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## Unfinished work causes nightmares on moving day

Buyers usually must close even if work is unfinished

Avoid nasty shocks by scrutinizing the fine print

It happens all the time. It's the day of closing and the house isn't finished.

The purchasers complete the Ontario New Home Warranty Program pre-delivery inspection and realize there's no way they can live in the house. They call their lawyer in a panic.

"Do we have to close?" they ask.

"How can they expect us to close if the house isn't finished?"

"Can we hold back part of the price to ensure completion?"

Reputable builders will not usually force purchasers to close on an unfinished house or condominium, but too often these days the electricians, plumbers and carpet layers are in a race to finish the house before the movers show up.

In the vast majority of cases, lawyers for purchasers have to tell their unhappy clients that they must close the transaction even if the house isn't finished, and without a holdback of part of the purchase price.

Sometimes, a purchaser is forced to close the transaction even if the municipal building inspector hasn't given the necessary occupancy permit.

In my own practice, I have seen building inspectors sign occupancy permits on the contractor's promise to install the kitchen before the end of the day.

What do the courts say about whether a purchaser has to close on an unfinished house?

In April, 1989, George and Anastasia Gogos signed an agreement to buy a house to be built by Three D Developments (Kingswood) Ltd., in Barrie.

The purchasers visited the property on the morning of the final extension of the closing date.

They discovered that there was only temporary power without a hydro meter, and the heating system was incomplete. As well, window screens, kitchen desk, kitchen island, garage door and outside steps had not been installed. The concrete garage floor had not been laid and insulation not installed. The gas-proofing of the garage to prevent carbon monoxide coming into the house was not complete.

The land surrounding the house was full of construction debris, and presented a danger to the public.

The agreement of purchase and sale for the Gogos' house contained the typical clause, which stated that acceptance of construction by the mortgagee or the municipality "shall constitute conclusive acceptance by the purchaser."

It also stated that if the dwelling was "substantially completed by closing, the sale shall be completed on that date, and the vendor shall complete any outstanding items of construction ... within a reasonable time."

Similar clauses are still used in builder agreements today.

On the day of closing, the City of Barrie building inspector showed up at 4 p.m. and noted in his records that the house was "okay to occupy" by 4:45 p.m., after the land registry office had closed.

By that time, the purchasers had left the house and taken the position that the defects were too substantial to force them to close.

In a blow to consumer protection, Justice Sidney Ledeman ruled that by the end of the day, the interior work was sufficiently completed to permit "reasonable" occupancy of the premises. He concluded that, "on any objective test, this home could have been reasonably occupied."

In the end, the builder was awarded damages of \$90,000 against the purchasers on a house that wasn't ready for occupancy by the time the registry office closed for the day.

Before signing builder agreements of purchase and sale, buyers of new homes should carefully examine the clause that requires them to close if the building inspector gives the okay. Should there be a time limit of, say, noon on the day of closing? Should there be some sort of subjective liveability test for forcing a purchaser to close?

Should the builder's mortgage lender have any say in whether the purchaser can be forced to move in?

Should the purchaser be forced to close if there are unfinished items, as opposed to items that need repair?

Should the city building inspector have the final say on whether the purchaser must close?

Should there be a test of purchaser inconvenience in the offer, if for example, all the buyer's furniture has to be moved out after closing to allow the floors to be refinished or the carpeting installed?

All too often the decision on when the house is ready is signed off by the buyer without much thought.

It's an issue that should be examined very closely by purchasers and their lawyers at the time the offer is negotiated.

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