IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sewell v. Abadian,*
2024 BCSC 1116

Date: 20240626
Docket: S220518
Registry: Vancouver

Between:

Carolyn Eileen Sewell

Plaintiff

And

Ehsan Abadian

Defendant

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for Ms. Sewell:	A. Crabtree R. Ravanbakhsh
Counsel for the Defendant:	M. Drouillard
Place and Date of Hearing:	Vancouver, B.C. February 20-21, 2024
Place and Date of Judgment:	Vancouver, B.C. June 26, 2024

Table of Contents

I. INTRODUCTION

[1] This case arises out of a failed real estate transaction. The parties have terminated the contract of purchase and sale. The dispute concerns the deposit.

[2] The plaintiff Carolyn Sewell applies on a summary trial for an order that the defendant Ehsan Abadian return an initial deposit of $300,000 and a declaration that Mr. Abadian held the deposit in trust for her. Mr. Abadian seeks judgment on his counterclaim for an amount equal to a second deposit of $200,000.

[3] Ms. Sewell advances her claim on three grounds: (a) breach of a term of the contract that required Mr. Abadian to provide information with respect to non-conforming aspects of the property, which she argues constituted repudiation of the contract, entitling her to terminate the contract; (b) fraudulent or negligent misrepresentation in a property disclosure statement; and (c) failure to disclose a material latent defect.

[4] All three grounds relate to an addition to the home which Mr. Abadian knew the previous owner had constructed without a building permit from the municipal authorities. Ms. Sewell argues that the unpermitted addition was a material latent defect which Mr. Abadian deliberately and recklessly failed to disclose.

[5] Mr. Abadian argues that he disclosed the unpermitted addition in a text message his real estate agent forwarded to Ms. Sewell's real estate agent before she signed the contract. He argues that there were no representations in the property disclosure statement, and that Ms. Sewell's attempt to characterize a permitting issue as a latent defect is without merit.

[6] For the reasons that follow, I have concluded that Ms. Sewell's claim should be dismissed, and that Mr. Abadian's counterclaim should be allowed.

II. BACKGROUND

[7] Mr. Abadian listed 2525 Bellevue Avenue, West Vancouver (the "Property") for sale in late 2021. He retained Nima Alizadeh, a licenced real estate agent, to represent him in the sale.

[8] Mr. Abadian purchased the Property in 2014. He planned to use it as a rental property. Prior to purchasing the Property, he received a property disclosure statement which included disclosure of an addition or alteration made without a required permit and formal inspection:

> Are you aware of any additions or alterations made without a required permit and formal inspection; e.g., building, electrical, gas, etc.?
> Answer: YES.

[9] The disclosure statement also included the following handwritten note under "Additional comments and/or explanations":

> The back garden room area was built as a large "covered outdoor porch" with fireplace as designed by an architect in accordance with West Vancouver regulations. That area was subsequently enclosed without a permit.
>
> [emphasis added]

[10] The enclosed area was part of a family room of about 350 square feet. Mr. Abadian acknowledges that he was aware that the family room was constructed without authorization from the District of West Vancouver. He defines it in his own affidavit as the "Unpermitted Addition". He deposes: "Since the Unpermitted Addition had no impact on my planned use for the Property, I did not investigate the matter further."

[11] When he listed the Property for sale in 2021, Mr. Abadian prepared and signed a property disclosure statement (the "Disclosure Statement"). He or his agent drew a diagonal line through all of the questions on the standard form. He did not place his initial or any other mark in any of the columns for "Yes", "No", "Do Not Know" or "Does Not Apply" opposite any of the questions on the form.

[12] Under "Additional comments and/or explanations", Mr. Abadian or his agent typed: "Tenanted Property, Owner has never occupied".

[13] Mr. Abadian or his agent also prepared marketing materials for the Property. The marketing materials included photographs of the family room.

[14] Ms. Sewell was looking for a property to purchase in West Vancouver. She was represented in this search by Ralph Maglieri, a licenced real estate agent. Ms. Sewell became interested in the Property because it satisfied several of her criteria, including its location, size and design.

[15] Ms. Sewell viewed the Property with her agent in early January 2022, and again with her husband and the agent the following week. At the time, the house was tenanted, but the tenants were expected to move out by January 31, 2022. Ms. Sewell also reviewed the marketing materials for the Property.

[16] One of the features that Ms. Sewell particularly liked about the Property was the large family room located on the main level that opened onto the backyard. She deposes that this feature contributed to her decision to make an offer on the Property.

[17] Ms. Sewell asked her agent, Mr. Maglieri, to obtain information about the Property, including the property disclosure statement. Mr. Maglieri contacted Mr. Abadian's agent, Mr. Alizadeh.

