

E&O BULLETIN



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A common clause in agreements for purchase of a condominium unit has caused problems which to some extent may be avoided when the transaction is for all cash. It reads: "The Purchaser acknowledges that the Unit being purchased hereby and other units may on Deed Registration, still be subject to a blanket mortgage in favour of the First Mortgagee and that a partial discharge for the same may not be available on the aforesaid date. In such event, the Vendor will provide the Purchaser with a written undertaking to register the partial discharge as soon as reasonably possible after the Purchaser has provided and delivered all assumption agreements and other required documents to the Vendor, and the transaction shall be completed notwithstanding that the blanket mortgage is still outstanding in respect of the Unit being purchased hereby. In this Agreement, the word "discharge" shall include a Land Titles Cessation". The clause has not been before the Courts but appears not to be appropriate to a cash transaction. Many solicitors strike it out in those circumstances. Often a purchaser brings in the agreement already signed and the problem could then arise that notwithstanding there are no assumption agreements, the purchaser would seem to be required to close and to accept the vendor's undertaking to register a partial discharge at some time in the future. The danger is that the vendor may be unable to honour the undertaking if, for example, it becomes insolvent.

The following steps should be considered by a lawyer acting for a purchaser who has signed an agreement containing the clause when the transaction is for all cash:

1. Insist on a partial discharge before closing.
2. Pay the funds to the vendor's solicitor in return for a personal undertaking to obtain and register a partial discharge.
3. Make the cheque payable to the developer and mortgagee jointly or to the mortgagee and obtain a partial discharge.
4. At the very least, find out the amount required to obtain a partial discharge and try to obtain one directly from the mortgagee.
5. Refuse to close and tender though this might be unrealistic for practical reasons.

The Hobson's choice between paying the full purchase price against a mere paper promise or being in default under the agreement might well be resolved in favour of being in default though this would, of course, depend upon the particular circumstances.

Possibly one could rely on another clause often found in such agreements and demand "... that the title is good and free from all encumbrances, save as herein provided ..." there being none provided or contemplated.

Kenneth Jarvis,

Secretary.