

HOW TO STRUCTURE A DEED OF SALE THAT IS SUBJECT TO THE SALE OF THE PURCHASER'S PROPERTY

Here is a bit of advice which might prove invaluable when faced with a purchaser who needs the proceeds of the sale of their existing property before they can pay for their new home. We understand that there are different approaches to the problem and that you might not agree with ours. If so, we would love to hear from you. Please share your experiences with our community so that we can all benefit.

Selling a house is no simple task, and it becomes even more complicated when the purchaser needs the money coming from the sale of their property to pay for the new one. The simple approach would be to state that such a sale is subject to the sale of the purchaser's property by a specified date, but it would be naive and irresponsible to believe that this would provide the framework for success. Bear in mind also that when things go wrong with sales like these, they can go very wrong.

The first problem that comes to mind with this simple approach is: What happens if the sale of the purchaser's property is scheduled for a date in the future that does not tie up with your seller's expectations?

The second issue that comes to mind is: What happens after your sale has become unconditional and binding, but your purchaser's purchaser defaults, leaving your purchaser in a position where they cannot perform?

And thirdly: The issue of costs. Is the purchaser planning to use the proceeds from their sale to pay the transfer costs of their purchase, or do they have money available elsewhere?

Most agencies have specific prescribed clauses that they insert in deeds of sale to deal with these eventualities. We also have a suggested clause, and it goes like this:

SALE OF PURCHASER'S PROPERTY

This entire agreement is subject to the sale of certain existing immovable property situated at within a period of 45 days from date hereof; the fulfilment of all and any suspensive conditions that might be contained in such sale within a period of 30 days from date of the sale, and the successful conclusion of such sale (registration of transfer of ownership) within a period of 90 days from date of the sale, or the date of fulfilment of the suspensive conditions contained in such sale, whichever event occurs last. It is recorded that the Seller shall have the right in the Seller's sole discretion to unilaterally extend in writing any of the aforesaid periods, once for each period and for no longer than 21 days for each period.

OR (if property already sold)

It is recorded that the Purchaser has sold certain existing immovable property situated at and that this agreement is subject to the fulfilment of all, and any suspensive conditions contained in such sale within a period of 30 days from date hereof, and the successful conclusion of such sale (registration of transfers of ownership) within a period of 90 days from date hereof, or the date of fulfilment of the suspensive conditions contained in such sale, whichever event occurs last. It is recorded that the Seller shall have the right in the Seller's sole discretion to unilaterally extend in writing any of the aforesaid periods, once for each period and for no longer than 21 days for each period.

It is recorded that where the transfer of the Purchaser's property is to take place simultaneously with the transfer of this property, the Purchaser shall pay the transfer duty in this sale no later than 30 days prior to the date on which the Seller's conveyancers anticipate that the transfer will be lodged in the deeds office.

Obviously, you should consider the specific circumstances of the transaction to ensure the time periods are suitable and amend them if necessary.

Let's unpack the wording to understand the clause better.

Firstly, the clause sets 3 milestones that must be met by specific dates to keep your sale alive: date of the sale, the date that the sale becomes unconditional and the date of transfer. Inserting these milestones mean that if the purchaser's sale looks like it is going to fail, your seller does not have to wait until the end of the conveyancing process relating to the second sale before they can place their property back on the market. In addition, the clause gives the seller the flexibility to extend any time period if it looks as if, despite any minor delay, the purchaser's sale will be finalised. The time periods agreed on in your contract will also ensure that the timelines for this second sale will be acceptable to your seller.

Secondly, the clause protects your purchaser against liability in the situation where their purchaser defaults, once that deed of sale has become unconditional. It does this by finally making your sale subject to the transfer of the purchaser's property. Your purchaser can then never be held liable for damages by your seller if your purchaser's inability to perform comes about as a result of their purchaser defaulting. Why? Because your sale will remain conditional until the purchaser's transfer has been registered.

These clauses also deal with the situation where the 2 transfers will happen simultaneously and serves as a reminder to the Purchaser of the need to have the funds available to pay the transfer duty for your sale before the transfer of their property has been registered. This is often a problem when your purchaser is relying on the proceeds of their sale to pay these costs. If so, your purchaser would need to be advised to obtain bridging finance so that they could borrow the transfer duty against security of the proceeds of their sale.

Points to note here are that you need to see a copy of the purchaser's deed of sale to establish what the suspensive conditions in that sale are, and to do your best to ensure they are fulfilled. In this regard, look beyond the traditional bond clause. Often additional suspensive conditions get hidden in the body of a contract, and you would not want your sale to lapse if an inconsequential suspensive condition in the purchaser's deed of sale is overlooked and left unfulfilled.

In addition, if your seller has to give notice to extend any of the deadlines for milestones to be met, this must be done in writing, so that there can be no dispute. Most importantly, any such extension must be given before the deadline has expired, failing which your sale will lapse. The giving of notice like this can be done in terms of the "Notices" clause in your deed of sale, so it is important to record addresses and email addresses in the space provided in the deed of sale.

The foregoing obviously does not touch on 72-hour clauses, which are traditionally included in deeds of sale that are subject to the purchaser selling their property. These 72-hour clauses deserve separate treatment. This is especially the case when your sale is subject to the transfer of the purchaser's property. Rest assured we will publish an article on these 72-hour clauses soon.