




Case Studies **Poland**

March 2008




Investors are moving further East in their search for higher yields, which can be provided by countries such as Poland. However such investments are often open to substantial legal risks arising from the uncertainties of the property law or conveyancing systems in these jurisdictions.

The land registry systems may work differently to those in Western Europe. Just because an entity is registered as the owner of the title does not guarantee that they own the land and there is insufficient or no state indemnity if the entries are incorrect.

There is uncertainty as to the extent of checks carried out by notaries and there is always the threat of a restitution claim, as there is no conclusive search that can be undertaken to check whether there is a pending claim. Due diligence on historical title information often reveals breaches of legislative procedures or corporate defects which could invalidate previous transfers and lead to the title being challenged and possibly overturned.

Sellers' warranties are often of limited value and lawyers' due diligence can prove inconclusive on certain title issues. First Title provide a no fault insurance solution for a number of title defects and the general coverage provided by its policies can provide peace of mind for those title issues that cannot be identified during the due diligence process.

Title insurance can streamline the due diligence process and provide a fast and cost effective solution to title problems. Title insurance has been the first choice for many investors, lawyers and lenders which is proven by the fact that last year First Title insured 10 billion euros worth of property in Europe.



Land and Mortgage Registers

Case 1

Limited protection afforded by the 'Good Faith' principle

Background:

Under Polish law, a purchaser who in good faith acquires ownership or the right of perpetual usufruct to real estate from an owner who is registered in the Land and Mortgage Register has the benefit of a limited warranty regarding ownership.

Risk:

Problems can however arise where (1) the defects are divulged in the registers, such as in the case of restitution, or (2) regardless of the good faith protections a third party (an individual or the government) may still file a claim against the real estate and the owner is obliged to defend their ownership at their own expense. The owner may also face substantial losses as his development may be halted during the ensuing litigation.

First Title Solution:

Regardless of whether the defect is identified in the register, or not, First Title is generally able to provide coverage against defects which appear in the register and are "known" and also against those defects which do not appear in public records and are "unknown" such as restitution claims. First Title policies all contain a 'duty to defend' provision which legally obliges the company to defend a covered claim and pay all associated legal fees. The costs of defence will not reduce the amount of insurance under the policy.



Restitution

Case 2

Former owner's claims
VALUE 120 MILLION EURO

Background:

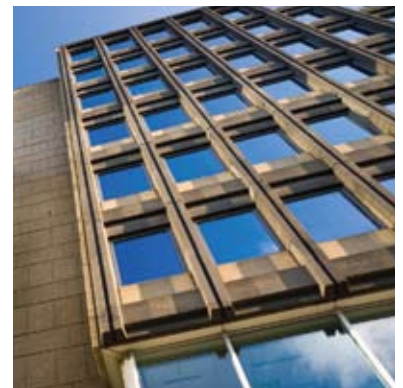
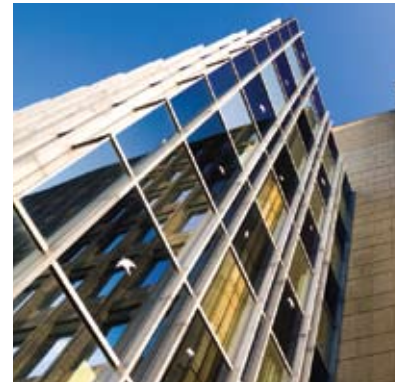
A global developer was contemplating acquiring a landmark building in Warsaw. The transaction was put on hold due to restitution claims initiated by the heirs of former pre-WWII owners.

Risk:

The restitution claims may have resulted in the invalidation of the current ownership of the real estate.

First Title Solution:

First Title was able to create a solution whereby the restitution claims were insured against the invalidation of ownership, and the investor was subsequently able to complete the transaction.



Restitution

Case 3

Former owner's claims
VALUE 10 MILLION EURO

Background:

A real estate investment division of a leading Polish Bank was acquiring undeveloped land for the purpose of constructing a residential building. The Bank's credit risk department would not release the funds due to a restitution claim brought by the heir of a former pre-WWII owner.

Risk:

The restitution claim could have resulted in the invalidation of the current ownership of the real estate.

First Title Solution:

Not only was First Title able to provide coverage over the possible successful restitution claim, but a process was created whereby the original developer's title policy over the complete property could be assigned to the individual owners of the apartment units.

General Title and Gap Coverage

Case 4

Registry in the land and mortgage books
VALUE 100 + MILLION EURO



Background:

A major international fund was acquiring a site for the purpose of developing 1,200 individual off-plan apartments.

Risk:

The fund was concerned that registration of ownership in the Land and Mortgage Registers would take up to 9 months. There was the risk that a third party could challenge their ownership during this period and the application for registration could lose priority.

First Title Solution:

The client's ownership was assured with a comprehensive title policy and the time period to register ownership was covered by issuing Gap insurance.

Conveyance Defects

Case 5

Missing permits
VALUE 5.5 MILLION EURO

Background:

A large international developer was seeking to acquire a shopping centre. Due to an illegal lease for the car park the project was stopped as the developer was unwilling to take the risk against the lease being invalidated.

