2014 ONSC 6952
Ontario Superior Court of Justice

Gillespie v. 1766998 Ontario Inc.

2014 CarswellOnt 16888, 2014 ONSC 6952, 247 A.C.W.S. (3d) 714, 49 R.P.R. (5th) 65

James Gillespie and Janet Jones, Plaintiffs and 1766998 Ontario Inc., Defendant

F.L. Myers J.

Heard: November 28, 2014
Judgment: December 1, 2014
Docket: CV-14-505852

Counsel: James S. Marks, for Plaintiffs
Rolf M. Renz, for Defendant

Subject: Civil Practice and Procedure; Contracts; Property

Headnote

Real property --- Sale of land — Remedies — Miscellaneous

Plaintiffs bought defendant's property under agreement of purchase and sale — Defendant refused to close sale — Plaintiffs brought motion for summary judgment for order of specific performance — Motion granted — Plaintiffs were highly qualified artists and property was viewed by them as being uniquely suitable for their proposed purpose — Fact that plaintiffs searched for 10 years and paid full listing price for property, and fact that their friends lived in close proximity to property, provided objective support for plaintiffs' views — Existence of alternative properties did not raise triable issue as to whether any of them would reasonably duplicate defendant's property for plaintiffs' proposed uses — Damages were not comparatively fair or adequate measure of justice.

Remedies --- Specific performance — Availability in particular contracts — Sale of land

Plaintiffs bought defendant's property under agreement of purchase and sale — Defendant refused to close sale — Plaintiffs brought motion for summary judgment for order of specific performance — Motion granted — Plaintiffs were highly qualified artists and property was viewed by them as being uniquely suitable for their proposed purpose — Fact that plaintiffs searched for 10 years and paid full listing price for property, and fact that their friends lived in close proximity to property, provided objective support for plaintiffs' views — Existence of alternative properties did not raise triable issue as to whether any of them would reasonably duplicate defendant's property for plaintiffs' proposed uses — Damages were not comparatively fair or adequate measure of justice.

Table of Authorities

Cases considered by *F.L. Myers J.*:

Baud Corp., N.V. v. Brook (1978), 1978 CarswellAlta 268, 1978 CarswellAlta 302, (sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp.)* [1979] 1 S.C.R. 633, [1978] 6 W.W.R. 301, (sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp.)* 89 D.L.R. (3d) 1, (sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp.)* 23 N.R. 181, 12 A.R. 271, 5 B.L.R. 225 (S.C.C.) — considered

Canamed (Stamford) Ltd. v. Masterwood Doors Ltd. (2006), 2006 CarswellOnt 1183, 41 R.P.R. (4th) 90 (Ont. S.C.J.) — referred to

Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 95 E.T.R. (3d) 1, (sub nom. *Hryniak v. Mauldin)* [2014] 1 S.C.R. 87, 27 C.L.R. (4th) 1, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 2014 CSC 7, (sub nom. *Hryniak v. Mauldin)* 314 O.A.C. 1, (sub nom. *Hryniak v. Mauldin)* 453 N.R. 51, 12 C.C.E.L. (4th) 1, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 21 B.L.R. (5th) 248 (S.C.C.) — referred to

John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd. (2001), 2001 CarswellOnt 3984, 56 O.R. (3d) 341, 46 R.P.R. (3d) 239, [2001] O.T.C. 803 (Ont. S.C.J.) — referred to

John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd. (2003), 34 B.L.R. (3d) 12, 10 R.P.R. (4th) 98, 63 O.R. (3d) 304, 168 O.A.C. 252, 223 D.L.R. (4th) 541, 2003 CarswellOnt 342 (Ont. C.A.) — considered

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Southcott Estates Inc. v. Toronto Catholic District School Board (2012), 24 R.P.R. (5th) 1, 3 B.L.R. (5th) 1, [2012] 2 S.C.R. 675, 2012 SCC 51, 2012 CarswellOnt 12505, 2012 CarswellOnt 12506, 351 D.L.R. (4th) 476, 296 O.A.C. 41, 435 N.R. 41 (S.C.C.) — considered

MOTION by plaintiffs for summary judgment for order of specific performance.

