

A Lost Opportunity for “Lost Opportunity”

by Albert S. Frank, LL.B.

A decade or more later, the courts are still sifting the debris from the real estate crash of the early 1990s. Let us take a look at **Rodaro v. Royal Bank of Canada** (2002), 59 O.R. (3d) 74, an interesting example from the Court of Appeal for Ontario.

Frank Rodaro, an engineer and land developer, bought 751 acres of land south of Barrie, Ontario for development. Rodaro – by which I mean Rodaro and/or his companies – borrowed millions of dollars from the Royal Bank of Canada, “RBC,” for the development project. A recession in 1990 and other circumstances hurt the project.

In June of 1992, after advancing about \$20 million to Rodaro, RBC advised that it would not advance any further funds. In July of 1992 RBC assigned the debt and related securities to Barbican Properties Inc.. Barbican demanded payment in full, and when repayment was not made it issued notices of sale. When the property was eventually sold there was a shortfall of about \$11.8 million.

Rodaro sued, complaining of various matters. The main thrust was that RBC and Barbican had wrongfully taken the project from Rodaro and deprived him of the potential profits. Barbican counterclaimed for the \$11.8 million shortfall.

After a lengthy trial of the Rodaro claim the trial judge ruled against Rodaro on all issues except that RBC had wrongfully given Rodaro’s confidential information to Barbican. The trial judge found that this caused Rodaro to lose an

opportunity to sell his interest in the project, for which lost opportunity Rodaro should be compensated, and that the debt and security were unenforceable.

RBC and Barbican appealed.

Assign a Debt

The first issue in the appeal was whether RBC had the right to assign the debt to Barbican. Rodaro had not consented to the assignment, but was that a problem?

The Court of Appeal stated that generally a party to an agreement (contract) – like RBC – may assign its rights under that agreement to a third party – like Barbican – ***without the consent*** of the other party to the agreement. This general right to assign can be blocked by limitations that can be created by statute, public policy, or the terms of a specific agreement (contract).

Nor can a party assign rights “if that assignment increases the burden on the other party to the agreement, or if the agreement is based on confidences, skills, or special personal characteristics such as to implicitly limit the agreement to the original parties....”

Rodaro was unable to establish any exceptions to the general right to assign rights. The Court of Appeal therefore found the assignment to be proper.

Confidential Information

While negotiating for a possible extension or expansion of the loan facility, Rodaro gave RBC his business plan for the project. RBC later disclosed this “confidential” information to Barbican while negotiating the assignment

of the debt. The trial judge's view was that RBC was wrong to do so.

The Court of Appeal decision shows considerable doubt as to the trial judge's view. Instead of reaching a conclusion on this point, however, the Court continued the analysis on the basis, for the sake of argument, that the trial judge was right on this point.

Detriment and Lost Opportunity

Courts rarely award substantive compensation unless the wronged person has suffered a detriment. In effect, a "no harm, no foul" rule.

What detriment did Rodaro suffer from RBC giving the business plan to Barbican?

The trial judge found that Rodaro lost an opportunity to benefit from the best possible sale terms. The Court of Appeal found the law to be as follows:

If as a result of a defendant's breach of contract, or negligence, a plaintiff loses a reasonable probability of realizing some economic benefit, the plaintiff is entitled to be compensated for that lost opportunity.

Proving and quantifying the lost opportunity can be difficult, but if there is a lost opportunity the plaintiff is entitled to compensation.

None of this law helped Rodaro, though. Firstly, lost opportunity was not an issue in the case until the trial judge's decision. Rodaro did not claim before or at trial that he had lost an opportunity. It was "fundamentally unfair" to RBC and Barbican to base the decision on a theory that they had no way of knowing they would have to face. Since the theory arose for

the first time in the reasons for judgment, the theory was “never tested in the crucible of the adversarial process.”

Moreover, looking at the facts and circumstances of the case the Court of Appeal found it unlikely that Rodaro would have taken advantage of the alleged opportunity, so it had no value to him.

Although the Court of Appeal dismissed all claims against RBC and Barbican, it did uphold “lost opportunity” as a possible basis in any case in which it could be proven. Perhaps some of my readers shall as expert witnesses help to prove lost opportunity damages in future cases.

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