

IN-DEPTH OTP TRAINING

SESSION 4

THE 72 HOUR CLAUSE

WHAT IS IT EXACTLY?

It is simply a right which the seller reserves to continue marketing the property UNTIL all suspensive conditions are met.

In other words, in order to sell it ASAP. This is the seller's clear intention.

Any offer that is subject to a suspensive condition should have one if your seller is anxious to sell.

It is therefore there to protect a SELLER who has the right to either enforce it, OR not! REMEMBER THIS – you cannot force a seller to invoke the 72hr clause in a prior offer.

Always make sure the back-up offer is “subject to cancellation of the prior offer”.

NB – So, if you have a back-up offer and the buyer is not willing to hang around indefinitely, make sure your buyer is aware of this OR make the backup “subject to the cancellation of offer #1 by no later than”

WHEN DOES ONE ISSUE THIS?

Not before all suspensive conditions in the competing offer are met.

Where you have “subject to” deals attached, not before they are 100% financially secured.

It is best practice to also first secure:

Payment of all costs from the competing buyer; and

If it is a cash deal, then we want the entire purchase price by way of deposit, or a guarantee, or at least a very big deposit.

Why? To ensure that the competing buyer IS in fact able to perform financially.

HOW IS THE TIME GIVEN, CALCULATED?

DEPENDS on the wording of the clause or the OTP.

If your contract does not allow service of legal notices BY EMAIL then hand delivery or registered post may be required. But how then do you calculate the 72 hours? When does it start?

Remember – the purpose of this clause is to allow a seller to sell ASAP!

So, make it simple - ensure your OTP expressly allows the seller to send such a notice by email to a designated address AND / OR by WA.

HOW ARE 72 HOUR NOTICES DELIVERED / DISPATCHED?

Again, this depends on your OTP.

Some say as from:

Dispatch (when you click “send”) REGARDLESS of receipt;

or

Receipt. But then you need proof!

Make it as from DISPATCH by email – the buyer must just be vigilant and check his emails regularly like everyone else.

WHO IS IT TO BE SENT TO?

NB – UNLESS YOUR OTP EXPRESSLY PROVIDES OTHERWISE - to the **PURCHASER** – not his agent or attorney, mother, brother or sister!

It is CRITICAL to ensure that the correct method of despatch is followed and that there is PROOF, as from when exactly the clock starts ticking.

If you are working on a different agency's OTP, MAKE SURE YOU FOLLOW THE CLAUSE BY THE BOOK!

One must ALWAYS first get the seller's express consent before issuing notices. **It is his/her RIGHT to do so** not an obligation.

WHAT IF I HAVE MULTIPLE BACK UPS TO BOOT OUT?

There is no case law on 72-hour notices. So, what follows is MY own view keeping the intention of a 72hr clause in mind.

When you have, multiple back-ups DO NOT ATTEMPT TO SEND A 72 HR NOTICE.

If all the prior offers have the SAME worded 72 hr clause, you can send a notice to all prior buyers simultaneously.

If any of those buyers meet or waive their condition/s, then depending on how many there are, you need NOT send out a FRESH 72hr to any remaining prior offers.

So, if you have 4 offers, and number 4 puts #1-3 on terms, and #3 now gets a bond – then #1 and 2 will only have the remaining time available to meet or waive their conditions.

WHY DO I SAY THIS?

Because the seller has now already put all of them to terms.

In the notice all these buyers are then advised that as between the 3 of them they have 72 hours, full stop, subject only to the remaining raking of their offers.

In other words, if #3 gets a bond first he/she does not trump 1 and 2.

1 and 2 are still first in time so they have to then still be allowed to

WHAT IF THE PREVIOUS OFFERS HAVE DIFFERENT 72 CLAUSES – DIFFERENT TIMELINES ETC?

Then you may need to deal with each one, one by one! #4 will have to first put #3 to terms and wait it out and so on.

If a Buyer WAIVES his conditions, then he must be able to secure the funds ASAP – your OTP should deal with this eventuality to remove any grounds for doubt.

OCCUPATION AND POSSESSION

Occupation clause must either be a date, or it must read “on transfer”.

Complete the occupational rental clause to ensure the parties are in agreement from the start.

The amount – currently it seems to be around 0.7% of the selling price. No rule at all.

Occupation is only to be given once all costs are secured; finances are in order and all documents are signed.

What does occupation mean vs possession/risk?

Occupation means when the buyer moves in.

Possession means “passing of risk”- from that date, if for example, the geyser bursts, it is the buyer’s problem. In your OTP this is as from TRANSFER.

Alterations may not be made before transfer and if the buyer chooses to, it is completely at his own risk should the sale become cancelled.

SALE OF PROPERTY WHICH IS BEING LEASED

Check that there is no option to renew or right of first refusal.

Option to renew means that the tenant has the absolute right to extend the lease.

Right of first refusal means that the seller must first offer the property to the tenant to buy.

Make 100% sure when taking the MANDATE whether either of these exist.

Make sure that the tenant is given proper notice – Does the CPA apply (fixed term lease) and may the landlord give notice before the lease expires – only allowed if the

lease expressly states this - or is it month to month? Then a full clear calendar months' notice must be given.

Huur gaat voor koop – a property which is subject to a lease cannot be sold unless the lease remains in place!

COSTS and TRANSFER DATE

Download the MM CONNECT APP.

Complete the amounts to ensure the buyer knows what he/she must pay

Payable on demand

If there is an HOA (R2500 – R4000) then there is also a consent fee and if it is an Sectional Title sale, then there is a levy clearance fee. (+/- R2500)

If there is a cession of an exclusive use area to be attended to then you can add another +/- R3500.

Remember to also canvass costs with the SELLER!

Compliance certificates

Bond cancellation fees (Around R5000)

Rates Clearance figures (Includes a 2-month advance collection)

90-day penalty interest

Costs to replace a lost title deed (Around R5000)

CHOOSING A TRANSFER DATE

Transfer dates are only an estimation. Buyers and sellers must be made aware that delays can occur and that they need to as far as possible also try to be flexible.

If the sale is subject to any suspensive conditions make it ASAP! One can always do an addendum closer to the time to regulate this.

FIXTURES AND FITTINGS

Rather stipulate MORE than less! There is often disagreement regarding:

- Bar Stools
- Pot plants
- Koi fish
- Water in a pool!
- Astro turf
- Gas bottles
- DSTV dishes
- Kitchen Islands on wheels

BE CAREFUL IF YOUR OTP WARRANTS THAT ALL FNFs will be in good working order as this will override VOETSOOTS!

Speaker: Robert Krautkrämer