

New guidance on flood risk and contaminated land searches

Paul Butt highlights two updated practice guides from the Law Society, which underline the benefits of flood risk and environmental searches and provide some useful pointers for conveyancers.

The various Law Society practice guides are very useful to all conveyancers – not just solicitors. They cover a large number of topics and indeed they are not just related to conveyancing. They cover a wide range of practice areas. They can be very usefully used as a basis for in-house training and are well worth exploring. They are freely available on the Law Society website to all; not just solicitors.

In December 2014, two guides related to conveyancing were updated – Flood Risk and Contaminated Land.

Flood Risk

Everyone must by now be aware of the risk of flooding affecting property and the devastation it can bring to lives. Every year seems to bring more reported flooding incidents and examples of lives and businesses ruined, but it is still the case that some conveyancers do not routinely advise clients about the availability and advisability of flood reports. These are quite cheap to obtain and arguably, in the writer's opinion essential in almost every conveyancing transaction.

The Law Society Flood Risk Practice Guide is an essential tool for conveyancers and well worth detailed study. It is the Law Society's view as to what is best practice in this area. Thus, not following it does not necessarily render a solicitor liable to a claim of negligence, but may well take some explaining as to why it was not followed.

If nothing else, it will also explain the different kinds of flooding that can occur and dispel the view that flooding is not a risk if the property is not near a river or on the side of hill.

It opens with two important statements that merit further attention:

You should encourage your clients to make sure that insurance can be obtained for the property on acceptable terms before entering into a contract.

You should also liaise with clients in relation to which, if any, flood searches or other investigations, may be appropriate.

In the writer's view, it is difficult to see when it would not be appropriate to make investigations etc. with regard to flooding – except when there are time constraints, perhaps. As the Guide states, one in six homes in England are at risk of flooding (Environment Agency figures). This amounts to a massive 6.4 million homes. In Wales, some 430,000 homes are at risk.

As to when it would not be appropriate to make a search, etc. the writer has come across practitioners who say 'Ah, well the house is nowhere near a river' or 'it's on high ground.' But does that matter? Flooding does not just happen because of rivers overflowing. A very useful part of the guide is the explanations given about the different types of flooding that can occur.

The most common types of flooding are:

- *Surface water flooding - occurs when heavy rainfall overwhelms the drainage capacity of an area.*
- *Sewer flooding - occurs when sewers are overwhelmed by heavy rainfall or when they become blocked.*
- *Groundwater flooding - occurs when underground water levels rise above surface level. This is most likely to occur in low-lying areas underlain by permeable rocks.*
- *River flooding - occurs when a watercourse cannot cope with the water draining into it from the surrounding land.*
- *Coastal flooding - results from a combination of high tides, low lying land and, sometimes, stormy conditions.*

It then makes the point:

It may not always be obvious that a property is at risk of flooding. Properties at risk do not need to be close to a river or the sea or on low lying ground to be exposed to flood risk. Surface water, groundwater and overflowing sewers are increasingly common causes of flooding.

It is always advisable, therefore, to explain to buyer clients the availability of flood searches, warn them of the risks and undertake a search unless written instructions are obtained to the contrary.

But, of course, in many – most – purchases we have two clients to consider: the buyer and one of our best clients, the lender. What do lenders say about flood searches?

If we are under an obligation to the lender to obtain the search, then the buyer must pay for one whether they want it or not!

Our instructions from lenders come in the form of the Parts 1 and 2 (and sometimes 3) of the CML Lenders' Handbook.

Rather strangely, it mentions environmental searches (which usually will give a limited amount of information about flooding – see later) but not flood searches. It simply provides:

5.4 Searches and reports

5.4.1 *In carrying out your investigation, you must ensure that all usual and necessary searches and enquiries have been carried out. You must report any adverse entry to us, but we do not want to be sent the search itself. We must be named as the applicant in the Land Registry search.*

5.4.2 *In addition, you must ensure that any other searches which may be appropriate to the particular property, taking into account its locality and other features are carried out.*

So, where does this leave us? Bearing in mind the one-in-six risk mentioned above, we would need very strong evidence that a flood search was not 'appropriate to the particular property'.

The mere fact that the seller on the Property Information Form has stated that the property has not been affected by flooding is not evidence that it will not be in the future. The Guide indeed states:

You should not rely solely on replies given to enquiries about flood, environmental or other physical issues in respect of the property.

Of course, the lender is not going to be living in the property, but will be concerned about anything that affects value insurability. A flood risk can, of course, affect both. The CML Handbook provides:

6.14 Insurance

6.14.1 *You must make reasonable enquiries to satisfy yourself that buildings insurance has been arranged for the property from no later than completion. You should remind the borrower that they:*

Must have buildings insurance in accordance with the requirements of the mortgage contract no later than completion and;

Must maintain such buildings insurance throughout the mortgage term. Check part 2 to see if we have any further requirements in relation to buildings insurance.

