

Do the Fish go with the House?



By Brian Madigan LL.B.

Who cares? Really, this is a more complicated question than it might appear at first blush.

Let's assume you have ten 50 cent goldfish in a tank, does it really matter all that much? On the other hand, I recently came across a situation where a vendor had \$15,000 worth of rather rare and exotic fish species in an outdoor pond. At least now, the answer to the rather simple question is worth \$15,000.

In an agreement of purchase and sale, we also have to assume that nothing was said about the fish. Certainly, the agreement would prevail. If the contract said they stay with the house, then they stay, and if the contract said the vendor could take them when he left, then he would be able to remove them.

The problem only becomes "tricky" when the agreement is silent on this point. Do they go with the land? Are they considered to be a fixture in some way? Or, are they chattels, such that they might be relocated?

To analyse this issue, we must consider:

- Where they are
- Their relationship to the land
- Whether they are fixtures
- Whether they are chattels
- Whether they "go with the land"
- Whether they are domesticated in some way

Fish swimming in a Fish Bowl in the house

This is rather straightforward. The bowl is moveable. The fish in the bowl are also moveable, and there would be little or no expectation that they remain with the house, any more than the buyer would think that the seller should leave behind his TV.

Fish swimming in an Aquarium, built into the wall in the recreation room

This situation is a little bit tougher. The built-in aquarium is precisely that, “built-in”. That makes it a fixture. So, we have the actual tank built into the wall as a fixture, what about the stones in the bottom, the water, the filtration system, the pump, the aerator and so on? Certainly anything which is not simply ornamental or décor is considered to be a fixture. And, automatically all fixtures go with the house, unless something is said to the contrary. The fish themselves however still remain chattels.

Fish swimming in a bowl, aquarium or tank, where the business is sold

This situation is a little more confusing, but the legal answer is clear. If the vendor sells a business, any business; it doesn't have to be an exotic fish warehouse, any regular run of the mill business will do. It could be a barbershop, a hair salon, a restaurant or a dental office. If the business is sold, then every chattel that might even remotely be used in the business is “deemed” to be part of the business and sold as a chattel that is included in the sale price unless the seller specifically excludes that particular item. So, any kind of fish in a hair salon, will go with the business unless the seller writes something into the contract to the contrary.

In this regard, you might want to refer to the definition of “business”, and the definition of “real estate” in the *Real Estate and Business Brokers Act, 2002* (Ontario).

Fish swimming in a natural stream on the property

These fish are not really owned by the owner of the real property. They are wildlife. They are still part of nature. Either they are not really owned by anyone, or they are owned by everyone (in a public sense). These fish are just swimming through the stream. They may or may not be there on the date of closing, and nothing arises one way or the other, in terms of their presence or lack of it.

Historically, there is a distinction at common law between domesticated animals and those in a state of nature. The test seems to be whether the animals might return to their owner's residence in the sense that they were fed and would frequently return on a regular basis. In this regard, there are owners of properties who consistently feed the same fish, and in these circumstances, they may be said to have domesticated some of the regulars. If they are “wildlife” or “domesticated”, the purchaser will have to acquire his own.

Fish swimming in a blocked, contained pond on the property

In this situation, the more modern laws treat these fish as chattels. They could be subject to a chattel mortgage. However, this line of cases all deal with business operations, so by and large this approach makes sense.

Have a look at the the case of *Canada (Attorney General) v. Canadian Sturgeon Conservation Center Ltd.*, 2005 (New Brunswick) where live fish were considered to be chattels for the purposes of bailment, liens, taxes and the enforcement of penalties.

Other issues

There are cases, although not in Ontario, where fish in stocked ponds were considered to be part of the property. In that regard, they were viewed as being somewhat less than “wildlife” and not quite “domesticated”, so the purchaser was entitled to have them in the pond on closing.

Conclusion

This is a situation which could become complicated. So, make sure it is addressed in the agreement. If you are buying the property and you want the fish in the stocked pond, put this in the agreement.

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