

What is a solicitor's role?

Flood risk investigations are now an intrinsic part of the conveyancing process, but to what extent do solicitors need to advise their clients and what are the implications of forthcoming changes to flood insurance? Hannah Kramer reports



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'Flood risk analysis clearly goes beyond our expertise as legal practitioners, so should we be eschewing any responsibility at all and directing clients toward flood risk surveyors instead?'

The winter of 2013/14 has proved to be one of the wettest on record for England and Wales, and the extensive flooding across much of the country has dominated the news headlines. At the time of writing, the Association of British Insurers have said that the cost of this extreme winter weather to insurers will be more than £800m, and the Environment Agency are still issuing flood alerts for the South East and South West of England, highlighting on their website that this was the wettest January in 250 years. Unfortunately, the latest flooding continues the trend toward an increased incidence of flooding in the UK in recent years. Many parts of the country experienced flash flooding in 2000, with further flooding affecting 55,000 properties in the summer of 2007 (the same year Rihanna's aptly named hit song Umbrella dominated the charts for ten consecutive weeks), and the Environment Agency estimates that the cost for all properties affected by the severe flooding in 2012 reached £277m. The forecast for the rest of 2014 looks set to remain wet in some parts of the country, even if the rain holds off, given current groundwater levels in some areas.

In light of this, concerns about flood risk will, understandably, be on many clients' minds when proceeding with property transactions. Flooding may not only affect their future use of a property, but also

impact upon its value and insurability. Some clients may well turn to their solicitors for guidance. However, what should our role be? Is it to identify possible risk, or advise on the practical steps to be taken? Many solicitors already carry out site-specific flood searches through commercial search agents as part of their standard conveyancing procedure. To what extent should we be reporting and advising on the results? Flood risk analysis clearly goes beyond our expertise as legal practitioners, so should we be eschewing any responsibility at all and directing clients toward flood risk surveyors instead? There is a need for clear guidance on a solicitor's role in advising clients on flood risk.

The increased focus on flood risk has also been precipitated by the current status of the agreement between the government and the Association of British Insurers (ABI), the Statement of Principles, which formally expired in July 2013 and is set to be replaced by the Memorandum of Understanding (see further below). This is particularly likely to affect the levels of insurance premium paid by small businesses and homes in council tax band H where properties are at a high risk of flooding. Engaging in increased flood risk due diligence, and advising clients to fully investigate the cost and availability of flood insurance, will therefore need to play a greater role in the pre-contract due diligence and reporting processes.

Law Society guidance

- Do not rely on screening searches, such as those covered by the Environment Agency’s website, which are not property specific, do not cover flood depth, speed or volume, and do not cover flooding from sources such as groundwater or overflowing sewers. Supplement with enquiries and, where appropriate, site-specific searches via commercial search agents.
- Consider the terms of any commercial flood risk search agent used, and the data set the result is based on.
- When reporting to clients clarify that you do not have the expertise to advise on technical details covered in the report.
- Before entering into a binding contract, advise your client to establish the available terms of any buildings insurance for covering flood damage for the relevant property, and to discuss the level of flood risk to which the property is exposed with a building surveyor or flood risk assessment consultant.
- Advise clients of lenders’ insurance requirements.

Is there responsibility for investigating risk of flooding?

The Law Society guidance, published on 23 May 2013, states that:

... in all conveyancing transactions, when acting for a prospective buyer, tenant or lender in residential and commercial transactions, you should mention the issue of flood risk to your client and, if appropriate, make further investigations.

Responsibility for carrying out an initial investigation on flood risk therefore clearly lies with solicitors.

Traditionally, flood risk due diligence has been limited to pre-contract enquiries of the seller or landlord, and searches of the Environment Agency website.

The latter can either be carried out directly, or via a separate environmental search which carried out flood screening assessments.

