

Risk & Insurance - Client Guide

Insure from Exchange | New-builds | Lenders

Should the seller insure too?

In general it is advisable for the seller to keep the insurance in place after exchange of contracts even though risk has passed to the buyer. The seller is still the legal owner and still has an insurable interest until the moment of completion. Also, if they have a mortgage on the property they will be required to keep it insured until it is sold.

This is because if the property was damaged after exchange of contracts and for some reason the buyer had failed to insure the property, and then failed to complete the purchase (and was not worth suing) the seller could at least claim for the damage on their insurance policy while deciding whether to take legal action against the buyer.

Although this means that both the buyer and the seller are likely to insure ('double insurance') this is better than discovering that there was no insurance in place to cover the damage. The position regarding claims in the case of double insurance and the way in which the purchase price may be adjusted between the buyer and seller is complex and will need specialist legal advice.

'Specific Performance'

It may be that the buyer refuses to complete on the day of completion because of the damage, or for some other reason. If that happens the seller can refuse to accept that the contract is at an end and sue the buyer for what is known as 'specific performance'. This is where the Court forces the buyer to comply with the contract and to complete the transaction.

Again, you would have to pay a litigation solicitor to deal with this, and the costs could be substantial. You would run the risk of paying the other party's legal costs if you lost the case.

Obviously, it might be pointless to sue the buyer for specific performance if the reason the buyer can't complete is that they can't get a mortgage on the property because of the damage.

The seller could also claim damages from the buyer for 'breach of contract'.



Buyers must insure from exchange

Unless you are buying a property in the course of construction, under the terms of the standard contract for the sale of land, the risk of a freehold property being damaged or destroyed generally passes to the buyer on the moment of exchange of contracts, not on completion. This means that if there is damage, flooding or fire, for example, it's not the seller's problem, it's the buyers.

In general the buyer cannot require the seller to repair any such damage or refuse to complete. It is not the same as buying a consumer item as you have no 'consumer rights'.

The buyer is expected to insure the property from the instant of exchange of contracts. If there is any damage after the exchange of contracts the buyer would be expected to complete the purchase and then claim on their insurance.

So, if the property caught fire or was flooded after exchange of contracts, the buyer would still be legally obliged to buy the property on the completion date, despite the damage to it. If the damage is not substantial it is possible that your new lender will still be prepared to give us the mortgage advance, but usually they would need to be notified of the issue, and may need to have it reinspected by the valuer before they reach a decision.

That's why buyers have to have buildings insurance arranged before exchange of contracts, ready to be put in place on the instant that contracts are exchanged.

New-build houses

The position is different if you are buying a new-build house from a house builder. In that case in general the contract will state that the risk remains with the house builder until completion. If the property is damaged before completion the buyer can expect the builder to fix the damage. However, be aware that most standard house-builder contracts say you have to complete the purchase even if there is minor damage, but that the house-builder will rectify the problem after completion.

In general you do not have to insure a new house from exchange of contracts, but only from completion. However, many buyers do, to be on the safe side.

Leasehold properties

If you are buying a leasehold property, such as a flat, then the structure of the building will generally be insured by the landlord so this is not an issue. However the interior and contents of the flat may be damaged after exchange and this may be the buyer's risk from exchange of contracts. The precise situation will depend on the terms of the lease and the terms of the landlord's insurance policy.



Completion Notices

If your buyer does not complete the purchase of your property by the time set in the contract on the day of completion, you can serve a 'completion notice' on them. However, the name of the notice is misleading this does not force the buyer to complete.

Serving a Completion Notice on them makes 'time of the essence' legally and gives them 10 working days to complete the purchase. If the buyer does not complete by the expiry of the notice then the seller will have a short time, perhaps only a day or two, when the seller then can decide to rescind the contract.

If the seller decides to rescind the contract the buyer would forfeit their deposit. The seller would also have the option of suing the buyer for damages for any breach of contract over and above this.

