

Couple sues over haunted house

Courts, industry grapple with duty to disclose stigma

BY MARG. BRUINEMAN

For Law Times

Everyone has a past and sometimes homes do, too. But when that past includes something gruesome, like a murder, it could prove haunting.

A Bowmanville, Ont., couple didn't discover the horrible history of the home they were purchasing until after the deal had concluded. Fifteen years earlier, a man suffering from paranoid schizophrenia stabbed his mother and young stepdaughter to death. The new owners of that home are now suing the real estate firm, the agent, and the former owners for not telling them.

The real estate industry understands the stigma that accompanies a house with a troubling past and the possible impact it could have on its value. As a result, licensed real estate agents must

follow the Real Estate and Business Brokers Act code of ethics.

But what are the limitations in the duty to disclose the history of a home with a haunted past and are they adequate?

"By not disclosing the gruesome double murder, that is a violation of the rule of ethics," charges Marvin Huberman, the couple's litigation counsel.

"Our starting point is there's at least a determination... in respect to the code of ethics."

The couple had earlier complained to the Real Estate Council of Ontario, a move that resulted in a warning and a sanction requiring the real estate agent to attend ethics education. That action is serving as a springboard to the lawsuit with the goal of sending the message that there's a legal duty to disclose.

Bruce Matthews, RECO's deputy registrar, says complaints of this nature do occur but notes

they're infrequent. Of the 1,500 or so complaints received in a year, one or two relate to a stigma issue.

The code of ethics under the Real Estate and Business Brokers Act requires agents to make a reasonable effort to learn about any serious negative history attached to a home and disclose any material facts.

"The registered real estate professional should be asking questions along those lines," says Matthews.

"Our advice to real estate professionals is disclose, disclose, disclose. There's no downside to disclosure."

Matthews notes the term material facts covers a broad spectrum. But critics say it's too broad and argue there's a grey area that remains untested.

Barrie, Ont., real estate lawyer Shari Elliott, for example, finds the definition of what constitutes



The definition of material fact is too vague, says Shari Elliott.

material facts somewhat unclear.

"I believe that the definition of what is considered a material fact is too vague and leaves too much to individual interpretation without additional guidance in the code or other legislation to assist," she says.

"While one could never expect the legislation to cover all the items that might be considered a potential stigma, as this list will likely grow over time and is specific to each purchaser, by having a ruling on items that are commonly occurring, like murder, suicides, and other traumatic events occurring on the property, new items could be handled by making a comparison."

Elliott says Ontario legislation doesn't address the obligation to disclose a murder whereas guidance exists in Quebec and many U.S. states.

That's where Huberman, a certified specialist in civil litigation, intends to go with the Bowmanville couple's suit.

"The law in that area really in Canada has not been well defined," he says.

"The application of the latent-defect exception in the context of non-physical defects or stigmas pertaining to residential property has not been fully considered or analyzed in detail in the legal literature or by the courts in Canada to date," he adds.

The case raises the question of where to draw the line between the real estate agent's responsibility to disclose a non-physical material defect and the doctrine of buyer beware. Is the stigma caused by the double murder, asks Huberman, an exemption to *caveat emptor*?

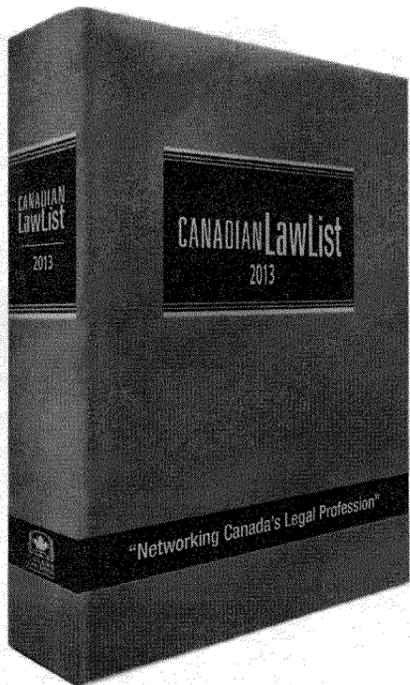
Some U.S. states have legislation for certain kinds of defects, but the rules aren't uniform.

The couple is seeking damages. They say they overpaid for the home and they've suffered emotional trauma after learning the details of what occurred in the house 15 years earlier.

The couple intends to put the home up for sale. By disclosing the stigma, they understand it may not fetch as much as it otherwise might.

"This really has the potential for being a cutting-edge case," says Huberman. **LT**

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