

Buyer entitled to recover deposit after seller misrepresented legality of addition (Sewell v. Abadian)

Buyer | Litigation | Litigation & Dispute Resolution | Misrepresentation

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In disputes where a buyer alleges that a seller made misrepresentations about the property being purchased, courts will generally focus on whether the representations were contained in the contract for the transaction or were otherwise reasonably relied upon by the buyer. Sellers should take care about the accuracy of any representations about a property in the listing or other disclosure documents. In some cases, incomplete or omitted information may give rise to liability.

In *Sewell v. Abadian*, 2025 BCCA 158 (CanLII), the Court of Appeal for British Columbia addressed a seller's liability for the contents of a written disclosure statement about a property.

The buyer agreed to purchase the property for \$6.2 million with a \$500,000 deposit paid in installments of \$300,000 and \$200,000. Before entering into the contract, the buyer requested that the seller provide a written disclosure statement in the standard form used in British Columbia. The seller did so but drew a diagonal line through the form, did not complete answers for any boxes, and wrote in an additional comments section: "Tenanted Property, Owner has never occupied".

The buyer was surprised to see that a line was drawn through the form and that none of the questions were answered. Through her agent, she requested more information, including whether any repairs had been made to the property.

The seller provided information to his agent via text message, including a statement at the end "Not sure if we have to mentioned [sic] but the tiled family room is/was an addition not by me. It's unauthorized accommodation." The seller forwarded the text message to the buyer's agent but as the text message was compressed on the recipient agent's phone, he did not see the statement about the addition. As a result, the buyer's agent did not see or convey any message to the buyer about the family room or potentially unauthorized addition.

After paying the first \$300,000 deposit, the buyer discovered the unpermitted addition while reviewing building plans for the home and refused to close the transaction.

Litigation ensued. The buyer sued for the return of her initial deposit and the seller counterclaimed for delivery of the second deposit. One basis of the buyer's claim was that the seller made a negligent or fraudulent misrepresentation in the disclosure statement.

The trial judge found that the seller did not make any misrepresentations: *Sewell v. Abadian*, 2024 BCSC 1116 (CanLII). In the trial judge's view, the fact that the seller crossed out the disclosure form and did not provide any answers meant that the only representation he was making was that the property was tenanted and he had never occupied it.

The Court of Appeal disagreed that this was the only reasonable interpretation. The appellate court noted that the transaction was not an "as is" sale and that the statement "Tenanted Property, Owner has never occupied" must be read together with the seller's refusal to answer any of the standard questions.

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The Court of Appeal determined that the lower court judge erroneously concluded that there was no misrepresentation by the seller, and the decision failed to take into account the following circumstances:

the seller was experienced in real estate sales, including as a prior licensed realtor, and knew the importance of filling out a disclosure statement accurately;

- a) the seller knew that a disclosure statement he had received from a prior owner of the property disclosed the unpermitted addition in two places;
- b) the seller had a choice of not providing a disclosure statement and saying nothing but instead chose to provide one and to agree that it would be incorporated into the contract;
- c) the disclosure form specifically stated that the seller was responsible for the accuracy of the answers and where uncertain should reply “do not know”;
- d) the disclosure statement also stated that the information provided was true, based on the seller’s current actual knowledge, and that any important changes to this information made known to the seller would be disclosed prior to closing;
- e) the additional comments about it being a “tenanted “property” and “owner has never occupied” were not responsive to the questions on the form asking for information about the property.

The Court of Appeal concluded that the above evidence ought to have been considered by the judge when he was considering whether the seller made a misrepresentation on the form.

Although the seller did not fill out boxes on the form to specifically answer “Do Not Know,” this did not in fact mean that he was not claiming he did not know the answers to relevant questions. Rather, in the Court of Appeal’s view, the seller was representing within the overall context of the form that he did not know that there were any unpermitted additions. Since he was in fact aware that there was an unpermitted addition on the property, this was a misrepresentation. Whether it was a negligent or fraudulent misrepresentation “does not matter in this case.”

There was also no question that the buyer relied on the form. The evidence was that she did not learn about the unauthorized addition before entering into the contract. The seller agreed that the buyer could rely on the disclosure statement by incorporation of it into the contract. The buyer relied on the seller to disclose everything he knew about the property and thought that the seller was indicating that he was unaware of the answers to the questions that were crossed out. In the Court of Appeal’s view, it was not open to the seller to say that the buyer did not rely on it.

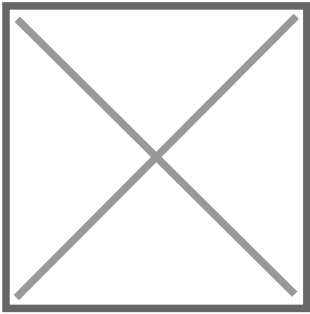
The buyer would not have entered into the contract if the seller had not misrepresented his knowledge about the unpermitted addition. The buyer was entitled to and did rely on the seller being accurate and complete in the disclosure statement. He was not.

Accordingly, the trial judge’s order was set aside and the buyer was entitled to recover the amount of the initial deposit of \$300,000.

There have been similar cases in Ontario regarding written disclosure statements, most notably *Krawchuk v. Scherbak*, 2011 ONCA 352 (CanLII), where a seller was found liable for misrepresenting their knowledge of foundation and plumbing issues. These decisions illustrate the issues that may arise where a seller makes representations to a buyer about a property, particularly if they are in written form in a disclosure statement or otherwise. Sellers and their agents must be cognizant of the need to be responsive to questions asked by a buyer as a court may conclude that a buyer is relying on what they say—or do not say. A PDF version is available for download [here](#).

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