The Law Commission

(LAW COM. No. 191)

TRANSFER OF LAND

RISK OF DAMAGE AFTER CONTRACT FOR SALE

Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed 23 April 1990*

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are:

The Honourable Mr Justice Peter Gibson, *Chairman*

Mr Trevor M. Aldridge

Mr Jack Beatson

Mr Richard Buxton, Q.C.

Professor Brenda Hoggett, Q.C.

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RISK OF DAMAGE AFTER CONTRACT FOR SALE

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THE LAW COMMISSION

Item 4 of the Fourth Programme: Transfer of Land

RISK OF DAMAGE AFTER CONTRACT FOR SALE

To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain

PART I

INTRODUCTION

Scope of this report

1.1 When land is sold, the parties generally enter into a preliminary contract for the sale, which in a normal case creates a specifically enforceable obligation to complete the transaction. It is only on completion that the legal estate in the land is conveyed and the purchase money is paid. Because of the time which can elapse between the date of the contract and the date of completion, events may occur in the interim which change the nature or value of the property. It can therefore be necessary to determine precisely when the risk[1] passes from the vendor to the purchaser.

1.2 The present rule is that in general the risk passes to the purchaser when the contract is entered into.[2] This is a consequence of the principle that, from the exchange of contracts, the purchaser is regarded in equity as owner of the property. In this report we examine that rule, assess its shortcomings and consider whether and in what way its effect should be altered.

Background

1.3 In August 1988 we published a working paper[3] in which we examined the history and nature of the rule and provisionally concluded that the law at present is unsatisfactory.[4] We put forward five possible reform options, preferring a suggestion that statute should imply a contractual obligation on the vendor to convey the property to the purchaser in the physical condition in which it was at the date of the contract (option 3).[5] This option included a proposal that the parties to a contract should have complete freedom to agree any alternative contractual terms.[6]

1.4 Three other reform options which we did not favour were: abolition of the trust under which the vendor holds the property for the purchaser (option 1),[7] risk to pass on completion (option 2)[8] and a right of rescission (option 4).[9]

1.5 The fifth reform option which we put forward[10] suggested that contracting parties should, immediately and without statutory intervention, agree that the risk should pass at the date of completion, as they are quite free to do. A voluntary change of this nature could be implemented at once. We saw this as having the potential to make a major contribution, but were doubtful whether it would be adopted.

> "If such a contractual term became common practice in this country, perhaps as a standard condition of sale, then most of the problems identified in this working paper would be resolved. At present, however, such clauses are apparently not used by English practitioners".[11]

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[1] It is customary to talk of the passing of the risk, but there are cases in which the property gains in value. The time from which the purchaser assumes the risk of deterioration is also the time from which he benefits from any appreciation.
[2] Para. 2.2. below.
[3] Transfer of Land: Passing of Risk from Vendor to Purchaser, Working Paper No. 109.
[4] Working Paper, para. 3.2.
[5] Working Paper, paras. 3.15 *et seq.*
[6] Working Paper, para. 3.42.
[7] Working Paper, paras. 3.7 *et seq.*
[8] Working Paper, paras. 3.12 *et seq.*
[9] Working Paper, paras. 3.47 *et seq.*
[10] Working Paper, para. 3.52.
[11] Working Paper, para. 3.54.

Since the working paper was published, there has been a significant practical development which has changed our view, the publication of the Standard Conditions of Sale.[12] This now leads us to favour this option for reform.

1.6 We list the names of the individuals and organisations who responded to our working paper in the Appendix to this report. We are grateful to them for the help which they gave us.

1.7 In preparing the working paper we were assisted by Mr Mark Thompson, LL.B., LL.M., Lecturer in Law at Leicester University, and the work of analysing the responses was undertaken by Mr S. A. Cotton, J.P. We should like to express our thanks to both of them.

Structure of this report

1.8 Part II of this report summarises and analyses the present law. In Part III, we consider the options for reform and how best it may be achieved. A summary of our conclusions appears in Part IV.

[12] The Standard Conditions of Sale are published jointly by the Law Society and Solicitors Law Stationery Society Ltd. See paras. 3.1 *et seq* below.