***F.L. Myers J.*:**

Background

1 The plaintiffs seek summary judgment for an order of specific performance requiring the defendant to transfer to them its property on Rednersville Road, Ameliasburgh, Ontario.

2 The plaintiffs bought the defendant's property under an agreement of purchase and sale. The defendant refused to close the sale. The plaintiffs say that the property is the perfect property for them to move into the next phase of their careers and personal lives. Subjectively and objectively, the property is unique in that it has qualities that make it especially suitable for the proposed use by the plaintiffs that cannot be reasonably duplicated. *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.*, 2001 CarswellOnt 3984 (Ont. S.C.J.) at para. 60. Put differently, not only is the property subjectively unique to the plaintiffs, objectively, a reasonable person familiar with the facts surrounding their purchase and sale agreement would consider the property to be unique. *Canamed (Stamford) Ltd. v. Masterwood Doors Ltd.*, 2006 CarswellOnt 1183 (Ont. S.C.J.). Therefore,

the plaintiffs are entitled to an order for specific performance for the reasons set out below.

The Facts

The Plaintiffs

3 The plaintiffs' counsel urges the court to understand the plaintiffs' uniqueness in order to appreciate the facts of the case. Of course, all people are unique. What I take counsel to be saying is that the question of whether a property is "unique" for the purposes of the law of specific performance turns upon the specific facts of each case. There is a large element of subjectivity to the issue of uniqueness of a property, especially a residential property. In this case, the plaintiffs have quite exceptional characteristics which makes the subjective aspects of this case straightforward.

4 Janet Jones is a 62-year-old artist. She is a senior faculty member at York University. Since 1982, she has been a Professor in the Visual Arts Studio Programme.

5 James Gillespie is a 69-year-old artist, writer, filmmaker and educator.

6 The plaintiffs have been in a relationship since 1984, cohabiting since 1988, and were married this past summer. They have been searching for a rural property for residential and professional purposes for about 10 years.

The Purchase and Sale Transaction

7 Having looked at many alternatives, the plaintiffs' realtor referred them to the defendant's property on April 29, 2014. They realized right away that it was the property for which they had been looking. They submitted an offer to purchase the property that day. The next day, the defendant presented a counter-offer which contained no compromise on the listing price. The plaintiffs accepted the counter-offer that day. The transaction was scheduled to close on May 22, 2014.

8 On May 15, 2014, the defendant sought an extension of the closing date. The plaintiffs had already begun transporting their goods to Belleville. They had also started making building arrangements for the property. They did not wish to delay the closing and declined the defendant's request.

9 On the date set for closing, the plaintiffs' counsel had documents in hand and was in funds for a planned 2:00 p.m. closing. The defendant's counsel called to advise that it would not be closing the transaction. Counsel wrote that day:

> Further to our previous correspondence in this matter, I confirm that we have received instructions from our client not to close this transaction today and to take no further steps. We received instructions from our client to direct you to deal with him directly on any further dealings with this property.
>
> . . . . .
>
> After discussing this matter with my client, it is apparent that the parties may not have been *ad idem* as to two critical terms of this Agreement. Our client understood that the transaction was closing in June, not May, and that the sale of the property was not subject to HST.

10 By letter dated May 26, 2014, the plaintiffs' counsel invited the defendant to close the transaction on May 30, 2014. They also confirmed that tender had been waived by the defendant's counsel. By an undated letter received by the plaintiffs' counsel on June 5, 2014, the principal of the defendant advised that he was not prepared to proceed with the transaction because the defendant's listing realtor led him to believe that there was no HST payable in the transaction. He wrote, "I am prepared to walk away from the deal if your client is not prepared to pay the HST otherwise I stand firm on my position."

The Defendant has no Defence

11 The relevant provision of the counteroffer submitted to the plaintiffs by the defendant, and accepted by the plaintiffs, says:

> If the sale of the property... is subject to Harmonized Sales Tax (HST) then such tax shall be included in the Purchase Price.

