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## **Check sealed areas during home inspection**

When conducting an inspection, is a home inspector required to gain access to sealed areas like an attic or crawl space to conduct a complete inspection? If those areas aren't viewed, can the inspector be held responsible for repairing defects which would have been disclosed?

Those were the questions facing an Ontario court in a recent case between two unhappy home buyers and a Toronto home inspection company which has based on my own clients' past dealings with them a very good reputation.

Audrey and Victoria Li had submitted an offer to purchase a house on Macdonnell Ave. in Toronto. Before waiving the condition on having a home inspection, they retained John Johnson of Baker Street Home Inspection Services to perform a building inspection for them.

During his visit, Johnson discovered that the hatch to the third floor attic had been sealed with a three-quarter inch bead of caulking and then painted over.

He told the purchasers it was not proper practice for a home inspector to cause any damage to an owner's property during an inspection. Forcing entry to a sealed space, he told them, can expose the inspector and anyone with him to health and safety hazards and is likely to damage the vendor's property.

He suggested that the purchasers could ask the vendor directly to open or give permission to break open the hatch. The request was never made to the vendor or agent, and the purchasers acknowledged that Johnson would prepare his report without looking into the attic.

Shortly after the transaction closed, the purchasers accessed the attic and discovered that the roof joists were cracking and splintering.

Trudel and Sons Roofing provided three repair estimates ranging from \$4,000 for the simple replacement of the roof joists to \$20,000 for a more extensive job involving the joists and removal and replacement of the old layers of shingles.

Two years ago, the Li sisters sued Baker Street claiming damages to repair the defects not disclosed in their report.

At trial last February, John Caverly, a founding member of the Ontario Association of Home Inspectors, or OAH, gave evidence as an expert witness. He explained the standards expected of an inspector during a home inspection.

In his report, Caverly noted that inspectors generally should attempt to enter and view the attic space by means of a hatch or door typically installed for that purpose.

The OAH standards of practice state that a home inspector is not required to enter an under-floor crawl space or an attic which is not "readily accessible," and is "sealed in place."

In explaining this guideline, Caverly's opinion was that where attic access has been sealed with paint, tape or other means, the inspector is not required to open the area.

Terry Carson, of Guardian Home Inspectors, also gave expert evidence at the trial. His opinion was that it is not reasonable to expect a home inspector to open a sealed attic access and risk exposure to damage from insulation or toxic animal and vermin droppings.

Engineer and home inspector David Hellyer, of Hellyer Engineering, agreed with the other experts and added that he usually offers to return once the owner unseals the attic access door.

Justice Gerald F. Day released his decision a few weeks ago. He agreed with Caverly that the home inspector should have asked the purchasers' agent to seek permission to open the sealed attic.

However, in the written report Johnson prepared after the home inspection, he noted that the roof was in fair condition for its age, but could fail at any time.

The report also contained a notation stating "re-activate small access" to the attic, and had a question mark beside the area for noting the condition of the structural portions of the roof.

The final paragraphs of the Baker Street report offered a free follow-up inspection to avoid unnecessary costs associated with repairs.

In the reasons for his decision, Justice Day emphasized that according to OAH standards supported by the evidence of Carson and Hellyer inspectors are not required to determine the condition of systems or components that are not readily accessible. In this case, the judge noted that the pop-up access hatch was in fact sealed and not accessible.

Based on the conclusion that the inspection was considered to be within the OAH standards, the judge dismissed the claim of the homeowners.

It may or may not have been a factor in the court's decision that the purchase price was reduced by almost \$40,000 following the delivery of the Baker Street home inspection report.

Purchasers conducting home inspections in future whether the homes are new or resale should always clarify with their inspector what is going to be inspected, and more importantly, what is not.

I have read this report and I am aware of the limitations of the inspection process. I accept this 14-page report and supplements according to the conditions as stated herein. I am aware that the fee paid for this inspection is for professional time and is not a guarantee of present or future conditions and is not an insurance policy of any kind.

It was signed by Audrey Li.

[9] Under the SUMMARY (GENERAL COMMENTS) on the first page, the Report called for Minor Repairs to the Roofing.

