



LOWER RISKS
for better outcomes

Risk Management Tips

For Real Estate Professionals

Insurance should be the last step in any risk management process.

Risk management is a serious issue from not only a practical business perspective but also in relation to your insurance. Real estate professionals should implement reasonable and effective risk management tools and procedures to ensure that their legal exposures are appropriately managed and monitored.

This booklet contains practical tips to assist real estate professionals in taking proactive steps to address their potential exposures and assist in reducing claims and keeping insurance premiums at low levels.

Follow your client's instructions

As a general rule an agent should always follow their client's instructions. As the agent, you are under a legal obligation to act for, on behalf of, and in the best interests of your client. Failure to act in accordance with your direct instructions is a breach of your obligations in contract, a breach of your fiduciary obligations and could also expose you to a claim in negligence.



Case example 1:

- > The rental property owner engaged the agent as the managing agent. The owner instructed the agent that the owner must approve all potential tenants before being signed by the agent.
- > The agent indicated that it had the Housing Department as one of its clients and that the Housing Department was looking for premises to let. The owner advised that it did not want the property let to the Housing Department.
- > The agent obtained a fixed term agreement with the Housing Department in direct contravention of its instructions and began letting the house. The agent only provided the owner with the new tenant's details and failed to advise that the property was in fact let through the Housing Department.
- > On discovering that the real tenant was in fact the Housing Department, the owner terminated the contract and sued for damages. The agent was found liable and in direct breach of the managing agent agreement. The agent was required to pay damages to the owner and the costs associated with re-letting the premises.



Case example 2:

- > The tenant advised the agent on two separate occasions that the handrail on the back stairs was wobbly and dangerous. The stairs were over 1.5 metres high and surrounded at the base by concrete.
- > The agent advised the owner who instructed the agent to effect repairs. The owner asked the agent to obtain quotes and to proceed with the cheapest quote without seeking approval from the owner. The owner did not follow through with the agent assuming that the instructions had been followed. The agent took no steps for over three months, at which time all that occurred was the agent contacting its usual carpenter to obtain a quote.
- > The tenant came home from work one evening (three months after the initial complaint) and placed his hand on the railing, which came loose. The tenant fell 1.5 metres onto the concrete below and sustained multiple injuries including a significant head injury.
- > The tenant sued the owner and agent and the owner cross-claimed against the agent for failing to effect the repairs despite being instructed to do so.

Keep adequate records

One of the most important tips that can be provided to agents operating a busy business is to ensure that you keep complete records and take file notes. Adequate record keeping is a must and includes:

- > Taking file notes of conversations particularly when a tenant is verbally informing an agent about problems or defects in a property or when an agent is discussing finer aspects of a contract for sale. A court will be more inclined to accept the contents of a contemporaneous file note (signed and dated) over your recollection of a two minute conversation that you may have had with someone three years earlier.
- > Keeping a complaints register.
- > If in doubt, seeking clarification of your client's position in writing. For example, if an owner provides you with instructions not to sell their house for less than \$700,000, obtain those instructions in writing.
- > Documenting steps taken in dealing with tenants, difficult landlords or in dealing with vendor/purchasers solicitors.
- > Filing letters and correspondence in the right place and in chronological order. Although a tiresome administrative task, if a legal claim is made against you the first thing that your lawyer will ask you for is a copy of your file. Alternatively, the lawyer will ask you to produce relevant documents and documents of a certain date/time. If your record keeping is poor and you are unable to find documents you run the risk of missing that one critical document that could assist you.

If a claim develops and the matter goes to court, good record keeping may play a part in winning or losing your case.



Do not perform work that you are not qualified to do

There are occasions where agents act outside their level of expertise, which potentially exposes their employer to liability. For example, agents providing valuation advice in circumstances where they are not qualified to do so or hold very little qualification in that area.

The risk taken by the agent in performing that task is that the valuation may be negligent or in breach of consumer protection legislation and entitle the claimant to sue. The agent's professional indemnity insurance may not be adequate to cover these kinds of claims, thereby leaving the agent exposed.

Tips

Outsource work that is not within your areas of expertise to companies that are experienced in those areas.

Outsource valuations to firms that have extensive experience in this area, that way the risk is assumed by the valuer, rather than the real estate agent. Note: the valuer will or should always have the appropriate cover for this kind of work which agent's insurance may not cover.

Further, you should ensure that you ask your outsourced contractor for a copy of their relevant insurances including professional indemnity, public liability and workers compensation insurance.

Audit your accounts regularly

Fidelity claims are on the rise. Business owners should not leave the management of trust accounts to one person or leave that one person unchecked.

Business owners should audit their trust accounts on a regular basis. This could include:

- > performing audits of accounts every six months;
- > having professionals (such as your accountant or an auditor) review the books annually;
- > undertake spot reviews and checks on employees work;
- > have monitoring systems installed that can be cross-checked.

Most importantly be observant! This is your business and your reputation on the line. If you receive calls from owners querying missed payments, take these warnings seriously and investigate how and why your clients are not being paid. Cases have shown that it is generally either a complaint from a client or an audit performed by the business owner that has revealed the untoward conduct of the employee.

Most professional indemnity policies limit fidelity claims to \$50,000. Therefore, in the event that substantial losses are incurred it is likely that you will only be able to recover a fraction of the actual loss. The outstanding sums not covered under the policy will be borne the agent. Given an agent is legally required to replace any funds that have been removed from the trust account as soon as possible, this could result in significant financial burden.

