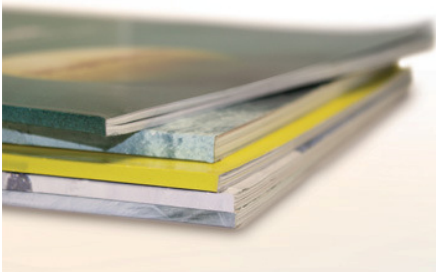


Selling Properties by Tender

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BY TIM HART

Sales of Jersey properties usually result from the property being advertised by an estate agent for sale at a specified asking price. Interested parties then submit offers (whether below, at or occasionally above the asking price) and the vendor accepts one of the offers. Lawyers are then instructed with a view to concluding the transaction.

From time to time, however, properties are advertised as being sold 'by tender', often because some special characteristic of the property, or its condition, makes it difficult for the selling agent to assess a realistic asking price. But, as the recent Royal Court judgment in the case of **Cooke v. Mold** makes clear, the contractual nature of the tender process will be determined by the wording of the tender documentation. From a contractual point of view, two very different processes can attract the 'tender' label.

On the one hand, the tender documentation can be worded so as to establish what is in effect an auction

or fixed bidding sale. In other words, the vendor invites bids for the property and a binding contract comes into being between the vendor and the highest bidder. Contractually, the tender invitation is the offer and the highest bidder's bid is the acceptance of that offer.

Under Jersey law, agreements for the sale and purchase of land are not specifically enforceable, that is to say that the court will not compel a recalcitrant vendor or purchaser to conclude the transaction by passing contract. Nevertheless, a party who breaches a binding agreement to sell or purchase will be liable in damages and indeed it is usual to stipulate in the contractual documentation substantial pre-agreed damages for such an eventuality.

On the other hand, and as is common in Jersey tenders, the tender documentation may follow the approach of the documentation in the **Cooke** case and state that the vendor is not bound to accept the highest or any bid. This results in an arrangement

which is radically different from the one described above. Since the vendor is under no obligation to accept any bid, those bids that are made are themselves the contractual offers and it is the vendor's acceptance of one of them, if indeed the vendor decides to accept one of them, that is the acceptance which results in a binding contract.

As the court in **Cooke** made clear, the vendor's discretion is absolute. Accordingly:

“The defendant could have chosen to accept the offer ... from the third party despite the fact that it was the lowest. She could have decided to accept an offer because she was friends with the particular bidder even though that bid was

not the highest. She could have decided to reject the highest offer because (hypothetically) the bidder happened to be red haired and she did not like red haired people. She could have accepted a private offer outside the whole tender process rather than any of the bids made under the tender process.”

Selling a property by tender can in appropriate cases be a useful way of maximising value and indeed of bringing together willing vendors and willing purchasers. But it is vital, if contemplating participation in such a process whether as vendor or bidder, to be absolutely clear as to the nature of the process established by the tender documentation.

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