PART II

THE PRESENT LAW AND THE NEED FOR REFORM

When the Risk Passes

2.1 The law on this topic is fully set out in the working paper,[1] so we confine ourselves in this report to a brief statement of the rules which are directly relevant.

2.2 The rules which at present apply may be summarised in this way:

(a) Physical damage to the property between the date of the contract for sale and the date of completion is at the risk of the purchaser, unless it is wilfully caused by the vendor or the vendor fails to take reasonable care of the property.[2] Subject to those exceptions, the vendor is not in the absence of any agreement to the contrary responsible. The purchaser may, if he chooses, insure.

(b) Once the vendor has agreed to sell he is under a duty to take reasonable precautions to protect the property,[3] so if he fails in that duty he is liable to the purchaser for resulting loss and damage which he causes or which is caused by third parties.[4] It is generally thought that it is for the purchaser to establish the vendor's fault.[5]

(c) Any rise or fall in the value of the property after the date of the contract benefits or prejudices the purchaser; the vendor continues to be entitled to the price which was agreed, but to no more.[6]

(d) Pending completion, the vendor must act as a prudent landowner. So he is liable to the purchaser if, for example, without consultation he takes action in relation to the property which reduces its value.[7] The vendor's position is usually expressed to be that of trustee for the purchaser.[8]

(e) The parties to a sale contract are at liberty to vary any of these rules, as part of their agreement.

Two Areas of Impact

2.3 The rules outlined above have an impact on two separate situations which they cover. On the one hand, there is physical damage to, or destruction of, the property; on the other, there is a change in circumstances, but without physical damage, which materially affects the value of what was sold. We shall deal with each in turn.

(a) *Physical Damage*

2.4 When a purchaser agrees to buy a building, it is clear that, unless the circumstances are exceptional, he wishes on completion to receive the building in as good a condition as it was in when the contract was made. Obviously he may realise that there is the possibility of damage between the time the contract is made and the time when it is to be completed, but we doubt whether many without express knowledge of this branch of the law would realise that the purchaser is expected to undertake this risk. The general rule is that it is the vendor exclusively who is entitled to possession of the property;[9] he remains in control of the property and continues to enjoy the benefits of ownership. Accordingly, the rule that the risk passes to the purchaser on making a contract seems unlikely to accord with general and reasonable expectations.

(b) *Change in Value*

2.5 We see the risk of changes between contract and completion in the value of

[1] Working Paper, Part I.

[2] *Lysaght* v. *Edwards* (1876) 2 Ch.D. 499, 507. Some doubt has been cast on the proposition that the risk of destruction always falls on the purchaser: see Working Paper, paras. 1.41 *et seq.*

[3] He is characterised as a trustee for the purchaser, see para. 2.6 below.

[4] *Clarke* v. *Ramuz* [1891] 2 Q.B. 456; *Davron Estates Ltd.* v. *Turnshire Ltd.* (1982) 133 N.L.J. 937.

[5] Working Paper, para. 1.29.

[6] *Paine* v. *Meller* (1801) 6 Ves. 349, 352; *Harford* v. *Purrier* (1816) 1 Madd. 532, 539.

[7] e.g., re-letting it on a new rent-restricted tenancy: *Abdulla* v. *Shah* [1959] A.C. 124.

[8] See, e.g., *Wilson* v. *Clapham* (1819) 1 Jac. & W. 36, 38, *per* Sir Thomas Plumer M.R.

[9] *Phillips* v. *Silvester* (1872) 8 Ch. App. 173, 178. If the property is let, it is the vendor who has the benefit of the rent paid during this period.

property, from causes other than physical damage, as quite different. Here, there will generally be no question of restoring the position to what it was at the date of the contract. Changes in value may merely be the result of a rise or fall in the market. Or, they may result from the intervention of some circumstances beyond the parties' control.[10] Such changes will be seen as one of the hazards of making any contract; it will be understood that if the bargain was unconditional, the parties have to accept the impact of what happens later without reopening it.

