

Property Insurance - Passing the Risk

Who takes the risk of a property being damaged after a sale Contract has been signed?

While the sale Contract form used will provide some guidance, the general law also makes some provision for these issues.

For example, Section 64 of the Property Law Act (Qld) allows a buyer to rescind a contract for the sale of a dwelling house or unit before the earlier of the taking of possession or settlement if the property is so damaged by fire storm or tempest as to be unfit for human habitation. That will always be a question of degree and the test may not be satisfied by partial or complete inundation by floodwaters. In any event, the damage to the dwelling would have to be severe. Section 63 of that Act also says, more or less, that the buyer is entitled to the benefit of any insurance held by the seller.

Section 50 of the Insurance Contracts Act 1984 (Cwlth) says that if a property is subject of insurance and is sold by a Contract under which risk has passed to the buyer then the buyer is deemed to be an insured person. Whether the relevant policy covers flood (however that may be defined in the policy) and whether the policy lapses or is maintained by the seller during the term of the Contract are not covered by that Act. The seller is not obliged by law to hold or maintain insurance.

The Contract forms in common use in Queensland differ in some respects.

The REIQ forms of contract (house and land, community title lots) say that the property is at the risk of the buyer from 5.00pm on the first Business day after the Contract Date. That provision satisfies at least partly the tests set in Section 50 of the Insurance Contracts Act. The seller must use the property reasonably until settlement and must not alter the property significantly or in a way that could cause expense for the buyer.

The ADL form says much the same thing and requires the seller to maintain its policy of insurance as long as he remains in possession. It goes on to say words to the effect that the seller must deliver the Property at Settlement without damage or loss, fair wear and tear excepted. Although the buyer cannot delay settlement or withhold money, they can require the seller to rectify prior to settlement and try to recover the reasonable costs of rectification from the seller after settlement.

On balance, buyers should be encouraged to make their own arrangements for insurance immediately after a Contract is signed. They should not wait until they have received a satisfactory building inspection and have obtained a finance approval or until satisfaction of special conditions. Buyers should also make sure that they understand what their insurance cover actually covers and not simply accept the cheapest quote.

For assistance with all your property needs, email info@msslawyers.com.au or visit our website www.msslawyers.com.au. Alternatively, contact our professional team at our Gold Coast or Brisbane office.



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