



SUPREME COURT OF CANADA

CITATION: Southcott Estates Inc. v. Toronto Catholic District School Board, 2012 SCC 51, [2012] 2 S.C.R. 675

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BETWEEN:

Southcott Estates Inc.
Appellant / Respondent on cross-appeal
and
Toronto Catholic District School Board
Respondent / Appellant on cross-appeal

CORAM: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Karakatsanis JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 63)

Karakatsanis J. (LeBel, Deschamps, Abella, Rothstein and Cromwell JJ. concurring)

DISSENTING REASONS:
(paras. 64 to 99)

McLachlin C.J.

Southcott Estates Inc. v. Toronto Catholic District School Board, 2012 SCC 51,
[2012] 2 S.C.R. 675

Southcott Estates Inc.

Appellant/Respondent on cross-appeal

v.

Toronto Catholic District School Board

Respondent/Appellant on cross-appeal

Indexed as: Southcott Estates Inc. v. Toronto Catholic District School Board

2012 SCC 51

File No.: 33778.

2012: March 20; 2012: October 17.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and
Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts — Commercial contracts — Remedies — Specific performance
— Duty to mitigate — Single-purpose company entering into agreement for purchase

of land — Vendor breaching contractual obligations — Company seeking specific performance — Whether single-purpose company must mitigate its losses — Whether plaintiff seeking specific performance has obligation to mitigate its losses — Whether trial judge erred in concluding there were no comparable properties available for mitigation.

The appellant S is a single-purpose company incorporated solely for the purpose of a specific land purchase, with no assets other than money advanced to it by its parent company for the deposit relating to such purchase. It entered into an agreement of purchase and sale for a specific property with the respondent. When the respondent failed to satisfy a condition and refused to extend the closing date, S sought specific performance of the contract. It argued that it was not required to mitigate its losses. The trial judge refused to award specific performance but awarded damages to S in the amount of \$1,935,500. The Court of Appeal concluded that the respondent had breached its contractual obligations but that S had failed to take available steps to mitigate its losses. It reduced the damage award to a nominal sum.

Held (McLachlin C.J. dissenting): The appeal and cross-appeal should be dismissed.

Per LeBel, Deschamps, Abella, Rothstein, Cromwell and Karakatsanis JJ.: Mitigation is a doctrine based on fairness and common sense, which seeks to do justice between the parties in the particular circumstances of the

case. As a general rule, a plaintiff will not be able to recover those losses which he could have avoided by taking reasonable steps.

The main issue is whether S, a single-purpose corporation, was excused from mitigating its losses when the vendor breached the agreement of purchase and sale, and particularly when it had promptly brought an action for specific performance. As a separate legal entity, S 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. One such responsibility is to take steps to mitigate losses. A plaintiff cannot recover losses that could reasonably have been avoided. S sought specific performance and was therefore ready to complete the purchase. Its alternative claim for consequential damages was predicated upon its access to capital to complete the agreement of purchase and sale. As such, both claims were premised upon resources that were not tied up as a result of the breach alleged. S can hardly argue that the same money would not have been available for mitigation. In the absence of actual evidence of impecuniosity, finding that losses cannot be reasonably avoided, simply because the corporation is a single-purpose corporation within a larger group of companies, would give these corporations an unfair advantage. If single-purpose corporations were not required to mitigate their losses, this could expose defendants contracting with such corporations to higher damage awards.

This Court has recognized that there may be situations in which a plaintiff's inaction is justifiable notwithstanding its failure to obtain an order for specific performance. If the plaintiff has a "fair, real, and substantial justification" or a "substantial and legitimate interest" in specific performance, its refusal to purchase other property may be reasonable, depending upon the circumstances of the case. 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 unless he can show that money is not a complete remedy because the land has "a peculiar and special value" to him. S has not demonstrated such a claim and therefore cannot justify its inaction. S 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, for which damages were an adequate remedy.

Where it is alleged that the plaintiff has failed to mitigate, the defendant bears the burden of proving that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible. Whether or not there were comparable properties and whether they are profitable is a finding of fact. The trial judge made a palpable and overriding error in finding there were no comparable mitigation opportunities. He failed to consider the reasonable and available inferences arising from expert evidence regarding other land suitable for development sold in the area, the investment properties purchased by the parent company of S and the absence of evidence to the contrary. The respondent discharged the burden of showing that there

were other comparable development properties available in the relevant time period to mitigate the losses.

Per McLachlin C.J. (dissenting): The Board, having breached the contract, bears the onus of proving that S unreasonably failed to mitigate its loss. This entails establishing, on a balance of probabilities: (1) that an opportunity to mitigate the loss was available to S; and (2) that S unreasonably failed to pursue that opportunity. The trial judge's finding that the Board failed to establish that S had an opportunity to mitigate is sufficient to dispose of the appeal. This finding was grounded in the evidence and did not constitute palpable and overriding error. The Board failed to prove that another property comparable to the one that S sought to purchase was available. Neither the evidence of the Board's expert witness nor that of purchases by other subsidiaries of S's parent company established that a comparable property was available for S.

Moreover, S could not be unreasonable in failing to mitigate its loss because it reasonably maintained its action for specific performance. 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 potential loss of damages at the same time. There is no basis on which to conclude that S acted unreasonably in maintaining its suit for specific performance instead of mitigating its loss. S had a "fair, real, and substantial justification" for claiming specific performance. The property was uniquely suited to S's needs for

single-family residential development within the City of Toronto. The evidence supported the view that there were no comparable substitute properties.

Furthermore, it is difficult to conclude that S unreasonably failed to mitigate given that S lacked the financial capacity to go into the market and purchase a substitute property.