12 The plaintiffs' counsel rightly notes that this sentence starts with the word "if". That shows that there may have been some uncertainty or risk as to whether HST would apply to the transaction. The sentence goes on to clearly ascribe to the defendant the risk of HST applying. The words "included in" are actually interlineations inserted in a blank spot in the pre-printed OREA form of agreement of purchase and sale. The specific inclusion was made to clearly allocate the risk. There is no ambiguity.

13 Moreover, there is absolutely no evidence that the plaintiffs suffered from a common or mutual mistake concerning HST. They would have had no basis to know or care whether the defendant was subject to HST or not. The counteroffer made to them by the defendant assumed the risk of HST. Accordingly, there was no common mistake in this case. This case meets none of the tests for the equitable doctrine of common mistake set out in paragraphs 25 through 30 of the Court of Appeal's decision in *Miller Paving Ltd. v. B. Gottardo Construction Ltd.*, 2007 ONCA 422 (Ont. C.A.).

14 Similarly, the defendant's "understanding" that the transaction was to close in June, is not an answer to its unambiguous contractual obligation to close on the agreed-upon closing date. His request for an extension was rejected in communication between competent counsel. There was no common mistake.

15 The defendant also asserts that the plaintiffs have not established that they were ready, willing and able to close. Paragraph 10 of their affidavit does just that. There was no indication from the defendant or its counsel that there was any problem that would have prevented the closing from proceeding as scheduled. The defendant waived tender. So there is no need for the plaintiffs to prove their readiness at the time. There uncontradicted evidence is sufficient for the purpose of this proceeding especially since the defendant chose not to cross-examine either of the plaintiffs on this issue.

16 There is, therefore, no issue for trial on the question of breach of the agreement of purchase and sale. The defendant's own evidence leads to no other conclusion than that its repudiation of the agreement amounted to a wrongful breach of contract. The only real issue in the case is whether the remedy of specific performance ought to be available to the plaintiffs and whether this motion is an appropriate forum for that determination.

The Plaintiffs Proposed Use of the Property

17 The plaintiffs are artists. Ameliasburgh is in Prince Edward County, Ontario. Prince Edward County has been the focus of the plaintiffs' search for property for a number of reasons. Both of the plaintiffs do business at art galleries and film centres for exhibitions, screenings, and professional meetings in both Toronto and Montréal. Prince Edward County is well-situated for the plaintiffs between both major centres. It has also become and promotes itself as a "mecca for artists" in Ontario.

18 The property itself is located near Highway 401 and the Belleville Via Rail station. Janet Jones teaches at York University three or four times per week. Both plaintiffs travel. Being as close as possible to transportation hubs is important to them.

19 The plaintiffs intend to build a house for themselves on the property. Janet Jones also intends to initiate an "International Summer Artist Residency" to focus on environmentalism and sustainability. She intends to have her programme accredited as a course by York University. To that end, the plaintiffs intend to build two art studios of at least 800 square feet each and a workshop. They were seeking a property of up to 30 acres in order to house the necessary facilities. The defendant's property is 28 acres.

20 Janet Jones anticipates initiating her programme for post-B.A. students to expand upon a course that she initiated and

taught at York University. She needs the students to have the ability to roam, explore, and study from their observations and experiences on the property. She says that:

> The space will allow them to draw, paint, and photograph unique subjects on the property and create site-specific installations that are a response to the features in the landscape and the natural flora, fauna, and insects inhabiting or migrating through it. The diverse topographical nature of the subject property allows for a diversity of aesthetic responses: the mixed deciduous forest, pines and Eastern Red Cedar bush; the trails through the woods; the hills; the long views of the county; the pond; and the farmers field(s), among other characteristics.

21 Students will not live on the property. So nearby accommodations and restaurants are important.

22 The plaintiffs intend to build their home on the property as well. They intend to build a green residence including solar panels, in-floor heating and bermed-in sections. The north facing slope is ideal for solar panels and, they say, selective bermed-in sections.

