EDITION 2. 2021

REAL TALK

A SPECIALIST RISK PUBLICATION FOR THE REAL ESTATE SECTOR

FEATURE ARTICLES

REAL ESTATE MARKET UPDATE – APRIL 2021

Discover how insurers are adapting and responding to the rapidly changing demands from the industry

SPRING BUDGET 2021

What does it mean for Property Owners?

PROPERTY OCCUPATION CHANGES FOLLOWING COVID-19

The implications of alternative uses for buildings that landlords need to consider

Gallagher

Insurance | Risk Management | Consulting

ABOUT GALLAGHER

Founded by Arthur Gallagher in Chicago in 1927, Gallagher has grown to become one of the largest insurance brokerage, risk management, and human capital consultant companies in the world. With significant reach internationally, the group employs over 32,000 people and its global network provides services in more than 150 countries.

Gallagher's London divisions offer specialist insurance and risk management services. We provide bespoke policy wordings, programme design and risk placement solutions, and consulting support across a range of specialisms. We manage complex, large, global risks on a direct and wholesale basis and serve as primary access point to Lloyd's of London, London company markets, and international insurance markets.

**WE HELP BUSINESSES GO BEYOND THEIR GOALS.
IT'S THE GALLAGHER WAY.**

CONTENTS

INSIDE THIS EDITION...

EXECUTIVE FOREWORD

Welcome back to the second edition of our specialist Real Estate risk publication, 'Real Talk'.

With 2020 firmly in the rear view mirror, it is fair to say that 2021 looks far brighter, with a noticeable uptick in transactions and activity across the Real Estate arena. Certainly, 2020 has brought about significant change in every facet of life, and Real Estate appears no different – asset classes that were once considered a safe bet are no longer as reliable, whilst demand for quality logistics space has skyrocketed and continues to do so.

In this edition, we cover a huge breadth of topics – from the nuances of acquiring distressed assets and portfolios, to scratching the surface on how insurance can play a positive role in a business' Environmental, Social and Corporate Governance (ESG) evaluation and reporting.

At Gallagher, our number one focus continues to be, and will always be, on putting our clients first – helping them negotiate their way out the other side of COVID-19 and opening up safely, understanding what the 'new normal' looks like, and what it means for a robust, adaptive insurance programme. Our team continues to grow, as we look to constantly strengthen our offering across all areas of Real Estate insurance and transactions. With the ten-year anniversary of our team behind us, it is our consistency, expertise and solidity that continues to set us apart.

On behalf of the entire team here at Gallagher, thank you once more for engaging with us and for taking the time to read our publication. As ever, if you have any feedback or if there are themes and topics you would like us to cover in future editions, or even if you would like to contribute, please do not hesitate to get in touch.

STEPHEN ANDREWS

Managing Director, Real Estate

+44 (0)20 3425 3212 | Stephen_Andrews@ajg.com

01. REAL ESTATE MARKET UPDATE – APRIL 2021

Whilst it may not feel like it, as large swathes of the country continue to work from home, we are indeed slowly exiting lockdown via the government's roadmap – and with that comes both new challenges and new opportunities. Our Real Estate team is set to grow further in 2021, as we continue to expand our offering and constantly look to improve the service we provide our clients.

Q1 has already proven that 2021 will be a continuation of 2020 as far as pressures on the insurance market are concerned – we are undoubtedly in a hard market for the majority of lines of business, although pockets of opportunity still exist as insurers look to adapt and respond to rapidly changing demands from the industry. With the recent Supreme Court decision on the FCA Business Interruption test case comes some clarity around many important coverage aspects of COVID-19; coverage for tenants with those wordings deemed to be triggered and beginning to pay claims, whilst the landscape for landlords and their policy wordings remains more challenging. Ensuring you have a broker who has their finger on the pulse and the expertise to navigate these challenging conditions is perhaps more important than ever. We hope you find our update helpful, and as always, please do not hesitate to contact us should you wish to discuss further.

UK Property Reinsurance

Since the reinsurance markets are one of, if not the key driver behind the Real Estate insurance market, reinsurers' January 2021 renewals are a good place to start our market update. Our colleagues at Gallagher Re have seen a tightening reinsurance marketplace with modest remedial rating action applied in property segments and geographies where losses have been minimal or absent, such as the UK. Had losses occurred, the reinsurers' response would no doubt have been a lot tougher. These trends, with the same caveat, are likely to continue throughout 2021 for UK exposed businesses.

By 1 January, a Communicable Disease Exclusion and Cyber Exclusions were a pre-requisite on all UK property reinsurance, however, reinsurance capacity for UK exposed business has been adequate and reinsurance programmes have been completed.

In times of uncertainty, people tend to become more risk averse. COVID-19 has shown insurers that significant correlations exist between the asset and liability sides of their balance sheets, which they may or may not have considered in the past.

