PROTECTING THE PURCHASER'S INTEREST PENDING COMPLETION OF A CONTRACT OF SALE OF A BUILDING

CRAIG BROWN*
London

A potentially important matter for the purchaser under an uncompleted contract of sale of real estate on which there is a building is his legal position in the event that the building is fortuitously damaged or destroyed before completion. At common law, if the contract is silent on the matter, the purchaser remains obliged to pay the full purchase price and accept the land and whatever remains of the building. In the first part of this article the author examines the sources of protection for the purchaser, statutory and contractual, which are available in various common law provinces of Canada. He concludes that existing legislation and contracting practice are often seriously inadequate. In the absence of effective legislation such as has been adopted in some other countries, his recommendation is that the purchaser take out separate insurance prior to completion. The second part of the article contains a discussion of some insurance law issues, such as insurable interest, subrogation and valuation of loss, as they would pertain to a purchaser's insurance.

La position légale de l'acheteur d'un terrain sur lequel se trouve un bâtiment peut soulever des difficultés si le bâtiment est endommagé ou détruit avant le transfert du droit de propriété. En common law, l'acheteur est obligé de payer le prix d'achat en entier et d'accepter le terrain avec ce qui reste du bâtiment si la question n'est pas mentionnée dans le contrat. Dans la première partie de l'article, l'auteur examine les différents moyens de protection qui s'offrent a l'acheteur dans les provinces canadiennes de common law, qu'ils soient statutaires ou contractuels. Il en conclut que la législation actuelle de même que la pratique en droit des contrats laisse beaucoup à désirer. À défaut d'une législation effective telle que celle adoptée dans d'autres pays, il recommande à l'acheteur de prendre une assurance spéciale pour se protéger avant le transfert du droit de propriété. Dans la deuxième partie, il discute de certaines questions du droit des assurances telles que biens assurables, subrogation et évaluation des dommages dans la mesure où elles se rapportent à l'assurance prise par l'acheteur.

Introduction

This article is about protecting the interests of the purchaser under a contract of sale and purchase of real property on which there is a building pending completion of the conveyance. The fact that there is invariably a lapse of time between the formation of such a contract and its completion gives rise to a potentially serious problem concerning the allocation of risk.

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* Craig Brown, of the Faculty of Law, University of Western Ontario, London, Ontario.

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Should a fire, flood or other calamitous event occur during this interval, totally or partially destroying the building, the question of who must bear the loss, and therefore have protection, is an important one for the parties and their solicitors. As will be discussed below, the law in the common law jurisdictions of Canada places the risk primarily on the purchaser so his or her legal advisor must be concerned to see that appropriate protection is provided. Indeed failure to do so may expose the solicitor to liability for malpractice.[1]

In the first part of this article, I examine a number of matters relevant to the purchaser's position. These include the common law principles about the allocation of risk between vendor and purchaser and those about the availability of the vendor's insurance, relevant legislation, the present means of providing protection in the contract of sale, and assignment of the vendor's insurance. This discussion leads to my conclusion that standard Canadian conveyancing practice in this area is, in general, inadequate and my recommendation that, at least in certain circumstances, the purchaser's interest should be insured separately. The second part of the paper contains an examination of certain insurance law principles, such as insurable interest, valuation and subrogation, as they would apply where the purchaser had separate insurance.

I. *The Present Position*

A. *The Allocation of Risk and the Vendor's Insurance*

The basic common law[2] rule that applies in Canada is that the risk of loss is on the purchaser as soon as the contract becomes unconditional. This is regarded as stemming from the doctrine of equitable conversion and the seminal case, *Paine* v. *Meller*,[3] which, despite the misgivings of some American writers about its extension to the question of risk,[4] has nonetheless been applied in that context in Canada[5] and in other parts of the Commonwealth.[6] That the risk is indeed on the purchaser is settled law.

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[1] See, for example, *Carly* v. *Farrelly*, [1975] 1 N.Z.L.R. 356 (S.C.).

[2] The term is used somewhat loosely here and includes what are strictly rules of equity. My intention is to exclude statutory rules and those established by particular contracts.

[3] (1801), 6 Ves. 349, 31 E.R. 1088 (L.C.). See also *Lysaght* v. *Edwards* (1876), 2 Ch.D. 499, at p. 506 (Ch.D.).

[4] See the views referred to in G. Walker, Insurance and the Sale of Land (1981), 9 Aust. Bus. L. Rev. 148, at pp. 155-158.

[5] *Buchanan and James* v. *Oliver Plumbing and Heating Ltd. and Porteous* (1959), 18 D.L.R. (2d) 575, [1959] O.R. 288 (Ont. C.A.).

[6] See Walker, *loc. cit.*, footnote 4, at pp. 154-158. I am indebted to Walker's article for its sound discussion of earlier cases and writing relating to the doctrine of equitable conversion. To reproduce his analysis here is unnecessary for two reasons. Interested readers can refer to his work and, in any event, my emphasis here is on finding solutions to the problem imposed by the risk being on the purchaser, a principle I accept as applying in Canada.

A second principle that compounds the problem for the purchaser is the rule that, absent a relevant statutory provision or express agreement with the vendor, the purchaser cannot obtain the benefit of any insurance carried by the vendor. A policy of insurance is personal to the insured and does not run automatically with the land. The rights under the policy must be assigned separately—a matter I come to below.

In the leading case, *Rayner* v. *Preston*,[7] the property had been insured by the vendor. After the date of the contract, but before completion, loss occurred and the purchaser claimed the benefit of the insurance proceeds from the vendor. There were no provisions in the contract of sale relating to loss or insurance. A majority of the English Court of Appeal denied the purchaser's claim on the ground that, without a relevant provision in the contract of sale, that contract did not pass the benefit of the vendor's insurance to the purchaser in the event of loss. In the result the purchaser continued to be bound to pay the full purchase price under the contract of sale even though the subject of the contract had become damaged after execution. *Rayner* v. *Preston* has been followed on this point in Canada.[8]

It is worth noting here that, in circumstances such as those that occurred in *Rayner* v. *Preston*, the vendor is not normally entitled to double recovery in the form of the insurance proceeds combined with the full purchase price.[9] It is true that the vendor retains an insurable interest in the property pending payment of the purchase price and may claim for any loss occurring before that date.[10] However, the vendor's insurer enjoys a right of subrogation in respect of the money owing under the sale and purchase agreement. Thus, depending on the circumstances, the insurer is entitled (1) to obtain reimbursement of any insurance money it has paid once the vendor has received the purchase price, or (2) if the vendor is paid by the purchaser in advance of the payment of insurance, to withhold payment, or (3) to enforce the contract of sale against the purchaser in the vendor's name but for its own benefit.[11] The effect is well illustrated by the famous case, *Castellain* v. *Preston*,[12] which arose out of the same facts as *Rayner* v. *Preston*. In that case a house on the property being sold burned down

[7] (1881), 18 Ch.D. 1 (C.A.).

