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Transfer of ownership of Real Property & Goods

By Paul Reeve FCII FCILA, Sedgwick International UK

CILA Education Committee

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Insurable interest is one of the principles of insurance. In *Lucena v Craufurd 1806* insurable interest was defined as *'to be interested in the preservation of the thing, is to be so circumstanced with respect to it, as to have benefit from its preservation or prejudice from its destruction'*.

This was developed in the Marine Insurance Act 1906 (s5, 2) as *'in particular, a person is interested in a marine adventure where he stands in a legal or equitable relationship to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of the insurable property, or may be prejudiced by its loss or by damage thereto, or by the detention thereof or may incur liability in respect thereof'.*

There are four elements that must be present for insurable interest in property to exist

1. There must be an item which is capable of being destroyed, lost or damaged. That could be a physical object or a liability that may be incurred
2. That physical object or liability must be capable of being insured and be the subject matter of the insurance
3. The policyholder must have a legally recognised financial relationship with the physical object or liability, so that the policyholder benefits by its existence or is prejudiced by it loss

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4. The insurable interest must be measurable in financial terms

The insurable interest must exist at the time of the loss

The most frequent way in which insurable interest arises is through ownership of the property or item, but it can also arise through joint ownership, the relationship between a mortgagee and mortgagor, the vendor of property and the purchaser, contractual arrangements, bailor and bailee and executor and trustee.

It is therefore important when handling claims for loss of or damage to goods or property to consider the insurable interest of the policyholder, and whether that interest exists.

Transfer of ownership of Goods

Ownership is the entirety of the powers of use and disposal allowed by law. So, the owner can use the item that they own, destroy it or dispose of it as they wish provided that they do not harm another or damage their property.

The transfer of ownership or sale of goods may involve three elements

1. Transfer in title – who actually owns the property
2. Transfer in risk – who is responsible for the property
3. Transfer in possession – who has the physical item in their possession

Sales of Goods Act 1979

The Sale of Goods Act 1979 applies to all contracts for the sale of goods.

Part II of the Act sets out the requirements for the formation of a contract for sale

S2 - Contract of sale

(1) A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

(2) There may be a contract of sale between one part owner and another.

(3) A contract of sale may be absolute or conditional.

(4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale.

(5) Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell.

(6) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

S3 - Capacity to buy and sell

(1) Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property.

(2) Where necessaries are sold and delivered to a minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price for them.

(3) In subsection (2) above “necessaries” means goods suitable to the condition in life of the minor or other person concerned and to his actual requirements at the time of the sale and delivery.

S4 confirms that the contract for sale can be in writing, agreed orally, part in writing and part orally, or can be implied by the conduct of the parties.

S5 states that the goods which form the subject of the contract may exist at the time that the contract is entered and be owned or in the possession of the seller, or be manufactured or acquired by the seller after the making of the contract. The Act refers to the latter category as being ‘future goods’.

If the contract for sale concerns specific goods that, without the knowledge of the seller, perished before the contract is made, then the contract is void (S6). Similarly, where there is an agreement to sell goods, and after the agreement is made but before the risk transfers to the buyer the goods perish, the contract is again void (S7).

S16 of the Act states that where there is a contract for sale of unascertained (unidentified) goods, ownership of the goods does not pass to the buyer until the goods are ascertained (identified).

Sections 17, 18 and 20 are important to determine whether the vendor or buyers of the goods owns the property, and therefore has insurable interest in the items

S17 Property passes when intended to pass

(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

This section confirms that ownership of the goods passes to the buyer at the time agreed or intended by the parties, taking account of the contract terms, and background to the sale negotiations. The rules in S18 regarding intention would also be taken into account

S18 Rules for ascertaining intention

Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, are postponed.

Rule 2. where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice that it has been done.

Rule 3. where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done and the buyer has notice that it has been done.

Rule 4. when goods are delivered to the buyer on approval or on sale or return or other similar terms the property in the goods passes to the buyer:-

a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, and, if no time has been fixed, on the expiration of a reasonable time.

S20 Passing of risk

(1) Unless otherwise agreed, the goods remain at the seller’s risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer’s risk whether delivery has been made or not.

(2) But where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.

