

## WHY TRUST CONDITIONS?

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Anyone that has bought or sold a house or a business with the assistance of a lawyer has run into something called “trust conditions”. These are often discussed as an afterthought, or not at all, and clients can be confused why they are needed. Most of the time, they seem only to add complexity to what should have been a straightforward deal. Why are trust conditions used?

To understand trust conditions in the commercial context, it helps to look at how sales used to be done. If I wanted to make sure that I was going to get possession of a house, and if the seller wanted to make sure that she got her money, we would literally hand the keys and the cheque to each other at exactly the same time. If I received the keys prior to giving her the cheque, there was a risk that she would never be paid. Likewise, I would risk not getting the house if I didn't get the keys before providing the funds.

In most cases, the inherent good faith of the parties would make this overly formal approach unnecessary, but where parties did not know each other, or where the amounts involved were large, every caution would have to be taken. Unfortunately, it is impossible to always transfer money and property at the same time.

A simple house deal under our Land Titles system is a good illustration of this. A vendor gives the purchaser a transfer of land. The purchaser gives the money to the vendor, and proceeds to register the transfer. Until that transfer is registered, the land remains in the vendor's name. If there was an error in the transfer, it might not be registered, and the vendor therefore would have the money **and** title to the land. It could be expensive for the purchaser to enforce its rights.

Likewise, in a sale of a business, it is almost impossible for every detail to be completed at the same exact moment. There might be searches that have not yet been done, funds that have to be held back for unknown liabilities, or certificates of compliance that need to be obtained. Without a mechanism to assist this process, commercial transactions would be impossible to complete without putting one party or the other at risk.

This is where trust conditions come in. They help keep some “hooks” on property until the party can be sure that they will get the appropriate property in return. For instance, a lawyer acting for a purchaser of a house will pay money to the seller's lawyer under certain trust conditions aimed at ensuring that the house will be properly transferred into the name of the buyer. If those trust conditions are not satisfied, so that the buyer does not get clear title to the house, the money will be returned to the purchaser.

Trust conditions are among the highest duties a lawyer has, and there are almost no excuses for non-compliance. In other words, a lawyer who can not or will not accept a particular trust condition has no choice but to return the offered property. Once use is made of the property, the trust conditions are accepted and it is the **lawyer** who is on the hook. Failure to comply means that an action can be maintained against the lawyer. This personal responsibility, together with the fact that failure to abide by trust conditions is strong grounds for disbarment, means that lawyers are very careful to ensure that trust conditions are met.

A trust condition is just a specialized form of contract, based on offer and acceptance, so it does not have to be lawyers who are subjected to them. Anyone can provide money or property to anyone else, on the condition that something be done. Non-lawyers, however, are not subject to

discipline by the Law Society, so a failure to comply with trust conditions in such a case means that a lawsuit will be necessary to enforce it.

Using trust conditions is a crucial role for a lawyer to ensure that its client gets what is contracted for. They cannot change the underlying deal (without the parties' consent) but many details that were not accounted for in the main agreement may be covered by trust conditions. Clients are sometimes frustrated by the lawyers arguing over trust conditions that seem petty and inconsequential, but where the original agreement did not cover all the necessary issues, trust conditions might be important protection.

Most lawyers will be happy to explain the trust conditions to his or her client, and why they are needed. If there are ever any questions, do not be afraid to raise them.

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