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Gambling on **Specific** **Performance** and Mitigation in Real Estate Investment Cases: the Implications of Southcott Estates Inc. v. Toronto Catholic District School Board — — Hein Poulus and **Matthew** **Nied**

Mr. Justice Todd L. Archibald

[C] — I. INTRODUCTION From the perspective...

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I. INTRODUCTION

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From the perspective of the real estate developer, the land was "one-of-a-kind": it was nestled in the heart of the city, situated next to a school, and easily developable. Eager not to miss an opportunity, the developer purchased the property for the purpose of a residential development. When the deal later fell through as a result of the seller's breach of contract, the developer brought a claim seeking specific performance and damages in the alternative.

Consistent with industry practice, the developer had attempted to purchase the property through a subsidiary corporation incorporated solely for the purpose of purchasing and developing the property. However, once the breach occurred, the developer chose not to use the subsidiary to purchase a substitute property in mitigation. The developer decided to take that approach because it believed that the property was irreplaceable, and that using the subsidiary to mitigate while it was embroiled in litigation would give rise to legal and financial complications.

That case, *Southcott Estates Inc. v. Toronto Catholic District School Board*, did not end happily for the developer despite the fact that the defendant was undeniably in breach of contract. After nearly 8 years of litigation, the real estate developer ended up empty handed: the Supreme Court of Canada denied the developer both specific performance and damages.

The developer's likelihood of success would have been far greater not more than two decades ago. Specific performance was once almost invariably granted in cases involving breaches of contract for the purchase and sale of real estate. However, modern courts have greatly reduced its availability. As a result, a developer who seeks specific performance while declining to mitigate is rolling the dice in a high-stakes game with relatively poor odds.

While the decision in *Southcott* is at first blush a case about specific performance, it is on closer review a case about the uneasy relationship between specific performance and mitigation. Specifically, the decision addresses the challenging issue of when a plaintiff who has sought specific performance can be excused from the consequences of its failure to mitigate.

This article begins by canvassing the law of specific performance and mitigation with a focus on the origins of specific performance, the consequences of the plaintiff's ability to elect between specific performance and damages, the uneasy relationship between specific performance and mitigation, the resulting modern approach to specific performance, and the unavailability of specific performance in respect of investment properties. The article then turns to a discussion of the decision in *Southcott* and considers its implications for specific performance and mitigation in the real estate investment context.

II. SPECIFIC PERFORMANCE AND MITIGATION

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1. The Origins of Specific Performance

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The goal of contractual remedies is to protect the plaintiff's "expectation interest" by putting the plaintiff, so far as possible, into the position that he or she would have been in had the contract been performed. [1] The goal can be achieved in two ways: by awarding the plaintiff damages, or by granting specific performance and requiring the defendant to perform its obligation.

Conceptually, the plaintiff who seeks damages has accepted the defendant's repudiation and thereby put the contract to an end. In that case, both parties are relieved from performance and all that remains is the defendant's exposure to damages. Conversely, where the plaintiff seeks specific performance, the contract continues in force and neither party is relieved of its obligations.

Accordingly, the plaintiff who seeks specific performance must remain ready, willing and able to perform its side of the bargain. Therefore, where the plaintiff is a purchaser of real estate, it must have funds available to complete the transaction. Where the plaintiff is a seller, it must retain the subject property.

Specific performance is an equitable remedy. It was developed by the courts of equity for circumstances where damages for breach of contract are considered inadequate to compensate a plaintiff for her loss. Damages are considered inadequate where the subject matter of the contract cannot readily be replaced by a sum of money. That may be the case if the subject matter of the contract is unique, or if the calculation of damages requires too much speculation.

These principles are illustrated by the seminal case of *Adderley v. Dixon*. [2] There, the plaintiff assigned the debts of two bankrupts to the defendant in exchange for cash. When the defendant failed to make payment, the plaintiff sought the remedy of specific performance. The Court surveyed the law and observed that "Courts of Equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy". [3] Accordingly, a Court of Equity would order performance of a contract for land "not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value." [4]

The Court went on to explain that damages may not be an adequate remedy where the profit that the plaintiff might obtain if the contract were performed is too speculative. In such a case, forcing a plaintiff to accept damages rather than specific performance amounts to compelling the plaintiff to "sell the actual profit which may arise from it, at a conjectural price". [5] It was for this reason that the Court granted specific performance: it was uncertain whether dividends might become payable from the estates of the bankrupts, and the amount of any such dividends was uncertain.

In *Adderley*, damages would have been an adequate remedy for the plaintiff because the contract entitled him to a defined sum in exchange for the assignment. Nevertheless, the remedy of specific performance was available to the plaintiff on the doctrine of mutuality. That doctrine provides that specific performance should be available to an innocent vendor if it would be available to an innocent purchaser.

Specific performance eventually came to be widely accepted as an alternative remedy for damages in cases involving breaches of contracts for the purchase and sale of real estate. Land was regarded as unique on the theory that each parcel of land has special characteristics such that no two parcels are exactly identical. Because real estate was presumed to be unique, damages were typically considered an inadequate remedy. Accordingly, specific performance was almost invariably granted.

Specific performance also became widely available to sellers based on the doctrine of mutuality. This is so despite the fact that the vendor's claim for specific performance is just a claim for the purchaser's money, which is indistinguishable from a damages claim.

The nearly automatic availability of specific performance appears to have been driven by historical factors which imbued real estate ownership with considerable social significance. Land traditionally represented not only the foundation of wealth, but political and legal power as well as social status. [6] All of those are things that cannot be readily replaced by damages.

2. Electing Between Specific Performance and Damages

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It is standard practice for a plaintiff claiming specific performance to include in its pleadings an alternative claim for damages. This is largely due to the rule that a plaintiff is entitled to elect damages in lieu of specific performance. [7]

The ability of plaintiffs to seek specific performance and damages in the alternative provides plaintiffs with optionality between the time of breach and trial. The plaintiff can abandon specific performance and elect for damages any time before judgment. Because the claim for specific performance avoids the duty to mitigate, the assessment of damages is postponed until either specific performance becomes impossible or the plaintiff elects damages in lieu of specific performance. [8]

Market values will usually fluctuate over the period of time that passes between the date of breach and the date of trial. Damages are generally calculated based on the difference between the contract price and the market value on the date of assessment. As a result, the plaintiff's ability to abandon her claim for specific performance at any point before judgment and to pursue only her damages claim enables opportunism on the part of the buyer in a rising market. Similarly, it enables opportunism on the part of a seller in a falling market.