Cases Cited

By Karakatsanis J.

Referred to: *Asamera Oil Corp. v. Seal Oil & General Corp.*, [1979] 1 S.C.R. 633; *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Company of London, Ltd.*, [1912] A.C. 673; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661; *Redpath Industries Ltd. v. Cisco (The)*, [1994] 2 F.C. 279; *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2; *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415; *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

By McLachlin C.J. (dissenting)

Asamera Oil Corp. v. Seal Oil & General Corp., [1979] 1 S.C.R. 633;
*British Westinghouse Electric and Manufacturing Co. v. Underground Electric
Railways Company of London, Ltd.*, [1912] A.C. 673; *Dunkirk Colliery Co. v. Lever*
(1878), 9 Ch. D. 20; *Janiak v. Ippolito*, [1985] 1 S.C.R. 146; *Darbishire v. Warran*,
[1963] 1 W.L.R. 1067; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Roper v.
Johnson* (1873), L.R. 8 C.P. 167; *Lagden v. O'Connor*, [2003] UKHL 64, [2004] 1
All E.R. 277; *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670; *Andros
Springs v. World Beauty*, [1970] P. 144; *Housen v. Nikolaisen*, 2002 SCC 33, [2002]
2 S.C.R. 235; *Apeco of Canada, Ltd. v. Windmill Place*, [1978] 2 S.C.R. 385;
Semelhago v. Paramadevan, [1996] 2 S.C.R. 415.

Statutes and Regulations Cited

Education Act, R.S.O. 1990, c. E.2.

Authors Cited

Bates, Paul. "Mitigation of Damages: A Matter of Commercial Common Sense"
(1992), 13 *Advocates' Q.* 273.

McGregor, Harvey. *McGregor on Damages*, 18th ed. London: Sweet &
Maxwell/Thomson Reuters, 2009.

Siebrasse, Norman. "Damages in Lieu of Specific Performance: *Semelhago v.
Paramadevan*" (1997), 76 *Can. Bar Rev.* 551.

Yorio, Edward. “A Defense of Equitable Defenses” (1990), 51 *Ohio St. L.J.* 1201.

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Sharpe, Blair and MacFarland JJ.A.), 2010 ONCA 310, 104 O.R. (3d) 784, 261 O.A.C. 108, 319 D.L.R. (4th) 349, 93 R.P.R. (4th) 159, 71 B.L.R. (4th) 196, [2010] O.J. No. 1772 (QL), 2010 CarswellOnt 2602, setting aside a decision of Spiegel J. (2009), 78 R.P.R. (4th) 285, [2009] O.J. No. 428 (QL), 2009 CanLII 3567, 2009 CarswellOnt 494. Appeal and cross-appeal dismissed, McLachlin C.J. dissenting.

J. Thomas Curry, Milton A. Davis and Paul-Erik Veel, for the appellant/respondent on cross-appeal.

Andrew M. Robinson, Elizabeth K. Ackman and Andrea Farkouh, for the respondent/appellant on cross-appeal.

The judgment of LeBel, Deschamps, Abella, Rothstein, Cromwell and Karakatsanis JJ. was delivered by

KARAKATSANIS J. —

I. Introduction

[1] Real estate developers frequently create single-purpose corporations for the sole purpose of purchasing and developing properties for profit. The corporation has limited liability and no assets other than those that arise from the particular real estate investment. The issue raised in this appeal is whether such a single-purpose corporation is excused from mitigating its losses when the vendor breaches the agreement of purchase and sale, and particularly when it has promptly brought an action for specific performance. The further issue is whether the trial judge erred in his finding that there were no other “comparable” properties available to mitigate the loss.

[2] The appellant, Southcott Estates Inc., was part of the Ballantry Group of associated companies that acquired and developed land in the Greater Toronto Area (“GTA”). Southcott was a single-purpose corporation, without assets, created for the sole purpose of developing the property that is the subject of this action. When the vendor, the Toronto Catholic District School Board, failed to satisfy a condition and refused to extend the closing date, Southcott sought specific performance of the contract. It argues that it was not required to mitigate its losses.

[3] The trial judge ((2009), 78 R.P.R. (4th) 285) found that the Board had breached the agreement of purchase and sale and had failed to prove that Southcott could have mitigated its damages. He awarded damages for loss of chance of profit. He refused to order specific performance, finding that the property was not “unique” and damages were an adequate remedy.

[4] The Ontario Court of Appeal (2010 ONCA 310, 104 O.R. (3d) 784) concluded that while the trial judge correctly found that the Board had breached its contractual obligations, he had erred in his approach to mitigation. The court concluded that Southcott had unreasonably failed to take available steps to mitigate its loss and reduced the damage award granted at trial to a nominal sum.

[5] Southcott did not appeal the trial judge's refusal to award specific performance. However, it maintains its losses were not avoidable. The questions raised in this appeal are:

1. Should a single-purpose company mitigate its losses?
2. To what extent must a plaintiff mitigate where the plaintiff has made a claim for specific performance?
3. Did the trial judge err in concluding that there was no evidence of comparable profitable properties available for mitigation?

[6] For the reasons that follow, I conclude that Southcott cannot recover losses that it could reasonably have avoided. I agree with the Court of Appeal that the trial judge erred in concluding that there was no evidence of other development properties that Southcott could have purchased in mitigation. I would dismiss the appeal.

II. Facts

[7] Southcott is a wholly owned subsidiary of Ballantry Homes Inc. and part of a larger group of companies called Ballantry Group of Companies (“Ballantry” or “Ballantry Group”). The Board is a School Board created pursuant to the *Education Act*, R.S.O. 1990, c. E.2, whose affairs were run by a publicly elected Board of Trustees.

