

KEEPING CURRENT

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Lender's failure to provide mortgage discharge results in damages for borrower's inability to complete secondary transaction (*De Rita v. 1266078 Ontario Inc.*)

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The failure to provide a mortgage discharge on a timely basis may expose a lender to damages arising from a borrower's inability to access the funds that are tied up with the mortgaged property. The principle of foreseeability may even extend to capture damages arising from the borrower's loss of opportunity to complete another transaction using the funds that would have been available at the time the discharge ought to have been provided.

In *De Rita v. 1266078 Ontario Inc.*, [2024 ONCA 460 \(CanLII\)](#), the Court of Appeal for Ontario upheld an application judge's finding that a lender's delay in discharging a mortgage deprived the borrower of the opportunity to use the mortgaged property to obtain financing to fund the purchase of another property on Bruce Avenue in Windsor, Ontario.

Due to a dispute with the lender, the borrower had to obtain a discharge by court order. By the time the borrower did so, the purchase agreement for the Bruce Avenue property at an extremely favourable price had lapsed. The borrower then sought damages against the lender.

The application judge awarded damages against the lender of more than \$150,000 based on the difference between the purchase price of the Bruce Avenue property and her estimate of what the property was worth when the borrower was able to re-enter the market, less certain deductions and contingencies.

On appeal, the lender argued that the application judge erroneously concluded that the mortgage discharge was the cause of the borrower's damages since the borrower could have used other resources to purchase the Bruce Avenue property and was not reliant on the equity in the mortgaged property as the source of financing.

However, the Court of Appeal found no error in the application judge's assessment of the evidence of the amounts borrowed nor with her conclusion that without the ability to access the equity in the mortgaged property, which could only be done after the mortgage was discharged, the borrower was without funds to complete the Bruce Avenue purchase.

The lender further argued that the borrower's loss arising from the inability to complete the Bruce Avenue purchase was too remote in law to be recoverable since it was not a reasonably foreseeable consequence of the lender's failure to provide the discharge. The application judge found that the loss of the Bruce Avenue purchase was not too remote, stating that a party registering a charge against title to the property of another must foresee the consequences of continuing to encumber title once the charge is spent. In the application judge's words, "[s]lander of title is a tort premised upon the foreseeability of such harm."

The principle of remoteness limits damages in breach of contract or tort claims to be losses that arise (i) "fairly, reasonably, and naturally as a result of the breach of contract"; and (ii) are "within the reasonable contemplation of the parties at the time of contract": *Saramia Crescent General Partner Inc. v. Delco Wire and Cable Limited*, [2018 ONCA 519](#), at paragraph [36](#). The remoteness test addresses the *type* of loss that is recoverable, not its *quantum*.

The Court of Appeal agreed that the type of loss suffered by the borrower in this matter was recoverable under either branch of the test.

The lender relied on the 1981 decision of the Court of Appeal in *Kienzle v. Stringer*, [1981 CanLII 1851 \(ON CA\)](#), to argue that losses on a "secondary transaction" involving another property (the Bruce Avenue property), rather than the land that was the subject of the mortgage, should be unrecoverable.

However, the Court of Appeal noted that *Kienzle* was a lawyer's negligence case, not a claim against a mortgagee or about a mortgage discharge, and the damages in that case did not extend to "the loss of profits from secondary transactions which may [have] be[en] fuelled by funds expected from the marketing of the subject real property". There had been no disclosure to


the lawyer that the property at issue would serve as the basis for a future purchase.

In contrast, the application judge found there had been significant information disclosed to the lender. The lender was experienced and knew that the borrower was earning a living by buying, selling, and managing a portfolio of commercial real estate in Windsor, and that he was acquiring the mortgaged property with a view to earning a profit. It was therefore reasonably foreseeable that unlawfully impairing title to the mortgaged property would threaten the borrower's access to the equity in his real estate and result in lost business opportunities.

The loss of a business opportunity to the borrower, who was known to be in the real estate investment business, was a foreseeable type of loss at the time of contracting for the mortgage. While the Bruce Avenue transaction represented a particularly advantageous opportunity, the foreseeability of this particular loss related to the quantum, which did not have to be foreseeable.

Lastly, the lender argued that the application judge erred by failing to use the date of breach as the date to assess damages. However, prior Court of Appeal decisions have affirmed that while the date of breach is the presumptive date for assessment of damages, the court may choose a different date depending on the context, such as cases where the innocent party establishes that it was not in a position to re-enter the market to mitigate at the date of breach: *Akelius Canada Ltd. v. 2436196 Ontario Inc.*, [2022 ONCA 259](#), at paragraphs [22-25](#); *The Rosseau Group Inc. v. 2528061 Ontario Inc.*, [2023 ONCA 814](#), at paragraph [62](#).

Here, the application judge exercised her discretion to vary the presumptive date and fix the date to assess damages based on applicable principles, namely the determination of when the borrower was able to re-enter the market. There was no error.



A major takeaway from the court's approach to the principle of remoteness for the assessment of damages is its consideration of the overall fairness in the circumstances of the dispute. Here, the appellate court reasoned that there was no unfairness in the finding that the damages were not too remote. Even after the lender delayed in providing the discharge, it was specifically advised that further delay was threatening the borrower's business opportunities. The lender could then have delivered the discharge and avoided the consequences that led to the claim. It chose not to do so. In the circumstances, it was not unfair to require the lender to pay the damages that were found to be the reasonably foreseeable result of refusing to provide a discharge when required.

The decision may cause some lenders to reassess whether they have valid grounds to refuse to provide a discharge to a borrower and the potential consequences of not doing so.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact James Cook, at 416.865.6628 or jcook@grllp.com.

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