[8] See, for example, *Bellhouse* v. *Wong & Gore*, [1941] 3 W.W.R. 503 (B.C.C.A.); *Denesuk* v. *Zajanczkowski*, [1948] 2 D.L.R. 549, [1948] 3 D.L.R. 866; [1948] 1 W.W.R. 225, [1948] 2 W.W.R. 494 (Man. C.A.).

[9] The vendor may achieve some degree of double recovery if his insurance company does not invoke its right of subrogation, as appears to have been the case in *Carly* v. *Farrelly*, *supra*, footnote 1. See also R.J. Sutton, Casenote (1974-75), 6 N.Z. Univ. L. Rev. 367, at p. 369.

[10] *Caledonian Insurance Co.* v. *Montreal Trust Co.*, [1932] S.C.R. 581, [1932] 3 D.L.R. 657. See also footnote 15, *infra*.

[11] For an exposition of the applicable subrogation rules, see C. Brown and J. Menezes, Insurance Law in Canada (1982), Chapter 15.

[12] (1883), 11 Q.B.D. 380 (C.A.).

before payment was made and the vendor collected on his insurance policy. As described above, the purchaser was obliged to honour the contract of sale and purchase since it contained no escape clause against the possibility that damage occur before completion of the contract. The insurer was held to be entitled to reimbursement by the vendor who was regarded as having suffered no loss.

This approach was adopted in the Canadian case, *Caledonian Insurance Co.* v. *Montreal Trust Company*,[13] in which the Supreme Court of Canada held that, if the sale in question had been completed and the purchase price paid before the damage occurred, the vendor would have suffered no loss.[14] However, in that case, the sale had not been completed at the time of loss and the vendor was held entitled to the insurance proceeds. This decision turned on the narrow principle that an unpaid vendor has an insurable interest in the property being sold.[15] The question whether, upon payment of the insurance money, the insurer was entitled to pursue the claim against the purchaser did not arise. If the terms of the contract between the insured vendor and the purchaser were such that the purchaser remained fully liable on the contract even after the loss (and was not entitled to the benefit of the insurance), then the insurer would have been subrogated to the vendor's right to enforce the contract.

The effect of these principles of subrogation is that even if the vendor is charitably inclined to use the insurance money to make the property whole for the purchaser's benefit—on a gratuitous basis or pursuant to a contract renegotiated after the loss—he is not in a position to do so. The vendor's insurer is entitled to stand on the rights of the vendor as against the purchaser at the date of the loss. The importance of ensuring that the purchaser is protected in the face of the risk imposed by the common law is thus further underscored.

B. *Relevant Legislation*

In some common law jurisdictions outside Canada these rules placing the risk of loss on the purchaser and denying him the benefit of the vendor's insurance have been modified by statute.[16] The only Canadian legislature

[13] *Supra*, footnote 10. See also *Willumsen* v. *Royal Insurance Co. Ltd.* (1976), 63 D.L.R. (3d) 112, [1975] 5 W.W.R. 703, [1976] 1 W.W.R. 446 (Alta. App. Div.).

[14] In fact the policy would no longer have effect at all since the vendor would have ceased to have had an insurable interest in the property.

[15] The court cited *Keefer* v. *Phoenix Insurance Co.* (1901), 31 S.C.R. 144 for this proposition. The same principles have been applied in expropriation cases; see, for example, *Jakimowich* v. *Halifax Insurance Co.* (1966), 57 D.L.R. (2d) 542, [1966] I.L.R. 1-169, aff'd (1966), 60 D.L.R. (2d) 191, [1966] I.L.R. 1-177 (Man. C.A.).

[16] See, for example, Law of Property Act, 1925, s. 47(1) (U.K.). For further examples of legislation adopted in Australia and the United States, see Walker, *loc. cit.*, footnote 4, at pp. 159-162. Perhaps the most extensive legislative intervention has occurred recently in New Zealand with the passing of the Insurance Law Reform Act 1983. Section 11 of that

to address the question has been Manitoba. Section 40(1) of that province's Law of Property Act[17] provides that a purchaser:

> . . . in the event of damage to, or destruction of, buildings on land by fire . . . may, . . . apply to the Court of Queen's Bench for an order governing the application of any moneys received or receivable under any insurance policy, in respect of the damage or destruction; . . . and the court may make an order directing the application of the moneys on . . . the agreement for sale or in or towards rebuilding, restoring or repairing the buildings damaged or destroyed, or partly in the one way and partly in the other.

In the appropriate circumstances this section can be of considerable assistance to a purchaser. In one case a court was prepared to grant the remedy provided even where it had not been specifically applied for.[18] It should be remembered, however, that the remedy is a discretionary one. Moreover, it is available only when the loss is occasioned by fire. Other perils, notably floods and other weather effects, can of course be destructive forces and should be planned for as much as fire.

Another statute which arguably affords protection to purchasers in some provinces is the Fires Prevention (Metropolis) Act 1774,[19] section 83 of which requires insurance companies:

> . . . upon the request of any person or persons interested in or entitled to any house or houses or other buildings which may hereafter be burned down, demolished or damaged by fire . . .

to cause the insurance money to be spent on rebuilding, reinstating or repairing the damaged building, unless there is an agreement to dispose of the proceeds in another fashion. The Act appears to have been part of the received law of all the common law provinces and territories of Canada except New Brunswick, Nova Scotia and Prince Edward Island whose dates of reception of English law were before 1774.[20] It has not been expressly overruled in any of the jurisdictions that are regarded as having received it. However, it seems clear that in some provinces it has been superseded in certain respects. For example, legislation has been adopted in Manitoba,[21] Newfoundland[22] and Ontario[23] giving mortgagees the right

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Act specifically entitles a purchaser of land to the benefit of any policy of insurance held by the vendor, to the extent the purchaser does not have his own insurance, for loss occurring between the making of the contract of sale and the taking of possession or settlement.

[17] R.S.M. 1970, c. L-90.

[18] *Denesuk* v. *Zajanczkowski*, *supra*, footnote 8.

