

RESALE OF CONDOMINIUM UNITS - THE AGREEMENT OF PURCHASE AND SALE

I. INTRODUCTION

Whether acting for a Vendor or Purchaser in the resale or purchase of an existing condominium unit, our role is to ensure that the property that is the subject of the transaction is effectively conveyed. Inherent in that task is ensuring that our clients fully appreciate the nature of what they are buying or have to sell.

This paper is not a research paper - its purpose is merely to provide an overview of some of the practical points you should consider and discuss with your client in resale condominium transactions. Consideration must be given of the ways in which the standard form residential agreement of purchase and sale should be modified to reflect the unique characteristics of condominium ownership. We must be careful to ensure our approach is practical and that our advice is tailored to the particular circumstances of our client, whether Vendor or Purchaser. Identification at the outset of their particular concerns will minimize unwelcome surprises at the time of closing.

II. THE "RESALE" TRANSACTIONS

By way of introduction and for the purposes of this paper, the term "resale transaction" is used to describe the transfer of condominium units that have had at least one owner, other than the developer, since their construction. It is essential that our clients appreciate that contrary to single family residential ownership the components of the condominium property being conveyed are a blend of exclusive and shared use characteristics:

1. The unit: Delineated from the interior wall and floor surfaces in; together with exclusive use of such unit.

2. Common Elements: The Units' percentage shares in the common elements and all rights and obligations associated with that percentage to be enjoyed in common with other unit owners;
3. Shareholding in the corporation - in accordance with the percentage of unit ownership; and
4. Limited Common Elements - those areas outside of the unit that the owner enjoys exclusive use of (e.g. Parking space, storage area).

Any agreement of purchase and sale, to effectively transfer all the property interest, must review each of these components to determine their applicability.

III. THE "STANDARD" FORM OF AGREEMENT OF PURCHASE AND SALE

The "standard" form to which I refer is the Nova Scotia Real Estate Association's form of purchase and sale for property transactions with which you are all familiar. For condominium transfers the use of the standard form will be restricted to resale transactions (hopefully). Some property lawyers, if presented with the option, might prefer to draft from scratch a separate agreement tailored to the particular transaction that their purchaser client is involved in.

However, most real estate agents are acquainted, some particularly so, with the variations that are necessary to adapt the standard form agreement to the resale transaction. That being so, our role at the outset is usually restricted to ensuring that the variations as drafted by the agent protect the interests of our vendor or purchaser client in their particular circumstance. To effectively review the agreement documentation, we must familiarize ourselves with the ways in which the standard agreement are not suited for resale transactions.

IV. TAILORING ASPECTS OF THE STANDARD FORM AGREEMENT

A. THE PROPERTY DESCRIPTION

Identification of the property that is being conveyed is the first basic consideration. As in any property transaction, the property must be described with sufficient detail to remove any question whatsoever as to what is being bought. In resale transactions, the civic number may be used, or the legal condominium unit number. Often the civic number is more appropriate as it is easy to make a mistake on the unit number, which may require reference to a level and building number, and in all cases a Condominium Corporation number.

The identification of the property will not at this point reflect all of the four components as set out in Section I above - only the first element will be described. Care should be taken that the other three elements, if all are applicable, are sufficiently described elsewhere in the agreement in such a way that they are clearly part and parcel of what is being purchased. In particular any exclusive use common elements should be specifically enumerated as being intended to be included in the purchase price. In addition to the realty interests, chattels often form part of the resale transaction, and while they are for the most part fixtures, they should be described in the agreement specifically as being included in the purchase price rather than relying on the common law cases relating to the definition of fixtures and your opposing counsel's familiarity with such case law at the time of closing.

B. DOCUMENTATION TO BE PROVIDED:

There are many documents to be provided to the Purchaser's solicitor in resale transactions to facilitate the examination of the Vendor's title. The obligation contained in the standard form agreement for the Vendor to provide "a metes and bounds description" is of little

value to the Purchaser's solicitor in condominium transactions. While current condominium agreement forms in other jurisdictions (notably Ontario) appear to take great care to remove any obligation of the Vendor to provide Condominium Corporation documents, I cannot personally follow this recommendation. An agreement should provide for the furnishing to the Purchaser of the documentation and in addition should specify a time frame for its examination (See Sample Clause No. 1).

Earlier drafts of the standard form for condominium transactions in Ontario created an obligation for the Vendor to provide the documentation. I am not aware of the developments leading to the subsequent removal of this obligation but cannot agree that the Purchaser should be put to the cost of obtaining these documents.

While in standard residential transactions care is taken to ensure that the written metes and bounds description matches the filed or "approved" plan boundary references, in resale transactions, care should be taken to ensure the unit your clients are purchasing is in fact the exact unit that they intended to buy. Review the plan with your client and place it within your client's knowledge of what was offered for sale. This concern, while associated predominately with new construction condominium purchasers, is also still of concern in resale transactions.

