

In general, risk borne by purchaser

Caveat emptor reigns in real estate law

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For Law Times

A murder in the house, a sexual deviant across the street and reported hauntings within a home can often play a role in the marketability of a property.

When it comes to real estate, the principle of *caveat emptor* reigns. But like life itself, in law there are exceptions to the buyer beware rule.

Case law over the years has established some guiding exceptions, observes civil litigator Marvin Huberman. An obvious exception is when the vendor fraudulently misrepresents or conceals a defect that isn't apparent upon examination, he says.

"In general, the risk is borne by the purchaser unless circumstances fall within certain exceptions" because the buyer has the ability to protect himself through contractual terms, says Huberman, a Toronto lawyer, mediator and arbitrator.

Huberman says a latent defect can be established when a vendor knows of an issue that renders the home unfit for habitation and when the vendor is reckless about the state of the house and its fitness for habitation. A vendor can also be seen to be in breach of his duty to disclose if he remains silent on a known defect, he says.

But when does a stigma attached to a home constitute a latent defect that should be disclosed to the purchaser?

"The law delineates a certain amount of perimeters about what a vendor is obligated to disclose about a property," begins

John Brennan, a commercial litigator with Lerner LLP in London, Ont. "In Ontario, generally speaking, there is no obligation in law by a vendor to disclose a stigmatization."

But, he adds, the law is always in motion and there are indications that the door isn't closed on the idea of a non-physical element being identified as a latent defect. There are some indications that further evolution may well include a variety of stigmas.

A British Columbia case, *Summach v. Allen et al.*, where the purchaser didn't know the adjoining property was used as a nude beach, seems to clearly draw the line in the sand. The lower court determined that the vendor wasn't under an obligation to disclose its use and the decision was upheld in appeal.

Key in *Summach* is the requirement that a latent defect is a material defect that's not generally visible during inspection but might render the property unfit for habitation, is dangerous or potentially dangerous to the occupants. So a physical issue such as leaking oil tanks on a property will clearly pass that test, but a less defined, tangible issue may not.

But observers such as Brennan say there is room for movement. While the courts haven't specifically issued decisions that certain stigmas be included among the latent defects, a couple of high-profile cases have left the door open to the suggestion that a stigmatized property could well constitute a latent defect.

In *Dennis v. Gray*, it was a failed motion by the vendor to dismiss that serves as a foot in the



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door for stigmatized properties to work their way into the realm of latent defects.

A couple with young children purchased a home in Gravenhurst, Ont. when, upon moving in, the wife learned that a man convicted of possession of child pornography was living across the street. She abruptly halted the move and sued the vendor as well as the real estate agent for keeping mum on what appeared to be common knowledge in the neighbourhood. The non-disclosure was tantamount to fraudulent concealment, accused civil litigator Arnie Herschorn, a partner with Minden Gross LLP in Toronto, who represented the plaintiffs.

"The litigation at that point is a bit of a gamble because there's no case law whatever at that point that extends the concept of latent defect that far. It's a pio-

neering statement of claim in that respect," says Herschorn, a civil litigator.

And then the vendor made what Herschorn describes as a tactical mistake by bringing a Rule 21 motion on a point of law that argued it was plain and obvious that the claim could not succeed. Herschorn says this move came instead of bringing a summary judgment motion that would at least require some factual basis including affidavits and cross-examination, instead of just pleadings.

Referring to a string of cases in the 1980s involving radioactive material, Herschorn argued that latent defects include what's in the neighbourhood — such as a sexual deviant — not just what is within the house and that *Dennis v. Gray* presented no new law.

When the presiding judge refused to grant the motion on grounds that it's within the legal ballpark, the claim was allowed to proceed and the plaintiffs had some legal ground to stand on. But the case settled and never went to trial. The case against the real estate agent was dropped because the vendor didn't want to finance what was sure to be a fight against the agent's insurer.

Even though *Dennis v. Gray* ended on a pleadings motion, it became a leading case on latent defects.

"It does push the envelope although not so far that it couldn't fit in the existing framework," says Herschorn. Interest in the case comes from the fundamental question, he says, which is what a vendor has to disclose about the neighbourhood, not

just the property.

In an unreported case, a Bowmanville, Ont. house where a double murder had occurred captured a great deal of attention after a couple bought the home only to later learn of the tragedy 15 years earlier and sued the vendor for failing to disclose the information to them.

"I would say there's probably a reluctance in the courts to expand these categories, but again, every case depends on its own facts. So if you have the right factual matrix and the evidence to support it, then the court is obligated by the law to those facts," says Huberman, who acted for the purchasers. "The parties decided to settle the case and we lost the opportunity to ask the court for a decision on this."

Brennan, who did not act in the case, says: "It was a fascinating case that could have been a test case for this exact type of issue."

But with no court decision, he says, "we're left with a sort of grey area in terms of whether or not a vendor needs to disclose the presence of a double homicide or suicide in the house."

He says that although there has been no obligation to disclose that kind of information, an appeal court has yet to weigh in on whether a sex offender in the neighbourhood or a historical crime in the house needs to be disclosed. And without specific guidance from the courts on what a vendor needs to disclose for stigmatized properties, Brennan says that area of the law remains unclear.

"The door isn't closed on this issue," says Brennan. **LT**