[19] 14 Geo. 3, c. 78. It appears that the Act does not apply to Lloyds underwriters; see E.J. McGillivray and M. Parkington, Insurance Law (7th ed., 1981) p. 700.

[20] For a review of the reception of English law by the various provinces and territories of Canada, see J.E. Coté, The Reception of English Law (1977), 15 Alta. L. Rev. 29, especially at pp. 86-92.

[21] Mortgages Act, R.S.M. 1970, c. M-200, s. 8(1).

[22] Conveyancing Act, R.S. Nfld. 1970, c. 63, s. 9(3).

[23] R.S.O. 1980, c. 296, s. 6(1). Similar legislation exists in New Brunswick; see Property Act, R.S.N.B. 1973, c. P-19, s. 49(3); but, as mentioned, the 1774 English statute is not in force there anyway.

to demand that insurance proceeds received by the mortgagor be applied in making good the loss or damage giving rise to the claim against the insurer. These provisions rather than the English Act would be taken now to govern the specific case of mortgagees. Nonetheless the imperial statute probably continues in effect for other types of interests.[24]

In Saskatchewan it has been held that section 83 has been totally superseded by a section in the Insurance Act of that province which provides, *inter alia*, that the *insurer* may opt to repair, replace or rebuild damaged or lost property.[25] That provision also appears in the insurance legislation of all other common law provinces.[26] However, two more recent cases in British Columbia have held that the corresponding section in the Insurance Act there does not remove the rights given under the Fires Prevention (Metropolis) Act. In one of these cases the court expressly declined to follow the Saskatchewan decision.[27] It is a reasonable conclusion that, excepting the Maritime Provinces and Saskatchewan,[28] section 83 continues to afford rights to persons with an interest in insured property, at least those other than mortgagees.

Assuming that is correct, the question is then whether a purchaser who has yet to pay the purchase price to complete the conveyance is a person "interested in or entitled to" the building for the purposes of the section. It would seem that a purchaser is such a person although the position is not entirely clear. In *Rayner* v. *Preston*[29] the question was addressed but only directly by the dissenting judge, James L.J., who stated that a purchaser, having an equitable interest under the contract of sale, is a person having an interest within the meaning of the Act. This view has been adopted by the High Court of Australia where section 83 is also in force in most States.[30] Although it is clear that for certain other purposes a purchaser's interest is a

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[24] Certainly other parts of the Act have been given effect subsequent to the passing of the mortgages legislation, at least in Manitoba; see *Mainella* v. *Wilding*, [1948] 2.D.L.R. 332, [1948] 1 W.W.R. 366 (Man. C.A.); *Can. Imperial Bank of Commerce* v. *Whiteside* (1968), 2 D.L.R. (3d) 611 (Man. C.A.). See also *Furlong* v. *Carroll* (1882), 7 O.A.R. 145 (Ont. C.A.) and *Can. Southern Rly.* v. *Phelps* (1888), 14S.C.R. 132 for earlier applications of other parts of the Act.

[25] *Royal Bank of Canada* v. *Pischke et al.*, [1933] 1 W.W.R. 145 (Sask. Dist. Ct.).

[26] For example, R.S.O. 1980, c. 218, s. 125, statutory condition 13.

[27] *Re Alliance Assurance Co. Ltd.* (1961), 25 D.L.R. (2d) 316, 33 W.W.R. 180, [1961] I.L.R. 1-002 (B.C.S.C.). The other case is *Ingre* v. *Barker* (1960), 31 W.W.R. 590, [1960] I.L.R. 1-357 (B.C.S.C.).

[28] Saskatchewan courts may in fact now be persuaded to follow the subsequent British Columbia cases.

[29] *Supra*, footnote 7, at p. 15. Cotton L.J. (at p. 7) said that even if the purchaser was such a person the claim could not be made after the money had been paid to the vendor since the insurer was then discharged.

[30] *Royal Insurance Co.* v. *Mylius* (1926), 38 C.L.R. 477 (Aust. H.C.). See also K.C.T. Sutton, Insurance Law in Australia and New Zealand (1980), p. 243.

qualified one,[31] it is submitted that, in Canada, a purchaser is protected by section 83. In British Columbia the section has been applied in favour of an owner of property contrary to the wishes of the vendor who was also the mortgagee.[32] The relationship between the parties there is analogous not only to that of purchaser and vendor under an instalment contract but also to that of purchaser and vendor under an uncompleted non-instalment contract.

Given that section 83 of the Fires Prevention (Metropolis) Act does operate in favour of the purchaser its effect is in any event limited in a number of ways. Firstly, the section only has effect "upon the request" of the person interested. Moreover it seems that the request must be made to the insurer before it has paid out on the vendor's policy (to the vendor) and thereby discharged its obligations.[33] Thus a purchaser must make his demand (a) to the vendor's insurer directly and (b) as early as possible after the fire. Secondly, the Act is only available where there is loss by fire. It is therefore of no help where the damage is caused by other perils. Thirdly, the relief under the Act is subject to any agreement between the purchaser and vendor. Fourthly, the purchaser cannot claim the money, only require it to be spent on rebuilding or repair. Finally, the Act applies only if the vendor's insurance is itself valid.[34] This reinforces the more general point that it is perhaps unwise to rely on the vendor's insurance for protection at all, a theme that I deal with more fully below.

C. *Protection for the Purchaser in the Contract of Sale*

Given the common law rules and the limited assistance afforded by statute, purchasers in Canada are most often protected by a provision in the contract of sale. This is included in standard form contracts and appears as clause 11 in the Ontario Real Estate Association Agreement of Purchase and Sale.[35]

> 11. All buildings on the property and all other things being purchased shall be and remain until completion at the risk of the vendor. Pending completion, Vendor shall hold all insurance policies, if any, and the proceeds thereof in trust for the parties as their interest may appear and in the event of substantial damage, Purchaser may either terminate this Agreement and have all monies theretofore paid returned without interest or deduction or else take the proceeds of any insurance and complete the purchase.

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[31] See the majority judgments *Rayner* v. *Preston*, *supra*, footnote 7 and also *Kimniak* v. *Anderson*, [1929] 2 D.L.R. 904, (1929), 63 O.L.R. 428 (Ont. C.A.), a case dealing with the rights of a purchaser against a creditor of the vendor executing against the property.

[32] *Ingre* v. *Barker*, *supra*, footnote 27.

[33] *Supra*, footnote 29. See also Sutton, *op. cit.*, footnote 30, p. 243.