In the UK, insurers of all sizes have been reviewing their retentions and risk management strategies, and almost all have been buying more cover. Some are buying more aggregate excess of loss to protect against unforeseen frequencies at the tail, and some are buying lower on per event and per risk covers that protect against middle-sized losses.

UK Real Estate Insurance Market Overview

As discussed in our market updates during 2020, the UK Real Estate insurance market has seen a dramatic change over the last 18 months. Principally, due to a lack of profitability seen by insurers, we have seen considerable increases in pricing and a corresponding reduction in appetite – with this trend expected to continue into 2021.

As a result of these sustained losses, insurers have moved quickly and taken a number of measures to attempt to improve their position:

- Withdrawing completely from certain lines of business, notably;
  - Residential risks
  - High Hazard
  - Poorly managed portfolios
- Reducing the amount of capacity they are willing to deploy
  - Insurers looking to minimise their exposure on certain risks where previously they would have been comfortable insuring 100% of the exposure
- Increased pricing
  - Rating increases across all sectors, even claim-free portfolios
- Increased excesses
  - Long term standard excesses being increased for the first time in number of years; moving away from nil excess on material damage

- Withdrawing completely
  - Certain markets have walked away from Real Estate completely – reducing competition and therefore driving pricing up amongst those that remain.

In addition to the above, the impact of COVID-19, the subsequent FCA Business Interruption Test Case and ongoing legal proceedings have resulted in uncertainty around where Business Interruption claims may finally land. As a consequence, insurers continue to be nervous and hold reserves for these potential losses.

Furthermore, insurers have either already reviewed or are currently still reviewing their policy wordings to either removing disease coverage in its entirety or sub limiting those sections of their wording.

Lending Due Diligence Market Update

As with all sectors in 2020, the lending market experienced challenges throughout the year as a result of the global pandemic. Whilst there was a downturn in the volume of transactions across the Real Estate lending market in Q2 and the beginning of Q3, there was a positive upturn in deal numbers towards the latter part of Q3 and this continued to the end of the year.

There has been a clear change in appetite for a number of lenders in the Real Estate space; perhaps predictably there are fewer retail and hospitality transactions taking place with the fortunes of retail/hospitality properties being as volatile as they are. There is, however, a focus on industrial portfolios along with assets with a clear sustainable future such as data centres.

It is expected that the strong end to 2020 will continue through into 2021, however the focus will remain on those sectors that are deemed stable and 'safe'.

Whilst the outlook for transactions in this space looks to be positive for 2021, it is prudent to note as highlighted above that the property insurance market continues to be in a difficult cycle whereby capacity is reduced and the flexibility of insurers is limited when compared to 12-18 months ago. It is therefore imperative for lenders to instruct their insurance advisor from the outset of each deal in order to ensure they benefit from correct market communication and ultimately the insurance policies are sufficient to protect lenders' needs, and adequately cover the assets in question.

Legal Indemnities (LI) Update

The title insurance market had a problematic 2020, with fewer transactions taking place – as a result, premium incomes were down, resulting in redundancies being made. In spite of this, the market remains competitive on premium and there is sufficient competition among insurers.

In terms of M&A movement, Titlesolv was purchased by Westcor and Secure Legal Title was acquired by AXA, bringing them in house to look at their book as they provide capacity to other Managing General Agents (MGAs). Legal & Contingency have diversified their book by bringing in a Real Estate underwriter to focus on property insurance and Zurich are expanding their European offering. Dual's capacity reduced to GBP500m at the beginning of the pandemic but has returned to the GBP1bn[1] that they previously had and Fidelis, one of their insurers, has an increased rating of AM Best A from A-.

2021 has certainly started in a more positive note for the LI market, with an uptick in transactions and developments requiring coverage. Although re-insurance rates will be rising, we envisage the market remaining buoyant and competitive, with claims being paid within reasonable timescales.

Construction Insurance Market for Refurbishments & Extensions Update

The cover available for refurbishment works has changed significantly in recent years. Due to a number of substantial high profile losses including Glasgow School of Arts, Mandarin Oriental, and Primark (Belfast), this sector was at the leading edge of hardening market changes. The practical implications of this include:

1 *https://www.dualasset.com/news/dual-asset-reinstates-gbp1bn-line-with-fidelis/*

- Reduced ability to insure the existing structure as part of the works insurance programme. While in the past existing structures valued over and above the construction works could be covered by extension to the Construction "All Risks" insurance, this is no longer the case and recent projects have shown no appetite for offering cover where existing structures are valued at over 50% of new construction costs.
- Certain insurers have withdrawn entirely from the refurb market, declining to cover even the works in isolation

This means an increased focus on contract drafting and apportionment of risk. The traditional use of JCT D&B Option C, whereby the employer gives the contractor protection in respect of damage to existing structures caused by specified perils, is often unachievable due to resistance from construction and property insurance markets meaning it often becomes a third party risk to contractors. This in turn creates challenging commercial negotiations around equitable allocation of risk and additional insurance requirements.

