

THE ESSENTIALS OF THE AGREEMENT OF PURCHASE AND SALE

Introduction

A properly drafted and executed agreement is particularly important in real estate transactions. Without it, the entire basis for the transaction may be void. In this regard, see Section 1 of the *Statute of Frauds* (R.S.O. 1990, c. S-19). Ultimately, every suit pertaining to the transfer of property between a purchaser and vendor involves the careful consideration of the Agreement of Purchase and Sale which gave rise to the particular rights between the parties. Very few provisions are deemed to be included in an Agreement of Purchase and Sale by statute. For solicitors, commenting upon or drafting this important contract represents not only the opportunity to provide the highest value legal services to your client, it also represents the last and only real opportunity for a lawyer to avoid a “problem transaction”.

There are hundreds of precedents and pre-printed form Agreements of Purchase and Sale which are in use today. This is perhaps not surprising, given that each transaction involves the need to set out particular protections or entitlements or rights which one or both parties wish to reduce to writing to enable them to be enforceable in accordance with the “business deal” which the clients have formulated between or among themselves. Great care must be taken by solicitors to consider, in each case, how these provisions apply to the task of representing the interests of a particular client in a particular transaction. Certainly, this high standard will be imposed by the courts in the event that things go very badly for your client as a result of any provision in the Agreement of Purchase and Sale which you had a hand in crafting, or on which you took instructions.

Attached is a copy of the Ontario Real Estate Association standard purchase agreement (Form 101, April, 2002). I attach it only as an example of a pre-printed form, to which I refer from time to time in my paper. In this paper, I will briefly go through a number of the salient provisions which, in my experience, represent “hot button” matters which you should raise with a client, whether you are acting for a purchaser or a vendor. Although the Agreement is intended for use in the purchase of a residential property, the considerations which I set out in this paper apply to non-residential transactions equally.

The Parties and the Property

Who is your client? In many cases, the purchaser has not fully considered who should own the property which is being purchased and who should be burdened with the obligations of the Agreement. This is not a simple matter. For example, if your client intends to purchase property from which it will run its business, you will need to inquire whether the purchaser really wants to put its operating company, with all of its assets, retained earnings, and representing a lifetime of your client’s work, on title. It may make more sense for a purchaser to incorporate an entity which will own only the property, and lease the property to the operating company. Among other things, such an arrangement will help to better protect your client in the event that the transaction results in a huge claim against the purchaser for failing to complete the transaction for reasons which do not appeal to the vendor as being legitimate. In addition, this is your opportunity to ensure that the parties are legal entities. Parties such as “The ABC Club”, “The National DEF Association”, “The GHI Company” and “Widgets ‘R’ Us” are, at most, unincorporated associations or, possibly business styles, but do not appear to

be valid legal entities (such as individuals or corporations). These issues become very important if the matter proceeds to litigation, as the parties must be properly described in order to ensure that the judgment is enforceable at the end of the process. Finally, in respect of the parties, this is your opportunity to explain to your client the effect of dealing with a party who has entered into the agreement “in trust”, “in trust for a corporation to be incorporated”, and “in trust for John Smith, and without personal liability”. The entitlement of your client, both as plaintiff and as defendant, may be substantially different depending on how they are described in the Purchase Agreement.

The property must also be properly described. Where the land is not described in accordance with a registrable legal description, it may be necessary to depict the property, including the boundaries, with appropriate dimensions, as a Schedule to the Purchase Agreement. Care must be taken in doing so accurately, because where the substance of the Purchase Agreement, namely, the property, cannot be readily identified from the Agreement of Purchase and Sale, it may be impossible to enforce the contract. In addition, property which is not adequately and accurately described makes searching title a nightmare for the purchaser’s solicitor when it comes time to search the property to ensure that the purchaser will obtain good title. If the land is situated in a jurisdiction in which it is possible to search title electronically, it is well worth the few minutes to double-check the legal description which, on occasion, has been provided to you by a real estate agent or one of the parties at a time prior to the execution of the Purchase Agreement.

Finally, it is helpful to use whatever filing system you have created to determine whether you have acted for the vendor or the purchaser before, and whether you have a file in your possession. Your client will not thank you where, for example, as a purchaser several years before, your reporting letter reminded him to include a provision in the Agreement regarding a nearby waste disposal site in the offer when he sells, but you fail to follow your own advice when drafting the Agreement when your client sells the property.

If possible, and if your retainer will allow it, it is very useful to attend at the property for a “view”. This applies to acting for either the vendor or the purchaser. The trained eye of a lawyer can sometimes disclose apparent possessory title issues, potential prescriptive easement issues, encroachments, and the existence of easements, both registered and unregistered, which could not be discerned from the warmth and comfort of your office.

