ZWICKER DISPUTE RESOLUTIONS

JACK ZWICKER
BA, LL.B., LL.M (ADR), MED, C. ARB

7100 Woodbine Avenue, Suite 118,
Markham, Ontario, L3R 5J2
Tel: (905) 604-0625
e-mail:zwickeradr@gmail.com

TIPS FOR REALTORS ON EARLY RESOLUTION OF CONFLICT IN A CHANGING REAL ESTATE MARKET

INTRODUCTION

As we all know the change made in 2017 in Ontario land transfer tax affecting non-residents along with the federal government's imposition of a borrower's stress test, rising interest rates and more conservative mortgage appraisals delivered a four pronged punch that seriously slowed down the real estate market by September, 2018.

One of the immediate by-products of these changes were lawsuits by sellers who had bought in a higher market and were forced to sell in a lower one if indeed they were able to sell at all.

Of course when transactions fail, your clients will look to you for advice and support. The most important piece of advice that you can provide them with is that the change in the real estate market does not need to be dealt with by reflexively running off to court. Here are the options your clients need to understand.

WHY LITIGATION MAY BE THE WORST POSSIBLE ALTERNATIVE

For a number of years the media have covered stories about the shortage of judges and courtroom space. The situation in the Greater Toronto Area is so bad that civil litigation is taking upwards of five years for lawsuits to reach trial. While clients wait for their turn in the justice system, a number of things happen. Firstly, most lawyers require significant retainers before they begin, respond or continue to act. In the interim, the parties personal expenses such as mortgage payments, property taxes, insurance premiums, maintenance fees where applicable, moving and storage costs, real estate lawyer's fees and disbursements have either been paid or will continue to build.

And when the parties eventually reach trial, not all of the costs they are put to are compensated in the form of a court judgment. For example, the psychological stress and disruption in their lives is not something that courts deal with. What our courts do take into account are such things as the loss of bargain that a seller suffers when he resells a home at a reduced price plus any actual outlays paid from the original closing date to the date when he completes a resale. The inconvenience suffered by both

sellers and buyers alike however real, does not matter. And if one side is unhappy with the result, he can always appeal. Appeals generally take a year or more. And seventy percent of appeals are dismissed.

From your point of view, the client is a casualty of the market. *And clients who are sidelined by these events do not transact meaning no commissions flow*. So here are the three alternatives you need to know about and to advise your clients of.

ENCOURAGE CLIENTS TO NEGOTIATE

Provided that you reach out to your client immediately, discuss the option of a two way negotiation with the help of their lawyers if they feel more comfortable with their assistance. If for some reason, their lawyers are untrained or uncomfortable acting as negotiators, professionally trained ADR practitioners can take over and apply *interest based negotiation* principles. The important point to understand is that market conditions will not likely change significantly in the short run. And no one has a crystal ball to help predict change five years or more from now. So watching clients refuse to negotiate, and run off to court apart from the costs and long delays will not provide a quick or satisfactory solution.

SUGGEST THAT CLIENTS MEDIATE

It may be that direct, one on one negotiation is not something clients may be comfortable doing even with the assistance of skilled negotiators. For one thing, they will be upset which means that logical discussion may give way to emotion. Parties who are upset are prone to blame the others for their predicament. *Creative problem solving cannot occur when both sides are in blame mode.*

It is for this reason that sellers and buyers in these circumstances are more likely to profit from professional mediation. Her are the basis steps to mediation.

MEDIATION:

Introduction

Mediation is a staged process that begins with the appointment of a trained mediator. A professionally trained mediator will have studied interest based negotiation and mediation at the very least, at a certificate level. Some mediators will have completed advanced studies at the post graduate level and hold degrees in the field.

When the parties decide to name a mediator, he or she will send them a mediation agreement for review and signature. The agreement will stipulate that the mediator is a neutral third party who is not engaged to judge the dispute but rather to work with both sides to fashion a solution. The parties will agree to equally divide the costs of the mediation including the costs of any facilities such as room rental and refreshments plus HST. The mediator may be asked to give a legal opinion of the

dispute where he is also a lawyer. The mediator will schedule time to meet the parties usually blocked in half days.

Mediation:

Step 1: Presenting the Facts

The parties will be asked to present their side of the dispute without any interruption. If the mediator needs more facts, he will ask questions that assist him in filling in any gaps. Once both sides have completed their presentations, the process will shift to a discussion of the interests each side has in the dispute. For example, the seller will present the amount of his dollar loss comparing the original sale price and the subsequent resale price, assuming a resale. He will also list any other expenses that flow from the failed transaction such as moving costs, interest paid on outstanding mortgages, property taxes, and insurance after the aborted closing, and interest on any lines of credit. If the seller has lost a deposit on a purchase of his own in a chain situation, he will claim that as well. He may also be responsible for and claim any of his seller's legal expenses for which he is liable where he is caught in a chain.