In the course of your inquiries for tax and betterment status, try to ensure that the status for the civic number is also the status for the correct legal unit being purchased. This process may not be as straight forward as it first appears. Confusion has occurred in the past as a result of changes made to the numbering sequence of the condominium units during the approval and ultimate filing processes.

The examination by you of the Condominium documentation should identify any unusual condominium characteristics and establish whether any further consents are required for the transfer of a condominium unit by the Condominium Corporation. There may be limitations on the nature of the

occupancy, which may include occupational limitations, leasing restrictions, age or pet limitations. Your client may ask you your opinion on the enforceability of such restrictions. Some of them have been the subject of litigation especially since the emergence of the Canadian Charter of Rights and Freedoms. (Yorke Condominium Corporation No. 216 v. Borsodi) (1983) 42 O.R. (2d) 99).

In reviewing your condominium documentation, your client should become acquainted with the nature of condominium ownership including the use of common elements, share ownership in the corporation, and participation by way of voting rights. Contact by your client with other existing unit owners may, depending on the size of the condominium corporation, be extremely informative on the effectiveness of management within the corporation and may identify day to day practical problem areas experienced by smaller corporation shareholders.

C. CONVEYANCE DOCUMENTS:

Conveyance by Warranty Deed is for the unit itself and the common elements appurtenant thereto and is subject to the Declaration and By-laws of the particular Condominium Corporation. If you wish a Bill of Sale for any chattels that are to be included this should be specified in this clause.

D. INSURANCE CLAUSE:

The insurance clause in the standard agreement should be deleted and replaced with a clause specifically tailored for resale transactions. (See VII Sample Clause No. 2). This topic has been thoroughly covered in an earlier paper of Frank Powell's and I do not propose to dwell on it at this point in my presentation except to indicate that the standard insurance clause is clearly inappropriate to reflect the obligations of the Vendor in resale transactions for the intervening time frame between the acceptance of the offer and the closing of the resale transaction.

In drafting a specific clause as indicated in VII Sample Clause no. 2, consideration of the purchaser's right to make an election to terminate the agreement should be viewed in conjunction with the provisions of the Condominium Property Act, S.N.S., 1970-71, c. 12, s. 23.

E. CLOSING ADJUSTMENTS:

Most of the standard closing adjustments are still applicable to resale transactions. Noteable exceptions however are common expenses, contingency reserve balances, and parking costs, if charged as a separate levy. Care should be given to include in the agreement reference to these specific adjustments (See VII Sample Clause No. 3). Inquiries should be made at the time of the drafting of the agreement as to the exact amount of the monthly common expenses and whether they are paid in advance or arrears. This will determine the manner in which this adjustment is made on closing. Inquiries should be made as well as to the amount of parking expenses, if any, and specific reference made to this adjustment.

With respect to credit balances and contingency reserve accounts, the manner of dealing with these will be different depending on whether you are acting for a vendor or purchaser in a resale transaction (See VII Sample Clause No. 4).

Silence in an agreement as to the manner of dealing with any credit balance in the contingency reserve account may result in the vendor losing his rights to recover these monies as it is not a credit balance that the Condominium Corporation recognizes as an asset of the unit owner. The credit is considered to attach to the unit and not its owner from time to time.

F. SPECIAL CLAUSES TO BE ADDED TO AGREEMENT:

There are some recommended additional clauses to insert by way

of schedule or otherwise to the standard form agreement which do not appear in any form at all in the agreement of purchase and sale. These additional clauses relate to the provision of estoppel certificates and additional vendor warranties. Both clauses would apply in all resale transactions.

- (i) **Estoppel Certificate** - It is a matter of practice that the Vendor has become responsible for any cost associated with the obtaining of an estoppel certificate by a Purchaser. There is no obligation created in the standard agreement however, and this should be the subject of a separate clause (See VII Sample Clause No. 5). As the Purchaser's lawyer, the request for an estoppel certificate from the Condominium Corporation should be specific. Verification should be requested for (a) the status of the contingency reserve account; (b) the common expenses, whether paid in advance or in arrears, and (c) the status of any special assessment whether made or contemplated as a result of recent capital expenditures. As with a tax certificate, the estoppel certificate should be addressed to the purchaser or their solicitor.

Even if a formal assessment has not been made by a condominium corporation against individual unit owners for repairs carried out to the condominium building, the condominium corporation may be required to outline the special assessment pending in the provision of an estoppel certificate or lose their right of recovery against the Purchaser. (Halifax County Condominium Corporation No. 5 Cowie Hill v. McDermaid (1982) 24 R.P.R. 248)

- (ii) **Vendor's warranties** - There are some particular matters that the Vendor should specifically warrant in resale transactions (See Sample clause No. 6). These are matters which may become apparent in the estoppel certificate, once

received, but it should be clear that the purchasers offer does not anticipate the assumption of any levies on special assessments current or pending, if such is the case. These charges can be significant and may substantially affect the intentions of the parties.