[18] Throughout their dealings, the two agents communicated primarily by text message, and occasionally by mobile telephone.

[19] Mr. Maglieri obtained the title search for the Property, which listed three mortgages on title, along with a judgment. Mr. Maglieri reported to Ms. Sewell that Mr. Alizadeh said the judgement related to a renovation on another property and that it would be cleared prior to closing.

[20] Mr. Maglieri also obtained the Disclosure Statement and provided it to Ms. Sewell for her review. Ms. Sewell deposes that she was surprised to see that a line was drawn through the form and none of the questions were answered. She discussed this issue with Mr. Maglieri, and they decided that he would make

inquiries of Mr. Alizadeh to get more information, including whether any repairs had been made to the Property.

[21] On January 12, 2021, Mr. Maglieri sent a text to Mr. Alizadeh asking for: “info on [the property disclosure statement] and if [Mr. Abadian] did an inspection when he purchased [the Property] any repairs he may have done over the 7 years”.

[22] Mr. Alizadeh passed these questions on to Mr. Abadian and received information back from Mr. Abadian by text message. Mr. Alizadeh then took a screenshot of his exchange with Mr. Abadian and forwarded it to Mr. Maglieri.

[23] The full screenshot contained the following text messages; the last response from Mr. Abadian is most relevant to the matter at issue:

Mr. Alizadeh	A group is wanting to go subject free, a lil nervous about pds not being filled out. I advised it’s been tenanted the entire time. They’re wondering if you done any minor or major repairs, did you do an inspection when you guys bought?
Mr. Abadian	This for Bellevue?
Mr. Alizadeh	Ya
Mr. Abadian	I did not do an inspection when I bought. As far as minor, how minor?
Mr. Alizadeh	Not minor, anything worth mentioning
Mr. Abadian	I’ve re-sealed a couple of the skylights. Had an insurance e claim I think 5 years ago, a leak around the gutter. Is this [redacted] group
Mr. Alizadeh	No this is Ralph’s buyers
Mr. Abadian	Not sure if we have to mentioned but the tiled family room is/was an addition not by me. It’s unauthorized accommodation.

[24] Unbeknownst to Mr. Alizadeh, the screenshot was compressed when it displayed on Mr. Maglieri's phone. As a result, the last text message was truncated and displayed as follows:

Mr. Abadian	Not sure if we have to mentioned but the tiled family room is/was an

[25] The full screenshot would have displayed on his phone had Mr. Maglieri double tapped on the message from Mr. Alizadeh. Mr. Maglieri deposes that he was not aware at the time he received the message that there was more text or that the screenshot could be expanded. He deposes that he only saw the truncated version and, specifically, did not see the words "It's unauthorized accommodation". He deposes that those words would have been a "red flag" to him, because, as a realtor, they suggested the presence of an illegal suite.

[26] Mr. Maglieri reported to Ms. Sewell that Mr. Abadian had made some repairs to the skylights and fixed a leak by a gutter. He did not mention the family room or the odd message from Mr. Abadian ("Not sure if we have to mentioned but the tiled family room is/was an").

[27] On January 12, 2022, Ms. Sewell made an offer to purchase the Property. She deposes that, in making the offer, she relied on the Disclosure Statement and the information from Mr. Abadian relayed to her by Mr. Maglieri.

[28] Ms. Sewell understood another offer had been made on the Property. She deposes that, in an effort to make her offer as attractive as possible in a multiple offer scenario, she did not include typical conditions such as financing or a property inspection.

[29] Mr. Abadian made a counter-offer. The counter-offer was not acceptable to Ms. Sewell, so she did not respond.

[30] Ms. Sewell was still interested in the Property. She made a second offer to purchase the Property for $6.1 million, with a $300,000 deposit payable to the

vendor's realty agency in trust. Once again, she did not make the offer subject to financing or an inspection, because she was under the impression that there was still a multiple offer scenario in play.

[31] Mr. Abadian made a counter-offer to Ms. Sewell's second offer. The counter-offer increased the purchase price to $6.2 million and increased the deposit to $500,000 in two instalments to be paid to Mr. Abadian and held by him "in trust", rather than deposited in his agent's brokerage trust account.

[32] Ms. Sewell accepted the counter-offer. She signed the Disclosure Statement via Docusign prior to accepting the counter-offer. The contract of purchase and sale is dated January 12, 2022 (the "Contract"). It provided:

a) A purchase price of $6,200,000;

b) A deposit of $500,000, payable in two instalments: $300,000 within 24 hours; and $200,000 by January 31, 2022; and

c) A completion date of March 1, 2022.

