



Conditions, Representations and Warranties in Real Estate Transactions

Conditions

A purchaser can terminate an agreement of purchase and sale and ask for the return of the deposit if the purchaser unable to waive a condition in the agreement such as financing, inspection, or the sale of their home. The waiver or non-waiver of a condition must be explicit and in writing as silence is deemed to be a waiver of the condition. The only exception to this rule is the implicit rule that the title to the property must be good. If on closing, title is not good and free and clear from all liens and encumbrances except for those stated, the purchaser has no obligation to close the transaction and the deposit should be returned to the purchaser. This rule applies even if the agreement of purchase and sale does not contain a provision regarding the validity of title. At law, it is always implied that the vendor has good title.

A vendor can also terminate an agreement of purchase and sale and keep the deposit if the purchaser refuses to close the transaction after all conditions in the agreement of purchase and sale have been waived by the purchaser. On closing, the vendor can also tender on the purchaser forcing the purchaser to complete the transaction, failing which, the vendor can make a claim for damages incurred as a result of the purchaser failing to close. The vendor may have a claim for damages against the purchaser, but the vendor is required to mitigate his/her damages. Such mitigation is normally proven by relisting the home after the purchaser fails to close and making reasonable efforts to sell the home to a new purchaser. If a vendor unreasonably delays the sale of the home to a new purchaser, a court will take these actions into consideration when making a judgment on the claim against the initial purchaser.

Representations

A representation in an agreement of purchase and sale, such as a representation that the property is not insulated with Urea Formaldehyde Foam Insulation (UFFI), relates to past or present events that induce the purchaser to make an offer and enter into the agreement. If there is a breach of a representation, and the representation is innocent, the purchaser will be entitled to rescind the contract before closing. The purchaser will be allowed to walk away and request the return of their deposit. If the representation was negligent, the purchaser will have the option to rescind the agreement with the return of the deposit before closing or to complete the transaction and sue the vendor for damages. If

the representation is fraudulent, the purchaser will have the above remedies and additional ones, as the case may be.

Warranties

A warranty on the other hand is different from a condition and a representation. For example, if a vendor warrants that they will fix the furnace on or before closing and they fail to fix the furnace, the purchaser is not entitled to walk away from the transaction and ask for the return of their deposit. The purchaser must complete the transaction and then he/she can sue for damages for breach of contract.

It is increasingly difficult to find sound grounds to refuse to close a deal. There is the availability of title insurance to "insure over" a problem and the courts' modern attitude is to favour the enforcement of an agreement of purchase and sale. The courts further consider that the parties owe a duty to each other to perform the contract honestly made. It is therefore very important for a purchaser and a vendor to understand the consequences of refusing to close a transaction.