly that advice will not be provided on certain matters and that the conveyancing process does not protect a buyer client from all risks associated with the conveyancing process. We will look at what should be excluded from the retainer later.

6. Where engagement letters or retainer documentation are vague as to the scope of services being performed, or even worse there is no engagement letter at all the conveyancer is even more vulnerable to claims in negligence and/or for breach of contract.

7. The courts can infer from the conduct of the parties the existence of a retainer between a conveyancer and a client and this inference is obvious in a conveyancing transaction when a client pays for searches on a purchase and a conveyancer requests searches from a relevant search provider. On a sale where a conveyancer obtains official copies of the register or starts the preparation of a contract bundle again, we can see clear indicators that would infer a retainer. This situation arose in the case of Midland Bank v Hett, Stubbs and Kemp [1978 3 WLR 167. In this case a solicitor had failed to register an option as a land charge over property. The court was asked what steps should have been taken by a solicitor in the conduct of a claim: The claimant sought to rely upon the fact that Mr Stubbs was a client's solicitor under some sort of general retainer imposing a duty to consider all aspects of his interest generally whenever he was consulted, but that cannot be. The court considered that there is no such thing as a general retainer in that sense. The concept of a client having a solicitor was meaningless in seeking to establish any general duty apart from that arising out of a particular matter in which his services are retained. The court found the extent of the duties owed to a client by a solicitor depended upon the terms and limits of that retainer and any duty of care to be implied must relate to what he is instructed to do.

   In this case the court decided that the duties owed by a solicitor to his client are high in the sense that the solicitor holds himself out as practising a highly skilled and exacting profession. The court explained the limits of the duty by explaining that perhaps a particularly meticulous and conscientious practitioner would, in his client's general interest, take it upon himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. That would be an exception to the rule and would not be the test to establish liability. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases . . demonstrate that the duty is directly related to the confines of the retainer.' On the facts of this case the solicitor defendants accepted 'a common law duty not to injure their client by failing to do what they had undertaken to do and which, at their invitation, he relied on them to do.'

8. As be seen from some of the case law we will look at later when a retainer is agreed the scope of work should also be regularly monitored and if it becomes clear that the scope has changed then this should be addressed either by sending an update to the engagement letter, a written update or at the very least it should be discussed with the client and recorded in an attendance note.

9. Conveyancers need to know that where there is any uncertainty about the scope of the professional's instruction and there is no written record of this and/or a vague retainer letter or other document and there is a subsequent dispute as to what he/she was instructed to do, the professional will be in difficulty and at a disadvantage should any claim arise from this. We frequently raise this argument when acting for clients where there is a lack of or no written record

of the scope of work agreed. We can look back at Griffiths v Evans [1953] again where the trial judge said "If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences."

10. Before we move on it is only right to explore the other side of the coin namely where a conveyancer or solicitor provides a retainer that is clear on what was being instructed to do and so any resulting alleged negligence may be difficult to prove. An example of this can be found in the family case of Wright v Rix and Kay Solicitors [2017] where the Court provided judgment in favour of solicitors sued for negligence by a client who said the solicitors should have advised beyond the terms of the agreed retainer. In this case a solicitor was instructed to act for the claimant in her divorce petition and the estimate of costs for this work was quoted as £500 plus VAT and disbursements. Separately to this work, the claimant told her solicitor that she was going to enter into mediation with her husband in relation to various financial matters. The claimant's solicitor was not involved in the mediation and the claimant ultimately reached a settlement with her husband. Subsequently, the claimant alleged that her solicitors were negligent as they failed to properly advise her on financial matters relating to the mediation and settlement. The trial judge had the benefit of seeing the defendants file of papers and said:

*"…*it is very clear that the terms of the retainer entered into between the parties were limited and I am satisfied that the defendant carried out the terms of their retainer and carried out the work which they agreed to do. It is clear that they did not give any overall financial advice. It is equally clear they were not in a position to do so".

This case is useful to explore as it also emphasises the importance of considering not only the written retainer entered into at the outset of a claim but the entirety of the file. The retainer acts as the starting point for considering what the professional instructed to do but the file should clearly evidence what work was carried out and what advice was provided.

11. Flowing on from the previous point in a conveyancing transaction care should be exercised where additional work is required. Whether the work involves the provision of information, explanation or advice consideration should be given as t whether the work is within an existing retainer or whether that retainer requires explicit extension or amplification. We will explore this point later.

12. Given the importance of the retainer in reducing potential liability for a conveyancer it is important that the retainer or engagement letter is provided to the client as soon as possible. Where contact is made with a client beforehand the client needs to be made aware that the retainer or engagement letter or terms of business of the conveyancer will regulate the relationship going forward.

## 3.COMMERCIAL ENQUIRIES BEFORE CONTRACT

CPSE's should be insisted upon in every transaction and should capture everything that the seller is aware of in respect of the property which the buyer is unable to determine from public information or an inspection.

Care must be taken when acting for the buyer or seller to determine who has completed the form. For example, have the replies been completed by the seller or the seller's solicitors? Many of the questions are complex and there is nothing to guarantee that the nature of the question has been fully explained by the seller's solicitor.

Both the solicitor for the seller and buyer should ensure that the answers given to the CPSE's are as full and complete as possible.

For example, if you consider CPSE.1 enquiry 4.1 a simple negative response will leave the seller open to a claim in the event there is something they should have disclosed. A one-word yes or no response could generate vulnerability.

As you will be aware the commonly encountered response "Not so far as the Seller is aware, but no warranty is given in that regard and the Buyer should rely on the results of its own survey, searches and inspection" is in essence the same answer but it puts the onus back on the buyer to make sure that the avenues of investigation first. But what is considered to be within the seller's "awareness"?

You will recall William Sindall plc v Cambridgeshire County Council [1993] EGCS 105, it was held that answering an enquiry in terms of the seller's "awareness" implies that the seller has taken reasonable steps to identify the correct answer. This can include, for example, checking its records for the property and checking with individuals within its organisation that may have the requisite knowledge.

Where information is publicly available to the Buyer it will have no recourse against the seller unless the seller has deliberately and fraudulently withheld information in the CPSE's.

Of course, the buyer should be advised to inspect the target property and commission a survey as well as undertake relevant searches.

The solicitor acting for the buyer needs to read the replies to CPSE enquires in the context of the seller's title and the result of the searches undertaken. The replies should not be read in isolation and answers provided should be cross-referenced against other information received.

This point can be developed in order to avoid negligence claims. Searches, replies to enquires and due diligence in relation to the title should not be considered in isolation,

To put this into context if one considers CPSE enquiry 1.1 concerning boundaries. The answer provided by the seller should be read in conjunction with the result of the SIM search, the title plan, and the property description. The best information possible should be available so the report on title to the client can be as detailed as possible to get as close as possible to the exact position of the boundaries.

A Data Layers Search might be useful in this context.

Where the CPSE's are incomplete the solicitor for the buyer needs to ensure that the missing items have been received and reviewed. Consider should be given to providing a client with a general explanation of the extent to which replies to CPSE enquiries can be relied upon when reporting to the client and what information is missing at exchange. The solicitor should be prepared to raise further enquiries particularly if the replies are unclear or considered misleading or contradictory.

In addition to the replies to CPSE's the seller's conveyancer may attempt to carve out representations or warranties by a provision in the contract which could extend to the CPSE's and correspondence.

Remember in commercial property transactions it is possible to limit or exclude liability for information generated in CPSE's as the attitude of the courts seems to be commercial parties can distribute risk between them.

Before we leave this topic consideration should be given to the following:

- CPSE's can be pre-populated by the lawyer acting for the seller. If this is the case the client needs to know that the information in the CPSE's is information that could lead to the seller being liable for misrepresentation.

- Where the seller deals with the replies it might be necessary to advise the buyer that the replies have been generated by an individual and then explain that individual's knowledge

- If acting for the buyer warn the client to use the enquires as a checklist and exercise caution about the availability of a claim for misrepresentation.

# 4.SEARCHES

## AVOIDING PROBLEMS

a) Explain the limitation with searches

b) Does a search result warrant further investigation

c) Ensure the report on title or information on search results transmits key information effectively

Before we go any further I would like to highlight that search results are sometimes defective. A case highlights the problem –

Chesterton Commercial (Oxon) Ltd. vs. Oxfordshire County Council [2015] EWHC 2020 (Ch).