The Vendor as Trustee

2.6 As we explained in some detail in the working paper,[11] the vendor is regarded as trustee for the purchaser pending completion.[12] However, it is an unusual trusteeship: the vendor remains entitled to possession of, and to the rents and profits from, the property,[13] contrary to the normal principle that a trustee cannot profit from his trust;[14] similarly, the vendor has been held entitled to retain damages recovered from a tenant for breach of a repairing covenant,[15] and to retain statutory compensation due to the owner of premises derequisitioned after contract but before completion.[16]

2.7 The trust concept has been particularly valuable in imposing duties on the vendor in the interim period between the date the contract is made and the date it is completed. He is liable for physical damage resulting from his not exercising reasonable care,[17] including such damage inflicted by trespassers.[18] His responsibility also extends beyond physical damage. For example, he must continue to perform lease covenants,[19] and must not relet in a way which would prejudice the purchaser.[20]

2.8 While the application of the term "trustee" to describe the vendor's position may sometimes be a cause of confusion, because some rules applicable to trustees have no application here, there is clearly a need for some restraint on the vendor's exercising the powers of a legal owner and for the imposition for the benefit of the purchaser of some positive duty of care. The trust concept which has developed is a useful, flexible tool enabling a degree of control over the vendor to be exercised in the very varied situations which arise. The possible option of abolishing this trust was put forward in the working paper[21] although we did not favour it. None of those who responded supported the suggestion. We therefore conclude that the trust should remain undisturbed.

Risk of Physical Damage

2.9 Because in our view, and in the view of those who responded to the working paper, the only causes for practical concern about the rule for the passing of risk arise in relation to cases of physical damage, the remainder of this report will concentrate on that aspect of the matter. We do not recommend any reform of the rule or its consequences in other cases.

2.10 The present position is fundamentally unsatisfactory and unfair because it imposes on the purchaser responsibility for the property without at the same time giving him control. He cannot take steps physically to protect the property or to do running repairs.

2.11 Also, as we have pointed out,[22] a buyer of land may not, in the absence of professional advice or previous experience of the law, expect to bear the risk of damage

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[10] e.g., a building becoming listed as of special architectural or historic interest: *Amalgamated Investment & Property Co. Ltd.* v. *John Walker & Sons Ltd.* [1977] 1 W.L.R. 164.
[11] Working Paper, para. 1.9 *et seq.*
[12] *Shaw* v. *Foster* (1872) L.R. 5 H.L. 321.
[13] *Cuddon* v. *Tite* (1858) 1 Giff. 395.
[14] *Boardman* v. *Phipps* [1967] 2 A.C. 46.
[15] *Re Lyne-Stephens and Scott-Miller's Contract* [1920] 1 Ch. 472.
[16] *Re Hamilton-Snowball's Conveyance* [1959] Ch. 308.
[17] *Lucie-Smith* v. *Gorman* [1981] C.L.Y. 2866.
[18] *Davron Estates Ltd.* v. *Turnshire Ltd.* (1982) 133 N.L.J. 937.
[19] *Dowson* v. *Solomon* (1859) 1 Drew. & Sm. 1.
[20] *Abdulla* v. *Shah* [1959] A.C. 124.
[21] Working Paper, paras. 3.7–3.11.
[22] Para. 2.4 above.

to the property he is buying before paying for it and before being entitled to take possession. So the rule is a trap for the unknowledgeable, because they are exposed to the risk of considerable loss without being alerted to the possibility of considering whether to insure or to take any other precaution. We accept that the majority of purchasers of land have the benefit of professional advice, but there is no obligation to employ an adviser. The minority of people who without knowledge of the rule decide to undertake their own conveyancing are exposed to potentially disastrous loss.[23]

2.12 This does not mean that a new immutable rule must be imposed on all who wish to buy land, even if the passing of the risk on completion would accord with the general understanding. There will be circumstances in which the parties consider the question and decide they want a different result.[24] That is wholly unobjectionable, because the matter would expressly have come to their attention; they would have had the opportunity to weigh up the consequences and to decide whether they wished to take precautions.

2.13 The defects which we have identified would be cured by a rule, applicable to every contract, that the risk of physical damage passed on completion, subject to the parties having freedom to vary the rule. So a vendor who proposed that the present rule should apply, putting the purchaser at risk earlier, would have to have a specific provision in the contract[25] and that express term would draw the matter to the purchaser's attention. Whether or not he accepted the risk would be a matter of bargain, but if he did it would not be in ignorance.

