

TALES FROM THE TRENCHES™

BY BARRY C. MCGUIRE

July, 2013

GET IT IN WRITING

A brand-new investor was looking to buy her first investment property. She had a couple of friends who were buying properties left and right using those cheap, high-ratio mortgages. Everybody's doing it right?

She found a realtor and they started looking for property. Fairly quickly they found an appropriate bungalow and put in an offer subject to financing.

I have to think that our brand-new investor and realtor didn't have very much conversation about the whys and wherefores of this new purchase. Why do I think that? Because fairly early on in the mortgage approval process, the mortgage broker wanted confirmation of, "You are moving into the property, right?" The answer was, "What? Of course not. I'm putting in tenants."

Our new member was shocked when the broker said, "But you can't do that. A 5% down payment means that you have to get your mortgage insured by [CMHC](#) or other mortgage insurer." Having no idea this was the rule, but not wanting to stray into the grey (actually in this case, **black**) area, our brand-new member decided to try for a conventional mortgage.

Having upset the financing applecart, time was running out on the financing condition in the offer to purchase. The realtor got a one-week extension to the financing condition, but it wasn't enough. Conventional financing meant a brand-new mortgage application and the application was not yet approved by the time the financing condition extension was expiring.

The realtor asked for a second extension, but the seller was out of town and not available. The seller's realtor insisted that the seller wanted to sell the home and thought, but did not guarantee, that the seller would have no trouble with an extension. The extended financing condition day came and, on the basis of the seller's realtor's comments, our member removed the financing condition. This was now a firm deal.

Unfortunately, the mortgage application process just went on and on and on. A 20% downpayment meant our member needed to get help from parents, in the form of a gift letter. The lenders took a closer look because of the previous history.

Meanwhile the seller returned from his travels and seemed cooperative, but somehow was always unavailable to sign extensions to the closing date, although new dates were discussed and agreed on verbally. Five weeks later when the mortgage was finally approved and the realtor was asking for a new closing date (the latest verbally agreed-to closing date was long passed), the seller said, "I'm not closing. I've changed my mind; I don't want to sell the house."

Despite eloquent and concerted effort by our member's realtor, the seller wouldn't budge. The deal was over and soon the letters appeared from the seller's realtor indicating that they were going to release the \$6,500 deposit to the sellers. There wasn't any way to argue that the deposit was not forfeit because that's what the contract says. If you remove conditions and don't close, the seller gets the deposit.

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Now my concern was whether this investor would have further exposure. When you don't close, a seller has to re-market the property and if they get less than what they were going to get when they sold to you, they can sue you for the difference. I took a flyer and threw up a few red herrings about why our member should keep her deposit. Then I suggested to the seller's lawyer that we would release the deposit without a fight if they would release our member from any further liability. Even though most sellers take the deposit and don't sue, I thought getting a release was going to improve a bad situation at least a little bit. We did get the release protecting against further loss but the \$6,500 is gone.

Lessons Learned:

1. 5% down or other cheap CMHC financing means you are actually moving into the property. Not for a day or a week but you intend to move in as your personal residence.
2. Use a realtor with investment experience
3. To quote Toronto lawyer Shayle Rothman, "If it isn't in writing, it doesn't exist." Get those extensions or any other amendments or changes to a contract ***in writing!!!***
4. If you don't close, you will almost for sure lose your deposit. Plus other seller's losses are potentially your responsibility.
5. Ask for a release in return for a quick discharge of the deposit.

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