[8] Having determined that certain land within a school property was surplus to its needs, the Board put it up for sale. Intending to use the land for residential development, Southcott agreed to purchase the 4.78 acres of land for \$3.44 million. It paid a 10 percent deposit and the parties agreed to a closing date of August 31, 2004. It was a condition of the agreement that the Board obtain a severance from the Committee of Adjustments on or before the closing date. On August 30, 2004, the parties agreed to extend the closing date to January 31, 2005.

[9] The Board applied for a severance in November; it was advised that a development plan was necessary but chose to proceed without one. On December 16, 2004, at the municipality’s request, the Committee of Adjustments deferred the severance application hearing as premature because it was not accompanied by a development plan. At that time, it became clear to Southcott and the Board that the transaction could not be completed by the closing date of January 31, 2005. The

Board refused Southcott's request to extend the closing date, declared the transaction to be at an end, and returned Southcott's deposit.

[10] Southcott took the position that the Board had breached its obligation to use its best efforts to obtain the severance and commenced an action for specific performance or, in the alternative, for damages.

[11] Southcott admitted that it never had any intention to mitigate its loss and, indeed, never tried to mitigate (para. 137 of the trial judge's decision). Southcott was a single-purpose company incorporated solely for the purposes of this development project and had no assets other than the money advanced by Ballantry for the deposit. It never intended to purchase other land. In fact, Southcott's principal testified at trial that there was no question of it purchasing other land, given that it was involved in this litigation (para. 18 of the Court of Appeal's decision).

[12] 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. The land was suitable for residential development and within the parameters, of size and price, of other lands purchased by the Ballantry Group.

[13] Corporations within the Ballantry Group purchased seven parcels of land for development purposes during this same period. The principal of Ballantry testified that it was always in the market for new land, had the financial means to

make the purchases, and it would have made these purchases even if Southcott had completed the land purchase from the Board (para. 138 of the trial judge's decision).

III. Decisions Below

[14] At trial, Spiegel J. concluded that the Board had failed to take all reasonable steps to fulfill the severance condition. It breached its best efforts obligation by failing to contact relevant city staff; delaying in processing the severance application; failing to include the proposed plan of use with the severance application; submitting an improper survey; failing to seek appropriate advice; ignoring the advice of the Committee of Adjustments; proceeding with the application for severance even after being advised that it was incomplete and failing to keep Southcott informed (paras. 71-87).

[15] The trial judge found that had the Board used its best efforts, the severance would likely have been granted, and the transaction would have been completed by the closing date. The trial judge was satisfied that the Board's breach caused Southcott's loss (paras. 93-116).

[16] Turning to remedy, Spiegel J. found that specific performance was not an appropriate remedy as the land did not have the quality of uniqueness (paras. 128-33).

[17] However, he concluded that Southcott was entitled to damages. He rejected the Board's argument that Southcott had in fact mitigated damages because the Ballantry Group made several purchases subsequent to the breach of the agreement:

I find that these subsequent purchases were collateral, independent transactions that did not arise out of the consequences of the breach. In all the circumstances, I do not consider these transactions as mitigatory. [para. 143]

[18] The trial judge found that the Board had not discharged the onus of proving that Southcott failed to take advantage of a reasonable opportunity to mitigate its loss. He held that there was no evidence that any of the available properties were actually offered for sale or could have been profitably developed and he was not satisfied that the properties were comparable (paras. 144-46). He therefore awarded Southcott damages in the amount of \$1,935,500 which represented the loss of a 60 percent chance to make profits in the amount of \$3,225,827.

[19] On appeal, the Board did not dispute the findings that it had breached its obligation to use its best efforts to obtain the severance required to complete the sale. It challenged the findings of causation and mitigation.

[20] Sharpe J.A., writing for the Court of Appeal, rejected the first ground of the Board's appeal, that the trial judge erred in finding that the Board's breach was the cause of the failure to obtain the severance by the closing date (paras. 11-14).

[21] Regarding the issue of whether the losses could have been avoided, however, the Court of Appeal concluded that the trial judge had erred in law in finding that the Board had not shown that Southcott could have mitigated its losses. First, Southcott's admission that it had no intention of taking any steps to mitigate was sufficient to satisfy the onus resting upon the Board and to shift the evidentiary onus to Southcott to demonstrate that, even if it had attempted to mitigate, it could not have done so. Second, the trial judge erred in dealing with the Board's evidence regarding the land that was available: "By requiring the Board to prove . . . the profitability of individual parcels, the trial judge raised any bar the Board had to satisfy to an unrealistic level" (para. 25). Finally, the trial judge failed to consider that Ballantry's purchases of other lands clearly demonstrated that the directing mind of Southcott knew that investment quality lands, suitable for profitable development, were available on the market. The Court of Appeal stated that Southcott was a distinct legal entity that could not avoid mitigating its loss by arguing that it was a part of Ballantry: the obligation to mitigate rested with Southcott (paras. 24-27).

[22] The Court of Appeal concluded that while Southcott had made out its case for breach of contract, it failed to make out a case for either specific performance or damages. The appropriate award was for nominal damages in the amount of \$1.

IV. Mitigation — General Principles

[23] This Court in *Asamera Oil Corp. v. Seal Oil & General Corp.*, [1979] 1 S.C.R. 633, cited (at pp. 660-61) with approval the statement of Viscount Haldane L.C. in *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Company of London, Ltd.*, [1912] A.C. 673, at p. 689:

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

[24] In *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74, at para. 176, this Court explained that “[l]osses that could reasonably have been avoided are, in effect, caused by the plaintiff’s inaction, rather than the defendant’s wrong.” As a general rule, a plaintiff will not be able to recover for those losses which he could have avoided by taking reasonable steps. Where it is alleged that the plaintiff has failed to mitigate, the burden of proof is on the defendant, who needs to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Asamera*; *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661, at para. 30).

