



Bob Aaron bob@aaron.ca

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Inspect home before listing to correct any minor flaws

Unhappy buyers backed out of \$1.5 million deal

When an offer to purchase is conditional on home inspection, does the home purchaser have to act honestly and reasonably if he or she wants to get out of the deal? Or can the buyer arbitrarily decide to kill the deal even if an inspection shows little or nothing wrong with the house?

The Ontario Court of Appeal has finally answered these questions in a case that contains useful lessons for buyers, sellers and their agents.

In August 1998, Margaret and David Marshall signed an agreement to purchase a home on Bernard Ave. in Toronto from Bernard Place Corp. for \$1.51 million. At the time of signing, they paid a deposit of \$150,000 to Chestnut Park Real Estate.

A clause in the agreement made it conditional upon inspection by a home inspector of the purchaser's choice and expense, as well as receipt of a report from the inspector "satisfactory to him in his sole and absolute discretion."

At the time of signing the agreement, the Marshalls lived in New York City and were planning to return to Toronto at some time in the future. They planned to buy a home and rent it out until their return.

When their offer on the Bernard Ave. property was accepted, the Marshalls arranged for a professional property inspection by Steve Liew, a civil engineer who was then employed by Carson Dunlop doing home inspection reports. Liew inspected the house and gave the Marshalls his written report describing it as a "well-built house."

He noted there were no major repairs indicated, and scored the house as a seven out of nine, which is above average. He noted a number of minor deficiencies, and estimated the repair costs at \$2,200.

Perhaps even more important to the purchasers, however, was their plan to build a rooftop garden and re-design the existing single patio door to create French double doors leading out to the garden. When the Marshalls discussed their plans with the home inspector, they learned that arranging a water supply to the rooftop garden and redesigning the patio doors would be disruptive and costly, and involve extensive renovations.

Evidence at the trial showed the Marshalls were concerned about the roof leak, because they did not want their proposed tenant who would be paying a very high rent to be disturbed by ongoing remedial work. They concluded that the property did not meet their expectations and, although the building was a "well-built house," its construction fell short of "the most exacting standards" that had been represented to them.

The Marshalls notified their agent that they would not waive the inspection condition, and asked for their deposit back.

The vendor corporation was somewhat miffed that the purchasers would back out of a \$1.5 million deal over repairs costing only \$2,200. They refused to return the deposit, claiming the Marshalls did not act reasonably, honestly or in good faith. As evidence of the buyers' alleged bad faith, the seller pointed to their refusal to justify their decision or to hand over a copy of the inspection report detailing the deficiencies.

The issues the court had to decide were whether there was a requirement of reasonableness, honesty and good faith on the part of the buyers, whether the seller was entitled to a copy of the inspection report, and whether the seller could participate with the buyers in deciding whether the report is or should be satisfactory to them.

The court ruled the purchasers were entitled to rely on the wording of the condition clause and had the right to decide not to go through with the deal.

The vendor appealed.

A three-judge panel of the Ontario Court of Appeal heard the case in December and released its decision two weeks ago.

The appeal court agreed with the trial judge that there was an obligation on the vendors to exercise both an objective and a subjective standard of reasonableness in deciding whether to invoke the inspection condition. Based on the evidence, the justices ruled that the buyers met the requirements of good faith, honesty and reasonableness.

Based on the clear wording of the clause in the agreement, the court also ruled the vendor had no right to participate in the inspection of the property, nor did it have any right to remedy deficiencies found in the report.

My colleague Merv Burgard in London, Ont., monitors court cases relating to real estate agents. He points out to his agent clients that they can draft inspection clauses that might require delivery of the report to the seller, set a maximum amount for repairs the purchaser has to absorb, or allow the vendor to remedy the defects.

In order to avoid the problem, Burgard suggests property owners obtain a home inspection prior to listing. Then, they can decide whether to remedy minor problems in advance.