The claimant was a small property developer which sought clarification in its local search of the status of a small parcel of land fronting a property that it wanted to buy. Chesterton Commercial wanted to redevelop and convert the property into mixed commercial/residential accommodation, each with the benefit of its own dedicated parking spaces.

In its responses to enquiries in June 2007, the local authority replied with confidence to Chesterton Commercial saying that the area of land in question did not form part of the public highway and was not maintainable at the public's expense.

The local authority was seemingly unaware that the land in question had been the subject of correspondence between the Henley Society, a local conservation group, and officials at Henley-on-Thames Town Council, as to whether the land formed part of the public highway. The land in question had formed part of the main road from Oxford to Marlow for hundreds of years but had fallen into disuse when the route of the highway was changed in the early 1900s.

Remember public highways can only lose this status if a formal 'stopping-up' order is applied for and approved by the relevant authority.

At first, the county council refused to agree that the land formed part of the public highway. However, the High Court heard how the county council had been carrying out investigations for over a year, with the assistance of a local highways expert, who had confirmed in writing that the land certainly did still form part of the highway; a position clarified by an independent local counsel.

The Court was unsympathetic to the county council's defence that it was sufficient that the search result would accurately show what was currently designated as "highway". Rather than provide an unequivocal response that the land was not maintainable at public expense, the court held that the county council should have at least made a note that the matter was under investigation.

The council was found to owe a duty of care to the claimant due to the principles established in the case of Hedley Byrne v Heller. In particular, councils are well aware of the purpose of search results in conveyancing, and that a buyer places reliance on the contents of such results. As such, the county council had acted negligently.

The claimant was entitled to recover the difference between the price it had paid for the property, believing the land it intended to use as space for private car parking spaces to be private land, and its value as a public right of way. The claimant was prevented from claiming for loss of development profits as the Defendant could not reasonably be expected to know the claimant's intention on purchasing the property.

The range of searches available to conveyancers conducting due diligence in property transactions has increased in recent years and puts conveyancers in a difficult position. What searches should they make on behalf of buyers and how far do their duties to report to their clients extend?

Appropriate advice should involve:

a) Identifying the searches that are available. Your search provider will generate a list.

b) Highlight those searches that are essential

c) Ask the client if there are any additional searches the client would like to have undertaken

d) Check the client objective and think about which additional searches might be appropriate.

Two other cases are worthy of consideration

The case of Orientfield Holdings Ltd v Bird v Bird LLP [2015] may provide some assistance. ,

In this case, the Claimant brought proceedings against its solicitors for failing to advise on the results of a Plansearch Plus report obtained in connection with the acquisition of a residential property for £25m. The significance of this was that a Plansearch Plus reports contained useful information about planning activities in the area around a property dealing with a wider geographic area than would ordinarily be covered by a local search. The report revealed that a nearby school was to be redeveloped and enlarged.

The seller had opposed the redevelopment on two occasions, but stated in replies to pre-contract enquiries that he was not aware of anything "nearby" that adversely affected the property, and the buyers' solicitors made no reference to the school development in their report to the buyer. The buyer became aware of the position shortly before completion, rescinded the contract, and settled proceedings against the seller just before trial on terms that the deposit was to be split equally between the parties, with each party being responsible for its own costs.

The issue that came before the Court was whether the buyer's solicitors liable for the buyer's losses?

The court held that solicitors are obliged to undertake investigations that a client expressly or impliedly requests and, if they consider that information might be important to a client, they have a duty to bring it to the client's attention.

On the facts having requisitioned the report, the Defendant was under a duty to explain the results to the buyer. A reasonably competent solicitor with the report to hand would have considered any development within 100m of the property to be of significance and it had been a breach of duty on the part of the Defendant to say that the information in the report did not reveal anything that adversely affected the property.

The trial judge accepted that the buyer had read the law firm's report on title and, since the buyer was spending more than £25m, and had been expecting to spend £4m on refurbishment, it had been fully entitled to view the school development as adverse to the value of the property. If it had known about the development, it would have withdrawn at an earlier stage or instructed the firm to make further inquiries before assuming any financial risk. Consequently, the buyer's claim was upheld.

His Honour Judge Pelling on considering Breach of Duty found in his judgment that the Solicitor from the Defendant company

- "was in breach of his duty by failing to include in the ROT a summary of the effect of the Plansearch report, the further investigations that could be undertaken with the LPA without undue difficulty, cost or delay, and to invite instructions in the light of that summary. By doing so, he would have given Ms Chow the opportunity to decide whether she wished to proceed, withdraw or obtain further information before deciding". In considering Causation, His Honour Judge Pelling ruled that the final point to prove this issue was the email to the Defendant Solicitor acting on the property purchase where the Claimant had said
- "I am sure I would not have entered into the purchase agreement if I had known that there was going to be a school for 1250 pupils and 250 staff in the same block as my property."

The case highlights a number of difficult questions for conveyancers arising from how they exercise their professional judgment. What searches should they make in the first place? And what information revealed in the results will a buyer regard as important?

We are back to the same question we posed earlier. Do we know our client's objective? The case also highlights another interesting point perhaps law firms should supply clients with more information about the searches that are available as part of the due diligence process and obtain full instructions from them at the very outset so that everyone knows where they stand.

The case of AW Group Ltd v Taylor Walton [2013] EWHC 2610 (Ch); [2013] PLSCS 224 reveals a number of issues in the due diligence process.

The case involved advice given in connection with the acquisition of an industrial estate. The buyer used some bare land at the rear of the site to create a hard standing for heavy goods vehicles, which brought it into conflict with the local authority planning department planning authority. The authority subsequently issued an enforcement notice requiring the removal of vehicles and the hard standing. The buyer appealed. Unfortunately, the appeal was dismissed because as the site was in the green belt and the buyer was unable to establish the existence of circumstances that would justify the grant of planning permission for such use.

The buyer issued proceedings and the case came before the High Court which decided that the buyer's solicitors had been negligent. The interesting point to extract from this case is that the Court held the Solicitors were not necessarily under a duty to provide detailed planning advice in connection with the purchase. They should have given their clients sufficient information about the planning position to enable them to seek specialist advice, if necessary. It was no excuse for them to say that they did not know what their clients' intentions were; it was up to them to find out and then to ensure that their clients had all the relevant information and understood the legal position. This point highlights the need to ascertain client objectives. Further, it confirms the need to ensure when producing a report or certificate of title to be careful to ensure what advice is being given. In short, we need in the Report or Certificate to be specific about the terms of our retainer.

Additional assistance was provided by the High Court which confirmed that the legal advice provided by the buyer's conveyancer, like any other communication, should be in terms appropriate to the comprehension and experience of the particular recipient. We need to take this forward when producing our report on title or certificate.

The facts of the case need a more detailed examination. The defendant solicitors' report on the title had disclosed very little about the planning position because at the time the report was drafted further information from the local authority was awaited.

The report on the title did state that the property was in the green belt and also in an area of outstanding natural beauty and great landscape value. Unfortunately, the report did not go on to explain the significance of this, or state that it might make it more difficult to obtain planning permissions in the future. In dealing with this point the court emphasised that a professional adviser does not necessarily discharge his duty by spelling out the obvious, without explaining the implications.

Another interesting facet of the case was the interesting and frank disclosure but the claimant buyers' who honestly advised they had not read the report on title provided. The court held the planning status of the site was of such significance in this case that the law firm should have communicated directly with the buyers in a manner that could not have been ignored.

The judge went on to decide that the buyer's solicitors had received a copy of a planning permission that should have alerted them to the potential problem before contracts were exchanged, and should have raised this with their clients. He also decided that the buyers were risk takers, who would have proceeded with the purchase anyway as a result of the commercial pressures they were under. Consequently, the negligence claim came to nothing because the buyers would not have acted any differently, had they been differently advised.

## THE SIM SEARCH

The Land Registry MapSearch function does not provide the buyer with any indemnity pursuant to the Land Registration Act 2002 and so does not preclude the need for a SIM search.