Enquiries

Pre-contract enquiries usually take the form of Commercial Property Standard Enquiries (CPSEs) for transactions involving commercial property, and the Law Society Property Information Forms (TA6) in respect of residential property. However, these enquiries only ask for details of flooding affecting the relevant property; solicitors may therefore choose to supplement these with further enquiries asking if flooding has affected any nearby properties and, if so, the source of flooding in order to gauge the level of risk. Where necessary and

depending on the replies initially provided, further specific enquiries should also be raised and the responses flagged to the client at an early stage in the transaction.

Screening

Flood risk screening reports provide an initial, high-level, non-property specific flood risk assessment and are often produced quickly at low cost. The results are based on data available from local authorities, the Environment Agency flood map and other publicly available sources. However, these reports will not necessarily provide information which is as accurate or comprehensive as may be required. Although the Environment Agency’s flood map now covers areas at risk of surface water flooding, screening reports do not always show potential flooding from groundwater or potential depth of flooding, or account for the presence and impact of flood defences, and are based on postcode rather than the specific property. Information obtained from the National Flood Risk Assessment, covered by the Environment Agency’s flood map, accounts for all properties in a large-scale grid (50m² for 2010). However, not every property in the same square grid will be subject to the same risk level.

The Law Society guidance therefore recommends that such reports are not relied upon as the sole means of assessing the risk of flooding for a property. The Land Registry ‘Flood Risk Indicators’, available to both conveyancers and the public at a cost of £9 per title, are based on the Environment Agency’s

What flood risk due diligence can be carried out?

- Flood risk screening search.
- Desktop environmental search including detail on flood risk (see box on p15).
- Enquiries of seller/landlord.
- Review of the Environment Agency’s flood map available on their website. However, note there are limitations to relying solely on such information.
- Land Registry ‘Flood Risk Indicator’. This is based on the Environment Agency’s flood map and is therefore subject to the same limitations.
- Physical inspection and valuation.

data and, therefore, should not solely be relied on when assessing flood risk either.

Commercial searches and flood risk assessments

The Environment Agency's 2009 report, 'Flooding in England', estimated that one in six properties in England are at risk from flooding. This estimate almost doubled those of previous years as it accounted for, among other things, the risk of flooding from surface water flooding. It is becoming increasingly apparent that a risk of flooding is not always based on the proximity of a property to coastlines or rivers alone. Understanding the sources of flooding is therefore important when determining the relevance of existing or planned flood defence schemes and the likely cost of insurance. This information will be particularly relevant to clients owning, or looking to acquire, commercial leasehold property where insurance and repair decisions will often turn on the landlord's leasehold obligations and, if relevant, any finance requirements.

Many solicitors are therefore also obtaining more detailed flood risk searches which include detail on a greater range of flood sources, the depth of flooding in the relevant area, the impact of flood defences, and an assessment of the risk of flooding. However, the information covered in the searches available from commercial search agents, as well as the search cost, varies. Furthermore, the market for commercial flood searches is not currently regulated.

Although the Law Society guidance highlights that such searches issued by commercial search providers are more likely to include greater detail and be property specific, it does not specifically recommend that separate flood risk searches are carried out in addition to environmental or flood screening searches. As such, the onus therefore lies on the individual solicitor to endeavour to choose the appropriate type of search for each transaction.

Where proceeding with a specific flood search, it is important to ensure that you have investigated the search agents used, the data sets covered by the search and their accuracy, and the search agents' terms of business and any exclusions from liability.

Some searches are more detailed and therefore more suited to commercial sites, while others are more appropriate for residential property transactions. The accessibility of search results also varies. For example, some providers will include brief summaries giving

is to be allocated appropriately between the solicitor and surveyor based on their respective expertise. Determining the level of flood risk, and what mitigation or defence steps (if any) can be taken, are the surveyor's responsibility.

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a 'passed' or 'further action' overall risk assessment. Though useful, clients should also be referred to the flood source breakdowns provided and the further information covered in the results.