Where market values are rising, a buyer can maximize damages by electing not to accept the breach and seeking specific performance. That approach will postpone the date of assessment to a time as late as the date of judgment when the value of the property is potentially substantially higher than the contract price. In the result, the buyer obtains higher damages commensurate with the higher value of the property. The law accepts this result on the theory that the buyer would have enjoyed the appreciation in value of the property if the buyer had received specific performance.

Similarly, in a market where land values are declining, a seller can maximize damages by not accepting the breach and seeking specific performance. That approach will postpone the date of assessment to a time as late as the date of judgment when the value of the property is potentially substantially lower than the contract price. In the result, the seller obtains higher damages commensurate with the lower value of the property. The law accepts this result on the theory that the seller would not have suffered the loss in value of the property if the seller had received specific performance.

The nature of the windfall that arises differs depending on whether the plaintiff is a buyer or a seller. A plaintiff seller in a falling market is limited to seeking specific performance or damages to compensate it for the property's actual loss of value. However, a plaintiff buyer in a rising market can obtain damages in the nature of lost profit without ever having taken the economic risk of property ownership.

3. The Modern Approach to Specific Performance

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Courts have greatly reduced the potential for opportunism over the past two decades. Today, courts no longer invariably grant specific performance in real estate cases. Modern decisions have challenged and modified the principle that every

parcel of land is unique and reconsidered the presumptive inadequacy of damages. The result is that the availability of specific performance has been significantly diminished.

The law's evolution appears to have been driven by significant changes in the social, political, and economic significance of real estate, most notably its commoditization. The evolution also appears to be underlain with policy rationales: first, the policy of encouraging plaintiffs to obtain acceptable substitutes where possible in order to encourage economic activity and minimize economic waste; [9] and second, to avoid opportunistic behavior and unfair windfalls.

The decision of the Supreme Court of Canada in *Semelhago* is often regarded as the defining moment in that evolution. [10] In that case, the vendor refused to close a transaction for the sale of a residential property. The purchaser sued for specific performance and damages in the alternative. By the time of trial, the value of the property had increased considerably. Unsurprisingly, the purchaser then elected to receive damages in lieu of specific performance.

The issue of whether specific performance was appropriate was not raised before the Court. Nevertheless, Mr. Justice Sopinka noted the modern reality that "[r]esidential, business and industrial properties are all mass produced much in the same way as other consumer products". [11] Mr. Justice Sopinka then went on to declare that, as result of the commoditization of real estate, courts should no longer assume that damages are an inadequate remedy "absent evidence that the property is unique to the extent that its substitute would not be readily available". [12]

Unfortunately, *Semelhago* provided limited guidance with respect to the circumstances in which a property would be considered to be "unique to the extent that its substitute would not be readily available". [13] As a result, courts applied the decision in different ways. For example, the reasoning in some cases focuses on the particular unique attributes of the property and how they "relate to the proposed use of the property" and make the property "particularly suitable for the purpose for which it was intended." [14] In other cases, the reasoning focuses on whether there are readily available substitutes which meet the plaintiff's needs. [15] In general, however, most cases focus on the question of whether damages are inadequate and treat uniqueness and replaceability as factors in that analysis. [16]

4. The Uneasy Relationship Between Specific Performance and Mitigation

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Plaintiffs are not automatically insulated from the requirement to mitigate merely by instituting and pursuing proceedings for specific performance. The failure to mitigate will only be justifiable notwithstanding a failure to obtain an order for specific performance where circumstances reveal "some fair, real, and substantial justification" for the claim to specific performance or "a substantial and legitimate interest" in seeking specific performance.

In *Asamera*, a leading decision of the Supreme Court of Canada, the plaintiff sought specific performance to compel the return of corporate shares. [17] The case focused on whether the plaintiff was required to mitigate its damages by purchasing replacement shares in the market despite the plaintiff's claim for specific performance.

In considering the relationship between mitigation and specific performance, Mr. Justice Estey held that if the circumstances reveal a "substantial and legitimate interest in seeking performance as opposed to damages", or "some fair, real, and substantial justification for his claim to specific performance", a plaintiff will be able to "justify his inaction and on failing in his plea for specific performance might then recover losses which in other circumstances might be classified as avoidable and thus unrecoverable". [18] In all other cases, a plaintiff's failure to mitigate will not be excused by the fact that it claimed specific performance.

As a result of *Asamera*, a plaintiff's decision to decline to mitigate and seek specific performance is not without risk. If the plaintiff fails in her claim for specific performance, then her alternative claim to damages will be at risk if the court

finds that the plaintiff did not have "some fair, real, and substantial justification" for the claim to specific performance or "a substantial and legitimate interest" in seeking specific performance.

The problem is that it may be inconsistent for a plaintiff to mitigate for so long as they seek specific performance. Mitigating could undercut the plaintiff's claim that damages are inadequate. In addition, if the plaintiff purchased a property in mitigation, the plaintiff might not have adequate funds to complete the breached contract if successful in its claim for specific performance.

In order to establish a failure to mitigate, the defendant must establish two elements: that the plaintiff failed to make reasonable efforts to mitigate, and that mitigation was possible. [19] If those elements are proved, the plaintiff will be deprived of its damages to the extent that mitigation would have reduced them.

