

# *A Legal Update*

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## **IT'S ONLY AN OFFER!**

To most people, buying and selling a home is the biggest personal and financial commitment they will ever make. Generally, when buyers find the home of their dreams, they immediately make an offer to purchase the property and secure it with a minimal deposit. After all, it's only a deposit and what's at stake, \$500.00! Buyer and seller beware! A recent Supreme Judicial Court ruling (*McCarthy v. Tobin*, 429 Mass. 84 (1999)) found that the Offer to Purchase was a binding contract and ordered the seller to sell the home to the buyer. The only problem was that the seller had already sold the property to another party.

In the *McCarthy* ruling, the Court found the Offer to Purchase (OTP) was a binding contract despite a provision within it requiring execution of a "Purchase and Sale Agreement satisfactory to Buyer and Seller." The court held the OTP adequately described the property to be sold, price to be paid and the date the transaction was to take place. Furthermore, the Court noted the OTP clearly stated that it created binding obligations and that the remaining terms to be addressed by the Purchase and Sale Agreement were subsidiary matters and nonessential terms of the bargain.

The controlling fact in determining whether the OTP is a binding contract is the intention of the parties. If the parties have agreed upon all the material terms but contemplate signing a Purchase and Sale Agreement ("P&S"), it may be inferred that the purpose of the P&S is only to serve as a polished memorandum of an already binding contract.

The most important thing to remember about the OTP is that, when signed by the buyer and seller, it creates a binding contract for the sale of real estate and more than the deposit is at stake. If the parties are identified, the price is established, the time of performance is decided, and it is clear that there is a "meeting of the minds", buyer and seller have engaged in a binding contract that can be enforceable upon the other. This may be true even where all of the terms and conditions of the "offer" have not been met. For example, typically the "offer" will state that there is to be a "Purchase and Sale Agreement" to be signed on a specific date. Even when that date comes and goes without signing a P&S, the "offer" may still be binding, because the signing of the P&S is said by the courts to be a mere formality. The accepted "offer" takes the house off the market and the buyer and seller are obligated to perform under this

contract (i.e. buy and sell the property).

In light of the above, we at Russell, McTernan & McTernan strongly recommend that you obtain legal advice or, at a bare minimum, include all relevant matters in the OTP before signing it. Many times "offers" will contain a financing contingency and a home inspection contingency and little else. You should consider such matters as whether the property is serviced by town water and sewer, the need for special financing (FHA, MHFA), or the need to sell your current home prior to purchasing the new property. While it is a good idea to address these matters in writing in the OTP even the wording of them may contain certain pitfalls. Take the home inspection for example . . . under what circumstances will the inspection reveal a condition that allows the buyer to back out of the deal?

Regardless of the issue, when signing an Offer to Purchase, buyer and seller beware!

### **Buying a Home/Refinancing ?**

#### **We can help!**

If you are considering buying or refinancing a home give us a call. Our firm works with many local mortgage lenders and we can refer you to a local lender with competitive mortgage loan rates. If you have already contacted a lending institution, tell them you would like our firm to do the closing for you. Our office will work with you and the lender to make the loan closing process pleasant, efficient, and financially rewarding.