[33] Clause 3 of the Contract, Terms and Conditions, is relevant to the matters in issue. It provided that:

> The purchase and sale of the Property includes the following terms and is subject to the following conditions:
>
> …
>
> The Buyer has received and approved a Property Disclosure Statement with respect to the information that reasonably may adversely affect the use or value of the property.
>
> If approved and signed by the Buyer such statement dated December 30, 2021 will be incorporated into and form part of this contract of purchase and sale";
>
> …
>
> "The Seller will provide the Buyer(s) with any information with respect to property notices received or any non-conforming aspects of the property as well as details with respect to any underground oil storage tanks [should one exist]. If an oil tank exists it will be the cost and responsibility of the Seller(s) to have it removed in accordance with current provincial regulations and any

> municipal guidelines, and to provide the Buyer(s) with documentation as to the work done, prior to the Completion date.
>
> …
>
> Each condition, if so indicated is for the sole benefit of the party indicated. Unless each condition is waived or declared fulfilled by written notice given by the benefiting party to the other party on or before the date specified for each condition, this Contract will be terminated thereupon and the Deposit returnable in accordance with the *Real Estate Services Act.*
>
> [emphasis added]

[34] The Contract included an entire agreement clause in Clause 19, Representations and Warranties:

> There are no representations, warranties, guarantees, promises or agreements other than those set out in this Contract and the representations contained in the Property Disclosure Statement if incorporated into and forming part of this Contract, all of which will survive the completion of the sale.

[35] Ms. Sewell provided a bank draft for the first installment of the deposit in the amount of $300,000 (the “Deposit”).

[36] Ms. Sewell subsequently asked Mr. Abadian, through Mr. Maglieri, for the building plans for the Property. Mr. Abadian said he did not have any building plans, but he agreed to sign an authorization for Ms. Sewell to obtain any plans on file from the District of West Vancouver.

[37] Ms. Sewell obtained the records from the District on January 18, and provided them to a contractor to review. Ms. Sewell deposes that the contractor, Grant Archer, told her that the approved plans did not include the family room and that the family room appeared to be an addition that was built without a permit.

[38] Ms. Sewell further deposes that Mr. Archer told her that he was unsure whether a permit could be obtained retroactively for the family room, and that, given the existing square footage and the maximum allowable buildable space on the Property and zoning regulations, it was unlikely she could add on to the house.

[39] Ms. Sewell's evidence of what Mr. Archer told her is inadmissible for the truth of what he said because it is hearsay; however, it may be relied on to explain Ms. Sewell's subsequent actions.

[40] Through a contact at her tennis club, Ms. Sewell obtained a copy of the property disclosure statement Mr. Abadian received when he purchased the Property in 2014. She saw that the "back garden room" had been enclosed without a permit. After considering her options, she decided that she did not want to purchase the Property.

[41] The real estate agents discussed the issue over several days between January 18 and 20. During these discussions, Mr. Maglieri discovered that the screenshot he received from Mr. Alizadeh on January 12 could be expanded to see the words "It's unauthorized accommodation". He also learned that what Mr. Abadian meant by "unauthorized accommodation" was actually that the family room was an unpermitted addition.

[42] On January 21, Mr. Maglieri spoke to Mr. Abadian directly and told him that Ms. Sewell was terminating the Contract and wanted him to return the Deposit. Mr. Abadian did not return the Deposit.

[43] Ms. Sewell did not pay the second installment of the deposit (the "Second Deposit") by the deadline of January 31, 2022.

[44] On February 1, 2022, Mr. Abadian's legal counsel wrote to Ms. Sewell and informed her that, because she had not paid the Second Deposit by the deadline, Mr. Abadian was terminating the Contract and claiming the Second Deposit as damages.

[45] On June 2, 2023, Justice Fitzpatrick ordered Mr. Abadian to pay the Deposit into court pending a decision on the merits in this case. To date, Mr. Abadian has paid approximately $1,500 into court in satisfaction of the order.

III. ANALYSIS

[46] The issues on the summary trial application are:

a) Is this matter suitable to be resolved by summary trial?

b) Did Mr. Abadian repudiate the Contract by failing to provide information with respect to the Unpermitted Addition?

c) Did Mr. Abadian make a misrepresentation in the Disclosure Statement?

d) Was the Unpermitted Addition a latent defect?

e) Did Mr. Abadian hold the Deposit in trust for Ms. Sewell?

f) Is Mr. Abadian entitled to the Second Deposit as damages?

A. Is This Matter Suitable for Summary Trial?

[47] The parties agree the issues are suitable for summary trial. Nonetheless, Rule 9-7 of the *Supreme Court Civil Rules* makes the presiding judge a gatekeeper. Sub-rule (15) provides that judgment should not be given on a summary trial if the court is unable, on the evidence, to find the necessary facts or if it would be unjust to do so: *Main Acquisitions Consultants Inc. v. Yuen*, 2022 BCCA 249, at para. 89.

