SUPREME COURT OF NOVA SCOTIA
Citation: *Sutherland v. Dorey*, 2023 NSSC 210

Date: 20230628
Docket: *Hfx.* No. 524073
Registry: Halifax

Between:

Genniene Sutherland

Applicant

v.

John Dorey

Respondent

Judge:	The Honourable Justice John A. Keith
Heard:	June 20, 2023, in Halifax, Nova Scotia
Oral Decision:	June 22, 2023
Counsel:	Richard Norman and Will Brien, for the Applicant John Dorey, self-represented (not in attendance)

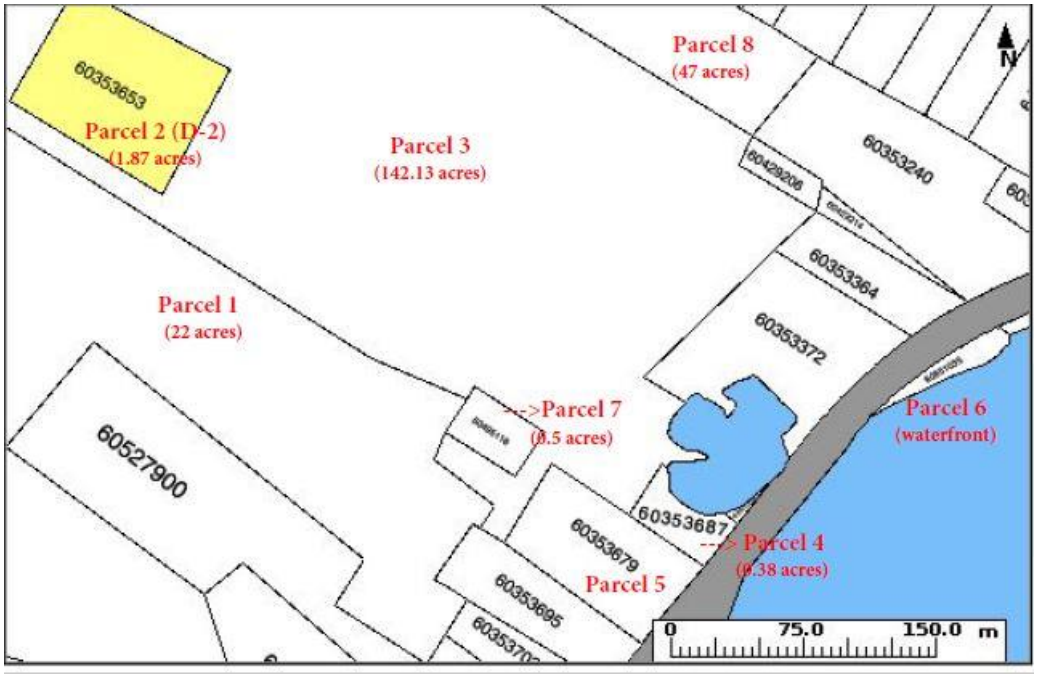
By the Court (Orally):

INTRODUCTION

[1] The Respondent, John Dorey, owns the following adjacent parcels of land totalling approximately 200 acres along Highway 331:

1. PID No. 60527934 (20.22 acres are referred to herein as **Parcel 1**)
2. PID No. 60353653 (1.87 acres and referred to herein as **Parcel 2** and sometimes referred to as Lot D-2. The details are discussed below.);
3. PID No. 6035646 (142.14 acres and referred to herein as **Parcel 3**);
4. PID No. 60353687 (0.38 acres and referred to herein as **Parcel 4**);
5. PID No. 60353679 (referred to herein as **Parcel 5**);
6. PID No. 60651056 (a small, waterfront lot and referred to herein as **Parcel 6**);
7. PID No. 60495116 (0.5 acres and referred to herein as **Parcel 7**); and
8. PID No. 60353638 (47 acres and referred to herein as **Parcel 8**).

[2] These lands are located near the mouth of the LaHave River and about five kilometers north of Risser's Beach Provincial Park. The following map shows the approximate location of Mr. Dorey's lands:



[3] The Applicant, Ms. Sutherland, states that Mr. Dorey repudiated his agreement to sell these lands and is refusing to close the transaction.

[4] By Amended Notice of Application dated May 31, 2023, Ms. Sutherland brought an Application in Chambers alleging that:

1. Mr. Dorey's lands are unique and ideal for Ms. Sutherland's planned residential subdivision development;
2. An Order for financial damages would be inadequate in the circumstances; and
3. The remedy of specific performance will put the parties in a place which appropriately recognizes their contractual obligations and achieves justice. Indeed, Ms. Sutherland does not claim any other alternative relief beyond specific performance in this proceeding.