As a result, the SIM search is vital to establish what the seller is purporting to sell is in fact owned by the seller. Of course, it will reveal if the land is unregistered and all registered titles including mines and minerals titles.

The search will reveal any pending applications and of course, cautions against first registration. It will also assist in confirming the boundaries of a property, particularly where boundary features may have altered over time or where the title plan is from an older version of the Ordnance Survey (OS) Map. Mapping discrepancies can be avoided by a SIM search.

This search has a wider scope than only being necessary for an acquisition of unregistered land. The search should be used when acting for a buyer of complex registered titles or where there are issues such as the potential for boundary disputes or boundary sensitivity.

## LOCAL AUTHORITY SEARCH

The Local Authority Search and Local Land Charges Search should be undertaken for every transaction along with any optional enquiries as necessary.

The buyer client must be made aware of the limitations relating to the Local Authority Search. Where the local search warrants additional searches such as a planning search care must be taken to report to the client the result of the additional search. Had this occurred the case of Orientfield Holdings Limited v Bird & Bird LLP (2017) EWCA Civ 348 and the liability of the buyer's conveyancer would have been avoided.

The case went before the Court of Appeal in 2017 where the decision was appealed on three grounds:

1. the court had failed to make a finding as to what summary of the Plansearch report should allegedly have been given;
2. any summary of the report would not have revealed the existence of the specific development that prompted the withdrawal; and
3. the only realistic conclusion was that the client would not have acted any differently.

The Court of Appeal accepted that the original judgment could have been more methodical and explicit on the question of causation. Nevertheless, the overall conclusions of the Judge at first instance amounted to a positive finding that a proper summary of the report would have revealed the development, and the potential impact on the Claimant, and have prompted further investigations. All three limbs of the appeal were accordingly rejected, with no reason to interfere with the original decision.

The case highlights the risks of solicitors trying to self-determine the relevance of the information to their clients. The solicitors had gone further than strictly necessary in carefully evaluating the vendors' responses. However, once then in possession of the additional information, the solicitor should provide the client with such information. This would place the onus back upon the client to make a more informed decision on its available options, and help to prevent the solicitor from becoming exposed to a claim further down the line.

Where an adverse entry is revealed then the solicitor for the buyer must advise the client as to the extent and effect of the issue.

Remember the search will reveal local land charges which are financial charges or restrictions placed on a piece of land or property, which can limit its use and bind successive owners. Local land charges are

governmental in character and imposed by public authorities under statutory powers. Their existence would not normally be apparent from an inspection of land or from the register of title or title deeds.

The local land charges search provides prospective buyers with information about the property, such as conservation areas, tree preservation orders, conditional planning permissions, compulsory purchase orders, financial charges, miscellaneous charges, listed buildings, light obstructions notices, section 106 agreements, and 10. section 38 and 278 agreements.

It is, however, important to note that even if a local land charge is not registered it will still affect a buyer in the same way as it affected the original owner.

As you will be aware the Land Registry is taking over the local land charges search function one area at a time. By the end of the migration project, it will complete all local land charges searches, with the aim of making the process simpler, faster and cheaper.

Most local land charges searches remain being carried out by local councils. There are currently long delays in obtaining local search results from a number of councils due to closures and business interruptions caused by the Covid-19 pandemic. even before lockdown.

There are a number of alternatives to an official local authority and land charges search. A personal search is an alternative to conducting an official local authority and land charges search. This is a search carried out by an independent search agent, who is separate to the local authority. When carrying out their search, a personal search agent will usually have access to and review the same documentation as the local authority would, so the validity of the source information is the same.

Some risk-averse lenders will not accept a personal search. one key reason is that a local authority must stand behind any incorrect search results. With a personal search, the purchaser is reliant on the insurance cover which the agent has in place to cover any loss caused as a consequence of an erroneous search result, for example, a failure to reveal a local land charge that was in existence at the time the search was made.

Indemnity insurance is another option available to a buyer specifically designed for situations where searches are not obtained or there is a delay in the search results. The policy will usually cover both the buyer and any mortgage lender if required. If on or after the date the policy commences, the buyer discovers any adverse matter which would have been revealed by a search had it been carried out or the result obtained prior to completion, the policy usually provides cover for the following:

a) the amount of any financial charges registered against the property;

b) the reduction in the market value of the buyer's interest in the property.

c) a reduction in the market value of the property might be difficult to prove.

Search insurance would not enable a buyer to withdraw from the transaction with a return of the deposit if an onerous search result was received post-exchange of contracts, but prior to completion. This leaves the idea of the use of conditional contracts assuming a seller is willing to proceed on this basis. Such a conditional contract would enable a buyer to pull out of the transaction with a return of the deposit monies if the local search reveals an onerous result

These provisions are likely to be heavily negotiated in a commercial transaction. if the search result is satisfactory the matter would proceed to completion in the usual way. not all sellers would be happy to use a contract that is conditional on search results as it creates a risk that the buyer could still pull out post-exchange of contracts, or seek to use search results to withdraw from the transaction.

## UTILITY SEARCHES

Of course, CPSE.1 generates enquiries relating to details of the utilities serving a property. Despite this searches should be instigated to verify the utilities listed by the seller. The result of the searches should be explained carefully to the client. In addition to checking which services are connected to the property, the location of the utilities on site may need to be identified.

Ancillary to this is the need to identify existing easements and to cross-check the same against the routes of service media. All utility search results should be shared with the client and any consultants to ensure that the location of all service media and third-party equipment is recorded and checked.

## ENVIRONMENTAL SEARCHES

Ideally, an environmental search and report should be undertaken due to the vulnerability of liability for decontamination costs for owners and occupants whether original contaminators or not.

Desktop environmental searches have limitations A desk top search that comes back as passed may require further investigation for additional environmental factors may be identified such as radon, and subsidence. A search that comes back as further action should be passed to the client and any problems identified by the report highlighted to the client.

The client should also be aware of your role relating to environmental issues and the fact that specialist advice is probably required.

## MINING SEARCH

The need for a mining search depends on the location of the property. The standard coal mining search allows for additional enquiries if the property is intended for development or is a commercial property. If there is a reference to mining activity then a mine interpretative report is required which will detail the potential effect on the property and the issues identified by the search.

Importantly the conveyancer does not have any obligation to spend time and effort on issues outside their retainer. If the conveyancer becomes aware of a risk or a potential risk to their client, then the client must be told and appropriate specialist advice sought.

## ENQUIRIES OF THE LOCAL AUTHORITY AND ADDITIONAL ENQUIRIES OF THE LOCAL AUTHORITY

Clients need to appreciate what can be revealed by Enquiries of the Local Authority and where it is appropriate for additional enquiries to be raised to the Local Authority.

## DATA LAYERS SEARCH

This new search generates a number of opportunities for commercial property lawyers. It reveals data including land use designations, planning application data, freehold ownership information, flood risk, land contamination risk, greenbelt data, listed buildings information and vital highways data, including Crossrail and HS2.

It can assess specific addresses by postcode or sites up to 20 hectares in size. It provides commercial property lawyers with the ability to quickly screen prospective sites or addresses for areas of risk as early as possible and provides trusted advice to clients, up-front, helping to reduce the number of aborted transactions that result from hidden risks being uncovered later in the process.

The search is useful in the following circumstances

- Generating added value

The search can be undertaken at the start of a transaction or in the situation where the client is undertaking preliminary investigations or negotiations concerning a target property to determine from outset any potential issues or problems.

- Bringing together other search results or information generated via the due diligence process.

- Providing an overview of the target property at any stage of the conveyancing process.

- Climate Change Search/Report

Depending on the type of commercial property being acquired and its locality it is advisable to mention to commercial clients the availability of other searches including a climate change search/report.

## 5.CLIENT INSPECTION

As for client inspection – the client should be told to inspect:

- Before exchange – in order to:

1. Check the information provided by the seller in the CPSE's
2. To identify the extent of the property from the description in the contract, title, title plan, agents particulars and survey/valuation. The client should be told to ensure that all the information about the extent of the property is consistent both with each other and with what is seen on inspection.
3. To check the state and condition of the property. To that end, the client should always be advised of the need for a survey.
4. To check for the existence of overriding interests.

