

Donald W. Clark

The purpose of this memorandum is to outline some of the factors which should be taken into consideration in the preparation of Agreements of - Purchase and Sale for condominium units.

To start this memorandum it is assumed that there is a Condominium Corporation in existence and that the declaration, by-laws, description and other relevant documents are registered.

We will consider the nature of a condominium and some of the factors which are necessary to know in order to prepare a proper Agreement of Purchase and Sale.

BACKGROUND

First, in analyzing this topic condominiums should first be defined. Donald Lamont, Q.C. in his text, "Real Property Conveyancing" states:

A condominium is a system of property ownership whereby a piece of property such as a highrise apartment building and surrounding lands, road housing or commercial complexes are owned by a number of people. Each is the absolute owner of a specified part ...In addition, each person, in common with others has an interest in the common areas such as parking lots, lobby, elevator, corridors, heating plant, ground and in some cases recreational facilities.

The legal mechanism for the creation of condominiums is established in Statute Law. In Nova Scotia, the procedure is governed by the Condominium Act, Stats. Nova Scotia, 1970-71, chapter 12 and regulations made pursuant thereto. Appendix No. 1 to this memo is the Condominium Act and Appendix No. 2 is the Condominium Act Regulations. In addition the Statutes of Nova Scotia for 1975 contain amendments to the Condominium Act but these amendments have yet to be proclaimed and no further reference is made to them with regard to this memorandum, except that they have been included as Appendix No. 3.

Condominium conveyancing differs substantially from residential home conveyancing. As such, the nature of the Agreement of Purchase and Sale in respect to the condominium must necessarily also reflect differences from an Agreement for residential home conveyancing.

When acting for a person who wishes to purchase a condominium unit, there are a substantial number of documents in which the solicitor must be well versed in addition to those which are normally required to be looked at in a residential home conveyance. These are:

1. The Condominium Act
2. The Declaration
3. The survey plan and sketches
4. By-laws
5. Common element rules
6. Management Agreement
7. Insurance Trust Agreement
8. Floor Plan

The proposed purchaser of a Condominium Unit is more likely to contact a lawyer prior to signing an Agreement of Purchase and Sale for that unit than is normally the case in the purchase of a residential home. As such in many instances it is possible for the lawyer to prepare an Agreement of Purchase and Sale prior to his clients signing a standard form Nova Scotia Real Estate Association Agreement.

In order for you to prepare the Agreement properly it is unfortunately almost necessary to have some legal knowledge of condominiums in order that you can ask the right questions to prepare the appropriate agreement. As set forth in the brochure for this two day program I have accordingly asked a few questions concerning whether the client and the lawyer really understand what the purchaser is buying. After having researched this matter

and trying to put together certain factors for consideration I found that one of our guest panelists, Donald Lamont, Q.C. had in fact already addressed this problem in 1974 in a volume entitled Condominium Conveyancing put out by the Law Society of Upper Canada. Mr. Lamont put forward some of these considerations with such eloquence that rather than plagiarize (horrors!) I have decided to quote directly from Mr. Lamont's article with the exception of adding certain sub-headings for your consideration.

What is the Purchaser buying? (Donald Lamont, Q.C.)

Townhouse

If it is a townhouse you would like to know the size of the lot front and back which goes with the house and whether this is included in the unit, or is a limited common element. If it is the latter, that means the purchaser will have the exclusive use, but the maintenance of that part of the property will be by the condominium corporation and the cost of maintenance will be included in the total operating costs, to which of course the purchaser contributes by paying his proportionate share of the common expenses.

Building

If it is a unit in a building you and your client will wish to know what are the boundaries. The details will be in the description, which you will be looking at later, but you do hope to find in the offer to purchase as specific a reference as possible to area dimensions to avoid misunderstandings between what your client thinks lie is buying and what you later check in the description.

Some developers are now attaching a floor plan of the unit with the measurements of each of the rooms shown. This you can later check with the description.

