

Conditions and Warranties

The law recognises when entering into a contract, the parties will in effect create terms of the contract that have different meanings and effect.

One of the more common and important distinctions is between conditions of the contracts and representations or warranties.

Representation or Warranty

A representation or warranty is effectively a statement or creation of a belief in a certain state of affairs.

The important thing to understand about a representation or warranty is that it is just a statement. It is not something which requires a party to do something, or to take a particular action. It is merely a statement as to a state of affairs or things.

There are a number of common representations that might be made by a seller or their agent relating to the sale of land, such as a block having particular zoning or development approval, or that council approval exists for structures on the premises.

The General Conditions for Sale of Land incorporated into the land sale contract also sets out a number of things that are representations and warranties. For example, clause 9.1 sets out a number of things that the Seller represents and warrants to the Buyer, such as the Seller does not know of any demand, order or requisition relating to the property which has been made or which an authority proposes to make. It also represents that it does not know of any encroachment on the land by building or other structure. In all there are a number of things that are represented under clause 9. Similarly, for strata titles, there is a raft of warranties contained at clause 10.2.

Often we see in special conditions prepared by the real estate agent, representations and warranties that for example electrical fixtures and fittings will be in good working order at settlement. Even though it is included as a "Special Condition", if the clause uses words such as "The Seller warrants" then it would be considered a warranty.

What needs to be understood in relation to representations or warranties, is that if a representation or warranty proves to be false, this does not give the Buyer a right to terminate the contract. It doesn't even give the Buyer a right to hold up settlement in any way. At law, a breach of a representation and warranty usually gives a right to a party to claim damages arising from the breach. In other words, the Seller might be liable to compensate the Buyer for its loss as a result of the representation proving false, if the buyer is actually put to expense in rectifying the matter. But the Seller will still be entitled to insist the Buyer settles, and will be entitled to claim they are "ready willing and able" to settle, if a breach of warranty is the only outstanding issue.

Conditions

Conditions things which the parties need to do as a part of the settlement process. They can be considered to be clauses which required some sort of action on the part of one party or another. The simplest and most basic type of condition for example is clause 3.1 of the General Conditions which states the Buyer must arrange for the transfer to be prepared. It effectively states something that must be done by one party or another and some action which must be taken. Breaches of conditions can, depending upon the circumstances, create a right of termination of the contract. Under the General Conditions for sale of Land, a party may need to complete steps such as the issuance of a Default Notice, prior to being able to terminate for breach of the condition.

Conditions can quite often be identified by the use of words or phrases such as “the Seller shall”, or “the Buyer must” or “this contract is conditional upon the Buyer”. It is something which again must be able to be determined from the clear words of the contract as in general terms external evidence will not be admitted to assist.

The distinction between the two is very important. If a condition of the contract is not met, then the party that is in breach is arguably not ready, willing and able to complete settlement, unless they have the means to remedy that breach at hand, and the other party is entitled to not settle until such time as that breach is ready to be or capable of being remedied.

However, a breach of a warranty will not entitle the “innocent” party to refuse to settle, or terminate the contract.

Obviously, this advice is general in nature, and does not replace advice on the specific clauses of your contract. Please contact MGB Legal if we may be of assistance to you in your specific situation.