FIRE INSURANCE AND ASSIGNMENT OF INTEREST IN PURCHASER-VENDOR RELATIONSHIP

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My purpose here is to examine some Canadian cases concerned with entitlement to recovery of fire insurance proceeds by vendors, purchasers, mortgagors, and mortgagees in the context of both executory and executed agreements of purchase and sale. This topic gives rise to an interesting comparison of the concepts of coverage and materiality to risk.

In *Keefer v. Phoenix Ins. Co.*, [1] Keefer took out a policy of fire insurance to the full value of the property, having entered into an agreement of purchase and sale in which as vendor he agreed to insure for the purchaser's benefit. A fire loss occurred while the agreement was still executory. Neither title nor possession had passed and only part of the purchase price of $2,000 had been paid. The insurer unsuccessfully urged that it was liable to pay only Keefer's interest to the extent of the $1,200 of the purchase price remaining unpaid. The Court ruled that a person with a limited beneficial interest could recover full value provided the whole interest in the property was insured. This depended on whether his intent was to insure the full value and whether the form of the policy was in terms of full value. [2] Keefer met these conditions, having intended to insure the "whole property" [3] and not merely his own beneficial interest therein. The policy terms indicated this; the rate charged was for "an absolute interest." [4] Consequently, Keefer was held entitled to recover to full value, partly for himself and partly as trustee for the purchaser. Of course, as Mr. Justice King pointed out, Keefer himself really had a full interest when one added to his beneficial interest, his contractual liability to the purchaser to insure for his benefit. [5] In any event, it follows that there would have been no recovery on behalf of the purchaser had Keefer taken out the policy before he entered into the agreement or before he contemplated entering into it. In insuring

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[1] 31 Sup. Ct. 144 (1901).

[2] *Accord*, Jakimowich v. Halifax Ins. Co., 56 W.W.R. (n.s.) 359 (Man. Q.B. 1966).

[3] Keefer v. Phoenix Ins. Co., *supra* note 1, at 150.

[4] *Id.*

[5] *Id.* at 154-55.

the whole interest in those circumstances, he would have intended to insure only his own interest. Recovery should go then in favour of an insured on behalf of the interest of some other party only where there was an intent to cover that interest as well as his own. [6]

When *Keefer* was decided, there was in force a statutory condition [7] similar to statutory condition 2 of the present Ontario Insurance Act. This condition provides that "unless otherwise specifically stated in the contract, the insurer is not liable for loss or damage to property owned by any person other than the insured, unless the interest of the insured therein is stated in the contract." [8] Keefer was held to be under no obligation to disclose the purchaser's interest or the nature of his own interest presumably because he was, in the Court's words, "owner in fee of the whole property." [9] As long as the insured is owner he need not disclose the fact that someone else has an interest, yet he may still insure that interest.

Although the insuring owner is not required by statutory condition 2 to disclose another's interest, can it be said that such disclosure is required by statutory condition 1 which deals generically with omissions to communicate and misrepresentation? [10] When, as in *Keefer*, two people have an interest in property, it is correct to say that the moral element involved is different from that where only one person has an interest. But mere difference in moral element does not necessarily mean an increase of moral risk. On the other hand, cases could arise in which knowledge of this other interest would, in good probability, influence a reasonable and prudent insurer to decline the risk or stipulate for a higher premium. [11] In that event the company could avoid the policy pursuant to statutory condition 1 if the applicant fraudulently omitted to disclose the other interest. The authorities would indicate, however, that unless the applicant is questioned about interest, title or encumbrances, statutory condition 1 does not require disclosure. [12] In short, one who is the owner need not disclose any other interest.

Mulholland v. Commerce Gen. Ins. Co., [13] another decision on statutory

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[6] *See* A. WELFORD & W. OTTER-BARRY, FIRE INSURANCE 223 (2d ed. 1921).

[7] Ontario Insurance Act, ONT. REV. STAT. c. 167, § 114, stat. cond. 10(a) (1887).

[8] ONT. REV. STAT. c. 190, § 111 (1960).

[9] Keefer v. Phoenix Ins. Co., *supra* note 1, at 147.

[10] Statutory condition 1 provides:

> If a person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance that is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract is void as to any property in relation to which the misrepresentation or omission is material.

ONT. REV. STAT. c. 190, § 111 (1960).