If the buyer has no facts to present other than lack of ability to close, the buyer's presentation will be shorter. The buyer should disclose his current finances. The old saying is "you can't get blood from a stone". If the sellers sues and the buyer can't pay, the seller may recover judgment, but no money. It happens all the time. Getting judgment is no guarantee of payment. At least 50% of court judgments go unpaid.

If the buyer on the other hand owns other property and is able and willing to disclose his financial situation, that should be put on the table. The critical point is that the buyer is in the legally weaker position if his reason for not closing is strictly financial. The seller, however, may be financially exposed if he is carrying the costs of two or more properties. Each situation is different.

Step 2: Working out the Parties' Interests.

Once the facts are on the table, the mediator will assist in working out each side's *interests*. *Interests or needs* as they are sometimes called represent what the parties look to achieve. If both sides are acting in good faith, it is likely that each will be interested in reaching settlement. Each has an opposite interest in setting the amount of that settlement. The seller will look for more, and the buyer will want to offer less. How a settlement is structured may be of interest to each party. If time to pay is needed certainly the buyer will have an interest in discussing this. If the buyer has other property, he may want to provide a mortgage on that other property as part of a settlement. The possibilities are unlimited. It all depends on the facts.

Step 3: Matching the Common Interests

Once the parties have disclosed their interests, the mediator will do a quick match up to see how many of those interests they share in common. The more common interests they share, the more likely they will find common ground.

Step 3: Discussing the Issues

The next step is for the mediator to inquire as to any issues that may act as an obstacle. For example, if the buyer wants to refinance on another property and is unable to discharge an outstanding mortgage until a later date, that is a legal issue. If the buyer has cash invested in a certificate that will not mature until a later date, that is also an issue. In both of these situations, the issue is one of timing.

Step 4: Brainstorming - Creative Options

The most interesting and most challenging part of mediation is brainstorming. This is the part where the parties look at their common interests, and make sensible offers that take into account the interests of both parties making sure that any offers are not defeated by any issues which make completion impossible.

Step 5: Memorandum of Agreement

Provided that the parties agree on terms, the mediator will prepare a written memorandum of agreement for signature. And if the parties prefer to sign only after having their lawyers review it, the appropriate wording may be added. If all goes well, the mediation is over. The parties must complete whatever agreement they make.

ARBITRATION

Where mediation fails it is often due to one or more legal issues that one or both sides are either unable or unwilling to negotiate. If that is the case, and if the parties prefer to have the dispute adjudicated by a neutral third party, that person can be a professionally trained arbitrator. The arbitrator is very simply a private judge who acts for the parties under the terms of an arbitration agreement and is the counterpart to a judge appointed to conduct a trial in a court of law.

Step 1: Making an Arbitration Agreement

The first thing the parties need to do is to prepare and sign an arbitration agreement. The arbitrator they select can prepare this, if necessary. It will appoint the arbitrator to act; set out his powers; provide an outline of the process from start to finish including a formal hearing if the parties require one, and obligate the parties to equally share all of the expenses including, the arbitrator’s fees, disbursements, including room rental and meal and refreshment costs, and the cost of a certified court reporter who transcribes the evidence. Remember that the arbitrator is neutral party who must act impartially, fairly, and without bias. He acts like and has the same powers as a judge.

Step 2: The Preliminary First Meeting

The arbitrator will set a time to meet at which every conceivable procedural issue is discussed. The purpose of this meeting is to get the parties to agree to their own procedures. If the parties want to simplify and speed up the process, they can do so. And in doing do, the process ends more quickly and less expensively. *The speed and cost of arbitration all depends on the procedural choices the parties make.*

Step 3: Production and Examinations

Usually, the parties will produce copies of their critical documents to one another. *The key here is quality, not quantity*. In law as in life, less is most often more. The lawyers may want to conduct examinations of the other party. However, this is not mandatory. Where the facts are simple, and are not disputed, examinations can be waived.

Step 4: The Formal Hearing and the Award

The arbitration may end with a formal hearing (like a trial) at which each party and any his witnesses testify. In some arbitrations, each party swears an affidavit and is cross examined on it. Each side has the opportunity to do so and once all of the evidence is heard, each side will make a closing statement in which both the evidence and the law is reviewed.

The process will conclude with the arbitrator's award, usually in writing, in which he will make findings of fact, declare the winner, establish the remedies such as damages and set the amounts to be paid, and award costs and interest in the same manner as a judge would in court. Once the arbitrator's award is delivered the process is complete. As I said earlier, parties who need a decision based on legal principle and who are unwilling or unable to put principle aside in favour of making a deal that satisfies as many of their interests as possible are advised to arbitrate. Having said this, mediation is bound to be quicker, faster and less expensive. It's up to them!

SUMMARY

In these situations, running to court most often takes upwards of five years, and can be the most expensive option for both sides. Mediation is the most time and cost efficient option and arbitration falls somewhere between. The trick to efficient arbitration lies in simplifying the process. The more layers the parties and their lawyers add to arbitration, the longer it takes and the more costly it becomes.

Jack Zwicker

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