

Focus REAL PROPERTY

Assign or direct, but not both



Ray Mikkola
Steven Pordage

There are several reasons why a purchaser may wish to assign an agreement of purchase and sale or direct title on the closing of a transaction, including tax planning, limiting liability, and ensuring compliance with the *Planning Act*. While assigning an agreement of purchase and sale or directing title will each result in a third party becoming the registered owner of the property, the method that is chosen to accomplish this can have serious implications.

Directing title

Directing title is the simplest and most common way to ensure that a third party becomes the registered owner of a property on closing. A purchaser will execute the direction on or before closing and present it to the vendor's solicitor. The conveyance will then be drawn in the name of the transferee. In this situation, the original purchaser is not relieved from their responsibilities and is still responsible for executing documents in connection with the closing. If the transaction fails to close, the transferee will have no rights under the agreement, and only the purchaser, being a party to the original contract, will have the ability to sue. This is preferable where the purchaser and transferee are not dealing with one another at arm's length. It would be unwise for a third party transferee, who has paid good money to take title to a property, to rely on the original purchaser to co-operate in any litigation once the transaction has closed.

Vendors are generally willing to allow purchasers to direct title on closing. As the purchaser is executing the closing documents, the vendor can sue the purchaser if a problem arises. If a vendor refuses to allow the direction, title could be registered directly in the name of the purchaser, and then the purchaser could transfer title to the transferee. However, depending on the relationship between the purchaser and the transferee, this could result in land transfer tax being paid twice.

Assignment of agreement

While a direction re: title will limit a purchaser's liability to an extent, the best way for a purchaser to do this once a trans-



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Ray Mikkola
and Steven Pordage
Pallett Valo

action has closed is to assign the agreement of purchase and sale to a third party.

There is some debate as to whether a purchaser can unilaterally assign an agreement of purchase and sale. Vendors are often reluctant to allow agreements to be assigned, particularly where the vendor is taking back a mortgage or the purchaser has given significant indemnities or covenants. In these situations, vendors will want to ensure that a purchaser is able to fulfil their promises, and will therefore want to have some control over who the purchaser is. As a general rule, if the agreement of purchase and sale is silent on the right to assign the agreement, the purchaser may assign the “benefits” without consent, but not the “burdens,” just like any other contract.

In *Rodaro v. Royal Bank of Canada*, the Court of Appeal for Ontario held: “Aside from limitations imposed by statute, public policy or the terms of a specific contract, a party to an agreement may assign its rights, but not its obligations under that agreement, to a third party without the consent of the other party to the contract. A party will not, however, be allowed to assign its rights under a contract if that assignment increases the burden

on the other party to the agreement, or if the agreement increases the burden on the other party to the agreement, or if the agreement is based on the confidences, skills or special personal characteristics such as to implicitly limit the agreement to the original parties.”

This is not surprising, as vendors may want to ensure that they are dealing with a “monied” purchaser.

Whether the original purchaser continues to be liable to the vendor may be relevant even after closing. The doctrine of merger may apply, unless the contract expressly provides for the survival of contractual obligations, or if the court finds from the surrounding circumstances that the parties' intention was that a particular obligation would survive. It seems obvious, therefore, that a purchaser's post-closing covenants (including the covenant to pay a mortgage) will not merge on closing, and accordingly the purchaser will not be relieved of this responsibility unless this is provided for in the agreement of purchase and sale. For this reason, purchasers may wish to assign the rights and responsibilities contained within an agreement of purchase and sale and, for greater comfort, obtain an express release if it is available.

In sum, the right to assign an interest in the agreement of purchase and sale does not need to be included in the agreement itself. However, should a purchaser wish to be released from all liability once an agreement has been assigned, this should be included in the original contract or negotiated as a closing document which recites good consideration for the release. This will, of course, be a business decision that will depend upon the negotiating power of the parties involved.

Ray Mikkola is a partner with Pallett Valo. Steven Pordage, a member of the firm's commercial real estate practice, practises in a wide range of commercial real estate and municipal law matters.

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