23 The plaintiffs are close friends with two fellow artists, Yvonne Lemmerich and Ian Carr-Harris. They have been friends for approximately 45 years. Ms Lemmerich and Mr. Carr-Harris were the witnesses at the plaintiffs' wedding. They are active international artists with significant, established reputations. Ms Lemmerich and Mr. Carr-Harris live on the property immediately next door to the defendant's property.

24 The municipal address of the defendant's property is known as Rednersville Road. The plaintiff's realtor Mark Hall testified that Rednersville Road is a highly desirable address in Prince Edward County. Mr. Hall has been working with the plaintiffs since February, 2013. The plaintiffs told him that a location on Rednersville Road was there desire. They declined to make an offer recently on a property that was available on nearby Victoria Road. The street and land size, Mr. Hall says, were critical to the plaintiffs because of their proposed use for the property. The defendant's counsel did not cross-examine Mr. Hall.

25 The plaintiffs submit that the defendant's property is unique for them because of: (a) its size; (b) its diverse topography including mixed deciduous forest, trails, fields; (c) its proximity to Via Rail, Highway 401, hotels and restaurants; (d) it is on Rednersville Road; (e) their close friends live right next door; and (f) the price was at the upper limit of their budget in light of their need to preserve funds for planned construction.

The Law

26 The Supreme Court of Canada severely limited the availability of the remedy of specific performance in 1996. At common law, the remedy for breach of contract is damages. Historically, however, courts of equity intervened to provide the remedy of specific performance for agreements for the purchase and sale of land because land was viewed as unique and not a fungible commodity for which monetary damages was an adequate substitute. In today's economy, land is often the subject of commercial transactions at the heart of which lies opportunities for profit rather than any unique qualities of the land itself. Even residential land today is often fungible. Units in cookie-cutter urban townhouse developments and, especially, in condominium buildings, can be identical and can hardly be thought of as unique. Equity's rationale for providing a remedy other than damages in most cases involving sales of land, therefore, no longer applies.

27 The current state of the law was described by the Court of Appeal in *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.*, 2003 CarswellOnt 342 (Ont. C.A.) as follows:

> [38] In *Semelhago v. Paramadevan*, 1996 CanLII 209 (SCC), [1996] 2 S.C.R. 415, 136 D.L.R. (4th) 1 at para. 22, Sopinka J. observed that specific performance will only be granted if the plaintiff can demonstrate that the subject property is unique in the sense that, "its substitute would not be readily available". Although Sopinka J. did not elaborate further on this definition, in *1252668 Ontario Inc. v. Wyndham Street Investments Inc.*, [1999] O.J. No. 3188 (Quicklaw), 27 R.P.R. (3d) 58 (S.C.J.) at para. 23, Justice Lamek stated that he

> [does] not consider that the plaintiff has to demonstrate that the Premises are unique in a strict dictionary sense that they are entirely different from any other piece of property. It is enough, in my view, for the plaintiff to demonstrate that the Premises have a quality that makes them especially suitable for the proposed use and that they cannot be reasonably duplicated elsewhere.

> [39] I agree that in order to establish that a property is unique the person seeking the remedy of specific performance must show that the property in question has a quality that cannot be readily duplicated elsewhere. This quality should relate to the proposed use of the property and be a quality that makes it particularly suitable for the purpose for which it was intended. See also the comments of Low J. in *904060 Ontario Ltd. v. 529566 Ontario Ltd.*, [1999] O.J. No. 355 (Quicklaw), 89 O.T.C. 112 (Gen. Div.) at para. 14.
>
> [40] The time when a determination is to be made as to whether a property is unique is the date when an actionable act takes place and the wronged party must decide whether to keep the agreement alive by seeking specific performance or accept the breach and sue for damages: *Greenforco Holding Corp. v. Yonge-Merton Developments Ltd.*, [1999] O.J. No. 3232 (Quicklaw) (S.C.J.) at [page318] para. 76.

28 Two related lines of inquiry have developed to assess the uniqueness of a piece of property in terms of its suitability for a proposed use. One focuses on the subjective and objective qualities of the land itself. The other focuses on whether damages would be an adequate remedy for the plaintiffs in light of their propose use. Both inquiries relate to the fundamental underlying issue in this as in most equitable remedies which is whether the outcome proposed by the common law remedy of damages is fair and just in the circumstances.

