

EXCLUSIVITY OR “LOCK OUT” AGREEMENTS



In markets such as Cambridge and London, the imbalance between supply and demand for desirable residential properties has resulted in Exclusivity Agreements becoming commonplace. Usually they are a tool to enable a Seller to obtain early commitment from a Buyer in circumstances where there are a number of interested or competing buyers (and the Seller is in a position to dictate terms when agreeing to sell). However, buyers can also insist on an Exclusivity Agreement or the parties can mutually agree to enter in to one.

1. What is an Exclusivity Agreement?

- They are, in essence, an “agreement to agree”. So, they are NOT a formal, binding exchange of contracts to buy and sell the property, they are pre-agreements setting out the terms upon which the parties intend to proceed to exchange of contracts and what will happen if they don’t.
- Typically they will record that the Seller will do all that is necessary to achieve exchange of contracts with the Buyer during a fixed period and a commitment not to deal with any other prospective buyers during that time. The property should also be removed from the market during that period.
- In return the Buyer must do everything necessary to exchange within that period.
- Because the terms of these agreements are often dictated by the Seller, the Buyer is usually required to pay a deposit typically in the region of 1% of the price. This deposit is kept by the Seller if the Buyer fails to exchange contracts within the time limits set out by the agreement. There is no reason why the agreement cannot also specify that the Seller pay a deposit (which they would forfeit should they not exchange when the Buyer offers to do so) but this is rare and the most the buyer might expect is to recover their costs.

- Given that the Buyer will typically have done none of the usual due diligence, the agreement will normally allow a Buyer to withdraw (and for the deposit to be repaid) if there proves to be a major defect in the property’s title or in its structure or condition.

2. Are Exclusivity Agreements a good thing?

- As legal agreements we cannot recommend them. They are commonly drafted by estate agents and, if there were to be a disagreement between the parties about whether or not a Buyer is entitled to withdraw, the potential for dispute is substantial. Defining in these agreements whether a defect in title or condition is sufficiently “major” to justify a Buyer withdrawing is inherently challenging. There could also be arguments about whether the Seller has provided enough or sufficiently good information about the property to enable the Buyer’s lawyer to recommend that his client proceeds.



- However, what these agreements do achieve is early commitment by the parties to the transaction which, in practice, means that they almost always proceed to unconditional exchange of contracts. This, effectively, removes the usual concern about whether one party or the other might get “cold feet” and withdraw at the last moment. In these terms they work extremely well.

3. How to make an Exclusivity Agreement work for you.

- The most important point is for the parties to agree both the principle and the terms of an agreement BEFORE the sale of the property is agreed i.e. it should be one of the terms of the sale and, ideally, a draft of the Agreement should have been seen and approved by the parties beforehand. This needs fully explaining to both parties, most usually by the estate agents.
- It is important for the agents to identify those cases where it is NOT appropriate to use an Exclusivity Agreement. This will be where one or other party can not commit to exchanging within a fixed time period. The most common reason for this will be that they have a related transaction (where they are unable to control how quickly the other party to it can proceed).
- Ideally both parties’ lawyers should be both familiar with and enthusiastic about the use of an Exclusivity Agreement. Some lawyers feel they are not a good thing and that time spent putting one in place should be better spent trying to achieve unconditional exchange of contracts.
- The agreement should be exchanged quickly and, ideally, a date by which exchange must take place should be specified as a term of the property’s sale.
- We would recommend that, in every case, the Seller’s title to the property is produced to the Buyer’s lawyer before the Exclusivity Agreement is exchanged. Now that title to 90% of properties is registered, this is quick and easy to achieve and allows any major defects in title to be identified. It is also an opportunity to check that the owners of the property and the Seller in the Agreement are one and the same person.

We would also recommend that, if possible, the Buyer gets their survey done before the Agreement is exchanged. This is beneficial for both parties because it means that the other main reason why a buyer might wish to withdraw from an Exclusivity Agreement will have been dealt with. However, it is more difficult to achieve

- because surveys can take a while to arrange and this delays the timescale for getting the Agreement in place.

Conclusion

Provided the necessary preparatory work is done to establish that an Exclusivity Agreement is appropriate to your transaction (and that the parties agree to its principle and terms), they can work extremely well to achieve early commitment. By doing so they largely remove the anxiety caused by not knowing whether a transaction will proceed until contracts have been exchanged.

Tim Middleton



**Partner
Cambridge**
01223 461155
timmiddleton@hewitsons.com

Clare Martin



**Partner
Cambridge**
01223 461155
claremartin@hewitsons.com



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