[34] For a full discussion of the operation and limitations of section 83, see McGillivray and Parkington, *op. cit.*, footnote 19, pp. 700-707.

[35] For alternative types of agreements that might be used see R. Keeton, Insurance Law, Basic Text (1971), p. 200.

The first sentence reverses the effect of *Paine* v. *Meller*[35a] and places the risk on the vendor. Without more, this means that, at the date of completion, the vendor must deliver up the property in the condition it was in at the time of the signing of the contract subject only to reasonable wear and tear. The vendor would be liable to the purchaser for any damage beyond reasonable wear and tear even if such damage was not the result of the vendor's default.[36] In the result the purchaser would be entitled to the property at a reduced price. However, the options of suing the vendor in damages,[37] or insisting on a reduced price do not appear to be open to the purchaser. The remaining words of the clause define what is meant by the property's being at the vendor's risk. More particularly, those words state what the purchaser's remedies are; to take the benefit of any insurance held by the vendor, or to rescind the contract. Other options appear to be precluded.[38]

But even the two options available are not free from potential problems. Whether rescission is available to the purchaser turns on the occurrence of "substantial damage", but that term is not defined. I have found no case on the point but it is not difficult to imagine arguments arising. For example, is destruction of 10% of a house "substantial damage", or does it depend on the total value of the house? On any criteria, $10,000 worth of damage to a house valued at $40,000 would be substantial; but would that be true of $10,000 worth of damage to a house valued at $1,000,000? In other words, is "substantial" measured in relation to the value of the property as a whole or is it calculated on some absolute basis? This may be an important question in a case where the vendor either has no insurance or the insurance he does have is subject to a co-insurance clause or substantial deductible so that only a partial indemnity is recoverable from the insurer. Especially for more expensive properties, where even partial damage has expensive consequences, it would be advisable for the purchaser to insist on a more specific provision about the right to terminate the contract. It would also be advisable to ascertain from the vendor details of insurance that will be carried by him through the closing date.

[35a] *Supra*, footnote 3.

[36] See generally D.I. Cassidy, The Insurance of Land and Buildings the Subject of a Contract of Sale (1971), 45 Aust. L.J. 30, at p. 31, and D.H. Lamont, Lectures on Real Estate Conveyancing (1976), pp. 68-70, reproduced in B.J. Reiter, R.C.B. Risk, Real Estate Law (1st ed., 1979), pp. 210-211, (2nd ed., 1982), pp. 195-196. The author emphasises the need for the vendor to have insurance even if he did not have it prior to entering into the contract.

[37] Of course, if the loss was the result of the vendor's negligence the purchaser would have a remedy regardless of the existence of particular wording of a 'risk' clause.

[38] It might be argued that the first sentence of clause 11 can stand alone giving the purchaser a wider range of remedies. It is submitted, however, that the language used in the second sentence clearly qualifies the first in terms of the remedies available. The validity of much of the following turns on the correctness of my interpretation in this regard.

The provision that the vendor holds the policy and the proceeds of any insurance in trust for the parties as their interests may appear is clearly aimed at circumventing the principles laid down in *Rayner* v. *Preston* which drew a distinction between the contract of sale and the insurance policy. As Cotton L.J. stated:[39]

> An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a Court of Equity will give effect to by transferring the property sold to the purchaser, and so far as he is a trustee he is so only in respect of the property contracted to be sold. Of this the policy is not a part.

Brett L.J. put it this way:[40]

> But even if the vendor was a trustee for the vendee, it does not seem to me at all to follow that anything under the contract of insurance would pass . . . The contract of insurance does not run with the land; it is a mere personal contract, and unless it is assigned no suit or action can be maintained upon it except between the original parties to it.

The effect of including clause 11 in the contract of sale extends the scope of the trust to include any insurance policy.[41] Thus the proceeds of such insurance must be applied for the benefit of the purchaser. Moreover, the insurer cannot rely on subrogation to deny liability. The rights of the vendor's insurer under subrogation are entirely derivative. If those rights are based on contract (as, for example, in *Castellain* v. *Preston*) they are circumscribed by the total package of rights and obligations that pertain to the vendor. Under clause 11 of the standard form contract of sale, leaving aside the case of "substantial" damage which gives rise to the right to rescind, the purchaser continues to be bound to pay the full purchase price, but this obligation is subject to the right to receive from the vendor any insurance proceeds. In other words, in the event of loss, the vendor's obligation to pay the insurance proceeds to the purchaser is part of his consideration for the purchaser price. Thus, if the vendor's insurer was to invoke subrogation, it would step into the shoes of the vendor and be required, in order to claim the purchase price, to make the insurance proceeds available to the purchaser. In effect the insurer cannot benefit from subrogation. The vendor would not be gaining double indemnity so the basis for subrogation does not exist. It cannot be said, as it was in *Castellain*, that the vendor has suffered no loss by virtue of his continuing rights against the purchaser. In *Keefer* v. *Phoenix Insurance Co.*,[42] the sale and purchase agreement contained a provision by which the vendor agreed to maintain insurance on the property until closing. In an action by the

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[39] *Supra*, footnote 7, at p. 6.

[40] *Ibid.*, at p. 11.

[41] Thus, achieving what the minority judge in *Rayner* v. *Preston*, James L.J. held the purchaser was entitled to even without such a provision in the contract of sale: *ibid.*, at p. 13. Interestingly the judgment of James L.J. has been applied in Canada although not in the context of insurance; see *R.* v. *Caledonian Insurance Co.*, [1924] S.C.R. 207.

[42] *Supra*, footnote 15.

vendor to obtain the insurance proceeds after loss had occurred, King J., in the Supreme Court of Canada, stated:[42a]

> If that agreement [to maintain insurance] were a valid one . . . there could be no doubt that under this policy the plaintiff could recover in respect of the whole value of the property to the extent of the insurance, for in such case the plaintiff, in addition to the amount of his interest as unpaid vendor, would in case of loss be prejudiced to the further amount to which he had bound himself to keep up the insurance.

D. *Assignment*

An alternative way of viewing clause 11 is to regard it as having brought about an assignment of the insurance in favour of the purchaser to adopt the language of Brett L.J.[43] But caution must be exercised in using the term "assignment" in the context of insurance policies because it can mean several different things.