(3) Nothing in this section affects the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party.

(4) In a case where the buyer deals as consumer or, in Scotland, where there is a consumer contract in which the buyer is a consumer, subsections (1) to (3) above must be ignored and the goods remain at the seller’s risk until they are delivered to the consumer.

In summary, title in goods will pass from the seller to the buyer at the time specified in the contract, or if the contract is silent on that point, title will pass on delivery. So, ownership of the goods may pass to the buyer before the seller has received payment.

To avoid the risk of not being paid, the seller of the goods may incorporate a ‘retention of title’ clause into the sale contract. This clause will state that title to the goods does not pass to the buyer until the seller has been paid in full. Such a clause is often referred to as a ‘Romalpa’ clause from the case of *Aluminium Industrie Vaassen Bv v Romalpa Aluminium 1976*.

In the Romalpa case, the plaintiffs sold aluminium foil to the defendants. The defendants subsequently went into liquidation having not paid for the goods. The sale contract included a clause *‘ownership only transfers once the buyer has fully paid for the goods’*. The court found in favour of the plaintiff and held that the aluminium foil was not part of the liquidated company’s assets as Romalpa had no interest in the goods as they had not been paid for.

A subsequent case *Borden UK Ltd v Scottish Timber Products Ltd 1981* also involved a retention of title clause. In this case, the plaintiffs had supplied resin which was used by the defendants in the manufacture of chipboard. The supplied resin had been incorporated into the chipboard and was no longer a separate product. The court held that as the resin was no longer a separate component, Borden could not rely on the retention of title clause in the contract and the claim was not successful. Had the retention of title clause expressly stated that goods manufactured by the buyer incorporating the resin would become the sellers in the event of non-payment, the claim would have probably succeeded.

Transfer of ownership of Real Property

The term 'real property' in general relates to interests in land. This may be the ground on which a building stands, as well as any building constructed on the land.

A contract for the sale of real property requires there to have been offer and unconditional acceptance. The sale contract must be in writing, naming the parties to the agreement, identifying the property involved and the price paid. The contract must be signed by the seller and buyer. The transfer of ownership has to be legal, and both parties must have capacity to enter into the contract.

In a typical sale of real property, the potential buyer will make an offer to purchase the building and there will frequently be a negotiation on the price or fixtures to be included in the sale. Once the price and any other aspects are agreed searches will be carried out (usually by the buyer's solicitor) to verify that the vendor has good title to the property, whether there are any covenants or restrictions in place on the property, planning issues that may relevant etc. and a survey may be carried out on the building. Once these stages are satisfactorily completed, the vendor and buyer will agree to exchange contracts. Up to the point of exchange of contracts the sale is 'subject to contract' and either party can withdraw from the purchase / sale.

On signing and exchanging contracts a deposit is usually paid by the buyer, and the agreement is binding on both the vendor and buyer from the time of exchange. Transfer of ownership is subsequently completed when the balance of the purchase price is paid. This stage is referred to as completion.

In the period up to exchange of contracts the vendor has insurable interest only. On exchange of contracts the risk in a property passes to the buyer (unless the contract states otherwise) so from exchange the buyer has insurable interest. The vendor also retains insurable interest following exchange of contracts to the point of completion as the sale may not proceed or the buyer may not arrange cover as required. So, while there is no requirement for the seller to insure the property following exchange of contracts (unless stated in the sale contract) it is prudent for them to do so. On completion of the contract, the buyer solely has insurable interest.

Section 47 of the Law of Property Act 1925 refers to how any insurance monies should be applied where the vendor has maintained an insurance policy. It states:

1. Where after the date of any contract for sale or exchange of property, money becomes payable under any policy of insurance maintained by the vendor in respect of any damage to or destruction of property included in the contract, the money shall, on completion of the contract, be held or receivable by the vendor on behalf of the purchaser and paid by the vendor to the purchaser on completion of the sale or exchange, or so soon thereafter as the same shall be received by the vendor.
2. This section applies only to contracts made after the commencement of this Act, and has effect subject to -
   a) Any stipulation to the contrary contained in the contract,
   b) Any requisite consents of the insurers,
   c) The payment by the purchaser of the proportionate part of the premium from the date of the contract.