Given the current market conditions we do not anticipate any improvement in this position from the insurers in the short to medium term and therefore reiterate that early engagement and negotiation remains the best way to help ensure this potentially major issue does not delay commencement of works.

Real Estate Warranties & Indemnities (W&I) Update

Perhaps in contrast to most other insurance markets, the W&I and tax insurance market continues to innovate, develop and grow within the Real Estate space. Nil seller liability for warranties is becoming the norm and deals that would have previously fallen overdue to adverse due diligence findings are now completing with the help of M&A insurance.

With new M&A markets and MGAs being set up every few months, insurers are desperate to differentiate themselves through reduced premiums and additional enhancements. Coverage for known tax and contingent risks are now becoming much more common, so that buyer and seller can transfer these risks to an insurer upon completion.

Conclusions

Q1 2021 has shown us that this year will undoubtedly be another challenging year economically, and the insurance market will be no exception. At the time of writing, there are still limited signs of new entrants to the mainstream Real Estate market, bringing fresh appetite and capacity – meaning trading conditions in 2021 are set to be tough once more. Early renewals are seeing a continuation of themes from 2020, with upward pressure on pricing and tightening of wordings continuing. Our advice to our audience however remains the same:

- **Be proactive**
- **Engage with us early**
- **Provide comprehensive information**
- **Engage with experts**.

These are still the keys to a successful insurance placement in a challenging market. With a team of almost 50 experienced professionals focussed purely on the Real Estate sector, we remain confident of being able to achieve favourable outcomes for our clients.

TO FIND OUT MORE ›

DARREN TING

Executive Director, Real Estate
+44 (0)20 7234 4550 | Darren_Ting@ajg.com

DOMINIC LION

Development Associate Director, Real Estate
+44 (0)20 7204 6159 | Dominic_Lion@ajg.com

02. SPRING BUDGET 2021: WHAT DOES IT MEAN FOR PROPERTY OWNERS?

As the country looks to steer its way out of lockdown and to restart the economy, Rishi Sunak's Budget, announced on the 3 March, attracted perhaps more interest than almost any budget in recent times. Businesses and individuals up and down the country listened in, keen to understand the extent of the government's ongoing support in rebounding from the effects of COVID-19.

Sentiment amongst the Real Estate fraternity appears to be largely positive, as some level of support was provided for almost all areas of property ownership. The headline elements set to affect the UK Real Estate market are as follows:

- Corporation Tax Increase to 25%
  Corporation tax is set to rise to 25% from April 2023, a 6% hike from the 19% currently paid on all profits
- Extension to Business Rates Holiday
  The temporary reduction to VAT rates applicable to retail, leisure and hospitality businesses has been extended, with the rate remaining at 5% until 30 September 2021, before rising to 12.5% where it will remain until a return to the standard 20% on 1 April 2022. This should undoubtedly have a positive impact on rental payments by those businesses affected
- Relaxation of Loss Carry Back Rules
  The Budget has granted a temporary extension allowing a three year carry back of trading losses (suffered in the period between 1 April 2020 and 31 March 2022) to be offset against profits in prior years. Again, this should benefit both Real Estate owners and their tenants from an overall cash flow and profitability standpoint
- 130% "Super-Deduction" on certain Capital Expenditure
  From 1 April 2021 until 31 March 2023, this super deduction will apply to qualifying expenditure on new plant and machinery, whilst a first year allowance of 50% will also be recoverable for expenditure, which would usually have qualified for special rate relief, such as lifts and air conditioning. We expect this to trigger a noticeable increase in Real Estate owners investing in these areas, taking the opportunity to upgrade plant and machinery whilst such significant incentives apply
- Announcement of Eight Freeports in England
  The government has identified eight areas of the country where they are particularly keen to drive growth and investment, and in order to encourage this, they will provide a host of additional tax reliefs to qualifying businesses investing in those areas. Specific to the Real Estate sector, these benefits include an enhanced 10% rate of structures and buildings allowance (usually 3%) when constructing or renovating non-residential property within those areas, and an enhanced first-year capital allowance providing 100% relief for businesses investing in plant and machinery for use in Freeports. Again, we expect to see an increase in Real Estate investment in these Freeports in response to this change

What does this mean for my insurance?

With a number of significant and mostly temporary tax changes, perhaps the obvious area of insurance that will be most impacted by these updates is that of Tax insurance. We expect to see a noticeable uptick in the use of Tax insurance when Real Estate owners buy and sell assets and/or portfolios to protect against greater areas of uncertainty caused by these rule changes. The Tax insurance market has grown significantly in recent years alongside the Warranty and Indemnity (W&I) insurance market, and whilst most of the insurance market is hardening, W&I and Tax insurers continue to grow. As a result of this growth, premiums are reducing, and coverage is broadening as insurers compete to grow their books in these areas.

