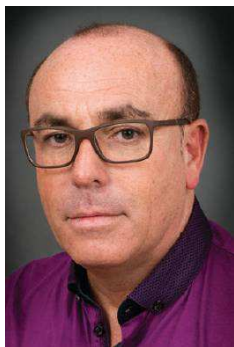


# Legal indemnity and title insurance: present and future trends for the market

**David Bowden** evaluates modern conveyancing indemnity risks and current and predicted developments in the title insurance market.



**About the author**  
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After the House of Lords ruled that neighbouring landowners had to pay for repairs to the local parish church of Aston Cantlow under an ancient chancel repairs doctrine, title insurers adapted to this risk by offering coverage to those buying properties near similar churches (see *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank and another* [2003] UKHL 37). This piece looks at other risks for conveyancers which have emerged since that time, as well as the present and anticipated trends in the market for title insurance.

## Aston Cantlow: the impact on conveyancers

Many conveyancers might have thought that chancel repairs were no longer something to worry about, or had not paid much attention to the subject when it was covered in their land law courses. However, the House of Lords' ruled, in *Aston Cantlow* above, that the owners of a nearby farm had to pay over £95,000 for repairs to a neighbouring parish church. In response, the

market offered insurance against this liability. These policies are usually sold on a block-rated basis by intermediaries to conveyancers.

## Has the chancel repair market reduced?

Chancel repair obligations now have to be registered with HM Land Registry to be enforceable. There was a deadline of 12 October 2013 for the historic property right to be registered, after which the church authorities were unable to enforce the liability against a new owner when the property next changed hands.

However, Kelly Clayton at Property Search Group (PSG) reports that her firm is selling more of these policies than ever. Tom Aldis at Countrywide Legal Indemnities comments that chancel policies will continue to be popular while there is still land and property that has not changed ownership since October 2013, as there is still a risk of registration of an unknown liability.

In many ways that may not be surprising because the claims for chancel repairs continue to pour in. One claims manager I spoke to said that the largest repairing bill he had dealt with was for over £100,000, and that already this year new chancel repair claims had landed on his desk for £12,000, £25,000 and £65,000 respectively.

## Emerging risks that need title insurance

In *Dreamvar (UK) Ltd v (1) Mishcon De Reya (a firm) (2) Mary Monson Solicitors Ltd* [2016] EWHC 3316 (Ch), Mr David Railton QC (sitting as a deputy High Court judge) ruled that Mishcon de Reya had a liability of over £1m when a buyer was duped into buying a property from a fraudster posing as the owner. Permission to appeal has been granted. The Court of Appeal is going to hear this appeal over, four days, before January 2018.

This ruling has, however, served as a wake-up call to many conveyancers. Kelly Clayton says that PSG is looking at providing title insurance to cover this sort of vendor fraud (see also HM Land Registry update of this issue). Tom Aldis says that Countrywide's secure conveyancing insurance policy (SCIP) covers 'unforeseen and unknown risks, including fraud, forgery and seller impersonation', which the insurer has been offering for six years. He says that since the media reports about *Dreamvar (UK) Ltd* first surfaced, SCIP volumes have picked up.

In *P&P Property Ltd v (1) Owen White & Catlin LLP (2) Crownvent Ltd t/a Winkworth* [2016] EWHC 2276 (Ch), Mr Robin Dicker QC (sitting as a deputy High Court judge) dismissed a claim made by a buyer property investment

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company for compensation for alleged breach of warranty of authority and negligence in respect of the solicitors' firm that had acted on behalf of a fraudster vendor, who had impersonated the true owner, and the estate agent that had marketed the property; there was an additional claim for breach of trust and breach of undertaking relating to the former. However, this case is also under appeal to be heard by the Court of Appeal by the end of October 2017.

