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Buyers back out after plan altered

Builder changed construction agreement

Cathedral ceiling replaced with flat version

Two homebuyers are cancelling their purchase after the builder made a fundamental change to their construction agreement and they have the weight of Ontario's highest court behind them.

Emery and Margaret Danko signed an agreement to purchase a home to be built by Marbrook Homes in a new Richmond Hill subdivision in 1988. Negotiations were long and difficult, extending from January to September that year.

The final agreement included the addition to the base house of a 400-square-foot loft area with an adjacent cathedral ceiling over the family room.

The Dankos agreed to pay an extra \$40,000 for the upgrades. The purchase price of the house added up to \$430,000, plus \$2,200 for a skylight over the family room.

Plans and specifications for the cathedral ceiling were set out in schedules to the agreement of purchase and sale, which were stated to be an "integral part" of the offer.

As is typical with builder offers in the Toronto area, the contract provided that the builder had the right to alter plans and specifications without notice to the purchasers.

Another section stated that the builder had the right to "change, vary or modify" the plans and specifications of the house. In addition, the purchasers would have "no claim against the vendor" for any changes.

During construction, Marbrook made a decision to eliminate the cathedral ceiling and replace it with a flat ceiling. When the Dankos found out that the cathedral ceiling had been scrapped, they sought to terminate the contract and obtain a deposit refund.

It never came.

Several months later, they started legal action to get the money, and the builder counterclaimed for its losses, totalling more than \$110,000.

The trial before Justice H. David Logan took 16 days in April, 2002.

The Dankos argued that the builder's decision to eliminate the cathedral ceiling turned the loft into an attic room and changed the whole character of the living space on the ground floor.

Guido Marinucci testified that he was the guiding mind of Marbrook Homes and made all of its decisions.

The judge noted that Marinucci had been in the building business for 25 years, and that he and his company "have a good reputation as builders of quality homes."

The Tarion (ONHWP) Web site (<http://www.tarion.com>) shows that in the last 10 years, Marbrook has had no claims or conciliations a perfect record.

In his testimony, Marinucci was adamant that he did not have to discuss changes with the purchasers, and that Marbrook had the right to make unilateral decisions about changes.

His decision-making, he said, was based on "costs, costs, costs."

But the justice found that Marbrook had in fact breached the contract when it eliminated the cathedral ceiling.

"Marinucci knew or should have known that the cathedral ceiling ... remained an 'integral' part of the agreement of purchase and sale," the judge wrote.

The Dankos, he said, had a "reasonable expectation" that they would get the cathedral ceiling

The case went to the Court of Appeal in April this year, and the trial court's decision was upheld.

There was evidence, the court wrote, upon which the trial judge could find that the cathedral ceiling was a "crucial feature" of the house.

"The purchasers were entitled to have the house built in accordance with their clear, contractually agreed-upon expectations," the court wrote. "The vendor therefore breached the agreement in a fundamental way, and the purchasers were entitled to the return of their deposit."

To protect their reasonable expectations, future buyers may want to consider these suggestions when buying a new home:

- * Schedules containing construction or design details should be marked as an "integral part" of any agreement.

- * Always attach floor plans and exterior elevations to the agreement.

- * Clarify in the agreement which items are unchangeable and fundamental to the entire contract.

- * Never sign an upgrade schedule headed "request for upgrades."

- * Discuss with your lawyer the contract terms allowing the builder to make changes, and attempt to minimize their scope.

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FOLLOW UP: On July 24, I wrote about the case of Emery and Margaret Danko who had contracted with Marbrook Homes to buy a new house to be built with a cathedral ceiling. When the house was built with a flat ceiling in the family room, the Dankos cancelled the deal and successfully sued to get their \$22,200 deposit back. (See www.aaron.ca.)

After the column appeared, Margaret Danko called me to report on an aspect of her case that did not appear in the published law journals. After a 16-day trial, she told me, she is out about \$150,000 in legal costs and still did not have her deposit back at the time of our conversation. The court ordered the builder to pay a large chunk of her legal bills, but she hasn't received anything.

Something is seriously wrong with the justice system and with the protection of the Tarion Warranty Corp. when a homebuyer is subjected to this type of loss. It's a black eye for the whole home-building industry.

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