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WHAT ARE YOUR INTENTIONS? Letters of Intent in Real Estate Transactions

Despite the use of words and phrases emphasizing that a Letter of Intent (“LOI”) is non-binding, there are legal AND strategic consequences to consider when preparing an LOI. Understanding them is essential to skillfully engage in the purchase and sale of commercial real estate.

While this issue of News ReLease is dedicated to buyers and sellers, landlords and tenants in the audience would do no wrong to interpret our commentary as applicable to their lease negotiations. The process of negotiating an LOI in any commercial transaction is sometimes compared to nailing jelly to a wall. Even for astute parties, this is tricky business.

Quick Offer - An interested purchaser may choose to present a vendor with an LOI to test whether the vendor is amenable to the deal the purchaser has in mind. Prior to knowing the vendor’s position, a prospective purchaser may want to avoid the costs associated with a detailed agreement of purchase and sale. An LOI provides an inexpensive way to explore whether the parties are a likely match for a successful transaction.

Capturing Attention - There may be adverse consequences if a party substantially deviates from the terms of the LOI. This risk should be weighed against the advantages of postponing the preparation and execution of a definitive agreement of purchase and sale. Where many parties are vying for a vendor’s attention, an attractive LOI can make one purchaser stand out in the crowd. Knowing that its LOI is non-

binding, an attention-seeking purchaser may be tempted to include terms that are more generous to the vendor than the terms to which the prospective purchaser will eventually commit. However, this approach can have detrimental consequences.

An intrigued vendor will be acutely attuned to the LOI. If it subsequently comes to light that the purchaser is not committed to a deal on the terms of its LOI, but merely engaged in the process to pique the vendor’s interest, the purchaser’s credibility will suffer. The parties may anticipate slight deviations from the terms of the LOI, but substantial departure on important terms will be met with resistance and mistrust. Therefore, a prospective purchaser should be sure that it is willing to proceed on the terms and conditions of the LOI. Significant deviations are likely to strain the relationship and sour the negotiating process; they may even kill the deal.

Enforceability Concerns - An LOI expresses the basic terms of a potential contract. It indicates the parties’ mutual intention to form a binding agreement of purchase and sale on terms that incorporate those of the LOI. The LOI is, essentially, an agreement to agree. Canadian courts have consistently held that an agreement to agree is no agreement at all.

An important exception to the general unenforceability of an LOI is that it may be found to be **enforceable as a result of the parties’ actions**. In the case of *Wallace v Allen* (2009), the Ontario Court of Appeal held that the parties’ actions following the signing of an LOI for the sale of a business clearly demonstrated their

expectation to be legally bound by the LOI. The vendor had not only announced his retirement and the planned sale of his business on multiple occasions, but had also introduced the purchaser as the new owner of the business. The purchaser immediately began working at the business on a full-time basis and had transferred the purchase funds into his solicitor's account on the day of closing. The LOI provided that "this letter of intent must be reduced into a binding agreement of purchase and sale within the next 40 days." The Court interpreted this provision, in light of the parties' conduct, as plain evidence that the parties intended to be bound by the terms of the LOI, rather than a separate agreement incorporating the terms of the LOI.

In many cases an LOI, while largely unenforceable, nevertheless includes some enforceable provisions. For example, an LOI may contain a provision obligating the parties to keep all aspects of their negotiation confidential. Another example is what is sometimes referred to as a "no shopping" or "exclusivity" provision. This term prohibits the vendor from negotiating with any other party for a prescribed period of time, with the result

that the vendor has agreed to temporarily take its property off the market notwithstanding the absence of a legally binding commitment on the part of the purchaser.

When should an LOI be used?

An LOI provides a quick and inexpensive way to elicit a vendor's attention. But both parties should consider whether an LOI is the best vehicle to accomplish their objectives. Proceeding with an LOI can have significant strategic and legal implications on the subsequent negotiation, so the parties must carefully consider the details included in the LOI. Inclusion of terms in the LOI that are later retracted may extinguish the possibility of a deal; omitting essential terms that are later insisted on can have the same effect.

On the other hand, if the LOI is highly detailed, it may be preferable to simply approach the vendor with a binding agreement of purchase and sale. Where a great amount of time and expense is incurred to carefully consider and negotiate the details of the transaction, a non-binding LOI may simply add an unnecessary (and expensive) step to the process.

Our transactions team is ready to assist you with embarking on your next venture and with structuring the terms of the deal to best suit your goals. For more information, please contact Ron Haber at rhaber@dv-law.com or Candace Cooper at ccooper@dv-law.com.



Our secret for closing files lies as much in what is taken out as in what is put in. By eliminating exorbitant expenses and excess time, by shortening the process through practical application of our knowledge, and by efficiently working to implement the best course of action, we keep our clients' needs foremost in our minds. There is beauty in simplicity. We avoid clutter and invest in results.

Often a deal will change complexion in mid-stage. At this critical juncture, you will find us responsive, flexible and able to adjust to the changing situation very quickly and creatively. We turn a problem into an opportunity. That is because we are business minded lawyers who move deals forward. The energy our lawyers invest in the deal is palpable; it makes our clients' experience of the law invigorating.

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