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Subjective vs. Objective Conditions ©

Congratulations: Your offer on the condo was just accepted. You have been waiting for almost a year to get the right unit, and this one is almost perfect. With your offer you submit a cheque for \$10,000. All that is left is to fulfill your mortgage financing condition within the next 3 days. Although you have been given a pre-approval certificate, you are extra cautious; after all it is your first home. The bank requires some outstanding information, and a salary letter.

Half an hour before your appointment with the bank representative, you notice on the internet another unit on a higher floor with a better view than this one. This apartment is absolutely perfect in every way. No worries, the condition reads that you get your deposit money back if you are not approved for the mortgage. You cancel your appointment with the bank, and inform the agent that you have not been successful in obtaining financing. You ask for your deposit back ASAP. To your surprise, the vendor's agent replies that they are unwilling to release your deposit money, and if you wish to back out of the deal, you must split the deposit money with them.

How can this be? After all the offer states in black and white that there is no deal if you do not get financing within the time period. The time has past and the bank could not give you the final approval without the salary letter. You accordingly did not waive the condition. Now you need your money back. After all, you need the deposit money in order to buy the other unit.

Conditions are a common feature in an Agreement of Purchase and Sale. Although common, they may create problems for the purchaser later in the contract. The law of conditions in Canada is complex and unpredictable and may create traps for the purchaser.

The law is clear, if a condition in an agreement is for the benefit of the purchaser, the purchaser cannot take advantage of the condition unless

they took all reasonable steps or used their *best efforts* to fulfill the condition.

Where a purchaser wishes to get out of the contract on the basis of a condition, the courts will review the circumstances surrounding the transaction. The courts will assess the reasonableness of the actions during the transaction and the credibility of the purchaser and witnesses to determine whether the person acted reasonably and in good faith or used best efforts in trying to fulfill the condition. The courts will not consider whether any other purchaser would have acted the same.

The courts will also pay close attention to the clarity of the condition. The Ontario Court of Appeal has indicated that some conditions are so imprecise, or depend on the subjective state of mind of the purchaser, that the contract process must still be regarded as at the offer stage. In other cases, the condition is clear, precise and objective and a contract is completed. In this case, neither party can withdraw; but performance is held in suspense until the parties know whether the objective condition is fulfilled.

Now what do you do? Go ahead with the deal, negotiate, or sue for your deposit back? Litigation is an expensive and long process. Also litigation can take on an unexpected course, and parties who enter the litigation arena may be surprised to discover the extent to which their actions during a transaction are evaluated.

If you are thinking of abandoning a transaction by dragging your feet and not fulfilling a condition or you are in doubt about any aspect of your offer do not hesitate to consult your lawyer.

For more information about this or any other real estate law related topics please do not hesitate to contact John Poletes at 416-482-1902, or e-mail him at john.poletes@bellnet.ca.