

Property Transaction Precedents - Climate Change & Climate Search Results

Introduction

In July 2022 Groundsure instructed Stephen Tromans KC In The Matter Of Conveyancers Duty Of Care To Advise Clients About Climate Risk And How To Discharge This Duty. Stephen is the UK's foremost environmental law practitioner. His advice is available to download here: <https://bit.ly/3CY7Ynm>

Section F of Stephen's advice¹ relates to the practical steps which property lawyers can take to discharge their duty to advise clients on climate risks. The advice provided is as follows:

Given the existence of a duty to advise on climate risks, what practical steps should conveyancers take to discharge that duty?

The first step seems to me to become familiar with what search services are available and then to advise the client on the need for such a report. Obviously then if the client does not wish to incur the cost, that is their decision, but the conveyancer should in my view state clearly the risks (both physical and transactional) in not doing so – and should record that advice in writing.

Assuming a report is obtained, it is not enough simply to pass over the results to the client – these need to be explained and the risk put in context. For example for a coastal property it may be necessary to explain the risk that whilst coastal defences may now be in place and maintained by an authority, that will not necessarily continue to be the case in the medium or long term.

If there are issues arising outside the conveyancer's own professional expertise, such as valuation or insurance or flood risk, it may be necessary to recommend the client considers taking such professional advice. This would of course depend to a large extent on the size and nature of the transaction.

It is very important in order for the conveyancer to protect their own position to ensure that all this advice is clearly recorded in writing. The Report on Title would seem the most obvious place to do this.

Point of Information

The following clauses are provided for illustrative purposes. They are intended to help commercial and residential property lawyers to consider how the increasing use of climate searches may justify making some changes to their standard conveyancing enquiries, certificates and reports. Property lawyers may wish to develop their own clauses or to modify the illustrative clauses. Please note that Groundsure assumes no legal duty to any person who uses or otherwise relies upon any of the following clauses.

¹ Stephen Tromans KC assumes no legal duty to any person to whom a summary of his advice is provided. Furthermore, Mr. Tromans does not endorse any particular climate search product. Conveyancers and others can check the suitability of Groundsure's ClimateIndex™ and other climate searches for their purposes.

1. Climate Clauses for Commercial Property Transactions

A. Buyer's Pre-Contract Enquiries/ Enquiries Before Contract/ Preliminary Enquiries – Modification of CPSE 1 Section 15

Please supply a copy of all environmental reports, including climate searches, that have been prepared in relation to the Property or indicate where such reports may be inspected.

B. Certificate of Title For Lenders³ - Climate Search Result:

Climate Search Result – Pass

The Property passed a climate search dated [insert date]. The search is attached.

OR

Climate Search Result – Further action recommended

The Property did not pass a climate search dated [insert date]. Further actions recommended.
The search is attached.

C. Report on Title – Reporting Clauses

C.1 TCLP's Marni's Clause (Amended)

1. Interpretation

The following terms are used in this report:

Climate Change means the long-term and material changes in global or regional weather patterns including, temperature, humidity, precipitation, or wind which is predicted by the Met Office, British Geological Survey and other climate specialists to bring about increased flooding, increased subsidence, increased coastal erosion and other physical impacts to land and buildings.

2. Scope of the Review and Limitation of Liability

A climate search [is / is not] available for the Property to assess it for certain future physical impacts arising from Climate Change.

² Groundsure's climate search is called ClimateIndex™. It is included within Groundsure's commercial environmental reports at no additional cost. It is an enhanced environmental report. Hence, it is not a separate / additional report that conveyancers need to commission so it makes the conveyancer's task easier.

³ This is the document the conveyancing solicitor gives to the lender to confirm certain statements about the property.

⁴ <https://chancerylaneproject.org/climate-clauses/report-on-title-climate-change-clauses/>

| Physical risk | Included in the Climate Search for the Property | Not included in the Climate Search for the Property |
|--|---|---|
| Subsidence | | |
| Coastal erosion (with active intervention – creation or maintenance of coastal defences) | | |
| Coastal erosion (without active intervention) | | |
| Fluvial (river) flooding | | |
| Pluvial (surface) flooding | | |
| Coastal (tidal) flooding | | |
| Groundwater flooding | | |
| Heat stress (excessive heat in buildings) | | |
| Risk to potable water supplies including private wells | | |

Please note that climate searches do not currently cover all of the above climate risks. We have summarised the findings of the climate search:

The Property passed the climate search dated []. The search is attached.

OR

The Property did not pass the climate search dated []. Further steps recommended. This is because [explain]. The search is attached.

The risks to which the Property is exposed because of Climate Change could affect the future value of the Property as well as the ability to obtain future borrowing against it and policies of insurance.

The following further action is recommended:

- Consider taking professional advice from your valuer as to the impact of the identified climate change risks on the value of the Property. A reduction in the market value of the Property as a result of predicted climate change impacts may mean that a price reduction is appropriate. It may also lead to a lender, if applicable, withdrawing from, or imposing additional conditions in, their offer for your purchase of the Property.

- Consider taking professional advice from a flood risk specialist, structural engineer or other appropriate specialist as to the cost of making the Property more resilient against the predicted risks of increased flooding, subsidence and coastal erosion due to climate change.
- Consider taking professional advice from your insurance broker as to whether the Property is likely to continue to be insurable at commercially reasonable rates for losses arising from or relating to the predicted risks of increased flooding, subsidence and coastal erosion due to climate change.

We are not qualified to advise further on this search result.

C.2 Shorter Reporting Clause For Report On Title

Climate Search Result - Pass

The Property passed a climate search dated [insert date]. The search is attached. We are not qualified to advise further on this search result.

Climate Search Result – Further Actions Recommended

The Property did not pass a climate search dated [insert date]. Further action is recommended. This is because [explain why further action is recommended]. The search is attached.

We recommend the following further action:

- Consider taking professional advice from your valuer as to the impact of the identified climate change risks on the value of the Property. A reduction in the market value of the Property as a result of predicted climate change impacts may mean that a price reduction is appropriate. It may also lead to a lender, if applicable, withdrawing from, or imposing additional conditions in, their offer for your purchase of the Property.
- Consider taking professional advice from a flood risk specialist, structural engineer or other appropriate specialist as to the cost of making the Property more resilient against the predicted risks of increased flooding, subsidence and coastal erosion due to climate change.
- Consider taking professional advice from your insurance broker as to whether the Property is likely to continue to be insurable at commercially reasonable rates for losses relating to the predicted risks to the Property from [increased flooding], [increased subsidence] and/ or [increased coastal erosion] due to climate change.