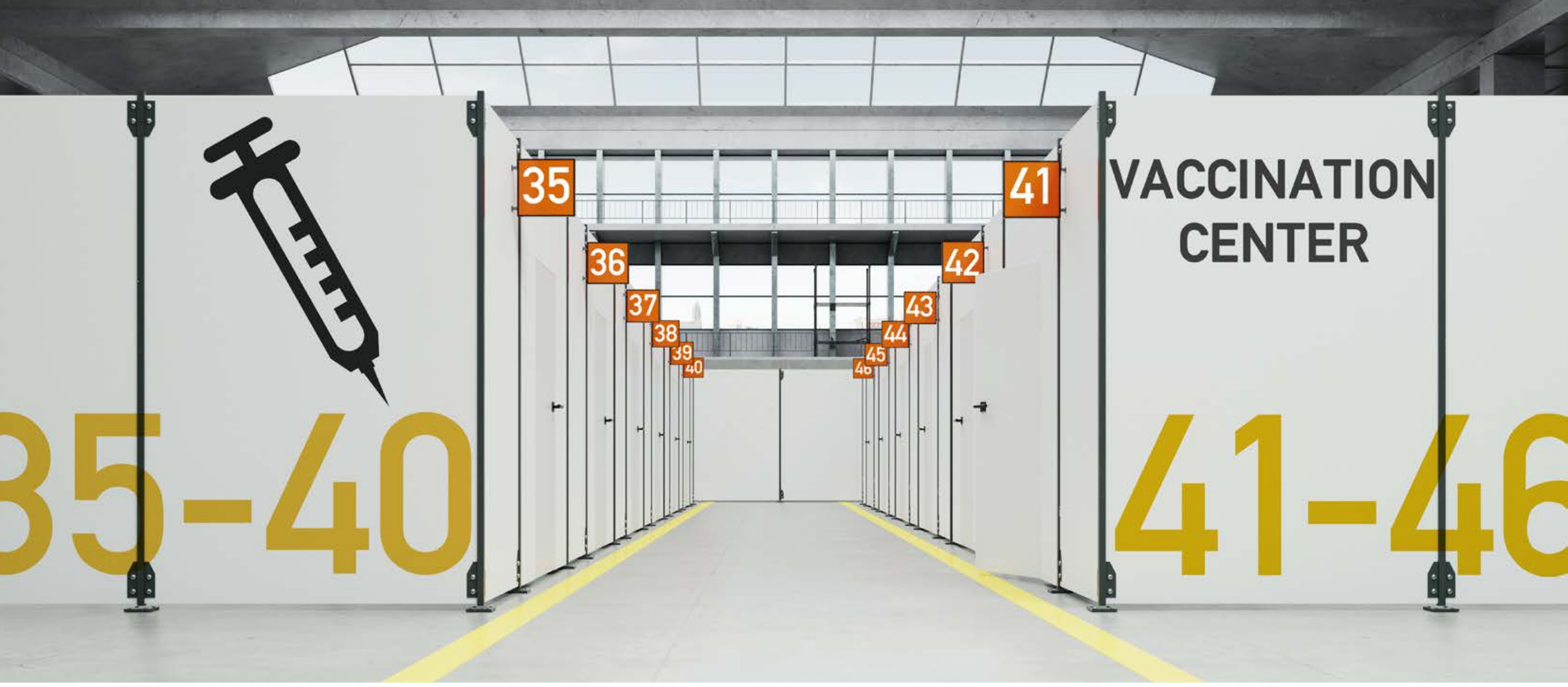
The second key area of insurance that we see being impacted by these changes for Real Estate owners is that of construction or refurbishment insurance. With a number of these tax incentives encouraging businesses to upgrade and/or work upon existing assets, this brings with it the challenges around insurance during those works. Depending on the scope and scale of said works, building tenancy and contract duration, it may be possible to cover any exposures under the existing property insurance policy. Even if that is the case, engaging with Gallagher to ensure your appointed contractors carry sufficient levels of insurance to protect your asset is vital; and engagement is even more crucial should the works exceed existing property insurance extension limits and require specialist placement.

As always, should you wish to discuss any of the topics raised by this article, please do not hesitate to get in touch and we would be delighted to talk further.