Case example:

- > A claim brought by the agent in relation to the alleged fraud perpetrated by a former employee. It seems the employee was in a position of trust and was creating entries in the agency's books that made it appear as if the tenants had paid their rent when in fact they had not.
- > The employee also created electronic funds transfer payment reversal in the ledger which made it appear on paper as if the books were balanced.
- > The loss occurred over a two-year period (2007 – 2009) and when the employee left, the fraud was discovered when a landlord called to say that he had not received payments since September 2008. It was estimated that between \$60,000 to \$80,000 in trust funds were misappropriated.
- > At no time during the two years in which the fraud was being perpetrated did the owner of the business perform any checks or audits of either his trust account or his employee.

Perform regular property inspections and report

It is important to remember to conduct regular inspections of rental properties and to report to the owners promptly. Whilst this would seem an obvious tip, there are many legal cases of agents failing this basic duty resulting in risk exposure to the company and potential increases in premiums.

Agents should diarise review dates and try to adhere to booking inspections when those dates appear in their diary.

Case example 1:

- > The owner sued the agent for failing in their duty as managers of the property and for breach of its managing agent's contract.
- > The tenants were lawfully evicted from the premises for continued breaches of the tenancy agreement. The breaches had occurred over a 12 month period culminating in agent seeking instructions from the owner to evict them.
- > However, throughout the tenancy (over 2 years) the agent had only conducted two inspections of the property. The agent also failed to provide regular reports to the owner or advise the owner of any ongoing issues until the tenant needed to be evicted.
- > Once the tenants were evicted, the owner attended the property and discovered it to be in a state of significant disrepair. The owner incurred over \$20,000 in costs in repairing the premises and having the premises cleaned.
- > The owner was successful in suing the agent on the basis that the agent breached its contractual retainer with the owner and was negligent in its management of the property causing the owner to sustain significant loss.

Case example 2:

- > The agent failed to adequately record the condition of the rental property prior to the tenancy agreement being executed by the new tenants. In fact, the agent failed to inspect the property at all. Instead, the agent relied on the condition report provided by the former tenant that indicated that the property was undamaged and clean. The new tenants entered the property and found it to be in a state of disrepair. The new tenants completed the condition report and wrote a letter to the agent informing the agent that there was significant damage to certain parts of the property and that the former tenants had left the home in a very unclean manner.
- > Despite receiving the notification of damage to the property, the agent failed to provide a copy of the new condition report to the owners. Further, during the one year lease the tenant notified the agent on several times of the damage without any repairs being conducted.
- > When the tenants lease ended they left the property and the owner requested an inspection. At that time the owners noticed the significant damage to the property. The owners sought to recover from the tenant until the tenant produced several notifications to the agent of the damage.
- > The agent clearly failed to address the issue of the pre-existing damage. Furthermore, the agent was in breach of its managing agent agreement by failing to conduct proper inspections and report to the owner on the condition of the property.

Be careful what you say

It is important that agents go that extra mile to ensure that what they are saying is accurate. For example, agents should ensure that the descriptions of the properties they are selling are a true reflection of that property. Failure to do this will leave the agent exposed to claims for misleading and deceptive conduct under consumer protection legislation.

It is important that agents check their facts. Critical issues that can affect a purchaser's decision to buy should be reviewed by the agent prior to advertising and prior to discussing the property with the potential purchaser. The following are a set of issues that have given rise to legal claims by buyers who insisted that the agent acted in a manner that was misleading and deceptive:

- > whether the property has city views;
- > whether there are any encumbrances on the land;
- > the size of the land;
- > whether the property has one or two car spaces;
- > whether the property is strata title;
- > whether the land was subject to an easement;
- > if the property was heritage listed or if the property had a heritage listing application; and
- > whether a vacant block of land had title to an attached jetty.



Case example:

- > The agent advised a potential purchaser that the property for sale (a vacant block of land with jetty access to a river system) included the jetty access. The agent had not checked the contract for sale but assumed that the jetty belonged to the property.
- > The jetty in fact did not belong to the land for sale; rather, it was the adjacent property's jetty.
- > The purchaser's main reason for purchasing the property was the jetty access. The purchaser subsequently complained that the purchase price paid was excessive on the premise that the price paid took into consideration the fact that the property had jetty access. The purchaser asserted that he would suffer a loss on resale.
- > Whilst the purchaser also has a responsibility to check their records and perform the appropriate searches before purchasing a property, the agent was considered to have engaged in misleading and deceptive conduct and was in breach of consumer protection legislation.

Check your documents

It is at times difficult to keep up with work demands and ensure that you are checking all your documents and records properly. However, it is worth your time and effort to take that extra 10 minutes to check that you have:

- > picked up the correct document;
- > made the requested changes;
- > ensure that your records confirm what is actually for sale.

A simple check of your documents can save you from legal proceedings.

Case example:

- > The selling agent prepared sale documents and provided them to the vendor. The vendor's solicitors informed the agent that the documents were incomplete and needed to be changed.
- > Despite being advised of the required changes the vendor failed to make changes to the documents and sent the purchaser the incomplete and incorrect documents of sale. The documents were signed by the purchaser.
- > The purchaser subsequently had a change of heart and did not want to buy the property. The purchaser's solicitor relied on the fact that the documents were incomplete and argued that the sale documents were void.
- > The sale fell through and the vendor was unable to secure a subsequent sale price at the same amount. The vendor sued the agent on the basis that it negligently prepared the documents and was successful.



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1 3000 COVER



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This Brochure is issued by

Coverforce Insurance Broking Pty Ltd

ACN 118 883 542 | ABN 11 118 883 542 | AFSL 302522

Level 26, Tower One, International Towers Sydney
Barangaroo NSW 2000

Locked Bag 5273
Sydney NSW 2001

T 02 9376 7888

F 02 9223 1422

info@coverforce.com.au

www.coverforce.com.au



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Smart Insurance Solutions