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Builders must fulfill their promises

Slope unsuitable for chosen model

Court awards cost of retaining wall

The Ontario Superior Court of Justice has sounded a clear warning to builders that they will not be able to escape liability if they deliver a house that significantly differs from the promised model.

It all began in 1999, when Renato and Leda Lattavo purchased what they hoped would be their dream home from Grand Brook Homes in Caledon.

They chose a model, which was described to them as being particularly suited to the corner lot they chose.

Attached to the agreement of purchase and sale were drawings of the model, labelled "artist's impression" and "subject to minor modification."

The agreement allowed the builder to "change, vary or modify the plans and specifications pertaining to the property, including but not limited to, ... architectural ... landscaping, grading."

The offer also contained what the law calls an "entire agreement" or "exclusionary" clause. Typical of virtually all builder and resale offers, it states that the seller is not responsible for any representation, warranty, collateral term or condition unless it's specifically written into the contract.

If a misrepresentation was made to the purchaser in the sales office, or if the brochure was not part of the offer and the drawings don't resemble the house at all, the buyer is out of luck.

For decades, this type of clause has been treated in the construction industry as giving builders some latitude to build and deliver houses or condos that differ from what buyers saw in the sales office or model home.

One of the most significant design features of the model the Lattavos chose, as shown in the Grand Brook brochures, is an impressive and gracious front entrance, flanked by two stately pillars. Two wide steps lead up to the landing in front of elegant double doors framed by windows on each side.

The Lattavos visited their house during construction and it was obvious to them that the slope of the lot was so severe that the house design was clearly not suitable for it.

It was impossible, practically and aesthetically, to place wide front steps in front of the entrance, as called for in the original design. To do so would require anyone entering the home from the street to scale a small hill in order to mount the steps. The sharp grading would present a safety hazard and contravene Caledon's building regulations.

Grand Brook made some attempts to resolve the problems but the Lattavos were unhappy with the aesthetic and practical shortcomings of the property.

They sued Grand Brook for the costs of fixing the grading. They proposed to build a retaining wall surrounding part of the lot to enable them to have a more level grading and improve the appearance of the entrance.

The two-day trial took place in April and the judgment was released in mid-August. In court, the biggest hurdle the plaintiffs had to overcome was the "exclusionary" clauses, which appeared to allow the builder to make any changes it wanted to the selected design.

Justice Elizabeth M. Stewart reviewed a series of Ontario cases on exclusionary clauses dating back a dozen years. Whether these clauses apply, wrote the judge, depends on a number of factors, including:

The wording of the clause;

The nature and significance of the defect;

The type of assurance the purchaser received with respect to the feature in question, and;

Whether the vendor was aware of the risk of the defect and failed to inform the purchaser.

Stewart ruled the deficiencies were "of such magnitude" that it would be "unconscionable" to allow Grand Brook to rely on the exclusionary clauses.

"The placement of steps to the side of a majestic entrance design is not only unsatisfactory from a practical standpoint, it is aesthetically displeasing," she wrote. "The steep slope of the lot, which makes it impossible to put out a lawn chair in the back yard without having it tip over, is an intolerable deficiency."

The judge awarded the Lattavos $18,500 in damages for breach of contract an appropriate amount, she ruled, to allow the owners to build a retaining wall to correct some of the grading problems. (The full decision is online at http://www.canlii.org/on/cas/onsc/2004/2004onsc11988.html [and below].

Earlier this week, I spoke with Renato Lattavo, who told me that on the advice of his lawyer, Neil J. Boyko, the claim against Ontario New Home Warranty Program (now Tarion) was not pursued.

The sad part of the story is that Tarion was not involved in the case, and the warranty program does not cover grading. In fact, Tarion's website reports that Grand Brook Homes has built more than 600 houses in the last 10 years and has a perfect claims record.

It's a shame that some Ontario consumers are forced to take their builders to court over what a judge calls a major deficiency. In my view, Tarion should be protecting homebuyers in future cases like this.

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Docket: *01-CV-221780SR*
URL: http://www.canlii.org/on/cas/onsc/2004/2004onsc11988.html

COURT FILE NO.: 01-CV-221780SR

DATE: 20040813

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
RENATO LATTAVO and LEDA LATTAVO	)	*Neil L. Boyko*, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
	)	
- and -	)	
	)	
	)	
770373 ONTARIO LIMITED, carrying on business as GRAND BROOK HOMES, 707931 ONTARIO LIMITED, THE CORPORATION OF THE TOWN OF CALEDON and ONTARIO NEW HOME WARRANTY PROGRAM	)	*Carrie Srigley*, for the Defendants 770391 Ontario Limited c.o.b. Grand Brook Homes and 707931 Ontario Limited
	)	
	)	

Defendants)
)
))))
)
) **HEARD:** April 5 and 7, 2004

StewartJ.