These warranties consist substantively of matters of which the Vendor would have been given due notice and therefore the Purchaser is acting reasonably in requesting confirmation of the Vendor's knowledge. For example, there may have been lengthy discussions at a meeting of the unit owners with respect to a pending capital expenditure that would not be reflected in an estoppel certificate. The knowledge of the vendor in this instance is critical as it may affect the purchaser's desire to complete the transaction on certain terms and conditions and with certain financial parameters.

V. CONCLUSION:

In reviewing the manner in which the standard form agreement of purchase and sale should be tailored in resale transactions, I have provided some sample clauses. The drafting of these clauses is by no means definitive and care should be given that any clause drafted reflect the particular circumstances of your vendor or purchaser client.

In the Metro area, the Halifax-Dartmouth Real Estate Board is considering standarizing as far as possible the specific clauses applying in resale transactions. This is a difficult process, as the real estate agents are obligated to their vendors and some of the amendments discussed in this paper, for example vendor's warranties, would not be considered to be in the vendor's interest. However, irrespective of the legal advice we provide to our clients which may vary depending on whether our client is buying or selling, an ongoing familiarity with the nature of resale

transactions is essential for the property practitioner.

CHECKLIST WHEN REVIEWING AGREEMENTS FOR RESALE TRANSACTIONS

- A. Description of Property - unit and chattels
 - common elements
 - limited elements
- B. Documentation to be provided for examination of title
 - declaration, description
 - bylaws - rules and regulations
 - management agreement
 - insurance trust agreement
 - financial statements
- C. Conveyance documents
 - warranty deed
 - bill of sale
- D. Insurance Clause
 - options of termination
 - government of corporation
- E. Closing Adjustments
 - contingency reserve account
 - common expenses
 - estoppel certificate
 - special assessments
- F. Additional clauses:
 - (a) estoppel certificate requirement
 - (b) vendor's warranties - legal actions,
 - major capital expenditures
 - special assessments or levies
 - no arrears common expenses

SAMPLE CLAUSES TO ADD TO STANDARD FORM AGREEMENT IN RESALE TRANSACTIONSSample Clause No. 1 Documentation

"This offer is subject to the Vendor providing to the Purchaser a copy of the Condominium Corporation No. _____ documentation, including a copy of the Declaration, Description, By-Laws, Management Agreement, Insurance Trust Agreement, Common Element Rules and Regulations, and all financial statements of the Corporation received by the Vendor. The Purchaser shall be allowed _____ days from the receipt of the documentation within which to examine it and make any objections to the Vendor in writing, failing which Purchaser shall be deemed to have accepted the documentation as satisfactory."

Sample Clause No. 2 - Insurance

"The unit and other chattels, fixtures and common elements being purchased shall be and remain at the risk of the Vendor until closing. In the event of damage, the Purchaser may, at his option either elect to have the insurance proceeds applied to the repair of the damaged unit, building or common elements as the case may be, in accordance with the terms of the Insurance Trust agreement, or terminate this Agreement with all deposit monies refunded to him in full without interest or further liability."

Sample Clause No. 3 - Closing Adjustments (Purchaser)

"Monthly common expenses of approximately \$ _____ (and monthly parking levies of approximately \$ _____ if applicable) will be adjusted on the closing date as part of the usual closing adjustments, together with any debit balance in the contingency reserve account for the unit and any balances owed on special assessments. Any credit balances in the contingency reserve account are included in the purchase price and do not form part of the credits to the Vendor on closing adjustments."

Sample Clause No. 4 - Closing Adjustments (Vendor)

"Any credit balance in the contingency reserve account shall be a cost to the Purchaser in addition to the purchase price on closing."

Sample Clause No. 5 - Estoppel Certificate

"Vendor shall be responsible for the provision to the Purchaser of an estoppel certificate from the Condominium Corporation."

Sample Clause No. 6 - Vendor's Warranties

"Vendor warrants to the Purchaser that there are no legal actions pending, no major capital expenditures contemplated or made, and no special assessments or levies which would affect in any way the subject

unit being purchased. Vendor further undertakes to give immediate notice of any knowledge or notice received of these matters between the offer acceptance date and closing date."

VIII.

REFERENCE MATERIAL

1. Condominium (Housing)
Canadian Bar Association - Ontario Branch
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3. The Law and Condominium Development
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Proceedings of a Conference held at the Faculty of Law
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4. Rosenberg, Alvin B. Condominium in Canada
Agincourt, Ont., Canada Law Book, 1972
Looseleaf. Kept up to date by supplements
5. (Ontario)
Burns, A.D.
Condominium: The Law and Administration in Ontario
Toronto: Carswell, 1981
6. Practical Property - CLE Conference 1982
D. Clark - "Preparing The Agreement of Purchase and Sale
for Condominium Units"