



PROPERTY INSURANCE INITIATIVES

## **Special Legal Indemnity Risks**

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a creative and dynamic approach to risk solutions...



## Rights to Light

“Questions of Ancient Lights occupy a most important position with reference to building enterprise in large towns, and most of all in London. As the value of house property has increased, disputes of this class have become more common than ever, more difficult of settlement, and more expensive”

- **On Ancient Lights: And the Evidence of Surveyors Thereon**  
**By Robert Malcolm Kerr (1865)**

### What are Rights to Light?

A right of light is an easement which allows owners of properties which have had access to illumination, the ability to protect that level of illumination. This is based on the Ancient Lights law.

It is also possible for a right to light to exist if granted expressly by deed, or granted implicitly, for example under the rule in *Wheeldon v. Burrows (1879)*.

Once a right to light exists, the owner of the right is entitled to “sufficient light according to the ordinary notions of mankind” as per *Colls v. Home & Colonial Stores Ltd (1904)*.

To determine what is considered “sufficient” light, experts use a method initiated by Percy Waldram in the 1920s. Waldram suggested that ordinary people require one foot-candle of illuminance (roughly ten lux) for reading and other work involving visual discrimination. This equates to a sky factor (similar to the daylight factor) of 0.2%.

The infamous case of *HKRUK II (CHC) Limited v Heaney (2010)* changed the landscape beyond recognition. Developers can no longer assume that paying damages to the affected party will resolve a rights to light dispute. Instead, they face the real prospect of an injunction. This could lead to them having to alter the development, possibly even after completion of the works. It could also lead to the project becoming unviable and having to be abandoned altogether.

### How does the Policy work?

Cover comes in a variety of forms:

- Ground up cover - which is not subject to any excess
- A combination of ground up cover and excesses
- Ground up cover with excesses which fall away once neighbourly matters have been agreed
- An approach based policy which greatly reduces the chance of an injunction and provides catastrophe cover

The policy will include all legal costs involved in defending claims against the insured and typically insure any combination of the losses incurred as a result of either a third party claim or a court ordered cessation of a project. These can include settlements, damages, abortive or additional project costs and diminution in value of land.

We can also look at providing business interruption cover should any delay cause problems with contracts.

## Administrator / Insolvency Practitioner / Liquidator / Trustee Sale

Usually, property is sold with “full” or “limited” title guarantee, in accordance with the Law of Property (Miscellaneous Provisions) Act 1994. This allows the buyer to sue the seller for breach of the title guarantee. If the seller is a trustee, personal representative or mortgagee, he will normally sell the property with limited title guarantee. A liquidator selling a property, or a seller who cannot prove good title to his property, may sell with no title guarantee at all. This means no covenants for title are given, and there is nothing in respect of which the buyer can sue.

This policy essentially has the insurer give the guarantees, so should they be breached, the insurer will compensate the insured for loss rather than the seller. A policy can assist by:

- Offering a clean exit, free of contingent liabilities
- Helping to reduce the risk of “price-chipping” by the purchaser
- Complementing or replacing title reps and warranties
- Streamlining the sales process
- Enhancing the marketability of the asset

For the buyer our policies can assist by:

- Offering surety of ownership
- Avoiding the need to “take a view”
- Streamlining the due diligence process, saving time and cost and, where relevant, enhancing your bid
- Providing cover for every asset in the portfolio (see below)
- Helping to facilitate and streamline lending
- Helping to manage the buyer’s own exit strategy

These policies are also increasingly used in portfolio scenarios where there may be hundreds or even thousands of assets to consider. This can make the process of performing due diligence difficult due to prohibitive timescales and/or prices. In this scenario, portfolio insurance can be used.

## Portfolio

Portfolio insurance helps the purchase, refinancing and securitisation of property and loan portfolios complete more quickly and more cost effectively.

This is achieved by working alongside the due diligence process and conducting a sampling approach of the portfolio. The overall risk is then assessed and a wrapper put around the non-sampled policies which protects them from any potential legal defect. This type of cover is particularly useful when speed or budget are critical, such as in bid situations.

## Judicial Review

Despite changes to the legislation and time limits, Judicial Review applications still represent a significant risk to developments. The planning process can be difficult to navigate and any mistakes will be exploited by opponents of a development. This can cause significant delays and incur high legal costs. Judicial review policies allow the developer to get to work without the uncertainty of having to sit out the 6 week challenge period. The policy covers all legal costs in defending a judicial review challenge, as well as a variety of other losses, including the resubmission of the planning application and wasted development costs.

## Forfeiture of Lease and other Lease related issues

Leases can be extremely complex and their operation has been varied by laws over the course of time. Many terms and formats which were previous acceptable, are no longer such. Cover can be provided in the following instances:

- A breach of the terms and covenants in the lease
- A breach in the lease to a superior interest
- A lack of mortgagee step in rights in the event of insolvency
- Issues arising from guarantees as per the decision in Good Harvest
- Good leasehold title
- Defective leases
- Leasehold enlargement

## Ongoing Litigation

Risks can materialise into events. Should the worst happen and you are uninsured, we can provide policies which allows the insurer to step in and take control of the situation, bringing their specialist knowledge and expertise to bear and resolving the issue quicker and more effectively. The insurer will work with developers and their advisers to define pre-agreed risk management strategies intended to diffuse the impact of construction projects and corral potential disputes towards fair and reasonable outcomes for both sides.

## SPV Share Sale

This policy protects should the person transferring the property to you turns out to not be the owner of the company in whom title to the Property is vested or the registered proprietor at Land Registry. In addition, you are insured if the seller does not have legal capacity to transfer the Property to you for any of the following reasons:

- The Seller is not duly incorporated in England
- The Seller does not have all necessary power and authority to enter into and perform its obligations under the Share Sale Agreement and other Transaction Documents described in the Certificate of Insurance;
- The execution, delivery of and the performance by, the company of its obligations under the Share Sales Agreement and the other Transaction Documents breach the Seller's memorandum or articles of association, byelaws or any similar constitutional document, order or judgment that affects it or results in a breach of any law, regulation, order, judgment or decree of any court or Governmental Entity to which it is a party or by which it is bound.



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