- At exchange – to identify the state and condition of the property at the exchange

- Before completion – to confirm that the sellers are ready to complete

- At completion – to identify overriding interests which have to be disclosed to the Land Registry using Form DI

Clients must be told of the principle of let the buyer beware and must also be told that they will be bound by anything that a reasonable inspection of the property would have revealed whether or not it was revealed by their own inspection (constructive notice), and anything that was revealed by an inspection by anyone acting as agent for the buyer (surveyor, managing agent etc ) due to the doctrine of imputed notice.

## 6.THE PROVISION OF ADVICE

Remember:

a) A conveyancer has no duty to advise on the commercial wisdom or otherwise of a proposed property transaction.

b) That said it may be incumbent on the conveyancer to go beyond this and actively advise the client of risks associated with the transaction. Lord Justice Hoffman gave appropriate advice in the case of Haigh v Wright Hassall & Co. [1994] EG 54 (CS) "The Solicitor is not a business advisor, he is a lawyer. Although most good solicitors will offer business advice, and will, to some extent, try to protect clients from themselves, it would be wrong, in my judgement, to hold that there was invariably a legal duty to do so. It must of course depends on the facts of the case. There will be situations in which it is clear to the solicitor that the client is commercially wholly inexperienced and is deluding himself. In those circumstances, there may well be a duty on the part of the solicitor to probe further."

c) The statements above have been accepted and developed in later case law. For example in Carradine Properties Ltd v DJ Freeman & Co. (A Firm) [1999] Lloyds Rep PN 483 where Donaldson LJ said – " A solicitor's duty to his client is to exercise all reasonable skill and care in and about his client's business. In deciding what he should do and what advice he should tender the scope of his retainer in undoubtedly important, but it is not decisive. If a solicitor is instructed to prepare all the documentation needed for the sale or purchase of a house, it is no part of his duty to pursue a claim by the client for unfair dismissal. But if he finds unusual covenants or planning restrictions , it may indeed be his duty to warn of the risks and dangers of buying the house at all, notwithstanding that the client has made up his mind and is not seeking advice about that. I say only that this may be his duty , because the precise scope of that duty will depend inter alia upon the extent to which the client appears to need advice. An inexperienced client will need and will be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client."

## 7.ADVISING ON RESTRICTIVE COVENANTS

Commercial property clients need to be advised as to whether the property being acquired is burdened by enforceable restrictive covenants or whether the property has the benefit of enforceable restrictive covenants.

Remember just because a restrictive covenant is protected by notice in the charges register of a title does not make the covenant enforceable.

In order for a covenant to be enforceable it must comply with Section 53(1)(a) of the Law of Property Act 1925 it must be in writing and must be signed by the grantor of the covenant.

For the burden of a restrictive covenant to run with the land it must comply with the rule in Tulk v Moxhay EWHC Ch J34 which is composed of a number of elements –

- The covenant must be negative both in terms and operation . The test commonly used is the hand on pocket test – see Haywood v The Brunswick Permanent Benefit Building Society: CA 1881. References: (1881) 8 QBD

- The Covenant must accommodate the dominant tenement which itself can be sub-divided as follows:

a) The covenantee and successors in title must have retained land capable of being benefited

b) The covenant must touch and concern the land – it must affect the nature, quality, value and amenity of the land it benefits – see P and A Swift v Combined English Stores [1989] AC 632

c) The two tenements must be in proximity

- There must be evidence of an intention for the burden to pass in other words the original parties must have intended successive owners of the burdened land to be bound by the covenant

- The owner of the servient tenement must have had notice of the covenant. When dealing with registered land it should be protected by notice in the charges register (see Section 29(2) of the Land Registration Act 2002). If the land is unregistered the covenant should be protected by a Dii land charge

Whether the proposed activity is a breach of the covenant is a matter of interpretation. For example, a proposed extension was held to be a breach of a restrictive covenant against causing annoyance to owners of nearby land because it would ruin their sea view and compromise the value of their home: *Dennis v. Davies* [2009] EWCA Civ 1081.

- Who Is Bound By The Burden Of The Covenant?

The original party to the restrictive covenant will always be bound unless the covenant contains an automatic release. Because a restrictive covenant could be found in a deed now vested in other parties, one must consider whether the party said to be in breach is bound by the restriction. Where the tests in Tulk v Moxhay are satisfied then the current owner of the burdened tenement will be bound.

- Sometimes, the restrictive covenant will only be expressed to bind the original covenantor whilst that covenantor owns the restricted land. There are some restrictive covenants which do not bind the successors in title examples include

(i) Personal obligations.

(ii) Those not protected by registration when the ownership of the land was passed on for value (registration of a covenant against unregistered land takes effect as a Class D(ii) land charge or by way of notice from the Charges Register in respect of registered land).

(iii) Where the same party after the restrictive covenant is agreed has owned both the benefited and burdened land.

(iv) Where the land intended to benefit from the restriction cannot do so, usually because it is too far away.

(v) There may be un-enforceability due to anti-competitive effects (see later).

- .Who Has The Benefit Of The Covenant?

The next thing to determine is who can complain of the perceived breach. Clearly, the original covenantee can enforce the restriction and may continue to do so even after the covenantee has parted with ownership of the retained land (unless there is a restriction within the covenant prohibiting this). However, and as might be expected, to seek to enforce a covenant where ownership has been given up would only lead to the recovery of nominal damages.

Successors in title may enforce the covenants, but will not be able to if:

(i) The covenant was expressly or in part for the personal benefit of the original covenantee.

(ii) The retained land is not capable of benefiting from the restrictive covenant.

(iii) The retained land cannot be identified either under the deed or from other intrinsic evidence: see *Crest Nicholson Residential (South) Ltd v. McAllister* [2004] EWCA Civ 410, [2004] 1 WLR 2409.

(iv) If the covenant is expressed to be for the benefit of retained land as a whole, and the successor in title only owns part of the retained land, then it would be unenforceable.

(v) The successor in title has acted in a way which will be inequitable to allow enforcement of the restrictive covenant, for example, by acquiescence.

- What about enforceability?

Even where a restrictive covenant continues to be in force and binds the parties, all may not be lost. It is possible, to negotiate a release fee or to seek some form of insurance against the possibility that someone will seek remedies for breaches.

Alternatively, as we shall see under section 84(1) of the Law of Property Act 1925, an application may be made for the release or the variation of the restriction. This may occur despite opposition from one of the parties. Usually, for this to succeed, the applicant needs to show that the restrictive covenant is obsolete or that it impedes a reasonable use of the plot without achieving any other substantial benefit.

Restrictive covenants can appear in both leases and in relation to freehold land. They are contractual obligations that prohibit certain specific conduct. Unlike normal contractual promises, which bind only the original parties, these can bind subsequent owners of the affected land.

2. Common examples of restrictive covenants include:

(i) Not to erect any buildings or structures on the land that has been acquired.

(ii) Not to use the land for any business activity.

(iii) Not to use the land other than for agricultural use and not to carry out any building or residential development.

3. Importantly, it is the effect, not the language, of the covenant that matters. By way of example, a promise to keep a plot as a garden has been held to be a restriction on building on that plot.

4. Whether the proposed activity is a breach of the covenant is a matter of interpretation. For example, a proposed extension was held to be a breach of a restrictive covenant against causing annoyance to owners of nearby land because it would ruin their sea view and compromise the value of their home: ***Dennis v. Davies*** [2009] EWCA Civ 1081.

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The original party to the restrictive covenant will always be bound unless the covenant contains an automatic release. Because a restrictive covenant could be found in a deed now vested in other parties, one must consider whether the party said to be in breach is bound by the restriction.

Sometimes, the restrictive covenant will only be expressed to bind the original covenantor whilst that covenantor owns the restricted land. There are some restrictive covenants which do not bind the successors in title examples include

(i) Personal obligations.

(ii) Those not protected by registration when the ownership of the land was passed on for value (registration of a covenant against unregistered land takes effect as a Class D(ii) land charge or by way of notice from the Charges Register in respect of registered land).

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(iv) Where the land intended to benefit from the restriction cannot do so, usually because it is too far away.

(v) There may be un-enforceability due to anti-competitive effects (see later) .

