

# Real estate agent not liable for taking instructions from buyer's spouse

British Columbia | Litigation | Litigation & Dispute Resolution | Real Estate

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Real estate agents often represent co-owners or potential buyers during the course of a transaction and at times they may receive communications from only one of the clients. In such cases, agents should take reasonable steps to ensure that the clients have agreed-upon the instructions or other course of action. However, clients should also be aware that they may be bound by the communications and instructions provided to the agent by the other client.

*Morden v. Pasternak*, 2023 BCCA 252 (CanLII), involved a claim by a buyer against her real estate agent arising out of an aborted transaction.

The buyer and her husband were experienced real estate owners, and had bought at least 10 properties before the transaction at issue. In June 2016, the buyer and her husband decided to make an offer to buy a property in Maple Ridge, British Columbia. While they both intended to go on title, the husband was leaving for a vacation, and they decided that he would not be signing the agreement to buy the property since he would be away.

The buyer signed the contract to buy the home and entered into a firm agreement with the sellers by providing her agent with a \$50,000 cheque for the deposit. That evening, however, the buyer's husband decided to terminate the contract. He left a voice mail message with their real estate agent the following morning with instructions to cancel the deal. Further he transferred funds out of the account upon which the deposit was to be drawn thereby ensuring the cheque would be NSF if cashed.

The sellers eventually re-listed the property for sale and sold it for \$100,000 less than the buyer had agreed to pay. At trial, the buyer was found to be liable to the sellers in the amount of \$97,800 for failing to complete the purchase but she sought indemnity from her real estate estate for the damages awarded.

In that regard, the buyer argued that the real estate agent should not have relied on instructions from her husband since he was not her agent and had no authority to cancel the transaction. She further alleged that the real estate agent was liable for failing to ensure that she and her husband received legal advice about the potential consequences of terminating the transaction and the potential damages that could result.

The trial judge found that the buyer's husband had actual authority to act for her, that their acquisition of the property was a joint purchase, and that she had intended for her husband to manage the transaction. The trial judge further found that the buyer's husband had authority to make decisions and communicate those decisions to the real estate agent, including the decision to repudiate their agreement.

The trial judge found that the agent was aware of "emotional tension" between the buyer and her husband and should have taken better care to advise the buyer on the potential consequences of failing to complete the transaction. Nevertheless, the trial judge was satisfied that the agent's failings did not cause the buyer's losses and her claim for indemnity was dismissed 2022 BCSC 433 (CanLII).

The buyer appealed this decision to the Court of Appeal for British Columbia.

The Court of Appeal affirmed that the trial judge had correctly identified that causation is a necessary element of an action in negligence: "Simply put, a defendant's negligence, without more, does not make out the cause of action. Instead, a defendant's negligent conduct must cause the plaintiff's loss. The onus lies with the plaintiff to establish causation on a balance of probabilities and on a "but for" basis" (referring to *Clements v. Clements*, 2012 SCC 32 at paragraphs

8–11).

Given this test, the buyer had to show that but for the agent's allegedly negligent advice—or lack thereof—she would have chosen to complete the transaction and/or otherwise avoided liability to the sellers. In the Court of Appeal's view, however, the evidence was to the contrary in that the buyer and her husband demonstrated a clear intention to breach the contract to buy the property without taking any steps to seek legal advice before doing so or making any attempt to revive the transaction notwithstanding that they were aware that damages could be awarded to the sellers.

Among other things, the buyer's husband and the real estate agent exchanged an email in the days after the contract was cancelled where the agent commented that the costs could be as much as \$100,000. The buyer and her husband made no effort to try and salvage the transaction. Based on the evidence, the decision of the buyer and her husband to cancel the deal was firm and unwavering.

Further, the evidence was that the buyer and her husband had the real estate experience and knowledge to understand the potential consequences of “collapsed deals” and knew the importance of obtaining legal advice. It was clear that they never entertained the option of completing the transaction once the husband called the agent to cancel the deal and withdrew the funds from the deposit account.

There was therefore no causation on the part of the real estate agent—the buyer and her husband would have never contemplated completion of the transaction or reconsidered their decision. Any shortcomings in advice given or not given by the real estate agent to the buyer and her husband had no impact on their decision to abandon the purchase of the property. The buyer's obligation to compensate the sellers for their losses would have crystallized regardless of the real estate agent's actions and negligence. The appeal was therefore [dismissed](#).

The decision illustrates some of the perils that may arise when an agent takes instructions from one joint client which may be subsequently challenged by the other. Although the agent was successful, the claim may have been avoided by confirming significant instructions in writing with both clients. Ultimately, however, the buyer was bound by the decision of her husband to cancel the deal as she failed to take steps to advise the agent that she did not agree with this decision and wished to complete the transaction. A PDF version is available to download [here](#).

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