



### Lost deeds

A solicitor has asked the Committee to indicate in what circumstances it is reasonable for the solicitor for a purchaser or a solicitor for a lender to require an insurance company bond in relation to the non-availability of a deed or deeds, which are lost.

The Committee feels that the following are reasonable guidelines. Obviously these guidelines have no relevance in relation to registered land.

A bond may be necessary in addition to the usual declaration explaining the circumstances of the non-availability of the missing deed or deeds.

1. Practitioners must distinguish between the loss of all the deeds and the loss of a document. The kernel of the matter is whether whatever is lost is sufficient to take by way of equitable mortgage. What a purchaser or lender is trying to guard against is some type of mortgage, lien or pledge having been created with the missing documents which would gain priority to his deed or mortgage. If the documentation missing would not be sufficient to create such a mortgage, lien or pledge, then it would be unreasonable to insist on an insurance company bond.
2. In all cases, it is reasonable to ask for a declaration accounting for the disappearance of the deeds and, where at all possible, this should be supplemented by declarations from each subsequent owner on title confirming that no claim had been made, and that the document had not come into his possession since. Normally a confirmatory declaration or letter from the owner's bank is also furnished.
3. If a solicitor is able to make a positive declaration that a deed or deeds had been lost in his or her office and excluding the possibility of the missing documents having been given to the client, then it would be reasonable for the purchaser's solicitor to accept this without an insurance company bond. Such a declaration should be supported by a declaration by the client.
4. In furnishing a bond in connection with a mortgage, the amount of the bond should be the amount of the loan. In a sale there are differing views. Prima facie, the Committee feels that a bond should at least be for the amount of the sale price. Given the ever-present reality of inflation, its inconstant nature and other relevant factors, it is inevitable that in most instances, a figure in excess of the sale price should be sought, but the question does arise as to who should bear the cost of that part of the premium as is referable to such excess. In this context, the circumstances of each individual case will have to be examined, but logic should prevail. It is suggested that, where the potential increase in value is triggered by outside factors – as, for example, by inflation per se – the resultant enhancement over, say, the succeeding five years should be estimated with the bond (at the cost of the vendor)

### INSURANCE

### COMPANY BONDS IN RELATION TO LOST DOCUMENTS AND DEFECTS ON TITLE



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covering same in addition to the purchase price. On the other hand, where the potential for enhancement is due to the activity of the purchaser (as in the exploitation of development potential), it is very difficult to lay down any hard and fast rules. Much will depend on the underlying circumstances, with particular reference to the price being paid and the proportion of same attributable to the (development or other relevant) potential. There may conceivably be an argument for the apportionment of premium(s) between the respective parties.

It will be appreciated that it is virtually impossible to give meaningful guidance in the abstract on the amount of the bond. Hopefully, the foregoing observations will be of some basic assistance, but each case should be considered on its own merits and from a practical perspective. If a property which was sold with the benefit of a bond is being re-sold at a higher price, the current vendor might reasonably be required to furnish a top-up bond.

**Title defects**

Difficulties posed by some title defects or deficiencies (usually of such a nature as to be curable by the passage of time) can, on occasion, be met by bonds. The latter and the procedures attending same will usually be in vein somewhat similar to bonds covering lost documents. As a pre-requisite to the issue of such a bond, the insurance company will invariably require the submission of a statutory declaration detailing all the relevant features, and perhaps an Opinion from Counsel on the legal issues arising. Duplicates or certified copies of these should, of course, be retained with the bond itself and the muniments of title.

Bonds in the last mentioned category will more than likely only be of relevance in exceptional circumstances. Many of the defects encountered on title are capable of being remedied by getting in outstanding interests. However, it may be desirable to secure a bond where the owners of such interests cannot be identified or located, as can occur in, say, the tracing of parties entitled to undivided shares arising on the distribution of estates or in dealing with missing leasehold terms where there are still a number of years to run.

**General**

All such bonds as those mentioned above and any further bonds dealing with problematical aspects of a particular property should be so drawn as to enure for the benefit of all relevant successors in title (including mortgagees). This is an important point, which should be checked meticulously, as there have been cases where, on the wording thereof, the cover extended only to the applicant or to his immediate purchaser/mortgagee.



The protection in monetary terms to be provided by the bond should be considered with care. Reference is made above to the positions with regard to lost documents in the respective circumstances of mortgages and sales. Special and, perhaps, different criteria may have to be applied in approaching the financial aspects of cases involving defects on title.

Thought should also be devoted to the life span of the bond. Its practical effectiveness should not be diminished by the imposition of inappropriate time limitations.

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