RealTalk® about Real Estate

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Topic: Thoughts on the New AREA Contract

The new AREA contract is now in use. Here are some of my thoughts on the new contract, including where I think there have been shifts in liability:

Clause 2.3

The previous language was "subject to any tenancies" but now the starting point is that there will be "vacant possession." This shifts the onus, and any liability, on to the Seller and the Seller's agent, to ensure that either the property will be vacant or any tenancies are specifically written into the contract.

Clause 3.1(f)

The Seller is now obliged to disclose "known Material Latent Defects". While "Material Latent Defects" are defined, the definition includes reference to defects that "affect the use or value" of the property. This language might invite trivial claims and it would be helpful if the definition said "materially affect the use or value of the property" so as to limit this possibility.

Clause 6.1

There is now an onus on the Seller to disclose any "known" lack of permits. Exactly what "known" means is not clear especially for the Seller who has no knowledge of what previous owners did. For example, if the Seller suspects that a previous owner might not have obtained a permit, is there an obligation to make enquiries? Overall, this is a dramatic shift from the previous contract and from the common law position of "buyer beware". In essence, it is now "Seller beware".

Clause 10.3

This new language enables the Buyer to force the Seller's lawyer to accept an electronic fund transfer directly from the Buyer. I anticipate considerable resistance from Seller's lawyers who, understandably, do not want to disclose their trust account details to a Buyer.

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