[25] On the other hand, a plaintiff who does take reasonable steps to mitigate loss may recover, as damages, the costs and expenses incurred in taking those reasonable steps, provided that the costs and expenses are reasonable and were truly

incurred in mitigation of damages (see P. Bates, “Mitigation of Damages: A Matter of Commercial Common Sense” (1992), 13 *Advocates’ Q.* 273). The valuation of damages is therefore a balancing process: as the Federal Court of Appeal stated in *Redpath Industries Ltd. v. Cisco (The)*, [1994] 2 F.C. 279, at p. 302: “The Court must make sure that the victim is compensated for his loss; but it must at the same time make sure that the wrongdoer is not abused.” Mitigation is a doctrine based on fairness and common sense, which seeks to do justice between the parties in the particular circumstances of the case.

A. *Should a Single-Purpose Company Mitigate its Losses?*

[26] Southcott argues that the Court of Appeal failed to recognize the unique circumstance of a single-purpose corporation in mitigating contractual loss; as a single-purpose company, it was impecunious and unable to mitigate without significant capital investment of the parent company or without the corporate mandate to do so. Further, it submits 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. In this case, Southcott acted reasonably, within its ordinary course of business and promptly brought this lawsuit.

[27] Southcott sought specific performance and was therefore ready to complete the purchase. In any event, its alternative claim for consequential damages was predicated upon its access to capital to complete the agreement of purchase and

sale. As such, both claims were premised upon resources, resources that were not tied up as a result of the breach alleged. Indeed, the alleged breach in this case did not affect Southcott's ability to obtain capital. Southcott can hardly argue that the same money would not have been available for mitigation.

[28] Further, the question is factual and it was not suggested at trial that Southcott had no access to capital or that borrowing money would have been unreasonably risky or costly. Southcott did not argue that it was impecunious at trial.

[29] In the absence of actual evidence of impecuniosity, finding that losses cannot be reasonably avoided, simply because it is a single-purpose corporation within a larger group of companies, would give an unfair advantage to those conducting business through single-purpose corporations. In addition, not requiring single-purpose corporations to mitigate would expose defendants contracting with such corporations to higher damage awards than those reasonably claimed by other plaintiffs, based solely upon their limited assets.

[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.

B. *Southcott Was Required to Mitigate Losses Despite its Claim for Specific Performance*

[31] Specific performance is an equitable remedy that is difficult to reconcile with the principle of mitigation. Obviously, if Southcott had purchased a property in mitigation, it may not have been able to complete its agreement of purchase and sale of the Board’s surplus land if ultimately successful in its claim for specific performance. When can a plaintiff seeking specific performance justify inaction and recover losses which may otherwise have been classified as avoidable?

[32] The trial judge found that Southcott did not have a viable claim for specific performance. He found that while the business opportunity may have been

unique, the property itself was not. The trial judge found that what was at issue here was a straightforward business plan, the failure of which could be measured in damages (para. 132). The Court of Appeal agreed. The trial judge's decision not to order specific performance is not challenged in this appeal.

[33] However, Southcott submits that even though it was unsuccessful in its claim for specific performance, it proceeded expeditiously and the claim had real substance because the property was a unique opportunity, given its location and the rarity of such properties in the GTA. As a result, it says that it was not reasonable to attempt to mitigate; the remedy of specific performance would become illusory.

[34] Southcott suggests that there are two separate questions that a court must ask in cases where a plaintiff seeks specific performance: (1) should specific performance be awarded? And if the answer is no, (2) is this plaintiff justified in its mitigatory inaction? Southcott says that the trial judge conflated these two questions and did not consider whether it was justified in failing to mitigate.

[35] This Court dealt with this issue in *Asamera*, at pp. 668-69:

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. . . .

...

. . . Where . . . circumstances reveal a substantial and legitimate interest in seeking [specific] performance as opposed to damages, then a plaintiff will be able to justify his inaction and on failing in his plea for specific performance might then [be able to] recover losses which in other circumstances might be classified as avoidable and thus unrecoverable

[36] This Court thus recognized that there may be situations in which a plaintiff's inaction is justifiable notwithstanding its failure to obtain an order for specific performance where circumstances reveal "some fair, real, and substantial justification" for his claim or "a substantial and legitimate interest" in seeking specific performance (*Asamera*, at pp. 668-69 (emphasis added)). This does not mean that a plaintiff with such a claim should not attempt to mitigate; rather it recognizes that such a claim for specific performance informs what is reasonable behaviour for the plaintiff in mitigation. See N. Siebrasse, "Damages in Lieu of Specific Performance: *Semelhago v. Paramadevan*" (1997), 76 *Can. Bar Rev.* 551.

[37] *Asamera* set out the general principles governing mitigation: was the plaintiff's inaction reasonable in the circumstances, and could the plaintiff have mitigated if it chose to do so. Those principles apply to a plaintiff seeking specific performance. If the plaintiff has a "substantial justification" or a "substantial and legitimate interest" in specific performance, its refusal to purchase other property may be reasonable, depending upon the circumstances of the case.

