

Real Estate Investor's Claim for Lost Opportunity Damages Rejected

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

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****In March 2022, the Ontario Court of Appeal upheld the decision discussed below: <https://grllp.com/date-of-breach-of-contract-affirmed-for-assessment-of-buyers-damages>****

In *Akelius Canada Inc. v. 2436196 Ontario Inc.*, 2020 ONSC 6182 (CanLII), the Ontario Superior Court of Justice rejected a real estate investor's claim for lost opportunity damages resulting from the failed purchase of an apartment complex in Toronto.

In 2015, the Plaintiff entered into an Agreement of Purchase and Sale (APS) to buy seven residential apartment buildings from the Defendants for \$228,958,320. The Plaintiff paid deposits as required but the transaction failed to close as scheduled in January 2016, as there were several encumbrances registered on title as of the completion date which the Plaintiff buyer did not wish to assume. The Defendants subsequently sold the properties to another buyer in 2018 for a substantially higher price.

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.

The parties agreed that the sale price under the APS reflected the fair market value of the properties at the time of the aborted closing in January 2016. They disagreed as to whether damages should be calculated as of that date or as of the time of the subsequent sale of the properties by the Defendants in 2018, by which point there was a significant increase in value of \$56,544,318.00, based on the figures in the Land Transfer Tax affidavits (which the Court accepted as reflecting the market value of the properties for the purposes of the argument). The Plaintiff sought the latter amount as "lost opportunity" damages. The Plaintiff's theory was that the Defendants had intentionally failed to take steps to clear title to the properties prior to closing as they realized they could achieve a greater profit by breaching the APS and reselling the apartments to another buyer in the rising real estate market.

The Defendants countered that the operative date should be the breach of the APS, and that the Plaintiff had therefore suffered no damages in addition to the sunk expenses.

The Court described the essence of the dispute as follows:

In argument at the hearing, counsel for the Plaintiff contended that the Defendants only seem to have realized when they were half-way to closing that discharging the mortgages would result in a significant loss of profits. At that point, they determined that they would benefit by waiting for a more profitable future sale. In a nicely executed Canadianism, Plaintiff's counsel submitted that the Defendants then "ragged the puck" until the closing buzzer sounded. I feel compelled to add that what followed is the current donnybrook.

In assessing the issues, the court noted that in the ordinary case of an aborted purchase and sale of real estate, damages are usually assessed as of the scheduled closing date: *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.*, 1978 CanLII 1630 (ON CA). There is however some flexibility to this approach based upon "what is fair on the facts of each case": *642947 Ontario Ltd. v. Fleischer*, 2001 CanLII 8623 (ON CA).

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The date at which damages for breach of the APS is assessed was also crucial because the basic principle for breach of contract is that damages should put the injured party as nearly as possible in the position it would have been in had the contract not been breached. Typically this is determined by "the difference between the contract price and the market price": *100 Main Street*. The price achieved on a subsequent mitigating sale may be good evidence of the market value on the intended closing date, but it is not determinative in all cases where the re-sale price differed from the relevant market price: *Marshall v. Meirik*, 2019 ONSC 6215 (CanLII).

As well, the Court explained that it could take into account the nature of the property and the nature of the market: *Greenberg & Greenberg v. Shanghai Real Estate Limited*, 2010 BCSC 1837 (CanLII).

Ultimately, the Court ruled against the Plaintiff's claim for lost opportunity damages and drew a distinction between claims where the seller has breached the APS rather than the buyer.

In cases where a seller is seeking damages from a buyer for failing to complete a real estate purchase, the damages are often assessed as of the date of subsequent sale, as the loss represented by the decline in the market (if any) is to be borne by the breaching party. The seller is generally entitled in those circumstances for damages equal to the difference between the contract price and the highest price obtainable within a reasonable time after the contractual date for completion following the making of reasonable efforts to sell the property commencing on that date.

Conversely, in the case at hand, the Plaintiff sought damages based upon what a disappointed investor would seek, namely the dollar differential between the APS price and the price achieved had the Plaintiff been able to purchase and resell the properties at later date. The Plaintiff argued that its damages should be measured by putting it in the same position it would have been in but for the Defendants' breach. Essentially, the Plaintiff sought to step into the shoes of the Defendants who speculated on the increasing value of the properties.

Unfortunately for the Plaintiff, the Court determined that this very approach had been rejected years earlier by the Ontario Court of Appeal in *642947 Ontario Ltd. v. Fleischer*, which held that where a seller retains a property in order to speculate on the market, damages will be assessed at the date of closing.

Instead, the measure of damages for failure to complete a purchase of land is the difference between the contract price in the APS and the market value of the land at closing, which is intended to represent the lost benefit of the bargain: see *Marshall v. Meirik*.

Essentially, the Defendants' motive (for profit or otherwise) was irrelevant as the Plaintiff was not entitled to speculative profit as a measure of damages just because the Defendant made such a profit. The damages must make up what the buyer lost in value on the closing date, not a speculative future date.

While the Plaintiff argued that there were no comparable investment opportunities available, the Court noted that in the commercial real estate business, where investment units are entirely fungible, the Plaintiff could have made investments that replaced the properties in the failed transaction at issue. It is noteworthy, that no such evidence was before the Court because the Plaintiff (and its multinational parent company) refused to provide it on the grounds that to do so was burdensome. In the Court's view, this evidentiary burden was not disproportionate to the approximately \$50,000,000 being claimed for lost opportunity.

In short, as at the aborted closing date, the Plaintiff was simply not 'out money' on top of the expenses which it was entitled to recover. The Plaintiff retained the millions of dollars not invested in the apartment complex and could have invested the funds elsewhere during the intervening years.

This case demonstrates once again that in failed commercial real estate transactions, lost opportunity damages are not necessarily easy to obtain, especially for a jilted buyer. Rather than sinking costs into a court case for more than the recovery of sunk costs, the better course of action for a jilted investor is likely to recover the sunk costs as quickly as possible and seek out other investments opportunities.

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