



Case Update:

Kipfinch Developments Inc. v. Westwood Mall (Mississauga) Limited

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In our last issue, we discussed the Ontario Superior Court decision in *Kipfinch Developments Inc. v. Westwood Mall (Mississauga) Limited*. Kipfinch entered into an agreement of purchase and sale to purchase a shopping centre from Westwood, but the deal fell apart when Westwood refused to let Kipfinch carry out desired environmental testing. Kipfinch sued and the court found that by refusing the testing, Westwood had breached the agreement of purchase and sale. Kipfinch was awarded \$330,000, based on a projected profit of \$660,000 if the deal had closed and a 50% chance of the deal closing if Kipfinch had been permitted to carry out the environmental testing.

Interestingly, it was Kipfinch, not Westwood, who appealed, and asked for increased damages. The Ontario Court of Appeal released its decision this past January.

The Court of Appeal found that the trial judge had correctly assessed the chance of the transaction closing at 50%. The trial judge also correctly assessed the damages as of the date of the breach of contract, and not, as argued by Kipfinch, as of the date two years later when the leasing-up of the mall would have been completed. Kipfinch did succeed on one minor point – the trial judge erred when he excluded certain management expenses from the quantification of damages. A new trial was ordered on this issue alone. ■