**WHEN BOND CLAUSES SINK SALES**

“Before anything else, preparation is the key to success” (Alexander Graham Bell)

You sell your house, give the signed sale agreement to your attorney, and wait to get paid out as soon as the property is transferred in the Deeds Office. What could possibly go wrong?

Quite a bit as it turns out, but perhaps the most frequent “sinker of sales” is a failure by one party or the other to meet a “suspensive condition” (often also referred to as a “condition precedent”).

As our courts have put it “a suspensive condition suspends the operation of all obligations flowing from a contract until occurrence of a future uncertain event. If the uncertain future event does not occur, the obligations never come into operation.” In other words, there is no binding sale at all until all suspensive conditions have been met.

**The bond clause**

A very common suspensive clause in property sale agreements, where the buyer cannot pay the purchase price in cash, is the “bond clause” making the sale subject to the buyer obtaining a “bond approval” from a financial institution (usually a bank). The bank loans the money to the buyer against the security of a mortgage bond over the property.

The bond clause is of course an essential escape route for you if you are a buyer needing to raise a loan. As a seller on the other hand you want the clause tightly drawn to stop the buyer using it as an excuse to pull out of the deal if the dreaded “buyer’s remorse” should set in after the sale.

For both parties it is essential to ensure that the clause is properly drawn to reflect clearly and correctly what you are both agreeing to. Preparation is key here! Our law reports are replete with bitter and expensive disputes over bond clauses, many of them avoidable had the parties proactively sought legal assistance before signing the sale agreement.

**What should be in the bond clause?**

In broad terms a bond clause will provide that the sale agreement is suspended until the bank approves the bond, and that the agreement will lapse if approval is not given by the date and in the amount specified in the clause.

Beyond that, make sure that there are no grey areas around what the deadline is or around what exactly will constitute “bond approval”. What format must it be in? Is it enough that an approval is granted, or must it be communicated to the seller before deadline? Is the bank’s offer to the buyer subject to the National Credit Act and if so on what basis can the buyer reject the offer? Is it enough to specify that the bond approval should be on the bank’s “usual terms and conditions”? What if the buyer rejects a reasonable offer from the bank in order to get out of the sale? And so on…

As a seller, if you are concerned about your buyer not being able to raise the required finance, consider adding a “72-hour clause” to the sale (ask your attorney for advice on this).

As a buyer, consider specifying the maximum interest rate at which you will accept the bank’s offer of a loan, or you could find yourself tied to unaffordable bond repayments.

Each case will be different, and our courts will always look at the specific wording of each particular case. So make sure the clause is specifically tailored to protect both parties in your respective circumstances.

**Amending or waiving the bond clause**

What if the buyer can’t get an offer from a bank by due date or in the required amount or (if the buyer specified a maximum interest rate as suggested above) at the required interest rate?

If that happens, the parties can agree to vary the agreement – perhaps to give the buyer more time to raise the bond, or to change the amount of the bond. Just remember that that must be done in a written, signed agreement before the due date. After the due date the whole agreement will have lapsed and there will be no contract left to amend.

Alternatively as a buyer, you have the option to “waive” the bond condition. You can do so unilaterally (i.e., without the seller’s agreement), provided again that the agreement hasn’t already lapsed, and provided that nothing in the agreement prevents such a waiver.

Importantly, you can only waive a suspensive condition where it is for your “exclusive benefit”. A bond clause will usually qualify in that it is normally there purely to protect you from being tied to an agreement you cannot afford – but perhaps avoid any possible doubt by specifying that in the clause.