

Ask for a deposit and include a penalty clause

IF YOU have just sold your home and put in an offer for your dream home, what would happen if the purchaser of your existing home did not follow through with the sale?

Recovering your losses where you have cancelled the sale due to the purchaser's breach can be a costly and time consuming exercise. Asking for a deposit and including a penalty clause can make this an easier process and you may be able to retain the money paid by the purchaser as a penalty.

But the enforcement of a penalty clause can be problematic, particularly in cases where the clause has been incorrectly drafted, so bear in mind the following:

SPONSORED COLUMN

Kim
Edwards



PROPERTY TALK

For a penalty clause to be enforceable the sale must have been cancelled because of a breach committed by the purchaser. If the purchaser fails to procure a loan within a specified time, which is a suspensive condition of the agreement, then the agreement will lapse and the penalty clause will not be enforceable. The failure to fulfil a suspensive condition results in the agreement not coming into effect.

There is no breach of agreement.

The purchaser can challenge the amount of the penalty under the Conventional Penalties Act, 1962 ("Act") if the penalty is out of proportion to the prejudice suffered by the seller. The seller cannot claim damages as an alternative to the penalty unless the contract expressly allows the seller to do so.

A "rouwkoop" clause is often confused with a penalty clause, but the two are very different. "Rouwkoop" is a mechanism that allows the purchaser to withdraw from the contract. By paying an amount set out in the clause the purchaser exercises a right under the contract and his withdrawal is not regarded as a breach.

"Rouwkoop" clauses are not regulated by the Act but can be regarded as a penalty and therefore will be subject to the Act if the "rouwkoop" clause states that the purchaser is bound to forfeit his deposit if the sale is cancelled by the seller.

A conveyancer may withhold or refuse to return money paid by the purchaser to the conveyancer only if the purchaser has, in the sale agreement, authorised the conveyancer to pay the funds to the seller or to hold the deposit in trust pending the determination of damages.

A properly drawn penalty clause should record that if the seller cancels the sale as a result of the pur-

chaser's breach, the seller will be entitled to declare all moneys paid to the seller or to the conveyancer, including interest on money invested, to be forfeited to the seller.

The clause clearly must set out the amounts to which it will apply and when it can be enforced.

● Edwards is an associate at Cox Yeats Attorneys and practices in the property law team. She can be reached at 031 536 8500 or kedwards@coxyeats.co.

COX | YEATS
attorneys