

Terraffirm Contaminated Land Indemnity Policy

A new contaminated land insurance product, under the name "Terraffirm", has been developed by Argyll Environmental Limited together with Countrywide Legal Indemnities and is distributed by ensura Ltd. Argyll undertook market research as to the need for a relatively simple and inexpensive product which provides environmental coverage for relatively low-risk commercial sites. This has indicated that current products are viewed as too expensive, too detailed and slow in their underwriting requirements, too complex in their policy wording, and generally insufficiently attuned to the commercial realities of property transactions. The problem is that in many cases there is not a sensible distinction between the type of reasonably low-risk site which the policy is intended for, and sites which require a much greater level of underwriting effort.

This does not surprise me, and accords with my own views of the current market as it has developed over the past 17-18 years. There has been emphasis placed by Government on the importance of recognising and dealing with contaminated land as part of the process of obtaining planning permission, and much contaminated land is being dealt with in that context. However where land is being marketed on the basis that it will continue in its current use the information available may be much less comprehensive, and indeed the cost of acquiring such information may be disproportionate to the value of the transaction, or the potential risk, or it may not be possible to carry out intrusive investigations because of the built footprint of the property.

It is this type of site where I would agree there is a gap in the market in which the Terraffirm policy should be of assistance. It is actually a very significant gap. The number and variety of sites which may to a greater or lesser extent be contaminated must be a matter of concern to prospective purchasers. This concern is likely in my view to increase in the coming years, as initiatives such as the EC water framework and new groundwater directives and the proposed directive on soil protection come to be implemented. If a prospective purchaser is contemplating holding onto the land over the next 10-15 years or longer, these developments need to be factored in to the risk profile. That risk may well not be capable for practical or commercial reasons of being addressed either by detailed site investigation or by contractual means such as warranties or indemnities by the vendor. The existence of an appropriate insurance product, at a commercially attractive premium, may well therefore be a very important factor in reducing that risk to an acceptable level. As is well known, general public liability and property insurance policies will not provide reliable coverage of this type of liability, and therefore a specifically-tailored product is needed.

The Terraffirm policy in my view is commercially a very apt and attractive instrument, in terms of its coverage, extent, period of cover, amount of cover, its extension to mortgagees, tenants and successors in title during the period of cover, and generally its clear and straightforward wording. Obviously, Terraffirm is not the only product available for covering the relevant risks, and solicitors and PSLs will obviously wish to form their own view of it having read the detail of the cover. However, the Terraffirm product has in my view a number of features which mean that the coverage is commercially attractive, and it is also designed on the basis of a process of underwriting that is specifically intended to meet and work with, rather than impede or obstruct, the timescale for deals. Overall it seems to me that the policy once underwritten should not only avoid protracted, unproductive and potentially deal breaking negotiation or impasse over the allocation of environmental risks, but will also be of potentially significant benefit to the insured in ongoing dealings with the property over the period of cover. It is certainly in my view well worth considering as something of a fresh start, even by lawyers who may have become disenchanted with what the market has had to offer hitherto.

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