

Seller liable for misrepresentations about competing offers (*Tran v. Brickman*)

Litigation | Litigation & Dispute Resolution | Misrepresentation | Seller

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In order to drive up the sale price for a property, sellers may be inclined to raise the spectre of other potential buyers who are waiting in the wings to snap up the property. In heated markets, there may even be bidding wars that require potential buyers to formally register their offers with the seller's agent. In situations involving multiple offers, excited buyers may end up agreeing to pay considerably more than they otherwise would have. If it turns out that there weren't in fact other offers being made, contrary to what a buyer was led to believe, the buyer may understandably feel that they were wrongfully induced to overpay.

The Ontario Divisional Court decision in *Tran v. Brickman*, 2025 ONSC 4341 (CanLII), arose from a decision involving a misrepresentation about competing offers being made for a residential property owned by an experienced real estate agent.

Initially, the seller tried to sell the property for \$1,500,000 in February 2020. The plaintiff buyers offered \$1,250,000 at that time. The seller delisted the house because she could not get her desired price.

The seller then relisted the house in March of 2020 at \$1,250,000. She claimed that she undervalued the house hoping to create a bidding war.

Early on, the plaintiffs' agent told the seller that they may be willing to go up to \$1,300,000 but that they were straining at the top of their budget to get there.

The sale price was negotiated via text messages between the plaintiffs' real estate agent and the seller. During the exchange, the seller made several statements concerning other offers she said that she had received:

- she had "two other registered offers for tonight";
- she had "2 [offers] besides [the plaintiffs]";
- one offer had "just dropped";
- "two other agents that say the same [as the plaintiffs' agent];
- another agent told her that a party was going to "improve their offer";
- the offer from the plaintiffs and that other offer "are very close";
- she had a "current offer until 11 pm" that night that she may accept if she did not hear from the plaintiffs; and
- the plaintiffs' offer was "a lot less" than another offer she had received.

The plaintiffs ultimately bid \$1,305,000 for the property, which was accepted by the seller.

After the transaction was completed, the plaintiffs learned that there were no other registered offers as claimed. They sued the seller for the amount they claimed to have overpaid.

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The seller denied liability, arguing that she had no intention of selling the property for less than \$1,350,000, and that any discussion of competing offers occurred after she had received the plaintiffs' offer for \$1,300,000. She also claimed that the plaintiffs' agent was aware that any other offers received were not "written offers" since she had not stated they were.

In the trial judge's view, the overall impression left by the seller's text messages was that the plaintiffs were competing for the purchase of the property with other buyers who had made "registered" offers. Further, the seller's representation that she had an offer that she could accept until 11:00 p.m. that night unless the plaintiffs increased their bid was false. The trial judge found that there were no offers received in writing by the seller and therefore no offer capable of acceptance in law (whether described as "registered" or not).

The trial judge found that the plaintiffs were induced by the seller's misrepresentations concerning competing offers to increase the amount they agreed to pay for the property.

The measure of damages was based upon the plaintiffs' loss of a chance based upon the Court of Appeal for Ontario's decision in *Folland v. Reardon*, 2005 CanLII 1403 (ON CA). In the case at hand, the loss of chance was the opportunity to negotiate a fair price uninfluenced by the seller's "false portrait of what competition they faced".

The plaintiffs argued that they should have been able to purchase the property for the listing price of \$1,250,000. The seller argued that the plaintiffs had communicated via their agent that they were willing to go up to \$1,300,000, so the damages should only be the additional \$5,000 that they agreed to pay.

The trial judge seemingly split the difference by concluding that the plaintiffs lost a real and substantial chance to negotiate a final price at the midpoint between \$1,250,000 and the sale price of \$1,305,000. Damages were awarded based upon this calculation.

On appeal, the seller argued that the trial judge erred in failing to find that the offers were "registered offers" and erroneously classifying them as "phantom offers."

The Divisional Court noted, however, that as a matter of law an offer that is capable of being accepted must be signed and in writing, whether made by express notice or "registered". The appellate court agreed with the trial judge that there were no written offers capable of acceptance received by the seller because there were no offers made in writing as required in Ontario by the *Statute of Frauds, Real Estate Business Brokers' Act, 2002*, and the common law. While it may be industry standard for agents to exchange informal verbal offers in advance of the formal presentation, the appellate court noted that this was irrelevant as to whether the plaintiffs were induced by the misrepresentations in this case.

The Divisional Court expressly disagreed with the seller's argument that a "registered" offer simply meant that there were interested parties. In the Court's words, "Oral puffery is not a registered offer or an offer capable of acceptance or presentation".

As for damages, the Divisional Court agreed with the seller that it would have been an error to simply split the difference between the parties' positions. However, there was a principled basis for the trial judge's decision to do so. The trial judge had rejected the seller's evidence that \$1,305,000 was her hard minimum because he rejected her credibility as a witness. Had the misrepresentations not been made, there would have been a fair back and forth, not infused by unlawful conduct. A finding of \$28,600 or the midpoint between bid and ask was a reasonable view of the likely outcome given the parties' proven positions and was a "just and agreeable" outcome to the dispute. The appeal was therefore **dismissed**.

The decision demonstrates that sellers should take care with any representations made during the bidding process which influence the buyers into increasing their offer. In some jurisdictions during heated markets, properties may have multiple formal offers that are registered. Any representations made by the seller as to the number of offers and terms may be subject to scrutiny after the transaction is completed. A PDF version is available for download [here](#).

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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

Author



James R.G. Cook

Partner

416.865.6628

jcook@grllp.com



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22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

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Fax: 416.865.6636
contactGR@grllp.com