It is sometimes said that when a policy is transferred from an insured to another party so that the second party is substituted as the "insured" that this is an "assignment" of the policy. This is misleading. To be effective, the transfer needs more than mere compliance with the requirements for assignment of a chose in action (discussed in further detail below). In particular the consent of the insurer must be obtained.[44] This is because, as discussed above, the contract of insurance is personal to the insured. It relates to the individualized risk that he represents depending possibly on such factors as age, marital status, criminal record, financial status and so forth. For this reason a policy is not something that can be transferred at all in the normal sense. On the other hand, where the consent of the insurer is given to the replacement of the insured by a third party (even without adjustments of premium or coverage) there is in effect a new contract rather than an assignment of the old one. An important consequence of this is that any defences the insurer might have had against the original insured (arising say, from breach of one of the terms or from material misrepresentation) cease to have effect.[45] A further point is that, pursuant to such an "assignment", the original insured no longer retains any rights under the contract[46] unless expressly reserved.[47]

[42a] *Ibid.*, at pp. 154-155.

[43] See the passage quoted, *supra*, footnote 40.

[44] *Gill* v. *Yorkshire Insurance Co.* (1913), 4 W.W.R. 692, 23 Man. R. 368 (Man. K.B.); *Hendrikson* v. *Queen Insurance Co.* (1870), 30 U.C.Q.B. 108; *Crozier* v. *Phoenix Insurance Co.* (1876), 26 U.C.C.P. 89 (Ont. C.A.).

[45] *Springfield Fire & Marine Insurance Co.* v. *Maxim*, [1946] S.C.R. 604, [1946] 4 D.L.R. 369; *Chapman* v. *Gore Dist. Mutual Insurance Co.* (1876), 26 U.C.C.P. 89 (Ont. C.A.). However, the new contract may be subject to arguments based on mistake.

[46] *Wilton* v. *Rochester German Underwriters Agency* (1917), 35 D.L.R. 262, [1917] 2 W.W.R. 782, 11 Alta. L.R. 574 (Alta. App. Div.); *Drumbolus* v. *Home Insurance Co.* (1916), 37 O.L.R. 465 (Ont. App. Div.).

[47] *Taylor* v. *Equitable Fire & Marine Insurance Co.*, [1918] 1 W.W.R. 676 (Alta. App. Div.).

This type of "assignment" could be utilized for the purchaser's benefit but it is unnecessarily complicated for the purpose of providing interim protection.[48] In any event the mere provision of a term such as clause 11 in the contract of sale does not achieve such an assignment because the insurer is not involved in that transaction.

The "assignment" achieved by clause 11 is of the right to receive the proceeds of the policy rather than of the policy as a whole. The insurer's consent is not necessary for this[49] as the vendor remains the "insured" under the policy and retains for example, the right to cancel the policy.[50]

As with any other chose in action, the right to receive insurance proceeds is subject to either statutory or equitable assignment. A statutory assignment is one made pursuant to the relevant legislation in each of the provinces.[51] Under the majority[52] of these statutes, while the wording is not identical in each case, a valid assignment must be absolute in the sense that the purchaser is not limited in his ability to control or pursue an action

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[48] Clause 14 of the Ontario Real Estate Association Agreement recognizes that an assignment of this type may be used for ongoing protection of the purchaser after the contract is completed. In that clause the assignment is expressly subject to the consent of the insurer. Interestingly, in *Denesuk* v. *Zajanczkowski, supra*, footnote 8, at pp. 556 (D.L.R.), 233 (W.W.R.), Major J. of the Manitoba King's Bench seems to have regarded such an assignment provision as negating the rule in *Rayner* v. *Preston* as regards loss occurring before completion. With respect, I think that view is incorrect. The benefits under the policy can only accrue to the purchaser after completion and then only with the insurer's consent.

[49] *Canadian Bank of Commerce* v. *Wawanesa Mutual Insurance Co.*, [1925] 1 D.L.R. 72, [1924] 3 W.W.R. 822 (Sask. C.A.).

[50] *Morrow* v. *Lancashire Insurance Co.* (1898), 26 O.A.R. 173.

[51] Conveyancing and Law of Property Act, R.S.O. 1980, c. 90, s. 53; Judicature Act, R.S.A. 1980, c. J-1, s. 21; Law and Equity Act, R.S.B.C. 1979, c. 224, s. 33; Judicature Act, R.S.N.B. 1973, c. 7-2, s. 31; Judicature Act, R.S. Nfld. 1970, c. 187, s. 21(k); Judicature Act, S.N.S. 1972, c. 2, s. 39(5); Judicature Act, R.S.P.E.I. 1974, c. J-3, s. 15; Judicature Ordinance, R.O.N.W.T. 1974, c. J-1, s. 19(e); R.O.Y.T. 1976, c. J-1, s. 10. Section 53(1) of the Ontario Act provides as follows:

> 53(1) Any absolute assignment made on or after the 31st day of December, 1897, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action is effectual in law, subject to all equities that would have been entitled to priority over the right of the assignee if this section had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.

[52] In Manitoba and Saskatchewan materially different wording is used; see Law of Property Act, R.S.M. 1970, c. L-90, s. 31; Choses in Action Act, R.S.S. 1978, c. C-11, ss. 2-6. The essential difference is that there is no specific requirement that the assignment be "absolute". In fact the sections expressly allow for conditional assignments including, it seems, those by way of charge only.

to enforce the right of recovery.[53] The assignment must also be in writing "under the hand of the assignor", and written notice of it must be given to the insurer. The effects of an assignment made in conformity with this section are that the purchaser may sue on the policy in his own name and discharge the insurer from his obligations without the further consent of the vendor. In fact under these circumstances the insurer pays out to the vendor at his peril.[54] Unlike a transfer of the policy as a whole (as described above) however, the purchaser's rights remain subject to "all equities that would have been entitled to priority over the right of the assignor if [the] section had not been enacted". This means that if the insurer had available to it any defences arising, for example, from the vendor's breach of a condition of the policy or misrepresentation those will defeat a claim by the purchaser.[55]

The "assignment" effected by clause 11 of the standard contract of sale is not of itself a statutory assignment. Given the trust arrangement envisaged, the assignment could be not be regarded as "absolute" within the meaning of the section.[56] In any event written notice would have to be given to the insurer. These deficiencies could be rectified by an amended form of contract combined with the requisite notice to the insurer and thus enable the purchaser to sue on the policy directly.

