Option to buy land and property: extension of term subject to conditions

|  |  |
| --- | --- |
| This agreement is dated: | [date] |
| [Private individuals] |  |
| The Seller is: | [name] of [address] |
| The Buyer is: | [name] of [address] |
| The Guarantor: | [name] of [address] |
| [For Companies] |  |
| The Seller is: | a company registered in the Commonwealth of Australia, Australian Company Number [number] and all references to "he", "him" and the like, in this document shall be interpreted as relating to the Company. ("the Company") |
| The Buyer is: | [name] of [address] |

It is now agreed as follows:

# Definitions

The following definitions apply in this agreement:

|  |  |
| --- | --- |
|  |  |
| "Deposit" | means the sum to be paid by the Buyer to the Seller when he serves a Notice of Exercise. |
| “Exercise Date” | means the period of time commencing on [date] and ending on or before the Last Exercise Date or the Extended Exercise Date. |
| "Extended Exercise Date" | means the last date by which the Buyer may exercise the Option after having given a valid Extended Option Notice. |
| "Extended Option Notice" | means a notice by the Buyer to the Seller whereby the Last Exercise Date is deferred. |
| "Extended Option Price" | means the additional price, not forming part of the Sale Price, payable at the time of exercise of the Extended Option. |
| “Increased Value” | means the increase in the value of the Land over the value today, attributable to the obtaining of planning permission or any other activity of the Buyer. |
|  | The increased value shall be calculated by reference to the difference between the value today on the one hand and the value at the Last Exercise Date or the Extended Exercise Date on the other hand. |
| "Land" | means [the land and building containing 12 residential flats situate and known as Plummy Gardens, Plummy Street, Sydney ] [give very full description here, preferably with a plan] |
| OR |  |
|  | “The Land” means the land and buildings as described in Schedule 1 and Plan 1. |
| "Last Exercise Date" | means the last date by when the Buyer may exercise the Option without having served an Extended Option Notice. |
| "Notice of Exercise" | means notice in writing to the Seller from the Buyer in which the Buyer states his intention to exercise the Option. |
| "Option" | means the option granted by this agreement. |
| “Rights Granted” | means the following rights: |
|  | [a right of access of minimum width [8] metres, for all times and all purposes, over the land coloured blue on Plan 2]  [ a right of light against the building . . . .]  [a pedestrian right of way, of minimum width three metres, over the track coloured pink on Plan 2] |
| OR |  |
| “Rights Granted” | means the rights set out in Schedule 2 |
| “Rights Reserved” | means the following rights:  [state rights to be reserved] |
| OR |  |
| “Rights Reserved” | means the rights set out in Schedule 2 |
| "Sale" | means the sale of the Land by the Seller to the Buyer as a result of the exercise of the Option |
| "Scheme" | means a scheme of development for the Land, broad details of which are set out in Schedule1, or any other scheme of development which creates at least the same value of the Land. |
| “SCC” | means the standard conditions of sale of land approved by the Law Society of [State]. |

# Interpretation

This agreement shall be interpreted as set out below.

* 1. A reference to a person includes a human individual, a corporate entity and any organization which is managed or controlled as a unit.
  2. If any party to this agreement comprises more than one person, all obligations of that party shall be construed as joint and several.
  3. A reference to a paragraph or schedule is to a paragraph or schedule to this agreement unless the context otherwise requires. The schedules form part of this agreement.
  4. The headings to the paragraphs and schedules (if any) to this agreement are inserted for convenience only and do not affect the interpretation.
  5. Any agreement by any party not to do or omit to do something includes an obligation not to allow some other person to do or omit to do that same thing.
  6. [Except where stated otherwise,] any obligation of any person arising from this agreement may be performed by any other person.
  7. A reference to the knowledge, information, belief or awareness of any person shall be deemed to include the knowledge, information, belief or awareness that person would have if he had made reasonable inquiries.
  8. This agreement contains the entire agreement between the parties and supersedes all previous agreements whether written or oral, discussion, promises and understandings between the parties. Each party acknowledges that while entering into this agreement he does not rely on any representation, warranty or other term not forming part of this agreement.

