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No simple answer to disclosure of defects

Purchaser not told about buried pool

It's often a case of buyer beware

Recently I had the pleasure of appearing on the "Inside Real Estate" television program which is broadcast Thursday evenings on the Rogers Cable network. The format is a phone-in show where viewers can call in to ask questions of the guest panelist.

One of the evening's most interesting questions came from a North York caller who had purchased his home three years ago.

After closing the deal, he discovered that the back yard contained a buried swimming pool covered over with grass. When it rains, he said, the yard doesn't drain properly and becomes one big grassy swamp.

It turned out that before closing, the seller had discussed with his next-door neighbour whether to disclose the buried pool to the buyer. But he decided to keep quiet.

The caller wanted to know if he had any recourse against anyone, and if the seller had an obligation to disclose the buried pool.

Coincidentally, a similar problem arose in my practice last week.

Clients of mine were selling a house not far from the underground tunnels of the Bloor-Danforth subway. Back in the late 1970s, the municipality of Metropolitan Toronto acquired a subsurface easement underneath hundreds if not thousands of houses along the subway right-of-way. The easement, or right-of-way, allows the city to access the subway tunnels underground without disturbing the surface use of the houses.

The sellers forgot about the easement until the purchaser's lawyer discovered it in his title search. Now the buyers want a price reduction.

The area of law relating to the existence of a buried swimming pool or oil tank, or a subsurface subway easement is the doctrine of patent and latent defects.

This doctrine is an extension of the caveat emptor rule buyer beware.

A patent or obvious defect is one which a reasonably prudent buyer could discover on an inspection of the property such as crumbling brickwork, leaky roof, defective windows and doors, and faulty faucets.

A buyer cannot back out of a contract or get a price reduction if there is a patent defect, which he or she could or should have discovered.

A latent or hidden defect is another matter entirely. These are defects that only an expert inspection might detect. Improper foundations or a structural weakness eventually resulting in wall cracks or a sagging floor might be latent defects.

The law presumes that latent defects are unknown to both buyer and seller. Depending on the circumstances, a buyer may be forced to close, or he may be allowed to back out of the deal. Occasionally, he can obtain a price reduction.

A third category of defect is the concealed defect one where the seller knows about the defect but does not tell the buyer.

If the seller actively conceals a defect, a court may view his or her actions as fraudulent, and award damages to the buyer.

There have been court cases, for example, where sellers got hit in court with damages for building interior walls to hide a leaky basement or termite infestation.

But the law starts to get muddy when a seller is aware of a defect that a buyer might or might not notice like the buried swimming pool but simply keeps quiet about it.

Back in 1960, professor (later chief justice) Bora Laskin lectured at the Law Society on this area of law.

Assuming there was no fraud, mistake or misrepresentation, Laskin concluded that the doctrine of buyer beware applies.

"A purchaser takes existing property as [he] finds it," wrote Laskin, "whether [the property] be dilapidated, bug-infested or otherwise uninhabitable" unless the purchaser protects himself by terms in the contract.

As recently as 1995, in the landmark Tony's Broadloom case, an Ontario court followed Laskin's view and ruled that a seller did not have to disclose either latent or patent defects. In that case, the soil had significant varsol contamination.

Despite some conflicting views, the courts are starting to rule that potential hazards relating to health and safety must now be disclosed.

Writing in a Law Society paper a few years ago, Toronto lawyer Brian Bucknall said that the practice is moving toward a standard of candid disclosure.

Unfortunately, there is no simple answer to the question of whether the seller should have disclosed the buried swimming pool.

The law is not clear in this area, and there is no predicting what a court might say in the future.

The underground subway easement is a different matter. Since it does not affect day-to-day use of the house, there may be a good argument that the easement is not even a defect.

It's very easy to say that the best policy is always full disclosure. In the real world, however, with real buyers, real sellers and real defects, it's not quite that simple.