

Reverberations for Real Estate Agents

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What is the duty of a real estate agent to verify the information provided by the vendor of the property to prospective purchasers?

In this space I frequently moan about the danger of mediation stemming the flow of judicial precedent, but here is a nice legal question answered by the Court of Appeal for Ontario this month.

The property was a residential home with significant structural and plumbing problems.

The agent, who acted for both the purchaser and the vendor, became the meat in the sandwich.

The purchaser sued the agent for failing to advise the purchaser to obtain professional advice about the possible structural problems, and for failing to warn about the risks of making an offer that was not conditional on inspection.

The vendors sued the agent on the ground that she failed to advise them of their duties with respect to providing information to prospective purchasers about the house.

The trial judge dismissed both claims against the agent. He found the agent had no reason to question the vendors' representations about the condition of the house. He also found the purchaser understood the value of an inspection before closing, but made her own decision to remove the condition on inspection to make her offer more attractive.

The Court of Appeal reversed this conclusion. It ruled that the agent had plenty of reasons to question the veracity of the vendors' statements. The house was underpriced because of settlement problems, her visual inspection prompted her to ask questions about settlement problems, and as she testified, she was "no home inspector" herself. On this evidence the trial judge was "clearly wrong" to conclude that the agent had no reason to doubt the vendors' representations.

The appeal court held the agent's failure to verify these pertinent facts herself, or recommend in the strongest terms that the purchaser either obtain an inspection or make the offer conditional on an inspection, was "an egregious lapse."

It further held the agent's failure to clarify to the vendors their obligations in providing information to the purchaser, was also egregious.

The appeal court disagreed with the trial judge's decision not to admit expert evidence on the standard of care of an agent in these particular circumstances. He did not refer to the Code of Ethics which governs real estate agents. He simply concluded that there was

no obligation on the agent in this case to enquire further as to the representations made by the vendors.

Although there was a dearth of evidence in the trial record bearing on the standard of care owed by the agent, the Court of Appeal found the Code of Ethics provided sufficient grounds to determine that the agent had not met the appropriate standard. In particular the court referred to provisions in the Code that require agents to encourage clients to seek the assistance of professional advice where appropriate, and another provision that requires agents to verify pertinent facts respecting a property. The court also cited judicial precedent to the effect that an agent owes this duty, even when not put on enquiry.

The vendor and the agent made claims against each other for contribution and indemnity which the trial judge dismissed. The appeal court agreed, on the ground that a party must be wholly free from fault to be entitled to indemnification from the other. It apportioned liability to the purchaser as between the agent and the vendors at 50/50%.

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