Boundaries of Unit

What should you check respecting the boundaries of the unit? These may be the unfinished surface of the solid walls or the backside of the dry walls, and the upper surface of the floor slab and the upper surface of the dry wall ceilings. If so the unit owner will own as part of his unit the plaster surfaces, hardwood floors, wainscoting and wooden door frame of the entrance door and the inside surface of that door and the unit owner will be responsible for the repair. What will likely be excluded will be any interior load bearing walls, the rest of the front door, windows, and all conduits, ducts, plumbing, sewers, wiring and other facilities which service more than one unit, and so far as they serve the unit in question then to the interior side of the above described boundaries. Heating and air-conditioning services within the unit will likely also be excluded. What are excluded are of course part of the common elements.

Common Elements

The importance of knowing what are common elements and what is included within the unit boundaries is that whatever one owns determines the respective obligations to repair by either the unit owner or the condominium corporation.

You and your client would also like to know what general areas are included in the common elements. Obviously the lobby, halls and elevators are part of the common elements, but are the laundry room, swimming pool and other recreational areas? It probably makes sense that the use of these sort of areas should be paid for by the people who use them. However, it is a source of friction when your client later finds that they are either not part of the common elements and continue to be owned by or leased out by the developer, or if part of the common elements charges must be paid for their use.

If it is the latter there should not be too much objection by your client because any revenue for the condominium corporation will reduce the operating budget and thus the common expenses.

Parking

Parking arrangements should also be considered at this point. Does your client have parking space allotted and is it part of the common elements and is it included without charge, or will there be an additional monthly amount for parking space?

Proportionate Interest

Next is for you to ascertain the proportionate interest of your purchaser in the common elements.

This figure is usually in a number of decimal points, and to a purchaser is somewhat mysterious. But you can expect that the proportionate interests of the unit owners will bear a close relationship to the respective values of units. Putting it simply a three-bedroom unit will have a higher proportionate share than a two-bedroom unit. A corner unit or a unit with a view will have more value than say one at the front on the second floor.

Percentage Interest

You will find the percentage interests in the declaration. About all you can do and it is not a legal responsibility is to roughly check to see that the respective interests appear to be realistic in relation to the respective values.

The importance of the percentage interests is that invariably they are applied to setting the respective amounts each unit owner will pay towards the operating budget of the condominium corporation by way of common expenses.

Well if you have the above information you know what your client is buying.

AGREEMENTS OF PURCHASE AND SALE

Attached as Appendix No. 4 and Appendix No. 5 you will find a sample copy of an Agreement of Purchase and Sale. Appendix No. 4 is in relation to a sample of an Agreement of Purchase and Sale concerning Hampton Mews from a developer, Clayton Developments Limited to the prospective purchaser.

Appendix No. 5 is a sample form of an Agreement of Purchase and Sale again taken from a volume Condominium Conveyancing, prepared by the Law Society of Upper Canada and the Department of Continuing Education in 1974.

For the most part, a sample agreement of Purchase and Sale as set forth in Appendix No. 5 is an illustration of the type of clauses we should be considering in the preparation of an agreement on behalf of our clients concerning a resale of a particular condominium unit. In most situations, the standard approved form of the Nova Scotia Real Estate Association Agreement of Purchase and Sale is not sufficient even with the insertion of certain clauses for the average agreement.

Description of Property

On the standard form agreement of Purchase and Sale there is insufficient room to properly describe the Condominium Corporation and unit being conveyed. You should set forth in such an agreement the full name of the condominium corporation and appropriate number, a description of the condominium project, i.e., Hampton Mews, and a description of the condominium unit being conveyed together with an undivided interest in the common elements appurtenant thereto and the civic number of the property if applicable.

Financing Clauses

There should of course then be the addition of the appropriate financing clauses be it an assumption of an existing mortgage for a set amount of money or refinancing through a new institution etc,.

What does the Unit include?

There should at this point be an insertion in the Agreement of Purchase and Sale of whatever indeed the sale of the unit includes: a storage locker facility, a particular parking spot, refrigerator, stove etc., delivery of by-laws, declarations etc.,. Certainly when acting for a Purchaser one should ensure that the Vendor delivers to the Purchaser within a certain number of days in acceptance of the offer declaration, by-laws house rules, management agreement, if applicable and insurance trust agreement if applicable. The Purchaser should then have a certain number of days in which to examine the same and if not satisfied with the provisions *therein contained* can at his option terminate the agreement.