INTRODUCTION

[1] In 1999, Renato and Leda Lattavo purchased what they hoped would be their "dream home" from 770373 Ontario Limited, carrying on business as Grand Brook Homes. Grand Brook Homes ("Grand Brook") is the name used by the parties in this action to describe collectively the Defendants 770373 Ontario Limited and 707931 Ontario Limited.

[2] Mr. and Mrs. Lattavo's claims against the remaining Defendants, The Corporation of the Town of Caledon and Ontario New Home Warranty Program, were resolved by the parties before trial. Those claims have been dismissed on consent.

[3] The Plaintiffs' claim against Grand Brook, brought under the Simplified Rules of Civil Procedure, is for damages for breach of contract and negligence, calculated on the basis of what they estimate to be the cost necessary to remedy the alleged deficiencies in design and construction of the home built by Grand Brook to make it conform more closely to the dream home they contracted to buy.

BACKGROUND

[4] On July 24, 1999, Mr. and Mrs. Lattavo entered into an Agreement of Purchase and Sale (the "Agreement") to buy a lot from, and new home to be built by, Grand Brook in the Town of Caledon. Grand Brook had built and was building several other reasonably upscale homes in the immediate vicinity of the proposed Lattavo home.

[5] Because the lot on which the home was to be located was a corner lot, the Lattavos chose from several artistic renderings provided by Grand Brook the "Trilium" design, described to them by Grand Brook's salesperson as being particularly suited to placement on a corner lot. The drawings provided to the Lattavos of the Trilium were labelled "Artist's Impression".

[6] Although no model home of the Trilium design was available for inspection, the Plaintiffs took advantage of Grand Brook's suggestion to view a home that had been built in the Trilium design located across the street from the proposed site of the Lattavo residence.

[7] After having reviewed the drawings and toured the home across the street, the Lattavos executed the Agreement with Grand Brook to buy the lot and to have their home built for a total cost of $257,000.00. The home was to contain 1700 square feet of living space and included many luxury features.

[8] Attached to the Agreement executed by the Lattavos is the floor plan of the Trilium design on which dimensions are noted to be "subject to minor modification".

[9] The Agreement provides at Section 13(d):

> The Purchaser acknowledges and agrees that the Vendor may, from time to time in its sole discretion, change, vary or modify the plans and specifications pertaining to the Property including but not limited to architectural, structural, engineering, landscaping, grading, mechanical, site service or other plans from the plans and specifications existing at execution of this Agreement or as same may be illustrated in any sales brochure(s), model(s), in the sales office or otherwise, and the Purchaser shall have no claim or cause of action against the Vendor or its agent(s) for any such changes, variances or modifications, nor shall the Purchaser be entitled to any notice thereof and the Purchaser hereby consents to same.

[10] In addition, Section 23 of the Agreement provides:

> This offer, when accepted, shall constitute a binding agreement of purchase and sale. It is agreed and understood that there is no representation, warranty collateral term or condition affecting this Agreement or the Property, or for which the Vendor or the owner of the Lands (or any sales representative) can be held responsible in any way, whether they are contained in any sales material, brochure, or alleged against any sales representative or agent other than as expressed herein in writing.

[11] Grand Brook maintains that the Lattavos bought an unimproved, sodded lot on which their chosen Trilium model was to be built. It is Grand Brook's position that the lot was conveyed to the Lattavos and the home was built in general accordance with the terms of the contract. To the extent there were changes made to the Trilium design prior to completion, Grand Brook asserts that such changes were only minor and that the sections of the Agreement referred to above disentitle the Lattavos from any remedy.

ISSUES

[12] The following issues arise in this action:

1. Do the Lattavos have the right to damages for breach of the Agreement or negligence by Grand Brook?

2. Is Grand Brook entitled to avail itself of the exclusionary clauses in the Agreement?

3. What is the appropriate quantum of damages to be awarded if Issues 1 and 2 are determined in favour of the Lattavos?

[13] The Lattavos maintain that they agreed to purchase a lot and home from Grand Brook which would be in reasonable conformity with the Trilium design selected by them. The Trilium design was specifically proffered by Grand Brook and selected by the Lattavos because of its suitability for a corner lot. In my opinion, this aspect of the evidence simply serves to confirm that the suitability of the model of home chosen for the specific lot purchased was an important consideration for the Lattavos.

