

WORKSHOP III - PROTOCOL

INTRODUCTION:

It would seem that with the real estate market becoming so competitive and the client so demanding, we, as lawyers, tend to lose sight of the practical procedural issues involved when handling a real estate transaction. Courtesy and common sense start taking a back seat to expediency and the philosophy of "getting the job done".

It seems timely, then, to have an opportunity to discuss with our peers ways that we, as property practitioners, can help each other and help ourselves and as an end result, help our clients deal with and close a property transaction in a timely and courteous fashion.

The issues under the topic of protocol have been broken down and the breakdown is of no particular consequence and the order is certainly not important. The purpose of the suggestions were simply to put before us all a number of items which can be discussed fairly quickly and openly to determine a sensible and clear cut approach to these issues.

It is hoped that, as a result of this conference, we will all have a better idea as to how to help each other in a timely fashion, better serve our clients and at the same time make the procedure a little more enjoyable for us all.

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PROTOCOL

- Office to Office Protocol
 - Timeliness of documents
 - Disclosure of outstanding encumbrances or interests
 - Disclosure of powers of attorney or other documents that would be registered by the vendor to convey title.

- Undertakings of Solicitors
 - What can or cannot be the subject of an undertaking;
 - Timeliness of the follow-up of an undertakings;
 - Suggested enforcement procedures for undertakings.

- Miscellaneous Procedural Protocols
 - Statutory Declarations and the obligations to provide and/or pay for registration; split cheque suggested in reference to payout of vendor's mortgage; holdbacks for oil top off, last payment on vendor's mortgage, etc.
 - Procedural suggestions in reference to new home construction such as
 - deficiency holdback requirements;
 - mechanics' lien holdback requirements;
 - occupancy permit requirements.
 - GST Assignment forms
 - * Who prepares and When
 - List of Extras and Credits, Timeliness of Agreement and Payment
 - Burner Agreements
 - Should letters be secured as to up-to-date payments
 - Warranties/Statements of Facts in Agreements of Purchase and Sale
 - How are they to be handled at closing if at all
 - Rental Properties
 - Timeliness of forwarding of leases, security deposit amounts, letters to tenants from vendor or vendor's solicitor
 - Escrow provisions in final letters of vendor's solicitor and purchaser's solicitor at closing

FROM THE DIARY OF A PROPERTY PRACTITIONER

Undertakings - they're lurking in those files I can't close. Some are relatively fresh, some have a light growth of a bacterial nature, and some are approaching the self-destruct stage.

Fall appears to be the season for taking stock of unfulfilled undertakings. The crises of summer closings have passed, the clocks are turned back and the kids are settled in their school and after school routines.

Undertakings will always be part and parcel of any property practice. We provide undertakings with regard to releases of mortgages, payouts of mortgages, discharge of liens, and satisfaction pieces for judgments, to name a few. We all experience some of the age old problems with regard to unfulfilled undertakings. For example:

1. What time frame is reasonable for the fulfilment of an undertaking?
2. What do you do when the lawyer who has provided the undertaking has not responded to repeated requests to do so?
3. What do you do when you have no written verification of the lawyers undertaking except what you have confirmed in your closing letter? Or in your conditions of escrow?

Sometimes however a property season gives us new dimensions to old problems. For example:

1. If a lawyer is bankrupt - is there anything which prevents the acceptance of their undertaking? What if you don't know they are bankrupt? What if the undertaking is financial in nature? What if the lawyer is a sole practitioner? Is it different if the lawyer is within a larger firm.
2. You're selling a property for a client that you acted for last year when they bought. There are unfulfilled undertakings remaining outstanding that were given to you during the purchase transaction. Is the new purchaser's lawyer obligated to accept the renewed undertaking of the old seller's lawyer? If the new purchaser's lawyer asks for the undertaking from you - can you give it based on the undertaking you received?

There are no absolute rules. The acceptance of and provision of undertakings will always relate to the nature of transaction and the lawyers professional judgment. Hopefully we will have the courage to exercise our professional judgement reasonably. However, when we accept an extended or renewed undertaking that remains

outstanding from a previous transaction, are we extending professional courtesy at the risk of doing our clients a disservice? Is the extension of professional courtesy reasonable? Are we creating a personal liability to complete the undertaking if the other lawyer does not do so?

If we are truly going to extend to others professional courtesy we will declare the months of October and March "Amnesty months". September was "Amnesty month" at the library and I, with great relief, took stock of all my family's overdue books and piled them into the car, to return to the library. So let us all share in a sense of relief by taking stock of those unfilled undertakings festering on our desks and lurking in our filing cabinets, and taking a moment to list them - and fulfill them.

We all need a nudge every now and then to deal with those old files. So, if your having problems collecting on an undertaking - send a copy of this article to the lawyer who gave it. I've emptied out a drawer waiting for copies to be sent to me.