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The next thing to determine is who can complain of the perceived breach. Clearly, the original covenantee can enforce the restriction and may continue to do so even after the covenantee has parted with ownership of the retained land (unless there is a restriction within the covenant prohibiting this). However, and as might be expected, to seek to enforce a covenant where ownership has been given up would only lead to the recovery of nominal damages.

Successors in title may enforce the covenants, but will not be able to if:

(i) The covenant was expressly or in part for the personal benefit of the original covenantee.

(ii) The retained land is not capable of benefiting from the restrictive covenant.

(iii) The retained land cannot be identified either under the deed or from other intrinsic evidence: see ***Crest Nicholson Residential (South) Ltd v. McAllister*** [2004] EWCA Civ 410, [2004] 1 WLR 2409.

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Even where a restrictive covenant continues to be in force and binds the parties, all may not be lost. It is possible, to negotiate a release fee or to seek some form of insurance against the possibility that someone will seek remedies for breaches.

Alternatively, as we shall see under section 84(1) of the Law of Property Act 1925, an application may be made for the release or the variation of the restriction. This may occur despite opposition from one of the parties. Usually, for this to succeed, the applicant needs to show that the restrictive covenant is obsolete or that it impedes a reasonable use of the plot without achieving any other substantial benefit.

7. What are the remedies for breach of covenant

A party in breach of a restrictive covenant may claim damages or injunctive relief. If a party seeks injunctive relief, then that party may ultimately be granted that injunction; granted a more limited injunction; be awarded damages or a combination of both remedies. Specific performance may also be sought if appropriate.

8. Enforceability

The question as to whether a restrictive covenant remains enforceable is often one that is of paramount importance to the advisor. If the covenant remains enforceable then sometimes much will depend upon the interpretation of the covenant.

The original covenantee can always enforce any express covenant against the original covenantor so long as the covenantee has not expressly assigned the benefit to some other person.

When the covenantee disposes of the land the benefit may pass at law in one of two ways:

An express assignment as a chose in action – usually by way of a statutory assignment under section 136 of the Law of Property Act 1925;

b) The benefit of the covenant may run with the land. The covenant must "touch and concern" the land and both the covenantee and assignee must have legal estate in the land benefited.

Section 78 of the Law of the Property Act 1925 provides:

"a covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them and shall have effect as if such successors and other persons were expressed".

This section means that an assignee does not have to have the same legal estate as the covenantee in order to enforce the covenant.

In law the burden of a covenant does not pass with freehold land. But the position in equity is different. In equity the rules of restrictive covenants developed in the nineteenth century when there was an expansion in building and industrial activities. The demands of living in a densely populated country led to the need to control activities on land. It was held that a restrictive covenant could be enforced against a later purchaser of burdened land so long as the land was purchased with notice of the covenant.

The original covenantor remains liable on the covenant even if there is no dominant tenement and even if he has parted with the servient tenement. In that case his liability is purely contractual.

An assignee of the original covenantor's land is bound only if 4 conditions are fulfilled:

1. The covenant must be negative. It does not matter whether the wording is positive or negative. It is the substance of the covenant that is important;

2. The covenant must be made for the protection of the land retained by the covenantee. There must be two plots of land, a dominant and servient parcel of land. The two pieces of land must be near one another. There are statutory exceptions to this rule and it also does not apply to schemes of development;

3. The burden of the covenant must be intended to run with the covenantor's land; and

4. The burden of the covenant only runs in equity. Thus it needs to be protected through the appropriate form of registration and equitable remedies are open to enforce it.

In order to benefit from a restrictive covenant the claimant needs to show that he has the benefit of the covenant so.

1. The covenant must touch and concern land of the covenantee;

2. The benefit must have been transmitted in one of 3 ways:

(a) annexation;

(b) assignment;

(c) under a scheme of development.

Fortunately, most restrictive covenants entered into after 1925 are automatically annexed by statute to the covenantee's land benefited by them. Annexation is now relevant only to covenants entered into prior to 1926. Section 78 of the Law of Property Act 1925 has the effect of annexing covenants entered into after the LPA came into force. ***Federated Homes Ltd v Mill Lodge Properties Ltd*** [1980] 1 WLR 594 confirmed the section was for the benefit of the land and not the covenantee personally. A covenant against erecting more than 300 dwellings on the covenantor's land was enforceable by successors in title of the covenantor.

The authority of Federated Homes was recently followed in ***Bryant Homes Southern Ltd v Stein Management Ltd*** [2016] EWHC 2435 (Ch). A covenant only to use the land for agricultural purposes touched and concerned the land and section 78 rendered it capable of transmission without assignment.

It is still necessary to be able to identify the land to be benefited from the covenant. Thus in ***Crest Nicholson Residential (South) Limited v McAllister*** [2004] EWCA Civ 410, Chadwick LJ decided that statutory annexation via the decision in Federated Homes could only take place if the covenant or conveyance identified the land to be benefited, either explicitly or by implication.

Statutory annexation will only take place if the covenant is unqualified. Annexation will not take place if it is clear the covenant is only to pass by way of express assignment.

Following Federated Homes the circumstances where it is necessary to rely upon assignment are rare. This will be the case in four situations:

1. where the covenant was entered into prior to 1926 and the benefit was not expressly or impliedly annexed;

2. where the covenant was expressly for the benefit of and annexed to the whole of the covenantee's land only and the covenantee wished to dispose of part of the land with the benefit;

3. where the terms of the covenant are that the benefit must pass by express assignment; and

4. where statutory annexation fails because the land cannot be identified.

If a scheme of development exists then the covenants that are given upon each sale of a plot are enforceable by the owner for the time being any plot on the estate scheme of development has its own distinct rules.

This is where a series of

A useful case examining building schemes is ***Birdlip Ltd v Hunter*** [2016] EWCA Civ 603 where the court had to determine whether a building scheme existed and whether the Claimant was bound by restrictive covenants. The Claimant owned a plot of land with one house on it but wanted to build two new detached houses on the land. The Defendants were the owners of a neighbouring property. The properties had originally been sold by the same vendor in 1909 and 1910 at a time when a road had been laid out but none of the plots had properties constructed on them. The Claimant's plot was subject to a covenant not to build "one or two detached residences" on it. Eighteen other plots were subject to the same covenant and it was said to bind the purchasers' and vendors' "heirs and assigns".

The Claimant initially made an application under section 84(1) to modify but this was transferred by the Upper Tribunal to the High Court to be heard together with an application for a declaration under section 84(2). The court had to determine whether the covenant remained enforceable under a building scheme.

The Claimant said there was no defined estate; the property did not have the benefit of the scheme and that it had not been shown the restrictions were intended to ensure for the benefit of future purchasers.

HHJ Behrens sitting as a Deputy Judge of the Chancery Division dismissed the Claimant's claim. For an enforceable scheme to exist it was necessary to be able to define the physical extent of the scheme at the date of its creation. The judge looked at a 1908 plan and considered that when the parties' properties were sold in 1909 and 1910 there would have been a plan attached to the agreement for sale. The court inferred that the plans would have contained the same boundaries as the 1908 plan. The court considered that the estate had many features of a classic building scheme as there was a defined estate and it was laid out in lots. The judge also took into account the fact that in two previous Lands Tribunal cases the restrictive covenants had been treated as enforceable. The court concluded that a building scheme existed and thus the development could not take place.

This was reversed by the Court of Appeal which held:

(i) One of the pre-requisites of a building scheme is that the land is capable of identification. Here the plans only showed the individual plots conveyed;

(ii) A second pre-requisite is that each purchaser must have accepted from the common seller the mutual benefit of the covenant; and-

(iii) A subsequent plan, the 1914 plan, stated that it depicted the estate boundaries but showed a different boundary and smaller estate than the 1909 and 1910 plans.

Simply because a series of conveyances contain similar covenants is not sufficient for a scheme of development to be inferred. Similarly, an express power to vary the covenants is equivocal and in fact may support the conclusion that there is no scheme of development.

Lewison LJ held that there was insufficient evidence to demonstrate the existence of a scheme of development. In particular, the conveyances did not refer in the parcels clause to any estate of which the land was said to form part, the conveyance did not show any lots or refer to any other plans and there was no provision of mutual enforceability between purchasers.