[38] The statements in *Asamera* dealing with specific performance and the determination of what is reasonable conduct must be read in light of *Semelhago v.*

Paramadevan, [1996] 2 S.C.R. 415. In that case, the Court acknowledged that “[w]hile at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case” (para. 20). The Court thus found that it “cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases” (para. 21). Specific performance will be available only where money cannot compensate fully for the loss, because of some “peculiar and special value” of the land to the plaintiff (para. 21, citing *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239, at p. 240).

[39] The overriding issue is therefore whether Southcott’s inaction was reasonable. Southcott argued at trial that the fact that the property was uniquely well situated gives it the unique character required to constitute a fair justification for specific performance (para. 119 of the trial judge’s decision).

[40] I agree with the courts below that this is not a case where the plaintiff could reasonably refuse to mitigate. The trial judge made clear findings that the land was nothing more unique to Southcott than a singularly good investment and that this was not a case in which damages were too speculative or uncertain to be a satisfactory remedy. The unique qualities related solely to the profitability of the development for which damages were an adequate remedy (paras. 126 and 128). The calculation of profits was not conjectural or speculative as the proposed development was not complex, and the only disagreement between the parties regarding the

quantum of damages related to the timing and rate of sale of completed units (paras. 130 and 132).

[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.

C. *The Trial Judge Erred in Finding no Evidence of Comparable Profitable Properties Available for Mitigation*

[42] In this case, Southcott admitted that it made no efforts to mitigate — on the basis that it was not obliged to do so. Southcott submits that the Court of Appeal erred in shifting the onus to the plaintiff based on the admission by Southcott’s principal that he had no intention to mitigate through Southcott. Southcott says that the Board did not provide the trial judge with evidence that there was a comparable profitable investment property available for sale. The trial judge found that there were no comparable or profitable properties. Southcott submits that the Court of Appeal erred in disregarding the trial judge’s finding of fact and in substituting its own.

[43] The entirety of the trial judge's analysis on this issue was as follows:

There was no evidence that the properties referred to [by the Board's expert] were actually available to the public for sale but only that they had been sold. Also there was no evidence that had these properties been purchased that they could have been profitably developed. In any event, I am not satisfied that the evidence established that these were comparable properties or that had they been purchased, that the plaintiff's loss would have been avoided or reduced. [para. 144]

[44] Regarding the failure to mitigate, the Court of Appeal found that the trial judge had erred in law:

First, Southcott's admission that it had no intention of taking any steps to mitigate its loss was sufficient to satisfy the onus resting upon the Board to prove failure to mitigate and to shift the evidentiary onus to Southcott of demonstrating that, even if it had attempted to mitigate, it could not have done so. Southcott led no evidence to that effect. In my view, the trial judge erred by holding that the Board had failed to meet the onus imposed upon it to prove that Southcott had failed to mitigate its damages.

. . . By requiring the Board to prove the precise manner in which 81 parcels of investment land had been sold or to prove the profitability of individual parcels, the trial judge raised any bar the Board had to satisfy to an unrealistic level, particularly in the face of Southcott's admission that it had no intention to mitigate and of the evidence that Ballantry actually did find other suitable development properties to purchase.

Third, the trial judge erred in the manner in which he dealt with the evidence of purchases made by Ballantry. Those purchases clearly demonstrate that the directing mind of Southcott knew that investment-quality lands, suitable for profitable development, were available on the market. [paras. 24-26]

[45] As noted above, where it is alleged that a plaintiff has failed to mitigate damages, the onus of proof on a balance of probabilities lies with the defendant, who must establish not only that the plaintiff failed to take reasonable efforts to find a substitute, but also that a reasonable profitable substitute could be found.

[46] Thus, it would be an error to suggest that the defendant did not have the burden of showing that mitigation was possible even where the plaintiff made no attempt to do so. Further, while I agree that the trial judge erred in dealing with the Board's evidence regarding the availability of the 81 properties, the error is best approached as an evidentiary issue rather than as one engaging the burden of proof.

[47] The finding about whether Southcott could have mitigated involves applying a legal standard; it is a question of mixed fact and law. Whether or not there were comparable properties and whether they were profitable is a finding of fact. Implicit in the Court of Appeal's decision is the conclusion that the trial judge's findings of fact were unreasonable.

[48] For the reasons that follow, I agree with the Court of Appeal that the trial judge erred in principle by failing to consider relevant evidence. In particular, Ballantry's subsequent purchases were evidence that other development properties were reasonably available. These errors skewed his factual analysis on the issue of mitigation. I conclude that the trial judge made a palpable and overriding error in

finding that there were no comparable profitable mitigation opportunities: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10.

(1) The Expert Evidence of Comparable Properties

[49] At trial, the Board presented evidence that 81 parcels of raw land suitable for development and 49 properties subdivided into lots suitable for building were available for sale in the GTA and were in fact sold in the period between January 31, 2005 and the time of trial (para. 136 of the trial judge's decision). The parameters that the Board's expert used in selecting alternative available parcels were sales of land between \$1,000,000 and \$27,000,000, that had an estimated time to develop of one year or less, and that could be developed for low to medium density residential. These parameters were chosen to match the parameters of the actual purchases made by the Ballantry Group.

[50] Nevertheless, the trial judge concluded that the Board had not discharged the onus of proving that Southcott failed to take advantage of a reasonable opportunity to mitigate. He found that: there was no evidence that the 81 properties were actually available to the public for sale; there was no evidence that, had these properties been purchased, they could have been profitably developed, and the plaintiff's loss could have been avoided or reduced; and in any event, these properties were not comparable properties.

[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. In cross-examination, the Board's expert witness admitted being unaware of the marketing strategies used to sell the 81 properties sold during the period in which the Board suggested that Southcott could mitigate (A.R., at p. 232-33). However, notwithstanding that answer, 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.

