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Residential property disclosure statements are worth using, despite the risk to vendors
By Nigel McCready

Months after buying their dream home, your clients are pumping six inches of rainwater from their finished basement. Upon reviewing the file, you discover a Property Disclosure Statement in which the vendors claim to be unaware of any water problems. The purchasers now have someone to blame, and so a new defect claim is born.

Vendors often complete a disclosure statement (sometimes called the "Property Condition Disclosure Statement" or "Seller Property Information Statement") when placing their homes on the market. Some local agents' associations require their members to use the statement, but it is not generally mandatory.

The statement asks a series of questions about the property, covering both legal matters and the physical condition of the building and land. It includes a disclaimer, but this typically carries little weight in court (particularly when the statement is incorporated into the agreement of purchase and sale).

Vendors who voluntarily complete an inaccurate or misleading disclosure statement place themselves at risk. This risk is compounded when vendors provide information based on their own incomplete knowledge. However, when properly advised and informed, a vendor gains an advantage in both sale negotiations and in later litigation.

Critics of disclosure statements are wary that the statements require information on matters which may be outside the vendor's knowledge, such as registered easements and local development projects. Standard purchase agreements mitigate this by letting lawyers investigate these items before closing; title insurance also covers many such issues. The caselaw on disclosure statements mainly addresses physical defects, perhaps because it is harder to prove that the vendor knew about a purely legal issue.

The Manitoba Court of Appeal addressed the growing use of disclosure statements in Alevizos v. Nirula, 2003 MBCA 148. The Court stated that the answers vendors provide are representations, but clarified that vendors will not be liable when they complete the statement fully and honestly.

In this case, the plaintiffs were unaware until after closing that the windows of their newly purchased home leaked during heavy rain. The purchasers noticed suspicious stains around the windows prior to the purchase but did not investigate because the vendors did not mention window leaks in the disclosure statement.

Because of the frequency of the leakage and the age of the stains, the trial judge found that the vendors must have known about the problem. Their failure to include this knowledge in the disclosure statement was a fraudulent misrepresentation for which they were liable.

In upholding this decision, the Court of Appeal was very critical of disclosure statements, calling them "a ripe ground for litigation" and warning against their routine use. In their view, the statement invites dispute by forcing uninformed vendors to provide complex information in a short "fill in the blanks" format.

Despite the court's misgivings, the statements remain in wide use. Fortunately, lower courts are limiting vendors' liability to appropriate situations. For example, the vendors in Cartwright v. Fournier, 2006 ABPC 43, successfully defended a leaky basement claim by showing they were unaware of the problem. They had stored valuable property and antiques in the affected area,

none of which sustained water damage.

In contrast, the vendor in Boreland v. Gilmore, 2006 NBQB 34, was liable for a faulty septic system because of his proven dishonesty. The disclosure statement described the septic system as 10 years old, but it was actually decades out of date and the vendor had occupied the property for 19 years without replacing it.

Regardless of the contents of the disclosure statement, the purchaser bears the risk of unconcealed patent defects. However, they may not be obliged to investigate suspicious items in the face of written assurances from the vendor. In Whaley v. Dennis (2005), 37 R.P.R. (4th) 127 (Ont. S.C.J.), the purchasers closed without investigating “evidence of waterproofing” in the basement because the vendors’ statement disclosed no knowledge of water problems. The court accepted the purchasers’ claim for water damage, ruling that the buyers were not in a position to second guess the vendors’ representations.

Critics often ignore that a properly completed disclosure statement actually assists a vendor when facing a potential claim. Reporting a defect early shifts the onus to the purchaser to inspect the matter and negotiate necessary amendments to the agreement, leaving the vendor in a good position to discourage and defend potential post-closing litigation.

Lawyers and agents should advise vendors about their obligations and assist them in completing the statements properly. When in doubt, vendors should use the space provided to provide further explanation. Lawyers must warn potential litigants about the risk of alleging fraud, as failing to plead and prove the necessary elements may mean costs consequences later.

It makes sense to allocate the risk of a concealed defect to the party who had actual or inferred knowledge of the problem. As long as vendors receive proper advice and the courts keep liability within reason, disclosure statements will be a valuable tool in everyday transactions and in defect litigation alike.

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