29 The remedy of damages is complicated in these cases by the law of mitigation of damages. Long before 1996, the Supreme Court of Canada had recognized that a party who claims specific performance will not mitigate his or her damages. If a plaintiff is claiming performance of a sale contract to obtain a specific piece of property, then it is inconsistent for the plaintiff to go out a buy a substitute to quantify his or her loss. However, if the plaintiff holds out for the property that is the subject of the contract, the defendant is cast into the role of being an insurer of market fluctuations in the value of the property pending trial including in cases where the plaintiff could have replaced the property and avoided some of the post-breach losses. Recall that not all cases involving claims for specific performance relate to land transactions. In *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633 (S.C.C.) [hereinafter *Asamera*], 1978 CanLII 16, for example, the issue involved shares in a corporation. In that case, the Supreme Court of Canada held that the duty to mitigate takes precedence over a desire for specific performance unless the claim for specific performance is very realistic so as to justify the plaintiff's unilateral determination to claim the remedy and to decline to crystallize his or her loss by buying replacement property. That is, to even claim specific performance and avoid the duty to mitigate, there is a preliminary assessment to be made. As described by Estey J. in *Asamera* at p.668:

> Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real, and substantial justification for his claim to performance must be found. Otherwise its effect will be to cast upon the defendant all the risk of aggravated loss by reason of delay in bringing the issue to trial.

30 In 2012, the Supreme Court of Canada reiterated and, some say, strengthened this rule in a claim for specific performance related to land. In *Southcott Estates Inc. v. Toronto Catholic District School Board*, [2012] 2 S.C.R. 675, 2012 SCC 51 (S.C.C.), the plaintiff sued for specific performance of a contract to purchase a large tract of land that the plaintiff intended to use to develop and construct a subdivision of townhouses. Karakatsanis J. writing for the majority of the Court held that the plaintiff was required to mitigate its damages by buying an alternative piece of land and could not seek specific performance. The Court concluded as follows:

> [41] A plaintiff deprived of an investment property does not have a "fair, real, and substantial justification" or a "substantial and legitimate" interest in specific performance (*Asamera*, at pp. 668-69) unless he can show that money is not a complete remedy because the land has "a peculiar and special value" to him (*Semelhago*, at para. 21, citing

> *Adderley*, at p. 240). Southcott could not make such a claim. It was engaged in a commercial transaction for the purpose of making a profit. The property's particular qualities were only of value due to their ability to further profitability. Southcott cannot therefore justify its inaction.

31 The commercial context of that case was obviously the key consideration for the Court. However, the narrowness of the sliver of room left for true cases of specific performance cannot be ignored. To avoid the duty to mitigate, the plaintiffs have an initial hurdle to show that they have a "substantial and legitimate" interest in specific performance showing that money is not a complete remedy because the land has "a peculiar and special value" to them.

32 In the lower court decision in *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.*, 2001 CarswellOnt 3984 (Ont. S.C.J.), Lax J. assessed the scope of the inquiry as follows:

> [55] The more fundamental question is whether the plaintiff has shown that the land rather than its monetary equivalent better serves justice between the parties. This will depend on whether money is an adequate substitute for the plaintiff's loss and this in turn will depend on whether the subject matter of the contract is generic or unique.
>
> . . . . .
>
> [58] Although a plaintiff may claim specific performance and damages and make an election at trial, as a practical matter, the mitigation principle operates as a powerful disciplining tool. The plaintiff must now carefully and realistically assess if he will succeed in an action for specific performance and this will depend, in part, on whether or not there is a readily available substitute property. If there is, the plaintiff's remedy will be damages and subject to the mitigation principle.
>
> [59] There is both a subjective and objective aspect to uniqueness. While it is difficult to be precise about this, it strikes me that normally, the subjective aspect will be less significant in commercial transactions and more significant in residential purchases, unless the motivation in the latter case is principally to earn profit. In terms of the subjective aspect, the court should examine this from the point of view of the plaintiff at the time of contracting. In some cases, there may be a single feature of the property that is significant, but where there are a number of factors, the property should be viewed as a whole. The court will determine objectively whether the plaintiff has demonstrated that the property has characteristics that make an award of damages inadequate for that particular plaintiff. Obviously, investment properties are candidates for damages and not specific performance.
>
> [60] It is important to keep in mind that uniqueness does not mean singularity. It means that the property has a quality (or qualities) that makes it especially suitable for the proposed use that cannot be reasonably duplicated elsewhere. To put this another way, the plaintiff must show that the property has distinctive features that make an award of damages inadequate. The plaintiff need not show that the property is incomparable.
>
> [footnotes omitted]