Once you have satisfied yourself as to the appropriate legal description to insert in the offer, you may wish to obtain instructions from your client to do a quick subsearch, which may reveal surprises such as cautions, easements, construction liens, certificates of action, options to purchase and leases, all of which will need to be dealt with in order for your client to either convey or to obtain good title. A description which is part of a lot on a registered plan of subdivision suggests that you will need to be careful to ensure that the subdivision control provisions of the *Planning Act* have been complied with and the extent of your real property search will be different where the land is held under the Registry or Land Titles system. Of course, this will assist you in fine tuning your quote or range of fees which you will wish to communicate to your client sooner rather than later.

Business Issues

It is very rare that a lawyer will give advice as to the reasonableness of a proposed purchase price or the quantum of the deposit. However, to whom the deposit is paid and how it is held is an important question which you should raise with your client, even if the client doesn't raise it. It is customary that a deposit, for example, is not paid directly to the vendor, but is held in trust either by the vendor's solicitors or by the listing agent (or less typically by the purchaser's solicitor). But even in these circumstances, it is unlikely that, even in the face of a clear breach by a defaulting party, the person holding the monies will release it to the non-defaulting party without obtaining a release duly signed by the defaulting party. This should be explained to your client, as, in my experience, this often comes as a surprise, both to the purchaser and the vendor.

Where the deposit is large, or the closing is several weeks or a month away, it is necessary to address what is to be done with the deposit. Typically, the holder of the deposit is required to place it in an interest bearing account, but sometimes the Purchase Agreement does not set out to whom the interest is to be paid, both in the event of a successful closing and the event of a termination of the Agreement.

It is not an inappropriate question to ask your client how your client proposes to pay for the purchase of the property. The purchase price may be made up by a cash payment from the client's own resources, a private mortgage from family members, a mortgage from a Schedule 1 bank, a mortgage from your client's or some other person's RRSP, a vendor take-back mortgage, etc., or any combination of the foregoing. Each of these will require significant

revisions or additions to many standard Agreements of Purchase and Sale, and financing will raise a host of issues to be negotiated between the parties. One size will not fit all for these methods of financing the transaction. They will also impact very directly on the amount of time you can expect to spend on the file and, therefore, will also directly affect your quote or your range of fees.

The next speaker will set out more particularly the issues to be considered in the context of financing a transaction.

Goods and Services Tax is also an important issue which must be addressed in the Agreement of Purchase and Sale. Do not rely on the provisions of the standard agreement which you have been asked to comment upon, as the required provision will vary substantially, based on the nature of the transaction. Another speaker later this morning will set out the GST fundamentals for real estate transactions.

Finally, it will be necessary for you to ensure that any formulation of the calculation to the purchase price makes sense, is workable, and is in accordance with your client's instructions.

For development property, difficulties sometimes arise when the Purchase Agreement contains a description for various portions of the property which are not to be included in the formula for calculating the purchase price where the purchase price is determined by a per-acre amount.

Careful drafting is required, as a number of non-legal terms used by clients sometimes are difficult to apply (such as "hazard lands" and "lands below top-of-bank") later when issues arise. Many of these terms have no precise legal meaning and must be defined in order to avoid

disputes later. Lawyers who fail to draft clear definitions sometimes find themselves involved in these disputes.

Timeframes

It will be necessary for you, as solicitor, in most instances, to advise your client as to the appropriateness of various timeframes to be inserted into the Purchase Agreement. For example, it is usual that an offer prepared by a purchaser will contain the shortest possible irrevocable date, to encourage the vendor to provide a counter offer, and not to “shop” the offer to other parties who may be interested. The title search date, also known as a requisition date, should allow you enough time to be able to complete your search of title and your off-title enquiries. On occasion, municipalities will take several weeks to respond to enquiry letters. Some government agencies and Ministries take even longer. At this stage, it will be useful for you to set out for your client the necessary timeframes in order for you to undertake all examinations and provide your client, and any lending institution which will be relying on your opinion, with the necessary opinions. This is also a good time to examine the possibility of using title insurance to solve title problems or to reduce the extent of your enquiries. A speaker will address the issue of title deficiencies and title insurance later in the morning.

Even where you are presented, as you often are, with an executed Agreement of Purchase and Sale into which you have had no input, it will be necessary to examine the timeframes and to advise your client. Also, it will be necessary for you to review the key dates for the formation of the contract to ensure that the contract is validly executed (and that it may be closed on a date which is not either a Sunday, Saturday, or statutory holiday). For example, if the offer was

accepted after the irrevocable date (and time), it will likely be necessary for you to overcome the problem that, according to the contract, the deal is already dead.