Risk:

The risk that the car park could have been invalidated would have been disastrous for the shopping centre.

First Title Solution:

While the illegality of the leased car parking was confirmed, First Title used a “practical” approach and agreed to insure against the invalidity of the car park lease allowing the project to proceed.



Conveyance Defects

Case 6

Privatisation defect
VALUE 20 MILLION EURO

Background:

A large European developer was seeking to acquire a landmark building in the North of Poland. It was discovered during the due diligence process that the privatisation procedure was defective.

Risk:

If the privatisation process was ever challenged there would have been a substantial risk that the developer would lose title to the property.

First Title Solution:

Using a “practical” approach First Title offered to insure the developer against the risk that the privatisation process would ever be challenged.

Conveyance Defects

Case 7

Missing documents
VALUE 18 MILLION EURO

Background:

A German fund was acquiring a large office building in Warsaw. The office building had a number of issues, one of which was a missing power of attorney document authorising the former owner from purchasing the property.

Risk:

While the 'good faith' principle of Land and Mortgage Registers may apply in this situation, the fact that the purchaser knew about the possible title defect may have caused some difficulty in applying this defence.

First Title Solution:

A comprehensive title insurance policy was provided to the purchaser which insured against a number of risks and included a specific provision against the invalidity of title caused by fraudulent or missing power of attorney documents. The use of title insurance by the fund enabled them to discharge their fiduciary obligations to the investors and the coverage also dealt with their contingent liabilities in connection with title.

Legal Defects

Case 8

Missing permits
VALUE 20 MILLION EURO



Background:

A large German fund acquired a landmark property in Poland. Previously the property was purchased in the year 2000 by foreign investors.

Risk:

Polish law currently requires that in certain circumstances foreign investors who purchase real estate must obtain a permit from the Ministry of Internal Affairs and Administration (MOI). In many instances this permit was not obtained and the investment was structured so that a Polish national would be the de-facto purchaser thereby omitting the MOI permit requirement. The law however, foresees these types of schemes and if it was ever proved that the Polish purchaser was in fact “tied” to foreign investors there is a risk that the ownership would be invalidated.

First Title Solution:

A comprehensive title insurance policy was provided to the new purchaser insuring, amongst other risks, that in case the property was invalidated due to the MOI permit issue, First Title would defend and reimburse any covered damage or loss.

Legal Defects

Case 9

Public tender
VALUE 120 MILLION EURO

Background:

State-owned enterprises must meet stringent legal requirements when selling their assets, which usually consist of strict adherence to certain legislative processes or procedures when embarking on a public tender process for example.

Risk:

Due to the often complex nature of tender requirements the following can occur: (1) not all requirements are complied with thereby opening up attacks from future governments or third parties, or (2) even if the requirements were complied with, claims and attacks can still occur for purely political purposes. The risks can either cause a complete failure of ownership or considerable expense in defending your title.

First Title Solution:

Specific provisions in the title insurance policy are inserted to specifically protect against most attacks on title whether initiated by the government or not, and whether the claim is legitimate or not. Purchasers enjoy the comfort that their investment is protected wherever a cover claim may emanate.



Legal Defects

Case 10

Legal definition errors
VALUE 150 MILLION EURO

Background:

A large private developer based in the U.S. recently purchased a former brewery. While title to the property for the most part was clean there was a specific issue with the definition of what constitutes developed land. A plot of the real estate was sold with mention of two sheds which couldn't be considered as "development".

Risk:

Polish law provides that the sale of an underdeveloped plot of land which is the subject of a perpetual usufruct right, is subject to a statutory right of first refusal in favour of the local municipality. Any previous sale agreement had been executed in breach of this right which meant that the sale was potentially invalid which could in turn lead to a loss in title.

First Title Solution:

A title insurance policy was delivered to the client which gave protection against the municipality seeking to enforce its pre-emptive right.

Contact

United Kingdom:

London International Press Centre,
76 Shoe Lane, London, EC4A 3JB

Tel: +44 20 7832 3100

Email: new.business@firsttitle.eu

www.firsttitle.eu

Western Europe:

Mainzer Landstrasse 46,
60325, Frankfurt, Germany

Tel: + 49 69 7191 43606

Email: new.business@firsttitle.eu

www.firsttitle.eu

Central and Eastern Europe:

Szent Istvan ter 11/B,
1051 Budapest, Hungary

Tel: + 36 1 472 2891

Email: new.business@firsttitle.eu

www.firsttitle.eu

Poland:

Al. Jana Pawla II 23,
00-054 Warsaw, Poland

Tel: + 48 22 653 8529

Email: new.business@firsttitle.eu

www.firsttitle.eu

Turkey:

Ebulula Cad. Gül Sok. Park Maya
Barclay 19A No.4
34335, Akatlar, Beşiktaş İstanbul, Turkey

Tel: + 90 212 324 88 90

Email: new.business@firsttitle.eu

www.firsttitle.eu