[48] The court must be able to resolve any material disputes in the evidence on the critical issues, for example, by referring to documentary evidence. A summary trial judge cannot “simply choose between one affidavit and another”: *Cory v. Cory*, 2016 BCCA 409, at para. 10. However, conflicts in the evidence do not necessarily mean the issues are unsuitable for a summary trial: *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15, at para. 182.

[49] In this case, the issues can be decided based on the documents, text messages and undisputed affidavit evidence. The affidavits contain conflicting evidence about the handling of the Deposit and what Mr. Abadian may have said

about borrowing the funds. However, given the nature of the legal arguments on the summary trial, it is unnecessary for me to resolve that conflict.

[50] I find that the issues are suitable for summary trial.

B. Did Mr. Abadian Repudiate the Contract?

[51] Ms. Sewell relies on Clause 3 of the Contract, which includes the following term or condition:

> The Seller will provide the Buyer(s) with any information with respect to property notices received or any non-conforming aspects of the property as well as details with respect to any underground oil storage tanks …

[52] Ms. Sewell argues that Mr. Abadian breached Clause 3 because he did not disclose the Unpermitted Addition.

[53] Mr. Abadian argues that he disclosed the Unpermitted Addition in the screenshot that his realtor forwarded to Ms. Sewell's realtor before Ms. Sewell signed the Contract. As discussed, the full screenshot included the following text message:

> Mr. Abadian Not sure if we have to mentioned but the tiled family room is/was an addition not by me. It's unauthorized accommodation.

[54] The truncated version as it initially displayed on Mr. Maglieri's phone was:

> Mr. Abadian Not sure if we have to mentioned but the tiled family room is/was an

[55] Ms. Sewell argues that the text message was not sufficient disclosure because: (a) neither she nor her realtor saw the full screenshot until after she signed the Contract and paid the Deposit; and (b) even the full message would not have put her on notice that the enclosed area of the family room was constructed without authorization from the District.

[56] Ms. Sewell relies on an expert report by William Binnie, a West Vancouver realtor. Mr. Binnie has over 40 years of experience in the real estate industry. He has served on the Real Estate Board of Greater Vancouver (president in 2003); the British Columbia Real Estate Association (director) and the Real Estate Council (member).

[57] In his report, Mr. Binnie writes that the industry standard for disclosure of a non-conforming aspect of a property is to make sure the disclosure is clearly made to all parties. He opines that disclosure in a portion of a screenshot which is not entirely visible sent by text message is not standard practice for disclosure of a non-conforming aspect of a property. He further opines that "unauthorized accommodation" is a term used in the real estate industry to describe a separate living accommodation which cannot be legally used to earn income, and not an unpermitted addition.

[58] Mr. Binnie's report is unnecessary, and therefore inadmissible, on this summary trial. His opinion may state the standard of care of licensed realtors accurately; however, it is not helpful for the purpose of interpreting a contract of purchase and sale between two unlicensed parties. Mr. Binnie relies on the *Real Estates Rules* and the *Real Estate Services Act,* which regulate licensees. I do not accept his opinion as an "industry standard" amongst buyers and sellers of residential properties, if there is such a thing.

[59] The issue of whether Ms. Sewell was entitled to terminate the Contract and demand return of her deposit is primarily a question of ordinary contractual interpretation.

[60] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Supreme Court of Canada instructed that "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction" (para. 47). A court must read the contract as a whole, giving the words their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time they made the contract. The

overriding concern is to determine “the intent of the parties and the scope of their understanding” (*ibid.*).

[61] The ordinary meaning of the words at issue in this case is that the seller was required to provide the buyer with information about any aspects of the Property that did not conform to the uses permitted by zoning or municipal by-laws. The intent of the parties was that the seller - who would know about property notices or non-conforming aspects that would not be known to the buyer - was to provide that information to the buyer so that they could plan accordingly.

[62] Notably, however, the parties did not make the Contract subject to the buyer being satisfied with the information about any non-conforming aspects of the Property. Put another way, the Contract did not entitle the buyer to terminate the transaction if the information provided by the seller made the buyer less interested in purchasing the Property.

[63] The Unpermitted Addition was a non-conforming aspect of the Property. Mr. Abadian knew that it was a non-conforming aspect because he knew that the enclosure on the family room was constructed without approval from the District.

[64] The Contract did not require that the information about non-conforming aspects be provided in a specific form or prescribed document. It did not even require that the information be provided in writing.

[65] Both realtors in this case used text messaging to communicate about the Property, before and after the Contract was signed. Providing information by text message was not itself a breach of the Contract.

