

Stigmatized Properties



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Stigma

- a) a mark or sign of disgrace or discredit
- b) unfavourable reputation

Oxford Dictionary



Stigmatized Properties

“...houses with unusual, emotionally distressing non-physical features or histories. Such routine stigmatized properties include dwellings where a murder, a suicide or child abuse has occurred...”(underlining that of the writers)

Today's Realtors - February 19, 1997
the National Association of



The Evolution of Stigmatization

1980s - First Generation

- Properties which most closely resemble NAR definition
- Terms “horrific” or “traumatic” may apply
- Site specific



Early 1990s - Second Generation

- Proximity to toxic waste sites, landfills and other environmental issues
- Impacting conditions may be offsite



The Evolution of Stigmatization

Late 1990s - Third Generation

- Now includes houses with other forms of criminal activity
 - crack houses, grow operations
- Brings back part of the physical aspect of damage to a property
- May be offsite or site specific



Now

- The term 'stigmatized' embraces a broader field with less emphasis on the “emotionally distressing” or “psychologically impacted” that seemed to characterize the early cases

A National Example

- Urea Formaldehyde Foam Installation (UFFI) not really thought of in terms of “stigmatization”
 - prime example of a perceptual stigmatization
- “Perception” existed even though it had been removed from a residence
- In the Nova Scotia agreement of purchase and sale, the changes went from:
 - a) Not dealt with
 - b) No UFFI and never had been
 - c) No UFFI
 - d) Not dealt with

A Local Example

Five Island Lake

- Late 1980s early 1990s, elevated levels of PCBs found in a number of water courses
- Nova Scotia Department of Health and Nova Scotia Department of the Environment issued a health advisory with respect to 21 water courses all within the same geographic area of what is now Halifax Regional Municipality
- Advisory warning about eating fish from these waters



Legal Origins of Stigmatized Properties

◦ **Reed v. King** (1983 - 145 Cal. App. 3d 261, 183 Cal. Rptr. 130.)

Uninformed buyer purchased property where ten years earlier a woman and her four children had been murdered.

- Appraisal results in the house being valued at \$11,000 less than buyer had paid
- On appeal, court held that the Seller had a duty to disclose fact which materially affected the value of the property

Legal Origins of Stigmatized Properties

Blease, J. stated on page three of the decision that:

“The murder of innocents is highly unusual in its potential for so disturbing Buyers they may be unable to reside in a home where it has occurred. This fact may foreseeably deprive a Buyer of the intended use of the purchase. Murder is not such a common occurrence that buyers should be charged with anticipating and discovering this disquieting possibility. Accordingly, the fact is not one for which a duty of inquiry and discovery can sensibly be imposed upon the Buyer.”

Legal Origins of Stigmatized Properties

◦ **Stramboski v. Ackley and Ellis Realty** (169 A.D. 2d 254, 572 N.Y.S. 2d 672.)

Rueben, Justice

“Plaintiff, to his horror, discovered that the house he had recently contracted to purchase was widely reputed to be possessed by poltergeists, reportedly seen by defendant seller and members of her family on numerous occasions over the last nine years. Plaintiff promptly commenced this action seeking rescission of the contract of sale. Supreme Court instantly dismissed the complaint, holding the plaintiff has no remedy at law in this jurisdiction.”



Legal Origins of Stigmatized Properties

Rueben, Justice

“While I agree with Supreme Court that the real estate broker, as agent for the seller, is under no duty to disclose to a potential buyer the phantasmal reputation of the premises and that, in his pursuit of a legal remedy for fraudulent misrepresentation against the seller, plaintiff hasn’t a ghost of a chance, I am nevertheless moved by the spirit of equity to allow the buyer to seek rescission of the contract of sale and recovery for his downpayment. New York law fails to recognize any remedy for damages incurred as a result of the seller’s mere silence, applying instead the strict rule of caveat emptor. Therefore, the theoretical basis for granting relief, even under the extraordinary fact of this case, is elusive if not ephemeral.”