[10] Page 2 of the Report refers to the house as being in Fair Condition which it describes as, system or component is performing its intended purpose, but *due to its age* can fail at any time. (emphasis added)

[11] With respect to INACCESSIBILITY at page 2, it refers to Basement only. The attic is not indicated.

[12] The METHOD OF ROOF INSPECTION at page 3 shows it as Fully accessed and then At ground level with binoculars (too steep/inaccessible) .

[13] At page 3, under ROOF COVERINGS CONDITION , the General condition of flat roof coverings was described as Fair .

[14] At page 11, under the heading ATTIC/ROOF SPACES , and under the sub-heading, ACCESSIBILITY , the item Attic/roof space has been converted into living space , is marked. Also, under that heading is hand-printed the following: RE-ACTIVATE SMALL ACCESS . It is to be noted that possible consequences are not indicated. Beside the sub-headings, VENTILATION and INSULATION , is printed by hand, NOT VISIBLE . Beside CONDITION OF RAFTERS/COLLAR TIES/TRUSSES/STRUCTURAL MEMBERS , is a large handwritten question mark.

[15] On a separate page between pages 13 and 14 is the following: YOUR MINIMUM BUDGET ALLOWANCE ; over the first 0 2 years is checked; then \$10,000 - \$20,000 is checked. No mention is made of the roof or its member structures.

[16] At page 14 of the Report, the closing paragraphs are of note and they read in part as follows:

The staff of Baker Street Home Inspection Services Inc. will remain available to you over the phone, at no further expense, to address your concerns

Should you experience any problem with the home, you must contact us immediately. We will address your concerns promptly and also help you avoid any unnecessary cost associated with the repairs. Upon request, we can revisit the property at no further expense to you. This mutual contractual obligation is an important part of the process. Please be advised that we can not provide any assistance nor accept any responsibility for damages once repairs have been effectuated or contracted.

[17] With respect to the first of the above two paragraphs, there were no steps taken to RE-ACTIVATE SMALL ACCESS , which the Report invited. The second of the above two paragraphs provides that once the revelations from opening the pop-up hatch came to be, there was an obligation to contact Baker Street Home Inspection Services. The plaintiffs did not. Rather, they unilaterally went ahead with the repairs while being on notice that Baker Street would not accept responsibility for repairs effectuated.

[18] In her affidavit evidence, Victoria Li advised that the purchase price was reduced by \$40,000 following the inspection report. She advised that factors in the Report that reduced the price were: updating of electricals, repairs to basement, eaves tightening, laundry to the second floor, and updating of the livingroom, etc. She advised that she could not say that the \$40,000 reduction was due entirely to the Report. She was not there for the inspection. The purchase price was \$399,800 from a listing of \$438,000.

[19] Sylvain Louis-Seize accompanied John Johnson of Baker Street Home Inspection Services Inc. as he toured the property to perform his inspection. At paragraph 3 of his affidavit he says:

In the hallway on the second floor (3<sup>rd</sup> floor in his *viva voce* evidence) of the property, there was a pop-up hatch access to the attic. As we were standing in the hallway, John Johnson pointed to the attic pop-up hatch access and said, That s how you get to the attic .

[20] At paragraph 4:

John Johnson did not suggest that we attempt to access the attic, however, he did say to me, It s very easy to get in. You should use an exacto knife to cut the dried paint so that you have a smooth edge.

[21] At paragraph 5:

John Johnson did not discuss with me the pop-up hatch beyond that brief comment. It did not occur to me that I should insist that John Johnson view the attic area as I have no experience in purchasing or inspecting houses. I did not think to request that John Johnson request the vendors for permission to access the attic, as I was relying on Mr. Johnson to conduct a thorough inspection.

[22] John William Caverly is a founding member of the Ontario Association of Home Inspectors ( OAH I ), whose *curriculum vitae* displays outstanding qualifications, and was an expert in this for the plaintiffs. At paragraph 12 of his affidavit he deposed as follows:

I consider it to be of key importance that a building inspector, while inspecting any property should attempt to view the attic space as the attic space is one of the critical areas of a building where things may not be as they should be. This typically involves entering the roof space through a hatch/door system that is installed for the purpose of access.