Insurance

2.14 In the working paper[26] we examined the rules governing the insurance of property between the date of a contract for sale and the date of its completion, and the statutory provisions aimed at giving the purchaser the benefit of any policy effected by the vendor. Unless the parties agree otherwise, the vendor must account to the purchaser for any insurance money paid as a result of the property being damaged or destroyed. However, this is subject to the insurers giving any requisite consents and to the purchaser paying a proportionate part of the insurance premium.[27] We identified defects in the protection which this statutory provision gives. It does not, for example, tackle the difficulties which arise when the vendor's policy does not insure the property for its full rebuilding value or the vendor has not complied with a condition of the policy. Indeed there is doubt whether the purchaser can take advantage of the vendor's policy at all.[28] We accordingly concluded that while some existing doubts could be cured by legislation, real difficulties for purchasers would remain.[29] We therefore suggested that, rather than seeking to solve the difficulties by insurance, a more satisfactory approach was to deal with the underlying allocation of the risk. None of those who responded to the working paper disagreed with this, and it remains our view. Accordingly, we are not recommending changes to any of the present rules relating to insurance.

2.15 We certainly accept that in practice most of the risks of damage to property are likely to be insured. If the party in peril considers it prudent to insure, no doubt that is a wise precaution. We would not want to deter anyone from insuring, although a more satisfactory rule governing when the risk passes may cause people to reconsider at what point they need to insure.

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[23] However, the number of those at risk is probably small. The trap is one for purchasers and not vendors, and if they borrow to finance their purchase the need to insure as soon as contracts are exchanged may be pointed out by the mortgagees. Further, published guides for those who wish to undertake their own conveyancing mention the point: e.g., *Which? Way to Buy, Sell and Move House*, (1987), p. 131.

[24] Para. 3.5 below.

[25] The contract term would have to be in writing: Law of Property (Miscellaneous Provisions) Act 1989, s.2.

[26] Working Paper, Part II.

[27] Law of Property Act 1925, s.47. There is also a general provision, not limited to properties in the course of being sold, which allows anyone interested in a building damaged by fire to require the proceeds of any insurance to be laid out in making good the damage: Fires Prevention (Metropolis) Act 1774, s.83. This latter provision is not free from difficulty: e.g., it only applies to fire damage, does not require any shortfall in the insurance money to be made up and does not cover insurance at Lloyd's.

[28] Working Paper, para. 2.17.

[29] Working Paper, paras. 2.39–2.44.

2.16 We also recognise that there will always be risks against which it is not possible to insure, or not possible to insure to the full extent of the risk, and also properties and people who are uninsurable. However, we do not consider that the availability of insurance should alter the rule governing where, as between the parties to a contract for sale, the risk should lie. A clear and easily understandable rule needs to deal with all the risks in the same way; if the contracting parties wish to negotiate other arrangements they would be at liberty to do so.

Duplication of Insurance

2.17 Another concern we expressed in the working paper was that because it is common for both vendor and purchaser to insure the same property between the date of the contract and the date of completion, there is an unnecessary duplication of expenditure.[30] Those who responded agreed that insurance provision often overlapped in this way. But they variously pointed out that the sums involved were comparatively small, that the duplication was entirely proper because the insurable interests of the vendor and of the purchaser are different and that it would not be prudent for parties to do otherwise than continue or make their own insurance arrangements.

2.18 There are several practical reasons for both parties to insure: many vendors are not fully insured because long-established policies are not always revised to take account of rising building costs, so a purchaser cannot rely on being fully protected even if he has the benefit of the vendor's policy; a vendor may be well advised to continue to insure even if the risk passes on the making of the contract, because the purchaser may fail to comply with his obligation to complete; and there is always a risk when one person seeks to rely on another's insurance policy that it is voidable by reason of misrepresentation or non-disclosure on the part of the policy holder. Moreover, there are a very large number of cases in which vendors who have contracted to sell continue to have insurance obligations to mortgagees or to landlords, and cannot therefore cancel their policies as soon as the contract passes the risk to the purchaser.

2.19 We accept that, for these reasons, prudence may well dictate a temporary duplication of insurance cover, and that the cost in each case for such reassurance is comparatively small, when set against the other expenses of buying property. Nevertheless, the total sum involved cannot be insignificant and we still have misgivings about the value which property owners taken as a whole are receiving for this expenditure. Clearly, this is a matter for individual decision, but we would urge those involved, and particularly their professional advisers, to reconsider the position in any case where the risk does not pass until completion. There may well be cases in which it is quite unnecessary for the purchaser to insure before completion and in those cases the cost of duplication of insurance will be saved.

