

ACCEPTED OFFERS AND BACKUP OFFERS

Purpose: To emphasize the risks involved in proposing an amendment to an original accepted offer when a backup offer is in place.

This bulletin applies to a real estate brokerages, brokers, associate brokers and associates.

The basis for this Information Bulletin is an article written by Greg Blanchard of the law firm of Whitelaw Twining. The Real Estate Errors and Omissions Insurance Corporation of British Columbia published it in the May 2009 issue of Risk Report. The Real Estate Council of Alberta (RECA), expresses our appreciation to the corporation and to Greg Blanchard to allow us to use their article in this Information Bulletin.

This article discusses the situation where there is:

- an accepted offer to purchase on a property
- a backup offer for the same property, and
- the parties of the accepted offer agree to change that contract.

This was the background of a Provincial Court of British Columbia decision in *Wright v. Hamster*.

The backup offer was subject to the collapse or non-completion of the first accepted offer that was subject to financing by a certain date. The parties of the first contract agreed to extend the time for removal of the financing clause. The original offer completed within the extended timeline.

The people with the backup offer took the position there was a collapse of the first contract by other parties agreeing to extend the time for removal of the subject to financing clause.

In considering this question, the Court referred to the British Columbia Court of Appeal decision in *B.D. Management Ltd. v. Tajico Holdings Ltd.*, which dealt with a similar fact situation. The backup offer in the *B.D. Management* case was:

The seller and N. had agreed in writing to increase the amount of the deposit by \$25,000 and to extend the completion date. The purchaser under the backup offer claimed that these amendments constituted a collapse or non-completion of the agreement between N. and the seller.

The Court found that the amendments did not reject the original contract. The conclusion was that the parties “did nothing other than to amend a contract in certain non-fundamental details while affirming the continuing existence of that contract.”

Use caution with any proposed amendment to an original contract when there is a backup offer in place. Any changes to the original agreement could result in the “seller ceasing to be obligated under the previously accepted contract of purchase and sale.” For example, a change to the price or to the parties involved could fall into this category. Where there is a backup contract in place and a seller or a buyer under the original contract seeks to change the terms of that contract, you should recommend that your client(s) seek legal advice on the proposed change.

There is always a risk the change may end the original contract and put the backup contract in first place. The seller may be in the unfortunate situation of having agreed to sell the property to two different buyers. It would be wrong for an industry member to conclude the *Hamster* and *B.D. Management* decisions stand for the proposition that **any** change to an original contract will not cause its collapse.

Related information

Legislation

- *Real Estate Act* Rules - sections 41(b)(d), s.57(e)(g)(h)