It is important to concentrate on the terms of the conveyance. The Court of Appeal was also dismissive of the extent that inference may be used to fill evidential gaps when seeking to determine the existence of a scheme. Thirdly, Lewison LJ suggested that it would require cogent evidence for the court to allow extrinsic alone to prove a scheme of development.

9. Modification and Variation of Covenants

Section 84(1) of the LPA 1925 provides the statutory power to modify or discharge.

It will be recalled that the Upper Tribunal needs to be satisfied of one of the following four grounds:

(a) That by reason of changes in the character of the property or neighbourhood or other material circumstances the restriction ought to be deemed obsolete.

(aa) That the existence of the covenant would impede a reasonable use of the land where it confers no practical benefit of substantial value or is contrary to the public interest and can be adequately compensated in money.

(b) That the parties agree either expressly or impliedly to discharge or modify the covenant.

(c) That the discharge or modification will not injure the persons entitled to the benefit of the covenant.

It is important to note that the Tribunal has discretion even where the substantive grounds are established. Each case obviously depends upon its own facts.

An examination of the case law reveals Reasonable user is the most common ground relied upon. The following questions should be considered to determine whether this ground is likely to be successful –

- Is some reasonable user impeded by the restriction?
- Does the restriction generate any practical benefit of substantial value or advantage to those with the benefit?
- Will money be an adequate compensation?

Usefully the ground was explained by Carnwarth LJ Shephard v Turner [2006] EWCA Civ 8 at para 58:

"The general purpose is to facilitate the development and use of land in the public interest, having regard to the development plan and the pattern of permissions in the area. The section seeks to provide a fair balance between the needs of development in the area, public and private, and the protection of private contractual rights. "Reasonable user" in this context seems to me to refer naturally to a long-term use of land, rather than the process of transition to such use. The primary consideration, therefore, is the value of the covenant in providing protection from the effects of the ultimate use, rather than from the short-term disturbance which is inherent in any ordinary construction project. There may, however, be something in the form of the particular covenant, or in the facts of the particular case, which justifies giving special weight to this factor."

Planning issues for the site in question and the surrounding area are relevant (see s84(1B) the mere fact that planning permission has been granted for the proposed development is by no means conclusive. A useful case in this point is Bell v Norman Ashton Ltd (1956) 7 P&CR 359 where Harman J said :

"[The defendants' surveyor] said that town planning approval had been obtained for houses on this scale of density; modern conditions demand that suburban planning should be on that kind of scale; that is the right density at which suburban people ought to live, and if they do not they are obsolete and they ought to be disregarded as being anti-social persons wanting more room than in a crowded country it is right that they should occupy. I must confess that I was much incensed by this evidence. There does remain in a world full of restrictions and frustration just a little freedom of contract. I do not see why a man should not contract that he shall have half an acre around him and not four neighbours right on him. I do not see why it is anti-social to wish to have a little longer bit of garden or a little wider bit of frontage. To suggest that because these people live on an estate near others where the density is greater their rights ought to be disregarded by the court and swept away is a proposal which I reject with some indignation."

The case emphasises the distinction between planning considerations and property law. Put simply A person's property rights (ie the benefit of a restrictive covenant) will only be taken away as provided for by law and the mere grant of planning permission is only part of the story.

Three cases can assist to get a flavour of the issue

**Zaineeb Al-Saeed (24 April 2002, Lands Tribunal)**

The applicant relied upon planning permission for in-fill development in a conservation area. However, the Lands Tribunal held that the modification would be “the thin end of the wedge”, and would ultimately lead to an adverse effect on density levels and would therefore injure persons entitled to the benefit of the covenant.

**Dobbin v Redpath [2007] EWCA Civ 570**

The Tribunal "accepted that the existence of planning permission was very persuasive in determining the reasonableness of the user" but went on to hold that the mere fact that there was planning permission which accorded with a development plan was not sufficient to override other objections. In particular, he gave weight to the fact that the restriction against further development was part of a building scheme. This decision was upheld by the Court of Appeal.

**Graham v Easington District Council [2008] EWCA Civ 1503**

In this case, it was held that the grant of planning permission by a local authority although not determinative was, on the facts of the case, a relevant factor in determining whether or not that authority could object in its capacity as land owner to modification of the covenant. The modification was allowed. Although the Court of Appeal was clearly not changing the law in any way, it does highlight that a local authority that has granted planning permission may in some cases have more trouble objecting to a modification under s84 than another private land owner.

The relevance of planning can be summarised by stating that where a covenant is to be modified planning permission should be obtained before application for modification is made. However, the fact that planning permission has been granted will by no means be conclusive; although will perhaps have even more weight where the land owner is the authority that granted the permission.

Worth a mention in addition to the well-known provision of section 84 there is a little known provision whereby a party is able to apply to the County Court under section 610 of Housing Act 1985 which concerns the power of the courts to authorise the conversion of premises into flats. It permits an application when either the character of a neighbourhood has changed so that the premises could no longer be let as a single dwelling or when planning permission has been granted for the conversion of premises into two or more dwelling houses.

The Court of Appeal had to consider this section in ***Lawntown Ltd v Camenzuli*** [2007] EWCA Civ 949; [2008] 01 EG 136. The case concerned a pair of semi- detached houses in south west London. The purchaser wanted to convert them into flats but the neighbours were none too happy about this as planning permission had not been obtained and the houses were subject to restrictive covenants requiring them to be used solely as a single dwelling-house. Planning permission was then obtained but those with the benefit of the restrictive covenant still refused to consent. An application was made under section 610 and at first instance, the judge concluded that:

The court should not have regard to planning matters which have already been considered and decided upon by the...planning authority but should have regard to considerations which were not before the planning authority or which were not relevant to the decision.

The judge considered three main objections.

a) That the objectors would lose the benefit of the restrictive covenant;

b) That any relaxation of the covenant would pave the way for similar applications in the future; and,

c) Third that the conversion of the property would diminish the value of the other houses in the area. He felt when considering the application that the need for housing in London tipped the scales in favour of allowing the conversion.

The Court of Appeal held that it was necessary for the court to consider planning matters and notably the effect of the conversion on the amenity of nearby properties. The judge had exercised his discretion incorrectly and the Court of Appeal should consider the matter afresh. The court considered factors including the effect on noise levels, the character of the neighbourhood and whether this would set a precedent for future conversions. Ultimately the court agreed with the trial judge that the pressure on housing was such that the restrictive covenant should be modified to permit the conversion to take place.

As previously described the court has the power to rule that a covenant has ceased to be enforceable through obsolescence. This should only be exercised in very clear cases.

Also, the Upper Tribunal has the power to modify or discharge covenants including where the restriction is deemed obsolete. It has been suggested that the Upper Tribunal is the appropriate forum for the determination of such matters and this was a relevant factor where an injunction was granted to prevent construction work from being carried out in breach of a covenant: ***Turner and Turner v Pryce & ors*** [2008] EWHC B1 (Ch). If there is doubt it is probably going to be safer to go to the Upper Tribunal and have the matter determined there, rather than press on with the case in court.

Remember that where a client buys property which has the benefit of a restrictive covenant the client needs to understand that the right to enforce a restrictive covenant could be lost due to acquiescence, waiver or estoppel.

## 8.TIPS AND TRAPS FOR EFFECTIVE REPORTING ON TITLE

Reports on the title have not been standardised across the profession in the same way as have many common transactional documents. A report on title produced by one firm can differ significantly from a report produced by another. Indeed, reports can differ from client to client within the same firm, and from fee earner to fee earner. Some reports are delivered on a very informal basis, exposing the lawyer to potential liabilities.

