



# Real Estate News

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## LIPPA V. COLLETTA - THE SHIFTING SANDS OF CONTRACT AND TORT LAW IN THE REAL ESTATE CONTEXT

**L**ippa v. Colletta 2017 ONSC 1122 (CanLII) is a recent Divisional Court decision in which the court found that a home inspector breached the terms of the home inspection contract and was negligent, but limited the home inspector's liability to the cost of the inspection report - \$325 – due to an exclusion clause contained in the contract.

The case involved a typical home purchase agreement that was conditional on a home inspection. The offer to purchase the property was accepted on October 30, 2009, and the inspection was performed on November 2, 2009. Before the inspection began, Ms. Lippa executed the inspector's standard form inspection agreement and there was little or no negotiation of its terms. The inspection was performed and no significant defects were identified in the inspection report. The inspection condition was waived, the transaction closed and the plaintiff took possession on January 29, 2010. On February 15, 2010, Ms. Lippa observed large water marks, puddling water, actively leaking water and large cracks in the basement foundation of the property.

Ms. Lippa commenced a claim on August 19, 2010, (which was amended at trial for the total amount of \$35,662.64) against the vendors, the home inspector and her real estate agent and brokerage for repairs and out of pocket expenses. She alleged that the vendors failed to disclose latent defects that were known to them, that her home inspector for negligently misrepresented that the property was free of defects and breached the terms of the home inspection contract and that her real estate agent breached the standard of care required. Ms. Lippa was self-represented at trial.

The trial judge dismissed the claim against the vendors finding that  *caveat emptor*  continues to be the rule in real estate transactions and the plaintiff had not successfully established that the vendors had intentionally concealed the water issues. Similarly, the claims against the real estate agent and brokerage were also dismissed on the basis that the plaintiff failed to establish that the agent or brokerage breached the standard of care required in the circumstances or that those breaches resulted in the damages claimed by the Plaintiff.

With respect to the home inspector, while the court found that the home inspector breached the contract and

the standard of care required of home inspectors in his inspection and drafting of the home inspection report, his liability was limited to the cost of the home inspection - \$325. In making this determination the trial judge relied upon the Supreme Court of Canada case of *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* 2010 SCC 4 (CanLII), contextual factors and the wording of the exclusion clause contained in the home inspection contract.

Briefly, *Tercon* involved sophisticated commercial entities involved in a tendering process for the construction of a provincial highway. The Defendant accepted a bid that did not comply with the strict provisions required for the bidding process and then relied on an exclusion clause to limit liability.

*Tercon* determined that the principle of fundamental breach established by *Hunter Engineering Co. v. Syncrude Canada Ltd.* and sometimes applied to render exclusion clauses unenforceable should be laid to rest and replaced with a new analysis of exclusion clauses which consists of a three-part test: 1) Whether the exclusion clause applies to the circumstances established in evidence. This will depend on the intention of the parties as expressed in the contract. If the exclusion clause applies, then the court considers the second part: 2) whether the exclusion clause was unconscionable at the time the contract was made. If the exclusion clause is held to be valid and applicable, the court may undertake a third enquiry: 3) whether the court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

In applying the *Tercon* analysis to the facts in *Lippa v. Colletta* the trial judge considered a number of factors when interpreting the exclusion clause, including: neither of the parties were sophisticated (although the home inspector was more sophisticated), the inspection was intended to be a non-invasive visual inspection only, the nominal cost of the inspection, the inspection was to take place in the context of a real estate transaction, and the inspection was a process that invited reliance on the home inspector's professional experience. The court also acknowledged some inequality of bargaining power as the home inspector operated a business that conducted home inspections and was likely familiar with the terms of the contract he provided to his clients.

The specific wording of the exclusion clause stated:

The parties understand and agree that the Inspector and its employees and its agents assume no liability or responsibility for the costs of repairing or replacing any unreported defects or deficiencies either current or arising in the future or any property damage, consequential damage or bodily injury of any nature. If repairs or replacement is done without giving the Inspector the required notice, the Inspector will have no liability to the Client. The client further agrees that the Inspector is liable only up to the cost of the inspection.

Based on the factors discussed in *Tercon*, the wording of the exclusion clause contained in the home inspection contract, and the particular facts of the case, the trial judge determined that the exclusion clause remained valid and the home inspector was only liable up to the cost of the home inspec-



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tion. The trial judge concluded that the Plaintiff did not understand what she bargained for but that it was a bargain she struck. Had she read the exclusion clause she would have understood that she could place only limited reliance on the home inspection report. Finally, the trial judge found no public policy interest that over-rides the public interest in enforcing contracts freely entered into, nor had the Plaintiff made any such submissions in this regard.

While each case turns on its own facts, *Lippa v. Colletta* is an unfortunate result for home purchasers seeking to rely on home inspectors to provide greater insight for the decision to proceed with the purchase of a significant asset. One can only speculate regarding whether the result would have been different if the Plaintiff was not self-represented at trial. A brief review of the case law seems to suggest that the outcome of proceedings against home inspectors are highly dependent on the stage at which the potential home purchaser receives a copy of the home inspection contract before signing, whether a standard form contract is used, the sophistication of the parties and the specific wording of the exclusion clause itself.

Finally, it will be interesting to see whether the exclusion clause is-

sue raised in *Lippa v. Colletta* is addressed by section 52 (governing the form and content of home inspections) of the *Home Inspection Act, 2017 S.O. 2017, c. 5, Sched. 1* when it finally comes into force. ■

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