Courts have recognized that mitigation is a contextual doctrine based on fairness and common sense which seeks to do justice between the parties in the circumstances. [20] Accordingly, the plaintiff need not take unreasonable risks: it need only take the steps which a reasonable and prudent person would ordinarily take in the course of her business. [21]

5. The Unavailability of Specific Performance for Investment Properties

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Semelhago significantly reduced the availability of specific performance in cases involving investment properties. Following the decision, courts routinely held that specific performance is not an appropriate remedy with respect to property purchased as an investment because any loss of profit is compensable in damages. [22] Although some real estate developers have argued that certain properties are "unique" because they have qualities which make them "uniquely good investments", courts have typically held that such qualities are only valuable for their potential to further profitability. In that case, any loss is generally appropriately remedied by damages. [23]

Some real estate developers have made creative and sometimes successful attempts to obtain specific performance in the wake of *Semelhago*. In general, these plaintiffs have relied on unique physical, commercial, or transactional attributes of the property. For example, one property developer unsuccessfully argued that specific performance was necessary for a large tract of land in order to maintain its competitive market position and reputation as a property developer. [24] In other cases, developers assembling related parcels of land have been granted specific performance. [25] In another case, the court implicitly held that a purchase of land for the purpose of building and operating a hotel was distinguishable from a purchase of the land as an investment and found that specific performance was justified because the land was uniquely situated in terms of being able to attract business for the hotel. [26]

In some cases, courts have accepted that investment property can be sufficiently unique for the purposes of specific performance where it has a quality that makes it "especially suitable for the proposed use and that cannot be reasonably duplicated elsewhere". [27] These cases can be difficult to reconcile with general principles. A purchaser will typically have no interest in properties for investment or resale purposes unless they believe that they can generate a profit. Accordingly, monetary damages will generally be adequate unless it can be fairly said that the income-producing potential of the land, or its resale value, is unusually difficult to assess. For example, a developer that was intending to purchase a hotel and convert it into condominiums argued that profits were speculative because at the time of the purchase it was unknown what conditions would be placed on the required planning consent to convert the hotel to condominiums or what number of units would be approved. [28] In another case, a property developer argued that the fact that a contemplated development would span a lengthy period of time made the quantification of damages speculative and that it justified specific performance. [29]

III. *SOUTHCOTT ESTATES*

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1. Background

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Having canvassed the law of specific performance and mitigation, we now turn to the decision of the Supreme Court of Canada in *Southcott*. In that case, the Court revisited the relationship between specific performance and mitigation and considered when a plaintiff that seeks but fails to obtain specific performance will be excused from failing to mitigate.

The appellant, Southcott Estates Inc. ("Southcott"), was a wholly owned subsidiary of Ballantry Homes Inc. ("Ballantry") and part of a larger group of associated companies called the Ballantry Group of Companies that acquired and developed land in the Greater Toronto Area ("GTA").

Southcott entered into an agreement of purchase and sale to purchase a 4.78 acre parcel of land in the GTA from the Toronto Catholic District School Board (the "Board"). The property was part of a larger parcel used by the Board for school purposes which had been declared surplus to the Board's needs. Southcott sought to purchase the property for the purpose of developing it with single-family homes.

Southcott was a single-purpose corporation created for the sole purpose of purchasing and developing the property. As a result, Southcott had limited liability and no assets other than money advanced by Ballantry for the deposit on the property. Ballantry's use of Southcott for this purpose was consistent with general practices: developers would incorporate single-purpose subsidiaries and then provide them with just enough assets to purchase and develop individual properties. The objective was to insulate each project from any legal liabilities arising out of others.

The contract provided that the Board was to use best efforts acting in good faith to obtain consent to the severance of the property from the committee of adjustments. The Board did not obtain the severance by the closing date, refused to extend the closing date, and then took the position that the contract was terminated.

Southcott promptly commenced an action claiming specific performance and damages in the alternative. As is common, Southcott claimed consequential losses flowing from the loss of profits contemplated from a successful residential development had the contract been performed. Southcott made no attempt to mitigate.

2. Trial

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The issues at trial were (1) whether the Board breached its obligation to use best efforts acting in good faith to obtain the severance within the required time; (2) if so, whether that breach caused the plaintiff's loss, and, if so, whether Southcott was entitled to specific performance; and (3) if Southcott was not entitled to specific performance, what damages should be awarded. [30]

Mr. Justice Spiegel of the Ontario Superior Court of Justice concluded that the Board had breached its obligation to use its best efforts to obtain the severance and that the breach caused the plaintiff some loss, namely the chance of closing the transaction. [31]

The trial judge then turned to consider whether specific performance was an appropriate remedy. Southcott argued that specific performance was appropriate because the property was unique for its intended purpose and a substitute was not readily available. Southcott pointed to the fact that the property was within the GTA, relatively small in size, situated next to a school, and surrounded by good quality residential development. In addition, Southcott argued that specific performance was appropriate because the calculation of damages required speculation.

The Board argued that Southcott was not entitled to specific performance because Southcott intended to acquire the property as an investment to develop and resell at a profit. All of the factors relied upon by Southcott to support its claim that the property was unique were simply qualities that would make the development more profitable. The Board also argued that any difficulty in assessing damages did not make the remedy of specific performance appropriate because the calculation of loss or profit had been largely agreed upon by the parties.

The Court held that specific performance was not an appropriate remedy because the property had been purchased for investment purposes and had "qualities which related solely to the profitability of the development". As a result, the property did "not have the quality of uniqueness, beyond that of being, perhaps, a uniquely good investment". [32] As a result, any loss was compensable in damages. The Court also held that the calculation of damages was not so difficult as to be conjectural or speculative in light of the parties' agreement as to loss of profit.

The trial judge then turned to consider whether Southcott's failure to mitigate was unreasonable. The Board argued that Southcott mitigated through the purchase of land by Ballantry's other subsidiary companies. In support, the Board led evidence that other subsidiaries purchased several parcels of comparable land for development purposes during the same period.

In the alternative, the Board argued that if Southcott did not mitigate through the purchase of land by other subsidiary companies, then those other purchases were evidence that comparable land was available for purchase and development. The Board argued that Southcott failed to mitigate its damages by failing to pursue these properties.

In support of its argument that there were properties available for mitigation, the Board led expert evidence that 81 parcels of vacant development land in the GTA were sold between the date of breach and the date of trial and that in the same period 49 properties subdivided into lots suitable for building were also sold. The expert evidence also indicated that the land was suitable for residential developments and within the parameters of size and price of other lands purchased by the subsidiaries.