Over the years some interesting views have been ventilated by the judiciary including -

Interesting quotes

Jackson and Powell, 11-177:

*"A solicitor is not a general adviser on matters of business, unless he specifically agrees to act in that capacity. Thus he is not generally under a duty to advise whether, legal considerations apart, the transaction which he is instructed to carry out is a prudent one."*

***Clarke Boyce v Mouat*** **[1994] 1 AC 428**

Lord Jauncey:

*"When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction."*

***Reeves v Thrings & Long*** **[1996] PNLR 265**

Simon Brown LJ:

*"I cannot accept that [the solicitor] was under any duty to advise [the client] upon the commercial implications or importance of the access provision or to warn him against the risks that it might pose for the future development, operation or sale of the hotel. Those matters were well within the client's competence to appreciate and evaluate for himself, business considerations rather than legal ones. I find no useful analogy*

*between this term and the altogether more opaque tenancy provisions under consideration in County Personnel v Pulver...The legal implications of those clauses were by no means obvious and themselves needed to be explained; this term, once clearly explained, left no room for legal misunderstanding."*

***Credit Lyonnais v Russell Jones & Walker*** **[2002] PNLR 2**

Laddie J:

*"if, in the course of doing that for which he is retained, [the solicitor] becomes aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions nor is he doing 'extra' work for which he is not to be paid. He is simply reporting back to the client on issues of concern which he learns of as a result of, and in the course of, carrying out his express instructions."*

***Yager v Fishman Co*** **[1944] 1 All ER 552**

Goddard LJ:

*"The nature and amount of advice which, in a matter of this sort, a solicitor would be expected to give to a person wholly unacquainted with business may differ very materially from what he would offer to an experienced business man, who would naturally decide for himself the course he thought it in his interest to take."*

1.2 The duty to explain

The duty to explain can be examined in County Personnel Ltd v Alan R. Pulver & Co. Ltd (1987) 1 WLR 916 and Balogun v Boyes Sutton and Perry [2017] EWCA Civ. 75.

We can extract from these cases that where a clause is vague or ambiguous or a clause warrants the use of rules of construction the client needs to be advised that litigation might arise as a consequence with all of the litigation risks that flow.

Reciting the terms of a document or providing the client with a copy of the document are not enough further comment is required and advice given.

As well as the specific issues referred to above the following more general matters require consideration -

d) A conveyancer has no duty to advise on the commercial wisdom or otherwise of a proposed property transaction.

e) That said it may be incumbent on the conveyancer to go beyond this and actively advise the client of risks associated with the transaction. Lord Justice Hoffman gave appropriate advice in the case of Haigh v Wright Hassall & Co. [1994] EG 54 (CS) "The Solicitor is not a business advisor , he is a lawyer . Although most good solicitors will offer business advice , and will , to some extent, try to protect clients from themselves, it would be wrong, in my judgement, to hold that there was invariably a legal duty to do so. It must of course depends on the facts of the case. There will be situations in which it is clear to the solicitor that the client is commercially wholly inexperienced and is deluding himself. In those circumstances there may well be a duty on the part of the solicitor to probe further."

f) The statements above have been accepted and developed in later case law. For example in Carradine Properties Ltd v DJ Freeman & Co. (A Firm) [1999] Lloyds Rep PN 483 where Donaldson LJ said – " A solicitor's duty to his client is to exercise all reasonable skill and care in and about his client's business. In deciding what he should do and what advice he should tender the scope of his retainer in undoubtedly important, but it is not decisive. If a solicitor is instructed to prepare all the documentation needed for the sale or purchase of a house, it is no part of his duty to pursue a claim by the client for unfair dismissal. But if he finds unusual covenants or planning restrictions , it may indeed be his duty to warn of the risks and dangers of buying the house at all, notwithstanding that the client has made up his mind and is not seeking advice about that. I say only that this may be his duty , because the precise scope of that duty will depend inter alia upon the extent to which the client appears to need advice. An inexperienced client will need and will be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client."

## 2. What is a report on title?

- A legal report produced by the buyer's conveyancer based upon a review of the legal documentation relating to the target property. The report on title will be formatted in a variety different of ways and ranging from an in-depth report on the legal documentation, a red flag summary, or a hybrid (sitting between the two).

- A report on title should generate a flexible and client facing way of presenting information ascertained after a due diligence exercise.

- The quality of the report is dependent upon the information which produced by the seller and in particular whether the seller and its conveyancer is willing to respond appropriately to enquiries before contract.

- If the report is being prepared for a buyer of a development site the report on title may be called a development constraints report. Such a report will address the development constraints on the project which will include rights of light, restrictions on title preventing the physical nature or proposed use of a development, rights or easements in favour of third parties and the rights of existing tenants or occupiers and consideration of the need to terminate tenancies to ensure vacant possession of a site.

- Important considerations

When acting on the purchase of a multi-let building consideration needs to be given as to whether all tenancies will be reported on or can a materiality threshold be applied and sampling exercise undertaken (for example a percentage of the highest value leases)? A materiality threshold or limited lease reporting exercise may be particularly relevant on the acquisition of a future development site where one of the buyer's main concerns will be the ease with which it can achieve vacant possession of the site for redevelopment purposes, as opposed to the ongoing future income stream from existing tenants.

- Who else other than the buyer client needs to review the legal due diligence?

For example building surveyors, architects, rights of light surveyors, the project management team and valuers, may all need to do so. If this is the case consideration needs to be given as to who the Certificate or Report is addressed too and in what way liability can be limited.

- Where the buyer’s or seller’s conveyancer relies on a cap on liability in a report or consideration should be given as to whether the cap is appropriate.

- The requirements of any lender must be carefully considered. If a report is required for a lender it can be costly and likely to cause a delay to convert a report to a Certificate or Report on Title to meet the requirements of the lender.

- What should an executive summary contain?

Traditionally an executive summary should contain an analysis and evaluation of the title, searches and enquiries.

A buyer client should be asked to confirm its objective in connection with the purchase. The summary should address whether the title, searches, and enquiries reveal any issues relating to that objective.

The summary should identify issues or areas of weakness with the due diligence process or the information provided.

The summary must investigate that the due diligence process has limitations including the limitations attached to searches, title investigation and replies to enquiries before contract.

- What should be explained to the client?

A conveyancer must explain the results of the due diligence process in a conveyancing transaction in a form and in terms that can be readily understood.

Importantly the conveyancer does not have any obligation to spend time and effort on issues outside their retainer. If the conveyancer becomes aware of a risk or a potential risk to their client, then the client must be told.

In this regard we should look again at ***AW Group Ltd v Taylor Walton*** [2013] EWHC 2610 (Ch); [2013] PLSCS 224 reveals a number of issues in the due diligence process.

We are all aware that in the course of carrying out their instructions, solicitors representing lenders come into possession of information that is clearly significant to their clients – for example, indicating that security has recently changed hands at a much lower price – they have a duty to report this to them. The old and much referred to case ***of Mortgage Express v Bowerman & Partners*** [1996] 2 All ER 836 confirms the position.

More recently the case of ***The Connaught Income Fund, Series 1 (in liquidation) v Hewetts*** [2016] EWHC 2286 (Ch) developed the point. The case concerned the scope of that duty in circumstances where a firm of solicitors had addressed a certificate of title to a lender and a third-party funder. The lender was taking a charge over the property named in the certificate and had a contractual relationship with the law firm that was acting for the buyer/borrower and providing the certificate. The fund, which pooled investors' money for investment in the loan market, was taking a sub-charge and had no such relationship with the firm. The borrower became insolvent and the property was sold at a loss.

Some interesting arguments were put before the Court. The Claimant argued that Defendant's law firm had owed the same duty of care to both the parties named as the recipients of the certificate. It based this on the fact that the solicitors knew, or ought to have known, that information that they had acquired during the course of their due diligence might have had a material bearing on the fund's decision to lend to the lender.

The Defendant law firm argued that its duties to the fund were very much more limited in scope and extent, and did not extend to giving the fund advice. It had not been asked to, and was not given any means to, communicate with the fund. The fund had no mechanisms or ability to deal with issues raised by the solicitors and expected such matters to be dealt with by the lender, who was managing the legal work.

As a consequence it contended that it did not owe a *Bowerman* duty to the fund. Rather its duty was limited to exercising due skill and care when making the statements and setting out the opinions in the certificate.

Significantly the High Court held that the Defendants' duty of care to the fund was limited to exercising due skill and care when speaking in the certificate. The transactions between the law firm and the lender, and the law firm and the fund, differed, involving different lending considerations and decisions.

The Defendant was not privy to the basis upon which the fund was taking and making its lending decisions and although it owed a duty to the fund to act competently when completing the certificate, which was how it "spoke" to the fund, its obligation to "speak" did not go further than that.