However, be aware that, unless you settle the matter quickly, litigation can take years to go through the courts. You would have to pay a litigation solicitor to deal with the case. If your claim is successful you could in principle claim all the reasonable costs and losses that you have suffered that result from the buyer's breach of contract.

However if you lost you might then be liable for all the legal costs they incurred in defending your claim.

Breach of contract damages

These might include claims for interest, plus any removals costs, hotel expenses or out of pocket expenses (over and above the forfeited deposit) that the seller has suffered as a result of the delay. Your conveyancers will not be responsible for covering these losses.

Also if the seller can only resell the property for less than the buyer was going to pay for it, the seller can claim that loss as well as the costs of the resale.

Specialist legal advice

Your conveyancers will have no liability to pay the costs or expenses resulting from disputes over completion or damage or insurance issues, as long as they have acted in the same way as any other reasonable and competent conveyancer.

Nor will their original fee quote normally cover the legal work involved in resolving such disputes. You may need to obtain independent legal advice, at your own cost.

Extreme damage to the property?

In extremely rare cases, it may be that the property you have exchanged contracts to buy is badly damaged before completion. It could be the result of a gas explosion destroying it completely, a major fire, flooding or a sink-hole opening up in the garden. In general this will not invalidate or frustrate the contract and the buyer may still be contractually bound to buy the property. The legal position if this happens will depend upon the precise circumstances and you will need to obtain specialist legal advice from a litigation solicitor.

Normally the basic legal position is that under the terms of the contract for purchase the buyer will still have to proceed to complete the purchase of the property on the original contractual completion date. However, if the seller can't remove their belongings and furniture from the property the buyer may be able to argue that they don't have to complete as the seller is in breach of contract because the seller cannot give the buyer 'vacant possession'.

Such disputes can take a long time to resolve and may cost significant legal fees to litigate. Our fee quote for the conveyancing process will not include advice on these aspects and you will need to obtain independent legal advice at your own cost on what steps you should take next if this happens.

In practice it is likely that the seller will realise that the most practical course of action for them to take is to claim on their existing insurance policy for the damage caused. The seller is very likely to have kept their insurance in place until the completion of the sale. However, in principle they could still sue the buyer for damages for breach of contract.

Chain consequences

The fact that your new property has been damaged and you cannot or will not complete the purchase will not excuse you from breach of contract claims if, as a result, you refuse to complete on your related sale of your existing house. If you refused to complete your related sale you would then be in breach of that contract with your buyer.

If the house you have exchanged contracts to buy has become uninhabitable then you may also have to move out of your existing house on your related sale contract, put your furniture into storage and go into temporary accommodation initially at your own cost. You may be able to reclaim these costs from the insurer of your new house assuming you took out insurance on exchange of contracts as we advised.

If you were able to complete the purchase despite the damage then, depending on the terms of your new insurance policy, your insurance company should meet the cost of the repairs to the property, storage and similar costs.

Will your lender lend you the money to complete?

It may well be that your new lender is satisfied that the cost of repairing the damage to your new home will be covered by insurance eventually and they may still be prepared to lend the original mortgage advance to you to enable you to complete the purchase. However, this is not guaranteed and everything will depend on the precise circumstances.

If there is substantial damage to the property the lender may not be prepared to lend any money, or may delay lending the money until it is clear whether the work is going to be covered by any insurance. Even if the property was significantly damaged by a sink-hole, for example, they may be prepared to advance the money or they may refuse. It will depend on the lender's attitude, the terms of the mortgage offer, the extent to which the insurance will cover the damage, and how quickly the repairs can be carried out.

In other less dramatic cases they may be prepared to complete once the repair work has been started. In such cases the buyer will still be liable for breach of contract to the seller for delaying completion, and will still be liable to pay the sellers' losses as a result. These may or may not be covered to some extent depending on the terms of the insurance policy and the precise circumstances.