

# KEEPING CURRENT

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## Buyers not allowed to terminate purchase due to size misdescription or building permit concerns

By James R.G. Cook

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While the discovery of misdescriptions as to the size of a property or unpermitted renovations may allow a buyer to terminate a purchase transaction, that is not always the case. Whether a description of the size of the property is a material factor not only depends on the written representations as to the size of the property but the buyer's visual investigations. As to building permits, a buyer should proactively investigate any concerns and raise the specific issues in a timely manner. The Ontario Superior Court of Justice addressed each of these issues in *Lamba v. Mitchell*, [2021 ONSC 1612 \(CanLII\)](#).

In July 2020, the sellers listed their residential bungalow in Mississauga for sale. The MLS listing represented the interior of the house to be approximately 2500-3000 square feet. This representation overstated the size of the house unless the lower level of the bungalow was included in the calculation, as the main floor ("above grade") was 2155 square feet and the lower level was 665 square feet. A marketing brochure prepared for potential buyers accurately set out the above grade and lower level dimensions.

A highly experienced real estate agent in Mississauga, who had closed over 2,000 transactions collectively worth over \$1 billion, viewed the property with his wife. They made an unconditional offer to purchase the property for \$1.2 million within a few hours of their visit, as there were multiple offers being made. Their offer was accepted. The scheduled completion date was September 15, 2020, with a \$20,000 deposit.

After the offer was accepted, the buyers learned that the "above grade" size of the house was 2,155 rather than 2,500-3000 square feet. The buyers claimed to have relied on the MLS listing for the dimensions of the property and said that they did not see the marketing brochure when visiting the property before making their offer. The evidence of the sellers was that the brochure and the floor plan were on display in the kitchen during the viewings. The buyers claimed that the difference of 345 square feet was a shocking discovery.

Further, the buyers learned of a prior renovation that built an addition onto the bungalow that almost doubled its original size. The sellers claimed that the

renovations were done prior to their purchase of the property and that they did not have copies of any permits relating to the work. The buyers refused to complete the purchase and litigation ensued over the deposit.

The issues before the court were whether the buyers were entitled to rescind the Agreement of Purchase and Sale (“APS”) for the transaction due to either the MLS listing which gave the incorrect area of the home or their concern over the building permit for the addition.

In a [decision](#) released on March 31, 2021, Justice Michael T. Doi ruled in favour of the sellers on both issues.

While the MLS listing incorrectly set out the home’s above grade area, Justice Doi found that this did not amount to a material misrepresentation by the sellers that was relied on by the buyers. The Ontario Court of Appeal has confirmed that rescission of an agreement to buy a property may be obtained on the basis of a misrepresentation involving the square footage of a property (*Issa v. Wilson*, [2020 ONCA 756 \(CanLII\)](#) discussed in [Misrepresentation in Square Footage leads to Rescission of Agreement of Purchase and Sale](#)). However, the key factors are whether the alleged misrepresentation was (a) material, and (b) induced the complaining party to enter into the contract.

Prior court decisions have addressed whether misstatements of lot sizes in real estate cases amounted to “material” misrepresentations by assessing whether the discrepancy would affect the purchase price; whether the discrepancy was known, or ought to have been known to the purchaser; and whether it would have impacted the decision of a reasonable person to purchase the property: *Zhang v. Lin*, [2020 ONSC 6559 \(CanLII\)](#) at para [31](#);

*Sankarsingh v. Ali*, [2019 ONSC 5655](#) at paras [65-68](#). Justice Doi reasoned that similar considerations should apply to representations as to the interior size of the house.

While Justice Doi was prepared to accept that the 345 square foot overstatement as to the above grade size of the bungalow was not insignificant, he was not persuaded that the discrepancy should allow the buyers to rescind the contract. In that regard, His Honour noted that the buyers had personally attended the property before making their offer, and that they were likely well aware of the home’s actual size and layout before they decided to buy what they had seen. Further, one of the buyers was an experienced and sophisticated realtor and would have appreciated the bungalow’s interior area and layout. In light of this, Justice Doi was satisfied that the discrepancy between the actual and misstated area in the MLS listing did not constitute a material misrepresentation that would have impacted the buyers’ decision to make an offer and enter into the binding agreement with the sellers.

Further, the court had previously dismissed a motion by the buyers for leave to issue a certificate of pending litigation on the property, on the basis that the MLS listing did not constitute a material misrepresentation. The buyers could not re-litigate the same issue since they had not attempted to appeal the earlier decision.

As to the open permit, Justice Doi found that the buyers had not requisitioned a valid objection to title. The buyers had asked the listing agent for the municipal records relating to the addition built onto the property and were told that the sellers did not have any records. The buyers’ real estate lawyer asked the sellers’ lawyer to produce the municipal building permits for the addition or, alternatively, to confirm if the permits did



not exist. The response of the sellers' lawyer was that the buyers needed to conduct their own investigations of the building permit issue.

The buyers' lawyer took the position that she could not obtain the records from the City due to the COVID-19 pandemic, but the sellers' lawyer requested confirmation that the City's offices were in fact closed and that the building permit particulars could not be obtained. For reasons unknown, the buyers chose not to provide any proof that they could not get the building permit information from the City. Instead, they took the position that it was the sellers' obligation to do so. The transaction failed to close as a result of this impasse.

Justice Doi determined that the buyers had failed to raise a defect or encumbrance that went to the root of title, and had failed to requisition a valid objection to title that required the sellers to respond, based on the applicable caselaw: *67 College Street Inc. v. 2329005 Ontario Inc.*, [2019 ONSC 7346](#) at para [17](#); *Karami v. Kovari*, [2019 ONSC 637](#) at para [72](#); *Stykolt v. Maynard*, [1942 CanLII 95 \(ON SC\)](#). Merely requesting that the sellers provide copies of the building permits without more did not, in the court's view, raise a valid objection to title. There was no evidence that the sellers were aware of any open permits or issues with the renovations, and the buyers failed to show that they could not have obtained the building records from the City on their own to alleviate their concerns.

As a result, the sellers prevailed and were entitled to retain the deposit. No claim for damages in addition to the deposit was asserted, and it may well be that the sellers were able to sell the property to another buyer for a higher price.

The decision shows that buyers should take reasonable steps to satisfy their own concerns about the size of a property before making an offer to purchase, rather than relying on a written statement as to square footage in a listing. Further, any concerns about renovations to the property should be investigated independently rather than relying on the sellers to provide documentation which they may not have. As the court found that the buyers did not have a valid reason to refuse to close, they could have faced a claim for considerably more money than the deposit, and are fortunate that the deposit was a fairly low amount of \$20,000.

### Contact us

If you have a litigation matter and are in need of legal advice, please contact [James Cook](#), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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