

PROMISES, PROMISES

Real Estate Warranty Enforceability

By Albert S. Frank, LL.B.

The case of *Melko v. Lloyd Estate (2002)*, 61 O.R. (3d) 151 is an interesting example of a battle over the enforceability of a real estate warranty.

As part of buying land from Lloyd, the Melkos required certain representations and warranties about the sewage systems serving the property, and that the warranties would survive the completion of the transaction. Thus, the Melkos' idea was that if, after they completed the purchase, they learned that any of the representations and warranties were untrue, they could demand compensation. Unfortunately, it turned out after the Melkos took possession that there was indeed a problem with the sewage system.

Warranty "to the best of his knowledge and belief"

The representations and warranties in the Agreement of Purchase and Sale were expressed to be "to the best of his [the vendor's] knowledge and belief." It was clear by the time of trial that there was a problem with the sewage system. Upon reviewing the evidence, however, the trial judge found that the defendants had honestly believed, to the best of their knowledge and belief, that the representations and warranties were true. Since the representations and warranties were made only "to the best of his knowledge and belief," the defendants had met their obligations under the Agreement of Purchase and Sale.

So the Melkos could not be compensated based on the contents of the Agreement of Purchase and Sale.

Statutory Declaration warranties and representations

There was also, however, a Statutory Declaration. Before the closing the lawyers for the Melkos had prepared this document in the form of "a solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath". In the Statutory Declaration, signed on behalf of the vendor by the lawyers for the vendor, the representations and warranties are stated bluntly, without any wording about knowledge and belief.

Accordingly, the Statutory Declaration was wrong. The question was whether it was legally binding on the vendor, who would then have to compensate the Meklos.

Lack of Consideration

Promises – and other statements – are not always legally binding on the person who makes them. The usual basis for a legally binding effect is to provide "consideration" – something of value going to the person who makes the promise. The law accepts many kinds of value as good consideration.

Consideration can, for example, be a large or small amount of money, land, gold, personal services, food, clothing, or art. Practically anything of value that is not illegal or against public policy might be consideration.

The trial judge's view was that the warranties and representations as expressed in the Statutory Declaration were a sufficient amendment or change that there would have

to be fresh consideration to make it legally binding. As there was no fresh consideration – i.e. no consideration beyond what was already provided in the Agreement of Purchase and Sale – the warranties and representations of the Statutory Declaration were unenforceable.

This left the only binding warranty as the one in the Agreement, which was merely “to the best of his knowledge and belief” and was therefore complied with by reason of the vendor’s genuine – though incorrect – belief.

The result was that the purchaser lost the lawsuit.

Seal

Is there any way this result could have been avoided, without providing fresh consideration?
Yes.

As I discussed in a prior issue of the ***Bottom Line***, there does not have to be any consideration for a document under seal. Indeed, in legal history contracts and other solemn documents had to be under seal. It was only later that the courts began to enforce them even though there was no seal, if there was consideration. The courts in effect decided that the presence of consideration could be a substitute for a seal.

So the parties could have signed, ***under seal***, an amendment to the Agreement changing the warranty from “to the best of his knowledge and belief” to an absolute wording, and the amendment would have been binding.

#

The above article first appeared in the February, 2003 issue of ***The Bottom Line***.

#

*Albert S. Frank is a business trial lawyer
(commercial litigator).*

E-mail: afrank@FrankLaw.ca

Web: www.FrankLaw.ca

Copyright © Albert S. Frank