



Bob Aaron bob@aaron.ca

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House must be completely empty when sale closes Seller's belongings must be gone from moment keys are handed over

It's a question virtually every homebuyer asks: When do I get my keys? The answer usually is that the keys are released when the seller's lawyer receives the money and the buyer's lawyer registers the deed.

Getting vacant possession of the house or condo, however, is another story. In theory, at the moment the buyer receives the keys and registers the deed, the home belongs to him or her, and it should be empty. Unfortunately, it doesn't always work out that way.

I'm grateful to my colleague Merv Burgard in London, Ont., for bringing to my attention a 15-year-old court decision that seems to answer the difficult question of whether the home has to be totally empty at the moment the buyer gets the keys.

Roger Foord was moving from Toronto to London, and retained a lawyer there to represent him. At 3:09 p.m. on Jan. 16, 1992, the London lawyer closed the purchase of Foord's house on Glenora Dr.

That purchase and sale was part of a chain reaction, which is typical when a series of buyers and sellers all want to close on the same day.

When Malcolm and Bessie Smith, the sellers of Foord's house, received the closing funds, their lawyer immediately used the money to close their own purchase.

Three hours after the transaction closed, Foord's movers arrived at the Glenora Dr. house with a truck full of household goods. Unfortunately, the Smiths were still in the process of moving out and the house was not empty.

The movers waited for the better part of three hours, but the house was still not empty. They returned to Toronto since they needed the truck there the following day.

Finally, on the following Monday, the movers were able to return with Foord's possessions and move him into the house. For the second trip, the movers billed him an additional \$1,393.91. On top of that, Foord incurred hotel and other expenses totalling \$401.55.

He sued the sellers for his losses, and the case came up for trial in Small Claims Court in London in September 1993.

The judge succinctly set out the main issue of the case, which was when vacant possession is to be given to purchasers in residential real estate transactions.

Standard-form real estate agreements provide that vacant possession is to be given on closing. In other words, when the seller gets the money and the purchaser gets the keys, the house is supposed to be empty.

In court, the sellers' representative argued that vacant possession did not have to be given on closing, and that the vendor was entitled to possession of the property until midnight on that day.

She pointed to a 1985 case of the Ontario High Court, which ruled that if a vendor remained in possession for a few hours after the Land Registry Office closed, it was not a fundamental breach of contract. That ruling was found not to have any bearing on the Foord vs. Smith case.

After considering the evidence and relevant law, the deputy Small Claims Court judge awarded the plaintiff \$1,791.18 in damages, plus costs and interest of \$685.20.

In making the award, the judge wrote: "It is often that parties are moving in as others are moving out, and most of the time this is done in a co-operative spirit which recognizes the problems inherent (in) moving in and out, along with timing of transactions at the registry office. In almost all cases, the loss would be nil, except for inconvenience. Here, unfortunately, there was loss, and the Smiths must pay Mr. Foord's losses."

The case serves as a useful reminder that at the moment the seller's lawyer receives the purchase money and hands over the keys, the sellers should be completely moved out of the house.

If they aren't out, and the purchaser's movers are charging by the hour, the sellers are going to have to pick up the tab.