# Particulars of transaction

* 1. The “Deposit” is the sum of [$100,000 (one hundred thousand dollars)].
  2. The "Option Price” is the sum of [ten thousand dollars] now paid by the Buyer to the Seller, receipt of which the Seller now acknowledges.
  3. The "Sale Price" is [$1,000,000 (one million dollars)], the purchase price for the Land, to be paid on the Completion Date.
  4. The Last Exercise Date is: [date]
  5. The "Completion Date" is [eight] weeks after the date when the Option is exercised.
  6. The Extended Option Price is: [$20,000]
  7. The Extended Exercise Date is: [date].
  8. If the Option is exercised, the Option Price [is / not] included in the Sale Price.
  9. If the Option is exercised, the Extended Option Price [is / not] included in the Sale Price.
  10. The valuations giving rise to the calculation of the Increased Value shall be provided by a fellow of the Australian Property Institute (API), selected from a panel of three, namely:

|  |
| --- |
| [name 1] |
| [name 2] |
| [name 3] |

In the event that the parties fail to agree on the appointment, the decision of the [Seller / Buyer] shall be final.

* 1. GST [is / not] payable on the Option Price nor on the Sale Price.

# The agreement

* 1. For the Option Price, and subject to the terms of this agreement, the Seller agrees to grant the Option to purchase all of the interest of the Seller in the Land for the Sale Price.
  2. The Option may be exercised by the Buyer at any time before the Last Exercise Date, by serving a Notice of Exercise to the above address of the Seller (or to any substituted address later notified to the Buyer in writing) such Notice to be accompanied by the Deposit. The Deposit may be paid by:
     1. cheque and if the Deposit is tendered by cheque, then the cheque must be met at first presentation;
     2. in cash;
     3. by Internet transfer;
     4. by any other transfer whereby the money is guaranteed to be in the Seller’s bank account within 24 hours;
     5. by any other means agreed by the Seller.
  3. The Option shall expire if not exercised by [24.00 hours] on the Last Exercise Date or, if extended, the Extended Exercise Date.
  4. Exercise of the Option constitutes a binding contract for Sale between the parties in the terms of the SCC, so far as they are not inconsistent with this agreement.

OR

* 1. The Sale shall proceed in accordance with the terms of the draft contract annexed to this agreement.
  2. The transfer to the Buyer shall contain a restrictive covenant by the Buyer in the terms set out in Schedule 5.
  3. Completion of the Sale and purchase shall take place on the Completion Date, when the balance of the Sale Price, [after deduction of the Deposit and the Option Price] shall be paid to the Seller.
  4. The Seller sells with full title guarantee.
  5. The Seller agrees to transfer the Land to any person whom the Buyer nominates in writing in the document by which Notice of Exercise is given to the Seller.
  6. The Land is sold subject to all third party rights, whether registered or not, which have in the past been exercised over it.
  7. The Land is sold with the benefit of such rights over adjacent or proximate land of any third party, whether registered or not, which have in the past been exercised over it.
  8. All of the rights of any other person known to the Seller, over the Land, are listed in Schedule 2.

# Conditional Extended Option

* 1. At any time before the Last Exercise Date the Buyer may serve on the Seller an Extended Option Notice.
  2. The notice must make clear that the Buyer wishes to extend the Last Exercise Date and provide details of the grounds on which he has a right to do so. The notice must be accompanied by payment of the Extended Option Price.
  3. The Extended Option Notice takes effect to extend the Last Exercise Date until [the Extended Exercise Date / the relevant authority specified in the Extended Option Notice has informed the Buyer of its decision]

OR

# Absolute Extended Option

* 1. At any time before the Last Exercise Date the Buyer may serve on the Seller an Extended Option Notice.
  2. The notice must make clear that the Buyer wishes to extend the Last Exercise Date and must be accompanied by payment of the Extended Option Price.
  3. The Extended Option Notice takes effect to extend the Last Exercise Date until the Extended Exercise Date.

# Buyer’s activity

* 1. The Buyer may appeal against any planning refusal or condition, but he is not compelled to do so.
  2. Notify the Seller if at any time before the Last Exercise Date, he decides not to exercise this Option.
  3. The Buyer warrants that he will use his best endeavours to obtain planning consent for the Scheme.
  4. The Buyer may take whatever action he decides in order to attempt to add value to the Land, including, without limitation:
     1. making any planning application to the local authority;
     2. applying for any other relevant permission;
     3. making any site investigation;
     4. undertaking any public research with regard to any aspect of the Land;
     5. speaking in any public forum about any proposal for the Land in his absolute discretion.

# Seller's warranties

The Seller represents and warrants that:

* 1. title to the Land is registered in his name alone;

OR

* 1. he is the owner of the Land and knows no reason why he may not transfer the freehold interest in the Land to the Buyer free of any charge or other encumbrance, whether registered or not.

