



General Guidance

Rights of Light Insurance

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insurance management

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Background

Insurance is a prevalent mechanism or tool used by developers to manage their Rights of Light risks when developing a site. The evolution of the Rights of Light insurance product now means that there are a number of options of how an insurance solution can take shape in order to meet a clients' specific needs.

Rights of Light insurance is aimed to provide a risk transfer mechanism (financial security by way of indemnity for insured losses) against the prospect of an affected party asserting their right of light. Insurers can take three differing strategies when dealing with affected properties under an insurance policy. Given the development of this kind of insurance in recent years, insurers are now able to provide policies which are a hybrid combination of the three available strategies.

Traditionally, policies would hold a condition against an insured approaching any of the parties with an interest in any of the insured affected properties. In this case, the insurer deals with any claims that arise with the cooperation of the insured party and the policy would not normally carry a policy excess. This strategy is typically known as 'traditional wait and see'.

Policies can also be adjusted so that if a claim were to occur then the insured could, within a certain limit and policy conditions, initially handle the claim within a 'Material Event Agreed Conduct' (usually defined within the insurance policy). This strategy is known as a 'reactive' insurance solution. The benefit of this type of insurance is the increased control it gives you compared to the more traditional approach. This also means that the policy will almost certainly hold a policy excess of a set amount, which can be equal, lower to or in some instances higher, than the amount identified as the level of compensation payable in the Rights of Light report.

It is now possible to obtain an insurance product that is tailored to enable clients to proactively approach affected parties with a view of gaining deeds of release, safe in the knowledge that an insurance policy provides comfort against any insured losses over and above a policy excess. This is the third strategy, often referred to as 'proactive' Agreed Conduct solution. The policy would contain a general Agreed Conduct clause (a set of agreed conditions of how one would deal with a proactive approach), and contain a policy excess that is typically based on a similar rationale to the reactive insurance (above).

The conduct of the insurance policy is specified within the endorsements and governs the way in which both reactive and proactive discussions should take place. The benchmark for these discussions is that you or your appointed advisors should at all times act reasonably and not do anything that may prejudice yours or the insurer's position.

Please note that where you proactively approach a party to gain a Deed of Release, the costs and fees associated will not be included in the calculation of the excess. The understanding of this aspect of the insurance is that the excess will only take into consideration awards paid to the affected parties to release their rights.

Claim mechanics

Foreword: The following information is aimed at providing a simple guide as to some of the mechanics of how a claim could be handled, although each claim and the circumstances surrounding it will of course be handled on its own merits and governed by the terms and conditions of the policy.

1. Proactive - General Agreed Conduct: Negotiations within the deductible (policy excess) - the insured may elect to approach certain identified injured parties to conduct discussions and negotiations using their preferred surveyor/lawyer, however these communications would normally require the consent of the insurer prior to their commencement. Likewise, any formal offer of compensation would normally be notified to the Insurer for their approval (not to be unreasonably withheld or delayed), unless certain provisions within the policy before it is submitted.
In this case the insured will be responsible for the professional fees/costs associated with the negotiations until the matter becomes a claim under the policy. Therefore, the deductible/policy excess for the property in this type of solution only applies to the settlement or compensation amount agreed between the parties.
2. Reactive Material Event Agreed Conduct: negotiations within the deductible (policy excess) - the insured may elect NOT to approach the identified injured parties to conduct discussions and negotiations, but the Insurer may feel that the risk is such that if a notification were to come forward from a party within a particular property or property owner, that they will want the insured to deal with this under similar Agreed Conduct conditions as in the proactive Agreed Conduct (above).
3. In the event that a claimant comes forward, rather than the insurer being in control of the initial responses and negotiations, these will be with the insured party. The terms of the negotiations are governed by the conditions within the Material Event Agreed Conduct endorsement. As above, any formal offer of compensation must be notified to the Insurer for their approval (not to be unreasonably withheld or delayed) before it is submitted.

4. Claims exceeding the deductible - in the event of a claim (i.e. a fact or circumstance arising which could reasonably be expected to give rise to a loss for which the Insurer is liable under the policy), the insurer will be entitled to participate fully in any defence, negotiation or settlement of that claim. The insured is at liberty to continue with the project until such time, as the court issue an interim or temporary injunction; at this point to comply with the court order the Insured would stop works therein exposing the insurer to delay costs and potential loss. In practice, it is highly unlikely that the management of a claim would ever get to a point where an interim or temporary injunction would be served, as insurers are unlikely to expose themselves to losses from delay costs.
5. Dependent upon the policy, there may be a dispute mechanism built within the insurance policy to deal with disagreements between the insurer and the insured as to the interpretation of the market value of the property (see definition of market value contained within the policies).
6. There will be an obligation for the insured to mitigate loss (usually defined in the general conditions) subject to both the General Agreed Conduct and Neighbourly Matters Agreed Conduct endorsements (this endorsement acknowledges that various neighbourly discussions may be necessary in order to facilitate the development, such as party wall awards, crane oversail licences and scaffold licences). In the event that a decision needs to be made whether to resist/defend a claim any further then in the absence of agreement between the insured and insurer, there is usually a mechanism which allows for the parties to refer the matter to Counsel.

If Counsel decides that there is more than a 60% chance of an injunction, both sides will agree that the Right of Light asserted should be resolved by way of a settlement, which may include a Curtailed Use and the resultant implications to the insurer.

Delay Costs will be triggered by either (a) an interim or temporary injunction being issued by a court which prevents the insured from continuing with works on site or (b) an agreement between the insured and insurer that works on site should be suspended.

"The losses covered as a result of a delay (triggered by a scenario set out in (3). above) include (but are not limited to) additional finance costs, sums contractually due (such as penalties) and additional expenditure incurred in relation to staff and equipment. The Delay Costs covered will be detailed within the Delay Costs Extension forming part of the Policy."

Please be aware that, although (as set out above) the typical approach is for all offers of financial compensation made during Agreed Conduct to be subject to the prior approval of the insurer, in some circumstances it is possible to structure a policy to permit offers up to a certain percentage of the budget for that property without insurer approval.

Furthermore, it is possible to structure a policy so that savings made in one negotiation can be added to a surplus pot which, if agreed, can be used for other difficult negotiations.



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The pros and cons of Rights of Light insurance

PROS	CONS
Transference of financial risk from your balance sheet to that of the insurer for a fixed amount	
Does not remove the risk of injunction	
Peace of mind	Confidential product
Cost efficient and assists in budgeting	Terms and conditions
Deal enabler	Claims management within the control of insurers who may manage a claim tactically. As such, there could be an instance divergence of interests (insurer may want the matter slowed, whereas a developer may just want it to go away)
Time efficient	Costs associated with the cover
Project/Works enabler	Claims "triggers": losses will only flow from defined triggers in the policy such as "order", "decision", "settlement"
Flexible to allow negotiations with high risk properties and cover lower risk on a wait and see basis	
The policy wording can be negotiated to try to meet any specific requirements or specific losses (delay cost, loss of rent and relocation of tenants, etc..)	
Policy provided in perpetuity – one off insurance with cover all parties with an interest in the development/ property and is automatically transferable to successors in title	

Ultimately, the value of insurance will vary depending from one organisation to another and in our experience generally depends upon:

- your requirements
- the requirements of lenders/shareholders
- your attitude to risk and its management
- most important of all the specific risk profile itself

Contact us

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