As it is presently drafted, clause 11 represents an equitable assignment of the right to receive the insurance money. All that is required for this is a demonstration that, by whatever means, the benefit of the policy has been made over to the purchaser.[57] Clause 11 achieves this. However, to enforce the assigned right against the insurer, if it is necessary, the purchaser must join the vendor in the action.[58] Alternatively, the vendor may bring the action himself and then, pursuant to the clause in the contract of sale, apply the proceeds to the benefit of the purchaser. In either case it is not necessary

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[53] *Taylor* v. *Equitable Fire & Marine Insurance Co.*, [1918] 1 W.W.R. 676, 13 Alta. L.R. 58 (Alta. App. Div.); *O'Dwyer* v. *Banks*, [1953] 2 D.L.R. 204, (1953), 8 W.W.R. (N.S.) 161 (Alta. App. Div.).

[54] *Greet* v. *Citizens Insurance Co.* (1879), 27 Gr. 121 (Ont. Ch.). Note that the obligations under the policy, such as that to supply notice and proof of loss, fall to the purchaser.

[55] *Boyce* v. *Phoenix Mutual Life Insurance Co.* (1887), 14 S.C.R. 723; *North British & Mercantile Insurance Co.* v. *Tourville* (1895), 25 S.C.R. 177; *Zimmerman* v. *Northern Life Assurance Co. of Canada*, [1931] 2 D.L.R. 489 (Ont. S.C.).

[56] This may not matter in Manitoba and Saskatchewan: *supra*, footnote 52.

[57] Although not involving insurance *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454, at p. 462 (H.L.) demonstrates the point with respect to assignments of choses in action generally.

[58] In such cases the assignor (vendor) may be brought into the proceedings pursuant to the rules of procedure; see, for example, rule 136 of the Ontario Rules of Practice. Rule 89, which provides that "an assignee of a chose in action may sue in respect thereof without making the assignor a party" has been held not to apply to equitable assignments: see *Di Guilo* v. *Boland* (1958), 13 D.L.R. (2d) 510, [1958] O.R. 384 (Ont. C.A.), aff'd [1961] S.C.R. vii.

for the insurer to have been informed of the purchaser's interest in the property.[59] As in the case of a statutory assignment, the claim is subject to any defences the insurer may have against the vendor.

E. *The Inadequacy of Present Practice*

As we have seen, the ultimate source of protection for most purchasers of buildings in Canada is the vendor's insurance. Such statutory provisions as there are give the purchaser some rights over that fund, if there is one, as does the device usually adopted in contracts of sale. But, as some of the discussion above has already suggested, there is danger in relying on the vendor's insurance as the only form of protection.

Firstly, the vendor may have no insurance at all. Even if he does, it may be largely accounted for by the prior claim of a mortgagee. If the vendor has mortgaged the property, he will usually have obligations to the mortgagee until the date of closing. These obligations will include his having to keep the property insured with the loss payable, up to the value of the mortgage, to the mortgagee.[60] Moreover, this right of the mortgagee is typically recognized by an express provision in the vendor's insurance policy. This "mortgage clause", as it is often called, has been held to bring the owner and the mortgagee into a direct contractual relationship.[61] As a result the mortgagee has rights in respect of the insurance proceeds, which would be prior to those of a purchaser under a mere equitable assignment of those proceeds.[62]

Secondly, if there is insurance and the purchaser takes a statutory or equitable assignment of the right to receive the proceeds of it—and recall that current practice under the standard contract amounts to the latter—a claim may be defeated by any breach of the policy by the vendor, before or after the contract of sale is signed. Further, if the vendor has been guilty of material misrepresentation or non-disclosure to the insurer, that renders the policy voidable even with respect to claims relating to the purchaser's interest. The purchaser may try to make sure policy obligations arising after

[59] *Keefer* v. *Phoenix Insurance Co.*, *supra*, footnote 15.

[60] See generally, Brown & Menezes, *loc. cit.*, footnote 11, pp. 387-388.

[61] *London & Midland General Insurance Co.* v. *Bonser*, [1973] S.C.R. 10, (1972), 29 D.L.R. (3d) 468, [1972] I.L.R. 1-477.

[62] It might be argued that the mortgagee's prior claim does not really matter because the purchaser would still have a right against the vendor based on the provision in the contract of sale regarding the risk and insurance. The argument would be that the purchaser could have the benefit of this right in the form either of damages or a reduced purchase price (equal to the promised insurance). However, as I have argued above (*supra*, footnote 38), the rights afforded by the standard form clause are very much restricted. In particular, there is access to the vendor's insurance "if any". It is at least a viable argument for the vendor that, where the insurance is subject to a prior claim, when it comes to the purchaser's claim to it, there is none. In any event, there is sufficient uncertainty in the matter to give cause for concern, and to provoke some precautionary measures.

loss, such as furnishing proof of loss, are complied with but, even here, there may be imposing practical difficulties.[63]

Even if he is not somehow in default, the vendor's insurance may be less than satisfactory. It may contain terms such as a co-insurance clause or deductible clause which make recovery substantially less than a full indemnity. Similarly, if the policy does not contain an optional loss settlement clause a considerable depreciation deduction could seriously undermine the value of the recovery for the purchaser. As noted above, the circumstances may be such that a court may not regard the damage as "substantial" for the purpose of allowing the purchaser to rescind, but nevertheless that damage—without full indemnity—may affect the property's value to the purchaser considerably. Alternatively, the purchaser may simply not want to terminate the agreement because there is some intrinsic value in the property for him or, as is not unlikely, similar properties have increased in value between the date of contracting and the date of loss.[64]

These difficulties may be reduced if the purchaser's solicitor obtains details of the vendor's insurance and is satisfied that it is adequate. However, it would be extremely difficult to ensure that there has been no prior default by the vendor in respect of the insurance or, for that matter, to ensure that there will be no default pending completion of the contract of sale.[65]

Other problems might be avoided if there were inserted in the contract of sale an amended "risk" clause, particularly regarding the circumstances in which rescission is permissible. But neither is this a complete solution. For reasons such as the difficulty of finding an alternative property (the purchaser may, for example, have contracted to sell his existing house on the date he is due to buy the new one), rescission may not be an attractive alternative. In any event, under the usual practice, contracts of sale are

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[63] If however, the vendor is regarded as a trustee of the policy he may be liable for breach of trust for post-contract conduct; *quaere* if that would afford an effective remedy to the purchaser.