Most flood searches will report whether the property can be insured against flood risk at normal rates of premium. Many lenders also have Part 2 requirements about the amount of excess. Many lenders, for example, will not accept an excess of more than £1,000 for any risk, and some no more than £500. And, of course, although the lenders require insurance from completion, the enquiries about it must be made before exchange.

It is a little late after the buyer has committed to buy to discover that insurance cannot be obtained in compliance with the lender's requirements. And in any event, under the Standard Conditions of Sale (5th Edition), the buyer assumes the risk in the property as from exchange, so insurance for the buyer should be in place from exchange.

The Guide also discusses at length the various types of flood search that are available. It mentions the various flood maps available on the Environment Agency website (Natural Resources Wales if the property is in Wales) and explains their limitations: they are not property specific and do not cover all types of flooding. It then states:

Because of these limitations of the Flood Maps, they should not be used as the sole means of assessing the flood risk for a property.

There are similar limitations with the Land Registry Flood Risk Indicator and so again it advises should not be relied upon on its own.

As far as commercial searches are concerned, it points out that some - but not all - will provide information about all types of flood risk.

They are not regulated and so it is often not clear what data is being used and how up to date it is. You should, though, study the terms and conditions on which the search is provided and the liability of the provider.

We must also, of course, point out to the client that we are not experts in interpreting the information provided and that they should address any queries to their surveyor or the consultant who prepared the report.

The sensible thing must ALWAYS be to advise clients to undertake a Flooding Search of some sort. Many environmental searches cover this anyway in outline at least anyway – which brings us nicely to:

Revised Law Society practice guide on contaminated land

Environmental searches were introduced in the 1990s following the enacting of the Environmental Protection Act 1990 and the increased awareness that some land could be so contaminated that it affects its future use. The Act required local authorities to set up a register of land which was contaminated. Such information would then be revealed by the usual local search and enquiries. Local authorities were empowered to issue remediation orders, requiring the land to be cleaned up.

The liability for this, although primarily placed on the original contaminator, could also be imposed on the current landowner, particularly if the original contaminator could no longer be identified or found. The cost of remediation can be very large, and there also health and safety issues for those occupying the premises.

In fact, it has to be said that most local authorities never completed the registration process and the remediation is now effected through the planning process as a condition of the grant of permission for development. But remediation will still cost the same and there still remain many thousands of properties built on unremediated contaminated land before we all became aware of it.

The focus of the Law Society Guide is still very much on the risk of contamination and advises that:

You should consider whether land contamination is an issue in all conveyancing transactions

It also points out that a negative reply on the local search as to whether the land has been designated as contaminated, might just mean that it had not been inspected and so could still be contaminated. Further enquiries, i.e. an environmental search, should then be considered.

Lenders' requirements should also be considered. And here they are quite clear:

5.4.4 *You must advise us of any contaminated land entries revealed in the local authority search. Check part 2 to see if we want to receive environmental or contaminated land reports (as opposed to contaminated land entries revealed in the local authority search). If we do not, you do not need to make these enquiries on our behalf.*

Most lenders do not deviate from this in their Part 2. So we do not need to make an environmental search on behalf of the lender in most cases.

Most conveyancers do seem to undertake environmental searches, but if it is contamination we are thinking of, then a few further thoughts are worthwhile. As stated above, it has been the practice for some years for most contamination issues to be dealt with through the planning process. Planning conditions will often require investigations as to whether the land is contaminated and, if it is, suitable remediation. We customarily obtain copies of planning consent in relation to houses built in the last 10 years and often even further back than that.

If these conditions are present, do we need an environmental search as well?
Also remember that since 2004, NHBC cover for new houses has covered the cost of

remediating land discovered to have been contaminated at the time of the sale to the first buyer.

So again, we do not need a search to tell us it is contaminated. Nor do we for a new build that the information sheet clearly tells us is being built on a brownfield site.

But that does not necessarily mean that we do not need an environmental search. Nowadays, such a search deals with lots of other matters as well as contamination – flooding is something we have already mentioned, but also the nearness to landfill sites, smoke and other emissions to the atmosphere, ground stability, nearness to overhead pylons and even proximity to HS2. So clients should always be advised of the availability of these searches and what they may reveal.

So flood searches and environmental searches are very useful tools in a conveyancing transaction, but, unfortunately, many buyer clients are just concerned about the bottom line. If it costs extra, they are not interested and become resentful when told that the lenders insist on a particular search. The fault, of course, is ours. We must emphasise to them that making these searches does not put any more money in our pockets – or indeed the lenders. They are being recommended for their protection. They are the ones that will live in this house, not us.

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