### Are all fraud risks protected?

In *Swift 1st Ltd v Chief Land Registrar* [2015] EWCA Civ 330, Lord Justice Patten ruled that a proprietor of a charge registered at HM Land Registry, which later turned out to have been forged, was entitled to payment by way of indemnity under Land Registration Act 2002 Sch 8 where the registered proprietor and rightful owner of the property was in actual occupation at the date of the forged charge. Tom Aldis says that such risk would not be covered by Countrywide's SCIP because it relates to a third-party mortgage fraud against an existing owner's policy, whereas SCIP is designed for purchases.

### Trends in right to light claims

On the whole, policies covering this liability are more common for commercial conveyancers, particularly those advising developers that are building new blocks of flats. These policies are underwritten on an individual basis. For new developments, typical amounts of cover could hover around the £20m mark. However, Tom Aldis advises that some of these policies may come with a sizeable policy excess, particularly when developers want to approach the injured parties after a policy has been issued in order to fulfil their neighbourly responsibilities. One claims manager said that policy excesses he had seen varied from £50,000 to £250,000. Tom Aldis said that Countrywide will usually need to see a surveyor's report for the proposed development before being able to start working on a quote.

Not surprisingly, there is a greater skew of these policies in the London area. When claims do come in, the losses sought from neighbours living in low-rise buildings are greater than the amount claimed by those living in mid-rise and other high-rise buildings.

### Cover for Japanese knotweed?

Question 7.8 of the Law Society Property Information Form TA6 asks property sellers: 'Is the property affected by Japanese knotweed?' The options for an answer are 'yes', 'no' or 'not known'. This question has served to concentrate

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the minds of many property sellers and buyers. One experienced conveyancer said that she had arranged a lot of these policies for clients, emphasising how difficult it was to get rid of the invasive plant.

Tom Aldis agrees that Japanese knotweed is a UK-wide problem. He adds that it is difficult to identify the plant and to answer 'no' to the TA6 question. He adds that higher risk areas are where nearby land or property is vacant, unmaintained or close to a railway line. Kelly Clayton says that PSG offers a block-rated policy, which provides up to £20,000 of cover in respect of this risk.

Tom Aldis says that premiums start at £67 for cover up to £100,000 and block insurance schemes are also available. He reports that Countrywide dealt with a claim where Japanese knotweed was found in a London property 'nestled in a space between his shed and a wall', with problems compounded by 'uncertainty over the legal boundary'. Countrywide appointed a specialist to treat the infestation before it could grow any bigger. He says that 'even though there were only three knotweed stems on the property, they will take three years to completely eradicate and the treatment will cost £2,400'.

### Insurers' reaction to SDLT changes

In the 2016 Spring Budget, the then Chancellor, George Osborne, introduced changes which meant that buy-to-let investors would pay an additional 3% stamp duty land tax (SDLT) on property purchases completed on or after 1 April 2016. In response, more policies were sold in the early part of 2016 covering local search delays; however, conveyancers cautioned that this was an exceptional event and that buyers really needed a full local search result before making a decision about whether or not to proceed to buy.

### Contaminated land

The search results from an environmental search will usually guide conveyancers as to whether cover is needed for contaminated land. On the whole, such policies are individually rated, but Kelly Clayton said that where the report indicates that there is a low level of risk, these policies are available to buy online. Tom Aldis notes that, historically, Countrywide has sold more of these policies for residential properties than for commercial ones. This difference could be explained by new residential developments that have been built on brownfield land.

### Effect of lenders' demands for large deposits

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There is a risk that a relative who gives a sum of money to another family member so that they have a sufficiently large cash deposit to be able to buy a house with a mortgage will become insolvent after completion. If this happens, there is a risk that any such gifted deposit could be sought to be set aside by a trustee in bankruptcy.

The market has always offered cover in relation to later insolvency claims alleging that a conveyancing transaction is one at an undervalue, and should be set aside. Kelly Clayton says that a PSG policy offering gifted deposit protection is now one of their top sellers. The policy premium depends on the value of the property, with a typical policy for a £250,000 house costing £100, including insurance premium tax.