The Court conceded judge accepted that the fund had relied on the certificate but dismissed all but one of the Claimant's allegations that the certificate contained negligent miss-statements omissions.

For our purposes, an important point the court identified was that Certificate providers are required to state the date and consideration given when the property was last sold. The law firm should have confirmed the value stated, in lieu of the purchase price, in the office copy entries, but had failed to do so. However, the judge considered that the fund would have advanced the money anyway. Consequently, the law firm was absolved from liability on the ground that its omission was not the cause of the loss suffered by the fund.

What should the report should cover –

- The key terms of the contract – price, timing, conditionality
- Title

- Searches
- Replies to Enquiries
- SDLT liability

# 9.DEFECTIVE TITLE INSURANCE

## 1.INTRODUCTION

The use of defective title insurance in commercial property transactions is commonplace and is effective in enabling conveyancing transactions to progress to completion.

Some of the more common types of legal indemnity policy include:

- Breach of covenant indemnity insurance: this would be used where, for example, a restrictive covenant affecting a freehold title has been breached.
- Absence of easement indemnity insurance: this would be appropriate where, for example, some part of the property is accessed over private land but there is no apparent legal right to exercise such access.
- Lack of planning permission/building regulations approval indemnity insurance: this very common indemnity insurance is routinely effected where a property has been built, altered or extended without the benefit of planning permission and/or building regulations approval. The policy should cover financial losses suffered by the owner of the property in the event that the local authority took action for breach of planning or building regulations. This insurance is usually only available for work that was carried out at least 12 months ago. Obviously, an insurance policy does not mean that building work which may have been carried out without planning permission or building regulation consent is safe.

Legal indemnity insurance policies should be chosen and used with care and details of the cover provided should be very carefully checked to ensure that the risk associated with the defect is adequately covered.

The cover is not always available dependent upon risks, however, insurers vary in approach and it is always worthwhile investigating first.

There are two important points to be aware of –

- Defective title insurance does not resolve the title issue it simply provides a shield and sword in the event of a problem.

- Clients need to be aware of their ongoing duties owed to the defective title insurer.

Historically conveyancers have tried to avoid the need for insurance preferring to resolve the title problem. Of course where this is possible it is commendable as it cures the difficulty and purifies the title but such an approach may lead to problems. If nothing else the need to speed up transaction times and the pressures generated means that resolving title issues is not often a viable option.

An interesting development has been the ability of insurers to cope with applications for defective title and premiums becoming more affordable.

A defect in title is the seller's responsibility as the seller is contractually bound to prove a good title to the buyer. It follows that the seller should meet the costs of obtaining the policy.

The contract should deal with the liability for the expense of obtaining the policy. Where an existing policy is being transferred to the buyer the seller should provide warranties in the contract as to the existing policy (see later) or the buyer's conveyancer should perform due diligence on the policy directly with the insurer.

## 2.WHAT IS A DEFECTIVE TITLE INSURANCE POLICY

Defective title is a generic term. A title is considered to be defective when the title is not good and marketable or where there is potential for a third party to establish or attempt to establish an estate right title or interest which is adverse to, or in derogation of, the property owner's title to the property.

A defective title can lead to a number of problems for the owner of that title leading to the risk of liability for damages, the award of an injunction, or an order for specific performance. Such orders could result in the prevention or curtailment of a development; or could even result in the property owner being forced to relinquish title to part or all of the property.

When acting for a seller an audit of the title should be performed before the contract bundle is prepared.

In performing due diligence when acting for a buyer, care should be taken to ensure that title is good and marketable. In addition, a buyer client should be asked what their objective is in connection with their acquisition.

What is a good and marketable title?

A good and marketable title should be considered. We need to subdivide good and marketable title. Good title is title so that the seller is seised of the estate it is purporting to sell, and that it is in the position *"without the possibility of dispute or litigation to"* pass that fee simple to the purchaser – see Stirrup v Foel Agricultural Co-operative Society 1962. Good title is not necessarily perfect.

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Marketable title goes beyond good title requiring the seller's estate to be supported by maximum evidence requireable by conveyancing practice and law which must suffer no blot to which a prudent purchaser might object. In simple terms the seller can prove to the satisfaction of a prudent purchaser that it owns the property.

Defective title insurance can be used to plug any gaps or problems with title.

Common areas where defects in title can arise include -

**1.** Adverse possession – an absence of title to land which has been adversely possessed in derogation of the true legal owner's title

a) Adverse third party rights or easements – the title to the property is subject to known or unknown third party rights

c) The title is registered with less than an absolute title, i.e. it is registered possessory title, good leasehold title, or qualified title

- Lost title deeds – some or all of the title deeds to the property have been lost or destroyed; such lost title deeds may contain unknown matters, rights and easements that the property remains subject to and the absence of the original or certified copies of the deeds may result in the Land Registry registering the title to the property as possessory

- The registered title or other documents of title may contain reference to deeds and/or other documents of title which are unavailable and the contents of which are unknown but nonetheless to which the property may remain subject

- The title is subject to a grant or reservation of rights in relation to mines and minerals or other manorial or sporting rights

- The title may be subject to an estate contract (e.g. one containing pre-emption rights, put agreements, overage agreements, etc)

- The title deeds or their plans may contain inadequate descriptions of all, or part of, the property.

- Technical problems that exist with either the title itself or the documents that make up the title, e.g. lack of an assent

- Liabilities or issues that arise out of statute (e.g. School Sites Act, Place of Worship Act, Registration of Common Land Act, Matrimonial Act, various Housing Acts and the Insolvency Act)

Title may also be considered defective where it does not record certain rights or easements required for the use and enjoyment of the property. Similarly, where the title is subject to known or unknown freehold restrictive covenants which have, may have been, will or may be breached, the title may also be considered defective.

Why should a client be advised to take out defective title insurance?

Quite simply defective title problems can delay a sale transaction or can make sale of a property very difficult without a suitable insurance policy to protect the buyer and the lender against any financial loss that could result.

Cover can be provided on a continuous use basis and also on a development or change of use basis. Insurers are able to offer policies providing indemnity cover for risks relating to pre-planning issues and post-planning issues (i.e. planning consent has already been obtained, the development proposals are therefore in the public domain and neighbouring property owners should be aware of the proposals).

Title insurance is frequently seen as litigation insurance but in some circumstances, the insurer might adopt a proactive approach to negotiating with a third party to overcome a title issue once a defective title insurance policy is in place.

Where the client or their conveyancer approaches such a third party the costs involved may be more expensive and time-consuming than obtaining defective title insurance. However, negotiations with third parties could leave a residual risk for which insurance may be necessary and is available.

As we have seen defective title insurance generates protection from financial loss arising from the enforcement or attempted enforcement of a possible breach of a restrictive covenant. It may also cover diminution in value of the property in the light of a claim being made If we delve into what such a policy will cover it can be ascertained that the policy should cover -

1. Damages or compensation awarded against the insured by the Courts

2. Cost of altering, demolishing and/or reinstating all or any part of the property including any part of any building or other construction on or forming part of the property

3. Reduction in market value

4. Abortive costs of works

5. Costs of settlement

6. Defence costs

7. Costs and expenses incurred with the insurer's consent

Depending on the circumstances of an individual transaction and the insurer's assessment of the defects in title, cover may be available to cover other losses such as business interruption losses.

A defective title insurance policy provides cover in perpetuity and as such can usually benefit successive owners of the property and their lenders.

Before we go any further an important point should be made.

It is vital that clients are aware of what the policy will cover. For example, a client purchased a property where a problem arose as to whether a car parking space was part of the title or was part of the highway meaning there was an issue with regard to whether the property had a designated parking space or not. A defective title insurance policy was taken out.

It transpired the property did not in fact have the benefit of a designated parking space and a claim was successfully made on the policy. The insurer paid to the insured the diminution in value of the property. Unfortunately, the insured bought this particular property as it was ideal for his disabled spouse who had mobility problems. The lack of a designated parking space and the easy access it permitted meant the property was of little use and the compensation payable irrelevant.

## 10.CONCLUSIONS

To avoid problems –

- Do the simple things well.
- Clarify and review the retainer
- Ascertain client objective
- Communicate effectively
- Be careful when reporting on title