At paragraph 14:

It is my professional opinion that where a pop-up or other hatch has been taped shut or painted, it is always prudent for a building inspector to request through the real estate agent that the vendors open the pop-up attic if it is not immediately available to be opened. Since I began doing inspections in 1975 I have never been refused such a request.

[23] Mr. Caverly provided the OAH I standards of practice provide in part as follows:

2.2 Inspectors shall:

A. inspect:

1. readily accessible systems and components of homes

B. report:

4. on any systems and components designated for inspection in these Standards of Practice which were present at the time of the Home Inspection but were not inspected and a reason they were not inspected.

13.2 General Exclusions

B. Inspectors are NOT required to determine:

1. the condition of systems of components which are not readily accessible.

E. Inspectors are NOT required to enter:

3. the under-floor crawl spaces or attics which are not readily accessible.

The Glossary of Terms, provides the following definitions:

READILY ACCESSIBLE:

Available for visual inspection without requiring moving of personal property, dismantling, destructive measures, or any action which will likely involve risk to persons or property.

READILY OPENABLE ACCESS PANEL:

A panel provided for homeowner inspection and maintenance that it within normal reach, can be removed by one person, and is *not sealed in place* (emphasis added).

[24] In his letter to Richard J. Worsfold of September 17, 2004, Mr. Caverly stated at page 2, Item #2, Where attic/access door system have been sealed with paint, tape or other means, the inspector is not required to open the area as it is not readily accessible as stated under article 13.2 [b.][1.].

[25] The inspector, John Johnson, deposed in his affidavit at paragraph 11 as follows:

#### Attic Access Blocked

11. Once inside 38 MacDonnell, I found an access hatch to the small, third floor attic. I discovered that the attic hatch had been sealed with a three quarter inch bead of caulking and then had been painted over. It is not my normal practice, nor proper practice for any home inspector, to cause any damage to the vendor's property while performing a home inspection. To force entry into a sealed space can expose the inspector and anyone with him to health and safety hazards and is likely to damage the vendor's property. I told the Purchasers, who were standing under the attic hatch with me, that I would not open the hatch and that they had three options if they wanted to see into the attic:

- a. ask the vendor directly to open the hatch (the vendor was downstairs);
- b. through the agent, create access immediately with permission of the vendor; or
- c. create access upon possession of the house.

12. I told the Purchasers that I would not be the one to unseal the attic. They acknowledged that I would prepare my report without looking into the attic and understood why. They did not ask the vendor, who was downstairs in 38 MacDonnell, to open the attic.

In his *viva voce* evidence Mr. Johnson said what he put in his affidavit is what he *would* say, but that he did not remember his words verbatim. But he is certain as to the accuracy of this affidavit in substance as such would have been done that way based upon the entirety of his experience.

[26] Jeff Clark, president of Baker Street Home Inspection Services Inc., in paragraph 3 of his affidavit that said: John (Johnson) has been instructed by me never to break the seal of an attic access that has been caulked shut. He was not cross-examined.

[27] Terry Carson, President of Guardian Home Inspectors Inc., gave an expert opinion by way of letter to Solomon Rothbart Goodman LLP dated November 21, 2004. He said at paragraph 3:

3. It is not reasonable to expect a home inspector to break open an attic access which has been sealed shut. A home inspector risks unknown exposure and damage from insulation which may be over the hatch, as well as toxic animal and vermin droppings. For this reason, the Standards of Practice explicitly state that such accesses need not be opened. A home inspector uses his/her best judgment and would likely recommend accessing a sealed space if there is evidence of weakness or deterioration.

[28] David Hellyer, a professional engineer and registered home inspector, President of Hellyer Engineering Limited, gave an opinion memorandum to Jeff Clark of Baker Street Home Inspection Services Inc., dated January 2, 2004, as amended November 22, 2004. Mr. Clark asked in Question #2, as follows:

#### Question #2:

Would I open an attic access that was sealed shut by paint and caulking?

