

## Real Estate...Real Risks..?

It is assumed that the directors of an investment fund (or other entity) which invests in or owns property / real estate would have in place a Directors' & Officers' ("D&O") insurance policy to provide indemnity for the directors for their positions on the board. Extreme care needs to be taken however to ensure that cover for some exposures are not excluded by your insurers.

A D&O policy is designed to provide indemnity for "wrongful acts" committed by the directors in their running of the company, i.e. decisions made (or not made) or actions taken (or not taken) which result in financial loss incurred by third parties. The insurance coverage is purchased for loss(es) suffered by any party with whom the corporate entity engages with, transacts with, or has a fiduciary responsibility for. In respect of a real estate investment fund or a property owning entity this could extend to include occupants or users of a property owned within the portfolio.

### **Bodily Injury Exclusion**

Following on from this raison d'être for the insurance cover, a standard D&O policy wording contains a number of exclusions of coverage. One such exclusion is for any liability, claims or losses for any bodily injury or property damage. (It being assumed that Public Liability insurance policy has been arranged by the property owning entity which would provide for such physical injury, loss or damage arising through negligence).

The lack of this core element of protection is often not realised or understood by the directors of a real estate fund or property owning company when they purchase or renew a D&O insurance policy. Such entities are however exposed for actions against directors for bodily injury from injured parties (or their dependants) should they deem a director responsible for any injury or death incurred resulting from the access to, or usage of, the property.

### **Litigation**

It is important to realise that we live in a litigious society and many will readily seek legal redress from any party they deem responsible for any loss they suffer regardless of whether those who are accused feel there is merit in the claim against them. Many claims made against directors, whether spurious or otherwise, do not actually make it as far as Court and a settlement will often be negotiated by the respective representative lawyers.

That aside, substantial legal defence costs can be accrued by the directors in instigating a defence to an action which, if not provided for by the D&O policy, can incur a large expense and burden upon the individual.

It is therefore of the utmost importance that the extent of the policy cover is fully understood and, where possible, the terms, conditions and exclusions of the policy discussed with your insurance broker and insurers.

### **Exclusion Wordings**

Many D&O policies contain a long list of exclusions and it is important to understand what is meant to be excluded, what actually is excluded, and how widely the exclusions apply. The wording of the exclusion will commence with a preamble and it is here that a subtle alteration in the insurance policy wording can have a huge affect on the extent of coverage provided/excluded. For example a preamble to an exclusion may commence with the words:-

- "arising from, directly or indirectly as a result of or in connection with..."

or

- "arising from or attributable to or in any way involving..."

Such wordings contained within a preamble extend the remit of the exclusions not only to acts committed by directors but also to events or situations arising from the acts of others. These wordings should be avoided and the example on the following page illustrates this point.

### **Example Situation**

A fire occurs within a shopping centre as a result of which wide scale and rapid evacuation occurs. Consequently a number of individuals are injured or cannot escape and suffer smoke inhalation or fatality.

It may be argued that the inability to escape from the building was down to the management and the operation of the shopping centre, (possibly through having insufficient fire escape routes or doors). In this situation should a claim be aimed towards a director of the ultimate real estate company which owns the property then no coverage would be provided under the D&O insurance.

Preference to the above can be through an amendment to the exclusion wording and the use of the word “for” in the policy exclusion preamble. This can be illustrated by the amended exclusion:-

“this insurance does not apply to any liability/claim for bodily injury”.

In this example where the policy uses “for” language and a claim is made by any injured party (or their estate) alleging that the directors have been negligent in their duties, they would not be directly responsible for bodily injury and the claim would be outside the scope of the exclusion. The directors will therefore be covered by the policy. The exclusion would only relate to bodily injury actually committed by the directors. In comparison, where the words “arising directly or indirectly as a result of bodily injury” are used it would be deemed irrelevant who committed bodily injury. The fact that bodily injury has incurred would be sufficient for a claim to be denied by insurers.

## Corporate Manslaughter

Directors of real estate funds or property owning vehicles need to be aware of potential actions against them for corporate manslaughter. Many modern D&O policy wordings whilst applying the standard Bodily Injury Exclusion often “carve out” an exclusion for defence costs as a result of corporate manslaughter proceedings. It should be noted that corporate manslaughter, being a criminal offence, would not usually be covered under a D&O policy (which is designed for civil proceedings) however underwriters are often prepared to provide defence costs for such criminal prosecutions up to the point that guilt is decided, if it is in the wider interests of the corporate entity and/or the directors.

## Innovation In Policy Wordings

From the above it will be understood how important specific phrases or words within an insurance policy are and how they can result in the level of insurance cover that they can provide (or exclude). The insurance market often devises policy wordings specific to an industry sector and many insurers now provide a D&O policy specifically for investment funds (which would include real estate funds). As a result the standard Bodily Injury Exclusion is often already removed by insurers, or if not, it can often be removed by negotiation with the broker. This however is not always the case and care needs to be taken when arranging cover. Furthermore other entities or SPV’s which own properties may not be deemed to be a collective investment fund and would therefore purchase a more “conventional” D&O policy wording. Some insurers will agree to removing or amending the standard bodily injury exclusion if it is presented, or brokered, to them in the right way.

Vantage Insurance are a specialist broker to Jersey’s financial services providers and have a great deal of experience in providing Professional Indemnity and Directors’ & Officers’ Insurance solutions to a wide range of clients. We have the necessary expertise and experience to identify punitive policy exclusions and work hard to ensure that Directors fully understand the risks, to ensure that the policy cover provided suits the needs for the risks and the reason that it is purchased.

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