Southcott argued that there was no reasonable opportunity to mitigate because there were no comparable properties available for sale. Southcott also argued that Ballantry was always in the market for new land, had the financial means to make the purchases, and that the purchases of property by other subsidiaries of Ballantry would have occurred even if Southcott had completed the purchase of the property.

Southcott also relied on the fact that it was a single-purpose company incorporated solely to purchase and develop the property and that it had no other assets other than money advanced to it by Ballantry for the deposit. Southcott argued that it was never intended that it would purchase other land, and Southcott's principal testified that there was no question of Southcott purchasing other land given that it was involved in the litigation.

The trial judge held that the Board had not discharged its onus of proving that Southcott mitigated its loss through the purchases by other subsidiaries. In the Court's view, Ballantry had the financial capacity to make the other purchases and they would have occurred irrespective of the breach. The purchases were not mitigatory because they "were collateral, independent transactions that did not arise out of the consequences of the breach". [33]

The trial judge also held that the Board had not discharged its onus of proving that Southcott failed to take advantage of a reasonable opportunity to mitigate. The trial judge was not satisfied that the evidence established that there were comparable properties or that Southcott's loss would have been avoided if Southcott had purchased them. In particular, the trial judge noted that there was no evidence that the properties referenced in the expert evidence were "available to the public for sale", or that the properties "could have been profitably developed". As a result, it was not clear that the properties were capable of avoiding or reducing Southcott's losses. [34]

Turning to damages, the trial judge observed that the parties had agreed that there was no evidence that the property had increased in value between the date of the contract and the breach or trial. As a result, the plaintiff had no claim for loss of bargain. Its only claim was for consequential damages flowing from the loss of profits envisaged from a successful residential development had the contract been performed. Because the development was conditional on securing planning consent — which was uncertain — the Court's damages assessment engaged a loss of chance analysis.

The parties agreed as to how the plaintiff's loss was to be calculated. Accordingly, the amount depended only on a finding as to the timing of the development process. The trial judge made that finding and concluded that there was a reasonable possibility that the transaction would have been completed had the Board fulfilled its obligations. The trial judge found that Southcott's chance of successfully completing the transaction was 60%, and applying this percentage to the finding of lost profits, awarded damages in the amount of $1,935,500. [35]

3. Court of Appeal

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The Board appealed on two bases. The first basis was that the trial judge erred in finding that the breach caused the transaction to fail. The second basis was that the trial judge erred in finding that Southcott did not fail to mitigate. The Board did not challenge the finding that the Board breached its obligation to use best efforts to complete the sale.

Mr. Justice Sharpe penned the unanimous decision of the three-member panel of the Ontario Court of Appeal. The Court of Appeal concluded that while the trial judge correctly found that the Board had breached the contract he had "erred in his approach to mitigation". [36] The Court made three key holdings.

First, the Court held that Southcott's admission that it had no intention to mitigate was sufficient to satisfy the onus resting on the Board to prove failure to mitigate. The evidentiary onus shifted to Southcott to demonstrate that, even if it had attempted to mitigate, it could not. Southcott had led no evidence to that effect.

Second, the Court held that the trial judge erred in the manner in which he dealt with the evidence led by the Board regarding the land available for mitigation. In particular, the Court held that by requiring the Board to prove the precise manner in which the land had been sold, or to prove the profitability of individual parcels, the trial judge had raised the bar the Board had to satisfy to an unrealistic level.

Third, the Court held that the trial judge erred in the manner in which he dealt with the evidence of purchases made by other Ballantry subsidiaries. The Court held that those purchases clearly demonstrated that the directing mind of Southcott knew that investment quality lands suitable for profitable development were available.

The Court did not conduct an analysis of the reasonableness of the alleged mitigation opportunities or assess whether the loss could have been avoided or reduced. This is presumably because the Court concluded that the burden of proof with respect to mitigation rested with Southcott.

In reaching its decision, the Court held that Southcott could not avoid mitigating its loss by arguing that it was a part of the Ballantry group. This is because the obligation to mitigate rested with Southcott:

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> 27 The plaintiff in this case was Southcott, a distinct legal entity, and the issue is whether it took reasonable steps to mitigate its damages. Southcott cannot escape or avoid its duty to mitigate damages by arguing that it was a part of Ballantry and that Ballantry would have purchased the other lands even if this transaction had not failed. Thus, the duty to mitigate rests upon Southcott. Southcott decided not to take any steps to mitigate damages. Ballantry's actions demonstrate that other good quality investment properties were available and that Southcott could have

> mitigated its losses. The controlling mind of Southcott decided not to put any assets in Southcott's name to avoid exposing those assets to the risks associated with Southcott's litigation against the Board. Southcott and Ballantry were certainly entitled to claim the legal benefit of limited liability by virtue of Southcott's distinct legal personality. However, Southcott and Ballantry also have to live with the consequences of the fact that because Southcott has a distinct legal personality, it is able to assert a claim for damages and, as a party asserting that claim, it thus bears the ordinary duty of mitigating its loss.
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> 28 In my view, it is clear that Southcott, and those controlling Southcott, flatly repudiated or, at the very least, sought to avoid the legal duty imposed upon Southcott to mitigate its loss by purchasing property that would have mitigated Southcott's loss in the name of other newly corporate entities and to, thereby, isolate such property from the legal consequences arising from this action. [37]

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The Court concluded that Southcott unreasonably failed to mitigate. As a result, Southcott failed to make out a case for either specific performance or damages. As a result, the Court allowed the appeal, set aside the judgment, and substituted a judgment in Southcott's favour for nominal damages in the amount of $1. [38]

4. Supreme Court of Canada

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The key issues on appeal were (1) whether Southcott was, as a single-purpose corporation, required to mitigate its losses; (2) whether Southcott's claim to specific performance justified its failure to mitigate; and (3) whether the trial judge erred in concluding that there was no evidence of reasonable opportunities to mitigate. The majority affirmed the Court of Appeal's decision. McLachlin C.J.C. dissented. [39]

The Court began by considering Southcott's unique status as a single-purpose corporation. [40] Southcott argued that as a single purpose corporation it was impecunious and unable to mitigate without a significant capital investment from Ballantry. Southcott also argued that it would be reasonably foreseeable to those contracting with a single-purpose corporation that such an entity would have finite resources and a confined corporate mandate.

