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Easement dispute points to value of survey

Judge allows purchaser to rescind on house offer and get deposit back

In real estate law, an easement is the right of a landowner to use someone else's land for a particular purpose. Like a right-of-way, an easement may be a right to pass over the land to access another area like a parking lot, a beachfront, or a well.

It can also be a right to pass through or under the property.

Condominium corporations often grant cable TV companies an easement to run their wiring through the common areas of a building.

Easements can also exist underneath a property for things such as subways, gas or electric supplies, or storm and sanitary sewers.

In many cases, easements do not have any effect on the day-to-day use of the property, but from time to time the existence of an easement can cause significant problems for a landowner or a would-be purchaser such as Gordon Ridgely.

He was interested in buying a high-end home in Toronto. An offer was prepared and signed, and Ridgely paid a deposit of \$60,000.

After the agreement was entered into, a title search revealed an easement for storm and sanitary sewers across the back yard of the property.

A new land survey prepared for Ridgely showed the easement to be 20 feet wide, and covering most of the rear garden.

As well, a two-storey gazebo, which was a prominent advertised feature of the property, sits partially on top of the easement.

When Ridgely found out about the existence of the easement, his lawyer asked the seller's lawyer to have it removed from title. The purchaser's lawyer based the title objection (known as a requisition) on paragraph 10 (d) of the standard form agreement in use by the Toronto Real Estate Board.

That section obligates a buyer to take title to the property subject to "any easements for drainage, storm or sanitary sewers, public utility lines, telephone lines, cable television lines or other services *which do not materially affect the present use of the property.*" (emphasis added)

The seller, Lief Nielson, was unable to have the easement removed from title presumably because the storm and sanitary sewers underneath the yard are still in active use.

Ridgely recently took his case before Justice Maureen D. Forestell in Toronto, and asked her to rescind the agreement of purchase and sale and order the return of his \$60,000 deposit. The seller, Nielson, objected to the request, insisting that the agreement was binding.

In reaching her decision, Justice Forestell was faced with analyzing section 10 (d) of the agreement, and deciding whether the easement affects the present use or enjoyment of the property in any significant way.

She quoted from a 1990 court decision, which stated that the test to be applied in cases such as this is whether the vendor can deliver substantially what the purchaser contracted to get.

"In this regard," the earlier case stated, "all of the surrounding circumstances must be considered to determine if the alleged impediment to title would, in any significant way, affect the purchaser's use or enjoyment of the property."

Justice Forestell looked at four surrounding factors: the location of the easement, the size of the easement, the point of access and the owner's enjoyment of the property.

She concluded that the easement in this case materially affects the present use of the property. It occupies most of the backyard. It takes up 3,400 square feet and represents 26 per cent of the total area of the property. Access to the pipes would require entry to the rear garden, and the yard, she noted, is an integral part of the enjoyment of the property.

Even though the wording of the agreement sets out that in order to force a purchaser to accept it, the easement must not materially affect the present use of the property, the judge wrote that the specific future plans of the purchaser to landscape the property, install a pool or build a modest addition to the house "are reasonably to be expected."

In this case, the judge concluded, the municipal sewer easement "significantly compromises" the purchaser's use of the backyard, and materially affects the present use of the property.

Despite the seller's argument that the easement is invisible and has no impact on the present use of the property, the judge issued an order declaring that the title objection was valid and that the purchaser was entitled to rescind the agreement. She ordered that the deposit held by the real estate broker be returned to the purchaser.

The Ridgely and Nielson case will no doubt stir considerable controversy among real estate agents and lawyers. The issue in dispute was whether or not an easement such as this one affects current use, and whether the conclusion of Justice Forestell that the easement does affect current use, is correct.

The lesson of the case is that listing agents would be well advised to examine a seller's title deed to see what sort of easements or other restrictions exist. As well, the case emphasizes once again the importance of reviewing an up-to-date survey prepared by an Ontario Land Surveyor either before the offer is signed, or while it is still conditional.

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