

Difficulties with Trust Conditions

Prepared for: Legal Education Society of Alberta

**Originally Prepared
For Presentation In:** Lake Louise, Alberta
May 6 – 10, 2006

**Reproduced for
Presentation In:** Calgary, Alberta
March 16, 23 & 30, 2007

Originally Presented by: Steven L. Shavers
Walisser Shavers LLP
Grande Prairie, Alberta

Difficulties with Trust Conditions

by Steven L. Shavers
Walisser Shavers LLP
Grande Prairie, Alberta

An excellent overview about trust conditions can be found in Chapter 3 "**Real Estate**" of the 2005/2006 CPLED Alberta Resource Materials produced by LESA. The text is less than 11 pages and I highly recommend reading it. One must also be cognizant of the rules governing the use of trust conditions set out in **Rule 11, Chapter 4 of the Alberta Code of Professional Conduct** (Rule 10 regarding undertakings). Other useful resources are **Trust Conditions and Undertakings, s.4.3 Alberta Residential Conveyancing Guide, pages 4-6 (LESA)** and the **Real Estate Conveyancing Practice Report on Status of Trust Conditions** which was prepared by the South Alberta Real Property Subsection of the Canadian Bar Association and is found on the Law Society of Alberta's website. It is not the goal of this paper to review what these resources have already so well covered, but rather to spark discussion about some common problems that do arise in the crafting and imposing of trust conditions in the context of residential real estate closings.

Trust conditions cause difficulties in closing real estate transactions when:

1. they are not drafted to suit the particular transaction (e.g. a "standard form" of trust conditions is used);
2. trust conditions are imposed which are uncertain, superfluous or unnecessary (for example, trust conditions that micro-manage the manner in which the entrusted lawyer is expected to handle the closing);
3. the trust conditions do not reflect the terms of the contract between the parties, or seek to amend the contract;
4. the trust conditions impose obligations that are beyond the control of the entrusted lawyer; in other words, things the entrusted lawyer cannot personally ensure can be performed.

There are other difficulties the reader will no doubt have experienced, but the above four are some of the most common in residential real estate practice. These difficulties are compounded by the environment we find ourselves in:

1. a hot economy resulting in an overwhelming number of closings to deal with;
2. the short time we often have between when we receive the instructions and the scheduled closing date;
3. difficulty contacting lenders to receive timely modifications or clarifications to what have become very complex sets of mortgage instructions;
4. clients unavailable to sign documents in a timely manner, usually because they are working long shifts (often out of town and often in the oil patch – a common problem in Grande Prairie) or are in transit moving (often from another province);
5. the pressure to do the deals quickly with minimal solicitor time due to the minimal fees we charge in our competitive residential real estate practices;
6. the increasing length of time it takes to register documents in our land titles registry.

Notwithstanding this environment, it is incumbent upon all of us, when imposing trust conditions, to try to avoid the common difficulties described above:

1. **Not drafted for the particular transaction**

"The only trust conditions which should be imposed are those which are necessary for the particular transaction." (*2005/2006 CPLED Program Real Estate Resource Materials p. 3-2*).

Generally, if we could all do this, all the other difficulties would also disappear. In the environment we find ourselves in, though, we tend to use our office's standard form and often do not have time to review every individual transaction with our legal assistants to