[14] It is apparent from the Artist's Impression of the Trilium supplied to the Lattavos that one of its most significant design features is an impressive and gracious front entrance, flanked by two stately pillars, with two wide steps leading up to the landing in front of elegant double doors framed by windows. This feature adds to a significant degree what is called, in real estate parlance, "curb appeal". A walkway is shown in the illustration which leads from the driveway around the front corner of the house to the main

entrance. Indeed, the overall impression in the Artist's Impression is one of comfortable and serene flatness - a bungalow-style dwelling with all major living space on the main floor. According to Mr. Lattavo, this single-level feature was a very important one since he and his wife plan to live in the home well into their senior years and did not want to have to negotiate too many stairs as they get older.

[15] Even if it is accepted that the Artist's Impression is a "perfect rendering on a perfect lot", as described by Donald Roughley (Grand Brook's Project Manager), I conclude from the evidence that the Lattavos were entitled to expect that the home purchased by them would be in reasonable conformity with the Trilium design.

[16] The Lattavos saw and selected the lot upon which the house was to be built before they executed the Agreement. They did not apprehend from their viewing of the lot or the Trilium design any grading or design difficulty nor was the risk of any such problem pointed out to them by Grand Brook. As Mr. Lattavo described it, the lot appeared to him at the outset as "a lot of rubble", and provided no indication to him of what the finished product would look like.

[17] There was no evidence led at trial to establish that either Mr. or Mrs. Lattavo had any special knowledge of the building or construction industry that would make them any more alert to or knowledgeable about lot grading issues than the average house purchaser. What is clear is that they purchased from Grand Brook the lot and the Trilium design home to be built on it.

[18] From time to time, Mr. Lattavo visited the site to see how construction was progressing. After the foundation of the house was poured, it became apparent to him that the home was perched significantly higher than the one next door, also built by Grand Brook. It became clear to Mr. Lattavo that the slope of the lot was so severe that the Trilium design was not suitable for it.

[19] Mr. Lattavo spoke to "Joe the Builder" (later determined to be Joe Tarquini of Grand Brook) about his concerns. According to Mr. Lattavo, Joe Tarquini told him that the Grand Brook engineer must have made a mistake and that maybe the problem could be fixed. No evidence from Joe Tarquini was led by Grand Brook to contradict that statement.

[20] Mr. Lattavo admitted that his conversation with Mr. Tarquini took place before closing and that he proceeded to close the transaction, in spite of his misgivings about the grading issue on October 15, 1999. I conclude from his evidence and the overall circumstances that the Lattavos did so while accepting and expecting, quite reasonably, that an experienced and capable builder like Grand Brook would come up with an acceptable solution to the problem prior to completion of construction of the home.

[21] As the construction of the home neared completion, the house remained perched high on the lot, well above the much lower elevation at the lot line. As a result, it was impossible both practically and aesthetically for Grand Brook to place the wide front steps in front of the entrance as called for in the original design. To do so would require anyone entering the home from the street to scale a small hill in front of the home in order to mount the steps. In addition, such a sharp grading would present a safety hazard and would contravene Caledon's building regulations.

[22] In June of 2001, Mr. Lattavo obtained from the Town of Caledon a copy of the lot grading plan for the home he had purchased which had been submitted to the municipality by Grand Brook. To his surprise, he learned that the grading plan showed the front steps placed to the side of the front entrance to his home. The evidence is uncontroverted that the Town of Caledon had required that the design of the front entrance be modified in order to make the home conform to building regulations concerning the allowable degree of slope/grading. Prior to Mr. Lattavo's discovery, this requirement had never been brought to his attention.

[23] In an effort to diminish the grading problem, Grand Brook raised the sidewalk in front of the house. They also lowered the soil at the front base of the house by more than a foot, thus exposing part of the building's foundation and its ugly plastic cladding. Grand Brook proposed to further address the remaining grading problem by placing steps at the side of the landing, rather than at the front directly leading toward the double-door entrance. Grand Brook suggested that the pillars could be moved forward on the landing by a few inches to allow for more space between the pillar and the front wall for easier entry. This proposal was not acceptable to the Lattavos since side steps inevitably would still be much narrower than the initial design called for and would not address the negative effect the placement of steps to the side of the landing would have on the overall aesthetic look of the front of the house.

[24] As of the date of the trial of this action, no repair satisfactory to the Lattavos has been carried out by Grand Brook to remedy this problem. As an interim measure, and at Mr. Lattavo's request, Grand Brook has created two temporary makeshift steps in front of the permanent steps that form part of the initial design so as to permit front entry onto the landing. The photographs of the front entrance to the house tendered as exhibits at trial, which show the front entrance with its extra makeshift steps, provide to stunning effect a depiction of what can only be described as an eyesore.