TO FIND OUT MORE ›

DOMINIC LION

Associate Director, Real Estate
+44 (0)20 7204 6159 | Dominic_Lion@ajg.com



03. PROPERTY OCCUPATION CHANGES FOLLOWING COVID-19

It is clear that whilst we may have a pathway out of lockdown, COVID-19 and its long term impacts will be with us into the foreseeable future. As the property industry begins to adapt to life with the virus, we are seeing an increasing number of landlords considering alternative uses for their buildings, either because tenants have exited due to financial difficulties and turnovers are down, or lucrative government contracts are on offer to inject revenue onto the balance sheet.

From cathedrals and retail/industrial units being transformed into temporary vaccination centres, to hotels being used for compulsory quarantine, we have seen a range of occupation changes in the short term. Looking further ahead, if the trend of office workers adopting a more agile approach to working life continues, will we see a similar pattern for office buildings in the cities? In this article, we look at what the requirements are under insurance contracts relating to change of use and offer some key points for client consideration.

Client Requirements – The Duty of Fair Presentation

Most contracts are based on the principle that all parties have an equal opportunity to understand what the effects of the contract will be. Insurance is different because the proposer of the risk (the policyholder) is likely to know far more about the risk than the insurer.

As a result of this, under the 2015 Insurance Act, as an insured you are required to make a fair presentation of the risk to insurers which discloses every material circumstance which you know (or ought to know), so that the insurer can make an informed decision as to whether or not to provide insurance for the risk and, if so, on what terms.

First and foremost, it is therefore imperative that any change in building occupation is disclosed to the insurer in good time, so that the underwriter has all of the information they need when considering their terms.

Key considerations

Below we have detailed a selection of the key considerations when changing the use of a property. From a Real Estate perspective, there are two main areas insurers will look at when assessing their position:

- Material Damage
  The underwriter will consider anything that may increase the risk of physical damage to a building. Fire is one of the most expensive property insurance claims in the UK, but Malicious Damage and Escape of Water are generally smaller quantum but greater frequency exposures. This list is not exhaustive, and it is important to think about any increase in risk from the insured perils when changing a building occupation, and consider any steps that may be taken to mitigate the risk of loss.

- Liabilities
  Liability insurance covers you for claims made against your business by third parties relating to injury or property damage. Claims can come from a member of the public (insured under Property Owners'/Public Liability) or employees (covered under Employers' Liability). If a change in occupation increases the risk of claims being made against you, it is again important to think about any steps that can be taken to reduce this risk.

There may be other points that need to be addressed with insurers, such as the severity of any potential losses and the resultant interruption to business, but the above is certainly a good place to start giving an idea of the trail of thought an underwriter is likely to have.

Contract Out

For short-term contracts, such as temporary vaccination centres and quarantine hotels, we have seen a number of clients take the approach of contracting the risk of loss out to the third party that will be using the building – be that for physical damage to the building, or liability claims that may arise. This is an approach that is well received by insurers, as it means that the third party that is now managing the property on a daily basis takes the increased risk on their insurance policy or balance sheet, rather than relying on the landlord to pick this up.

Engage with Gallagher early

Early discussions are key. In the longer term, and in situations where it is not possible to contract out, insurers will need to reassess the risk and can potentially alter policy terms.

Your Gallagher team is readily available to discuss any changes you are considering, and provide insurance advice on all things that should be considered in order to resolve any concerns your insurer might have, and ensure that an acceptable agreement is achieved.

TO FIND OUT MORE ›

JACK HEMMINGS

Associate Director, Real Estate
+44 (0) 207 234 4005 | Jack_Hemmings@ajg.com

04. TRANSACTIONAL RISK INSURANCE FOR DISTRESSED M&A AND SPECIAL SITUATIONS

As the COVID-19 crisis continues to evolve, the Transactional Risk Insurance market continues to innovate. Given the anticipated economic downturn, insolvency, restructuring and distressed acquisitions are becoming a major theme in the M&A market.

Despite offering some appealing opportunities, distressed deals do come with their own complications and uncertainties. As a result, distressed M&A funds, banks, insolvency and restructuring specialists are turning to Transactional Risk Insurance as the best way to create value and unblock deals in distressed situations.

Warranty and Indemnity Insurance

Warranty and Indemnity (W&I) insurance has long provided a useful and valuable tool for transactions, particularly where there is low seller covenant strength, or none at all.

If a distressed seller is able to provide warranties, traditional W&I insurance may be available. The buyer can rely on the W&I policy, allowing the seller to limit their liability and make a clean exit. In this scenario, insurers will expect to see a thorough disclosure and due diligence process.

On the other hand, a distressed seller (such as an administrator) may be disinclined or unable to give warranties. W&I insurance would normally be unavailable as the policies are traditionally designed to sit 'back to back' with the warranties given by a seller. However, as a result of increased competition, insurers are starting to offer synthetic warranty insurance.

Synthetic warranties are artificially negotiated between the insured and the insurer and can be an attractive solution in distressed situations where seller warranties are not available. They provide the buyer much needed protection and allow transactions to move forward.