[64] For other comment on the dangers of relying on the vendor's insurance, see V. Di Castri, The Law of Vendor and Purchaser (1976), p. 448. Note also the following comment by L.R. Freeman, in Law Society of Upper Canada, Fire and Property Insurance, Edited Proceedings (1974), p. 23, made with reference to mortgagees but which has equal relevance for purchasers:

> I have, from experience, considerable objection to relying on other people's insurance. You have no control over it, you do not know just what the position may be; there may be a change material to the risk, without the mortgagee's knowledge, so that then there is a dispute between insurer and insured. There may be co-insurance factors which are discovered later. It reduces the amount payable and again there are delays and disputes between insurer and insured and the mortgagee is sitting on the sidelines. There is one single way out of that. A mortgagee having insurable interest . . . can take out his own fire insurance policy on the property.

[65] But see the comment in footnote 63, *supra*.

commonly executed before legal advisers are involved leaving the purchaser saddled with the present, possibly inadequate, clause.

The solution outside of legislative changes (or possibly an alteration to the existing standard form contracts), is for purchasers to take out separate cover. This is standard practice in the United Kingdom and sometimes done in Australia and New Zealand and is usually achieved by the simple medium of a cover note issued by a broker.[66]

The remaining part of the paper consists of an examination of some of the questions which may arise where a purchaser has his own insurance before completion of the contract.

II. *The Purchaser's Own Insurance*

A. *Insurable Interest*

It is well established that a purchaser has an insurable interest in the property after the contract is signed and before completion of the sale.[67] The interest arises from the general principle of equitable conversion alluded to above. The purchaser is the equitable owner of the property upon execution. The insurable interest exists as long as the contract of sale is valid even if it is voidable or if the purchaser's right to the property is unenforceable by action.[68] The fact that equitable ownership carries with it the risk relating to any subsequent damage to the property undoubtedly adds to the extent of the interest but assumption of that risk is not crucial for an insurable interest to exist. Thus where the contract of sale places the risk of loss on the vendor, the purchaser still has an insurable interest. At the least, damage to the property would represent some loss to the purchaser.[69] This is certainly so under the risk clause in common use now in Canada. As indicated the consequences of the risk being on the vendor are strictly limited under that clause. The purchaser can either have the benefit of the

[66] For the United Kingdom, see J.T. Farrand and J. Gilchrist Smith, Emett on Title (17th ed., 1978) p. 41; E. Moeran, Practical Conveyancing (8th ed., 1981), pp. 20-22; E.J.D. Peverett, Shifting the Insurance Burden: Another View (1975), 125 New L.J. 217. For Australia and New Zealand see Sutton, *op. cit.*, footnote 30, p. 241.

[67] *Reid and Anor* v. *Fitzgerald* (1926), 48 W.N. (N.S.W.) 25, at p. 26 (S.C.); *Davjoyda Estates Property Ltd.* v. *National Insurance Co. of New Zealand Ltd.* (1965), 69 S.R. (N.S.W.) 381 (S.C., *in banco*). See also the Canadian case *Sellers* v. *Continental Insurance Co.* (1974), 48 D.L.R. (3d) 369, 18 N.S.R. (2d) 532, [1975] I.L.R. 1-657 (N.S.T.D.) where a mere option to purchase was held sufficient to found an insurable interest. For academic consensus on the point see McGillivray and Parkington, *op. cit.*, footnote 19, pp. 122-123; Sutton, *op. cit.*, footnote 30, p. 239; Cassidy, *loc. cit.*, footnote 36.

[68] Sutton, *ibid.*; Cassidy, *ibid.*

[69] See Cassidy, *ibid.*, at p. 31. The author describes the interest as arising from

". . . the possibility that the vendor will be unable to complete and perhaps discharge mortgages and other obligations attaching to the land with the reduced amount of purchase price that will be available to him and possibly also the equitable estate that he, the purchaser, has".

vendor's insurance or rescind. If the former, the insurance may be inadequate or, at worst, invalid leaving the purchaser to bear at least some of the loss personally. If the latter, the purchaser may still be put to the trouble and expense of finding alternative (and perhaps inferior) premises.[70] In other words, to adopt the often-quoted test given by Lawrence J. in *Lucena* v. *Craufurd*,[71] the purchaser has "benefit from [the building's] existence, prejudice from its destruction".

It is worth adding here that the nature of the purchaser's interest should be disclosed to his insurer at the time cover is applied for. It is clearly material that another party, the vendor or his lessee, is in possession as would be the fact that there are outstanding charges against the property. Failure to disclose such material facts renders the contract void.[72]

B. *Value of the Purchaser's Interest*

In the presumably rare case (in Canada) where the risk has passed to the purchaser on the exchange of contracts the extent of his interest is the full value of the buildings. It is sometimes stated that this means the purchase price, with a reduction for the value of the land, because that is the maximum the purchaser is liable for.[73] However, this may well be an inadequate amount. The rationale is that the purchaser can take this amount, together with the proceeds of the sale of his newly acquired damaged property, and go into the market and buy another, similar but undamaged property. But not only does this involve transaction costs in the form of delay and inconvenience, but there may not be other premises suitable for the purchaser's purposes. The purchaser should be able to insure for, and recover, an amount sufficient for rebuilding.[74] In other words, on the basis of the principle of indemnity, the purchaser should be able to insure, not simply for the cost to him of his bargain but for the value to him of that bargain.[75]

Where there existed the usual clause giving the purchaser the right to rescind or take the benefit of the vendor's insurance in the event of substantial damage, the question of valuing the purchaser's loss would be more complicated. If the contract of sale is rescinded, the value of the loss from the insurer's point of view is much less, in most cases, than if the deal

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[70] Peverett, *loc. cit.*, footnote 66.

[71] (1806), 2 Bos. & Pul. (N.R.) 269, at p. 301, 127 E.R. 630, at p. 643 (H.L.).

[72] See for example, Ontario Insurance Act, R.S.O. 1980, c. 218, s. 125, statutory condition 1. As to the principles relating to disclosure generally, including the test for materiality, see Brown & Menezes, *op. cit.*, footnote 11, pp. 98-110.

[73] Sutton, *op. cit.*, footnote 30, p. 239; T.M. Aldridge, Shifting the Insurance Burden (1974), 124 New L.J. 966.

[74] Usually this will be reduced to take account of depreciation but the purchaser, being an equitable owner should, like any other owner, be able to select cover on a replacement cost basis. See generally, Brown & Menezes, *op. cit.*, footnote 11, chapter 13.

