

## TERMS AND CONDITIONS

We came across a situation some time ago where a buyer had wanted to include an additional clause in the deed of sale to ensure that the house was built in accordance with approved building plans. To achieve this end, the agent inserted this clause:

*“This agreement is subject to the Seller furnishing to the Purchaser approved building plans for the dwelling prior to the date of transfer”.*

Both parties signed the agreement containing this clause. The seller had lived in the property for many years and had done no renovations to the property. He therefore had no reason to believe that there were any problems with obtaining the approved building plans.

When the seller went to get the plans however, he got a nasty surprise. He found out that the house had unauthorised extensions which included the swimming pool. Because of building lines and restrictive title deed conditions he could therefore not deliver the approved plans as he was obliged to, and in any event definitely not before the scheduled date of transfer.

The matter was eventually settled but if it had not been settled the sale would have fallen away and the agent would not have earned any commission. The reason for this is that the provision in the contract was phrased like a condition and not a term and because it was a condition, if it remained unfulfilled through no fault on either side, it would have resulted in the agreement falling away, in just the same way as if the agreement was subject to a bond and the bond was not granted.

This situation would have been different if the agent had phrased the clause differently and made the provision to furnish building plans a term of the agreement and not a condition. The revised wording would have read as follows:

*“The Seller shall furnish the Purchaser with approved building plans for the dwelling by no later than the date of transfer.”*

If the clause had been worded like this, and the seller could not provide the building plans, the seller would have been in breach and the purchaser would have had the option either to enforce or to cancel the contract. In both instances the seller would have been liable for any damages incurred. If the contract was cancelled this cancellation would have been caused by a breach by the seller, that breach being the seller's failure to provide the building plans in time. In such circumstances the agent would still have been entitled to claim commission from the seller.

The point of this article is not to encourage you to place unrealistic obligations on a seller, or to place your seller at unnecessary risk, it's only to point out the difference between a term and a condition. It also lays bare the difference in the consequences of a condition not being fulfilled as opposed to what happens when a party to a contract does not carry out an obligation which has been created as a term of the contract.

While our sale did actually proceed to transfer, this came about as a result of a compromise reached and the compromise required the agent also to dip their hand into their pocket and reduce the commission to allow the purchase price to be reduced.

The message is clear. Be careful about adding clauses to contracts without thinking them through, and if you have any doubt about what to do, give us a call. Our expert advice will assist you in avoiding pitfalls like these, before they arise.