The Court noted that there was no actual evidence of impecuniosity. The Court also noted that Southcott had sought specific performance and was therefore ready to complete the purchase. In addition, Southcott's alternative claim for consequential damages was predicated upon access to capital to complete the transaction. [41] Accordingly, both claims were premised on resources that were not tied up as a result of the alleged breach. Because the alleged breach did not affect Southcott's ability to obtain capital, the Court concluded that Southcott could not argue that the same funds would not have been available for mitigation.

The Court also noted that it had not been suggested at trial that Southcott had no access to capital, or that borrowing money would have been unreasonably risky or costly. [42] In the Court's view, finding that losses could not be reasonably avoided in the absence of actual evidence of impecuniosity simply because the entity is a single-purpose corporation within a larger group of companies would give an unfair advantage to those conducting business through single-purpose corporations. The Court also expressed concern that not requiring single-purpose corporations to mitigate would expose defendants contracting with such corporations to higher damage awards than those claimed by other plaintiffs.

Like the Court of Appeal, the Court also held that Southcott's status as a single purpose corporation did not make the properties purchased by other Ballantry subsidiaries "unavailable for mitigation". As a separate legal entity, Southcott had its own duty to mitigate:

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> [30] The trial judge found that the purchases of development land by other corporations within the Ballantry Group did not in fact mitigate Southcott's loss; that finding is not challenged here. As noted above, he found that the other properties purchased by other members of the Ballantry group were "collateral" in the sense that the purchases would have occurred whether or not the defendant had breached its contract with Southcott (para. 143). However, because Southcott is a separate legal entity, purchases by other Ballantry corporations of other comparable property did not make those properties "unavailable" for mitigation. As a separate legal entity, Southcott was required to mitigate by making diligent efforts to find a substitute property. Those who choose the benefits of incorporation must bear the corresponding burdens: *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2, at pp. 10-12. Southcott is entitled to the benefits of limited liability, but it is also saddled with the responsibilities that all legal entities have. The requirement to take steps to mitigate losses is one such responsibility. A plaintiff cannot recover losses that could reasonably have been avoided. The overriding issue here is whether Southcott's inaction was reasonable, and if not, whether it could have reasonably mitigated if it had tried to do so. [43]

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The Court then turned to consider whether Southcott's decision to seek specific performance could justify its failure to mitigate. [44] Southcott argued that its claim to specific performance had substance because the property was a unique investment opportunity and it had brought its claim expeditiously.

The Court concluded that Southcott's refusal to mitigate was not reasonable. In reaching this conclusion, the Court relied on the principle, originating from *Asamera* and *Semelhago*, that a plaintiff deprived of an investment property does not have a "fair, real, and substantial justification" or a "substantial and legitimate" interest in seeking specific performance. [45] Southcott could not justify its inaction because it was engaged in a commercial transaction for the purpose of making a profit. As a result, the property's particular qualities were only of value due to their ability to further profitability. In addition, this was not a case in which damages were too speculative to be an adequate remedy.

The Court then turned to consider whether mitigation was possible. [46] The Court held that the trial judge should have drawn the inference that if the 81 properties available during the period were offered for sale and were in fact sold then some investment properties were available to Southcott for mitigation. The Court also held that the trial judge failed to draw inferences regarding the profitability of those properties based upon the size and price of the property or the fact that the land had been purchased for development purposes by experienced developers.

The Court also held that the trial judge erred in failing to consider whether the purchases by the other Ballantry subsidiaries provided evidence of other profitable properties available for mitigation. [47] In the Court's view, the properties could not be considered "unavailable" for mitigation because Southcott was a separate legal entity. [48] It was a choice on the part of the principals of Ballantry as to which corporate entity would be used for each purchase. Had Ballantry wanted to mitigate Southcott's loss, it could have used Southcott to acquire a different development project.

The Court therefore dismissed the appeal. Chief Justice McLachlin dissented largely based on a different interpretation of the facts. In particular, McLachlin C.J.C. concluded that the trial judge's finding that the Board had not proved that Southcott had an opportunity to mitigate was grounded in the evidence and should not be disturbed. [49] Chief Justice McLachlin accepted that there were no comparable properties available for mitigation and would have required the Board to adduce stronger evidence that the allegedly comparable properties were sufficiently similar to the subject property.

Chief Justice McLachlin went on to observe that if an opportunity to mitigate did exist, then Southcott did not act unreasonably in maintaining its claim to specific performance instead of mitigating its loss. [50] Her reasoning noted the potential inconsistency between mitigating and simultaneously seeking specific performance:

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> [93] The act of filing a claim for specific performance is inconsistent with the act of acquiring a substitute property. A plaintiff, acting reasonably, cannot pursue specific performance and mitigate its loss at the same time. It makes no sense for a reasonable plaintiff seeking specific performance to effectively concede defeat and buy a substitute property. The plaintiff could end up with two properties — one it wanted and one it did not. Furthermore, an action for specific performance is often motivated by the unavailability of substitutes in the marketplace. A plaintiff's reasonable claim that substitutes are unavailable is inconsistent with the ability to acquire a substitute in the marketplace . . . [51]

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Chief Justice McLachlin also held that the fact that Southcott failed to obtain specific performance did not mean that Southcott lacked a "fair, real, and substantial justification" for maintaining its claim to specific performance.[52] Chief Justice McLachlin accepted that the property was "uniquely suited to Southcott's needs". She also impliedly accepted that specific performance can be available for an investment property if it has physically unique characteristics suited to the plaintiff's needs:

