



## *Lock-out agreements – a user's guide*

In a rising market, buyers are exposed to the risk of spending time and money investigating a property only to find that the seller decides to proceed with another party. Sellers want to maximise a rise in property prices and make full use of their agents' marketing efforts by selling quickly to the highest bidder rather than wasting time with slow or indecisive potential buyers. A pre-contract agreement such as a lock-out agreement can offer protection and reassurance to both parties during the due diligence process, but there are some limitations to consider.

### **Lock-out, lock-in or exclusivity agreement – which is the right pre-contract agreement?**

A lock-out agreement (sometimes called an exclusivity agreement) is intended to stop the seller negotiating with other parties during the lock-out period. A lock-in agreement, by contrast, is an agreement that the parties will commit to negotiating with each other until a deal is agreed, and is considered to be unenforceable in the UK.

If the pre-contract process is likely to last for months (rather than weeks) then it is worth thinking about whether an option agreement or a pre-emption agreement might be more appropriate than a lock-out agreement.

### **Typical terms in a lock-out agreement**

Although these agreements vary, there are some provisions which should usually be considered:

- Legal formalities – in order to be enforceable, the contract should contain consideration (£1 will be enough) or be executed as a deed.
- Lockout period clearly defined - it must be clear that the obligations apply for a fixed period.
- The seller's obligations might include all or any of the following:
  - to stop talking to any third parties with which it is currently in contact in connection with the sale of the property or any related transaction;
  - not to market to or commence negotiations with any other third parties in relation to the sale of the property or any related transaction;
  - to co-operate with the buyer and to enable the buyer to carry out its pre-contract due diligence, such as replying quickly and fully to enquiries before contract and allowing access for a site inspection and survey;
  - to instruct solicitors to issue a draft contract to the buyer within a specified period; and
  - if the property is a multi-let building such as an office block or a shopping centre then the seller will need to manage it efficiently during the lockout period, but the buyer will probably want to be kept abreast of all ongoing tenant negotiations such as rent reviews, lease surrenders and new lettings.
- The buyer's obligations usually include the following:
  - to proceed as quickly as possible (and in accordance with an agreed timetable) with searches, enquiries and survey; and
  - to establish to the seller's satisfaction that it is complying with the above, by for instance providing the seller with copies of search results and survey reports.

- Change of heart - neither party wants to waste time and costs by being locked into a pre-contract agreement with a party which has lost interest in the transaction, so lock-out agreements often contain a covenant by both parties to notify the other if, during the lockout period, they decide not to proceed.
- Confidentiality - depending on the transaction, a confidentiality clause might be a useful way of protecting both parties while they decide whether to exchange contracts.
- Good faith agreement – a lockout agreement might well contain a clause stating that the parties agree to act towards each other with the utmost good faith in connection with the agreement and the transaction. Although the concept of good faith is notoriously hard to pin down, such an obligation is generally understood to mean that the parties will observe reasonable commercial standards of fair dealing, be faithful to the agreed purpose of the agreement, and act consistently with the justified expectations of the other party. The more detailed the clause the more likely it is to be enforceable, so it is a good idea to specify what each party expects the other to do to progress the transaction.
- Rescission and payment of fees – there is usually a right for either party to withdraw if it reasonably considers that the other party has breached its obligations in the contract, and this is sometimes accompanied by a requirement for the party in breach to pay the other party's costs. However, while this sounds appealing, if the breach consists of, for example, a lack of good faith then there could clearly be problems in evidencing this breach and enforcing such a clause.

Sometimes the seller will ask for the payment of a deposit as evidence of the buyer's good intentions. This can raise a plethora of issues (such as how it should be held and by whom, what triggers its release to the seller or its return to the buyer, and what happens if the parties disagree over its release) the complexity of which usually outweigh any benefit obtained. The seller is likely to resist an attempt to include an obligation to financially compensate the buyer for any breach of covenant, but if the contract does include such a provision then the amount should be high enough to discourage the seller from breaching the agreement, but not so high as to constitute a "penalty", which would be unenforceable under UK law.

### Is a lock-out agreement worthwhile?

One of the two main concerns with entering into any pre-contract agreement is that it can distract from making progress with the transaction itself, so unless it requires minimal or no negotiation then it may turn out to be unhelpful.

The other main concern is the extent of the remedies available - a jilted buyer is very unlikely to be granted an injunction to stop the seller selling to a third party, so the only remedy available under the agreement will be the reimbursement of wasted costs and, in limited circumstances, the additional payment of damages.

### Conclusion

Pre-contract agreements can be reassuring, particularly where their terms are straightforward and where the parties understand that they do not bind the seller to sell or the buyer to buy.

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