

Addressing the pitfalls of standard documents

Upcoming OBA session to focus on avoiding problems in real estate form

BY DARYL-LYNN CARLSON
For Law Times

While the standard document for residential home sales introduced by the Ontario Real Estate Association seems relatively straightforward, some lawyers have experienced problems using it.

In fact, the standard form document has some issues lawyers should know about that could result in a flawed transaction in the event the parties don't address all of the nuances. Pervasive problems with the document have prompted the Ontario Bar Association to host an educational session for the real property section on Feb. 3 to update lawyers on the possible perils when using the standard form document.

"With the standard document agreement, there are problems," says Jeffrey Schwartz of the law firm Schwartz & Schwartz Professional Corp. He's co-chairing the OBA educational session along with Lori Swartz from LawPRO.

"Lawyers need to be refreshed on what they know and also about some details that they don't realize can affect a transaction," he says.

Schwartz notes roughly 95 per cent of real estate transactions use the standard document even though lawyers have experienced major problems with it.

For starters, Schwartz says the document enables property buyers to provide bad cheques or money orders without any ramifications.

"Some clients are scoundrels, and there are no consequences," he notes, adding he has contacted several banks about bogus payments for property sales that he has handled but hasn't received any constructive responses.

As well, condominium purchase transactions when buying a new property from a developer are particularly troublesome. "When you buy from a developer, they don't use standard agreements, so the lawyer involved will have to sit down and read the agreement thoroughly," Schwartz says. "That can be a problem for lawyers who are used to the standard document."

The document can be particularly problematic for clients seeking to purchase a cottage property, he adds.

"The document doesn't address things like plumbing and septic systems, so lawyers have had a lot of discussion about cases that arise from cottage properties."

As a result, the bulk of the focus during the OBA session on real estate transactions using the standard document will be on what lawyers need to know about negotiations, amendments, and addendums related to it.

"It's not how you draft the agreement but what you should be thinking about when you negotiate the agreement," Schwartz says. "There are so many details that have to be addressed that many lawyers don't know about."

Tom Baulke of Baulke Augaitis Stahr LLP in Collingwood, Ont., agrees that the standard form can be problematic, particularly when dealing with details it doesn't address, such as easement rights and other modifications a purchaser may want to include in a real estate transaction.

At the OBA session in February, he'll be speaking about the standard document's use in a resale transaction and additional clauses that lawyers need to include to ensure the contract holds up, especially if the matter ends up in court.

"There may be specific



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modifications that we should be making regarding the standard form" to accommodate additional details, he says. "If we have an issue, then often

lawyers are left to scramble to make the changes and modifications."

In many instances, lawyers have to modify clauses or add their own to the standard form to tailor the sale for their client.

"A typical condition is structured so that a purchaser can terminate the deal if they're not satisfied with the conditions," Baulke explains. "So lawyers must know how to formulate a condition in an offer in the context of how judges will look at these."

He notes lawyers also need to carefully review the property description in the context of the details provided on the standard form and feel free to make any additional modifications to be sure they address all of the nuances and clients' expectations.

"My approach is going to be that it is a contract, and we can't forget that," Baulke says.

"The majority of the time, we don't have the opportunity to negotiate the offer and terms, but there are contractual things that we need to be looking at in order to make sure there is an enforceable agreement."

Five lawyers will be speaking at the half-day session next month. Louis Radomsky will provide an overview of the forms and possible changes lawyers need to make.

Deborah Bellinger of Nelligan O'Brien Payne LLP in Ottawa will address nuances in a standard condo agreement.

Bradley McLellan of Weir Foulds LLP will discuss the standard recreational property agreement.

Steven Pearlstein of Minden Gross LLP will address the implications of the HST, while Bob Aaron of Aaron & Aaron will wrap up with a talk about the seller property information statement.

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