

### **Covenant of Faith and Fair Dealing Does Not Obligate the Grantor of a Right of First Refusal to Negotiate a Price Favorable to the Grantee**

On April 1, 2004, in the case of Uno Restaurants, Inc. v. Boston Kenmore Realty Corporation, the Massachusetts Supreme Judicial Court held that the owner of a building containing condominium units was not obligated to require that the price offered to purchase the entire building be allocated on a pro rata basis where the occupant of one unit had a right of first refusal to purchase that unit. The court expressly rejected the contention of the occupant that the implied covenant of faith and fair dealing applicable to contracts generally imposed such an obligation.

Coles Holdings, Ltd. made an offer to buy the building owned by Boston Kenmore Realty Corporation. Uno Restaurants leased a unit in the building and was the only occupant entitled to a right of first refusal. The court noted that the offer to buy the building was not solicited by Boston Kenmore, and other than requesting that Coles make a separate offer for the Uno unit, Boston Kenmore did not influence the allocation of the purchase price among the units. In addition, the price offered by Coles for the Uno unit was within the range of fair market values for the unit determined by an appraiser employed by Boston Kenmore. Upon notification of Coles' offer to buy the building, Uno offered to exercise its right of first refusal for a percentage of the total purchase price offered for the building equal to Uno's unit's pro rata percentage of the aggregate assessed value of the building.

The court concluded that Coles made a bona fide offer for the units notwithstanding the alleged disproportionate allocation of the purchase price among the units, the relatively unsophisticated method Coles used to value the units and the conditioning by Coles of its offer to buy the remainder of the units on its purchase of the Uno unit. The court further noted that Coles had no obligation to Uno and as a competitor for the unit, Coles had the right to offer a price that would be difficult for Uno to match.

The court concluded that Boston Kenmore's only obligation was to provide Uno with timely and accurate notification of Coles' offer so that Uno would have the opportunity to exercise its right of first refusal. There was no evidence that Boston Kenmore attempted to influence the allocation of the purchase price. The court left open the possibility that a sufficiently gross disproportion in the purchase price between the Uno unit and the balance of the building could constitute a violation of the covenant of good faith and fair dealing, but noted Uno failed to present any evidence as to the value of the remainder of the building.

The court's decision provides protection for owners of buildings comprised of condominium units where some of the occupants may have rights of first refusal to purchase individual units. In order to best utilize the protections afforded by the decision, in negotiations relating to the sale of the building, the owners should let the prospective purchase drive the negotiations with respect to allocation of the purchase price among units.

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