Most importantly, when reporting results, it should be made clear to the client that we are not qualified to advise on technical matters regarding the results and that specific enquiries should be raised with their surveyor or the consultant who prepared the report. The Law Society guidance recommends that we suggest to clients that they should 'discuss the level of risk to which the property is exposed with their building surveyor or, if necessary, a flood risk assessment consultant', the implication being that responsibility for assessing and investigating risk

However, as the Law Society guidance does not specify what information should be covered in the flood risk searches obtained by solicitors, the question remains as to the level of detail which should be included in our flood risk due diligence. Although it is clear that we should not be advising on technical matters, it is unclear what, if anything, we should be advising on. Clients will undoubtedly appreciate some guidance on the possible cost of managing flood risk in order to decide whether to proceed with transactions involving properties at risk of flooding. For example, some clients may be wholly deterred from proceeding based on a desktop search result without understanding possible flood risk mitigation and insurance options.

What to consider when obtaining a desktop flood search

- How understandable is the information provided? To be readily understandable the search should include an assessment of the raw data.
- Cost and turnaround time?
- What data set is included? Look for detail of surface and groundwater in addition to coastal, river and reservoir flooding, the risk of flooding, and flood defences and what they protect against. Check whether the data is sourced from the Environment Agency or from private flood consultants which often include a more comprehensive record of flood defences in different areas and how they affect different properties.
- Does the result include recommended next steps, such as obtaining a flood risk assessment for planning purposes?
- Check the accuracy of the data and the search agent's disclaimer.

Consider providing the following advice where there is a risk of flooding

- Further investigation by the client's surveyor.
- Consider terms and costs of buildings insurance covering flood risk for the property and advise client to consider any insurer requirements or limitations.
- Advise client to consider the costs of flood risk mitigation measures and report on any such measures (if any) the seller/landlord has taken.
- Renegotiate commercial terms such as purchase price/premium to account for costs of mitigation measures and buildings insurance premium, or make the contract conditional on implementation of such measures.
- Clearly set out responsibility for insuring against, and repairing, damage caused by flooding in a lease and advise the client of the default position where the lease is silent.

What to consider when there is a risk of flooding

Once it is established that there is a risk of flooding, what level of

designed to slow down or prevent water ingress, or resilience measures, which aim to reduce damage caused by flooding.

Before exchanging contracts, or entering into any security with the lender, clients should ensure that they have investigated the availability and cost of any insurance required by the lender.

advice should a client expect from their solicitor?

The Law Society guidance recommends raising further enquiries where relevant, suggesting that landlords/sellers should therefore be asked to comment on any recommended flood risk mitigation measures identified in any survey. Depending on the results, it may also be appropriate to suggest that a client instructs a surveyor to carry out further, site-specific investigation to understand the level of risk and possible mitigation measures.

Another appropriate step is to suggest that clients review the commercial terms of the transaction, such as the premium or purchase price, in light of the cost of flood risk mitigation steps or an increased insurance premium. Equally, a contract could be made conditional on the seller/landlord implementing any necessary flood resistance measures,

When acting on a leasehold transaction in respect of property which may be at risk of flooding, suitable lease terms should be negotiated to protect the client's interest. The lease should clearly allocate responsibility for insuring against damage caused by flooding and on what terms, specify the steps that must be taken to repair damage caused by flooding (both when it is and is not covered by insurance), identify who is responsible for the cost of repair where insurance does not cover flood damage, and state how long the parties are expected to wait until they may terminate a lease if reinstatement has not completed. Where a client is acquiring an existing leasehold or reversionary interest in property at risk of flooding, and such matters are not clearly dealt with in the lease, the client will expect advice on the 'default position' and on

whether a deed of variation is appropriate.

Lenders are increasingly likely to investigate the risk of flooding and account for this in their valuation. Lenders will usually specify their requirements regarding insurance, such as confirmation that flood risk is specifically covered by the building insurance for the relevant property. Such requirements should be highlighted to clients obtaining finance to be secured against property. Before exchanging contracts, or entering into any security with the lender, clients should ensure that they have investigated the availability and cost of any insurance required by the lender.

Changes to flood risk insurance

With the increased incidence of flooding, and more sophisticated flood risk assessments commercially available, insurers are looking to review their flood insurance premium structures, which may lead to fluctuations in premium rates. Possible changes to flood insurance costs and terms should therefore also be flagged to clients before entering into binding contractual arrangements regarding property susceptible to flooding.

