

Remuneration clause in an agreement of purchase and sale

This bulletin explains the use of a remuneration clause in an agreement of purchase and sale, where the buyer and seller agree that the seller will compensate the buyer for the buyer's brokerage fees. This bulletin also identifies the five key components of a remuneration clause.

Summary

A remuneration clause in the agreement of purchase and sale creates an agreement between the parties to the agreement, the buyer and seller, where the seller agrees to pay an amount to compensate the buyer for the buyer's brokerage fees. The seller's financial assistance in this type of arrangement can sometimes help the buyer to fulfil their obligations under the buyer representation agreement and lead to a successful transaction.

Whether a buyer's brokerage or agent is dealing with a self-represented seller or a seller who is under a representation agreement (for a mere posting or many services), a remuneration clause in an agreement of purchase and sale can help ensure the buyer client is sufficiently liquid to cover various expenses to successfully close the transaction, including the payment of their brokerage fees.

No agreement with a self-represented seller

Brokerages are prohibited from entering into an agreement with a buyer or seller for the purpose of trading in real estate unless the agreement includes the provision of representation.

Brokerages must not enter into an agreement with a self-represented seller to provide assistance or to charge or collect remuneration for the provision of assistance. The legislation promotes clarity around roles and obligations during a real estate transaction.

The buyer client is the party responsible for the fees associated with the representation and services they receive from the buyer's brokerage. However, buyers often want, and some even need, a seller to compensate them for some or all of the buyer's brokerage fees.

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Buyer representation agreement

SELLER OFFERS MORE THAN BUYER'S COMMITMENT

A buyer representation agreement should be clear about what happens if the remuneration offered by a seller is greater than the amount owed under the buyer representation agreement. For example, the buyer representation agreement should set out whether the buyer will reduce the amount the seller pays to match what the buyer owes their brokerage, whether the buyer retains any amount in excess of the amount the buyer owes their brokerage, or whether the buyer's brokerage is entitled to the entire amount the seller offers.

SELLER OFFERS LESS THAN BUYER'S COMMITMENT

A buyer representation agreement should be clear about what happens if the amount offered by the seller is less than the amount owed under the buyer representation agreement. For example, the buyer representation agreement should set out whether the buyer owes the shortfall, whether the buyer's brokerage will accept the amount paid by the seller without further payment from the buyer, or some other arrangement.

Components of a remuneration clause

Brokerages can develop their own remuneration clauses for use in agreements of purchase and sale. Agents are expected to comply with lawful brokerage policies regarding the form of the clause and its use in agreements.

The following are among the key components of a remuneration clause in an agreement of purchase and sale:

1. **Parties:** The agreement must be between the seller and buyer, the parties to the agreement of purchase and sale.
2. **Purpose:** The seller is agreeing to compensate the buyer for the buyer's brokerage fees, or a portion thereof, owed by the buyer under the buyer representation agreement.
3. **Amount:** The clause must include the amount the seller has agreed to pay the buyer and whether applicable taxes are also to be paid.
4. **Timing:** The clause must include when the payment is due. For example, "on transaction completion date."
5. **Payment:** The clause must include the payor (the seller). The clause might also indicate whether it will be disbursed by the seller's brokerage or the seller's lawyer. The clause must include the recipient of the payment. For example, if the money is to be paid directly to the buyer, or to the buyer's brokerage.

RECO consulted with financial institutions regarding the use of a remuneration clause in an agreement of purchase and sale, noting that this type of clause is already in use in Alberta. The financial institutions did not see any distinction between the use of a remuneration clause in an agreement of purchase and sale and the use of other agreements that obligate the seller to pay the buyer's brokerage fees. The remuneration clause is not a "cash back" clause.

A remuneration clause provides a simple, transparent way to address the buyer's financial obligation under the buyer representation agreement, without compromising the agent's fiduciary duties to the buyer and avoids the complexities associated with multiple representation (where the parties decide to enter multiple representation for the sole purpose of having the seller pay the buyer's brokerage remuneration).

Caution when entering into an agreement with a seller who intended to be self-represented

Entering into a representation agreement with a seller, and creating a client relationship, when the brokerage or designated representative is obligated to promote and protect the best interests of the buyer client in the trade requires:

- Disclosure of multiple representation and its risks to the existing buyer client;
- Disclosure of multiple representation and its risks to the prospective client;
- A recommendation to the existing client and prospective client that they seek independent professional advice (for example, from their respective lawyers) before consenting;
- Best efforts to obtain an acknowledgement that the disclosure was received, and the advice was provided; and
- Written consent to multiple representation of both the existing and prospective client prior to the brokerage entering into a representation agreement with the prospective client.

Agents are expected to clearly communicate to the client and prospective client that consenting to multiple representation means neither client will receive any advice related to the amount they should offer or accept or the terms to include in an agreement to protect their interests. The brokerage, or the designated representative, is required to treat both of the clients in an objective and impartial manner.

Even if these steps are taken, proper disclosures are made, and the necessary consents are obtained, the clients might later consider the agent's actions to have been in conflict with the agent's duty of loyalty and the agent's duty to act in the clients' best interests.

This is particularly true in a situation where a seller intended to be self-represented, and the buyer's brokerage persuaded the buyer and seller to enter into multiple representation for the sole purpose of ensuring the seller agrees to pay the buyer's brokerage the amount owed by the buyer under the buyer representation agreement.

If a complaint is received by RECO, the onus is on the agent to prove that entering into an agreement with the seller and asking their buyer client consent to multiple representation was in the best interests of the buyer client.

Related information

Bulletin No. 2.1 RECO Information Guide

Bulletin No. 2.3 Representation agreements

Bulletin No. 2.4 Dealing with a self-represented party

Bulletin No. 3.2 Multiple representation