OR

* 1. title to the Land is registered in the name of [company name].
  2. all planning applications and informal discussions with planning officers in relation to the Land or land adjacent to it, during the period of five years up to today, are listed in Schedule 3;
  3. he knows of no development project in sufficient proximity to the Land as to be likely to reduce the value of the Land in the next two years.
  4. there are not now nor have been during the last three years any dispute with any person relating in any way to the Land.
  5. [the leases / tenancy agreements / other / documents, copies of which are listed and attached as Schedule 4, are valid and effective.]
  6. [all rent is paid to date and that the Seller has no reason to believe the rent will not be paid on the due date by any tenant in the future.]
  7. all of the Seller's interest in the Land will be transferred free of any charge or other encumbrance, whether registered or not.
  8. *[Add more warranties that will vary from one Land to another, particularly if a sale contract is not attached in final form. May need to cover practical matters that would normally be covered in pre-contract enquiries].*

# Guarantor’s warranties and guarantee

* 1. The Guarantor warrants that he is not aware of anything which might or will adversely affect the Seller’s ability to comply with the terms of this agreement.
  2. The Guarantor warrants that the Seller is not insolvent and that he knows of no circumstance which would entitle any creditor to appoint a receiver or to petition for winding up or to exercise any other rights over or against its assets.
  3. The Guarantor guarantees performance of this agreement by the Seller.

# Seller’s compliance

The Seller agrees that from today until the Completion Date, he will:

* 1. not communicate to any person or authority, an objection to any development proposal or detail of any proposal for development, made or likely to be made by the Buyer;
  2. not submit any planning application;
  3. not charge the Land;
  4. not grant over the Land any right whatever;
  5. allow the Buyer and anyone with his permission, to come on the Land to measure, survey and test any matter affecting the Land;
  6. continue to maintain any policy of insurance in respect of the Land or any part of it, as he has maintained at any time in the previous [12] months;
  7. send to the Buyer a copy of any notice he receives in connection with the Land.

# Confidentiality

Neither party will divulge the existence or terms of this agreement to any person other than professional representatives.

# Assignment of the agreement

The Buyer shall be entitled to assign this agreement and all or any of its rights and obligations under it.

# Indemnity - Seller to Buyer

The Seller agrees to indemnify the Buyer, against any loss, including loss of future profit and/or loss of opportunity by his:

* 1. failing to complete the Sale, or
  2. any breach of this agreement;
  3. a warranty being shown to have been breached by any person.

# Default by Buyer

If the Buyer, after exercise of the Option, fails to proceed with the completion of the Sale as required by this agreement, the Seller shall be entitled to retain the Option Price as liquidated damages and shall have no further recourse against the Buyer.

# Miscellaneous matters

* 1. No amendment or variation to this agreement is valid unless in writing, signed by each of the parties or his authorised representative.
  2. If any term or provision of this agreement is at any time held by any jurisdiction to be void, invalid or unenforceable, then it shall be treated as changed or reduced, only to the extent minimally necessary to bring it within the laws of that jurisdiction and to prevent it from being void and it shall be binding in that changed or reduced form. Subject to that, each provision shall be interpreted as severable and shall not in any way affect any other of these terms.
  3. The parties acknowledge and agree that this agreement has been jointly drawn by them and accordingly it should not be construed strictly against either party.
  4. So far as any time, date or period is mentioned in this agreement, time shall be of the essence.
  5. The rights and obligations of the parties set out in this agreement shall pass to any permitted successor in title.
  6. Any obligation in this agreement intended to continue to have effect after termination or completion shall so continue.
  7. No failure or delay by any party to exercise any right, power or remedy will operate as a waiver of it nor indicate any intention to reduce that or any other right in the future.
  8. The parties agree that electronic communications satisfy any legal requirement that such communications be in writing.
  9. Any communication to be served on either of the parties by the other shall be delivered by hand or sent by first class post or recorded delivery or by e-mail.

|  |
| --- |
| It shall be deemed to have been delivered: |
| if delivered by hand: on the day of delivery; |
| if sent by post to the correct address: within 72 hours of posting; |
| if sent by e-mail to the address from which the receiving party has last sent e-mail: within 24 hours if no notice of non-receipt has been received by the sender. [Take care before agreeing to accept service by e-mail. It may be convenient, but you or your counter party (the other side) could miss or accidentally delete the message]. |

* 1. In the event of a dispute between the parties to this agreement, then they undertake to attempt to settle the dispute by engaging in good faith with the other in a process of mediation before commencing arbitration or litigation.
  2. In the event of any conflict between any term of this agreement and the provisions of the articles of a limited company or any comparable document intended to regulate any other corporate or collective body, then the terms of this agreement shall prevail.
  3. Each party shall bear its own legal costs and other costs and expenses arising in connection with the negotiation and drafting of this agreement.
  4. The validity, construction and performance of this agreement shall be governed by the laws of the State of [State] and the parties agree that any dispute arising from it shall be litigated only in the State of [State].

