"Best Efforts" Doesn't Automatically Apply To All Conditional Financing Provisions, B.C. Court Holds

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British Columbia's Court of Appeal has upheld a ruling that declined to apply a "best efforts" requirement to the fulfillment of a financing condition in a real estate purchase agreement.

- The case, *Gordon Nelson Inc. v. Cameron*, arose in the context of a real estate acquisition agreement.
- One condition of the agreement (the "financing condition") was that the purchaser find suitable financing within 45 days.
- Neither of the two mortgage brokers approached by the purchaser was able to arrange a loan large enough to pay for the $7 million purchase.
- The purchaser concluded that "suitable financing" was not available and refused to proceed with the purchase. In turn, the vendor refused to refund the purchaser's deposit, giving rise to this litigation.
- The B.C. Supreme Court found for the purchaser, a decision that was unanimously upheld in this ruling by the Court of Appeal.

Financing Clause

The case turned on the following financing clause:

The offer is subject to the following conditions: The Buyer finding, in their sole discretion, suitable financing for the property within 45 business days of receipt of a satisfactory Phase I environmental report for the subject property. This condition is for the sole benefit of the Buyer.

Issue on Appeal

The trial judge held that all that was required from the purchaser was an "honest effort" to find suitable financing. In her opinion, there was no ground for implying a stricter "best efforts" requirement into the contract.

On appeal, the vendors argued:

- That the trial judge had arrived at her conclusion as a result of misconstruing the contract as merely creating an "option" that the purchaser had decided not to exercise (it was clearly the case that the contract as a whole was binding, not conditional); and
- That previous case law – and in particular the 1988 B.C. Court of Appeal ruling in *Griffin v. Martens* – had established that, in B.C. at least, the best efforts requirement is broadly applicable to all kinds of conditional financing provisions.

Court of Appeal Ruling

Writing for the unanimous Court of Appeal, Mr. Justice Harris rejected the appellants' argument that the trial judge had misconstrued the contract as merely an option, despite her repeated use of that term. The key issue, as the Court of Appeal saw it, was whether the *Griffin* ruling had established a broadly applicable principle that "best efforts" are required with respect to all conditional financing clauses.

Griffin: the key B.C. precedent

In *Griffin*, which had also involved a real estate acquisition, the relevant language in the conditional financing clause (which was also stated to be for the benefit of the purchaser) had read as follows:

…subject to purchaser being able to arrange satisfactory financing on or before Friday, May 31, 1985….

The Court of Appeal had concluded in that case that the purchaser was obliged not merely to act honestly, but also to act reasonably and with best efforts to obtain financing. Anything less, Mr. Justice Lambert had held, and the contract would be turned into a mere option.

Distinguishing Griffin

The trial judge had arguably structured her ruling in a way that made it appear to be based on a finding that the contract had only created an option to purchase. However, the Court of Appeal held that the trial judge's references to an "option" were superfluous to the foundational principle of her ruling, which (in its estimation) was the principle that a contract "is to be interpreted according to its terms to give effect to the objective intentions of the parties".

The Court of Appeal affirmed the trial ruling on that basis. In particular, Harris J.A. noted that it followed from the "objective intentions" principle that *Griffin* does not lay down an iron-clad rule for all conditional financing agreements. In fact, in this case *Griffin* could be distinguished inasmuch as its conditional financing clause (reproduced above) had omitted the "sole discretion" language. In Harris J.A.'s words:

The most that can be said as a general proposition, in my opinion, is that the principle of good faith imposes a general duty of honest performance in all contracts: *Bhasin v. Hrynew*, 2014 SCC 71 at paras. 89, 93. Whether it implies anything further depends on the language and context of the contract itself.

The ruling went on to state that parties are entitled to contract as they wish and, in particular, are perfectly free to limit the purchaser's obligation in a conditional financing to "honest efforts":

Although the … courts will readily imply a term, such as a "best efforts" obligation where it is necessary to do so to give business efficacy to a contract, [the case law does] not support the proposition that this will always occur in the face of express language to the contrary or where such a term does not need to be implied.

The Court added that it is "entirely consistent" for the trial judge to have recognized that the contract was binding and enforceable while at the same time holding – as the Court of Appeal also held – that it

remained subject to a condition precedent relating to the financing. In the Court of Appeal's view, this was all that the trial judge had meant when she had referred to the contract as an "option".

Conclusion

While not a groundbreaking ruling, *Gordon Nelson* serves as a reminder:

- That if your conditional financing provision is litigated, a court may analyze its language very carefully in deciding whether the parties truly intended the purchaser to be held to a "best efforts" standard; and
- That the Supreme Court of Canada's landmark *Bhasin*ruling has reinforced "honest efforts" as a baseline standard that applies broadly to cases of this type.

No matter what side you're on, the key takeaway is to give due consideration to whether your conditional financing provision is expressed in terms that correspond to your understanding of the extent of the purchaser's obligations to find financing.