Where residential domestic property is sold, the parties to the contract will frequently use the Law Society Standard Conditions of Sale. At the time of writing the 5th Edition from 2011 (revised in 2018) is the most recent version of the contract

Section 5 of the Standard Conditions relates to the risk and insurance requirements

5.1.1 The property is at the risk of the buyer from the date of the contract
5.1.2 The seller is under no obligation to the buyer to insure the property unless:

a) The contract provides that a policy effected by or for the seller and insuring the property or any part of it against liability for loss or damage is to continue in force, or

b) The property or any part of it is let on terms under which the seller (whether as landlord or as tenant) is obliged to insure against loss or damage.

5.1.3 If the seller is obliged to insure the property under condition 5.1.2, the seller is to:

a) do everything necessary to maintain the policy

b) permit the buyer to inspect the policy or evidence of its terms

c) if before completion the property suffers loss or damage:

i. pay to the buyer on completion the amount of the policy monies which the seller has received, so far as not applied in repairing or reinstating the property, and

ii. if no final payment has then been received, assign to the buyer, at the buyer's expense, all rights to claim under the policy in such form as the buyer reasonably requires and pending execution of the assignment hold any policy monies received in trust for the buyer

d) cancel the policy on completion.

5.1.4 Where the property is leasehold and the property, or any building containing it, is insured by a reversioner (e.g. freeholder) or other third party, the seller is to use reasonable efforts to ensure that the insurance is maintained until completion and if, before completion, the property or building suffers loss or damage the seller is to assign to the buyer on completion, at the buyer's expense, such rights as the seller may have in the policy monies, in such form as the buyer reasonably requires.

5.1.5 If payment under a policy effected by or for the buyer is reduced, because the property is covered against loss or damage by an insurance policy effected by or on behalf of the seller, then, unless the seller is obliged to insure the property under condition 5.1.2, the purchase price is to be abated by the amount of that reduction

5.1.6 Section 47 of the Law of Property Act 1925 does not apply.

In summary, where the sale of a residential property is carried out under the 5th edition of the standard terms, the risk in the property rests with the buyer from the point that contracts are exchanged and the buyer should arrange insurance from that time.

Unless the contract stipulates otherwise the vendor does not have to insure the property from the point of exchange. If insured damage is caused after exchange of contracts and the vendor has insurance cover, the claim proceeds must be spent on repairing the damage or paid to the buyer. The vendor can assign the claim proceeds to the buyer.

Where both the vendor and buyer have arranged insurance from exchange of contracts, there would be no contribution between the respective policies, as they cover different rights and interests. If the vendor has insurance that is not required under the sale contract, the amount of money received from his insurer should be deducted from the sale price agreed. This maintains the principle of indemnity by which the policyholder should not profit from the insurance cover (*Castellain v Preston 1883*).

As previously stated, from the time sale contracts are exchanged up to completion, both the vendor and purchaser have insurable interest in the property.

Many domestic building insurance policies contain a Contracting Purchasers Interest Clause or Purchasers Memorandum. A typical wording is:

> *If you agree to sell your Home, the buyer will have the benefit of the cover for the Buildings under this Section from the date you exchange contracts until the date you complete the sale provided*
>
> 1. *the buyer completes the sale; and*
> 2. *the buyer does not have cover for the Buildings under any other policy.*

This clause provides cover for the vendor in the event that the buyer has failed to arrange insurance cover required by the sale agreement, or the vendor is required to insure to the time of completion. The owner's policy will only respond if the buyer has not arranged cover and the sale actually proceeds to completion.

For the sale of commercial property, the Law Society Standard Commercial Property Conditions are commonly used. The current version (at the time of writing) in the Third Edition, revised in 2018.

Section 8.1 of the Conditions confirms that the property is at the risk of the buyer from the date of the contract. The Conditions then allow for either the seller or the buyer to insure the property from exchange of contracts. If the sale conditions do not require the seller to insure the building, he is under no obligation to do so, but as with a domestic sale it would be prudent for the seller to maintain insurance to the contract completion.

Commercial insurance policies may include a Contracting Purchasers Clause or similar under the buildings cover, but it is not universally adopted as part of the standard cover.

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