

# IN-DEPTH OTP TRAINING

## SESSION 3

### SUSPENSIVE CONDITIONS

#### WHAT IS A SUSPENSIVE CONDITION?

It is a condition which must be met BEFORE the sale agreement becomes final and binding – such as first getting a bond/loan, selling other property; final viewing; doing a due diligence etc.

**If a suspensive condition is not met, there is no sale.**

If a term is not met, such as by when a deposit is payable, requires a party to be put “in breach” before the sale may be cancelled.

What about:

Subject to the seller finding alternative accommodation?

Subject to the seller providing approved building plans?

Subject to the seller effecting certain repair work or improvements?

**NB the due date!** If the due date lapses, and the parties wish to still proceed then the sale must be REVIVED. You cannot extend the bond date once the sale has lapsed. So always diarize and extend BEFORE the due date lapses.

**NB - Providing a guarantee or paying a deposit is not a suspensive condition. It is a TERM of the OTP.**

## **BOND CLAUSE**

When is a bond deemed to be granted? **NB - You may not contract out of the NCA.**

**Deeming provision** – once a quotation is issued (FULL STOP – whether the buyer accepts or not) the condition is deemed to be met.

**Does this not contradict the NCA?** Section 92? This provides that a bank MUST first provide a pre-agreement (quotation) and if accepted, a bank must proceed.

**If you have a deeming provision** and the buyer is not happy with the rate of interest, will it not result in a breach of the Act if one now holds him liable, because in essence, we are saying he MUST accept the pre-agreement/quote?

**1992 decision Basson v Remini** – condition is only met once a loan is accepted.

This is PRE NCA – so will probably be followed if this is revisited in court some-day. As such we would suggest that if you have a situation where a buyer refuses to accept a quotation, think carefully about proceeding with a claim for commission.

Yes, this could easily be used as a loophole by Purchasers who have lost interest, to avoid liability, but if the rate is otherwise good and there are no odd conditions, then one could make out the argument that the buyer is now deliberately frustrating the sale and then one could rely on “fictional fulfilment”. All depends on the circumstances.

**What if a bond is withdrawn?** Once a condition is met that is it!

**Normal terms and conditions.** What does it mean? It means that the buyer must sign bond docs; a bond must be registered, and the buyer must take transfer of the property. Those are normal terms and conditions attached to a bond. Any other conditions such as having to first get plans; or

sell another property are not normal terms and conditions. SO, CHECK THE WORDING OF YOUR BOND CLAUSE TO SEE WHETHER YOU MAYBE WANT TO CHANGE IT.

or

**On such T's and C's** a bank deems it appropriate. Then this would include any and all conditions.

**What happens if the bond is subject to:**

Valuation – AIP? Not a bond if it is subject to this.

Building plans – Depends on the wording of the bond clause whether this can be allowed.

Occupancy certificates - As above.

Repair work – As above.

Cancellation of other bond or settling of a credit card – As above

**If the purchaser accepts a lesser bond** – addendum is needed to secure the balance

**Waives a bond** - he must be able to then pay within a certain time.

WHO PAYS if the bank poses conditions such as provision of building plans or an occupancy certificate; repair work to be undertaken to the property? Unless the OTP otherwise burdens a seller with this, the BUYER will have to pay because it is after all his/her bond.

**PURCHASE OF PROPERTY SUBJECT TO THE SALE OF OTHER PROPERTY**

NB that the sale of the other property must be completed by the due date - all suspensive conditions must have been met – so give enough time.

If seller is going to grant more time this must be recorded **before** the due date else the sale lapses.

Where the buyer says the property has already been sold try to contact the transferring attorney to double check:

**a. Make sure that the transfer dates on the 2 sales are the same.**

**b. NBNB! If the buyer intends to use the proceeds of his sale to also pay for transfer**

**costs**, he must be reminded that he will need to **bridge transfer duty** from the proceeds of his sale because that is needed several weeks ahead of registration.

**Has the property already been sold or MUST it still be sold?**

***If it has been sold and all conditions are met, it does not make your sale CASH!! It is still to be made a "SUBJECT TO" TRANSFER.***

#### **HOW TO SECURE THE FUNDS - GUARANTEE vs UNDERTAKING**

**A guarantee** is a promise by a bank that it holds, at its disposal, a certain sum of money for a certain period of time to then pay out, once the property registers. It is therefore GUARANTEED to pay out. It means that this money has been "ring fenced" and is secure.

If your sale agreement says that the purchase price must be secured by way of a guarantee it means your buyer **MUST HAVE THE CASH READILY AVAILABLE! Guarantees also cost money to issue.**

**An undertaking** is usually a letter from an attorney promising to pay out money once one of his transfers registers (i.e. sales subjected to the sale of another property). This can only be given though once that attorney has secured the finances on his transaction and checked that there will be sufficient net proceeds.

If your buyer must first sell a property (i.e. the purchase is financially dependent on the “subject to” sale taking place first) **BE SURE TO CHECK THAT THE PURCHASER WILL HAVE SUFFICIENT PROCEEDS FROM THE SALE OF THE SUBJECT TO TRANSACTION.**

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