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Signing disclosure form requires legal assistance

A territorial judge in the Yukon has told the local real estate industry to take a hard look at one of its standard form documents. His comments were made in the context of a case involving what we in Ontario call a Seller Property Information Statement, and apply with equal force in this province.

Back in June 2007, Gary and Trudy Burdess signed an agreement to sell their rental property on Firth Rd. in Whitehorse, Yukon, to Kerry Lyle and Glenda Bowers. They signed a Property Disclosure Statement (PDS), which is used to inform buyers of problems or defects known to them that may not be readily apparent.

The PDS form asked the sellers if they were aware of any moisture problems in the walls, or any water damage, or any roof leakage or unrepaired roof damage. They answered "no" to all the questions, believing the problems they had encountered in 2006 and 2007 were due to condensation and had since been fixed. The entire PDS was incorporated into the agreement of purchase and sale.

After the transaction closed, Lyle discovered moisture problems in the walls and ceilings of the upstairs rental unit. It turned out that the problems were caused by a snow and ice buildup where the peaked roof meets an adjoining lower roof. During the spring thaw, melting snow drips into the roof cavity and ceiling space, damaging the walls and ceilings below.

Eventually, Lyle and Bowers had the problem fixed and sued the sellers for the cost of repairs.

Last month, after a 2 1/2-day trial, judge Michael Cozens ruled that the sellers had breached the contract by failing to disclose the moisture problem. In a 28-page judgment, he awarded Lyle and Bowers \$10,815.15 in damages.

What makes this noteworthy are the comments of judge Cozens about the PDS form.

"The PDS is a legal minefield," he wrote, "given the consequences that can arise for both a buyer and seller, and the apparent lack of actual legal advice accompanying their preparation and receipt."

The warnings that are incorporated into the form, he added, "are minimal and by no means sufficiently comprehensive."

The judge noted that in using the forms, real estate agents should explain that there are legal consequences to signing it, that the agent cannot provide legal advice, and that the parties may wish to discuss the consequences with a lawyer to fully appreciate them.

In an unusual judicial move, Cozens told the Yukon real estate industry that it needs to take a hard look at its use of the PDS form. His warning also applies to the Seller Property Information Statement, which has been the source of much litigation in Ontario courts.

"I would recommend that a comprehensive review be undertaken by real estate agencies and lawyers with respect to the use of the PDS in the Yukon. Such a review should work towards ensuring that both sellers and buyers are made fully aware of the potential legal implications that may flow from the preparation and disclosure of the PDS. ... Real estate agents are not lawyers and should not be expected to provide legal advice. The practical reality, however, is that many individuals in real estate transactions likely rely on their real estate agent for legal advice more than they should...."

"While there may be a concern among real estate agents that a PDS with numerous warnings and cautions may have the effect of delaying or possibly even preventing the completion of a purchase and sale, thus potentially becoming a 'deal breaker,' any such concern is far outweighed by the potential legal issues that could arise in cases such as the one before me."

I couldn't agree more.

Case citation: http://www.yukoncourts.ca/judgements/territorial/2007/lyle_et_al_v_burdess_et_al_2008_yksm_5.pdf

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