



Bob Aaron bob@aaron.ca

February 22, 2003

Real estate agents must exercise care

Ontario court makes ruling *Agent missed change in offer*

An Ontario court has slapped the knuckles of a Toronto-area real estate agent for failing to properly explain the terms of an agreement of purchase and sale to his client.

The ruling of Justice Anne Molloy, which was released last month, confirms that real estate agents must meet a high standard of care and skill when reviewing the terms of a purchase and sale agreement with their clients.

The case arose when Stephen Wemyss retained John Moldenhauer as his real estate agent to act for him in finding and purchasing a home.

When Wemyss and his wife found a home they liked in April, 1998, they toured the Markham-area house and grounds, and noticed that a large area in the backyard near the septic tank was wet and soggy, even though it had not rained for days.

They discussed their concerns with Moldenhauer, and instructed him to prepare an offer that would permit them to get out of the deal if there was a problem with the septic system.

Acting on these instructions, Moldenhauer inserted a standard clause making the deal conditional on the purchaser being satisfied with the results of a home inspection.

The first offer was at \$900,000 but the parties could not come to an agreement on price. On May 4, 1998, Moldenhauer submitted another offer signed by Wemyss at \$975,000.

The vendor signed the offer back at \$980,000, and made several amendments to the document.

Wemyss accepted the counter-offer by initialling all the handwritten changes made by the vendor. Most of them were routine, but one alteration proved to be very controversial.

The May 4 offer contained the same inspection clause that Moldenhauer had inserted into the April offer, but in the signback the vendor changed the inspection clause to limit its application to apply to structural defects only.

The amended clause made the deal conditional on the purchaser obtaining a home inspection and being satisfied that "there are no structural defects."

Wemyss testified at the trial that Moldenhauer presented the counter-offer to him, said nothing about the change to the inspection condition, and told him to initial all the changes.

Predictably, the home inspection revealed a problem with the septic system.

Wemyss testified that he only realized that there was a change to the inspection clause when he tried to kill the deal and get his \$50,000 deposit back, based on what he thought was in the inspection condition.

When Wemyss cancelled the deal, the vendor refused to return the deposit since the septic problem was not a structural defect.

Instead of suing the vendor, Wemyss sued the agent and his broker on the grounds that they were negligent and breached the duty of trust and confidence that they owed him. (This is usually referred to as a fiduciary duty.)

In her decision, Justice Molloy found that Moldenhauer did not advise the purchaser that any problem with the septic system would not allow him to get out of the deal, and that he did not adequately explain the amendment in the counter-offer.

The judge noted that a real estate agent has a duty to act with care and skill in reviewing the terms of an agreement with the client.

Moldenhauer was not only obliged to show Wemyss the change but specifically to advise him that the inspection clause had been fundamentally altered.

By not advising that the changed clause would not allow the purchaser to get out of the deal, Moldenhauer breached his duty to Wemyss.

In addition, Justice Molloy ruled that Wemyss did not have to share a percentage of the blame and the damages for failing to read the clause himself.

As a result of his failure to meet the standard of reasonable care and skill expected of a real estate agent in these circumstances, Moldenhauer was ordered to repay his client the full \$50,000 deposit, plus interest.

The courts have spoken. Real estate agents must explain every relevant provision of an agreement of purchase and sale to their clients.

Bob Aaron is a Toronto real estate lawyer. www.aaron.ca ©Aaron & Aaron. All Rights Reserved.