33 The defendant argues that the correct test that takes into account both related lines of inquiry was set out by McMahon J. in *Canamed (Stamford) Ltd. v. Masterwood Doors Ltd.* [2006 CarswellOnt 1183 (Ont. S.C.J.)], 2006 CanLII 6083, as follows:

> [103] I am satisfied for the plaintiff to be successful in obtaining specific performance, the following facts must establish on a balance of probabilities:
>
> 1. The subject property is unique and a substitute is not readily available;
>
> 2. The remedy of damages is comparatively inadequate to do justice; and
>
> 3. The plaintiff has established a fair, real and substantial justification for the claim of specific performance.

Is the Subject Property Unique?

[104] In determining whether this particular property is unique, I am satisfied there is both a subjective and objective element to the test. I will find it is not sufficient for the plaintiff to subjectively believe the property is unique. The plaintiff must also demonstrate that, objectively, a reasonable person familiar with the facts surrounding the Purchase and Sale Agreement would conclude that the property was unique.

[105] Upon review of the case law, the determination of uniqueness and the availability of a substitute property is fact driven.

Analysis

Subjective Uniqueness

34 Subjectively, it is apparent that the defendant's property was viewed by the plaintiffs as being uniquely suitable for their proposed purpose. While one can argue about whether objectively one swath of Prince Edward County land is likely not much different physically from another, the plaintiffs are highly qualified artists and educators. There was no challenge to their evidence that the particular mix of topography - the mixed deciduous forest, forest, trails, water elements, made this property particularly suited to their proposed use for living and for teaching students visual arts. Again, while perhaps there are many other properties near or around the train stations and Highway 401, this property is the one which has the plaintiffs' other desired elements and which meets that aspect of their desired use. Of greater significance subjectively, is that the plaintiff's friends are their next-door-neighbours and that the property is on the highly desirable Rednersville Road. There is little doubt that this property meets the plaintiffs' subjective desires and, to them, there is no substitute readily available.

Objective Uniqueness

35 Objectively, however, to the reasonable outside observer, is the same conclusion available — that there is no alternative property reasonably available for the plaintiffs' proposed uses? I agree with Lax J. that in a residential situation, the subjective component will likely be the more important. Here, the plaintiffs propose both residential and business uses for the property. However, the business use is not commercial in the sense of being proposed as a business solely for profit. The proposed business use is artistic and educational. While the plaintiffs may be paid for their efforts, even the commercial component is at the lowest end of the range of profit motivated businesses in which profit is fungible.

36 There are *indicia* to give circumstantial trustworthiness to the plaintiffs' subjective claims that support an objective assessment of the uniqueness of the land in this case. The fact that the plaintiffs searched for 10 years and literally jumped at this property provides objectively observable support for their views. The fact that they paid full listing price which their agent said was above the fair value of the property is also some objective support. See *Silverberg*, *supra* at para. 138. The proximity of their friends is another element that provides objective support for the property not being readily duplicated for its proposed purpose.