(2) The Purchases by Ballantry

[54] I agree with the Court of Appeal that the trial judge also erred in failing to consider whether the purchases by the Ballantry corporations provided evidence of other profitable properties available in mitigation. As noted above, the trial judge found (at para. 143) that the other properties purchased by other members of the Ballantry Group were “collateral” in the sense that the transactions would have occurred whether or not the defendant had breached its contract with Southcott and did not represent actual mitigation due to Southcott’s distinct legal personality. This is not challenged.

[55] The trial judge did not go on to consider, however, whether these transactions established that those same properties were evidence of “available” comparable mitigation opportunities in the market. Because Southcott is a separate legal entity, purchases by other Ballantry corporations of other comparable property did not make those properties “unavailable” for mitigation. In effect, the trial judge ignored the separate legal personalities of Southcott and the other corporations in the Ballantry Group by failing to consider those purchases as evidence of the existence of mitigation opportunities.

[56] The Ballantry Group companies purchased seven other development properties subsequent to the breach of the agreement, ranging in size from 2.3 acres to 110.8 acres and in price from \$3.3 million to \$27.1 million. In particular, two specific purchases were clearly comparable. Southcott had agreed to purchase 4.78

acres of land for \$3.44 million in August 2004. Ballantry corporations purchased 2.7 acres for \$3.3 million in August 2005 and 2.3 acres for \$6 million in December 2006.

[57] The defence raised by Southcott, which was accepted by the trial judge, was that the purchases by Ballantry Group of development lands in the GTA were purchases which would have been made in any event, regardless of whether Southcott purchased the Board's property. However, it is no answer to say that other companies in the same corporate group would have purchased the other available lands in any event. It was clear from the testimony of the president of Southcott and co-owner of Ballantry that the Ballantry Group was always purchasing promising development land and that the different companies were simply used as different vehicles to invest.

[58] It was a choice on the part of the principals of the Ballantry Group as to which corporate entity would be used for each purchase and they elected not to use Southcott. In addition, the trial judge found that "[t]he plaintiff[s] proposed development here was not complex, but rather a relatively straightforward plan for the development of 48 semi-detached residential units" (para. 132). In these circumstances, a straightforward development could have been carried out on a different property by Southcott, had it wanted to mitigate its loss. This corresponds to the modern reality recognized in *Semelhago* that "[r]esidential, business and industrial properties are all mass produced much in the same way as other consumer products" (para. 20).

[59] As the Court of Appeal concluded (paras. 25-26), the Ballantry Group's purchases of other properties was evidence that other suitable development lands *were* available and the decision not to purchase them in Southcott's name was based on other considerations. I agree with the Court of Appeal that the trial judge erred in failing to consider these purchases as evidence of other available and comparable development properties.

V. Conclusion

[60] In conclusion, the trial judge erred in failing to consider relevant evidence and made a palpable and overriding error of fact in concluding that Southcott could not have reasonably avoided its loss.

[61] He failed to take into account in his analysis of the mitigation issue that Southcott had simply refused to take any mitigatory action. He failed to consider the evidence of Ballantry's purchases as supporting the inference that alternative parcels were available and that their development was sufficiently profitable to meet Ballantry's requirements. He conflated a lack of evidence regarding the marketing of parcels with a lack of evidence that any of the parcels had been available for sale. He failed to consider whether the fact that all of the properties the Board's expert testified were development properties capable of being brought to development in a year could support an inference that their development was profitable. Finally, he

failed to consider the fact that Southcott did not lead evidence to challenge the Board's evidence regarding alternative development opportunities.

[62] In these circumstances, the Court of Appeal was entitled to look at the record and conclude that the trial judge's findings regarding mitigation were not available to him on the evidence. The evidence of the Ballantry purchases, in the context of Southcott's refusal to mitigate, established that there were opportunities to mitigate by purchasing other development land in the GTA. Failure to mitigate reduces damages. The Court of Appeal concluded that, based upon the investment properties purchased by Ballantry, and in the absence of evidence to the contrary, the Board discharged the burden of showing that other investment properties were available in the relevant time period to mitigate the losses and that the trial judge's finding that there were no comparable properties was not open to him on the evidence. I agree.

[63] I would dismiss the appeal with costs. In light of the result on the main appeal, I need not consider the cross-appeal. The cross-appeal should be dismissed without costs.

The following are the reasons delivered by

[64] THE CHIEF JUSTICE (dissenting) — Damages for breach of contract may be reduced if the plaintiff unreasonably fails to mitigate its loss. To show that a

plaintiff unreasonably failed to mitigate its loss, the defendant who is in breach of the contract must establish: (1) that an opportunity to mitigate the loss existed; and (2) that the plaintiff acted unreasonably in failing to take that opportunity.

[65] The trial judge found as a fact that the defendant had not proved that Southcott had an opportunity to mitigate. This finding, in my view, was grounded in the evidence. This is sufficient to dispose of the appeal. However, if such opportunity were found to exist, I see no basis on which to conclude that Southcott acted unreasonably in maintaining its suit for specific performance instead of mitigating its loss. It follows, in my view, that the judgment of the Court of Appeal should be set aside, and the trial judge's conclusion that the plaintiff established breach of contract and damages should be restored.

I. Background

[66] The Toronto Catholic District School Board contracted with Southcott Estates Inc. for the sale of 4.78 acres of surplus land for \$3.44 million. The closing date was August 31, 2004. Southcott was a wholly owned subsidiary of Ballantry Homes Inc., which was in the business of buying property and developing it for residential purposes. Southcott was a single-purpose company created expressly and only for the purpose of buying this parcel of land and developing it with single-family homes. Southcott had no assets except for the deposit it paid on the land.

