

DOCTRINE OF GOOD FAITH

- Duty to Disclose
- Good Faith in satisfying Conditions
- Suggestions to improve reliance on Conditions

- Home Inspection
 - Before 1979, Caveat Emptor was the rule
 - In McGrath v. Maclean 1979, the courts imposed a duty on the Seller for the first time to disclose a latent defect where the defect renders the premises unfit for habitation or dangerous
 - This was the start of “good faith” obligation in contract
 - Can’t be dishonest or unfair in negotiations – below community standards

- Home Inspection
 - Usually says “satisfactory in Buyer’s sole discretion” – implies subjective nature
 - Buyer has to conduct a home inspection – can’t rely on a condition if the Buyer made no attempt to satisfy the condition
 - Home inspection has to show some reasonable concerns
 - Can’t be completely *de minimus*
 - *Marshall v. Bernard Place Corp. 2002* – Buyer would not waive condition because true risk of deficiencies could not be quantified, but bought another house a month later, requiring \$1.6 million in upgrades. Court held Buyers acted in good faith.

- Obtain a Severance
 - Party agreeing to obtain a severance or municipal/Committee of Adjustment approval has a duty to use best efforts to obtain such severance or approval
 - In *Southcott Estates Inc. v. Toronto Catholic District School* seller was to use best efforts to obtain a severance by closing. Seller did not apply for severance until the deal went firm and had no discussions with local councilors. Then Seller terminated, because it could not obtain the severance. Original Judgement \$1.9 Million – reduced to \$1.00.

- Obtain Municipal Approvals
 - In 737985 Ontario Ltd. v. Essex Sanitary Plumbing and Heating Co. the judge summarized the case law:

It is common ground between the parties that the plaintiff cannot rely on the condition with respect to rezoning to secure the return of the deposit and to avoid the performance of the agreement unless it acted in good faith and used its best efforts to comply with the condition in the agreement.
 - Buyer did not pursue approval for its project after considerable due diligence indicated that it could not get density approved.
 - Court considered the words “suitable to the purchaser”
 - Court considered the Buyer’s efforts to determine likely density reasonable

- Financing
 - Condition usually contains similar “language” regarding Buyer’s discretion
 - Buyer has a duty to apply for financing or at least a pre-approval
 - Buyer would have difficulty using this to get out of an Agreement if the Buyer receives a commitment for a loan at market rates
- Status Certificate
 - Very broad condition – many things to be considered, including:
 - Financial Statements
 - Reserve Fund and planned increases
 - Pet provisions – if they have a prohibited pet
 - Seller refused to refund deposit until we advised the basis for refusing to waive the condition – found lots of reasons

- Use language to make the application of the condition more subjective
 - “in the Buyer’s sole and absolute discretion”
 - “suitable to the Buyer”
- Consider the severity of the obligation
 - Use “reasonable efforts” or “commercially reasonable efforts” versus “best efforts”
 - OR – if your for the other side, eliminate words like reasonable

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