In many cases it seems that the current Vendor does not have the declaration, by-laws etc., and in my view these should certainly be delivered to the Purchaser without the Purchaser having to bear the cost of obtaining copies and or re-producing the same. This also enables the client and or his solicitor to review the applicable condominium documentation as respects the unit and satisfy themselves that the Purchaser is in fact receiving that which he understands he is purchasing.

Warranties

When acting for a Purchaser it is certainly once again advisable to place a clause in the agreement of Purchase and Sale respecting warranties. Particulars of the nature and type of warranties which ought to be included are those as set forth in clause No. 3 in Appendix No. 5 of this memorandum. Obviously it is important to the Purchaser to know that the Vendor is not in default of payments under the declaration and by-laws. Clearly it is important that the Vendor warrants that he will apply for any consent to the sale if required either by the condominium corporation or by any mortgagee of the unit.

Estoppel Certificates etc.,

The Estoppel Certificate should be specified in the Agreement of Purchase and Sale as a required production by the Vendor at the Vendor's expense as some condominium corporations charge a fee of \$10 - \$20 for Estoppel Certificates. The Certificate should state:

- (a) that the attached Declaration and By laws are in full force;
- (b) that the corporation is solvent;
- (c) that no increase in common expenses is underway;
- (d) that no proceedings are pending against the corporation
- (e) that no meeting is pending to consider substantial changes in the corporation;
- (f) that there are no arrears of common expenses against this unit or other units
- (g) the balances in reserve funds of the corporation;
- (h) confirming fire and public liability insurance coverage;
- (i) the names and addresses of directors and manager.

Time of the Essence

In setting forth the time period under which a lawyer has to search title be generous! Remember, you probably have clauses in your agreement which will require the Vendor to deliver to the Purchaser the Declaration, By-laws, warranties etc., and you do not wish to commence your search of title on behalf of your client until he (or you) have satisfied yourselves that he is getting what he bargained for.

Insurance

The standard Nova Scotia Real Estate Association Agreement of Purchase of Sale form is normally not sufficient to adequately cover insurance coverage. In most cases

there is an insurance trust agreement in place whereby the condominium corporation appoints an insurance trustee and indicates that all insurance proceeds that are to be held in trust by the trustee and are to be disbursed in payment of the cost of repairing damage to the property. There may be certain clauses in the insurance trust agreement which state that in the event that there has been substantial damage to say 25\$ or more of the building and owners who own 80\$ of the common elements have not voted to repair then in that event the condominium will be terminated. In such a case the proceeds would be paid to the corporation and the unit owners subject to the interests of any mortgagees. As such, the Vendor would not necessarily have a policy in force and effect out of which he could designate certain proceeds to the Purchaser. In the event the Vendor had effected any improvements to the property, hopefully he would have a personal insurance policy in effect to cover the cost of those improvements.

Contingency Fund or Reserve Fund

A clause should probably be included in the Agreement of Purchase and Sale concerning whether or not the Purchaser is buying that portion of the reserve fund applicable to the unit. In the event the agreement is silent in that regard there may be an argument that the reserve or contingency fund is for the benefit of the corporation and it therefore is a benefit to which the Purchaser is entitled upon completion without paying the Vendor a prescribed amount.

OTHER FACTORS TO BE CONSIDERED IN PROTECTING YOUR CLIENT AND YOURSELF IN THE PURCHASE AND SALE OF CONDOMINIUM UNIT

found in section 21(1) of the Condominium Act of Nova Scotia, it states:

The corporation should ensure that its liability to repair the units and common elements after damage resulting from fire, and such other risks as may be specified by the declaration or the by-laws, to the extent required by the declaration or by the by-laws; and for that purpose the corporation has an insurable interest to the replacement value of the units and common elements. The corporation therefore does not have a duty to repair after damage and this insurance does not include the repair of improvements made to units after acceptance for registration of the declaration and description nor does it protect the unit owner's contents therein. Therefore, the unit owner should be advised by you that he should obtain replacement cost insurance for any improvements he makes and also- obtain insurance coverage on his contents.

\Refer to section 22 and 23 of the Condominium Act for Nova Scotia.

If your client is executing mortgage documents a check should be made to ensure that the mortgage document contains certain clauses necessary to condominium mortgages.

Voting

If the mortgagee has exercised the option to exercise the vote or consent, the owner cannot of course, vote, but should the mortgagee waive its right, the owner should exercise his vote.