Until June 2013 the government and ABI had worked on the basis of an agreed Statement of Principles, which covers the UK and had been running since 2007. It set out the basis on which cover against flood damage would be provided for most domestic and small business policyholders. Essentially, the Statement of Principles provided that insurers would continue to renew existing customers' home insurance on the same terms if the Environment Agency (or Scottish Government or Executive of Northern Ireland where relevant) considers the relevant property to be outside the risk of flooding, or, where there is a risk of flooding, there are plans to improve flood defences so as to reduce that risk in five years. The Statement of Principles applied to all homes and small businesses built before 1 January 2009.

The Statement of Principles technically expired on 30 June 2013 and many insurers are keen to revert to a risk-based market for flood insurance. The ABI and the government

have therefore been negotiating an alternative scheme to give homeowners access to affordable flood insurance even where the property is considered to be at risk of flooding.

On 27 June 2013, Defra published a consultation paper seeking views on various proposals to secure affordable flood insurance, and the ABI-preferred option was to pursue a subsidised reinsurance pool for high-risk households (Flood Re). A Memorandum of Understanding was therefore issued on 27 June 2013 setting out the basis on which this scheme will operate. The key features of Flood Re are set out below. If necessary, the relevant measures will be introduced using secondary legislation issued under Part IV of the Water Bill, the draft of which was also published on 27 June 2013.

The important point to note is that, at present, insurance premiums for small businesses, leasehold premises and higher-value homes are still covered by the Statement of Principles and are therefore subsidised by those for other properties. If the Memorandum of Understanding is implemented in full, flood insurance for such properties may move to a risk-based market and the insurance premiums for higher risk properties could well increase markedly. This should be highlighted to clients when relevant.

The government published a consultation on the draft clauses for the Water Bill in September 2013. At the date of writing this article, the draft Water Bill is still being considered in the House of Lords.

Conclusion

Flood risk and insurance look set to become matters solicitors will increasingly be required to comment upon. Given the range of property searches available to establish risk, there needs to be greater guidance on what solicitors must investigate, as a basic minimum; what level of client authority is required before proceeding with any site-specific search; and the level of detail solicitors should be required to report on. Linked to this final point is the need for solicitors and surveyors to coordinate and

allocate responsibility for investigating and reporting on flood risk to clients.

on any legislation or new statutory instruments introduced incorporating

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Clients should also be advised to investigate the availability and cost of flood insurance before exchanging contracts and, depending

the principles of the Memorandum of Understanding, advised of the potential future costs of flood insurance in high-risk areas. ■

Key features of Flood Re

- It will be run and financed by insurers as a not-for-profit fund to support the highest risk households.
- It will cap the highest risk households' flood insurance costs, with the caps differing by council tax band so that those in small properties pay less than those in large properties and with the level of excess being controlled between £210 and £540.
- The scheme will only cover council tax bands A to G, ie it will not cover homes in the highest council tax band H.
- There will be a gradual annual increase of the maximum premium.
- To help fund the scheme, member insurance firms will be subject to an annual £180m charge which will be passed back to customers at an average cost of £10.50 per annum on all home insurance policies, ie home owners insuring properties at risk of flooding will pay the same additional premium at those insuring properties subject to a low risk of flooding.
- The government may fund losses exceeding the agreed aggregate threshold, though details are yet to be agreed.
- The aim is to get Flood Re running by summer 2015 and ABI members will continue to meet their commitment under the current Statement of Principles in the meantime.
- Flood Re will only cover homes, ie not properties occupied by small businesses.
- Homes built after 1 January 2009 will not be covered to avoid building in flood risk areas.
- Neither will Flood Re cover buy-to-let landlord, holiday lets or leaseholders.
- Flood Re will not cover damage caused by large-scale flooding above a one in 200 probability (approximately six times worse than the flooding in 2007).
- The intention is that there will be a gradual transition toward a more risk-reflective policy in 20-25 years.