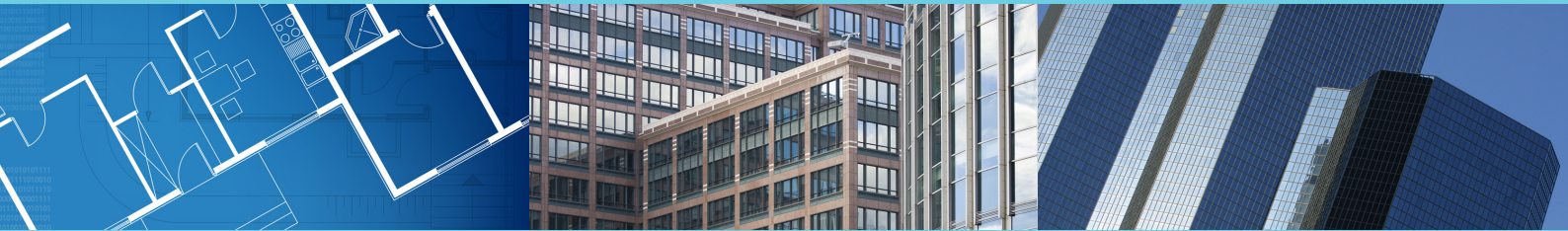


Managing Risks in Real Estate Transactions



When acquiring or disposing of a real estate asset an entity can be left to deal with substantial contingent liabilities and the management of these can be extremely difficult. In times of increasing corporate governance obligations and regulation, these issues have the potential to cause sizeable losses to a business or lead to the negative performance of a fund which may affect its reputation and in turn the decisions made by both current and potential investors.

Transactional Risk Solutions

We arrange bespoke insurance solutions for a range of scenarios faced by companies and funds to remove or reduce the potential risks associated with a transaction on the entity or a fund and their investors. Our key areas of focus include:

Disposal Exposures

Issues

When disposing of an asset, legal exposure is often assumed by a seller or the fund through giving warranties and tax indemnities under the acquisition agreement or tax deed.

Solution

A Seller-Side Warranty and Indemnity Policy can be a useful solution to offset exposures where a seller has had to provide a high financial cap on liability for warranties and indemnities, sometimes for a significant length of time.

Acquisition Exposures

Issues

Buyers and funders often have concerns over the recoverability of potential losses from warrantors. These commonly centre on:

- concerns over the seller's (warrantors') financial covenant/distressed sales
- use of Special Purpose Vehicles (SPVs)/corporate structures
- warranties being provided by individuals
- a low warrantors' cap under the acquisition agreement.

Solution

In all of the above scenarios buyers often require some form of additional comfort and for each a Buyer-Side Warranty and Indemnity Policy can be used to transfer risk away from the buyer and onto an insurer. A seller can also look to suggest a buyer's policy for commercial purposes in order to achieve a clean exit from a sale by capping their exposures at a low level and structuring the policy to cover the buyer's resultant exposure to a level the buyer is comfortable with.

Contingent Tax Risks

Issues

A significant loss may arise when taxation authorities successfully challenge the tax treatment of an entity or its wider group.

Typical areas of concern include:

- Onshore/offshore domicile concerns (including permanent establishment/transfer in land risks)
- Stamp duty land tax/capital gains tax exposures
- Pre/post sale reorganisations

Solution

Tax Opinion Liability Insurance can be arranged to provide protection against the possibility of these known contingent tax exposures crystallising. In terms of structure, a policy can be written to cover a specified issue or can sit behind an indemnity given within the acquisition agreement.

Environmental Liabilities

Issues

Real estate owners, funders, lenders, developers and tenants can all be exposed to the costs or effects of environmental clean-up liabilities and other associated losses attaching to a property asset or portfolio. Liability can arise from historic or current site activities, so it is important to consider the environmental exposures associated with current, past and future property interests.

Solution

Environmental Impairment Liability (EIL) Insurance can be structured to protect against the potential liabilities, whether for a single site or a whole property portfolio. The potential for environmental liabilities can come into particular focus at times of property transactions, especially given the limited nature of the due diligence information often obtained. EIL insurance can provide a long-term solution to overcome the environmental obstacles to a transaction completing.

Marsh's Private Equity and Mergers & Acquisitions Practice

The team in Marsh's Private Equity and Mergers & Acquisitions Practice has significant experience in arranging bespoke insurance solutions and providing environmental risk management and due diligence services for real estate transactions. We work closely with real estate companies, funds and their advisers to design solutions and provide expert advice to enhance protection against the risks associated with the acquisition and disposal of real estate assets or related funds, trusts, SPVs and companies.

Case Studies

Transaction	€120 million sale of an asset to a pension fund	Transaction	£250 million purchase of a UK office building held in an offshore trust	Transaction	Multi-million pound purchase by a Real Estate Investment Trust (REIT) of certain sites within an industrial estate with known legacy issues
Issue	Selling entity was an SPV and therefore the buyer had concerns over the seller's strength of covenant for any post-sale losses	Issue	The purchaser was a newly launched pension fund which was concerned about a possible future challenge by HMRC as the asset was held offshore	Issue	The available due diligence was considered limited and the REIT was assuming responsibility for any historic contamination through the terms of the acquisition agreement
Solution	Buyer-side warranty and indemnity (W&I) policy	Solution	Tax opinion policy	Solution	Environmental impairment liability insurance
Structure	A €30 million buyer-side policy was put in place with the sellers leaving €250,000 in escrow for first losses for the first 18 months	Structure	A combined buyer-side W&I and tax opinion policy was put in place with an aggregate limit of £25 million	Structure	A £15 million limit with a 10-year policy period
Benefits	The sellers initiated and paid for the policy, thus giving them a virtually clean exit. The buyers had protection up to a level they were comfortable with and at no cost to them	Benefits	Buyers protected from both a challenge by HMRC and any breach of the warranties. This meant that the fund could be launched without the potential for a sizeable loss early within the fund's life cycle	Benefits	Long-term cover for all the potential pollution liabilities of concern, including the loss of rent should a tenant need to vacate the site whilst remediation takes place. Flexibility for future assignment of cover. Premium less than 0.2% of the purchase price

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