Whilst synthetic warranties are an appealing and feasible solution, the availability and scope of the insurance policy depends on a number of factors, including the size of the deal, operations of the target (including jurisdictional spread), the availability of a comprehensive data room and the standard of due diligence provided.

It should be noted that synthetic W&I might not be available for distressed deals where there is an absence of information or counterparty disclosure. However, Tax and Contingent Risk insurance (for known and unknown exposures) for key risks such as intellectual property (IP), litigation, material contracts and tax, may instead provide the necessary protection.

Tax Insurance

The Tax insurance market has evolved rapidly over the last few years. The previously 'uninsurable' tax risks are now increasingly more possible to cover as insurers have increased their appetite exponentially. The Tax market is even going beyond traditional M&A into the likes of corporate restructurings and fund wind-ups.

When it comes to distressed M&A, Tax insurance can not only be used to release funds, protect a liquidator and provide alternative recourse but, it can also be utilised to remove tax liabilities from a target's balance sheet; freeing up capital and unlocking value. Beyond this, Tax insurance has also helped find valuable solutions in several distressed and special situations:

- Pre/post-sale/liquidation restructuring – in the course of a restructuring process, various tax complications may arise such as debt release, capital gains tax, corporation tax and stamp duty land tax. Tax insurance can be a useful tool to de-risk pre and post-sale corporate restructurings, help with debt tidy-ups and avoid the seller having to give an indemnity or escrow.
- Judgment/settlement protection – if a tax authority has reached a judgment or settlement but has not closed out the issue, it could prevent escrow distribution or winding up. A Tax insurance policy can stand behind the judgement or settlement, allowing the release of funds and helping the deal move forward.

More so than ever, these complex tax risks which would normally be dealt with by way of escrow or price-chip, are being transferred to an insurer, providing a valued and commercial solution in distressed situations.

Contingent Risk Insurance

Contingent Risk Insurance (CRI) offers insurance for known legal risks that could have a negative impact on a company or asset's value. Through CRI, we can ring-fence these known legal exposures that may not have been insurable through traditional W&I and Tax insurance or may have even completely derailed or prevented a transaction from moving forward.

CRI offers a major tool to de-risk distressed M&A and can be tailored to cover a variety of risks including:

- Distressed acquisitions – insurance for seller indemnities, title to assets, sale at an undervalue and known or unknown third party claims.
- Voluntary winding up (to reduce administrative costs and distribute proceeds) – insurance for third party claims.
- Insolvency winding up – insurance for the sale of assets, closing out the company's financial position and resolving claims made against the company, administrators, trustees and insolvency practitioners.

In a distressed transaction, the risk covered by CRI can often be a 'deal breaker' with the target only being available on an 'as seen' basis. CRI offers the protection needed by a buyer whilst also allowing the seller to exit with either no or minimal liability. Some recent examples of CRI policies we have placed for insolvent situations are below

Liquidation

Situation:
Distressed asset fund acquired a company. The company was restructured, assets sold, loans materialised and profits realised. Prior to distribution, the company received a letter before action.

Problem:
Seven year limitation for claims meant the fund would have to keep the company alive with cash reserved for outstanding litigation, preventing the winding up of the company and distribution of cash.

Solution:
Insurance procured for one known claim and any unknown third party claims. Statutory declaration executed on the basis of available insurance. Liquidation successfully executed and profits realised via distribution.

Sale at an undervalue

Situation:
Sale of London property. Seller acquired the property from a distressed asset fund.

Problem:
Buyer due diligence identified low probability, high value risk that the seller could have acquired the property at an undervalue (therefore subject to possible third party creditor claims). Seller unable to provide an indemnity to the buyer.

Solution:
Contingent risk policy placed for the buyer, replacing the need for a standalone seller indemnity and offering investment grade security in the event of loss.

As we start to see a downturn in traditional M&A, the availability and need for CRI is increasing. In an effort to explore these legal contingent style risks, insurers are expanding their appetite and underwriting authority, which means that the Transactional Risks Insurance market is fast becoming the home of these more unusual insurance risks.

TO FIND OUT MORE ›

HOLLIE MARKHAM

Account Executive, Real Estate
+44 20 7204 6239 | Hollie_Markham@ajg.com

05. THE RISING POPULARITY OF TITLE INSURANCE FOR MULTI – ASSET PORTFOLIOS

Real estate transactions that involve multiple assets whether in one territory or many will come with challenges when due diligence is undertaken. Traditionally, due diligence (DD) is undertaken on the titles to the properties which can take a long time and incur significant cost. The current Real Estate market is competitive for multi-asset portfolios and the length of time that DD takes can be a factor, especially if the seller needs to realise their capital – particularly in a distressed asset sale.

