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## Court rules real estate agent isn't responsible for home inspection

An Ontario real estate agent has escaped responsibility for failing to review the results of a professional home inspection with his purchaser client, according to a decision of the Ontario Court of Appeal earlier this year.

In a 2011 case, which sent shock waves through the real estate community, a real estate agent was ruled 25 per cent responsible for the buyer's damages for taking a "hands-off approach" with respect to the home inspection, and because he failed to warn his client about the implications of the home inspector's report.

It all began in 2006, when Glenda Halliwell wanted to buy a home on Dufferin St. in Toronto. She made it clear to her real estate agent, Joel Lazarus, and to the home inspector, that she was allergic to mould and wanted a dry house.

Lazarus ensured that a condition was inserted in the purchase offer allowing Halliwell to terminate the transaction if she was not satisfied with the report from the home inspector.

On the recommendation of Lazarus, Halliwell hired Brian Edwards to conduct a home inspection. Except for the furnace, which the seller replaced before closing, no other serious problems were noted during the home inspection, and there was no evidence of water penetration through the foundations.

Unfortunately, two months after closing, there were clear indications of moisture, mould, mildew, rot, rust and drywall deterioration in the home. Halliwell sued her agent, the broker, the seller and the home inspector. The parties agreed on \$90,000 damages prior to going to court, but not on who should pay them.

Following a 13-day trial, the judge found the home inspector liable for 50 per cent of the damages, and the purchaser for 25 per cent for failing to read the inspection report. But the part of the decision which upset many real estate professionals was the finding that the agent was liable for 25 per cent of the damages.

Justice Margaret Eberhard found that Lazarus took a "hands-off approach" with respect to the home inspection report. "Had he read the report he . . . might well have concluded that the parking and driveway issue raised concerns."

The judge found that the agent induced the purchaser to rely on the home inspection, and then "washed his hands of all responsibility to his client. . . . He failed to advise the purchaser of the use to be made of the report . . . (and) fell below the standard of care by failing to review the report with his client before waiving the home inspection condition."

Halliwell, the agent and the broker all appealed. Earlier this year, a three-judge panel of the Ontario Court of Appeal reversed Eberhard's findings of negligence against the real estate agent and the purchaser, and determined the home inspector was responsible for all of the damages.

"Turning to the agent's liability," the appeal court wrote, "we agree with the agent's submission that the trial judge erred in finding the agent liable on a failure to read the inspection report, review it with the (purchaser), and bring to the (purchaser's) attention the potential for moisture problems arising from the findings in the report."

This is not to say that some agent in the future would not be held responsible for failing to warn a buyer about a home inspection report. In the Halliwell case, the trial judge did not hear any evidence concerning the standard of care expected of an agent in these circumstances.

As a result, the appeal decision in the case presents both good and bad news for agents and their clients. While the agent in the case escaped liability for the moisture damages to his client's property, a future court in a different case could decide differently on the agent's responsibility.

Prudent agents will still review a home inspector's report with their clients, but in the end it seems to me that the obligation, and the risk, all fall on the shoulders of the home inspector.

[See Title Page column on trial decision at <http://www.aaron.ca/columns/2011-06-11.htm>]

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## Halliwell v. Lazarus, 2012 ONCA 348 (CanLII)

Date:	2012-05-04
Docket:	C53309
URL:	<a href="http://canlii.ca/t/frg7q">http://canlii.ca/t/frg7q</a>
Citation:	Halliwell v. Lazarus, 2012 ONCA 348 (CanLII), < <a href="http://canlii.ca/t/frg7q">http://canlii.ca/t/frg7q</a> > retrieved on 2012-12-02
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COURT OF APPEAL FOR ONTARIO

CITATION: Halliwell v. Lazarus, 2012 ONCA 348  
DATE: 20120524  
DOCKET: C53309

Simmons, Armstrong and Pepall J.J.A.

BETWEEN

Glenda Halliwell and Jenifer Halliwell

Plaintiffs  
(Appellants/Respondents by Cross-Appeal)

and

Joel Lazarus and Coldwell Banker Terrequity Realty

Defendants  
(Respondents/Appellants by Cross-Appeal)

AND BETWEEN

Glenda Halliwell and Jenifer Halliwell

Plaintiffs (Appellants)

and

Westbrook Building Inspection Ltd.

Defendant (Respondent)

AND BETWEEN

Glenda Halliwell and Jenifer Halliwell

Plaintiffs

and

Westbrook Building Inspection Ltd.  
aka Westbrook Building Inspections Service Ltd.

