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Considering COVID-19 Clauses in Purchase and Sale Agreements

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In the wake of the COVID-19 pandemic, real estate brokers have prepared suggested clauses for inclusion in real estate agreements of purchase and sale to address certain closing concerns that may be relevant during the course of the pandemic. Lawyers and their clients should be well aware that these suggested clauses may lack precision and may not in fact be what the parties to the agreements of purchase and sale actually want or what may be in the best interests of one or more of the parties. Any such clauses should be carefully reviewed and assessed before an agreement of purchase and sale is signed.

Set out below are some examples of these clauses, together with commentary:

1. The parties agree that if the buyer's bank or lender or the applicable land registry office "temporarily ceases operations, such that either party is frustrated from completing this transaction for reasons wholly outside the control of that party," then closing is extended to the date that is two business days after the resumption of bank or land registry services. It also provides that if the delay exceeds an outside date to be filled in following the original closing date, either party can terminate the deal.

This particular clause raises a number of issues and questions. Firstly, based on current information, the land registry offices in the Province of Ontario will not be ceasing operations and have been included as "essential services" in both the Province's original list and revised list. Moreover, there is no indication nor any reasonable basis for anticipating that banks will "cease" operations.

In addition to the current inapplicability of the proposed clause, one should question what "ceases operations" in the context of the Land Registry Office or banks or lenders means as well as what is meant by the term "wholly outside the control of the buyer".

The notion that once services are resumed two business days would provide sufficient time in which to complete the transaction is not realistic. The lender could very well resume operations but funds would likely not be available for the transaction within a two business day period. As well, and depending on what stage the transaction was at the time that operations ceased, it would likely take more than two business

days for the transaction to be organized, documents to be settled, requisitions to be addressed and other matters that are critical to the completion of the transaction to be resolved.

Finally, the inclusion of the right of any party to the transaction to terminate could lead to a result that is opposite of what one or more of the parties want and is ripe for a disingenuous party to use as an excuse for terminating a transaction that otherwise should not be terminated. The question of what period of time is reasonable for the parties to wait for such termination is also one that does not lend itself to any easy answer. One should also keep in mind that the clause does not apply at all if the land registry offices or lenders do not "cease" operations.

1. If there is a delay in registration due to measures taken by the Province in relation to land registry offices, closing is extended to the next possible date following the scheduled date of completion with no additional charges payable by the buyer. If there is title insurance with gap coverage and all closing funds are paid to the seller's lawyer in trust, possession can be transferred and all expenses related to the property become the responsibility of the buyer from the date of such escrow closing.

When viewing the two clauses referenced above together, it is clear that they cannot be used in conjunction with one another. The first clause contemplates a closing occurring two business days after resumption of services and this clause contemplates closing occurring on the "next possible date". As well, the second clause refers to measures taken by the Province in relation to land registry offices without addressing if such measures would include "ceasing operations".

The concept of an escrow closing referenced in this clause is also problematic for a number of reasons. This clause refers to an "escrow closing" but does not provide any particulars. The clause does not obligate the parties to proceed with an escrow closing nor specify what would be involved in an escrow closing.

This clause also contemplates that, as part of the escrow closing, "all" closing funds are paid to the seller's lawyer in trust without accounting for mortgages to be discharged and the payout of these mortgages, which often is addressed by way of a re-direction of the closing funds by the seller's lawyer in order to provide certainty to the buyer and its counsel that the mortgages will be paid out.

There are also practical post-escrow closing issues that are left unaddressed. The buyer is in the house and paying expenses and the seller does not get his money to pay off the mortgage. This does not seem fair or reasonable given that the seller will continue to pay interest on its mortgage until the funds are released from trust.

There are very good escrow closing agreements used by lawyers that address these issues. The proposed escrow closing clause is hardly satisfactory to address the nuanced issues that arise within the context of an escrow closing.

1. If the buyer or the seller is the "subject of a mandatory COVID-19 virus quarantine at the time of performance hereunder that results in the parties' inability to complete the transaction", the closing is automatically extended at the request of either party for a period of 14 days. Time remains of the essence of the agreement.

As we all know, the concept of a "mandatory COVID -19 virus quarantine" is a misnomer, as, aside from strict policies relating to returning travelers, quarantining and, its less strict relative, "self-isolating", are recommended voluntary practices, not mandatory ones. The clause also does not address the situation in which the party is still sick after the referenced 14 day period.

The clause also seems anachronistic in an age in which almost every person has some ability to print, sign and scan documents from the comfort of his or her home or to utilize another form or electronic signing, especially when viewed within the context of the Law Society of Ontario's various bulletins permitting more flexible methods of signing, witnessing and exchanging documents during this unprecedented time. More certainty as to the circumstances in which a party is truly unable to complete the transaction is needed.

Lastly, this clause contains a combination of a hard date extension with time of the essence and a concept of the parties using reasonable best efforts to close the deal. In short, it sends mixed messages that can

lead to both confusion and disputes among the parties, which is never the goal of a clause in an agreement of purchase and sale that is intended to address unforeseen issues.

While there are certainly ways in which to address the complications caused by the COVID-19 pandemic in order to attempt to ensure that real estate transactions can proceed, the clauses being proposed by some real estate agents do not achieve this goal and, as can be seen from the analysis set out above, may in fact lead to the opposite of the desired result or raise grounds for disputes between the parties where there should not be any. Buyers and sellers contemplating entering into agreements of purchase and sale for real property during these unprecedented times should view the types of clauses addressed herein with caution when presented with them and would be wise to seek the advice of counsel before agreeing to include them in their agreements of purchase and sale.

If you have any questions about COVID-19 we encourage you to contact a member of our Real Estate Group so that we can work with you to address your needs during this challenging time. For more information about dealing with COVID-19, please visit our COVID-19 Resource Center.

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