[25] Mr. Lattavo also described the problems created in his back yard by the severe slope of the lot. He testified that in most parts of the yard it is impossible to set out a lawn chair because the degree of the slope will cause it to tip over. Additional steps were placed by Grand Brook on the walk-up from the basement entry/exitway to deal with the slope, thus adding additional steps to the original design and diminishing the overall attractiveness of the back yard entrance. According to Mr. Lattavo's evidence, which I accept, the severe angle of the yard's slope makes it difficult for him even to cut the grass on the property.

[26] The Lattavos remain dissatisfied with the aesthetic and practical shortcomings of the property they paid more than a quarter of a million dollars to purchase. They seek damages from Grand Brook in an amount that will permit them to fix the problem themselves by building a retaining wall surrounding such part of the property to facilitate a proper grading and to improve the appearance of the entrance.

THE EXCLUSIONARY CLAUSES

[27] Grand Brook relies on the exclusionary clauses in the Agreement referred to above. Grand Brook also notes that Schedule I to the Agreement of Purchase and Sale provided to the Lattavos a full entitlement to review with their solicitor all of the terms of the Agreement and to back out of the deal if not satisfied. It is acknowledged that the Lattavos did not take advantage of that opportunity and closed the transaction on the basis of the form of Agreement, presented to them by Grand Brook, unamended.

[28] There are several factors that come into play in the interpretation and application of exclusionary clauses such as the ones in this Agreement. Among those factors is the wording of the clause, the nature and significance of the defect, the type of assurance the purchaser received with respect to the feature in question, and whether the vendor was aware of the risk of the defect and failed to inform the purchaser.

[29] In his decision in *Grinberg* v. *Law Development Group (Thornhill) Ltd.*, [1996] O.J. No. 1722, Justice Sharpe provided a useful review of the law in this area. In *Grinberg*, a case involving a claim by purchasers for rescission of a contract, the developer had entered into agreements of purchase and sale of condominium units that had not yet been built. All of the brochures and models depicting the units showed that they would be built with 23 windows. The Building Code did not permit that number of windows given the location of the building and, in the result, the actual units contained fewer and smaller windows. The purchasers successfully sought rescission of the agreements and return of the deposit money paid on the basis that there had been a material misrepresentation that had induced them to enter into the contracts.

[30] Justice Sharpe concluded that the evidence satisfied the objective standard set out by the Ontario Court of Appeal in *Abdool* v. *Somerset Place Developments of Georgetown (1992)*, 10 O.R. (3d) 120. In his view, a reasonable purchaser would consider the windows in the plan to be a significant element and would not have gone ahead with the transaction if made aware of the actual number and size of the windows. The developers knew about the risk that the units would not be able to be built in accordance with the plans and did not make adequate disclosure of this information to the purchasers.

[31] Justice Sharpe rejected the developer's defence based on the exclusionary clause in the agreement which is similar in many respects to the one in the Grand Brook Agreement. He held (at para. 18) that "...the wording of the provision, taken as a whole, is insufficient to permit the respondent to vary the construction of the unit to the extent that they have with respect to the windows."

[32] Justice Sharpe also considered (at para. 20) that, if he were wrong in construing the exclusionary clause as being inapplicable to a change of this magnitude, the developer was precluded from relying on the provision as it did not take adequate steps to make the purchasers aware of the provision and the related risk before the contract was signed.

[33] Further guidance is available from the judgment of Justice Fedak in *Keen v. Alterra Developments*, [1993] O.J. No. 2623, aff'd [1997] O.J. No. 401 (C.A.). Justice Fedak considered a situation in which purchasers had selected plans for their "dream home", a French country style home with a one or two step entry. As the house was being built, the purchasers observed deviations from the plans and were informed that due to grading difficulties the builder would have to construct four steps up to the porch of the house. Due to this change, there would also be steps required from the garage into the house and a reduction in the size of the garage. The purchasers refused to close the transaction and sought rescission. Justice Fedak found there to be two justifications for rescission: a) the plans, brochures and verbal assurances given the purchasers by the vendor constituted misrepresentations of the sort that entitled the purchasers to rescind the contract, and b) the changes to the house constituted a fundamental breach of the contract so that the purchasers were not getting the house for which they had bargained and were entitled to rescission. Justice Fedak did not allow the builder to rely on the exclusionary clause because the builder knew of the necessity of the steps to the front entrance prior to excavation and chose not to bring this fact to the attention of the purchasers. Because the

purchasers were thereby precluded from making an informed decision, Justice Fedak held (at para. 48) that "[s]ince there was a breach of a fundamental term of the contract, the builder cannot now hide behind the exclusionary clauses. It would not be fair, nor reasonable, nor in public interest to allow the builder to do so".

