

Residential Property

Deposits

When agreeing to buy a house or other property it is customary to pay a deposit on exchange of contracts. The deposit is traditionally 10% of the purchase price, but this is often open to negotiation and quite often nowadays the deposit is 5% of the price.

The forms of contract which are used most commonly incorporate 'the standard conditions of sale' which have largely superseded earlier forms. These conditions set out many detailed and important matters concerning the transaction and the way in which it is to progress.

One of these conditions provides that the deposit shall be paid to the seller's solicitor 'as stakeholder'. The effect of this is that the deposit, once paid, cannot be recovered by the buyer unless the seller defaults and equally the seller is not entitled to the money or to have use of it until such time as he has completed the sale in accordance with the contract. In this way, the interests of both the seller and the buyer are safeguarded.

However, the standard conditions of sale also provide that, if the seller is buying another residential property in a related transaction, he may use all or part of the deposit as a deposit in that transaction, and so to this extent the deposit that the buyer will have paid will have been spent and is therefore no longer safeguarded in the manner outlined above.

Whilst it is understandable that the seller may wish to have this facility, this inevitably creates some risk for the buyer; since if the money is no longer held in the stakeholder account between the seller and the buyer, it is not available for return to the buyer in the event that the sale does not proceed for some fundamental reason, eg, the seller goes bankrupt or has so many charges registered against the property that he is unable to complete the sale.

If a buyer has reason to believe that the seller may be in financial difficulties, or that there may be some problem about completing the transaction upon which he is about to embark with the seller, it may not be appropriate for the buyer to take on board the risk of possible loss of the deposit or part of it. In such a case the buyer may not wish to agree to allow the deposit to be released in this way. If for any reason the buyer is not prepared to take the risk (albeit slight) in releasing the deposit in the way outlined, the problem can be overcome in a variety of ways:

- by negotiating with the seller to agree that the deposit shall be held by the stakeholder and not released
- by perhaps agreeing to make some modest payment to the seller to cover his cost of taking out bridging instead, or
- instead of paying a cash sum of money, by utilising the deposit indemnity scheme whereby the buyer merely pays an insurance premium which secures to the seller a cash sum of money in the event that the buyer defaults.

Which alternative will be appropriate will depend upon personal preferences and the respective bargaining positions of the buyer and seller. Even if the buyer has no reason to suppose that any problem is likely to arise in releasing part of the deposit for the seller to use on his own purchase, there can never be any guarantee that such problems may not arise. Inevitably there is always a slight risk in releasing the deposit or part of it and there is no satisfactory way of covering that risk.

The above remarks do not apply in most cases of the purchase of a new property since in these cases the developer normally insists upon the deposit being both paid and released to him on exchange of contracts. However, most buyers will be protected in the event of the bankruptcy or failure on the part of the builder to complete the property, by virtue of the provisions of the NHBC or Zurich Municipal Agreement which will have been entered into on exchange of contracts. Under these provisions, subject to certain conditions, the NHBC guarantees the return of the deposit in the event of bankruptcy or default by the developer.

If you do not wish to allow the deposit you are paying to be released, please speak to the conveyancer looking after your interests who will be pleased to discuss the matter further.

Contact

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