[66] However, the text message that Mr. Abadian relies on did not provide information about the non-conforming aspect of the Property.

[67] The compressed version of the text message was incomprehensible. Mr. Abadian argues that it is irrelevant whether Mr. Maglieri could understand the

message. He argues that Mr. Maglieri ought to have expanded the screenshot and investigated its meaning.

[68] There is no evidence that Mr. Maglieri ought to have known he could expand the screenshot. Failing to expand a screenshot is not analogous to failing to read a document or failing to open an attachment to an email. The fact that screenshots may be compressed when they are sent by text message is not so well-known and obvious that the Court can take judicial notice that all screenshots must be double-tapped or expanded on receipt.

[69] It seems to me that a party who relies on text messaging to provide required information under a contract should bear the risk that the communication is unreliable or incomplete.

[70] In any event, the full text message did not provide information about the non-conforming aspect of the Property. The information that Mr. Abadian was required to provide was not that the family room was an unauthorized accommodation (which makes no sense, unless the family room was closed off as a separate suite). The information that needed to be provided was that the enclosed addition on the family room was constructed without approval from the District.

[71] It is no answer, in my view, for Mr. Abadian to say that Mr. Maglieri or Ms. Sewell ought to have made further inquiries to understand the information he provided. The Contract required Mr. Abadian to provide the information in his possession, which he did not do in the text message.

[72] Ms. Sewell argues that Mr. Abadian’s failure to provide her with the information constituted a repudiation of the Contract, which she accepted when she terminated the Contract.

[73] Repudiation occurs where a party demonstrates a clear and unequivocal intention not to be bound by the terms of the contract. An intention not to be bound may be demonstrated by a refusal to perform or by a fundamental breach of a

primary obligation: *Guarantee Co. of North America v. Gordon Capital Corp.,* [1999] 3 S.C.R. 423 at para. 40; *Kuo v. Kuo*, 2017 BCCA 245 at paras. 39-40.

[74] The issue of whether Mr. Abadian refused to perform or committed a fundamental breach of a primary obligation must be considered in light of the Contract as a whole and the conduct of the parties.

[75] The parties intended that the Contract be “subject free”, meaning that it was not subject to Ms. Sewell being satisfied with a building inspection, obtaining financing, selling her home, or other conditions that might be found in a real estate transaction.

[76] Ms. Sewell intentionally made her offer subject free to make it more attractive to Mr. Abadian in a multiple offer scenario. Mr. Abadian deposes that he accepted the offer in part because of its subject free terms.

[77] As discussed, the obligation to provide information about non-conforming aspects of the Property did not include a provision requiring Ms. Sewell’s satisfaction (as might be the case, for example, in a “subject to inspection” clause).

[78] Moreover, there was no deadline for Mr. Abadian to provide the information. Since the Contract was subject free, I would imply that the deadline the parties would have had in contemplation when they entered into the Contract, had they discussed it, was the closing date. There was no reason for the parties to agree on an earlier deadline when Ms. Sewell could not terminate the contract based on the information provided.

[79] The closing date was March 1, 2022. On January 18, 2022, Mr. Abadian provided his authorization for Ms. Sewell to request records from the District about the Property. By January 19, Ms. Sewell had obtained information about the Unpermitted Addition from the District and her contractor. On January 19 or 20, the real estate agents discussed the Unpermitted Addition. On January 20 or 21, Mr. Maglieri spoke directly to Mr. Abadian about the matter.

[80] In short, Mr. Abadian eventually provided the information about the non-conforming aspect of the Property, albeit in a haphazard and round-about manner. He provided the required information prior to the closing date. The Contract did not require him to provide the information in any particular manner or form. Ms. Sewell knew well before the closing date that the enclosed addition on the family room was constructed without approval from the District. The intent of the parties was satisfied.

[81] Assuming the requirement to provide the information was a primary obligation under the Contract, Mr. Abadian did not refuse to perform or commit a fundamental breach of that obligation. He did not repudiate the Contract.

[82] I find that Ms. Sewell was not entitled to terminate the Contract based on Mr. Abadian's initial failure to provide information about the non-conforming aspect of the Property.

C. Did Mr. Abadian Make a Misrepresentation in the Disclosure Statement?

[83] Ms. Sewell argues that Mr. Abadian made a negligent or fraudulent misrepresentation in the Disclosure Statement.

[84] Ms. Sewell argues that the Disclosure Statement contained an implied representation by Mr. Abadian that the Property was legally conforming and he did not have knowledge of any non-conforming aspects. She submits this representation is implied by his failure to disclose the Unpermitted Addition in answer to question 3.I, "Are you aware of any additions or alterations made without a required permit and formal inspection; e.g., building, electrical, gas, etc.?", and the additional comment under section 5, "Tenanted Property, Owner has never occupied".