Appraisals

- Issues for REALTORS® and appraisers carrying out evaluations
- Not a physical defect for which a monetary value can readily be attributed
- Quantifying the value of perception



Appraisals

‘These days, increasing attention is given to the “marking” of a property and the coincident unanticipated affects on value over and above the “real” problem. Many experts readily acknowledge the power of “perception” in the process. In fact, most professionals have only scratched the surface of this fascinating topic. As Bill Mundy stated in Stigma and Value (The Appraisal Journal, January, 1992). “The value of an (environmentally) clean property does not equal the contaminated value plus the cost to cure”. In other words, gone are the days of simply mathematical calculations. Stigmas must be wrestled to the analytical mat.’

*Paul Ouellette, Real Estate Magazine
(REM)
October, 1994*

Caveat Emptor

- Let the buyer beware or should we?
- Caveat emptor still strongly enforced in Canada
- Somewhat diluted in the United Kingdom and generally weakened if not legislatively erased in the United States
- To avoid the doctrine of caveat emptor you must show that you fit within the exceptions to the rule

Exceptions to the Rule

- Doctrine strict in early law - no disclosure requirement for the seller
- Exceptions include material latent defects being those items that cannot be discovered by normal inspection of the property
- Latent defect material to the transaction = legal requirement to disclose to buyer
 - includes defects that would render the property dangerous to perspective buyer's health
- Grey area as to what may or may not be “material”
- Positive burden to disclose

The Question

Does a stigmatization of a property due to a murder on the premise or a nearby toxic waste require disclosure by the seller or, by default, the seller's REALTOR®?



The Agent's Duties

- Protect the principals' negotiating position at all times and disclose all known facts which may affect or influence the principals' decision (undivided loyalty)
- Obey all lawful instructions of the principal
- Keep the confidence of the principal
- Exercise reasonable care and skill in performing all assigned duties
- Full accounting

Additional Rules

The REALTOR® Code (CREA)

- **Article 3 - Primary Duty to Client:** A REALTOR® shall protect and promote the interest of his or her Client. This primary obligation does not relieve the REALTOR® of the responsibility of dealing fairly with all parties to the transaction.
- **Article 4 - Discovery of Facts:** A REALTOR® has an obligation to discover facts pertaining to a property which a prudent REALTOR® would discover in order to avoid error or misrepresentation.

Additional Rules

• The REALTOR® Code (CREA)

• Article 4 – Interpretation:

- **4.2** - This Article is not intended to increase the disclosure obligations of REALTORS® beyond those required by common or civil law or any other statutory or regulatory requirements.
- **4.3** – The REALTOR® shall not be party to any agreement in any way to conceal any facts pertaining to a property.

Additional Rules

◦ Nova Scotia Real Estate Commission – Bylaw

- **Part Seven - Conduct and Trade Practices (Article 10):** The Industry Member has an obligation to discover facts pertaining to every property for which the Industry Member accepts an agency which a reasonably prudent Industry Member would discover in order to fulfill the obligation to avoid error, misrepresentation or concealment of pertinent facts. The Industry Member shall disclose any known latent material defects to his or her clients or other Industry Members involved in a transaction.

Neither CREA nor NSREC specifically use the term “stigmatized” or “psychologically impacted” property

Response in American Jurisdictions

Followed three paths:

- Most States have passed some form of legislation dealing with the issue and the split is about 50/50
- Some states have passed legislation making it mandatory to disclose issues that might stigmatize a property
- The other half (at the urging of NAR) have passed legislation stating that stigmas are not relative to a real estate sale and therefore do not have to be disclosed

Response in American Jurisdictions

- The common theme amongst most states has been the inclusion, in Property Condition Disclosure Statements, sections dealing with potential property stigmas or at least with respect to violent deaths or suicides that have taken place on the property
- Since the 1980s, California has had a State legislative requirement for disclosure of any death that has taken place on the property in the previous three years

In Canada

◦ The Province of Quebec's Real Estate Association (ACAIQ) does require that a violent death that has occurred in the property must be disclosed.



