

BROKER SURVEYS

The danger associated with broker risk surveys was highlighted by the Center Parcs case in 2003. Following a fire at their Suffolk location, all manner of allegations were made, not least against the broker surveyor for failing to warn the client that the panelling used had a propensity to burn rather well. This may seem a little harsh in view of the ensuing debate as to whether even a construction professional would have recognised the problem. What is clear is that in agreeing to perform the surveying function the broker can be undertaking an unenviable task and is an obvious target for a client whose insurers do not pay. The benefits of offering clients a surveying service must therefore be carefully balanced against the associated risks. This bulletin identifies the risks associated with surveys being relied upon by clients, underwriters or indeed other third parties and then sets out steps that the broker should take to ensure that these are kept to a minimum.

IDENTIFYING THE RISK

The Client

The attraction of offering a 'full' service to a client, in circumstances where an insurer requires information that can only be provided by a survey, is readily apparent. A broker who performs such a survey on behalf of its client is, in fact, assisting the client to make a full disclosure of all material information. The danger, of course, is of the survey not being performed effectively. Something may be missed by the surveyor that is later held to have been material. If that has not been disclosed by the survey the broker will be liable to its client for the consequences of an avoidance by the insurer. An additional danger exists in that the survey may fail to pick up some point which is not relevant to the insurance in question, but which may later cause a loss to the insured. If the insured can show that he relied on the surveyor in this respect, the broker could find itself liable to the client for this type of "surveying" rather than "broking" loss.

Visiting clients' premises and keeping abreast of what they are doing is good for client relations. However, beware the client who casually walks the broker around some new premises/operation and who later claims the broker thereby knew of some undisclosed information. Disclosure obligations must always be addressed with the client, however informal the circumstances. Where a survey needs to be commissioned to fulfil those obligations, the client should be advised accordingly.

The Underwriter

If a broker does prepare a survey report it should form part of the broker's advice to the client. It should not be intended as an aid to underwriters in making underwriting decisions. Nevertheless, frequently underwriters do see brokers' survey reports and certainly for smaller commercial risks may decide not to carry out their own survey. Where an underwriter does appoint his own surveyor, this does not remove the duty of disclosure from the insured. The contents of the underwriter's survey report will not be known at the time of the insured's disclosure and cannot be relied on to fill in any gaps in the client's own report.

Occasionally an underwriter, rather than the client, will ask the broker to carry out a risk survey on their behalf. Extreme caution needs to be exercised in considering any such request, in view of the potential conflict of interest this situation presents. The client's best interests must be the broker's paramount concern and these may well conflict with steps underwriters require to be taken following the broker's survey report. The broker is in no position to negotiate a compromise on the client's behalf in such a scenario.

Other Third Parties

There are other parties who may rely upon a survey report for a purpose other than that for which it was prepared, and who suffer loss as a result. An example could be a mortgagee relying on a report that may not address matters that a survey commissioned by the mortgagee might have done. A broker may not have contemplated a mortgagee relying upon the report when it was prepared. However, if it later became aware that the mortgagee had received a copy and was likely to act on its contents, but made no comment on the limited purpose of the survey, the broker could be liable for loss suffered by the mortgagee.

MANAGING THE RISK

There are a number of ways in which the risk associated with undertaking a survey can be limited by the broker.

- Where a client requests such a survey the broker should clarify at the outset that any report should be relied upon for insurance purposes only, to avoid the "surveying" rather than "broking" type of loss referred to above.
- The scope and purpose of the report should be recorded at the start of the document.
- The report should make it clear that it is only intended for the specified purpose so that underwriters cannot rely on it in making their underwriting decision and neither can other parties for other purposes. To achieve this we would recommend that a clause reading along the following lines should appear in a prominent place on the first page:

"This document has been prepared to meet the specific purposes described within it. It has not been prepared for, and may not meet, any other purposes. In particular, it has not been prepared for, and may not meet, the requirements of any party other than the party for whom it has been prepared by [broker]. Any third party to whom it is supplied should take such steps as it considers necessary to satisfy itself that its own requirements have been met and should not rely upon this report as doing so."

- The contents of the report should, of course, be accurate and should be limited to factual information and evaluation, avoiding subjective comments.

RISK MANAGEMENT MESSAGE

- Clarify scope of the instructions with client and that the report will be prepared for, and should be relied on for, insurance purposes only.
- Include an appropriate caveat in a prominent place specifying that the report cannot be relied upon by underwriters or other third parties.
- Limit the report to factual information and evaluation - avoid subjective comments.

This bulletin is for general information purposes only and does not provide a comprehensive or complete statement of the law relating to the issues discussed nor does it constitute legal advice. In addition, by its nature, this bulletin may be superseded by subsequent regulatory or legal developments. Professional advice should be sought where appropriate in relation to any particular circumstances.

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