**Signed by the parties**

Signed by [personal name] on behalf of [name of Seller] as its / his representative who personally accepts liability for the proper authorization by [name of Seller] to enter into this agreement.

Signed by [personal name] on behalf of [name of Buyer] as its / his representative who personally accepts liability for the proper authorisation by [name of Buyer] to enter into this agreement.

Signed by [personal name]

## Schedule 1 - Description of Land and development proposals

## Schedule 2 - Rights granted and reserved

## Schedule 3 - Planning applications and information

## Schedule 4 - Leases, tenancies and other occupational rights

## Schedule 5 - Restrictive covenants

The transfer of sale of the Land to the Buyer shall contain the following covenants.

The Buyer shall not:

1. [keep any domestic animal bred for meat or wool on the Land].
2. Use or permit the use on the Land for any purpose except [residential housing / development of . . . ];
3. [continue the list as required].

## .Notice of Exercise

Date: [Enter]

To,

[Name of the Seller]

[Address]

Re: Notice of exercise of option

Option for [name of Buyer] to buy land at [address]

Agreement dated [date].

Dear [name of the Seller],

I write to you to serve this notice upon you to exercise of the option to purchase the above and as permitted by the above agreement between us.

I therefore now confirm that I exercise my right to purchase all your interest in the Land.

I enclose my cheque for $ [amount], in payment of the deposit. My solicitor is [details].

If you would kindly give me the name of your own solicitor, I will take it from there and no doubt he will be in touch with you for your instructions.

Please do not hesitate to contact me if you can think of anything else we need to discuss.

For and on behalf of Buyer;

Signature:

Date:

Explanatory notes:

Option to buy land and property: extension of term subject to conditions

General notes:

1. **The politics of your deal**

An option agreement is unusual in that it is a selling proposal. It is up to you to convince the land owner that he should sign to a deal proposed by you. You therefore have a problem in deciding how far to push for terms which protect you. In our experience, most option agreements are rough and simple. The optioner takes many risks. This agreement is a complete and thorough version which provides a full framework. But if you need to soften it in order to get the deal across the line you can tweak the terms of the option agreement accordingly.

**Many options**

This agreement is a full version of a fairly basic deal. Nevertheless, there are many drafting options, which we will now explain. Where we refer to “option” lower case, we mean your drafting option. Where we use upper case, we refer to the Option to buy land - the subject of the agreement. In these notes, we have assumed that you are the optioner and that you have some property experience and some experience of the legal process, or that you are a property professional.

1. **Check every detail**

This agreement may not be effective if you fail to complete some vital element, such as the matters set out in paragraphs 3 and 5.

1. **Simpler version available**

This is a full version agreement. In most cases when you need a document like this, you will want to tie up your deal simply - before your seller changes his mind or takes advice from family, friends and neighbours. You do not want to put off your buyer by giving him a long legal document he will not understand. Net Lawman also sells several simpler versions, which are less likely to provoke a strong concern in your seller. Each is binding as a contract, but all lack the fine tuning and tying of loose ends available in this document.

Paragraph specific notes

1. **Definitions**

Please read “Editing Legal Documents” included in this legal kit.

This paragraph defines meanings. It also sets out critical figures and dates. If you change a defined term, make sure it applies to every use of it in the document.

You should first decide on the contents of the document, then return to check what definitions are needed and whether they really fit the text you have left in place.

“Land” description: many land disputes arise over the question of what was included. Boundaries, rights reserved and granted, must be carefully considered and set out as clearly as possible. A plan is essential. For best results, instruct to draw the plan a surveyor who works mostly for conveyancers.

Of course you will check the GST position.

1. **Interpretation**

Leave these items in place unless there is a good reason to edit or remove. Each of these items has been carefully considered in the context of this agreement and has been included for a purpose. Many of them strengthen the framework within which the agreement operates. Others simply avoid misunderstandings.

1. **Particulars of transaction**

This paragraph provides data. The sale price is fixed. That is a great advantage to the optioner who receives the benefit of inflation in buying later phases. However, the sale price could be inflation adjusted by the insertion of a few words, so as to give the land owner a payment which reflects the value at the date each phase is bought by the optioner.