[5] The evidence filed with the Court indicated that Mr. Dorey was personally served with the Notice of Application in Chambers. However, Mr. Dorey did not respond and did not attend in Court for the hearing.

[6] In failing to respond to this legal proceeding, Mr. Dorey declined the opportunity to defend himself and put his interests (and lands) at very significant risk. That said, Mr. Dorey's neglect neither guarantees Ms. Sutherland's preferred outcome nor relieves Ms. Sutherland from discharging the evidentiary burden of proving her entitlement to the remedy of specific performance.

[7] Specific performance is a remedy born in equity and dedicated to ameliorating historic limitations in the common law to provide an effective remedy in certain cases involving contractual breach. Chief among equity's concerns was the common law's inability to order that a contract be specifically performed where monetary damages were a comparatively inadequate response.

[8] However, in the circumstances of this case, the evidence demonstrates that monetary damages would be a comparatively adequate remedy.

[9] There are other issues which undermine specific performance as an appropriate remedy in this case. For example, the agreement is uncertain in the sense that the Court would inevitably become engaged in an ongoing supervisory role to resolve an important but extraordinarily vague contractual obligation to build a new home for Mr. Dorey.

[10] At the hearing and in response to my questions during oral argument, Ms. Sutherland offered additional information explaining how these problems might be resolved but this was neither proper evidence nor, respectfully, sufficient to overcome the Court's concerns.

[11] In addition, there is an issue regarding funds which Ms. Sutherland says were paid to Mr. Dorey as a deposit. The standard form used to record their agreement contains a paragraph in which the contracting parties are invited to confirm the details of any deposit paid (paragraph 1.1). Here, the deposit paragraph was left blank (and actually crossed out) signifying that no deposit was paid. Nevertheless, and despite a written agreement which says no deposit was paid, Ms. Sutherland says that a $6,000 deposit paid to Mr. Dorey should be deducted from the purchase price of the pending sale.

[12] Respectfully, specific performance is designed to enforce (not re-write) contractual terms. Specific performance seeks to reflect the parties' contractual intentions – not their contractual preferences.

[13] These issues, and others, raise related concerns regarding the need for any party seeking specific performance to come to the Court with clean hands.

[14] Ultimately, the issues surrounding this agreement are sufficient to preclude the remedy of specific performance. In the circumstances, I am compelled to dismiss the application. My reasons follow.

SUMMARY OF THE FACTS AND CONTRACTUAL TERMS

[15] Ms. Sutherland states that Mr. Dorey's lands are extremely unique. In her affidavit, she describes engaging in a lengthy search to find lands in this area suitable for a subdivision development. She describes certain topographical features which she says include a large assembly of land which rises up from the sea and offers sprawling, unobstructed views of the water and mountain valley below – ideally suited for her planned multi-levelled terracing homes with easy access to Highway 331 and nearby amenities.

[16] Ms. Sutherland states that she and Mr. Dorey eventually entered into a binding agreement in which he committed to sell (and she committed to buy) the lands in question.

[17] The underlying contractual arrangements which emerged and evolved are, generously speaking, convoluted. The first agreement is dated February 22, 2023 but it involves an agreement to sell only Parcel 1. The agreement was amended on March 22, 2023 but, again, it was limited to Parcel 1 and, for present purposes, is significant mainly because it extended the closing date from May 22, 2023 to June 29, 2023.

[18] Ms. Sutherland states that there was a second amendment dated April 2, 2023. It is only one page in length and was signed by Ms. Sutherland's son (Jason or "Jay" Sutherland) as her agent. The contractual implications of this second amendment are much more significant. Ms. Sutherland says that this second amendment expanded the contract such that Mr. Dorey now agreed to sell all of the lands described above (i.e. Parcels 1 - 8 and not just Parcel 1).

[19] To fully understand the contractual issues which arise in this case, it is necessary to review the terms of the evolving, expanding agreement in greater detail.

Original Agreement dated February 22, 2023

[20] The parties' agreement begins with a completed Nova Scotia Real Estate Commission's standard form and supplemented by six attached Schedules (A, B, C, D, E and X). The key written terms are recorded on the standard form and Schedule A. Schedules B, C, D, E and X are either survey plans or aerial photographs which are of lesser importance for present purposes.

[21] As to the completed standard form agreement, the relevant terms include:

1. Ms. Sutherland was only buying Parcel 1, defined above. The agreement indicates that Parcel 1 had already been migrated;
2. The purchase price for Parcel 1 was $278,707.51; and
3. Closing was scheduled for May 22, 2023.

