

Date of breach of contract affirmed for assessment of buyer's damages

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In *Akelius Canada Ltd. v. 2436196 Ontario Inc.*, 2022 ONCA 259, the Ontario Court of Appeal upheld a summary judgment decision *that dismissed* a real estate investor's claim for lost opportunity damages resulting from the failed purchase of an apartment complex in Toronto. At issue was the date to be used to assess the buyer's damages resulting from the seller's failure to complete the transaction.

In 2015, the plaintiff buyer entered into an Agreement of Purchase and Sale (APS) to buy seven residential apartment buildings from the defendants for \$228,958,320. The transaction failed to close as scheduled in January 2016, as several encumbrances remained registered on title as of the completion date which the plaintiff did not wish to assume. The defendants subsequently sold the properties to another buyer in 2018 for 25% more than the plaintiff had agreed to pay.

There was little dispute that the defendants had breached the APS by failing to remove the encumbrances as required by the time of closing, thereby entitling the plaintiff to reimbursement for "sunk costs" incurred towards the prospective purchase. These amounts totalled \$775,855.46. At issue, however, was the plaintiff's claim for lost opportunity damages of more than \$56 million, reflecting the value of the properties when they were re-sold by the defendants in 2018.

The plaintiff argued that the defendants had "ragged the puck" by failing to take steps to obtain the mortgage discharges before the closing date once they realized that they would benefit by waiting for a more profitable future sale instead of completing the transaction.

In dismissing the claim for lost opportunity damages, the motion judge followed appellate case law establishing that an innocent buyer cannot access a measure of damages based on the profit that it would have made had it purchased the properties as a speculator intent on flipping them to a new purchaser at some future point following the date of breach: 2020 ONSC 6182 (CanLII).

On appeal, the plaintiff argued that the motion judge's assessment of damages failed to put it in the position that it would have been in had the contract been performed. Rather, it was only put back in the position that it would have been in had the contract never been performed.

The Court of Appeal disagreed, however, and re-affirmed that the starting point for the assessment of damages for breach of contract is the date of the breach rather than some randomly picked date in the future: *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.*, 1978 CanLII 1630 (ON CA); *642947 Ontario Ltd. v. Fleischer*, 2001 CanLII 8623 (ON CA), at para. 41. To find otherwise would introduce uncertainty and unpredictability into the assessment of damages.

In rare cases it might be appropriate to move the date for the assessment of damages to a date that is later than the breach of contract date, such where a plaintiff established that it was not in a position to re-enter the market at the date of the breach, or where the plaintiff had specific uses planned for the property and had evidence showing that it would take a reasonable time to find a comparable replacement property. In one case, a trial judge found that a developer of a potential subdivision was entitled to the entirety of the lost profits that would have been realized had the seller completed the transaction: *The Rosseau Group Inc. v. 2528061 Ontario Inc.*, 2022 ONSC 486 (CanLII).

However, the date of the breach of contract remains the starting point for the assessment of loss, modified only to the extent that the innocent party satisfies the court that a later date is appropriate on the grounds that it is the first date upon which the party could reasonably have been expected to re-enter the market and mitigate its damages.

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In the case at hand, the appellant failed to establish that it could not have bought other properties that would have similarly appreciated in value nor why it could not have re-entered the market over that period.

In the Court of Appeal's view, shared by the motion judge, the appellant's business model showed that it not a property speculator but a long-term investor, and this would have informed the parties' reasonable contemplation at the time of the APS.

In effect, the appellant was seeking to begin with the amount that would represent the high point in the assessment of damages between the date of breach and the date of trial (or when the respondents sold the properties). The Court of Appeal had previously rejected such an approach as it would undermine the advantages of certainty and predictability arising from a long line of established and stable case law that presumes the date of breach for the assessment of damages for breach of contract.

Further, the appellant's position presumed it would have sold at the "high point" rather than at another point in a fluctuating market. This was contrary to the appellant's own business plans which reflected a pattern of keeping buildings as rentals for much longer periods of time.

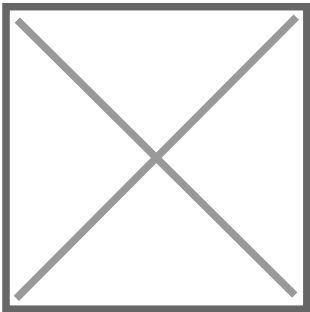
In the result, the Court of Appeal upheld the motion judge's decision regarding the date upon which the damages should be assessed. On that date, the market value and the contract price were the same so there was no loss aside from the sunk costs that the buyer had incurred towards the purchase.

The case affirms that there are very limited circumstances in which an innocent party will be able to claim damages for breach of contract based on date other than the date of the breach. The courts are reluctant to use a randomly chosen future date, whether the date of trial or otherwise, absent persuasive evidence that the innocent party could not have used the funds saved from the transaction to purchase another comparable property. The buyer may be motivated to seek a share of the profits eventually realized by the seller but that may have little relevance as to the issue of what the buyer was intending to do as of the date of the breach.

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