The Availability of Alternatives

37 The defendant offers some 24 MLS listing forms to show that there are many vacant properties offered for sale in Prince Edward County. In *Southcott*, *supra*, the Supreme Court of Canada held that the trial judge committed reversible error by failing to consider properly evidence of comparable properties. Karakatsanis J. wrote:

[51] The trial judge failed to consider the available and reasonable inferences of the Board's evidence that there were 81 parcels of raw land suitable for development and 49 properties subdivided into lots suitable for building sold during the time period in issue here... it is an obvious inference that if 81 properties suitable for development were offered for sale, and were in fact sold, then investment properties were available to developers for sale, particularly in the absence of evidence to the contrary.

> [52] Further, the trial judge failed to consider whether the fact that all of the properties the Board's expert testified to were capable of being brought to development in a year could support an inference that their development was profitable. Reasonable inferences of profitability could be drawn based upon the size and price of property or the fact that land was purchased for development purposes by experienced developers. The trial judge did not turn his mind to this evidence.
>
> [53] Finally, the trial judge also failed to consider that an adverse inference against Southcott could be drawn from the fact that it led no evidence about the profitability of the alternative development opportunities.

38 In *Southcott*, the plaintiff's sole proposed use of the land was for commercial development for a profit. The Supreme Court of Canada found that existence of other properties gave rise to inferences that similar profits were available, i.e. the plaintiff could have bought the other properties and put them to the same proposed use. Here, there is no issue of profit. The question is whether the mere existence of other properties for sale raises a triable issue as to whether at the closing date, there were reasonable substitutes for the defendant's property for the plaintiffs' proposed purposes. In my view, they do not.

39 Of the 24 alternatives proposed, only 6 are in the Hamlet of Ameliasburgh in Prince Edward County which is where the defendant's property is located. They are all further from the train station. Two of the six have already been sold. One listing expired in 2013. Two are on Victoria Road, where the plaintiffs already declined to purchase. The sixth property is only six acres.

40 None of the 24 MLS listings are for a property on Rednersville Road let alone beside the plaintiffs' friends.

41 The plaintiffs have specific wants and needs. They also have specific artistic, aesthetic, and educational experiences and goals. Putting together all of the numerous issues of import to the plaintiffs, the existence of the alternatives does not raise a triable issue as to whether any of them might objectively and subjectively reasonably duplicate the defendant's property for the plaintiffs' proposed uses.

42 One may question whether a plaintiff can define his or her proposed uses with such narrow precision that no reasonable alternative could ever exist. However, that is among the reasons why the law applies an objective view as well as a subjective view to the suitability and duplicability of the property in issue. The existence of objective factors gives circumstantial trustworthiness to the plaintiffs' subjective claims. They are artists and teachers. They have not suddenly claimed an interest in aesthetics. They searched for 10 years before offering on the defendant's land on the very day that they first saw it. The agent, Hall, confirms that for his two years of involvement, the plaintiffs consistently asserted the same proposed uses. They have not invented a narrow list of priorities for this litigation. Rather, they established a fair, real and substantial justification for the claim of specific performance.

Are Monetary Damages an Adequate Remedy

43 Turning to consider the other elements of the tests set out above by Lax and McMahon JJ., the question is whether monetary damages would be adequate in the circumstances. The assumption underlying this inquiry is that the plaintiffs did not have a proper justification to decline to mitigate their loss and that they ought to have bought an alternative property. What would their damages have been had they done so? There is no question of measuring the difference in value of the two properties as one is not a perfect substitute for the other. Ostensibly, whatever the plaintiff paid for the other property would have been its fair market value for whatever attributes it has. If one could prove that there was exceptional volatility in the market, it might perhaps be possible to claim that the plaintiffs paid more for the new property than they would have paid had they bought it at the date of the agreeement. But real estate markets do not tend to be that volatile. It is also not realistic to think that the plaintiffs could buy another property and spend some measurable amount to bring the second property up to the standards of the defendant's property. First, one cannot move land. Nor is it realistic to think that topography can be changed, forests altered, paths and rivers built or moved all to meet a pre-ordained aesthetic standard. Even if such were possible, the agreed upon price for the defendant's land was just $195,000 inclusive of HST. At that modest level, there is no reality to any notion of claiming damages to change or upgrade an alternative property so as to meet the plaintiffs' expectancies.

