



Bob Aaron bob@aaron.ca

July 12, 2003

The perils of buying a vendor-built home

When Sharon Ann Mariani bought a home in Puslinch Township, she learned the hard way that there are significant risks in buying from a vendor who builds his own house without adequate construction experience.

The defects in the house were so serious that they were incapable of repair. Earlier this year, Justice Thomas M. Dunn ruled that the value of Mariani's 3,459-square-foot house was "zero." He found the evidence "compelling" that the house required demolition "by reason of the defects and the prevalent mould."

It all began in 1987 when John and Anne Lemstra built their own house with help from a contractor and some sub-trades. They obtained a building permit from the township of Puslinch, south of Guelph, but moved in without a final inspection or occupancy permit.

In 1991, when the Lemstras sold the house to Sharon Ann Mariani, the standard form agreement of purchase and sale contained no warranties about the quality of the house. The listing agreement was the only document that stated the house was "well built."

The judge found this to be a "fraudulent (or negligent) misrepresentation," even though Mariani never used the word fraud during her case.

According to Justice Dunn, Mariani relied on that statement to her detriment, even though the agreement clearly voided warranties outside the document.

Evidence at a nine-day trial showed two latent, or hidden, defects which made the house "dangerous." An unstable centre structural wall made the building susceptible to movement or shifting in a substantial wind or under a significant snow load.

In addition, the failure of the building envelope allowed significant water penetration whenever it rained, resulting in the flooding of the basement and a hazardous proliferation of mould.

Mariani's case against the Lemstras and the township of Puslinch began in 1993, reached trial in June, 2001, and ended when the court decision was finally released early this year more than 19 months after the trial ended.

Dunn ruled that since John Lemstra acted as his own contractor, he either knew or must be taken to have known of the defects.

Damages were assessed against the Lemstras at \$275,000 plus the \$23,000 cost of demolishing the house. They were held responsible for paying 75 per cent of the \$298,000 damages and the township of Puslinch got hit with the remaining 25 per cent.

Prior to trial, Mariani settled her case against Puslinch, but the details were not disclosed to the court.

The settlement arrangement is known as a "Mary Carter agreement," in which one defendant agrees to pay damages and the plaintiff agrees to return to that defendant any monies recovered from the other defendant.

The lesson from the case is for buyers to deal with builders registered with the Ontario New Home Warranty Plan (ONHWP).

In Ontario, it is illegal for a builder to enter into an agreement of purchase and sale or construction contract with a purchaser if the builder is not registered with ONHWP. It is also illegal to begin construction of a home or condominium for resale without first enrolling it with ONHWP. Offenders can be charged by ONHWP under the Ontario New Home Warranties Plan Act.

In the first three months of this year, ONHWP laid 317 new charges against 16 builders for being unregistered vendors, or selling units that were not enrolled in the warranty plan.

In total, \$95,175 in fines and victim surcharges were levied during that period. Penalties imposed in 58 charges ranged from a suspended sentence to \$3,750, with an average of \$1,641.

A situation like the Mariani home is a gray area, however, when an individual builds a home, lives in it for a time, and then sells it as a "used" residence.

The quality of this type of home may be superb or it may be demolition-calibre.

The best ways to check the quality of vendor-built homes is to inspect previous homes they have built, talk to the current owners, and above all, have a thorough home inspection by a qualified home inspector.

Bob Aaron is a Toronto real estate lawyer. Send questions to Bob Aaron, 10 King Street East, #1400, Toronto, Ontario M5C 1C3, or by e-mail to bob@aaron.ca, phone 416-364-9366, or fax 416-364-3818.