



Selling a House Containing UFFI

The legal consequences of the presence of UFFI in a property being sold were considered in a recent Ontario case, *Earl Berger vs. John Hugh Westren and Margaret Ruth Westren* in a decision filed June 2, 1983 in the County Court for the Judicial District for York under No. 172659/82.

In this case the plaintiff had agreed to purchase a residential property from the defendants by an agreement of purchase and sale which was silent with respect to the question of UFFI. The closing date was extended several times to May 3, 1982. On January 15, 1982 the solicitor for the purchaser requisitioned "an affidavit from the vendor with respect to urea formaldehyde foam." Solicitor for the vendors answered on March 18, 1982, "with respect to the requisitions contained in paragraphs numbered 5 and 6, please satisfy yourself" and pointed out that the time for requisitions had expired in early December.

No closing took place on the appointed date, and the purchaser sued for return of his deposit, while the vendors counterclaimed for damages for breach of the agreement.

During the course of the ensuing trial, the solicitor for the vendor gave evidence. He was asked why he had refused to supply the affidavit requisitioned and replied that it was his position that if the purchaser had any particular concern with respect to urea formaldehyde it was up to him to make it a condition of the agreement of purchase and sale and this had not been done, and further that he viewed the request for the affidavit as an *ex post facto* attempt to amend the agreement of purchase and sale. He testified he had not been approached by the purchaser, or his solicitor, to amend the agreement of purchase and sale.

The purchaser argued that the requisition was validly made because the presence of urea formaldehyde is a latent defect which the vendor has an obligation to disclose to a prospective purchaser. Cited in support of this proposition was *McGraw v. MacLean et al* (1979) 22 O.R. (2d) 784. Commenting on this argument her Honour Judge Karen M. Weiler stated:

"That case makes it clear, however, that it is incumbent on the purchaser to establish that such latent defect was known to the vendor, or that the

circumstances were such that the vendor was guilty of concealment or a reckless disregard of the truth or falsity of any representation made by him. In this case it is quite apparent that there was no latent defect at all. (Ex. 9) There was therefore nothing for the vendor to disclose. Counsel takes the position that the vendor had an obligation to state *whether or not* urea formaldehyde was present. In the absence of this being made a condition of the agreement I cannot agree. This requisition, in my view was not a valid requisition and the answer given was satisfactory."

While not going so far as to hold that the presence of UFFI was not a latent defect, the court nevertheless found there was no obligation on a vendor to give an assurance with respect to UFFI in the absence of stipulation to that effect in the agreement of purchase and sale.

The outcome of this case was that the property was resold by the vendor in a falling market and the defaulting purchaser was ordered to pay the amount of difference between the price he had bargained for and the amount actually received, which amounted to \$21,420.00.

It is customary practice in this area for real estate agents to insert a warranty in the agreement of purchase and sale whereby the vendor guarantees that UFFI is not or never has been present in the subject property. The foregoing case seems to indicate that in the absence of such an undertaking, a purchaser has no recourse and that his solicitor had better be cautious as to how he advises his client to proceed.

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