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> [94] In the end, the trial judge dismissed the claim for specific performance. However, that does not mean that Southcott acted unreasonably in pursuing the claim. Whether a plaintiff had a "fair, real, and substantial justification" for maintaining a specific performance claim is a different question from whether specific performance should be granted at the conclusion of the trial when all the evidence is in and appraised by the trial judge. Plaintiffs can never be certain that an action for specific performance will succeed, particularly as this is an equitable, discretionary remedy.
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> [95] The trial judge, while ultimately rejecting Southcott's claim for specific performance, did not find that Southcott acted unreasonably in pursuing that remedy. Nor does there appear to be a basis for such a finding. It can be fairly argued that Southcott did not act unreasonably in pursuing specific performance of the contract. The property was uniquely suited to Southcott's needs for single-family residential development within the City of Toronto. Though the common law presumption of the uniqueness of real property no longer holds, a claim for specific performance may still be reasonable if a property has unique characteristics such that a substitute property is not readily available[.] Southcott's contention that there was no comparable substitute property found support in the evidence. [53]

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Chief Justice McLachlin also accepted that Southcott lacked the financial resources necessary to mitigate. This is because Southcott was a single-purpose company with no assets other than the deposit funds advanced to it by Ballantry.[54] In McLachlin C.J.C.'s view, Southcott was dependent on Ballantry for funds and there was no evidence that Southcott could have obtained other financing.

IV. DISCUSSION AND IMPLICATIONS

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1. Approach to Mitigation

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The Court was faced with choosing between two approaches to its mitigation analysis. The first approach was to treat Southcott as a standalone company for the purposes of mitigation. The second, broader approach was to view Southcott's "duty" to mitigate from the perspective of the entire corporate group.

The majority adopted the first approach, which, at first blush, seems analytically consistent with the doctrine of separate corporate personality. However, in having taken that approach, the majority's reasoning is internally inconsistent. While the majority viewed Southcott as a standalone entity for the purposes of assessing whether Southcott had opportunities to mitigate, the majority, without purporting to pierce the corporate veil, took account of the fact that Southcott was a subsidiary of Ballantry for the purposes of assessing whether Southcott had capital available to mitigate. The majority did so even though there was no evidence that Ballantry was under any obligation to provide financing.

In order to be consistent in its mitigation analysis, the majority would have had to conclude, as did McLachlin C.J. in her dissenting reasons, that Southcott lacked the financial resources necessary to acquire and develop a substitute property. That holding would have reflected Southcott's reality as a single-purpose corporation. Because it had no assets other than the deposit advanced to it by Ballantry, it had little prospect of acquiring an alternative property except with capital supplied by Ballantry, either directly or by guaranteeing Southcott's obligations to a third-party lender.

Although viewing Southcott's duty to mitigate from the perspective of the entire corporate enterprise would have more closely reflected economic realities, doing so would have given rise to analytical challenges. As a preliminary matter, the Court would have had to find some legal justification for ignoring the corporate veil. Although creating a mitigation-specific exception could have been supported to some extent by the context-driven nature of the mitigation analysis, doing so might have led to unintended consequences in other cases.

Even if the Court had found a legal justification for ignoring the corporate veil, it would then have had to make findings regarding the corporate enterprise's ability to mitigate. In particular, the Court would have had to determine (1) whether Ballantry had the capital and management necessary to execute all of the projects that it bought in addition to the Southcott project; (2) whether other profitable projects were available; and, (3) if so, what profit would have been generated by pursuing the most promising of those other projects.

If Ballantry had the capital and management necessary to execute all of the projects that it bought in addition to the Southcott project, and there were no other profitable projects, then the loss of the profit that Ballantry could have made on the Southcott project was a true loss to Ballantry that could not have been avoided through mitigation. Put another way, using Southcott for another purchase in those circumstances would not have avoided a loss for the corporate enterprise as a whole. If Southcott had mitigated by purchasing a property pursued by another Ballantry subsidiary, Southcott would effectively have cannibalized a corporate opportunity.

One might argue that the majority's approach is fair because Ballantry should be saddled with the burdens as well as the benefits of purchasing the property through a shell corporation. Because the shell had limited assets, Ballantry could back out of the transaction with minimal exposure in the event that land values declined. In that case, the Board would have been unable to recover damages in excess of the deposit funds held by Southcott. Although that gives rise to some asymmetry in the parties' positions, that asymmetry is a contracted outcome with which courts should arguably not interfere. If the Board had concerns about conducting business with a shell corporation, it could have insisted on a guarantee from Ballantry.

2. Availability of Specific Performance

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The decision also confirms that specific performance is generally not an appropriate remedy when property is purchased as an investment. This is because any unique attributes relevant to profitability will generally be reflected in profits from the investment and will therefore be compensable in damages.

Most post-*Southcott* jurisprudence is consistent with that proposition. In one recent case, an appellate court found that the size, location, and single ownership nature of a property, which factors supported a finding of uniqueness at trial, merely optimized the land's use with a view to maximizing profits. [55] Accordingly, as in *Southcott*, the plaintiff could not show that money was not a complete remedy. Rather, the land's particular qualities were only of value due to their ability to further profitability for which damages were an adequate remedy. [56]

Southcott also confirms that a plaintiff's failure to obtain specific performance is not necessarily fatal. As in *Asamera* and *Semelhago*, *Southcott* confirms that a plaintiff who fails to obtain specific performance may be excused from mitigating where it meets the test of showing that it had a "substantial justification" or a "substantial and legitimate interest" in seeking specific performance. However, as in *Asamera* and *Semelhago*, the Court left unclear how that test relates to the test for obtaining specific performance.

The Court made several comments which might be read to mean that the tests are effectively identical. For example, the Court noted that the "overriding issue" in the tests for both mitigation and specific performance is reasonableness, [57] that the "general principles governing mitigation [also] apply to a plaintiff seeking specific performance", [58] and that "a claim for specific performance informs what is reasonable behavior for the plaintiff in mitigation." [59]

In light of these comments, it seems likely that the same factors leading to a conclusion that the test for specific performance is not met will lead to the conclusion that the failure to mitigate was unreasonable. [60] It is difficult to imagine facts upon which a court would conclude that a breach of a contract for the purchase and sale of an investment property was compensable in damages, but go on to find that the plaintiff had "substantial justification" or a "substantial and legitimate interest" in seeking specific performance in the first place. Although such an outcome is theoretically possible, hindsight will likely render it exceedingly rare.

