

EMMS•GILMORE•LIBERSON
Solicitors

Advice for purchase & sale procedures

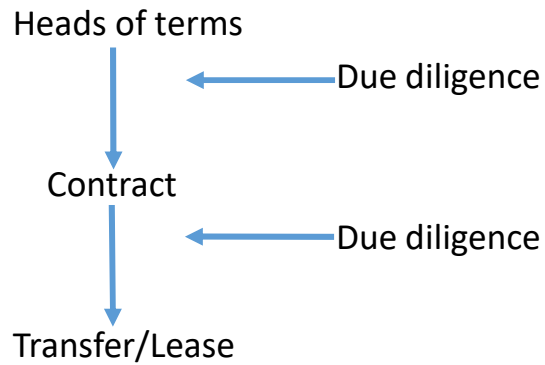
Beth Margetson
Director
Emms Gilmore Liberson

Agenda

- Process
- Pros & cons of heads of terms
- Heads of terms trouble-shooting

EMMS•GILMORE•LIBERSON
Solicitors

Process



EMMS·GILMORE·LIBERSON
Solicitors

Why have Heads of Terms? Pros

- 1) Moral commitment
- 2) Focus negotiations and highlight issues
- 3) Can include exclusivity, confidentiality and cost provisions
- 4) Third party – boards, lenders, etc
- 5) Use to instruct solicitors

EMMS·GILMORE·LIBERSON
Solicitors

Why have Heads of Terms? Cons

- 1) Binding contract
- 2) Misrepresentation

EMMS·GILMORE·LIBERSON
Solicitors

Binding Contract

Important to use the phrase “Subject to contract”, which shows:

- a) Parties still negotiating; or
- b) Agreement reached but is not intended to be binding until signed

But

it's not foolproof!

EMMS·GILMORE·LIBERSON
Solicitors

Case law

- 1) DMA Financial Solutions v BaaN UK Ltd 2000 – Heads of terms can be binding even if clearly expect subsequent formal written agreement
- 2) MJ & SC Collins v H Padfield & Sons 2005 – Subject to contract prevented binding agreement, assisted by fact that one critical term had not been agreed
- 3) Pro Force Recruit Ltd v The Rugby Group 2005 – Agreement subject to contract was binding because parties performed its terms

EMMS·GILMORE·LIBERSON
Solicitors

To mitigate risk insert:

“Provisions in the heads of terms not intended to be legally binding”

EMMS·GILMORE·LIBERSON
Solicitors

Exclusivity, confidentiality and costs clauses

- Keep in a separate document; or
- Must make it clear in the heads of terms that only these clauses are intended to be legally binding.

EMMS·GILMORE·LIBERSON
Solicitors

Misrepresentation

A misrepresentation is an untrue statement of fact or law which:

- 1) Induces a buyer/tenant to enter a contract; and
- 2) Causes loss to the buyer/tenant

EMMS·GILMORE·LIBERSON
Solicitors

Property Ombudsman 3 bed house

Contract damages to put buyer/tenant back in position
as if the contract had not been performed

EMMS·GILMORE·LIBERSON
Solicitors

How to manage the risk of a misrepresentation claim?

- 1) Engagement letter
- 2) Non-reliance clause in contract
- 3) Entire agreement clause

EMMS·GILMORE·LIBERSON
Solicitors

Engagement Letter

- Will include limitations on liability and an indemnity in your favour for losses arising out of your appointment.
- But, cannot exclude liability for your own negligence
- Will be subject to the Unfair Contract Terms Act 1977 (“UCTA”) which controls the extent to which you can rely on a clause excluding or limiting liability
- Must be “reasonable” (s.3 UCTA)

EMMS·GILMORE·LIBERSON
Solicitors

Context – will look at:

- 1) Your resources
- 2) Availability of insurance cover
- 3) Nature of deal and size of loss
- 4) Fees paid to you

EMMS·GILMORE·LIBERSON
Solicitors

Cramaso LLP v Viscount Reidhavens Trustees 2014

Representation made about number of grouse on a grouse moor being made available for lease. Decided:

- a) A misrepresentation can occur to someone who was not the original representee – another agent
- b) Can make a misrepresentation prior to agency starting if can imply that you stand by original misrepresentation

EMMS·GILMORE·LIBERSON
Solicitors

(2) Non-reliance clause in contract

“The Buyer acknowledges it does not rely on and shall have no remedies for any misrepresentation other than those in this contract or in replies to written enquiries”

EMMS·GILMORE·LIBERSON
Solicitors

(3) Entire Agreement Clause

“This contract constitutes the whole agreement between the parties and supersedes all previous discussions, correspondence, negotiations, understandings and agreements between them relating to their subject matter”

EMMS·GILMORE·LIBERSON
Solicitors

Nailing Heads of Terms

- Talk to a solicitor!
- Use your own words
- Use template heads of terms, especially where the property forms part of an estate
- Attach standard tenant requirements

EMMS·GILMORE·LIBERSON
Solicitors

Nailing Heads of Terms

Leasehold transactions: areas for detail

- 1) 1954 Act
- 2) Rent review
- 3) Alienation
- 4) Alterations
- 5) Repair
- 6) Break
- 7) Premium

EMMS·GILMORE·LIBERSON
Solicitors

Managing Delay

- EPC – since 1 April 2018 property must meet minimum energy efficiency standards unless an exemption applies
- If rated F or G, cannot be let

EMMS·GILMORE·LIBERSON
Solicitors

Managing Delay

Searches:

- Allow time for the results to be returned
- Searches insurance

EMMS·GILMORE·LIBERSON
Solicitors

Managing Delay

Third party involvement:

- Landlords
- Bank
- Shared estate
- Overage

EMMS·GILMORE·LIBERSON
Solicitors

EMMS•GILMORE•LIBERSON
Solicitors

Advice for purchase & sale procedures

Beth Margetson
Director
Emms Gilmore Liberson
E: bmargetson@egl-law.com
T: 0121 262 6438