Need for Reform

(a) *Risk of Loss*

2.20 Those who responded to the working paper had not encountered difficulties arising from the present rules about passing of risk, although they had evidence of duplication of insurance. However, we must bear in mind that the working paper did not attract comments from members of the public who had undertaken their own conveyancing. It is they who are at risk from not realising the implications of the present rule, because a purchaser without advice may not effect insurance which he could have done. This absence of reports of difficulty does not, therefore, enable us to draw any conclusions as to the existence or extent of the problem.

2.21 We accept that although even minor damage can be a cause of real concern it is most unlikely that there are often serious problems. General experience suggests that it is rare for properties to be seriously damaged, and we are concerned only with the brief period between making a contract for sale and completing it. Dwelling-houses, for example, change hands on average about once every five years, so for that type of property we are concerned with a period of usually no longer than four weeks once every five years, or about 1.5 per cent of the time. Damage during so short a period

[30] Working Paper, para. 1.77.

must necessarily be rare, and it will be even rarer for it to occur to an uninsured property.

2.22 Yet, however rare the occurrence of significant uninsured damage while a contract is pending, the potential loss to the purchaser in question could be disastrous. The risk of such loss is quite clear. We consider that the law should avoid exposing unadvised, or indeed ill-advised, property purchasers to this possibility. We therefore conclude that there are good grounds for changing the effect of the rule on passing of risk.

(b) *Options for Reform*

2.23 A large majority of respondents to the working paper agreed that the present law on passing of risk is unsatisfactory and in need of reform or clarification.[31] Some of them supported the working paper's option 2, the risk to pass on completion,[32] and others option 3, vendor's contractual obligation to convey the property in the physical state in which it was when the contract was made.[33] In the context of our decision to limit our consideration to the passing of risk of physical damage,[34] these options give much the same result.

2.24 There was also support for option 5 in the working paper, that the parties should immediately adopt contractual terms to delay the passing of risk until completion,[35] although some respondents expressed doubt whether any call for voluntary action would be successful.

(c) *Conclusion*

2.25 We consider that there is a clear case for a change in the present rule. On the other hand, where the matter has been drawn to the parties' attention, there can be no objection to their agreeing individual arrangements by contract. Accordingly, what is needed in our view is a new rule that, subject to agreement to the contrary, the risk of physical damage should pass to the purchaser on completion of the contract, rather than when the contract is made.

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[31] As to the working paper's first reform option, abolishing the trust, see para. 2.8 above.
[32] Working Paper, paras. 3.12 *et seq.*
[33] Working Paper, paras. 3.15 *et seq.*
[34] Para. 2.9 above.
[35] Working Paper, paras. 3.52 *et seq.*

PART III

IMPLEMENTING REFORM

Standard Conditions of Sale

3.1 Since we prepared the working paper, the publication in March 1990 of the Standard Conditions of Sale has made what is likely to prove a significant change in the practice of conveyancing in relation to the passing of risk. For many years, it has been almost universal practice for sales of land to be made by contracts incorporating either the Law Society's General Conditions of Sale or the National Conditions of Sale.[1] The conditions have been adapted or varied to fit particular cases, but most of their terms, which covered the routine mechanics of conveyancing procedure, have been adopted unchanged, to avoid the need for repetitive negotiation of uncontroversial matters. These two sets of conditions have now been superseded by the single Standard Conditions of Sale, which are intended for use on the sale of all forms of property, to whatever use it is put and whether it is freehold or leasehold. The predecessor sets of conditions were similarly used in that general way, and it seems likely that the conveyancers who used them will simply substitute the new conditions for the old. Although these conditions are primarily used by professional conveyancers, forms for contracts incorporating them are available on general sale from specialist stationers.

