RealTalk® about Real Estate

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Topic: Clause 6.1(f) of the standard AREA Contract - a Seller's duty to disclose known, material latent defects

It's time to dust off and re-visit the issue of latent defects because they continue to make regular appearances in the case law. The standard AREA contract has changed the wording on this, but we believe that the principles remain the same. For houses the new wording is in clause 6.1(f) where the Sellers represent that: "known Material Latent Defects, if any, have been disclosed in writing in this contract." So, for a Buyer to have either a right not to complete the contract, or a right to sue the Seller:

1. There must be a defect which is latent, because it could not have been identified by an ordinary Buyer's reasonable inspection;

2. The Seller either knew of the defect, concealed it or was reckless as to knowing of the defect;

3. The latent defect renders the property dangerous or potentially dangerous or unfit for habitation;

4. The Buyer relies on misrepresentation or concealment when buying the property.

Case law shows that it is difficult, although not impossible, for a Buyer to prove all of the required elements on a balance of probabilities. There is particular difficulty in proving the Seller's knowledge. However, reported cases also demonstrate that notices from the municipality can sometimes be useful in establishing the Seller's knowledge of a latent defect.

Finally, note that any disclosure that the Sellers make must be in writing – verbal disclosure will not be sufficient to discharge the Sellers' obligation under clause 6.1(f) of the AREA contract.

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Tiro Clarke, Barrister & Solicitor
Direct: (403) 444-1162
Email: tiro@admirallaw.ca

301, 522 – 11th Avenue SW, Calgary, AB T2R 0C8
Fax: (403) 537-1220
www.admirallaw.ca

Trina Campbell, Assistant
Direct: (403) 444-1163 ext. 201
Email: trina@admirallaw.ca