### Issues with planning permission or building control

Planning permission and building control policies seem to be hardy perennials for title insurance providers. Tom Aldis says that these policies, together with a combination including listed building consent, remain Countrywide's most popular since the ruling in *Cottingham and another v Attey Bower and Jones (a firm)* [2000] PNLR 557.

The enforcement options available to a local planning authority are usually limited after four years for breach of planning control and after one year for breach of building regulations control. Kelly Clayton says that PSG offers a policy, costing £23, to cover missing building regulations approval on a house costing £250,000. A claims manager said that the typical value of these sorts of claims hovered around the £1,000 mark, with claims in relation to replacement boilers being the most common.

### Have rentcharges fallen off the radar?

Rentcharges have been most prevalent in Manchester and Lancashire, and conveyancers in those areas are most used to dealing with them. However, last year Judge Elizabeth Cooke, sitting in the Upper Tribunal, handed down her reserved judgment in *Roberts and others v Lawton and others* [2016] UKUT 395 (TCC) (known as the *Morgoed Estates Ltd case*). She ruled that, potentially, there were just two legal reasons why a rent owner might not be entitled to register their leases:

- the presence of anything in the rentcharge deed that negated the possibility of a lease being used as a remedy; and
- the rentcharge having been barred by limitation (para 35).

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At the moment, some title insurance providers are working out the best way to respond to this development. Tom Aldis advises that Countrywide offers a freehold rentcharge policy, and has done so for a number of years.

### The view from the Financial Ombudsman Service

As part of the research for this piece, I approached the Financial Ombudsman Service (FOS) to see if it had issued any guidance or whether any unresolved title insurance claims had reached it. Megan Webster, senior caseworker to the Independent Assessor at FOS, says that the ombudsman categorises complaints in line with the Financial Conduct Authority's (FCA's) listed product groups.

She says that FOS does not have a special subcategory for title insurance complaints. It seems that FOS groups such complaints with 'specialist insurance' under the FCA's 'General insurance and pure protection' product category. (Firms report volumes of complaints to the FCA according to 36 different product categories. These categories are combined into the five different product groups.)

### The Insurance Distribution Directive

At the moment, sales of general and protection title insurance policies are regulated by the *Insurance: Conduct of Business Sourcebook* (ICOBS), the handbook rules made by the FCA. The rules implement an existing regulatory framework that applied across Europe when the 2002 Insurance Mediation Directive (IMD) (2002/92/EC) came into force. However, the EU has revised and tightened up these rules, and the Insurance Distribution Directive (2016/97/EU), which will repeal and replace IMD, will be implemented by 23 February 2018.

The FCA has published a consultation paper setting out how it proposes to enforce these new rules in the UK.\* The consultation, which runs until 5 June 2017, contains new draft rules for the ICOBS handbook.

Most problematic for insurance providers will be the new requirement for insurance brokers to provide to their customers, before selling an insurance policy, details of the fee, remuneration or other commission they are receiving from the insurer for arranging the sale. Samantha Horn, head of support and financial services at PSG stresses that UK implementation of these new rules is still in its very early stages, but that it 'may result in commission disclosure, more demands and needs information, and also CPD requirements for general insurance advisers'.

## Title Insurance Policies that do not sell well

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Although this is not a guarantee of future trends, Kelly Clayton says that, presently, the sales volumes for policies covering risks, such as absent landlords, freehold rentcharges and mineral rights are very low. One claims manager said that, in relation to enlargement of lease cover, he had not seen a claim in the past 10 years.

### Do policies offer peace of mind?

A conveyancer with over 30 years' experience stressed that property buyers are spending a lot of money on buying their home, and the transaction was not like buying a loaf of bread. As can be seen with risks such as knotweed, these policies do offer peace of mind; they also allow a seller to progress the transaction and prevent hold-ups in the conveyancing chain.

\* *Insurance Distribution Directive implementation – consultation paper I* (CP17/7), available at: <http://tinyurl.com/kxks8ap>. A second consultation paper will be published later this year.