Southcott is illustrative of this difficulty. The Chief Justice held that the property had characteristics that made it "uniquely suited to Southcott's needs for single-family residential development within the City of Toronto" and that "Southcott's contention that there was no comparable substitute property found support in the evidence." Although McLachlin C.J.C. held that it was therefore arguable that Southcott did not act unreasonably in pursuing its claim of specific performance, there was no agreement from any of her Supreme Court colleagues or any of the four judges below.

As a result, any plaintiff who seeks specific performance with respect to an investment property faces a high-stakes gamble with poor odds. If the plaintiff declines to mitigate and claims specific performance, it runs the risk that a court will find that damages are adequate, which will then likely lead to the conclusion that the failure to mitigate was unreasonable. In that case, the plaintiff will be left with nothing: that is, without the subject property and without damages.

The only prudent choice in most cases is therefore to accept the breach, mitigate the losses to the extent possible, and claim damages for whatever losses cannot be mitigated. Where the disappointed purchaser is a single-purpose corporation, mitigating will require it to take on legal liabilities and risks that could be avoided by purchasing the property with a different corporate vehicle that is not embroiled in litigation. Whether those risks are worth the benefit will depend on the exercise of business judgment in the particular circumstances of each case.

Although a plaintiff could try to avoid the risk of claiming specific performance by simultaneously purchasing a substitute property in mitigation, such an act could undercut the plaintiff's claim that damages are inadequate. That approach would also require the plaintiff to have access to enough capital to purchase the replacement and complete the breached contract. Even if the plaintiff succeeded in obtaining specific performance, the victory might well be pyrrhic. As McLachlin C.J.C. recognized, "[t]he plaintiff could end up with two properties — one that it wanted and one it did not." [61]

On the other hand, the decision is a rosy development for breaching parties, who now have significantly less exposure. The risk inherent in seeking specific performance will likely dissuade most plaintiffs from pressing such claims. In addition, because disappointed parties are now encouraged to mitigate, breaching parties likely have less exposure to damages. Although breaching parties still face the risk of specific performance or higher damages when a plaintiff later elects for damages in a rising market, such situations are likely rare.

The decision has also helpfully clarified the changes wrought by *Semelhago*. One problem with the law post-*Semelhago* was the difficulty in assessing when a property was "unique to the extent that its substitute is not readily available". Because courts were inconsistent with respect to the application of this test, seeking specific performance was an uneasy gamble. Although *Southcott* has made the odds of that gamble far less appealing for would-be plaintiffs, the increased commercial certainty is undoubtedly a positive development. While disappointed parties may not like the prospect of having to accept a breach, swallow their pride, and move on to the next investment opportunity, at least they now know that it is probably their best bet.

Footnotes

1 Waddams, S., *The Law of Damages*, (Canada Law Book: 1998) at 5.20 and 5.30.

2 *Adderley v. Dixon* (1824), 1 Sim. & St. 60, 57 E.R. 239 (Eng. V.-C.) at p. 241.

3 *Adderley v. Dixon* (1824), 1 Sim. & St. 60, 57 E.R. 239 (Eng. V.-C.) at p. 240.

4 *Adderley v. Dixon* (1824), 1 Sim. & St. 60, 57 E.R. 239 (Eng. V.-C.) at p. 240.

5 *Adderley v. Dixon* (1824), 1 Sim. & St. 60, 57 E.R. 239 (Eng. V.-C.) at p. 241.

6 See e.g. Cohen, "The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry" (1982), 32 U. of T. L.J. 21 at p. 54.

7 *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.) at para 11.

8 *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.) at paras. 12, 13.

9 *Domowicz v. Orsa Investments Ltd*, 1993 CarswellOnt 1860 (Gen. Div.).

10 *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.); The Court's decision was not completely novel. Prior to the decision, several lower courts had declined to grant specific performance in respect of property purchased for investment purposes for similar reasons: see e.g. *Heron Bay Investments Ltd. v. Peel-Elder Developments Ltd.* (1976), 2 C.P.C. 338 (H.C.); *Chaulk v. Fairview Construction Ltd.* (1977), 14 Nfld. & P.E.I.R. 13 (C.A.).

11 *Semelhago v. Paramadevan*, *ibid.* at para. 20.

12 *Semelhago v. Paramadevan*, *ibid.* at paras. 20-22.

13 *Semelhago v. Paramadevan*, *ibid.* at para. 22.

14 See e.g. *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2003), 63 O.R. (3d) 304 (C.A.); leave to appeal refused 2003 CarswellOnt 4375 (S.C.C.) at para. 39.

15 See e.g. *1244034 Alberta Ltd. v. Walton International Group Inc.*, 2007 ABCA 372 (C.A.); leave to appeal refused 2008 CarswellAlta 615 (S.C.C.).

16 See e.g. *Raymond v. Raymond Estate*, 2011 SKCA 58 (C.A.).

17 *Asamera Oil Corp. v. Sea Oil and General Corp.*, [1979] 1 S.C.R. 633 (S.C.C.); varied 1979 CarswellAlta 201 (S.C.C.).

18 *Asamera Oil Corp. v. Sea Oil and General Corp.*, [1979] 1 S.C.R. 633 (S.C.C.) at pp. 668-669, ; varied 1979 CarswellAlta 201 (S.C.C.).

19 *Asamera Oil Corp. v. Sea Oil and General Corp.*, [1979] 1 S.C.R. 633 (S.C.C.); varied 1979 CarswellAlta 201 (S.C.C.).

20 *Redpath Industries Ltd. v. Cisco*, [1994] 2 F.C. 279 (C.A.) at para. 77, 79, ; leave to appeal refused 1994 CarswellNat 2816 (C.A.); leave to appeal refused (1994), 116 D.L.R. (4th) vii (note) (S.C.C.).

21 *Redpath Industries Ltd. v. Cisco*, [1994] 2 F.C. 279 (C.A.) at para. 70, ; leave to appeal refused 1994 CarswellNat 2816 (C.A.); leave to appeal refused (1994), 116 D.L.R. (4th) vii (note) (S.C.C.).