He answered:

#### Reply to Question #2:

I would not attempt to open a sealed attic hatch for a number of reasons including but not limited to the following:

Our inspection standards are intended to respect the property rights of the current owner and leave the house in exactly the same condition as it was found. Breaking a sealed hatch would be contrary to the OAH standards which are designed to ensure that the inspection is non-destructive.

The hatch may be sealed for a reason. For example, loose fill insulation may have been blown in over top from a roof vent. Opening the hatch under these circumstances would again be destructive.

However, if I can not access the attic I generally offer to return once the owner or his/her agent has provided proper access. Within the short time frame of a typical pre-purchase inspection, the offer is infrequently accepted, and my customers either accept the risk or walk from the deal.

[29] In his *viva voce* evidence at cross-examination Mr. Hellyer said he would not take an exacto-knife to the house; if they wanted to open it up they would instruct him to do so. He said that as soon as he asked to open something up that is sealed, he is asked to act as a tradesman and he is not licensed to do that. If he had to cut with tools, then he would not do so. However, if a light tap would open it, then that would be suitable. He said that he must leave the house as he found it. When asked if he would open a sealed hatch if asked to do so, he replied that he would not.

#### **The Law**

[30] In *Seltzer-Soberano v. Kogut*, [1999] O.J. No. 1871, a decision of B. Wright J., states at paragraph 6:

*The usual house inspection is general in nature and is performed by a visual inspection. A house inspector cannot be held responsible for a problem which is not readily apparent by a reasonable visual inspection.*

Cited with approval by Gillese J. in *Biggs v. Harris (c.o.b. Harris Homes Inspections)*, [1999] O.J. No. 4831, she went on to say at paragraph 33 of her decision:

*33. The standard of care owed is that of a reasonable visual inspection done in accordance with ASHI standards but, I would add, what is reasonable is to be determined, as well, by the cost of the inspection and the known level of expertise of the inspector.*

Justice Gillese in paragraph 49 referred to the Supreme Court of Canada decision in *Queen v. Cognos Inc.* 1993 CanLII 146 (S.C.C.), (1993), 99 D.L.R. (4<sup>th</sup>) 626, where the Supreme Court set out five elements to be proven in the tort of negligent misrepresentation. These elements are as follows:

1. There must be a duty of care based on a special relationship between the parties.
2. The representation made by one party to the other must be false, inaccurate or misleading. [In this respect, the representation in the report refers to the condition of the flat roof covering as fair].
3. The representation must be made negligently.
4. The person to whom the representation is made must have reasonably relied on the representation.
5. The reliance must have been detrimental to that person with the consequence of his suffering damages. [The damages here as established by the roof repair bill would be \$13,600, being the portion of the repair bill allocable to stripping old roofing and rebuilding roof joists.]

[31] *Brownjohn v. Ramsay* is a decision of the British Columbia Provincial Court (Small Claims Division) reported at [2003] B.C.J. No 43. While it is a provincial court of another province it presents some interesting perspectives:

At paragraph 17:

The broad purpose of securing a residential home inspection is to provide to a lay purchaser expert advice about any substantial deficiencies in the property which can be discerned upon a visual inspection, and which are of a type or magnitude that reasonably can be expected to have some bearing upon the purchaser's decision-making regarding whether they wish to purchase the property at all, or whether there is some basis upon which they should negotiate a variation in price. Broadly speaking, it is a risk-assessment tool.

At paragraph 18:

In *Seltzer-Soberano v. Kogut*, [1990] O.J. No. 1871 (Ont. Superior Court of Justice), Justice Wright said (at paragraph 6):

The usual house inspection is general in nature and is performed by a visual inspection. A house inspector cannot be held responsible for a problem which is not readily apparent by a reasonable visual inspection

At paragraph 20:

While I suggest there are obvious limitations to what one can expect from home inspections of the type undertaken in this case, one also needs to be mindful of the responsibility which is taken on by the home inspector. Persons who hold themselves out to the community as professionals prepared to provide advice for a fee accountants, lawyers, engineers, architects, physicians, and other professionals immediately come to mind must know that in marketing and providing their services, they invite reliance upon their advice and, in doing so, they create a risk that their client will suffer harm if the professional falls short of the standard of care which reasonably may be expected of that category of professional in the particular circumstances, and their advice is wrong.