[11] Murphy v. Sun Life Assur. Co. of Canada, 47 W.W.R. (n.s.) 47 (Alta. Sup. Ct. 1964) on the test of materiality to risk.

[12] *See* F. LAVERTY, THE INSURANCE LAW OF CANADA 259, 265 (2d ed. 1936).

[13] [1961] Ont. 137 (1960).

condition 2, held that if the insured is no longer the owner at the time of loss, the insurer is not liable. Mulholland insured, the court said, "as owner," [14] subsequently sold and transferred possession of the property to a group of people as tenants in common, taking a mortgage back as security for a good portion of the purchase price. Subsequently a portion of the property was damaged by fire. The court upheld the company's refusal to pay because Mulholland was no longer the owner at the time of loss. The word "owned" was regarded as being intended to have "the ordinary meaning as understood generally by members of the public who might seek insurance." [15] This statement suggests that the meaning intended for the word "owned" is its ordinary popular reference to the so-called home-owner holding a deed and paying off a mortgage. In general, a member of the public, if asked who owns the house across the street from him, would name the resident mortgagor. Assuming that even in the more technical context of statutory conditions the mortgagor would popularly be regarded as owning the property, the meaning of the word is still obscure for lack of a popular definition as such. The court goes on to say that Mulholland's interest as mortgagee was "of a different character than his interest as an owner of the legal and beneficial estate and as a person in occupation and actual possession of the property." [16] One might read this as suggesting that the ownership interest in its ordinary meaning involves not merely title but also possession; on the other hand, it might be read as speaking of two different concepts : firstly, ownership or title, and secondly, possession.

In any event, regarding Mulholland as once but no longer the owner, the court reiterates the well-established proposition that an insurance contract is a contract of a personal nature. It is a contract insuring or limiting coverage to a particular person named therein against loss; it does not insure the property so as to run with the land. The court said that statutory condition 2, in giving effect to this principle, limited coverage to the insured Mulholland as owner. Coverage is regarded then as ceasing—seemingly in the same way that coverage ceases when the subject matter of the insurance is placed outside a clearly defined location, as for instance in *Renshaw v. The Phoenix Ins. Co.* [17]—where the policy covered loss of the property "while located and contained as described herein, and not elsewhere." In determining in this latter situation whether a change of location has placed a loss outside coverage and beyond what was contracted for, the question of whether the change was material to the risk would appear to be irrelevant. Admittedly, however, some courts have confused or interchanged the two

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[14] *Id.* at 139.
[15] *Id.* at 139-40.
[16] *Id.* at 139.
[17] [1943] Ont. 223.

questions [18] and some courts have dealt with the latter question of materiality in the alternative so as to anchor their decision on a more acceptable non-technical base. [19] Conceptually, however, it would seem best to regard property, clearly described as covered only while located in a certain place, as simply not covered if destroyed in another place, in spite of the fact that it was moved to a safer place. It is to be noticed, however, that *Mulholland* also traversed the bonds of the coverage provision to lay emphasis on the fact that Mulholland was no longer in occupation and that "[t]he risk under such circumstances might and probably would be of a different character and extent." [20] This resort to the question of change material to the risk can be accepted in a situation like *Mulholland* because, unlike the location description clause referred to above clearly and concretely limiting the risk to within the four walls of a certain building, neither statutory condition 2 nor 3 [21] is adequate notice of the ownership limitation. Even if it is, it does not clearly and concretely define the limits of interest coverage. These abstract coverage conditions are naturally different from the clear location clause. They do not clearly set out that coverage ceases on assignment of the beneficial title notwithstanding that the assignor retains legal title and a stake in the property. In this situation then, it is at least not as repugnant to the contract to go from the abstract ownership and interest conditions to the more solid ground of change material to the risk.