3.2 In relation to the passing of risk, the Standard Conditions of Sale contain these provisions:[2]

> **5.1 Responsibility for property**
>
> 5.1.1 The seller will transfer the property in the same physical state as it was at the date of the contract (except for fair wear and tear), which means that the seller retains the risk until completion.
>
> 5.1.2 If at any time before completion the physical state of the property makes it unusable for its purpose at the date of the contract:
>
> (a) The buyer may rescind the contract,
>
> (b) The seller may rescind the contract where the property has become unusable for that purpose as a result of damage against which the seller could not reasonably have insured, or which it is not legally possible for the seller to make good.
>
> 5.1.3 The seller is under no obligation to the buyer to insure the property.
>
> 5.1.4 Section 47 of the Law of Property Act 1925 does not apply.[3]

3.3 Although there are variations of detail, the general approach of these Conditions is to follow the principles of options 3[4] and 4[5] in the working paper. The terms may be summarised:

(a) The vendor must transfer the property to the purchaser in the physical state that it was in when the contract was made;

(b) Nevertheless, deterioration as a result of fair wear and tear is to be ignored;

(c) If the change in the property make it unusable for its purpose when the contract is made, both parties have a right to rescind. The purchaser's right is unrestricted; the vendor's is limited to cases of uninsurable damage, or when he is not able legally to make it good;

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[1] Neither set of conditions sought to vary the rule that the risk passed to the purchaser when the contract was made, except that the Law Society's Conditions (1984 rvsn.) did have the effect of delaying until actual completion the purchaser's responsibility for any chattels included in the sale (cond. 24). The Law Society's Conditions provided for an abatement in the purchase price if, by reason of double insurance, the proceeds of the purchaser's policy were reduced and the proceeds of the vendor's policy were not spent on reinstatement (cond. 11(1), (2)). The National Conditions (20th ed.) placed an obligation on the vendor, if requested by the purchaser, to obtain or consent to an endorsement of the purchaser's interest on the vendor's insurance policy, in which case the purchaser had an obligation to pay a proportionate part of the premium (cond. 21(3)).

[2] This extract is reproduced by permission of the joint publishers.

[3] See para. 2.14 above.

[4] Para. 2.23 above.

[5] A right of rescission: Working Paper, paras. 3.47 *et seq.*

(d) The purchaser cannot insist on the vendor insuring.

These terms can be excluded or varied by parties who make special provision in their contract.

New Situation

3.4 If, as we envisage, the use of the Standard Conditions of Sale is widespread or near universal, there will in practice have been a radical change in the provisions affecting the passing of risk. In relation to most physical damage, parties using the Standard Conditions who make no special provision will accept the passing of risk on completion. Others, who agree alternative arrangements, will have to make specific provision in the contract excluding or varying the relevant general condition. It will only be in a small minority of cases that the parties are not alerted to the question of the passing of risk.

3.5 This to a large extent effectively achieves our objective[6] of a general rule that the risk should pass on completion, unless there is express agreement to the contrary. There will undoubtedly be cases in which the parties will want their contract to make other provisions or where they simply agree to revert to the risk passing when the contract is made. There may, to take one example, be sales of redundant buildings destined for demolition which are not worth repairing or insuring, or, to take another example, sales of reversionary interests where it is the tenants who are exclusively responsible for repairs and insurance.[7] The parties will be free to come to whatever agreement they deem appropriate.

3.6 Nevertheless, the underlying rule of law on the passing of risk[8] remains unchanged. This produces an untidy legal situation when the Standard Conditions of Sale are used: the law provides that generally the risk passes when the contract is made; this is varied by the Conditions so that it passes on completion; when the parties so wish, that variation is further varied so that the first rule is reinstated and the risk passes at the date of the contract. Further, there will be some people who will not use the Standard Conditions of Sale: for them, the defects which we have identified in the present law will continue to apply.

3.7 That is not a wholly satisfactory state in which to leave the law, but we have to consider how far we are justified in recommending reform by statute.

Method of Reform

3.8 A statutory provision to implement the reform which we favour, namely a rule that the risk passes on completion, but allowing the parties to contract out, would have the merits of universal application, fairness and consistency with reasonable expectations. But, for users of the Standard Conditions of Sale, such a legislative change would only replicate the situation produced by the use of those Conditions. If, as we expect, it becomes the widespread practice to use the Standard Conditions of Sale, it will only be in a small minority of cases that the present rule with its defects will continue to apply. The practical effect of any legislation altering that rule would, therefore, be extremely limited.