In Canada

October 2005 - Publication from ACAIQ states:

...In all three decisions, the Discipline Committee stated that as soon as a broker or agent is informed that a suicide was committed on a property in which a buyer is interested, the broker or agent “has knowledge” of the fact and must disclose it to the buyer. An agent even has an obligation to be proactive, in that he should not wait for the buyer’s questions in this regard. After all, the buyer has no reason to even think that such a drama may have unfolded and to ask questions about it. Note also that the occurrence must be disclosed no matter when or where it took place...

In Canada

...Although under the Civil Code the death of a person does not represent a latent defect that can jeopardize the integrity of an immovable, an agent has ethical obligations under the Real Estate Brokerage Act, especially concerning his duty to advise and inform. This duty is notably spelled out in sections 26 and 28 of the Rules of Professional Ethics of the ACAIQ, which dictate to the agent his obligation to inform the buyer of any factor of which “he has knowledge” that “could” unfavourably affect the parties or the very object of the transaction (sect. 28). Consequently, an agent has a duty to act with “objectively” whenever he is advising (as pertains to) all the facts surrounding the transaction and (to) the object thereof, without “exaggeration”, “concealment” or “misrepresentation” (sect. 26).”

(www.ACAIQ.com)

Other Factors

- An obvious tendency in the Canadian real estate industry in the last decade to embrace “I must disclose everything”
- Based on the assumption that the more that is told reduces the chances of being sued for having concealed some fact
- Does this balance with caveat emptor?
- The common law legal obligation of an agent to disclose can be no more than the obligation of the Principal (seller)



The Result in Canada

- Limited judicial consideration of cases involving stigmatized properties particularly those that can be categorized as “psychologically impacted”
- Numerous media reports of these situations but it would appear most have been settled out of court without the benefit of adjudication

Summach v. Alan (2003 BCCA 176.)

This was a decision from the British Columbia Court of Appeal with the unanimous decision being rendered by Madame Justice Ryan who noted:

The Result in Canada

Para (2) The respondent vendors and the appellant purchasers entered into a contract for the sale of lake-front property in Kelowna. Four days after the vendors accepted the purchasers' offer the vendors indicated they were interested in amending the contract to include a condition relating to the use of a dock on the property. Before the purchasers responded to the vendors and before they were to take possession of the property the purchasers learned from a neighbour that the adjoining property which was next door to a public park was being used in the summer as a "nude beach". They learned that sexual activity took place on a nearby dock.

The Result in Canada

Para (8) The trial judge in this case concluded that the existence of a nearby nude beach did not amount to a latent defect in the property. He said at paras. 23 and 24 of the Reasons for Judgment:

[23] The presence of nude bodies next door or parading in front of one's house may or may not be a defect. This requires a subjective test. To allow defects to be determined by individual preferences would open the floodgates of litigation by remorseful purchasers and create an impossible standard of disclosure for vendors. In this case, the alleged defect was occurring outside the boundaries of the property purchased.

The Result in Canada

◦ **[24]** The presence of a nude beach next door but one to the subject property is not a defect, latent or patent. There is no duty to the vendor to disclose the existence of the nude beach.

Para (9) I am not persuaded that the trial judge erred in reaching this conclusion. I would dismiss the appeal.



Where Are We?

- Limited judicial direction in Canada
- Caveat emptor held to quite strictly by Canadian courts
- Contrast with the real estate industry's desire to expand disclosure
- Restricted by a boundary that the Agent's duty to disclose can not exceed that of the Principal's

Solutions

- Put the ball back in the Seller's court
- Make greater use of the PCDS recognizing that it is not a well accepted document in some Provinces
- Specifically amend the PCDS to direct the Seller's attention to these issues
- Greater discussion, of the subject manner, with both the Seller and the Buyer at the time of first meeting