

Realtor's Warning Clauses

By **Brian Madigan LL.B.**

Within the last few years it has become increasingly common for realtors to place warnings within the terms of the agreement of purchase and sale. Precedents for such clauses abound, and the following is an example:

“The Buyers acknowledge that they have been advised to seek outside professional advice such as lawyers, insurance agents or brokers, title insurance, mortgage consultants, and the Chief Building Inspector for the Regional Municipality of Peel prior to the signing of this offer on the subject property.”

The hope and expectation is:

- The Courts will recognize that the realtor is doing his job
- The advice looks like good advice
- If the purchaser were smart, then they would take the realtor's advice
- The realtor has disclaimed responsibility
- The purchaser is now the only one to be blamed for their own actions

First of all, I don't like the warning clause. The agreement of purchase and sale is just no place for that type of discussion. It's not very professional.

If my agent started warning me about things and giving me notices in documents directed to other people, I would be offended, and I know both purchasers and vendors who have been offended by similar clauses.

There are no other similar documents that I have ever seen in legal practice.

Now, if you are a realtor and want to protect yourself, the best way is to write a letter or similar document explaining all the problems. It can be delivered to the client. It's private and confidential, which is specifically what this sort of advice should be.

You can prepare two copies and give both to the client. He keeps the first one. On the bottom of the second one, there is a provision included to the effect that the client acknowledges having received a copy. This one he gives back to you for your file. Or, send it by e-mail or fax and you have "proof" that it was, in fact, given to the client.

A final method, and more formal, particularly if you don't want the client to go ahead, is to have a separate document prepared which is an authorization.

This document will direct you to go ahead with the transaction, notwithstanding

your advice to the contrary. That's the practice followed by lawyers, and I think it makes a lot of sense here.

I raised the issue of this type of clause being "bad practice" at RECO's Annual Meeting in 2006. They said they would look into it, but I suppose we'll have to wait until this year's AGM to find out whether there is any response.

Here is what the Acknowledgement might look like:

“Acknowledgement

To: John Smith, the purchaser

Re: 25 Elgin Street, Mississauga

Authorization and Direction

The purchaser hereby acknowledges having been advised to seek outside professional advice including solicitors, insurance agents or brokers, title insurers, mortgage consultants, and the Chief Building Inspector for the Regional Municipality of Peel prior to the signing of this offer on the subject property.

And more particularly, the purchaser:

- Authorizes and Directs the agent to prepare and submit this Offer without such advice*
- Accepts all risks occasioned by reason of the failure to follow such advice*
- Releases the agent from all liability arising by reason of such failure*
- Indemnifies and agrees to save harmless the agent from any liability arising from such failure*

Dated at the City of Mississauga this 20th day of February 2007.

Signatures etc.”

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You will of course see the difference. This is a private and confidential document between the agent and the principal (realtor and client). It is not there for all to see, particularly the other side in the proposed transaction.

Courts might be a little concerned about the first approach, and will not permit it to have its intended effect. The second approach is far more professional and is similar to what would be prepared in a law office in a similar situation.

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