

Location, Location, Location - Or Not

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A recent decision of the Supreme Court of Canada in *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, confirms that it is very difficult for a developer purchasing development lands to obtain a legal remedy when the vendor refuses to complete the sale.

The facts in the case were typical of a sale transaction involving development lands. The plaintiff, Southcott, was a single-purpose entity incorporated to purchase development land from the defendant, the Toronto Catholic District School Board. The plaintiff carried on no business and had no assets other than the deposit that was advanced to it by its sole shareholder for the purpose of acquiring the subject property. The sole shareholder was a developer carrying on business as the Ballantry Group. The land in question was just under five acres and the purchase price was \$3.44 million. The sale was conditional on the School Board obtaining a severance of the land.

After some initial attempts, the School Board ultimately decided not to continue pursuing the severance. Southcott sued for breach of the agreement. The trial judge found that the School Board's failure or refusal to pursue the severance was a breach of its obligations under the agreement. This finding was not challenged on appeal. The issue before the Supreme Court of Canada was the appropriate remedy to be awarded.

At trial, Southcott initially sought specific performance of the agreement, requiring the School Board to complete the sale. The trial judge determined that the property was not special or unique enough to warrant granting specific performance and declined to grant that remedy. He found that this was merely a development property purchased with a view to earning a profit and therefore damages for lost profit would be an adequate remedy. He awarded damages of almost \$2 million.

The Supreme Court agreed with the trial judge that damages, and not specific performance, were the appropriate remedy, however it reduced the award from \$2 million to \$1.00. The reason for the reduction was that the Court determined that Southcott had failed to meet the obligation of virtually every plaintiff suing for breach of contract - it failed to take any steps to mitigate or minimize its damages.

Mitigation in this case would have involved seeking to purchase an alternative property to develop. The evidence of the Ballantry Group's executive at trial was that he did not even consider having Southcott purchase another property, particularly given that it was involved in litigation with the School Board regarding the subject property. To have purchased an alternative property through Southcott would have exposed the equity in that property to an adverse costs award made against Southcott in the litigation.

The Supreme Court did not approve of this position. The Court recognized that the decision to create a single-purpose entity provided the Ballantry Group with the benefit of limited liability by shielding its assets from the creditors of Southcott. Accordingly, the Court reasoned that having enjoyed the benefits of incorporation, the Ballantry Group should also bear the burdens of incorporation, including the obligation of all plaintiffs to mitigate their damages. The Ballantry Group's failure to search for a substitute property was a breach of its obligation to mitigate.

On the evidence, there were approximately 81 other development properties available for sale in the GTA that Southcott could have purchased. Furthermore, the Ballantry Group had purchased seven other development properties since the School Board's breach of the agreement, none of which were purchased in the name of Southcott. The Supreme Court determined that the evidence of other available properties was sufficient to discharge the School Board's burden to prove that Southcott had failed to mitigate its damages. This finding was made notwithstanding that there was no evidence that any of those other properties could be profitably developed. The Supreme Court was also not swayed by the argument that none of the seven properties purchased by the Ballantry Group in the interim were true alternatives to the subject property because they all would have been purchased in any event, even if the School Board had completed the transaction.

At the end of the day, the Court's over-arching concern appears to have been that single-purpose entities should not be treated differently from other corporations or individuals regarding the duty to mitigate. To treat them differently would unfairly burden vendors who deal with single-purpose entities with additional liability.

The impact of this decision for developers is that specific performance will only be available in rare circumstances - typically when a developer is assembling properties for a master plan development and the failure to obtain one parcel jeopardizes the viability of the entire development. Moreover, even damages will be difficult to obtain, unless the plaintiff can show that there were no suitable alternative properties available for sale.

Developers will want to consider inserting language in their offers to purchase to counteract the effects of the *Southcott Estates* decision, by, for example, including a provision in which the parties expressly acknowledge that the land is special and unique to the development and setting out the consequences of default without mitigation being required.

Blaney McMurtry's Real Estate Group has the expertise to assist developers in crafting appropriate provisions for agreements of purchase and sale for development lands and in the event an issue arises, our Commercial Litigation Group can advise on the viability of a claim for specific performance or damages at an early stage. ■