[34] In this case, the transaction has closed and the Lattavos do not seek rescission of the contract. In most respects they are pleased with the home Grand Brook has built for them except for the evident problems caused by the mismatch of lot and design. They do not expect that Grand Brook should be required to make the home look exactly like the one shown to them before they entered into the Agreement of Purchase and Sale; however, they do seek damages to permit them to effect such adjustments or repairs to the property so as to bring it into more reasonable conformity with the Trilium model which they had legitimately believed they had purchased.

[35] Grand Brook, having marketed the Trilium model as suitable for a corner lot and having used the Artist's Impression by the Trilium to create an image of serene grandeur, now attempts to minimize the importance of the look of the front entrance to the Lattavo dwelling. Among other things, Grand Brook seeks to put the changes required by the Town of Caledon to deal with the grading problem into the category of "changes, variations or modifications" that Grand Brook is entitled to make at its sole discretion and for which there is no remedy available to the Lattavos.

[36] The evidence of Mr. Lattavo establishes that the deficiencies referred to above are, from the subjective perspective of him and his wife, significant. In my opinion, the deficiencies and problems resulting from the placement of this house design on this lot by Grand Brook are also, on an objective basis, major.

[37] In my view, the changes required by this grading problem are so major and fundamental as to render the exclusionary provisions of the Agreement ineffective. The placement of steps to the side of a majestic entrance design is not only unsatisfactory from a practical standpoint, it is aesthetically displeasing. The steep slope of the lot, which makes it impossible to put out a lawn chair in the back yard without having it tip over, is an intolerable deficiency. These deficiencies are, objectively assessed, of such magnitude that it would be unconscionable to allow Grand Brook to successfully assert that the exclusionary clauses inserted by it into the Agreement permit it to vary the construction of the home to the extent it has. In my opinion, the wording of those provisions, when interpreted in the context of the Agreement as a whole, is insufficient to permit it to do so.

[38] Accordingly, it is my conclusion that Grand Brook has breached its Agreement with the Lattavos to provide a lot and house in reasonable conformity with the Trilium design. Having found that there has been a breach of the Agreement, I consider it unnecessary to deal with the claim of negligence which essentially mirrors the Lattavos' claim for breach of contract. For the reasons outlined above, the exclusionary clauses in Grand Brook's standard form Agreement do not insulate it from this result.

DAMAGES

[39] No evidence as to loss of value of the property was led at trial so as to permit damages to be assessed on that basis. In my opinion, therefore, the proper measure of damages in this case is that sum which will allow the Lattavos to make such adjustments to the property necessary to bring their home into reasonable conformity with what they had contracted to buy.

[40] Grand Brook maintains that the problems can be solved by the simple movement of the pillars on the front landing and the placement of steps to the side of the front entrance, plus the doing of some additional work on the area around the steps to the basement in the back yard, all of which can be performed by Grand Brook at relatively minimal cost. In my opinion, such an approach is inadequate. The only acceptable way of remedying the problem, short of tearing down the property to re-grade the lot, is to build a retaining wall. Having identified the problems, having seen the photographs and having heard the evidence of Mr. Rod Melo and Mr. Paul Belanger as to their estimates of the need for and cost of building a retaining wall, I am satisfied that the sum of $18,500.00 is the appropriate amount to award to the Lattavos for this purpose.

CONCLUSION

[41] The Defendants 770373 Ontario Limited and 707931 Ontario Limited are liable, jointly and severally, to pay to the Lattavos the sum of $18,500.00 as damages for breach of contract.

[42] If the issues of interest and costs cannot be resolved by the parties, counsel may deliver written submissions within 20 days of the date of release of this decision.

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Stewart J.

Released: August 13, 2004

COURT FILE NO.: 01-CV-221780SR

DATE: 20040813

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

RENATO LATTAVO and LEDA LATTAVO

Plaintiffs

- and -

770373 ONTARIO LIMITED, carrying on business as GRAND BROOK HOMES, 707931 ONTARIO LIMITED, THE CORPORATION OF THE TOWN OF CALEDON and ONTARIO NEW HOME WARRANTY PROGRAM

Defendants

REASONS FOR JUDGMENT

Stewart J.