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Barristers & Solicitors

DEAL IN DANGER: THE HOUSE SALE OFF THE RAILS

Clients expect their real estate lawyer to try to get a transaction closed as quickly and economically as possible. That is the goal, and that is the natural orientation for a real estate lawyer. But what happens when the buyer alleges there is a leaky basement, or a 'mould problem', after he has signed an unconditional agreement to purchase your house? Can he require a price reduction and still keep the deal alive? Can he tie up the property until he gets his way? There is no easy answer to these questions, but this memo outlines some of the factors that a lawyer has to consider in advising a client when a deal may go off the rails.

Good Faith in Contracts

The courts expect parties to a contract to be acting in good faith. If it proven that the seller has deliberately hidden problems from an innocent buyer, you can expect a judge will take a dim view of his case. Similarly, the sharp buyer who is simply trying to improve his deal by pointing out defects that he knew or ought to have known when he made the deal, will get no sympathy in court.

Caveat Emptor

The old legal doctrine of *caveat emptor*, - "let the buyer beware" still applies to real estate deals. We recommend that a seller should not be meeting with the buyer or discuss the merits of the property. The seller can legitimately take the position "I am selling what is there, not a dream home. You have inspected it, and you get what you see." And to the buyer, we point out the standard contract wording that there are no representations outside the written contract is still effective in most situations.

Home Inspections

We recommend a home inspection as a contract condition to buyers; and in fact, the seller benefits thereby, as well. If the buyer refuses to hire a home inspector, his complaints of defects that a home inspection might have revealed have a lot less credibility.

Tender on closing v. "anticipatory breach"

To end a deal on the basis that the other side is not going to live up to the contract, the party has to demonstrate that he from his side is "ready, willing, and able to close" on the date set for closing. To "tender" is still the best policy in this situation. The buyer's lawyer must have the cheques and closing documents ready and deliver them to the seller's lawyer, where there is a refusal to accept them; and vice versa for the seller. With a view to avoiding this expense, some lawyers allege that the other side, even before closing, has, in anticipation of the closing, breached the contract by stating that he will not close exactly in accordance with the contract. For example, the buyer's lawyer may say, "I am not going to pay full price;

I am going to pay the price minus \$X". The seller's lawyer may end the deal by writing back "So you are not prepared to close per the contract - the deal is over." This doctrine of anticipatory breach is, in our opinion, a risky substitute for the certainty of tender.

Specific Performance v. Rescission (and damages)

In real estate, "specific performance" was a remedy of choice for many years. A buyer especially could start a court action claiming that the property was of such a unique character that a remedy in money (damages) would not suffice. That tactic could prevent the seller from putting the property back on the market, requiring him to await a court decision before being able to "move" on - even if, ultimately, he won in court. Nowadays, the courts look askance on specific performance as a remedy except in rare circumstances. A house buyer trying to show that "that house was a one and only" is not generally going to be believed, especially in the urban market of today.

Seller Property Information Statement (SPIS)

The real estate industry has developed a complicated disclosure form which sellers are requested to complete at the time of listing. We recommend that a seller refuse to sign such a form. The law remains in place that the seller must disclose to the buyer any latent material defect such as mould; but this form engenders so many risks and possibilities for disputes that this form has been referred to as a "ticking time bomb".

What can we do?

Our goal is, of course, to get the deal closed to your satisfaction, as either a buyer or a seller. We are, however, aware of the issues described above, and on some occasions, we may need to address such issues. Unfortunately, there are no easy answers, as every case depends on its facts.

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