

Case shows fraudulent misrepresentation voids a contract

By Jennifer Pritchett, Associate Editor



A British Columbia judge's **decision** to order a woman who was selling her upscale Vancouver home to return a buyer's \$300,000 deposit because of "fraudulent misrepresentation" highlights how an "incomplete" presentation of a contract can void the agreement in its entirety, says Toronto civil litigator **Sarah O'Connor**.

"This decision shows that while buyer beware exists, it's important to do your due diligence at a property before purchasing," she says. "It's up to you to ask the reasonable questions.

"And on the seller side, if the buyer asks a specific question, don't misrepresent the answer."

O'Connor, principal of **O'Connor Richardson Professional Corporation**, comments generally on the B.C. matter and isn't involved directly.

At the heart of the dispute is whether the failure of the seller to disclose the unsolved murder of an occupant of the property entitled the buyer to refuse to complete the purchase and to recover her deposit, says the decision.

Initially, the buyer agreed to purchase the house in 2009 for \$6,138,000. But upon learning about the murder, she didn't go ahead with the purchase and the vendor later sold the property to another purchaser for the price of \$5,500,000, it says.

The vendor took the matter to court, arguing that the defendant breached the contract and claimed she was entitled to keep the deposit of \$300,000 and to additional damages of \$338,000, the decision says.

The defendant, who launched a counter lawsuit to get her deposit back, told the court that the plaintiff's failure to disclose the violent death of her son-in-law near the front of the property in 2007 entitled her not to fulfil the contract, the judgment says.

The buyer argued that the plaintiff was obliged to disclose the death on two grounds: firstly that the death was a material defect in the property. Secondly, she claimed that the deceased man was a member of a Chinese gang and that this "rendered the property dangerous, or potentially dangerous, and constituted a latent defect, which the plaintiff failed to disclose," it says.

O'Connor explains that if a seller is aware of a latent or material defect and didn't disclose the information to the buyer, it could be considered misrepresentation and that gives rise to being able to recover her deposit from the vendor.

She notes that the judge indicated in this matter that the sellers weren't obligated to include the information about the killing in the property disclosure statements because it could have been discovered by anyone asking reasonable questions about the house.

But the key issue was that the buyer did ask questions about why the owners were selling the house, O'Connor says.

"The buyer asked why they were selling and they said a child was switching schools — the vendor didn't mention anything about the dad being gunned down in front of the house," she says.

"If the buyer didn't ask why they were selling, she probably would have lost her deposit."

The judge says the first element of the test for fraudulent misrepresentation involves how the plaintiff told the seller that the reason she was selling the property was that a member of the family had moved to a school in West Vancouver where she would have a better chance to practise her English.

"That representation, while true on its face, was incomplete. It concealed the fact that [the young girl] changed schools as a result of [the man's] death, and that the death was a factor in the plaintiff's decision to sell the property," says the judge.

For the second element of the test, the defendant established, on a balance of probabilities, that the plaintiff's representation of her reason for selling the property "was a false representation by omission," says the judge.