The title insurance market in the US has long been providing title insurance to cover known and unknown defects in title in place of full DD and this is now moving across the pond. Title insurance has grown in popularity in the UK and Europe over the last five years and portfolio title insurance is also becoming popular.

In the event that you are buying a portfolio of assets there are a number of things to take into consideration:

1. Is this a bidding process, what can you do to enhance your bid?
2. Where are the assets located and what will the cost of DD be, particularly in multiple territories?
3. How many assets are there, how long will DD take?

Portfolio title insurance can help with all three questions. In bidding process, the bidder who can confirm that the transaction timeline will be very short, will be looked upon favourably, even if the financial offer is not as high – particularly in a distressed asset transaction.

In the event that there are multiple territories, portfolio title insurance can provide a solution to cover the known and unknown risks without having to engage lawyers in each territory to provide DD on the titles to the assets. This not only saves time, but money as well.

If there are hundreds or thousands of assets, full title DD may not even be an option. Portfolio title insurance can cover for financial loss even if DD is not undertaken.

What is portfolio title cover?

Portfolio title insurance is underwritten by most insurers and only a sample DD needs to be undertaken in order for cover to be available.

The policy will cover the buyer for most known and unknown title risks such as:

- Adverse Possession
- Access Issues
- Restrictive Covenants
- Services and Drainage Issues
- Easements
- Rent Charges
- Lack of Searches
- Unregistered Land
- Good Leasehold Title
- Mines and Minerals
- Encumbrances against the title
- Lack of Planning or Building Regulations
- Chancel Liability

The cover provided protects the buyer for as long as they own the assets and the following losses are covered:

- Loss in market value
- Legal and professional fees
- Settlement costs and damages
- Alterations to the asset that are required in the event of a claim
- Any other costs (with insurer agreement).

In summary, portfolio title insurance needs only a sample DD to put in place, the rates remain low and the coverage is broad. If you are looking at acquiring a portfolio of assets, this insurance should be taken into consideration to save money, time, de-risk the transaction and make your bid more attractive.

TO FIND OUT MORE ›

ANNA BEADSMOORE

Head of Legal Indemnities, Real Estate
+44 (0)207 234 4618 | Anna_Beadsmoore@ajg.com

06. PUBLIC PROCUREMENT: HOW INSURANCE CAN HELP DEVELOPERS ENTERING INTO CONTRACTS WITH THE PUBLIC SECTOR

When a public body is tendering for services, they must adhere to procurement law. This is also the case when it comes to public bodies working with developers and property owners. Falling foul of these rules mean that the development or letting can be challenged and ultimately the contract being declared ineffective. This can cause serious losses, not only for the public body but for the developer/property owner as well.

What is exempt?

It is generally accepted that obligations under a Section 106 agreement will not need to follow public procurement law as the provision of the additional facilities as a result of a development is not an obligation on the developer to execute works on behalf of the council but a decision of the developer to proceed with their intended works that warrant the inclusion of a Section 106. Therefore, planning obligations are not usually counted as contractual obligations.

Local authorities can submit a voluntary transparency notice (called a VEAT) which states that the authority does not believe that there is a requirement to advertise the contract. However, in the case of *Faraday Development Ltd v West Berkshire Council [2018]*[2] this notice was submitted and was deemed by the court to be insufficiently detailed and the contract was therefore deemed ineffective. Since this case, developers should be warned that successful challenges to public contracts might be more likely.

What are the issues?

There are six months in which the contract can be challenged by a third party and this puts developers and property owners at risk of facing abortive costs and contractual penalties due – much like Judicial Review insurance. These will be exacerbated in the event that the contract is deemed ineffective.

Solutions

Insurance is now available for this type of risk. In a bidding process with a public sector body, quango or charity that results in a contract, the risks associated with a challenge can be covered. In the event that a contract is awarded with a public sector body, that did not have a bidding process, there is greater risk of challenge, even if a VEAT is submitted. It is imperative that developers asses the risk of challenge and look into insurance as a way to mitigate financial loss. There is more than one insurer who can provide this type of cover.

The policies can cover:

- Abortive costs i.e. costs of materials expended / works that have been undertaken / legal fees and professional fees
- Increased costs associated with a delay in the development, such as increased finance costs
- Contractual liabilities.

These policies allow comfort, not only for the developer but for key stakeholders such as lenders to protect their balance sheet in the event of a challenge.

TO FIND OUT MORE ›

ANNA BEADSMOORE

Head of Legal Indemnities, Real Estate

+44 (0)207 234 4618 | Anna_Beadsmoore@ajg.com

2 https://www.brownejacobson.com/training-and-resources/resources/legal-updates/2018/12/faraday-development-ltd-v-west-berkshire-council-the-court-of-appeal-hands-down-important-public-procurement-decision#:~:text=The%20Court%20of%20Appeal%20has,the%20public%20procurement%20regime%20requirements.

