

SUBJECT-TO-FINANCING CLAUSES

Are you in or out?

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Real estate purchase contracts often make the buyer's obligation, in varying language, subject to the condition that the buyer obtain financing suitable to the buyer. Does this obligate the buyer to make an honest effort, best efforts or all reasonable efforts to obtain financing? When has the buyer done enough to rely on the condition to not complete the purchase and get the deposit back?

The B.C. Court of Appeal recently provided some strong guidance in *Gordon Nelson Inc. v. Cameron*, 2018 BCCA 304 (CanLII).

WHAT HAPPENED?

The buyer entered into an agreement to purchase properties for \$7 million. The agreement contained a clause making it subject to the condition that the buyer found, in its sole discretion, suitable financing.

The buyer pursued financing with two separate mortgage brokers with whom the buyer had prior business relationships. Based on their advice as to how much mortgage money would be available, the buyer would need to put in \$2.45 million. The buyer found this not to be suitable and informed the seller that the financing condition would not be removed.

The contract provided that unless the buyer gave the seller written notice that the condition was waived or declared fulfilled, the contract was terminated and the deposit (other than \$10) returnable.

Had the buyer done enough to rely on the financing condition?

DECISION

"Satisfactory" or "suitable" financing conditions do not in all cases obligate the buyer to make "best efforts." While courts will readily imply such a term where doing so is necessary to achieve the result intended by the parties, it will not imply such a term in the face of contrary language in the agreement or where such a term does not need to be implied. However, the principle of good faith does impose a general duty of honest performance in all contracts. Whether anything more is required depends on the language and context of the contract.

The language of the contract in this case meant the buyer was obligated to make an honest effort to find suitable financing but had sole discretion in determining whether the found financing was suitable. That discretion too was to be exercised honestly.

The buyer had honestly tested the market and honestly concluded that suitable financing was not available. The buyer was not using the financing condition to back out of the contract for other reasons.

The deposit was ordered returned to the buyer, except that the seller was entitled to keep the non-refundable \$10 portion.

APPLYING THE PRINCIPLE

The B.C. Supreme court in *Drover v Steer*,

2018 BCSC 1774 (CanLII) applied the Nelson decision.

A buyer entered into an agreement to purchase the shares in a company that owned a butcher shop. He made a \$75,000 deposit on the \$149,000 purchase price. The agreement was subject to the buyer's procurement of financing on terms satisfactory to the buyer. The buyer expected to receive the balance of the funds needed to complete the purchase from a military payout.

When the payout didn't arrive, he unsuccessfully sought financing from a friend. He made no other efforts to obtain financing. The Court concluded simply asking one friend for financing was not an honest effort and did not entitle the buyer to claim an inability to complete the purchase. The sellers were entitled to keep the deposit.

TAKEAWAYS

A contract is to be interpreted according to its terms to give effect to the objective intentions of the parties.

The parties should clearly state in the contract any required conduct and thresholds of performance (such as honest efforts, best efforts, and all reasonable efforts) regarding the obtaining of financing.

Parties may want to consider putting in thresholds as to what financing is to be deemed as being satisfactory (such as the principal amount, the rate and the length of the term). 