What about the transfer of beneficial title and change of occupation and possession in *Mulholland*? Was there a change material to the risk? The court seemed to think so. At any rate, it came to the bare conclusion that the risk probably was of a different character and extent since Mulholland was no longer in occupation. I submit, however, that a change of this nature is not a difference of such consequence. A higher rate of premium would probably not have been charged unless there was a change to more hazardous user or something else was unusual about the transferees such as a high loss experience. The court went on to say that it "was contemplated that if a change of ownership occurred the appellant would be given an opportunity to decide whether or not it would accept the risk of loss or damage to the new owners," [22] but it is suggested that it was not necessarily so contemplated. If there had been no material change, then Mulholland would have been entitled to recover to the extent that his security was diminished by the fire; but having insured only on his own behalf and not on behalf of the mortgagors, the company would have been entitled to subrogate to his rights against the mortgagors, assuming they had contracted

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[18] *E.g.*, Arnold v. British Colonial Fire Ins. Co., 45 N.B. 285, at 305 (1917).

[19] *E.g.*, Hudson Turner Furs Ltd. v. American Ins. Co., [1964] 1 Ont. 609, at 617 (High Ct.).

[20] *Supra* note 13, at 139.

[21] ONT. REV. STAT. c. 190, § 111 (1960). Statutory condition 3 is in a positive form. It provides: "The insurer is liable for loss or damage occurring after an authorized assignment under the Bankruptcy Act or change of title by succession, by operation of law, or by death."

[22] *Supra* note 13, at 139.

to assume the risk of fire loss. One might wonder, though, whether Mulholland really lost anything as a result of the fire. He may very well have been amply secured in spite of the partial building loss.

Perhaps an even harder case than *Mulholland* is that involving only one or two transferees. A clear illustration of this is the case of *Rowe v. Fidelity Phenix Fire Ins. Co.* [23] where the Ontario Court of Appeal denied, to both the vendor and purchasers of a cottage, recovery on the vendor's policy presumably on the good legal argument which was rejected at trial: that the vendor had been fully paid at time of loss and the insurance had not been transferred to the purchasers. Mr. Justice Urquhart, whose trial judgment [24] was reversed by the Court of Appeal without written reasons, had this to say about the equivalence of the risk:

> I am astounded that any reputable insurer should under the circumstances which I will narrate and which are *admitted*,[25] have refused payment of this claim. Both the plaintiff women are very fine types. The plaintiff, Mrs. Rowe, is a Detroit business woman, and I am sure would have the greatest interest in keeping her property; and, likewise, Mrs. Spur, a married woman, is a woman of very highest calibre. Both of them are of the highest credibility. I assume Mr. Spur is also of the same sort. It could not possibly matter to the defendant whether Mrs. Rowe or the Spurs owned the property. Neither one would have the slightest desire to burn or the intention of burning down the property. The risk was substantially the same in the case of either of them. I would have been interested to hear from the agent of the company why this payment was refused. I have my own private idea. Suffice it to say that in my opinion under the circumstances the defendants were very badly advised to endeavour to hide themselves under what is at best a very narrow technicality, if indeed such is available to them. Of course, I absolve counsel from such bad advice but they should have advised settlement after action brought.[26]

An editorial note to the case in the *Dominion Law Reports* replies to this broadside: "[O]ne may respectfully query why there should be astonishment at a reputable insurer taking advantage of principles of law with such authority, even though one's sympathy may be, and with good reason, against those decisions." [27] Indeed, the law versus sympathy, with good reason against the law, is the collision course.

Compare *Trotter v. Calgary Fire Ins. Co.*, [28] an interesting Alberta case on point decided before the statutory conditions, of which we have been speaking, came into force. [29] Trotter, an unpaid vendor of a lease and business, was held entitled to recover on a policy of fire insurance in spite

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[23] [1944] 4 D.L.R. 265 (Ont.).
[24] [1944] 3 D.L.R. 441 (Ont. High Ct.).
[25] The italics are mine.
[26] *Supra* note 24, at 442-43.
[27] *Id.* at 442.
[28] 3 Alta. 12 (Sup. Ct. en banc 1910).
[29] First enactment: Alberta Insurance Act, Alta. Stat. 1915, c. 8, sch. C.