I refer to the decision of the B.C. Court of Appeal in *Zippy Print Enterprises Ltd. v. Pawliuk*, [1994] B.C.J. No. 2778, where Justice Lambert said for the Court at paragraph 45:

I would apply the principle enunciated by this court in *Betker v. Williams* 1991 CanLII 1160 (BC C.A.), (1992), 63 B.C.L.R. (2d) 14 to the circumstances of this case. A general exclusion clause will not override a specific representation on a point of substance which was intended to induce the making of the agreement unless the intended effect of the exclusion clause can be shown to have been brought home to the party to whom the representation was made by being specifically drawn to the attention of that party, or by being specifically acknowledged by that party, or in some other way.

[32] Lastly, I would refer to *Petrasthuk v. Raina*, [2002] O.J. No. 492, a decision of P. Thomson J., at paragraphs 24 and 26:

24. There are also 8 cautions on the front page, which was signed by Mr. Ross. The limitation of liability on page 14 was never discussed or pointed out in any fashion by Mr. Tackaberry. It does not limit his liability.

26. Fair condition is defined in the Report as being no repair is necessary within the first year; however the system or component is marginal. The system or component is performing its intended purpose but due to its age can fail at any time. The Report does not contain a definition of poor condition. In fact, the roof was not performing its intended purpose ( protection from the elements ) and was sure to fail again within a short period of time. It was not in fair condition.

### Conclusion

[33] I would agree with the conclusions of Mr. Caverly, that Mr. Johnson should have suggested to Mr. Louis-Seize, representing the purchasers, that permission should be sought by the owners to open the sealed attic. However, he did write under the heading Attic/Roof Spaces, RE-ACTIVE SMALL ACCESS, and under that which he printed NOT VISIBLE beside VENTILATION and INSULATION, and a large question mark beside the heading CONDITION OF RAFTERS/COLLAR TIES/TRUSSES/STRUCTURAL MEMBERS. From this I infer that Mr. Johnson alerted the plaintiffs. In this respect, I place emphasis to the extended service policy at page 14 of the Report for the client to contact Baker Street Home Inspection Services Inc. immediately if there is any problem with the home, leaving open re-visiting the property at no further expense upon request, and indicating that they would not accept responsibility for damages once repairs have been effectuated or contracted. This may seem to run somewhat contrary to the reasons in *Zippy Print Enterprises, supra*; however, Baker Street Home Inspection Services Inc. was not given an opportunity to address the repairs, nor, in the full context of page 11 of the Report, were they requested, and thereby given the opportunity, to re-visit the site.

[34] Most importantly, I refer to the OAH standards of practice that a readily openable access panel is one that is not sealed in place, and that inspectors are not required to determine the condition of systems or components that are not readily accessible. It is acknowledged that the subject pop-up access hatch was sealed; it therefore was not accessible. This is supported by the opinions of Mr. Terry Carson at paragraph 3 and Mr. David Hellyer in his reply to Question #2.

[35] As stated above, the Report itself cautions at page 11 to RE-ACTIVATE SMALL ACCESS. It places a large question mark beside CONDITION OF RAFTERS/COLLAR TIES/TRUSSES/STRUCTURAL MEMBERS. The subject issue was not left unaddressed by the building inspector, Mr. Johnson. Accordingly, I find that the inspection was considered within the applicable OAH standards.

[36] For the above reasons, the action is dismissed.

[37] If the parties are unable to come to terms as to costs, I will be available to make a determination by appointment.

DAY J.

Date: August 9, 2005

COURT FILE NO.: 03-CV-257386SR

DATE: 20050809

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AUDREY LI and VICTORIA LI

PLAINTIFFS

- and -

BAKER STREET HOME INSPECTION SERVICES INC.

DEFENDANT

REASONS FOR JUDGMENT

DAY J.

Date: August 9, 2005