Defendants

and

Joel Lazarus and Coldwell Banker Terrequity Realty and Dung Ngoc Tran

Third Parties

AND BETWEEN

Glenda Halliwell and Jenifer Halliwell

Plaintiffs

and

Dung Ngoc Tran

Defendant

David A. Morin and Joyce M. Chun, for the appellants

Frank Csathy, for the respondent Westbrook

Sandy Robinson and Eric Sherkin, for the respondent Lazarus

Heard and released orally: May 4, 2012

On appeal from the judgment of Justice Margaret P. Eberhard of the Superior Court of Justice, dated January 18, 2011, with reasons reported at [2011 ONSC 390 \(CanLII\)](#), 2011 ONSC 390, 2 R.P.R (5<sup>th</sup>) 284.

ENDORSEMENT

[1] The issues on this appeal and cross-appeal arise out of the purchase of a home and a home inspection conducted in

preparation for the purchase.

[2] The appellant purchaser made it clear to her real estate agent and to the home inspector, whom her agent recommended, that she was allergic to mould and wanted a dry house. The agent ensured that a condition was inserted in the offer to purchase allowing the appellant to abort the transaction if she was not satisfied with the report from the home inspector.

[3] The inspection was conducted on March 12, 2006. The purchase closed on May 1, 2006 and, by July 2006, the appellant was experiencing an allergic reaction to mould. The parties agreed on damages of \$90,000 prior to trial.

[4] After a trial, the trial judge apportioned liability as follows: (i) the inspector at 50 percent; (ii) the real estate agent at 25 percent; and (iii) the appellant at 25 percent contributory negligence.

[5] The appellant appeals the finding of contributory negligence and submits that the agent should be found 50 percent responsible. Further, the appellant claims her costs award should not have been reduced. The agent cross-appeals, arguing that he is not liable.

[6] The trial judge found the appellant 25 percent contributorily negligent because the appellant failed to read the inspection report carefully and in its entirety. The appellant submits the trial judge erred in doing so because the trial judge also found that the appellant did not have the knowledge or experience to appreciate the warning signs for moisture problems that were contained in the inspection report.

[7] We accept this submission. At para. 83 of her reasons, the trial judge effectively concluded that the appellant did not have the knowledge or experience to be able to discern the existence of a moisture problem by reading the inspection report. This conclusion is fully supported by the evidence at trial. However, the decision to hold the appellant contributorily negligent cannot be reconciled with this finding.

[8] The inspector argues that the trial judge's finding of contributory negligence was premised on the appellant's failure to read the report and the appellant's failure to recognize the need for major repairs disclosed by the report. The inspector submits that, in addition to potential moisture problems, the appellant was also concerned about obtaining a house that did not require repairs. Thus, he suggests, had she fully read the report, she would not have purchased the house.

[9] We do not accept this submission. If the appellant's desire to avoid any repairs was the basis for the trial judge's conclusions, she neither identified it as such nor explained how she reached that conclusion. Moreover, had the trial judge reached her conclusion on this basis, in our view, on the record before her, it would have been a speculative conclusion.

[10] Turning to the agent's liability, we agree with the agent's submission that the trial judge erred in finding the agent liable based on a failure to read the inspection report, review it with the appellant, and bring to the appellant's attention the potential for moisture problems arising from the findings in the report.

[11] The appellant did not plead the agent's failure to read and review the report. More importantly, however, the appellant did not call expert evidence concerning the standard of care expected of an agent in these circumstances.

[12] It was the inspector's responsibility to discover the potential moisture problem. In the absence of expert evidence, it was an error in law to find the real estate agent liable for failing to read the report, and failing to pick up indicators of moisture problems from the report, when the inspector, himself, failed to pick up on them.

[13] In the result, the appeal is allowed and the finding of contributory negligence and the resulting reduction in the appellant's costs award are set aside. Further, the cross-appeal is allowed and the finding of negligence against the agent is set aside. In the result, the inspector is 100 percent liable for the damages.

[14] Costs of the appeal are to the appellant on a partial indemnity scale, fixed in the amount of \$20,000, inclusive of applicable taxes and disbursements of \$5,000, payable by Westbrook. Costs of the cross-appeal are to the cross-appellants in the amount of \$10,000, inclusive of disbursements and applicable taxes, payable \$5,000 by Westbrook and \$5,000 by the appellant.

Signed: "Janet Simmons J.A."  
"Robert P. Armstrong J.A."  
"S. E. Pepall J.A."

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