In short, most Purchase Agreements for real property contain a provision which sets out that time is of the essence. Before you get too far into drafting the Agreement, or providing advice to your client under an already-executed agreement, it is essential that you determine that the timings make sense. Where they don't, an amendment to the Agreement of Purchase and Sale may be necessary, or at least an exchange of letters or an amendment agreement signed by solicitors to rectify the problem (before it becomes a problem) may be necessary, assuming that the Purchase Agreement so empowers the solicitors. Once the transaction begins to go bad, it will be very difficult to rectify these matters, as parties are jockeying for the best possible "high ground" on the legal battlefield.

Title Clauses

In my experience, far too little effort is put in reviewing title clauses, both on standard form Agreements and in freely drafted Agreements. A clause which obligates a purchaser to accept title subject to "municipal utility easements" may be satisfactory to a residential purchaser (who never intends to construct a pool in the backyard) but your developer client purchaser will not thank you when his development cannot proceed as a result of a municipal easement for utilities which effectively ends his plan for his subdivision or high rise condominium in the face of which he was obligated to close (see paragraph 10 of the OREA form). It is very important to discuss the particular purposes for which the client is acquiring the property in the course of negotiating the title clause, and it is important to explain to the vendor its obligations to obtain

severance of the property where required (see paragraph 15 of the OREA form), to remove title defects and to otherwise exercise his best efforts to satisfy a purchase's valid requisition. All of these matters will be addressed, in some fashion, in the title clause. Again, your best opportunity to avoid problems will be to do a brief title search prior to finalizing the Purchase Agreement in order to clarify these matters.

Bear in mind also that there is a "silent third party" in most Agreements of Purchase and Sale. A lender has its own requirements for a clear title which may not accord with the purchaser's concerns. For example, the purchaser may be prepared to accept title subject to a third party option to purchase (because the purchaser is satisfied that it can comply with the pre-conditions to the exercise of the option to purchase) but the Bank may not be prepared to have its mortgage subject to it. Obviously, in these circumstances, the vendor will look to the purchaser to comply with its obligations to close under the Purchase Agreement (where there is no condition respecting financing or where it has already been waived), so the purchaser sometimes finds itself in a very difficult situation with a looming closing.

The "Fine Print"

The enforceability of a clause rarely depends on its font size. Unfortunate and often unintended consequences arise when standard form agreements are used without paying attention to the fine print. For example, paragraph 12 of the OREA form provides that the survey is to be produced only if it is in the possession or control of the seller. Where *Planning Act* consent is required, the seller covenants to "proceed diligently at his expense to obtain any necessary consent by completion". And the adjustments, in paragraph 18, set out a finite list of adjustments which do

not always accord with the particulars of the transaction as intended by the parties (or one of them). Helpfully, the agreement provides that provisions added to the agreement, including in any Schedule, supersede the pre-printed form, but they do so only where there is a “conflict” or a “discrepancy” between such provisions. One of the most difficult matters for a party to overcome is one which depends on the argument that an exhaustive and carefully worded clause, which is particular in its application, and which is included in the contract for the sale and purchase of real property, should be disregarded because it was included by one party by inadvertence. It is the job of the lawyer to review all provisions, regardless of font size, and to modify or delete them where they are not appropriate for the transaction for which the solicitor has been retained.

Effective Communications and Managing Client Expectations

Clients, even sophisticated ones, rely on lawyers, including very junior lawyers, to look out for their best interests and to reflect accurately in writing the agreed-upon arrangement with the other party. In order to do so effectively, and to ensure that the client understands the extent of your advice (and understands what advice you are not prepared to give), it is necessary for you to communicate regularly with your client, and, I would suggest, in this age of e-mail in particular, to do it in writing. This is the best way to create a record of what you have advised, and it is the best way for the client to confirm its understanding of your discussions and your advice.

It is also necessary for you to explain to your client very carefully what a lawyer cannot do for him. A lawyer cannot opine as to the appropriateness of the purchase price, in most

circumstances, or the adequacy of the deposit. A lawyer cannot give advice as to whether the purchase price reflects fair market value for the property, and, in most cases, whether the purchaser is “good for the money” and whether the purchaser will make payments under the vendor take-back mortgage. But these are all matters which clients have, from time to time, asked me to opine upon. It falls on you to explain your role to your client, and to ensure that the client understands what you have said.

Conclusion

Obviously, it is not possible in a single paper to outline all of the matters which a solicitor should consider in giving good advice to a purchaser or a vendor in the preparation of an Agreement of Purchase and Sale. But it is necessary for solicitors to carefully review, or carefully draft, Purchase Agreements for real property where, on occasion, centuries of common law trumps what might appear to be a logical conclusion based on business considerations. Also, where you are asked to provide advice on a real property matter, it is your professional responsibility to ensure that you are competent to do so. Where you are not entirely satisfied that you are able to act effectively, it will be necessary for you to refer the client to someone who has the necessary expertise, experience, or both, in order for you to discharge your duties as solicitor.

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