

Conditions and Escape Clauses



By Brian Madigan LL.B.

There is always a great deal of confusion and discussion concerning conditions and escape clauses contained in agreements relating to real estate. But, it is really rather straightforward and the documentation depends upon how the escape clause was written in the first place.

There are really just **two categories**:

- 1) pending deals (which require confirmation), and
- 2) confirmed deals (which include an escape).

Pending deals are generally described by a condition precedent clause, and confirmed deals with a provision for escape are evidenced by the condition subsequent clause. The condition precedent clause begins with the words “this agreement is conditional upon....” and the condition subsequent clause begins with the words “the purchaser shall have the right to terminate...”.

Conditions Precedent

There is no deal, until the condition is fulfilled, satisfied or waived. Usually, the condition will relate to a specific matter like mortgage financing or the physical state of the premises. Once it is satisfied, then in order to confirm the transaction and make sure that there is a binding agreement between the parties, this matter needs to be documented within the relevant time period.

This documentation can be accomplished in several ways which include either both parties signing or just one party signing. If a waiver provision has been included since the condition might be to the benefit of one party only, then a Waiver can be executed by that party alone. In many cases, realtors will often have both parties execute an Amendment deleting this clause. This is unnecessary.

True Conditions Precedent

This is a sub-category of conditions precedent, but it is rather unique in nature. The condition benefits both parties. Examples might include the compliance with the provisions of the Planning Act or registration of a condominium. If a vendor and purchaser enter into an agreement to convey a piece of property that is to be severed from a larger property and it doesn't get severed, then there is no deal. Same thing is true with respect to a condo.

If a purchaser were to offer to buy an apartment on the 27th floor of a building and it never gets registered then there is no deal. No one can waive this requirement. It benefits both parties. And, both parties cannot waive this requirement because there still is no severed property or apartment on the 27th floor. The actual decision is out of their hands and rests solely with a third party.

Another example might be a condition related to the assumption of a first mortgage upon the consent of the first mortgagee. If the mortgagee doesn't consent, then there is no deal.

Here, the only step that can be taken by the parties is to extend the time to permit fulfillment of the condition. They cannot waive the condition itself or delete the condition in the case of the *Planning Act* example or condominium example. In respect to the first mortgage assumption, both parties could delete that provision and agree to a new first. So, when drafting such a condition concerning mortgage financing, it would be wise to be aware of the rules related to true conditions precedent.

It is also noteworthy that almost every new condominium agreement of purchase and sale contains a true condition precedent clause.

Conditions Subsequent

In this case, the deal has been struck. The contract is binding but it does contain an "escape clause". The buyer has for example the right to terminate the agreement upon certain conditions. These are all the same reasons that you might have included in a condition precedent, ie. mortgage financing, condition of the premises etc.

The advantage is that if you do nothing, the deal is a "go". So, when the relevant date arises, there is actually nothing to do. You simply allow the time period to expire, no running around getting document signed, nothing like that. However, this doesn't seem to influence many realtors who insist on having either waivers, fulfillment statements or amendments deleting this clause signed. The purpose of this clause in the first place was to eliminate all this extra paperwork.

The leading case dealing with all three types of conditions was *Turney vs. Zhilka* in the Supreme Court of Canada in 1959. The Court preferred the use of conditions subsequent. Within about 10 years the Law Society adopted conditions subsequent as the preferred way of doing business (except when a true condition precedent was required). The real estate industry never adopted the change. As a result, the Law Society went back (about 20 years later) to using both types and that arrangement continues to the present time.

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