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Mediating Failed Real Estate Transaction Disputes

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It is not uncommon that buyers or sellers look for ways of getting out of real estate deals. In fact, many mediations involve just that, more often than not, buyers who want to avoid their obligations to close a real estate deal. Often, they cannot get the financing they need or have not been able to sell an existing home or the market has dropped. They then submit requisitions or object to the seller's formal compliance with tender obligations to justify their refusal to close. The pleadings in defence to the seller's claim to damages and forfeiture of deposits are typically technical and creative.

The courts however tend to favour good faith and reasonable conduct and as a result, testing the defence in court is fraught with challenges, especially when the issues raised suggest that they were not critical to the purchaser's decision not to close. For that reason alone, the uncertainty of a successful decision as well as the costs repercussions warrant a careful consideration of mediating an expeditious resolution of the dispute.

A recent case that offers a good lesson involved a purchaser that claimed that an underground sewer easement affected the material use of a property which constituted a valid requisition and a basis for refusing to close. In *Haghollahi v. Butt* (2020 ONSC 4082), the buyer wanted out of a deal and their deposit back when the search of title disclosed two sewer easements running across their property. The agreement of purchase and sale was the standard OREA form that makes title subject to such easements provided that they do not "materially affect the use of the property". The agreement of purchase and sale included the legal description that said it was "S/T LT605802" (i.e. subject to the easement in that instrument number). The easement agreement itself contained the usual clauses about keeping the easement lands free of trees, buildings and not to be paved. These are typical sewer easement restrictions.

It was a big house on a large lot and it had an inground pool and hot tub that were not on the easement lands. But the buyer claimed that they wanted to expand the pool, and maybe even put an addition on the house. The court noted that the buyers had not walked the back of the house when they bought it, or met with the town about their "plans" or investigated their plans with contractors, etc. However, they wanted out of the deal based on the easements materially affecting their use of the land. (Interesting that the court did not address whether a future use of the property is even covered by the right to object.)

The court reviewed the cases dealing with considerations of what makes such easements materially affect the use of the land. But more importantly, the court inferred that “the existence of the easements is not the real motive behind seeking rescission of the Agreement.”

In earlier days, our courts tended to accept technical objections to title and procedural issues on real estate transactions. More recently, the courts tend not to accept technical excuses for finding ways to get out of a deal when there are other motives for refusing to close. I advise real estate transaction lawyers that if they are advising clients on the likelihood of success of such a strategy, they ensure that they are very clear with their clients about the chances and the trend in the cases and that they protect themselves accordingly. In this case, the issue was determined on a *Vendor and Purchaser Act* application. More often, the buyer takes the technical position on closing, gets sued by the seller and often, the lawyer for the buyer is brought into the action because of advice given about whether he or she had the right not to close. The seller’s lawyer may also be added to the mix based on likely allegations that the buyer’s refusal to close was due to the seller’s lawyer’s procedural error such as not tendering, faulty tendering or poor advice on the seller’s rights.

For litigators, the advice is not that much different. There is no guarantee of judicial success and the costs can far outweigh the practical result. By the time the matter goes to trial, the only real thing being fought over is the deposit and the costs of success may dilute the amount that the seller will actually recover. Litigators too should be forthright with their clients about the practical result of pushing ahead with expensive litigation, given that they are relying on technicalities. Settling early, while not particularly satisfactory on a principled basis, may prove the best financial result.

Technical objections may well have merit and as a result, a mediator with a good grasp of real estate law, and real estate practice and procedure may facilitate a speedy and fair result.

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