

KEEPING CURRENT

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Lost profits of \$11 million not the appropriate measure of damages for aborted sale to developer (*The Rosseau Group Inc. v. 2528061 Ontario Inc.*)

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Is the measure of damages for a seller's failure to complete the sale of commercial land based upon the lost profits that the buyer could have realized had the transaction been completed? The Ontario Court of Appeal rejected this approach and set aside a developer's award of \$11.1 million for lost profits arising from the aborted transaction: *The Rosseau Group Inc. v. 2528061 Ontario Inc.*, [2023 ONCA 814 \(CanLII\)](#).

The buyer in the case sought to purchase a 45.71 acre undeveloped property, zoned for agricultural and conservation uses. The agreement of purchase and sale included a lengthy conditional period for the buyer to satisfy itself as to the economic feasibility of the development of the land. The final purchase price was eventually set at \$6.6 million.

However, a dispute then arose as to whether the parties had also agreed that the buyer no longer had to pay an additional \$400,000 deposit upon waiving the conditions. The seller

returned the \$50,000 deposit and refused to close on the scheduled completion date.

The buyer sued the seller for the aborted transaction. At trial, the Superior Court of Justice held that the seller repudiated the agreement and that the purchaser was entitled to damages: [2022 ONSC 486 \(CanLII\)](#).

Rather than the usual measure of damages based upon the difference between the contractual purchase price and the market value of the land on the date of the aborted closing, the buyer sought damages based upon its "lost expected profit". The buyer tendered expert evidence from a development consultant who estimated that over a six year period, the buyer would have earned between \$10 million and \$12 million, after rezoning the property and creating 49 serviced lots.

The trial judge agreed, reasoning that the buyer had entered the transaction with the intention of earning a profit

by developing it, and that these were special circumstances which justified departing from the normal measure of damages. The buyer was awarded damages of over \$11.1 million.

Although the Court of Appeal [agreed](#) that the seller had repudiated the agreement and was liable to the buyer, it disagreed that the damages should be based upon lost profits.

The normal measure of damages for a failed real estate transaction is the difference between the contract price and the market value of the land on the “assessment date” which is usually the day of closing: *Akelius Canada Ltd. v. 2436196 Ontario Inc.*, [2022 ONCA 259 \(CanLII\)](#), at paragraph [22](#); *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.* (1978), [1978 CanLII 1630 \(ON CA\)](#).

The main reason for this is that damages are generally awarded on the principle that the innocent party, as nearly as possible, should be put in the position it would have been in if the contract had been performed.

In a real estate transaction, the buyer usually pays the purchase price on closing and obtains, on the same date, ownership of the property. Using the difference between the purchase price and the land’s market value on the closing date the measure of damages puts this principle into effect.

In addition, the Court of Appeal stated that “commercial certainty is enhanced by a predictable damages methodology.” Using the early and predictable aborted closing date on which the innocent party’s damages crystallizes would reduce the uncertainty and speculation required by determining a later date.

The usual measure of damages compensates the innocent buyer for the loss of the market value of the lands on the closing date, less the purchase price that had to be paid to acquire them. This

measure takes into account the value the land has at the time because it can be developed.

The Court of Appeal noted that in expropriation cases, determining the market value of land relies on expert appraisal evidence which considers the highest and best use of the property which maximize economic returns, including by development: *Re Farlinger Developments Ltd. and Borough of East York*, [1975 CanLII 587](#) (Ont. C.A.). Assessing market value for damages based upon the date of an aborted transaction uses the same concepts.

The trial court had relied in part on the decision of *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002 SCC 19](#), wherein the Supreme Court of Canada upheld that the normal measure in that case was inappropriate because the parties had contemplated that optioned land at issue would be put to the use of residential housing. At trial, the developer was awarded \$58 million for the amount of money he would have been entitled to earn had he been permitted to complete the proposed residential development in accordance with the terms of the parties’ agreement, as rectified by the Court.

While the Court of Appeal noted that the normal measure will not be appropriate where it will not address the type of loss suffered by the innocent party, it rejected the view that [Performance Industries](#) stood for the proposition that the normal measure of damages is not to be used for a failed arms’ length sale of development lands simply because the parties had an awareness that the lands could be developed, where there is no suggestion that development value is ignored or excluded by the normal measure. In the case at hand, unlike in [Performance Industries](#), the normal measure did take the development value into account.

Lastly, the Court of Appeal held that the trial



court erred in using a period of six years to calculate expected lost profit rather than the date of closing as the assessment date for damages. First, the expected profit is inherent in the value of the land at the date of closing. Second, because the normal measure of damages compares the purchase price to the market value at the date of closing, it compares outflows and inflows of value at the same date. If no date, or multiple dates over a period of time are used, there can be concerns about what is being measured, and whether amounts are being measured and treated consistently.

In the result, the Court of Appeal set [aside](#) the award of damages and sent the matter back for a new hearing according to the normal measure.

This decision provides some clarification on when a court may depart from the normal measure of damages, and when it is an error to do so. Successful plaintiffs who are entitled to damages for an aborted agreement of purchase and sale of land will likely receive damages calculated on the difference between the sale price and the market value of the land. Unique circumstances or specific intentions for use of the land may justify a different approach to damages when the type of loss suffered by the non-breaching party would not be appropriately measured based upon the aborted closing date.

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