07. ENVIRONMENTAL, SOCIAL AND CORPORATE GOVERNANCE – ENVIRONMENTAL LIABILITY & REAL ESTATE

The new decade appears to have started with a plethora of emerging risks and a significant global increase in awareness of environmental matters – from climate change to the impacts of pollution and more.

Evaluation and reporting of Environmental, Social and Corporate Governance (ESG) criteria is becoming increasingly important for Real Estate organisations – and as part of the ESG agenda, companies need to show how they will consider, manage, mitigate and protect themselves against a range of environmental risks.

An important component of ESG is that a company should have a strategy to ensure the sustainability of its business and have demonstrable measures in place to be resilient. In addition to increasing environmental and social performance, it can add value to a company and protect its financial performance.

In this article, we highlight some areas where Environmental Impairment Liability (EIL) insurance has a positive role to play in risk mitigation, protection of business and ultimately protection of the environment for the Real Estate sector.

How can Environmental Impairment Liability (EIL) insurance support ESG in Real Estate?

Traditionally, EIL has mainly been used in single property transactions, for insuring against potential claims and regulatory liabilities arising from pre-existing pollution conditions (historic contamination). Increasingly, however, real estate owners and investors are acquiring EIL to cover their operational risks and/or property portfolios.

Change is a constant, whether it is a change in law, new scientific discovery, new technology, increased awareness, or simply a change in who/what is next door. It is not just environmental risks themselves that change over time, but people's perceptions as well, as we have seen. This makes the challenges of effective environmental risk management and protection even greater.

We have very briefly summarised below a range of environmental risks that real estate organisations should be considering. The list is certainly not exhaustive and each risk is worthy of an article in its own right:

- Climate change risk
- Emerging Contaminants
- Waste crime
- Historic contamination
- Site development pollution risks
- Operational pollution risks
- Knotweed & other invasive plants
- Asbestos
- Electro Magnetic Frequency (EMF)
- Radioactive substances
- Natural resource/biodiversity damage
- Legionella disease.

Landlord and landowners can face residual liability for pollution caused by their tenants and contractors (especially following insolvency of the polluter) and liability for pollution caused by trespassers and illegal occupants. There are a number of multi-million pound claims in the UK on landlords for this type of scenario ranging from individuals to blue chip pension funds.

Recently, we have seen a shift in clients' focus (especially amongst Real Estate developers & investors) from onsite liabilities (clean-up costs, etc.) to realisation of the potential impact of offsite third party claims and the need to mitigate against them. In addition, landlords and investors are increasingly considering how an environmental claim may impact their tenants' business's operations in terms of shutting them down or delaying their operations, resulting in loss of rental income and third party business interruption claims.

Many of the risks listed above are insurable with a specific EIL policy, but the coverage available and cost is highly dependent on a range of factors, such as the quality and extent of technical information, structure of contracts, etc.

EIL can protect business operations from interruption caused by pollution/contamination and cover property investment income such as loss of rent, to protect landlords and lenders/investors. This can be combined with contingency plans showing a robust and demonstrable management and mitigation of risks.

Policies can cover Directors and Officers of insured parties, multiple insureds and their benefits can also be assigned to a new purchaser and investors. Cover can be obtained for ongoing commercial/industrial activities, thus protecting a company's business operations and employment.

Reputational risk and the ability to respond proactively to an incident and effectively manage the ensuing communications and public relations issues can be an important factor for companies. Some policies can extend to include crisis management and emergency response costs.

EIL can also help to facilitate transactions and loans/investments, by transferring known and unknown environmental liability risks in an open and transparent way for a known cost to an environmental insurer. Thus showing management of the risk and adding value.

Summary

Ultimately, in the event of a significant environmental claim the company responsible (the 'Polluter') may become insolvent and be unable to pay, in which case the liability is likely to transfer to the landowner/landlord/employer.

Real Estate organisations are discovering that, irrespective of the contractual and technical risk mitigation measures they implement, not all risks can be 'engineered out' and some residual environmental risks will most likely remain with the site owner/operator, if the 'polluter' no longer exists.

With a combination of risk assessment planning and a properly structured EIL policy, stakeholders can be provided with protection to support both the sustainability of their business and protection of the environment.

TO FIND OUT MORE ›

GRAEME MERRY

Partner, Construction
+44 (0)130 5839425 | Graeme_Merry@ajg.com

ajg.com/uk | gallagher-uk | @GallagherUK

Arthur J. Gallagher (UK) Limited which is authorised and regulated by the Financial Conduct Authority. Registered Office: The Walbrook Building, 25 Walbrook, London EC4N 8AW. Registered in England and Wales. Company Number: 1193013. FP435-2021a Exp. 22.04.2022 | ARTUK-2068

Gallagher

Insurance | Risk Management | Consulting