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When selling home, truth is the best policy

I'm not sure why it happens, but when ordinary, honest citizens are selling their homes and large amounts of money are involved, they sometimes succumb to an overwhelming temptation to become less than candid in signing the paperwork for the transactions.

Two recently released court cases are prime examples of this phenomenon.

Scott and Sharon Gardiner were buying a property on Church St. in Harrow, a small community not far from Lake Erie in southwestern Ontario.

Future Homes and Real Estate Inc. acted as dual agents for the Gardiners, and for Nathan Mulder, the seller.

For the buyers, one of the most important features of the house was the hot tub, and they made it known that they would not submit an offer for the full asking price unless the hot tub was working. At the purchasers' insistence, the agent inserted into the offer a clause which reads, "The seller declares the hot tub is in good mechanical working order."

At the time the agreement was signed, the seller confirmed to the real estate agent that the hot tub was working, although he later admitted that it had not been operated for several years.

Predictably, after closing, the hot tub was filled with water and found to be inoperative.

Normally, when a real estate transaction closes, the buyers accept the house in full satisfaction of the obligations in the purchase agreement, unless the contract expressly states that those obligations often called representations or warranties will survive after the closing.

In this case, the buyers sued the seller because of the defective hot tub. They lost at trial in the Small Claims Court.

The Gardiners then appealed to Divisional Court in February, and Justice Anthony Cusinato later ruled that the representation or warranty about the hot tub in the agreement did not die on closing, but survived. The seller clearly understood, said the court, that the buyers wanted the tub to be in good mechanical order both before and after closing.

The court's decision was based on the fact that all parties knew that the buyers' intention was that the hot tub clause would survive after closing as a "collateral condition" of the agreement.

Damages were assessed at $4,500 plus costs, with the seller and the real estate agent responsible for 50 per cent each. It appears that the agent was found jointly liable for his role in negotiating and drafting the offer.

The second case took place in Fall River, Halifax County, N.S., where Christopher Lang purchased a large six-bedroom house with an outdoor swimming pool for $327,500.

A clause in the agreement of purchase and sale contained a warranty that the seller never had any problems with the drilled well on the property and that the water supply was sufficient for the normal household needs of a family of four. The agreement also contained a warranty that the accompanying property condition disclosure statement (PCDS) was "complete and current."

A question in the PCDS asked whether the seller was aware of any problems with water quality, quantity, taste or water pressure. The sellers, Gary and Lauren Knickle, answered "no" to that question.

As is typical in property information statements, both in Ontario and Nova Scotia, the form cautions buyers that the information is believed to be accurate but may be incorrect. There is also a disclaimer stating that the real estate agents involved assume no liability or responsibility for the accuracy of the disclosure.

The day after the purchasers and their children moved into the house, the well went dry and there was no water supply. A new well had to be drilled at considerable expense.

Last year, Lang sued the Knickles for breach of contract. Following a seven-day trial, Justice Gordon Tidman ruled in favour of the buyer and awarded damages of $26,393 for Lang's actual expenses in drilling a new well, plus an additional $20,000 for loss of enjoyment of the house and reduction in its property value.

The court ruled that the representations made by the sellers as to the water quantity from the well were "untrue, inaccurate and misleading," and that they were negligent in representing that there were no water quantity problems.

Justice Tidman provided an interesting comment on the disclaimer in the disclosure form. "The Court is satisfied," he wrote, "that this disclaimer is for the benefit of the realtor only and not for the vendor. If that were not clear by and in itself, the (preceding) paragraph ...makes it clear that the vendors are responsible for the truth of their statements..."

For buyers and sellers of resale homes, the lessons from the cases of Gardiner v. Mulder and Lang v. Knickle are these:

- Sellers should never sign what is called a Sellers Property Information Statement (SPIS) in Ontario. The forms are complicated and call for legal conclusions, which are risky for non-lawyers to complete. I've heard from many real estate agents and their local boards who disagree with me, but I'm convinced that following my advice is, by far, the safer route.
- Sellers signing SPIS forms should keep the name of a good litigation lawyer handy. They may well need it.
- Buyers should always make their own investigations. These include a home inspection and where there is no municipal water service, a well driller's certificate and a potability test.
- Both buyers and sellers should bear in mind Justice Tidman's comments that the disclaimer on the disclosure form "is for the benefit of the realtor only."
- It's always a good idea to have an agreement of purchase and sale reviewed by a real estate lawyer before it is signed. There's no such thing as a "simple real estate deal."
- Failing to be completely truthful when signing a property disclosure statement or a warranty in a sale agreement can be very risky, and very expensive.

Just ask Nathan Mulder or Gary and Lauren Knickle.

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