

CAVEAT EMPTOR



Arnie Herschorn
Partner

T: (416) 369-4134
E: aherschorn@mindengross.com

Recently there has been a spate of publicity about homebuyers complaining of the conduct of the real estate agents who assisted them in the purchase of a home and against the vendors who sold them the home.

In the most recent complaint to make the news, the purchaser complains that the real estate agent did not warn her that a baby had accidentally drowned on the property. In another case approximately two weeks prior, the homeowner complained that the real estate agent failed to disclose that a double murder had been committed in the house approximately ten years before the homeowner purchased it.

The sobering news for these complainants is that, to date, there is no precedent in Ontario for awarding damages on the basis of these or similar complaints. The basic law is simply “buyer beware” (caveat emptor). The general rule is that it is for the purchaser to make whatever inquiries about a property may be material and to satisfy himself or herself that the property is suitable. There are some limited exceptions. A vendor, and by extension a vendor’s agent, is generally obligated to disclose defects in a property that are not obvious on an ordinary inspection. Furthermore, a vendor is not entitled to cover up a defect, for example by doing a cosmetic repair does not really solve the problem but merely masks it.

Until now, the law in Ontario has been that a vendor, and by extension the vendor’s agent, must disclose a defect in the property that makes the property unsafe for habitation, again provided that the defect would not be obvious on an ordinary inspection. In one recent case handled by our firm, the Court affirmed that a purchaser who complained that the vendors and the vendors’ agent failed to disclose that a person convicted of possession of child pornography lived across the street had a complaint that was legally tenable. This is, however, only a minimal finding. The case settled before it could go to trial. We do not know what a trial judge, having heard all of the evidence, would have decided. In the case just mentioned, the presence of the bad neighbour was more than of theoretical interest to the purchasers, because they had two young children and would not have been in a position to give the children constant supervision so as to ensure that the children did not come into contact with the neighbour.

The law of Ontario had already developed to the point that a purchaser could, in theory, complain about a defect not only in the property itself but in the neighbourhood. This stems from a number of decisions years ago in Ontario relating to the presence of radioactive material in the soil elsewhere in the neighbourhood but not on the property itself. The Court found the vendors liable for not disclosing to the purchaser the presence of radioactive soil in the neighbourhood. So it is not a bar to a complaint that the defect relate to something in the neighbourhood rather than to the property itself.

The result is that the purchaser who wishes to make a complaint based on some unattractive feature of the neighbourhood, such as the presence of a “bad” neighbour or an unfortunate past event on the property itself does not yet have a favourable precedent on which to base his or her case even if the purchaser may suffer some psychological alarm.

Another sobering thought is that the insurer for the real estate agents in Ontario usually defends these cases to the hilt. There will be no easy victory for the purchaser.

One notable feature of the case handled by our office is that a number of newspaper articles made the point that it hardly does a careful and conscientious purchaser any good that there is a registry of sex offenders when the registry is not accessible to the public. It may be well and good to say that the onus is on the purchaser to make inquiry but the relevant avenue of inquiry in this case was closed. The newspaper articles called for the registry to be open to the public.

It will be interesting, to say the least, to see how the law develops in Ontario. But, for the time being, to those who know little law and even less Latin: buyer beware.