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New model homes may not be covered by Tarion

It came as quite a surprise to me to discover last week that the Tarion new home warranty does not always cover model homes. I always thought that Tarion (previously the Ontario New Home Warranty Program) covered all brand new construction, but it appears that model homes may be exempt from mandatory protection.

Last week a client came into my office to review with me a builder offer for a new Toronto townhouse. The house had been used as a model home by the builder. In the sales office, my client was told that the builder would offer its own lesser warranty but the house was not protected by the Tarion warranty.

That didn't sound right to me, so I decided to verify whether the house was eligible for Tarion warranty protection. To my surprise, I discovered that the Tarion warranty may not cover model homes, even if they are brand new and have never actually been occupied by a purchaser.

When my client called Tarion directly, a warranty rep from the "technical duty desk" told him that warranty coverage was mandatory, and that coverage applied whether the house was a model home or not. All model homes are covered, he told my client, "no ifs, ands or buts."

In order to resolve the conflicting statements, I phoned the builder's sales and marketing co-ordinator. I asked if the model home was covered by Tarion, and she replied, "I don't know the answer."

I then spoke to Dave Roberts, Tarion's head of enforcement who said a model home must be covered by the warranty, which starts on the date of possession by the purchaser.

I also consulted Mary Mullens, the vice-president and general counsel of Tarion. She explained in a detailed email that in order to qualify for warranty coverage, a home cannot have been "previously occupied."

Determining whether or not a home has been previously occupied is not a simple task. If the house was merely a model home, warranty coverage is mandatory. But if it was actively used as a sales office, for example, if it had computers, phones, copiers, faxes, desks and printers, it would have been "previously occupied." As such, the first purchaser would not benefit from the mandatory warranty coverage provided to new homes under the Act.

My colleague, Harry Herskowitz, acts for a number of large developers. He practises law at DelZotto Zorzi in Toronto and is vice-chair of the Tarion board of directors. He told me that warranty coverage depends on the "nature, extent and duration of use" of the model home.

If the use of the home was not extensive, Herskowitz said, it would qualify for warranty protection. The safest thing a would-be buyer could do, he said, was provide Tarion with a detailed factual background of the use of the house since it was built, and ask it to confirm whether the model qualifies for coverage.

The issue of previous occupancy was dealt with by Justice Arthur Gans in a 1998 court case. Sidonio Moreira had built a new, 3,200-square-foot house in the Lawrence Ave.-Dufferin St. area of Toronto. During construction, he moved some personal items into the house and "lived" there for a few months.

He later moved out while construction continued and the property was placed on the market as a "custom-built new luxury home."

Eventually, an agreement of purchase and sale was signed with Jose and Candida Carreiro, but they refused to close when Moreira would not register the house under the warranty legislation.

Both parties applied to the Ontario Superior Court to determine whether the house had to be registered under the warranty Act, and if so, whether the agreement was void because the house was not registered.

Looking at the facts, Justice Gans found that Sidonio had not previously "occupied" the house before deciding to sell it. "For occupancy to occur," he wrote, "there must be an element of residency or tenancy. Simple possession does not and should not suffice."

The purchase agreement was ruled void and the Carreiros got their deposit back.

The lesson of this case, and the story of my client who still wants to buy the model home, is this: If you're buying a model home or the builder's own residence, make sure the offer states whether or not you're getting the Tarion warranty. If not, discuss with your lawyer the risks you are taking and the potential costs you could incur by buying a new home without the statutory warranty.

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