[85] Ms. Sewell argues that Mr. Abadian could have simply not provided any property disclosure statement, but elected to do so and in doing so represented – both by drawing a diagonal line across all of the questions and by adding the additional comment - that he had no relevant knowledge of the Property due to it

being rented out and not owner-occupied, the implication being that he was not aware of any issues with the Property, which was false.

[86] Mr. Abadian argues that the Disclosure Statement did not form part of the Contract, and the question of whether it conveyed any representations about the Property is therefore irrelevant. If the Disclosure Statement did not form part of the Contract, he argues, any representation in it was excluded by the entire agreement clause in the Contract.

[87] In the alternative, Mr. Abadian argues that he deliberately did not complete the Disclosure Statement, and that by doing so he refused to make any representations about the Property. Further, he argues that Ms. Sewell could not have relied on any representation in the Disclosure Statement because she deposes that it provided a "total lack of information".

[88] In the further alternative, Mr. Abadian argues that he corrected any misrepresentation in the Disclosure Statement with the text message about the "unauthorized accommodation".

[89] Mr. Abadian's argument the Disclosure Statement did not form part of the Contract is based on the fact that the copy of the document exhibited to Ms. Sewell's affidavit is unsigned. He argues that there is no evidence Ms. Sewell approved the Disclosure Statement as required by Clause 3 for it to become part of the Contract.

[90] I disagree. Ms. Sewell's sworn evidence is that she signed the Disclosure Statement virtually, using Docusign. I see no reason to reject that evidence. Accordingly, I find that the Disclosure Statement formed part of the Contract.

[91] However, I agree that Mr. Abadian made no representations in the Disclosure Statement, except that the Property was tenanted and he had never occupied it.

[92] In *Smith v. Reder*, 2005 BCSC 635, Justice Silverman held that a crossed-out property disclosure statement constituted a refusal to make any representation or provide any information in response to the standard questions:

> [12] As part of the Contract there is a Property Disclosure Statement in pre-printed form, which had a diagonal line stroked through every pre-printed option. It is clear that the defendant was unwilling to make any representations, or provide any information, about any of the pre-printed options. One of those pre-printed options contain the following words: "Are you aware of any problems with the electrical system?" The defendant had the option, if he used the pre-printed form, to answer the question by placing a check mark under one of four columns which were headed with the following words: "Yes" or "No" or "Do Not Know" or "Does Not Apply". As with all the other questions on the form, none of these columns have any check marks in them. Rather, the diagonal stroke goes through the question concerning the electrical system.
>
> [emphasis added]

[93] In *Smith,* the seller wrote under Additional Comments: "Buyer to satisfy themselves. Property sold *AS IS."

[94] In the present case, of course, Mr. Abadian wrote: "Tenanted Property, Owner has never occupied." This comment must be read together with the refusal to answer any of the standard questions. It cannot imply a representation that Mr. Abadian did not know the answer to any of the questions, when Mr. Abadian had not answered any of those questions with "Do not know." The Disclosure Statement cannot contradict itself.

[95] The only reasonable interpretation of the additional comment in the context of the Disclosure Statement as whole is simply that the Property was tenanted and Mr. Abadian had never occupied it.

[96] The fact that Ms. Sewell was concerned about the "total lack of information" is evidence that she understood Mr. Abadian did not provide any information in response to the questions in the Disclosure Statement.

[97] On her own evidence, Ms. Sewell was not induced by the Disclosure Statement to enter into the Contract. As Justice Shergill wrote in *McGuire v. Kernel Construction & Development Ltd*., 2019 BCSC 58:

> [83] Rather than inducing Mr. Vasir to enter into the Contract, if anything, Ms. McGuire's refusal to make any disclosures about the Property should have alerted Mr. Vasir to the importance of conducting his own timely inspection of the Property if the condition of the Property was important to him. In his cross-examination, Mr. Vasir acknowledged that the PDS told him basically nothing about the Property.
>
> [84] In the face of a PDS that disclosed nothing, Mr. Vasir's decision to remove the "subject to inspection" condition without the benefit of an inspection was unreasonable. The facts in the case at bar are similar to *Smith v. Reder*, 2005 BCSC 635 [Smith]. In Smith, the defendant vendor had completely struck out the PDS. The plaintiff, though entitled under the contract to perform inspections, chose not to do so until the completion date was imminent. When the vendor refused the purchaser's request for an extension to complete the inspections, the purchaser argued that the delay was attributable to the vendor's non-disclosure. Mr. Justice Silverman held as follows:
>
> > [40] In all the circumstances of this case, the defendant was under no duty to disclose anything beyond what he did disclose. Rather, the duty in this case was on the plaintiff to inform herself, if necessary, but to complete on time in any event, or risk the consequence of not being granted an extension.

