Efficient COT transactions through risk transfer



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Clients instruct their law firm to act on a sale or re/finance based on expertise and trust. Firms will often have built that trust over many years and will have detailed knowledge of complex property title(s), asset management arrangements and their client which are all applied to preparing a comprehensive and accurate Certificate of Title (CoT).

As real estate transactions have grown in value, solicitors' professional indemnity capacity has become a more prominent consideration. The law firm with the strongest understanding of the transaction will not always have access to the level of professional indemnity cover sought by a lender or investor.

The 8th edition CLLS Certificate of Title

The inclusion of indemnity cap wording in the 8th edition of the CLLS Certificate of Title did not introduce a new concept. Instead, it formally recognises the way many transactions were already being approached.

No one would expect a valuer to assume responsibility for environmental contamination, nor would a planning consultant be expected to carry title risk. Commercial real estate transactions work best when the responsibility sits with those best placed to assess and manage it.

The same principle applies to Certificates of Title. The firm responsible for certifying title brings legal expertise, knowledge of the asset and familiarity with the transaction.

The size of the law firm's professional indemnity programme is a separate consideration, and one that is not always straightforward to change. Additional limits can be expensive, difficult to obtain, and disproportionate where a law firm encounters only a small number of exceptionally large transactions. Law firms carrying significantly higher limits on a permanent basis for occasional large transactions is not an efficient solution.

> *"Professional indemnity exposure has practical limits, particularly as deal values continue to increase."*

Expertise vs. PI capacity

Firms with long-standing client relationships have built up a deep understanding of their property assets. On a refinancing, they may have acted on the original acquisition. On a portfolio funding, they may have advised on multiple assets over several years. They understand the title history, previous negotiations, ownership structure and issues which enables the firm to produce a certificate efficiently.

Replacing advisors simply because a transaction requires a higher level of protection can add costs, duplicate work already completed, and introduce inefficiencies. It can also disrupt established client relationships and remove the people with the deepest understanding of the asset from a transaction at a critical stage.

Where the COT necessitates an indemnity cap which exceeds the professional indemnity insurance coverage of the law firm, specialist insurance can provide an additional layer of cover above the indemnity cap. This allows the liability position to be addressed separately from the legal work itself.

By transferring risk through one-off insurance, lenders and investors obtain the protection they require while the certifying solicitor remains engaged on the transaction and continues to apply their knowledge of the borrower, the asset and the title history. The transaction benefits from continuity of advice without requiring the law firm to restructure its professional indemnity arrangements around a single deal.

Enabling the transaction

The approach has already been used on major refinancings, portfolio transactions operating under aggregated liability caps and assignments involving the reissue of existing Certificates of Title.

As real estate transactions grow in complexity, retaining the certifying law firm's expertise is just as important as securing the appropriate level of protection behind it.

Specialist insurance gives the market another way to achieve both.

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