



Purchase Agreements:

Condition Precedents in Purchase Agreements: What they Are and How to Use Them to Your Advantage

By
Paul De Francesca
Lawyer
&
Amanda Carpenter
Associate Lawyer

In *THMR Development Inc. v. 1440254 Ontario Ltd.*, the vendor opted to walk away from a sale agreement of a mixed use residential/commercial property located in Port Perry. The disappointed purchaser elected to go to court to seek an order for “specific performance,” wanting the court to order the seller to convey the property to the buyer on the basis that the property was unique and that a remedy of damages would be insufficient. The vendor claimed that it had been justified in halting the sale as the purchaser had failed to satisfy a true condition precedent. This precedent required that the current lender approve the purchaser’s assumption of the existing closed mortgage on the property.

As a starting point, the term “condition” should be defined as “an explicit contractual provision which provides that a party to the contract is not obliged to perform one or more of its duties thereunder unless some state of event occurs or fails to occur.” Conditions may be categorized as either those precedent or those subsequent. If a condition precedent is not satisfied, then the contract is deemed to have never come into existence. True conditions precedent, which is a subset of conditions precedent, usually benefit both parties to the contract and cannot be waived by one of the parties, unlike conditions precedent that can be so waived. The true condition precedent in the aforementioned agreement of purchase and sale reads as follows:

“The completion of this transaction is conditional until the 40th business day following the date upon which this Agreement is fully executed (the “Assumption Approval Period”) on the Buyer being approved by Alterna Savings and Credit Union Limited (“Alterna”) to assume the existing first mortgage on the Property (the “Alterna Mortgage”) on terms acceptable to the Buyer. **The foregoing condition is a true condition precedent and cannot be waived.** Following the



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Execution of this Agreement, the Buyer shall diligently and expeditiously seek approval of Alterna for the said assumption. ... In the event that the said condition precedent relating to the assumption of the Alterna Mortgage is not satisfied within the Assumption Approval Period, this Agreement shall be at an end and the Deposit together without interest earned thereon shall be returned to the Buyer in full. If the Buyer, at the Buyer's sole and absolute discretion, is not satisfied with the terms of the existing first mortgage or the terms of the said assumption of the existing first mortgage within the Assumption Approval Period this Agreement of Purchase and Sale shall become null and void... .”

The vendor argued that this condition was not fulfilled because, while Alterna had consented to the purchaser's assumption of the mortgage by letter, the purchaser had not formally accepted Alterna's terms approving the mortgage assumption by signing and returning the approval letter prior to the end of the assumption approval period. Since this condition was not met, the vendor argued, the agreement of purchase and sale was at an end. The Ontario Court of Appeal dismissed the vendor's argument and determined that the true condition precedent in question was fulfilled when Alterna sent its approval letter, which was then altered slightly to the purchaser's satisfaction. Furthermore, the purchaser was not obliged to confirm acceptance in writing by signing and returning the mortgage assumption approval letter to Alterna. Providing a remedy to the purchaser, the Court of Appeal ordered specific performance, agreeing with the purchaser that there were no suitable alternative commercial properties available in the Port Perry area.

In essence, due care should always be exercised when drafting terms and conditions in agreements of purchase and sale and, more specifically, where a party wishes to rely upon a condition to terminate a transaction or obviate its obligations under said agreement. In these circumstances, it is recommended that a close review of the stipulation be undertaken by a real estate lawyer. We can assist you in ensuring that your purchase agreements are drafted properly and that all desired conditions are safely included.

