

Claim for misrepresentation of property tax amount in real estate listing defeated by entire agreement clause (*Langen v. Sharma*)

Agreement of Purchase and Sale | Litigation | Litigation & Dispute Resolution | Real Estate

7 August 2024

When deciding to buy a property, buyers may review various representations in the real estate listing which purport to list the property's key facts such as the square footage and measurements of various rooms. One statement typically found in the listing is the amount of the recent year's municipal property taxes, which may be relevant to a buyer's decision as to whether they can afford to own the property. However, if a representation in the listing turns out to be inaccurate, this may not entitle a buyer to back out of a transaction, as demonstrated by *Langen v. Sharma*, 2024 ONSC 4212 (CanLII).

The buyers in the case entered into an agreement of purchase and sale (APS) to purchase a home in Brampton, Ontario from the sellers for \$2.9 million. The transaction was supposed to close in August 2022.

The listing for the property stated that it contained at least 6,900 square feet of living space, approximately 4,800 of which was above ground. The buyers visually confirmed that those dimensions were reasonably accurate but did not make specific measurements.

The listing also stated that the municipal taxes on the property were \$7,297.03 for 2021, which was approximately \$600 to \$700 more than the buyers were paying on their existing home. The stated amount of assessed taxes was a factor in their assessment of whether they could afford the property.

A few weeks before the scheduled completion date, after the APS was signed, the buyers learned from their mortgage broker that they could not obtain financing to buy the property because the municipal taxes were incorrect due to a discrepancy in square footage. The sellers had made renovations to the property that were not brought to the attention of the Municipal Property Assessment Corporation (MPAC). MPAC had relied on the pre-renovation square footage for the property in making the assessment for the tax figure stated in the listing. A correction in the assessment would increase the taxes on the property. Indeed, MPAC subsequently reassessed the property and the property taxes became \$10,050.

As a result of being unable to secure financing on the scheduled closing date, their concern about an increase in taxes going forward, and the possibility of back taxes being owed on the property, the buyers requested a three-month extension of the closing date and a \$200,000 reduction in the purchase price.

In response, the sellers proposed an extension of the closing date to 16 September 2022, conditional on the buyers paying a further deposit of \$25,000 and delivering their mortgage commitment or approval at least one week prior to closing. The buyers rejected these conditions and refused to complete the transaction.

Although the sellers eventually re-sold the property to another buyer for \$2.5 million and incurred over \$25,000 in carrying costs, the sellers brought an application against the original buyers for forfeiture of the \$100,000 deposit and damages for breach of the APS.

In response to the application, the buyers claimed that they were entitled to rescind the transaction because the sellers had misrepresented the amount of municipal taxes. They also argued that the sellers had acted in bad faith by refusing to grant an extension to accommodate the buyers' efforts to obtain financing.

The application judge first considered the nature of the alleged misrepresentation by the sellers concerning the municipal taxes. The buyers argued that they were entitled to rescind the APS on the basis of a non-negligent, "innocent" misrepresentation of a fact that was material to their decision to enter into the transaction.

However, the buyers' position that they relied on the innocent misrepresentation faced an insurmountable hurdle due to the terms of the APS, which included an "entire agreement clause" stating as follows:

This Agreement including any Schedule attached hereto shall constitute the entire Agreement between Buyer and Seller. There is no representation, warranty, collateral agreement, or condition which affects this agreement other than as expressed herein.

In Ontario law, an entire agreement clause operates as a general bar to claims for innocent—as opposed to fraudulent—misrepresentations: *10443204 Canada Inc. v. 2701835 Ontario Inc.*, 2022 ONCA 745 (CanLII); *Krawchuk v. Scherbak*, 2011 ONCA 352 at paragraphs 71 to 74.

In the case at hand, the buyers did not argue that the misrepresentation concerning the property taxes in the listing was intentional or fraudulent. The application judge therefore concluded that the entire agreement clause in the APS precluded reliance by the buyers on the alleged misrepresentation.

As to whether the sellers had acted in bad faith by failing to accommodate the buyers' request for an extension, the application judge referred to the governing principles of good faith contractual performance from the Supreme Court of Canada's decision in *Bhasin v. Hrynew*, 2014 SCC 71, as applied by the Court of Appeal for Ontario in *2161907 Alberta Ltd. v. 11180673 Canada Inc.*, 2021 ONCA 590 at paragraphs 42 to 45. In that regard, "good faith" requires that parties generally perform their contractual duties honestly and reasonably and "not capriciously or arbitrarily": *Bhasin*, at paragraph 63. The duty of good faith does not require that contracting parties serve each other's interests. However, they may not seek to undermine those interests in bad faith.

Other Ontario decisions (not cited in the case) have determined that there is no obligation for a seller to agree to an extension of the closing date and that it is not an act of bad faith to require that the scheduled completion date be enforced: see, for example, *Christine Elliott v. Saverio Montemarano*, 2020 ONSC 6852 (CanLII), at paragraph 65; *Wilson v. Upperview Baldwin Inc.*, 2019 ONSC 4013 (CanLII).

The application of the doctrine of good faith to the facts at hand turned entirely on the application judge's conclusion that the entire agreement clause in the APS governed the dispute. Since the application judge rejected the buyers' position that the sellers were obligated to accommodate their request for an extension due to the misrepresentation, the sellers did not act in bad faith in relying upon the terms of the APS.

The application judge therefore decided in favour of the sellers.

The parties did not dispute the quantum of damages that would follow the application judge's decision on liability. In the circumstances, the buyers will likely be liable to the sellers for the difference in sale prices and the carrying costs.

Given the consequences illustrated in the decision, buyers should attempt to independently verify important information in a listing before entering a binding agreement that contains an entire agreement clause or ensure that the agreement contains terms that confirm any representations which are of concern. While there may be situations where a party is not entitled to rely on an entire agreement clause due to fraud or other misconduct, the courts will certainly consider whether such a clause is a bar to any claims for factual representations that could have been verified before entering into the agreement. A PDF version is available for download [here](#).

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).



Author



James R.G. Cook

Partner

416.865.6628

jcook@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com