[67] The land was part of a larger parcel on which school buildings were located so the agreement was conditional upon the Board obtaining a severance from the Committee of Adjustments on or before the closing date. The agreement was signed on June 14, 2004, but only became firm on August 23, 2004. The Board, realizing it might not be able to get severance of the property by the closing date of August 31, 2004, asked Southcott to extend the closing date to a fixed date after severance. Southcott was willing to extend the August 31 closing date, but insisted on a firm final date of January 31, 2005.

[68] The Board's application for severance was heard on December 16, 2004. It was deferred because the Board had failed to include a development plan in its application. This made it impossible for the Board to comply with the January 31, 2005 closing date. Southcott requested the Board to extend the closing date. The Board refused this request, declared the transaction to be at an end, and returned Southcott's deposit.

[69] Southcott took the position that the Board had breached its obligation to use its best efforts to obtain the severance and brought an action for specific performance or, in the alternative, damages.

[70] The trial judge held that the plaintiff was not entitled to an order for specific performance because the property was not sufficiently unique to satisfy the requirements of that remedy. However, he awarded damages in the amount of

\$1,935,500, representing the loss of a 60 percent chance to make profits in the amount of \$3,225,827. He rejected the Board's argument that Southcott had failed to act reasonably to mitigate its loss, holding that the Board had not established as a matter of fact that mitigation opportunities were available.

[71] The Court of Appeal reversed the trial judge's decision and set aside the award for damages, essentially holding that the evidence, properly viewed, established an unreasonable failure to mitigate.

II. The Requirements of Mitigation

[72] The doctrine of mitigation holds that a plaintiff cannot recover damages for loss that could have been reasonably avoided: *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at p. 660; *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Company of London, Ltd.*, [1912] A.C. 673 (H.L.), at p. 689; *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch. D. 20 (C.A.), at p. 25. A plaintiff is not contractually obliged to mitigate, and in this sense the term "duty to mitigate" is misleading. However, if the plaintiff unreasonably fails to mitigate, its damages for breach of contract may be reduced: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, at pp. 166-67; *Darbishire v. Warran*, [1963] 1 W.L.R. 1067 (C.A.), at p. 1075.

[73] The defendant, having breached the contract, bears the onus of proving that the plaintiff unreasonably failed to mitigate its loss: *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, at pp. 330-31; *Roper v. Johnson* (1873), L.R. 8 C.P. 167. This entails establishing, on a balance of probabilities: (1) that opportunities to mitigate the loss were available to the plaintiff; and (2) that the plaintiff unreasonably failed to pursue these opportunities.

[74] Failure to mitigate may not be unreasonable for a variety of reasons. One such reason may be a “fair, real, and substantial justification” for claiming specific performance: *Asamera*, at pp. 667-68. Another may be lack of financial resources: *McGregor on Damages* (18th ed. 2009), at para. 7-088. The rules for mitigation “do not require the injured party to do what he cannot afford to do when he is seeking to reduce the damages payable by the wrongdoer”: *Lagden v. O’Connor*, [2003] UKHL 64, [2004] 1 All E.R. 277, at para. 51 (*per* Lord Hope); see also *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670.

[75] Unreasonable failure to mitigate loss reduces damages to the extent that mitigation would have avoided the loss: see *Andros Springs v. World Beauty*, [1970] P. 144 (C.A.), at p. 154 (*per* Lord Denning). If a mitigation opportunity would only partially avoid the plaintiff’s loss, then only a partial reduction in damages can be justified.

III. Opportunity to Mitigate

[76] The trial judge found that the Board had not discharged its onus of proving that Southcott unreasonably failed to mitigate its loss because it did not establish that the opportunity to mitigate existed. This finding must stand unless it constitutes palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10.

[77] The Board sought to prove that mitigation opportunities existed in two ways — through the testimony of an expert witness and with evidence of purchases made by other Ballantry companies.

A. *The Evidence of the Expert Witness*

[78] The trial judge found that the Board's expert witness's evidence did not establish opportunity to mitigate the loss.

[79] The Board's expert presented evidence of 81 parcels of raw land and 49 subdivided properties that were purchased in the Greater Toronto Area ("GTA") between January 31, 2005 and the time of trial. The trial judge found a number of shortcomings in this evidence.

[80] First, there was no evidence that the alleged properties the expert referred to were actually available to Southcott; the Board's expert witness admitted to being entirely unaware of whether substitute property was available to the public for sale

during the period in which the Board suggested that Southcott could mitigate (A.R., at p. 233).

[81] Second, the evidence did not establish that these properties were comparable to Southcott's target property ((2009), 78 R.P.R. (4th) 285, at para. 144). Little was known about the properties identified by the Board's expert witness beyond their size, cost, and nearest major intersection. Most were outside the City of Toronto. The properties vary widely in both size and price, including parcels as large as 123.988 acres, as small as 0.251 acres, and costing as much as \$23.77 million. The trial judge concluded that the comparability of these properties to Southcott's 4.78 acre target property had not been established.

[82] Third, the trial judge found that the evidence did not establish that alternate properties could have been profitably developed (para. 144). Only a profitable development would mitigate Southcott's loss; an unprofitable one would aggravate it. A plaintiff is not required to take foolish steps that would not reduce its loss. The Board's expert presented no evidence on the potential profitability of the properties he referred to.

[83] The Court of Appeal criticized the trial judge's finding that the evidence did not establish profitability, on the ground that he raised the burden of proof on the Board to an unrealistic level (2010 ONCA 310, 104 O.R. (3d) 784, at para. 25). With respect, the burden was clear — the Board had to establish that alternate properties

could have been profitably developed on a balance of probabilities. There is no indication that the trial judge failed to appreciate this basic principle. See *World Beauty*, at p. 154.