3.9 We also bear in mind that this is not a case where those in a dominant position take unfair advantage of those with less bargaining power, leading to widespread unexpected loss to those unable to support it and to manifest injustice. There is no need here for intervention to impose a mandatory rule as a consumer protection measure.

3.10 For these reasons, we do not consider that at this stage it is appropriate for us to recommend any legislative change.

Future Consideration

3.11 The sudden reversal in the practical situation produced by the publication of the Standard Conditions of Sale emphasises that there may in the future be other, less

[6] Para. 2.13 above.
[7] e.g., *Sturcke* v. *F. W. Edwards Ltd.* (1971) 223 E.G. 1747.
[8] Para. 2.2 above.

welcome, changes. We, and others interested in this area of the law, will wish to monitor the position. Indeed, after some time has elapsed it will be appropriate to review the experience of the operation of the new Conditions.

3.12 If it turns out that the use of those Conditions does not, contrary to our expectations, result in the substantial elimination of the problems which we identified earlier,[9] we consider that this topic should again be examined. It might be that experience would then demonstrate that the Standard Conditions of Sale were not used as widely as we now expect or that a rule which the parties were at liberty to reverse was not satisfactory. In such circumstances we may wish to reconsider our decision not to recommend legislation.

[9] Paras. 2.10–2.11 above.

PART IV

SUMMARY OF CONCLUSIONS

4.1 In this Part, we summarise the conclusions reached earlier in this report.

4.2 Our conclusions about the present law and the need for its reform are:

(a) The general rule that the purchaser assumes the risk of physical damage to property as soon as he makes a contract to buy it, but does not assume control of it until the contract is completed, is unfair and is a trap for the unknowledgeable. [Paragraphs 2.4, 2.10–2.11]

(b) Changes, other than those caused by physical damage, in the value of the property after the contract is made are different, and it will be generally understood that they should not vary the parties' bargain. [Paragraph 2.5]

(c) The terms of the trust on which the vendor holds the property between the date that the contract is made and the date that it is completed should remain unaltered. [Paragraph 2.8]

(d) Reform should be confined to the risk of physical damage, and any general rule should be capable of variation by express agreement between the parties. [Paragraphs 2.9, 2.12]

(e) The availability of insurance should not alter the rule governing which party should bear any loss. [Paragraph 2.16]

(f) Duplication of insurance, effected by both vendor and purchaser, may often be unavoidable, but those involved should reconsider the position when the risk does not pass until completion. [Paragraph 2.19]

(g) The rule as to the passing of the risk of physical damage when the contract is made should be changed so that, in the absence of agreement to the contrary, it passes to the purchaser on completion of the contract. [Paragraph 2.25]

4.3 Our conclusions as to the way in which reform should be implemented are:

(a) In the light of the expected widespread use of the new Standard Conditions of Sale, which provide for the vendor to bear the risk of physical damage until completion but can be overriden by express agreement between vendor and purchaser, we do not at this stage recommend legislative change. [Paragraphs 3.8–3.10]

(b) When there has been sufficient experience of the new practice, the possibility of a need for legislation may require reconsideration. [Paragraphs 3.11–3.12]

(Signed) PETER GIBSON, *Chairman*
TREVOR M. ALDRIDGE
JACK BEATSON
RICHARD BUXTON
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*
22 March 1990

APPENDIX

Individuals and organisations who commented on Working Paper No. 109

Professor J.E. Adams
Association of British Insurers
British Property Federation
Building Societies Association
Chancery Bar Association
Committee of London and Scottish Bankers
Conveyancing Standing Committee
Country Landowners Association
Finance Houses Association
Halifax Building Society
Holborn Law Society
House Owners Conveyancers Ltd.
Institute of Legal Executives
Law Society
Liverpool Polytechnic
The Honourable Mr Justice Millett
Northern Chancery Bar Association
Royal Institution of Chartered Surveyors
Mr R.N. Sexton, Trent Polytechnic
Mr R. Watts, solicitor
Dr H.W. Wilkinson, University of Bristol
Withers Crossman Block, solicitors

Printed in the United Kingdom for HMSO
Dd 0503924 4/90 C16 3382 4235 101044 Job No. 901048

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