

Irrevocable Clause ~ Improper Use



By Brian Madigan LL.B.

The irrevocable clause in an agreement of purchase and sale is simply the time limit imposed upon the other party to respond.

The major criticisms of realtors concerning the use of the irrevocable clause is that:

- 1) they are too short, and
- 2) they are not changed.

The problem is that an **artificial sense of urgency** is imposed. This is good for the realtor, or the two agents assuming that both the seller and the buyer are independently represented. But, how is this ever good for either client?

Real estate agents will argue that it imposes an obligation upon the other party to act quickly and make a decision. That is apparently to your advantage. What they often don't say, is that puts that same pressure upon you.

Obviously, we cannot be talking about bidding wars and the sale of hot properties at the height of a sellers' market. However, most of the time we are dealing with simple straightforward transactions. The seller wants to sell and the buyer wants to buy. All we have to do is negotiate the proper terms. So, why all the extra pressure?

If there are potential issues for the buyer in terms of the financing and the sale of his own home, why not have the buyer visit with his lawyer and seek the lawyer's approval of the wording and the terms. This way, when a suitable property is located, it will be easy to draw an offer, and have it approved by the lawyer.

Unfortunately, most residential deals are done in the off-hours, after most law offices are closed. This often means that both parties are left without legal advice.

Initially, the buyer sets the time frame for the response. Many times, it is due that same day. And quite frequently, the Offer may be accepted up until midnight. So, this leaves the seller without the ability to consult with his lawyer or mortgage broker or financial advisor, or whomever else he may wish to consult. So, now the pressure is placed upon the seller.

Most of the time there will be a "signback", some alteration to the terms, usually

the price. The seller's agent has ample opportunity to remove any pressure by extending the irrevocable time until tomorrow. But, they don't. So, now the pressure is upon the buyer to decide before midnight. And, so it goes until the time period runs out and the deal has been signed.

What's all the rush? Why all the running around? Why not have people consult with their advisors.

The issue here is that the initial irrevocable time was short at hand. The second problem that arose was that the irrevocable time was not changed to permit both parties to enter into an agreement without the extra time pressure being imposed upon them.

There are, of course, situations in which there will be a great deal of urgency, however let's be honest about that, they would be fewer than one in a hundred. So, why the urgency with the other 99?

The only true explanation is that the realtors are self-motivated and working the deal, rather than acting in the best interest of their respective clients.

It is very unusual to find that someone would be prepared to put in an offer on a \$500,000 property, in which they propose to reside for the next 15 to 20 years, tonight, but if the deal went over to tomorrow they would walk away and buy something else.

If I knew that were the case, I wouldn't sell to that buyer, because they are likely to find a way out of the deal for some other reason. If their decision is that capricious, then they are too risky to deal with. Move on and find another buyer, this time someone who is reliable, and not quite so fickle.

When practising law, I found that a one day's delay never hurt the deal.

In the commercial real estate field, things are quite different. The realtor acting for the buyer will often contact the seller's agent and ask "how long do you need for your client?"

Offers that are open for acceptance for a week are not uncommon. Also, business is conducted in business hours, Monday to Friday. If an Offer is open for acceptance for five days, and the seller needs more time, then it will either be granted or the seller will permit it to expire and propose a counter offer with a reasonable period of time for acceptance. Generally, in the commercial field, the agents will be experienced, the deals will be more complicated, the clients will be sophisticated, but most importantly, the parties will be respectful of one another.

If a realtor shows up late on a Friday night with an Offer due at midnight, then they must be in the residential business. Commercial deals are negotiated during business hours.

Naturally, there are exceptions in the commercial field, but this certainly begs the question as to why the residential agents impose artificial deadlines. This cannot work in the best interests of their clients.

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