[84] The trial judge found that the Board's expert witness failed to establish that Southcott had opportunities to mitigate its loss. This finding finds support in the evidence and is not vitiated by legal error. It follows that it cannot be set aside: *Housen*.

B. *The Evidence of Purchases by Other Ballantry Companies*

[85] The second way the Board sought to discharge its onus of showing opportunity to mitigate was by evidence that other Ballantry companies had made purchases of development land in the GTA at the relevant time. The Board argued that these other Ballantry purchases had in fact mitigated the loss caused by the Board's breach.

[86] The trial judge accepted the Board's invitation to consider the matter from the perspective of the Ballantry Group as a whole, effectively piercing the corporate veil. He concluded that Ballantry's subsequent purchases were collateral, independent transactions that could not have avoided the loss arising from the Board's breach of contract (para. 143): see *Apeco of Canada, Ltd. v. Windmill Place*, [1978] 2 S.C.R. 385, at p. 389. Leaving aside the question of whether piercing the

corporate veil in these circumstances was appropriate, the trial judge's analysis was not in error. The trial judge's reasoning was that the Ballantry Group, with extensive access to credit, was limited only by the number of properties it could find. The more good properties it could find, the more money it stood to make. In this sense, other purchases by the Ballantry Group were collateral rather than substitutions for the Board's property.

[87] The trial judge, having dealt with the purchases of other Ballantry companies in this way, did not make a finding on whether these properties offered mitigation opportunities for Southcott, as an independent legal entity. The evidence, however, does not support such a finding, in my view. First, there was no evidence that the properties purchased by other Ballantry companies were available to Southcott. At best, Southcott would have been competing with its sister companies for these properties. Whether it would have succeeded in acquiring a comparable property was a matter of speculation.

[88] Second, the evidence did not establish that other Ballantry Group purchases were comparable to Southcott's target property. Under its contract with the Board, Southcott was purchasing a 4.78 acre parcel located in a desirable residential neighbourhood of the City of Toronto suited to the development of 48 semi-detached residential units (para. 132). There was no evidence that any of the other Ballantry purchases were comparable. It is not enough to show that some development land may have been available to companies which may have had different development

strategies. Ballantry had wide ranging interests in residential real estate development throughout the GTA. Southcott had a narrower, specific development objective. To show opportunity to mitigate, the Board had to prove that a property comparable to the one that Southcott sought to purchase was available.

[89] I respectfully cannot agree that two of the subsequent Ballantry purchases were clearly comparable to Southcott's target property (Karakatsanis J., at para. 56). The first (a parcel of 2.7 acres for \$3.3 million) was 43 percent smaller than Southcott's target property, cost 70 percent more per acre, and was purchased for the development of a retirement home. The second (a parcel of 2.3 acres for \$6 million) was 51 percent smaller than Southcott's target property, cost 260 percent more per acre, and was purchased for development of a high rise building. On the record, these properties were not comparable to the property that Southcott sought to acquire: a 4.78 acre parcel suited to the development of 48 semi-detached residential units. The remaining Ballantry purchases were even less comparable to Southcott's target property. The Board had the burden of establishing the comparability of these properties. It failed to do so.

[90] I see no error in the trial judge's conclusion that the evidence as to other Ballantry properties did not establish opportunities to mitigate the loss suffered as a result of the Board's breach of contract.

IV. Did Southcott Act Reasonably?

[91] The trial judge's finding that the Board failed to establish that Southcott had opportunities to mitigate its loss is sufficient to dispose of the appeal. However, I offer the following comments on whether the Board established, as it was also required to do, that failure to take advantage of any proven opportunities for mitigation was unreasonable.

[92] In my view, it is difficult to conclude that Southcott acted unreasonably. The first reason is that it had a "fair, real, and substantial justification" for claiming specific performance of the contract: *Asamera*, at pp. 667-68. In such circumstances, a plaintiff is not required to mitigate. As explained in *Asamera*, this is simply an application of the rule of mitigation requiring the plaintiff to act reasonably in the circumstances:

Where those circumstances reveal a substantial and legitimate interest in seeking performance as opposed to damages, then 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 [pp. 668-69]

[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 (E. Yorio, "A Defense of Equitable Defenses" (1990), 51 *Ohio St. L.J.* 1201).

[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. Demanding that losses be mitigated unless success in obtaining specific performance is assured would deter valid claims for specific performance and hold plaintiffs to an impossible standard.

[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: *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, at para. 22. Southcott's contention that there was no comparable substitute property found support in the evidence.

[96] Another reason for failing to acquire and develop a substitute property, assuming such a property had been available, is that Southcott lacked financial resources. Southcott did not have the financial capacity to go into the market and purchase a substitute property. It was a single-purpose company with no assets other than the \$344,000 advanced to it by Ballantry for the deposit on the target property (trial judgment, at para. 137). Whether it could have obtained financing to buy a different property is at the very least speculative.

[97] In summary, I see no basis for concluding that Southcott acted unreasonably in failing to mitigate its loss, assuming that opportunities to do so were available.

V. Conclusion

[98] I see no basis upon which to set aside the trial judge's conclusion that the defendant did not prove that the plaintiff unreasonably failed to mitigate its loss. His conclusions find support in the evidence and the law.

[99] I would allow the appeal and restore the judgment of the trial judge.

Appeal dismissed with costs. Cross-appeal dismissed without costs,

MCLACHLIN C.J. dissenting.

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