44 Practically speaking, the plaintiffs' damages would likely be limited to their legal fees and any moving or architects'

expenses thrown away on the aborted sale with the defendant. Put another way, the damages will put the plaintiff in the position as if the first sale had not occurred. This is a rescissionary measure. Damages cannot compensate them for uniqueness lost which they were entitled to expect.

45 From the defendant's perspective, it will be able to back out of a binding contract for sale by simply compensating the counter-party for expenses. It will not be required to pay for the reasonably foreseeable losses of the plaintiffs which are not readily quantifiable in money. When invited by the court to assist in assessing the proper measure of the plaintiffs' damages, the defendant's counsel respectfully declined to engage in hypotheticals. In all, I do not see monetary damages as being a comparatively fair or adequate measure of justice.

Summary Judgment is Appropriate

46 The defendant tries to raise contested facts so as to require a trial under a pre-*Hryniak* theory of summary judgment. Even on that basis, the question of whether the defendant's pond is fed by an artesian aquifer or whether development is available under zoning laws applicable to a narrow patch of environmentally sensitive land on the property are not factors which assist the court in determining the issues. There is no indication that the existence of the environmentally sensitive piece of the property will prevent the plaintiffs from building their proposed structures elsewhere on the property as they say. Nor does the fact that the pond may run dry in some summers affect the analysis.

47 The plaintiffs have answered the 24 alternatives put forward by the defendant. In *Southcott*, where fungible profit was the plaintiff's proposed use, the simple existence of other properties presented perfectly acceptable opportunities for profit. I cannot see how a trial in which there is an inquiry into the qualities of 24 pieces of vacant land at various locations in Prince Edward County would better inform the court in accordance with the tests set out in the case law concerning the plaintiffs' proposed uses of the property. Moreover, requiring the parties to pay for a battle of experts assessing the uniqueness of a large number of properties in subjective and objective terms is not efficient, affordable, or proportionate in the circumstances of these parties and a case involving a property worth less than $200,000. Such an inquiry is far too costly and offers far too little prospect of having any real probative value. See *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.), at para. 33.

48 The issue before the court is a narrow issue that can be readily resolved on the material before the court. For all of the forgoing reasons, I have confidence that I can find the necessary facts and apply the relevant legal principles to resolve this dispute. Doing so is in the interests of justice and promotes the most efficient, affordable and, especially, the most proportionate resolution of the dispute on the merits. *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.), at para. 66 *et seq*.

49 An order will therefore issue entitling the plaintiffs to specific performance of the agreement of purchase and sale with the defendant. If the parties need assistance as to the terms of such an order and the scheduling of the closing and the like, I may be spoken to.

Costs

50 The parties advised during the hearing that there may be relevant offer(s) to settle that could affect costs. Therefore, I deferred dealing with the issue pending the outcome. As summary judgment is granted, the costs include not just those of this motion but the full action. The plaintiffs may deliver written submissions of not more than 3 pages plus a Costs Outline by December 12, 2014. The defendant may respond subject to the same page limits by December 19, 2014. The plaintiffs may file a reply submission, if necessary, by December 23, 2014.

51 All submissions are to be made by pdf searchable attachments to emails to my Assistant. No case law should be enclosed. References to case law, if necessary, should be by hyperlinks to CanLII or an alternative resource embedded in the written submissions. If counsel need assistance with making pdf searchable attachments, reference should be had to the Guide to E-Delivery at http://www.ontariocourts. ca/scj/practice/practice-directions/edelivery-scj/.

52 Finally, I note that in all but rare cases the costs outcome, if not obvious, is well within experienced counsels' ability to

predict. While predictions may differ, the order of magnitude of the differences makes settlement readily available. Costs submissions should not be viewed as either a low cost way to take a shot at a ridiculous outcome or as a way to defer to a judge a difficult conversation with one's client. Counsel should be able to settle costs. If costs do not settle, counsel should be prepared to make submissions on the costs of the costs submission process. I will in that process look at the offers to settle costs made prior to the filing deadlines set above and assess whether anyone's conduct caused unnecessary or wasteful proceedings.

Motion granted.