[98] In this case, Ms. Sewell made a subject free offer to purchase the Property in the face of a property disclosure statement that disclosed nothing and minimal information obtained by her realtor. Mr. Abadian was not under a duty to disclose anything except the information required by the Contract. Ms. Sewell's decision to forgo a term of the Contract that would have made the sale subject to an inspection or her approval of any non-conforming aspects of the Property did not impose a higher duty on Mr. Abadian.

[99] For these reasons, I find there was no misrepresentation in the Disclosure Statement.

D. Was the Unpermitted Addition a Latent Defect?

[100] Ms. Sewell argues that the Unpermitted Addition was a latent defect that displaces and defeats the doctrine of *caveat emptor* in this case.

[101] *Caveat emptor* – let the purchaser beware - operates as a complete defence on claims regarding defects in real estate properties. The defence is subject to various exceptions, including:

a) Where the vendor fraudulently misrepresents or conceals;

b) Where the vendor knows of a latent defect rendering the house unfit for human habitation;

c) Where the vendor is reckless as to the truth or falsity of statements relating to the fitness of the house for habitation;

d) Where the vendor has breached his duty to disclose a latent defect which renders the premises dangerous.

Cardwell et al v Perthen, 2007 BCCA 313, at para. 23

[102] As Ms. Sewell acknowledges, to qualify as an exception to *caveat emptor*, a latent defect must carry with it a consequence of substance; it must render the property uninhabitable or dangerous: *Cardwell*, at para. 24; *Nixon v. MacIver,* 2016 BCCA 8, at para. 16.

[103] There is no evidence that the Unpermitted Addition rendered the Property uninhabitable or dangerous. The only evidence is that the enclosure on the family room was constructed without approval from the District. There is no evidence the enclosure is unsafe or that the family room can not be used by the owner unless and until they obtain approval from the District.

[104] The date of the addition is not in evidence; however, it is clear that people have lived in the house and used the family room since it was modified. There is no evidence the District would have ordered Ms. Sewell to vacate the Property or tear down the enclosure on the family room had she completed the purchase.

[105] Nonetheless, Ms. Sewell argues that the Unpermitted Addition is a latent defect, because permitting issues are not discoverable through reasonable

inspection or reasonable inquiries. She relies on s. 59(1)(d) of the *Real Estate Services Act* and the Material Latent Defect Form published by the BC Real Estate Agency, which define a "material latent defect" as including:

> (d) a lack of appropriate municipal building and other permits respecting the real estate.

[106] The definition of "material latent defect" in s. 59(1)(c) of the *Real Estate Services Act* is more expansive than the common law exception to *caveat emptor.* On my understanding of the common law, a lack of an appropriate building permit may defeat the defence of *caveat emptor*, but only if the failure to disclose the unpermitted construction is a fraudulent misrepresentation, or if the unauthorized construction renders the property uninhabitable or dangerous.

[107] Ms. Sewell relies on *Jakubke v. Sussex Group – SRC Realty Corp* (1993), 31 R.P.R. (2d) 193 (B.C.S.C.). In that case, the vendor added a new wing to his house before listing it for sale. As a result of a municipal inspection, a stop-work order was issued. The vendor amended his plans to comply with the municipal requirements. After the final inspection, however, he proceeded to complete a bedroom and bathroom without a permit and contrary to the municipal requirements. The Court found that the buyer could not legally occupy the new wing of the house:

> I find that the upper west wing to have been completed after the final inspections of the work done on permit and to be unauthorized and unlawful and subject to being ordered removed or to their use being enjoined pursuant to the provisions of the *Municipal Act*.
>
> [emphasis added]

[108] The Court further held that the illegal construction of the bedroom and the bathroom was a patent defect:

> I think that what was to be observed here was not a patent defect. What could be observed here could have been lawful, depending on the date of construction. While what could be observed should have excited concern and suspicion in the minds of the realtors, as I will discuss later in these reasons, the defect was not one that arose by necessary implication from something visible to the eye. I think that in this case where the remodelling was done without a building permit and in direct contravention of the directives of the appropriate authorities, and was done by Dr. Pennington

> himself or under his direct instructions, that there was then constituted a latent defect and that the conscious non-disclosure of that defect by Dr. Pennington constitutes a fraudulent misrepresentation.
>
> [emphasis added]

[109] The Court described the unpermitted addition in *Jakubke* as a latent defect. However, in my view, the case is distinguishable because: (a) the Court found that a wing of the house could not be lawfully occupied; and (b) the vendor was directly involved in the unlawful construction and actively concealed it from the purchaser, which the Court found to be a fraudulent misrepresentation.

