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## Conditional contracts—how much discretion does the purchaser really have?

Agreements for sale and purchase that are conditional always have the potential to raise problems. However, if the new REINZ agreement is used the issues arising from condition clauses could be more prevalent.

### Satisfaction of conditions

Many lawyers have reservations about the new REINZ agreement.

The process provided for in the REINZ agreement is a significant departure from that in the existing ADLS/REINZ agreement. For example, under the REINZ agreement if the purchaser wants to cancel the agreement on the basis that a condition is not satisfied a 'refusal notice' is required. The refusal notice must be given promptly, set out the reasons for not giving approval and explain 'what is reasonably required to rectify the problems disclosed in the notice if they can all be rectified'.

The ADLS/REINZ agreement provides for a different procedure. How the conditions operate is clearly set out in that agreement and is a procedure that is 'tried and tested'. It is important to remember that if the condition is not satisfied or waived, the contract does not automatically come to an end. Instead, the parties have a number of options. An extension of the period for fulfilment of the condition can be granted by the relevant party or the condition can be waived by the party whose sole benefit it is for. If one party wants to bring the contract to an end, they must give notice to the other party before the condition is fulfilled or waived.

Parties to an agreement for sale and purchase often include further conditional clauses; for example providing for due diligence or requiring the mortgagee's consent. When additional clauses are inserted the wording of those clauses can be crucial.

### **Wording of conditional clauses**

The wording of condition clauses is important regardless of whether the standard clauses in the REINZ/ADLS agreement, the new REINZ agreement, or specially drafted clauses are relied on, especially if the purchaser wants to cancel the agreement on the basis of non-satisfaction of a condition.

One issue that has been considered by the courts is whether the condition is required to be satisfied according to a subjective assessment, or according to the objective assessment of a reasonable person possessed of the same background knowledge and information as the party making the decision. In each case, the answer will depend on the terms and conditions of the agreement and, potentially, the surrounding circumstances.

Case law suggests that unless a contrary intention is clear from the agreement, the courts will support the objective approach (i.e. requiring the purchaser to behave reasonably). The purchaser's objective is to ensure that the wording allows the purchaser to cancel the agreement on the basis that they personally are not satisfied so that a subjective assessment will apply.

### **What does this mean for purchasers and vendors?**

Purchasers and vendors alike need to carefully consider, and seek advice on, the wording of condition clauses.

If a purchaser decides to cancel the contract on the basis of non-satisfaction of a condition, the wording of that clause could be crucial. When entering the agreement the purchaser should ensure that the clause makes it absolutely clear that it is only the actual purchaser's opinion that matters; not that of a 'reasonable person'.

It is also important to note that when there is a condition for the benefit of one party, that party must take all reasonable steps to satisfy the condition. This condition is expressly provided for in the ADLS/REINZ agreement. A failure to use all reasonable endeavours to fulfil the condition is a breach of contract.

The REINZ agreement provides that approval cannot be unreasonably withheld. This condition is likely to mean that under the REINZ agreement only an objective assessment is permitted for the standard conditions. On the other hand, under the ADLS/REINZ agreement a subjective assessment could be allowed depending on the wording of the particular clause. Clause 14 of the REINZ agreement applies to the title, LIM, builder's report, and tenancy conditions and 'any other conditions in the agreement to which this clause 14 expressly applies'. If one party wants to have a purely subjective right of approval, it would be prudent for the additional clause to expressly exclude the application of clause 14. However, we would prefer that the ADLS/REINZ agreement is used rather than the new REINZ agreement.

If the purchaser proceeds to cancel the agreement on the basis of non-satisfaction of a condition the vendor may want to seek to enforce the agreement. In these circumstances, the wording of the clause will obviously also be important from a vendor's perspective. The form of agreement used could also determine the outcome. We recommend obtaining legal advice in respect of condition clauses and enforcing a contract.

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If a vendor seeks to enforce a contract, the issue arises as to who has to prove what. This has also been considered by the courts and will depend on the circumstances of the particular case. By way of example, if the purchaser attempts to cancel the contract on the grounds that the condition is not met, the vendor may assert that the condition was met or that the purchaser did not take all reasonable steps to satisfy the condition. The purchaser would then have to prove, evidentially, why the condition was in fact not met or that they took all reasonable steps in respect of satisfying the condition.

### **What should you do?**

When entering into an agreement (whether conditional or not), obtain legal advice. Some agreements appear unconditional but still contain 'outs' for the purchaser.

If possible, do not sign the agreement until it has been reviewed by a solicitor.

Keep in mind that the wording of the particular clause, as well as the form of agreement used could be crucial, especially if:

- you are the purchaser and you decide to cancel the contract on the basis of non-satisfaction of a condition; or
- you are the vendor and you want to enforce a contract the purchaser is attempting to cancel.

### **Start a conversation**

If you entering sale and purchase agreement or would like more information on this article, talk to a Kensington Swan property law expert.

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