

Court of Appeal for Ontario clarifies appropriate date for assessment of damages for breach of contract

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In its recent decision in *Rougemount Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847, the Court of Appeal for Ontario helpfully clarified that, absent special circumstances, the appropriate date to assess damages for breach of contract is as at the date of breach, and not at some future date (for example, the end of the contract term or the date of trial).

Background

In 2004, the defendant IT developer and manufacturer entered into an agreement with Sixdion Inc. (Sixdion), an IT marketing company. Pursuant to the terms of the agreement, Sixdion would market the defendant's technologies to the federal government. In return, the defendant would assist in developing Sixdion's business, including making an immediate investment of \$1.5 million. Sixdion hired additional staff and incurred additional expenses on the understanding it would be receiving the financial and business support promised by the defendant.

After entering into the agreement, the defendant sought to "kill the deal," and refused to pay Sixdion the \$1.5 million. Shortly thereafter, Sixdion filed for bankruptcy. The plaintiff, a creditor of Sixdion, purchased Sixdion's right of action against the defendant and brought an action claiming breach of contract.

Trial decision

The trial judge held that the defendant breached its agreement with Sixdion, and awarded the plaintiff \$11 million in damages. In quantifying damages, the trial judge assessed damages not as at the date of breach, but at the end of a five-year business plan for Sixdion that had been developed by both parties.

Court of Appeal decision on damages

The Court of Appeal noted that damages awards are subject to considerable deference. It nevertheless concluded that the trial judge erred in principle by incorrectly calculating damages as at a future date, as opposed to at the date of breach. The Court first noted the "well established" rule that "the general measure of damages for breach of contract is the amount of damages that will, so far as money can, place the aggrieved party in the same position as if the wrong had not been done," and that the "focus is on the injured party's loss and on the measure of compensation required to restore it to the position that it would have

been in had the contract been performed."

The Court then held that in assessing damages, "the presumption is that damages, including those for loss of a business or opportunity, should generally be assessed as of the date of breach." That presumption is "subject to exceptions where fairness requires it," but should only be displaced in special circumstances. As examples of such exceptions, the Court cited circumstances where no market exists to replace undelivered securities at the date of breach, or where the case involves certain classes of property whose value is subject to constant and unpredictable fluctuations.

The Court held that no such special circumstances were present in this case that would justify displacing the presumption, and that the facts were "no different than any other case where damages for future loss have to be determined." By erroneously assessing damages at a future date, the Court held that the trial judge "focused solely on maximizing the potential benefits to Sixdion under the contract" and "failed to take into account Sixdion's deeply troubled financial history and uncertain status going into the contract [...] and the fact that Sixdion was embarking on a new line of business."

The Court held that the trial judge further erred by failing to apply a discounted cash flow analysis as at the date of breach. It was agreed by the parties' experts that if damages were assessed as at the date of breach, it would be appropriate to apply a discount rate that reflected the rate venture capitalists would apply in valuing a business based purely on forecasts, where the business had no prior history of revenue.

In the result, the Court substituted its own finding on damages, reducing the award from \$11 million to \$1.3 million.

Takeaway

The Court of Appeal's decision is a helpful appellate reiteration of the strong presumption that courts, in assessing damages for breach of contract, should confine their analysis to damages as at the date of breach. An approach that assesses damages as at the end of the term of the contract or as at the date of trial is not permitted absent unique circumstances, which do not include the mere fact that a court is required to assess future loss. This presumption, as the Court of Appeal noted, fosters predictability and efficient commercial behaviour.