1. **The agreement**

This paragraph deals first with the exercise of the option and second, with the contract for sale. It is the contract. The sale is based on the usual commercial property conditions approved by the Law Society. You can buy these from the law society website or from real estate institute for use. For guidance, you will find them at:

**QLD**

<http://commercialpropertysearch.savills.com.au/documentpreview.ashx?docid=b0fcd11f-3ac1-45a8-ab7f-faee64b1a413>

**ACT**

<http://www.barrettelton.com.au/getdoc_brochure.php?bid=72>

**WA**

<http://photos.harcourts.com.au/Harcourts.Public.WebTemplates/738/Files/JointForm2011.pdf>

**NSW**

2005 edition is valid and can be used by the end of 2015

[https://www.clarence.**nsw**.gov.au/page.asp?f=RES-LZU-22-16-87](https://www.clarence.nsw.gov.au/page.asp?f=RES-LZU-22-16-87)

**For 2014 edition which is available in electron format only:**

<https://ecosnsw.lawsociety.com.au/ECOS/faces/ecoslogin?_adf.ctrl-state=1863oomk6f_43&_afrLoop=12984710923770000>

**VIC**

[www.consumer.vic.gov.au/library/forms/businesses/estate-agents/sample-contract-of-sale-of-real-estate.doc](http://www.consumer.vic.gov.au/library/forms/businesses/estate-agents/sample-contract-of-sale-of-real-estate.doc)

1. **Conditional extended option**

We provide for two ways in which the option may be extended. The first way simply gives you extra time when you are “nearly there”. If the seller has insisted on a short date for the option to run, this provision effectively gives you a few more weeks.

1. **Absolute Extended Option**

This paragraph provides for a paid extension. Your seller will feel he will be paid fairly for your extension. You could use both provisions and extend on each.

1. **Buyer’s activity**

Beware of the seller’s solicitor inserting provisions relating to an appeal or to a narrower type of development that what you have in mind. You have a free hand if you can avoid reference to a particular scheme.

1. **Seller's warranties**

The extent of seller’s warranties is a matter of negotiation. It is essential that you use this opportunity to tie the seller to any "facts" which you require to be full and accurate. If the Land is let, you may find it necessary to ask for many more warranties.

This paragraph covers points you would normally cover in pre-contract enquiries or through your own investigation. By obtaining a warranty from the seller, you will be able to sue for breach of contract if information you have obtained turns out to be wrong.

1. **Guarantor’s warranties and guarantee**

If the land owner is a company, you should ask the director to guarantee this agreement.

1. **Seller’s compliance**

Here you are telling the seller to stay away. It is a matter of negotiation. This paragraph provides a cause of action against the seller for breach of contract.

1. **Confidentiality**

Delete if not important to you.

1. **Assignment of the agreement**

We have no comment.

1. **Indemnity - Seller to Buyer**

This is a short form of indemnity intended to make clear to the seller that this is a binding legal document and that you will commit to substantial expenditure on the back of it.

1. **Default by Buyer**

We have added this paragraph in order to limit the extent of a claim against the buyer. It is not primarily to protect the seller.

1. **Miscellaneous matters**

A number of special points. We have identified each of these as important to protect you. Some are relevant to particular paragraphs in the document, some apply more generally. Some are included to strengthen your position, some to minimise disruption and expense. Do not delete unless you are quite positive of the legal effect of doing so.

These are just as valid in law as if we had written them at great length, as you see in so many poorly drawn legal documents.

An option agreement does not need to be signed as a deed.

Schedule 1 - Description of Land

If the land is registered and you are buying all of it, refer to the certificate number in the definitions and delete this schedule.

If unregistered, pay for an excellent plan from a surveyor used to drawing conveyancing plans.

If you are buying part, use a plan.

Make sure plans include marks of boundary ownership and other relevant features.

In any event provide an address

Schedule 2 - Rights granted and reserved

Delete if none. Otherwise, set down clearly specifying details of uses, widths and so on. Use general words so as to allow for new things and reasons which may be required in the future.

Schedule 3 - Planning applications and information

We have no comment.

Schedule 4 - Leases, tenancies and other occupational rights

Delete if no lease

Schedule 5 - Restrictive covenants

Enter as required, if any. Example:

“The transfer of sale of the land to the buyer shall contain the following covenants.

The buyer shall not:

a) [keep any domestic animal bred for meat or wool on the land;

b) Use or permit the use on the land for any purpose except [residential housing / development of . . . ];

c) [continue the list as required]”

End of notes