

Seller Beware: Ontario Court of Appeal Confirms that a Purchaser's Inspection does not always Relieve the Vendor of Liability for Misrepresentations

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By and Max Skrow

The general rule regarding the purchase of real property is that the purchaser must satisfy himself or herself of the suitability of the property he or she seeks to purchase – *Caveat emptor*.^[1] There are, of course, exceptions. A vendor must disclose defects that would not be obvious upon inspection. Similarly, where a purchaser enters into an agreement of purchase and sale in reliance on a material misrepresentation made by the vendor, that agreement is voidable at the option of the purchaser (i.e. the purchaser can seek the remedy of rescission). Thus, there are circumstances in which a vendor must speak (i.e. where there are defects in the property that are hard to detect upon inspection) and, when a vendor does speak, he or she cannot mislead (even innocently).^[2]

But what happens when the vendor innocently misleads the purchaser about a defect which is immediately obvious upon inspection, but the purchaser fails to notice it? Is the remedy of rescission available to the purchaser?

The Ontario Court of Appeal recently considered this question in *Issa v Wilson*.^[3]

Background

The plaintiff/respondent, Mr. Issa, was a 26-year-old first-time home buyer who retained the defendants/appellants realty company (Keller Williams Realty Centres) and real estate agent (Mr. Jarrah) to help him find a suitable home to purchase for himself, his parents, and his three sisters. Mr. Jarrah found one such home, the MLS listing for which described the size of the home as being in the 2000-2500 square foot range. Mr. Jarrah, who acted for both Mr. Issa and the vendor of the home, told Mr. Issa that the home size was 2,100 square feet. At one of Mr. Issa's two visits to/inspections of the home, the vendor advised Mr. Issa that the property was about 2,000 square feet in size.

It was not.

Mr. Issa received an appraisal of the property in connection with his application for a mortgage. The appraisal revealed the actual size of the home to be 1450 square feet – a far cry from 2,000, much less 2,500.

Mr. Issa commenced an action against Mr. Jarrah, Keller Williams, and the vendor, seeking a declaration that the agreement of purchase and sale was void. Mr. Issa also sought the return of his \$50,000 deposit.

Trial Decision

At trial,^[4] the key issue was whether the discrepancy between the actual and advertised size of the property entitled Mr. Issa to

rescission, or whether his two inspections of the property displaced or overrode his expectations such that he ultimately purchased exactly what he expected to purchase. Justice Ferguson considered Mr. Issa's young age, inexperience with square footage, and his status as a first-time home buyer, and concluded that his inspections of the property did not displace his expectation that the home would be 2000+ square feet in size. Justice Ferguson accordingly declined to follow case law in which courts have refused to order rescission grounded on size discrepancies, ordered rescission, and directed the defendants to return to Mr. Issa his \$50,000 deposit, with interest.

Appeal Decision

Mr. Jarrah and Keller Williams appealed the judgment of Justice Ferguson, arguing that she erred by failing to apply the principle that where a purchaser inspects a property, their reliance on a misrepresentation as to the size of the property will be displaced.

A unanimous panel of Justices MacPherson, Zarnett and Jamal disagreed. They noted that the principle relied upon by the appellants is not to be applied where there exists "a constellation of facts that would make a strict application [of the principle] unfair in the circumstances," and that rescission may be obtained where the defendant made a false statement that was material and which induced the plaintiff to enter into the contract. In this case, the Court had no trouble concluding that representations as to the size of the home were made, that the size of the home was material, and that Mr. Issa relied on those representations in entering into an agreement of purchase and sale with respect to the property. Finally, the Court concluded that it was not an error for Justice Ferguson to reference Mr. Issa's age and inexperience, as these can in appropriate cases be relevant contextual factors. Accordingly, Mr. Jarrah and Keller Williams' appeal was dismissed.

Significance of the Decision

This decision highlights the interplay between the rule of *caveat emptor* (and the principles and policies on which it is based) and the equitable remedy of rescission where a contract is entered into based on a material misrepresentation. More generally, this case demonstrates that when evaluating the reasonableness of a plaintiff's reliance on a misrepresentation (especially where a diligent plaintiff could have discovered the innocent misrepresentation), it can be appropriate to consider the plaintiff's degree of experience and sophistication *vis-à-vis* the subject matter of the contract. The reasoning in *Issa v Wilson* may be applicable to cases concerning the remedy of rescission even removed from the context of the purchase of real property.

[1] "Buyer beware".

[2] For a concise statement of these principles, see *Lippa v Colletta*, 2017 ONSC 1122 at paras 51-54.

[3] 2020 ONCA 756.

[4] 2019 ONSC 6744.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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