of the fact that possession had been transferred by him at the time of the loss. Immediately after transferring possession, Trotter had gone to the defendant company's office to get signed consent to the assignment of the policy to the purchaser with loss payable to the vendor as his interest might appear. The manager of the office, however, was away on jury duty so the consent was not obtained. Subsequently, several attempts were made to reach him, but to no avail. A number of other companies, insuring the same subject matter, had been contacted, however, and had consented to the assignment with no change in premium. Now what of the defendant company from which consent had not been obtained? Not only was Trotter as vendor allowed recovery on his own behalf to the extent of the unpaid purchase price, but he was awarded recovery on behalf of the purchaser as well. No regard was had for the fact that neither title nor possession was in the vendor at the time of loss. The court laid emphasis rather on its legally questionable [30] finding that Trotter had an insurable interest at time of loss—an interest to the extent of the amount unpaid on the purchase price. The court then further held that consent to assignment was necessary only where the vendor had absolutely divested himself of all interest which, in this case, it felt he had not. The *Mulholland* decision, on the other hand, interprets statutory condition 3 [31] as requiring, on the facts of the case, consent on divesting of ownership presumably meaning that consent is needed when the interest contracted to be insured is assigned.

More interesting, however, is the decision in *Trotter* that change of possession was not a change material to the risk. Of course, this holding is fairly comfortable here because other companies insuring the risk agreed to insure the purchaser without increase in rate. However, instead of using this "cushion" the court equates transfer of possession with acquisition of an interest by another person which, it says, *Keefer* decided was not a change material to the risk. *Keefer*, however, cannot be taken as authority for the equation drawn as there had been no transfer of possession by Keefer at time of loss. In any event the *Trotter* court, in view of the consent of the other companies having been obtained, was presumably disposed to think of the company's defence as a technicality and thus demanded the further onus of substantiating the allegation of change material to the risk. Of course, on the facts and assuming there was such a change, the court regarded lack of notification as excused since all attempts at it were unavailing.

CONCLUSION

The *Rowe* and *Trotter* cases express discontent with letting a decision

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[30] The authorities, although questionable in themselves, do indicate that a simple contract creditor, unlike a secured contract creditor, has no insurable interest in goods sold under the contract, for lack of a sufficiently direct basis for the interest in legal right. *See, e.g.*, Stock v. South Easthope Farmers' Mut. Fire Ins. Co., [1944] Ont. W.N. 683 (High Ct.).

[31] *Supra* note 21.

turn on rules which are reduced by the circumstances of the case to mere technicalities, *viz.*—the insurance contract is a personal contract which purports to cover a certain defined interest or risk and no other. The legislature could make fundamental alterations in the statute so as to defeat or minimize some of these technical contractual expectancies of the insurer. In my submission, that would be an unfair and improper course, at least until lesser measures are tried. A more appropriate legislative measure would be an express grant of judicial discretionary power to avoid the technical defence where, in the circumstances of a particular case, the avoidance is in justice or in conscience warranted. [32] Under the impetus of a general discretionary provision, the court would then, I suggest, be authorized to pass directly on questions such as the following. Had the assignee a similar premium and loss record as the assignor? Had insurers bearing a rateable proportion of the risk in question already consented to the assignment of the policy without increase in rate? [33] Did the insurer admit the risk was the same? [34] Was the application for consent prevented by circumstances for which the insurer or its agent may be justly held responsible? [35] Were the goods, although technically insured only while in a certain place, moved to a place or kept in a place clearly no more hazardous or significantly less hazardous? Until something like this is done, techniques of adverse construction, if not of open defiance, will continue to be employed in combatting the technicality.

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[32] Legislative authorization to temper law and technicalities with broader considerations is not without precedent. The American UNIFORM COMMERCIAL CODE § 2-302, for instance, gives a court power to police contracts and contract clauses for unconscionability, to "limit the application of any unconscionable clause so as to avoid any unconscionable result." The first comment to the above § says that "[i]n the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract."

The Unconscionable Transactions Relief Act, ONT. REV. STAT. c. 140 (1960) enables a court to remedy a loan transaction which it finds to be "harsh and unconscionable."

The Division Courts Act, ONT. REV. STAT. c. 110, § 55 (1960), provides that a judge "may make such order or judgment as appears to him just and agreeable to equity and good conscience."

In deciding questions between husband and wife as to title or possession of property under § 12 of the Married Women's Property Act, ONT. REV. STAT. c. 229 (1960), the judge is given power of exercising discretion—to make such order "as he thinks fit."

[33] *E.g.*, Trotter v. Calgary Fire Ins. Co., *supra* note 28.

[34] *E.g.*, Rowe v. Fidelity Phenix Fire Ins. Co., *supra* note 23.

[35] *E.g.*, Trotter v. Calgary Fire Ins. Co., *supra* note 28.