What do you do in the case where a client requests an appointment with you and comes into discuss what he is really getting involved in when he is buying a condominium unit? He wants to know in simple terms what his rights are as regards voting, management of the corporation, what rights he might have to become an officer of the corporation and other really absurdly simple and easy questions like that. Head for the hills boys! I presume that in such a situation I am not entirely alone in that instance when I gaze steadfastly at my client with my most confident and intelligent look and say to myself "Why me Lord?!" The average practitioner (how presumptuous of me) then dips into his repertoire of general verbal diarrhea and proceeds to inform the client without so much as a quiver in his voice that each condominium corporation has its own declaration, by-laws, management agreement etc., and that these would of course govern , your client's particular situation. These words of wisdom are of course absolutely true but they don't go very far towards giving your client in a general way some of the answers to which he has sought out your particular fountain of knowledge.

In such a case I recommend that you perhaps give them a photocopy of Appendix No. 6 attached to this memorandum. Once again I would like to thank the Law Society of Upper Canada in the report of Condominium Conveyancing in April of 1974 wherein iffriam Kelly a barrister of the Ontario Bar addressed herself to many of these problems as seen by the unit owner or prospective unit owner. Ms. Kelly has in fact gone through the Ontario Condominium Act and set forth the particular statute sections and set forth a comparative analysis between the statute law and what in fact happens in practice.

The Ontario Act is of course different from the Nova Scotia Act and many of the sections that she mentions there are not set forth in that detail in the Nova Scotia Act. Nonetheless, in most instances the article is extremely beneficial in giving a practical overview to both ourselves as practitioners and .also to our clients.

One other point which should be strongly stressed with the purchaser is that a check of the declaration should be made to ascertain exactly what the purchaser's share of the common element entails. It cannot be stressed to strongly to the purchaser that he owns exclusively only the unit in question. This has significant impact if the purchaser is intending to make any alterations to the unit or any landscaping outside the unit. He will not be too pleased if in fact he makes an addition to the exterior of his unit only to discover that the condominium corporation will not allow his addition to stay where it is.

In searching the title don't make the mistake of only searching the title forward from the

time the corporation was registered. In addition to purchasing the unit, your client is purchasing his share of the common elements. This requires a full search. You can obtain a copy of the abstract of title to the property from the Registrar of Condominiums.'

As for judgment searches, it should be remembered that you are not buying a self contained home and when purchasing from a condominium it is necessary that you search the condominium corporation for judgements. Section 12(19) of the Condominium Act states that a judgement for the payment of money against the corporation is also a judgement against each owner.

If chattels are being conveyed don't forget to do a chattel search.

In closing my remarks concerning agreements of Purchase and Sale for condominiums I would just like to make a few final comments.

In the acquisition of a condominium unit the declaration, the by-laws, the management agreement, and insurance trust agreement are very important documents indeed. They should be examined very carefully as they contain the rights and privileges which the unit owner may enjoy but also they contain many other restrictions upon enjoyment of the unit by the owner.

For example the declaration may state that the unit cannot be used for purposes of running a business, that there may be no interior alterations and may contain restrictions on leasing. The declaration may also contain a provision restricting the sale of the unit and also obviously contains exactly what the purchaser's share of the common elements entails.

The key to protecting your client accordingly is to set forth with clarity in the agreement of Purchase and Sale the various clauses and provisions which protect your client be he Purchaser or Vendor. Should you fail in this duty of preparing the appropriate protection in the agreement you will find that the avenues of liability to your client are many.

Caveat Emptor?
CAVEAT BARRISTER!!!

Respectfully submitted,

Donald W. Clark

BIBLIOGRAPHY

- 1."Condominium Conveyancing", 1972, Law Society of Upper Canada.
- 2."Condominium in Canada", Alvin Rosenburg, 1969 Canada Law Book Limited.
- 3."Real Estate Conveyancing", Donald Lamont, Butterworth Limited, pp. 491-528.
4. "Condominiums and Canada", R.C.B. Risk, 18 U. Of .LEE. 1 (1968).
5. "Condominium Law and Practice", P.J. Rowan and M.A. Raskin, Mathew, Bender & Co., 1966.
- 6."Condominium Conveyancing", Department of Continuing Education, - The Law Society of Upper Canada, 1974.