[75] See the comments of Peverett, *loc. cit.*, footnote 66, at p. 219.

is completed and reinstatement required. Clearly, it is inappropriate for the purchaser to be able, by his election alone, to bind the insurer to the higher liability. There has to be some objective assessment. This would involve looking at the reasonableness of rescission given the availability of alternative premises for the purchaser's purposes.[76]

If there is a reasonable alternative available, the insurer would not have to pay for reinstatement. The insured purchaser's only claim could be for what he could establish he has lost in terms of the value to him of the insured premises before the loss over the next best available, and the cost (including delays) involved in finding the alternative. If there is no reasonable alternative (if, in other words, the difference in value between the pre-loss insured premises and the best alternative was greater than the cost of rebuilding), the insurer should be required to pay the cost of rebuilding subject, of course, to policy limits and to subsequent offset through any subrogated claim against the vendor (dealt with in the next section).

Where the purchaser's loss is less than the total loss (for example, where the contract is rescinded) he may be able to claim for the full loss and hold the excess for other persons interested (presumably the vendor and perhaps also a mortgagee) but only if he can show, *inter alia*, that that was his intention.[77] Presumably this would be an unusual case.

C. *The Problem of Waste*

It might be thought that, in a system whereby most vendors do have some insurance on the property until completion of the sale, it is wasteful to have a second policy on the same property. Certainly there is some inefficiency but, given the legal background, that may be worth putting up with bearing in mind the potential loss. In any event the waste would not be as great as might first appear. There would not be double payment of the amount of loss.

Because the vendor and purchaser have different interests in the property, if loss occurred there would not be double insurance in the sense that there would be contribution between the two insurers. Rather it would be a situation to which subrogation applies.[78] If the risk was borne by the

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[76] While questions of this type cannot be said to be simple, Canadian courts are at least familiar with them: see, for example, *Leger* v. *Royal Insurance Co.* (1968), 70 D.L.R. (2d) 344, 1 N.B.R. (2d) 1 (N.B.C.A.), involving a finding of the "intrinsic value" to the insured of buildings about to be demolished; and *McLachlin* v. *Dunwich Mutual Fire Insurance Co.*, [1935] 3 D.L.R. 194, [1935] O.W.N. 237, (1935), 2 I.L.R. 181 (Ont. H.C.), where the court examined the appropriateness of the size of a barn for the farm it was situated on.

[77] *Reid and Anor* v. *Fitzgerald, supra*, footnote 67. On the more general point of insuring other interests see also *Caldwell* v. *Stadacona Fire & Life Insurance Co.* (1883), 11 S.C.R. 212; *Keefer* v. *Phoenix Insurance Co., supra*, footnote 15.

[78] *North British and Mercantile Insurance Co.* v. *London, Liverpool & Globe Insurance Co.* (1877), 5 Ch.D. 569 (C.A.). See also Brown & Menezes, *op. cit.*, footnote 11, pp. 342-343.

purchaser the vendor's insurer would enjoy the right of subrogation in respect of the vendor's right to payment under the contract of sale.[79] The money coming from the purchaser's insurer would assist the purchaser in meeting his obligations under the contract of sale, the vendor would be paid in full and thereby suffer no loss. The vendor's insurer would therefore not be liable.

If, on the other hand, the contract of sale contained the usual clause placing the risk on the vendor, the purchaser's insurer would have the subrogated right. As described, under such a clause, the purchaser has a remedy against the vendor—to have the benefit of the vendor's insurance. Thus, the purchaser's insurer, on paying a full indemnity to the purchaser,[80] would be entitled to enforce that right in the name of the purchaser but for its own benefit.

If the contract was rescinded, his insurer would, as indicated above, be liable only for loss attributable solely to the purchaser and which would not be claimable by the vendor against his, the vendor's, insurer anyway. In such a case, the vendor would still have a claim against his own insurer for the loss of the building which would remain his in every sense.[81]

The "waste" that remains then, is the amount involved in the transaction costs consequent upon the subrogated action. These costs are reflected in the premiums that both parties would pay. In other words the waste is the double premium.[82] If the purchaser is satisfied that the vendor's insurance is, in all the circumstances, adequate and/or he is content that rescission is a satisfactory remedy in the event of substantial damage to the property, then the premium involved would not be worthwhile. But if there is any doubt on either of these points, then the extra premium to cover the period prior to completion would surely be justified.[83]

Conclusion

A solicitor acting for the purchaser of a building has a duty to ensure that there is adequate protection for his client's interest.[84] The standard of care imposed on a solicitor in this regard is that of the "ordinarily competent"

[79] See footnotes 11 to 15 and the relevant text.

[80] See Brown & Menezes, *op. cit.*, footnote 11. Note that the purchaser's insurer is not entitled to delay payment until after completion of the contract unless perhaps there is some doubt as to the validity of the contract of sale or as to the vendor's ability to show a good title; see Sutton, *op. cit.*, footnote 30, p. 239.

[81] Note that the existence of subrogation rights removes the possibility of either the vendor or the purchaser (or both by collusion) profiting from an insured loss.

[82] See Sutton, *op. cit.*, footnote 30, p. 241 and Aldridge, *loc. cit.*, footnote 73. But recall that the premiums are really protecting separate interests. See Peverett, *loc. cit.*, footnote 66.

[83] See Peverett, *ibid.*, at p. 219.

[84] *Supra*, footnote 1.

or "average" member of the profession.[85] In Canada the average solicitor appears to be satisfied with a clause in the contract of sale reversing the common law rule about risk and giving the purchaser the benefit of any insurance held by the vendor. When such a clause appears in the contract of sale there would appear to be no duty to go beyond this.[86] But where the contract of sale contains no risk clause there is clearly a duty, at least to inform the purchaser of his precarious position and, probably, to recommend some form of protection. The easiest method would be to procure separate insurance.

Even where there is a risk clause, while failure to do so might not incur liability on the solicitor's part, he would better serve his client's interests by pointing out the potential difficulties referred to in this article and to suggest that separate cover be considered.

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[85] See, for example, *Aaroe and Aaroe* v. *Seymour*, [1956] O.R. 736, at p. 747 (Ont. H.C.). It is not intended here to discuss the finer points of professional negligence law. I propose simply to offer some reflections on the solicitor's duty within the specific context of this paper.

[86] See generally, *Carly* v. *Farrelly*, *supra*, footnote 1, at pp. 368-371. The New Zealand court held the solicitor's duty to be to procure protection either by complying with the terms of the risk clause (which required his obtaining the consent of the vendor's insurer) or by procuring separate insurance. Interestingly, the measure of damages was the amount of the vendor's insurance. The court could have enquired about the purchaser's actual loss (i.e. the cost of rebuilding) but did not.