22 See e.g. *Domowicz v. Orsa Investments Ltd.* (1994), 20 O.R. (2d) 722 (Gen. Div.); varied (1998), 40 O.R. (3d) 256 (C.A.); See e.g. *Chaulk v. Fairview Construction Ltd.* (1977), 14 Nfld. & P.E.I.R. 13 (C.A.); See e.g. *Heron Bay Investments Ltd. v. Peel-Elder Developments Ltd.* (1976), 2 C.P.C. 338, [1976] O.J. No. 1403 (H.C.) at para. 4; *Tsang v. 853908 Ontario Inc.*, 1995 CarswellOnt 4354, [1995] O.J. No. 722 (Gen. Div) at para. 8.

23 See e.g. *Heron Bay Investments Ltd. v. Peel-Elder Developments Ltd.* (1976), 2 C.P.C. 338, [1976] O.J. No. 1403 (H.C.) at para. 4; See also *Chaulk v. Fairview Const. Ltd.* (1977), 14 Nfld. & P.E.I.R. 13 (C.A.) at p. 21.

24 *410675 Alberta Ltd v. Trail South Developments Inc.*, 2001 ABCA 274 (C.A.); leave to appeal to S.C.C. refused 2002 CarswellAlta 696.

25 *2475813 Nova Scotia Ltd. v. Lundrigan* (2003), 213 N.S.R. (2d) 53, 13 R.P.R. (4th) 197 (S.C.); additional reasons 2003 NSSC 67, 2003 CarswellNS 106 (S.C.); *11 Suntract Holdings Ltd. v. Chassis Service & Hydraulics Ltd.* (1997), 36 O.R. (3d) 328, 15 R.P.R. (3d) 201 (Gen. Div.); additional reasons 15 R.P.R. (3d) 234 (Gen. Div.); additional reasons further 1998 CarswellOnt 856 (Ont. Gen. Div.).

26 *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), 56 O.R. (3d) 341, 46 R.P.R. (3d) 239 (S.C.J.) at p. 356 [O.R.], ; affirmed (2003), 223 D.L.R. (4th) 541, 63 O.R. (3d) 304 (C.A.); leave to appeal refused 2003 CarswellOnt 4376 (S.C.C.).

27 *1252668 Ontario Inc. v. Wyndham Street Investments Inc.* (1999), 27 R.P.R. (3d) 58, [1999] O.J. No. 3188 (S.C.J.) at para. 23, ; additional reasons 91 A.C.W.S. (3d) 303 (Ont. S.C.J.); leave to appeal to allowed 92 A.C.W.S. (3d) 302 (Ont. S.C.J.); See also *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), 56 O.R. (3d) 341, 46 R.P.R. (3d) 239 (S.C.J.) at p. 356 [O.R.], ; affirmed (2003), 223 D.L.R. (4th) 541, 63 O.R. (3d) 304 (C.A.); leave to appeal refused 2003 CarswellOnt 4376 (S.C.C.); *Cross Creek Timber Traders Inc. v. St. John Terminals Ltd.* (2002), 248 N.B.R. (2d) 201, 49 R.P.R. (3d) 35 (Q.B.).

28 *Carttera Management Inc. v. Palm Holdings Canada Inc.* (2011), 9 R.P.R. (5th) 155 (S.C.J. [Commercial List]).

29 See e.g. *Neighbourhoods of Cornell Inc. v. 1440106 Ontario Ltd.* (2003), 11 R.P.R. (4th) 294 (Ont. S.C.J.) at para. 112, ; affirmed 187 O.A.C. 218 (C.A.); leave to appeal refused 2005 CarswellOnt 93 (S.C.C.).

30 *Southcott Estates Inc. v. Toronto Catholic District School Board*, [2009] O.J. No. 428 (S.C.J.) [Trial reasons], ; varied 2010 CarswellOnt 2602 (C.A.); additional reasons 2010 CarswellOnt 4721 (C.A.); affirmed 2012 CarswellOnt 12505 (S.C.C.).

31 Trial reasons at para. 116.

32 Trial reasons at para. 128.

33 Trial reasons at para. 143.

34 Trial reasons at para. 144.

35 Trial reasons at para. 164.

36 *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2010 ONCA 310, ¶23 (C.A.) [Appeal reasons], ; additional reasons 2010 CarswellOnt 4721 (C.A.); affirmed 2012 CarswellOnt 12505 (S.C.C.).

37 Appeal reasons at para. 27-28.

38 Appeal reasons at para. 29-30.

39 *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 [SCC reasons].

40 SCC reasons at para. 26.

41 SCC reasons at para. 29.

42 SCC reasons at para. 28.

43 SCC reasons at para. 30.

44 SCC reasons at para. 44.

45 SCC reasons at para. 35.

46 SCC reasons at para. 40.

47 SCC reasons at para. 55.

48 SCC reasons at para. 55.

49 SCC reasons at para. 65.

50 SCC reasons at para. 92.

51 SCC reasons at para. 93.

52 SCC reasons at para. 94.

53 SCC reasons at para. 94-95.

54 SCC reasons at para. 96.

55 *101090442 Saskatchewan Ltd. v. Harle*, 2014 SKCA 6 (C.A.) at paras. 96, 101.

56 *101090442 Saskatchewan Ltd. v. Harle*, 2014 SKCA 6 (C.A.). See also *Interrent International Properties Inc. v. 1167750 Ontario Inc.*, 2013 ONSC 4746 (S.C.J.) at paras. 33-36, ; additional reasons 2013 CarswellOnt 14200 (S.C.J.); *180 University Residential Limited Partnership v. Yours Asia Corp.*, 2014 ONSC 1761 (S.C.J.) at paras. 12-13. However, the BC Court of appeal has recently emphasized that there is no categorical presumption that damages are appropriate for claims involving commercial property. Although there is no longer a presumption that specific performance is available for claims to land, it remains open to a claimant to show that specific performance of a contract respecting commercial property is an appropriate remedy. See *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 at paras. 54-58.

57 SCC reasons at para. 39.

58 SCC reasons at para. 37.

59 SCC reasons at para. 36.

60 See *1092369 Alberta Ltd. v. Joben Investments Ltd.*, 2013 ABQB 310 (Q.B.) at para. 138.

61 SCC reasons at para 93.