[110] Ms. Sewell also relies on *Doan v. Killins,* 1996 CanLII 3415 (B.C.S.C.). In that case, the vendors were told by the previous owner that he had developed a back yard onto land owned by the municipality. The encroachment onto municipal land was a large lens-shaped area covering approximately one-third of the back yard. The vendors subsequently fenced the land and planted a hedge that obscured the encroachment. The encroachment had no material impact on the living area of the home because it only related to the back yard. However, it prevented the purchasers from building a swimming pool.

[111] When they listed the property for sale, the vendors filled out a property disclosure statement in which they answered “no” to the question whether they aware of any encroachments, unregistered easements, or unregistered rights of way.

[112] The Court found that the contract incorporated the property disclosure statement and that the vendors were guilty of fraudulent misrepresentation because they answered “no” to the relevant question and deliberately withheld the true extent of the encroachment problem from the buyers. The defence argued that the fence and cedar hedge constituted a patent defect which was discoverable by observation. The Court disagreed:

> [31] … Any reasonable person viewing the property would have concluded that the fence or hedge represented the property boundary lines. There was nothing that would indicate to anyone that the northeast boundary of the property was a significant distance from the fence and cut across the

> landscaped back yard in a direction quite different from that delineated by the fence and hedge.
>
> [32] The defect in the property was as much a latent defect as was an unlawfully constructed wing of a home in *Jakubke v. Sussex Group - SRC Realty Corp.* (1993), 31 R.P.R. (2d) 193 (B.C.S.C.).

[113] In my view, *Doan* is distinguishable because the Court found fraudulent misrepresentation and intentional concealment, both of which are exceptions to *caveat emptor. Doan* does not stand for the proposition that, standing alone, an undisclosed encroachment on municipal property is a patent defect entitling a purchaser to terminate the contract.

[114] In this case, I have found that Mr. Abadian did not make a fraudulent misrepresentation in the Disclosure Statement. I have found that there is no evidence the Unpermitted Addition renders the Property uninhabitable or dangerous.

[115] For these reasons, I find that Ms. Sewell has not demonstrated that this case falls within an exception to the defence of *caveat emptor.*

E. Did Mr. Abadian Hold the Deposit in Trust for Ms. Sewell?

[116] Ms. Sewell seeks a declaration that Mr. Abadian held the Deposit in trust for her. Given my conclusions on the summary trial, a declaration to this effect would serve no purpose.

[117] Clause 12 of the Contract provided that “time was of the essence”. Compliance with time periods in the Contract, including the deadline for Ms. Sewell to pay the Second Deposit, were therefore material terms of the Contract.

[118] Mr. Abadian was entitled to accept Ms. Sewell’s failure to pay the Second Deposit by the deadline as a repudiation of the Contract, terminate the Contract and retain the Deposit. Mr. Abadian therefore lawfully terminated the Contract on February 1, 2022.

[119] Mr. Abadian did not hold the Deposit in trust for Ms. Sewell after February 1, 2022. A determination as to whether he held the Deposit in trust for her before that date would not serve any purpose in the circumstances.

[120] Accordingly, I decline to grant any declaratory relief to Ms. Sewell.

F. Is Mr. Abadian Entitled to the Second Deposit as Damages?

[121] Mr. Abadian's right to the Second Deposit accrued on the deadline of January 31, 2022. As stated, he accepted Ms. Sewell's repudiation of the Contract on February 1, 2022.

[122] Where a seller's right to a non-refundable deposit has accrued before they accept the buyer's repudiation, the seller can sue for an amount equal to the unpaid deposit: *Argo Ventures v. Choi,* 2020 BCCA 17, at para. 36.

[123] Ms. Sewell has not argued that the total deposit in this case was excessive or unconscionable, so as to offend the rule against penalties: *Tang v. Zhang,* 2013 BCCA 52, para. 52.

[124] Accordingly, I find that Mr. Abadian is entitled to judgement in an amount equal to the unpaid Second Deposit.

IV. CONCLUSION

[125] Ms. Sewell's claim to a return of the Deposit is dismissed. There will be an order that the funds Mr. Abadian paid into court pursuant to the order of Justice Fitzpatrick be returned to him.

[126] Mr. Abadian's counterclaim to an amount equal to the unpaid Second Deposit is allowed. There will be an order that Ms. Sewell pay Mr. Abadian $200,000.

[127] Unless the Court orders otherwise, Mr. Abadian is entitled to pre-judgement interest and costs of the action.

[128] If the parties wish to make submissions on interest or costs, they may do so in writing. Their submissions should not exceed two pages in length and should be exchanged according to a schedule to be agreed between counsel, with the first submission to be filed with the registry within 28 days of the release of these reasons.

"Elwood J."