

# \*CONDITIONS APPLY

**A HANDSHAKE, A SMALL DEPOSIT AND A SIGNED PIECE OF PAPER ARE OFTEN ENOUGH TO SEAL A DEAL, BUT IT CAN OFTEN GO PEAR-SHAPED. JONATHAN KAPLAN REMINDS READERS THAT THIS IS WHY SOLICITORS WERE INVENTED.**

IT never ceases to amaze me how slapdash some vendors or purchasers can be when selling or buying a business. I am talking possibly about disposing or acquiring your second major asset, if not the major one.

As a solicitor engaged in completing numerous business transactions, I am often gobsmacked when presented with the transaction documentation, frequently no more than an agreement scribbled on a page torn from an exercise book and signed by both parties or worse still, no paperwork at all.

When I enquire about the poor (or lack of) documentation, the response is often, "I didn't expect any problems – the vendor seemed like a really decent bloke" or "we thought it would be cheaper to do it that way". Fair enough. In 90 per cent of cases things may work out well. But who wants the risk of being in the far more expensive 10 per cent?

By way of example, I was once consulted by two potential purchasers who had made an offer to purchase a pub through an agent. It was a

conditional offer but the conditions were poorly drafted and virtually worthless. Usually a token deposit is paid at the time of signing the offer, often around the \$1000 mark pending execution of a formal contract, when the full 10 per cent deposit is paid. Without seeking advice, the purchasers had ignorantly paid \$25,000 to the agent, which was the full 10 per cent deposit on signing the offer.

It was at this point that I was consulted and after making some fairly rudimentary enquiries from the purchasers and examining the "red line" plan (the plan of the area within which liquor may be served), it became apparent that problems existed that made the proposed acquisition unviable.

The agent, to his credit, would not return the deposit unless the vendor and purchasers agreed or, failing that, a court order was produced requiring the agent to pay the deposit to a designated party. The vendor refused to return the deposit and legal proceedings were initiated. The matter was settled prior to a hearing (the deposit being split between the vendor and purchasers) but by that stage significant legal costs had been incurred, costing both parties many thousands of dollars in legal fees and, in the case of the purchasers, the loss of a significant part of their deposit. Some basic legal advice prior to making the offer to purchase could have obviated a stressful and expensive experience.

In this particular example, the problems that were encountered could have been avoided in the offer to purchase if provisions properly drafted had been included in the offer.



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Had the offer provided that it was conditional upon satisfactory due diligence being concluded by the purchasers, the purchasers could have withdrawn the offer if they were not satisfied with their investigations. Usually a vendor would require a date to be inserted by which time a purchaser is to notify the vendor in relation to the outcome of the due diligence, and failing that, the offer then becomes binding.

An offer can also be made subject to satisfactory approval by the purchaser's solicitor and accountant, and should either of them not approve, the purchaser may notify the vendor and the offer may then in those circumstances also be withdrawn.

Because the offer to purchase would likely be the basis for preparing the contract for the sale of the business, it is prudent to include all of

the other critical conditions forming the basis of the sale. Some of these conditions might be that the sale is subject to (a) the consent by the landlord of the premises to the assignment of the lease to the purchaser; (b) transfer of the liquor licence to the purchaser; (c) planning approval by the local authority, if renovations are intended; (d) the vendor attending to and paying for any work required to be done as a consequence of an inspection by the local environmental health authority or (e) approval of finance.

These are fairly basic conditions but I hope that I have highlighted some of the problems that could potentially be encountered by treating the sale or purchase of your business in a lackadaisical way.

The money spent upfront in having your "offer to purchase" or "terms sheet", as it is often called, properly reviewed by a solicitor before signing it could possibly be the best money you ever spent. ■■■

*The advice and information contained in this article is of a general nature only and is not intended to constitute or replace professional advice. Jonathan Kaplan is a commercial and hospitality lawyer and accredited specialist mediator. Contact him on (03) 8686 9197 or 0418 588 855; or online at [kaplanlaw.com.au](http://kaplanlaw.com.au)*