[22] As to Schedule A, the following terms are germane:

1. Mr. Dorey granted Ms. Sutherland the right of first refusal with respect to the remaining parcels of land defined above (i.e. Parcels 2 – 8).[1] A

[1] I note that Schedule "A" begins with a clear and express confirmation that Ms. Sutherland's interest in the remaining lands are limited to a right of first refusal. There is additional language in Schedule "A" which is inconsistent with a right of first refusal and suggests that Mr. Dorey agreed to sell all of the remaining lands (i.e.

specific value was attached to the remaining parcels together with an obligation to migrate these lands within 12 months of signing the agreement;

2. The purchase price for Parcel 1 was calculated by taking the value attributed to Parcel 1 ($375,000) and deducting a total of $96,292.49 which Ms. Sutherland agreed to pay in order to discharge various judgements or liens registered against Mr. Dorey's land. The agreement does not make clear which amounts are registered against Parcel 1 and which are registered against other parcels of land. In any event, again, Ms. Sutherland agreed to pay, and discharge, these encumbrances and deduct that amount ($96,929.49) from the value of Parcel 1. After making this deduction, a total of $278,707.51 would remain owing on closing. Thus, $278,707.51 was described as the purchase price;

3. There are two unusual terms in which Mr. Dorey both surrenders sweeping powers so that Ms. Sutherland's son (Jason or "Jay" Sutherland) may act on his behalf. In particular:

    a. In paragraph (f) of Schedule "A", Mr. Dorey grants Ms. Sutherland's son (Jason or Jay Sutherland) sweeping powers to act on his behalf. It states that Mr. Sutherland has:

> "the Express Right to Act on behalf of John Frank Dorey's person right [sic.] and The Buyer [i.e. Ms. Sutherland] agrees to allow Mr. Sutherland [i.e. Ms. Sutherland's son] to sign off any/all and all contractual matters regarding future easements needed from the development of any of the PID's … that involve development for any future changes or additional easements for NOVA SCOTIA POWER, BELL or any 3rd party services needed without any limitations."

    b. In a related section entitled "Assignment to act on my personal behalf, the agreement goes further and states that Mr. Dorey is:

Parcel 2 – 8 and just Parcel 1). I discuss this inconsistent language below. Suffice it to say that counsel for Ms. Sutherland agreed at the hearing that this original agreement was, in fact, limited to the sale of Parcel 1 with a right of first refusal over the remaining parcels. This interpretation also accords with a subsequent amendment made March 22, 2023. This amendment extended the closing to June 29, 2023. Importantly, it only refers to Parcel 1 and does mention any other parcels of land. This subsequent written amendment reinforces the fact that, by this time, Mr. Dorey had only agreed to sell Parcel 1 to Ms. Sutherland. I return to this issue below.

> "assigning and granting [his] personal rights and [he] hereby provided to Mr. Sutherland control to sign, negotiate, contact, review, inquire and not limited too [sic.] as well as, Act in good faith on my personal behalf to ensure any and all contractual matters regarding the Future easements, for the sale and development of my properties as well as, changes to land registration as well as in any and all matters not listed in this letter needed for all development process prior to the execution of all sales of all PID's to G and J Sutherland or an assignee of their choice."

In that same related section, Mr. Dorey also entitles Mr. Sutherland to:

> "assign, register, Apply by application, release of all documentation [sic.], apply leans [sic.] and carry out any business matters required to execute our contractual matters not limited to these items to ensure development of all PID's and all executed terms outlined in the executed sale contract for the listed PID's below."

I pause here to note that these provisions suggest that Mr. Dorey agreed to sell all of Parcels 1 – 8. In fact, as mentioned, he had only agreed to sell Parcel 1. See footnote 1 above.

4. There are also two equally unusual provisions in which Mr. Dorey gives broad personal guarantees in favour of Ms. Sutherland. In Paragraph (g) of Schedule "A", Mr. Dorey agreed to sign a personal guarantee that he will "unequivocally sell all of the listed PID's to the Buyers without any interference or delay and will work with Jay Sutherland to ensure a smooth and quick closing date." Mr. Dorey further personally guaranteed "any and all additional costs unknown to date that could arise from entering this deal … all previous expenses made by the Buyer and the Buyer's company including legal fees if the deal is not able to close."

   A related provision tacked on to the end of Schedule "A" and entitled "PERSONAL GUARANTEE" repeats and reiterates these same, broad personal obligations. Here again, despite the wording suggesting that Mr. Dorey had agreed to sell all of Parcels 1 – 8, this original transaction was limited to the sale of Parcel 1, with a right of first refusal over the remaining lands. See footnote 1 above.

[23] One final term merits mention. Paragraph 1.1 of the original agreement refers to a deposit, but it is struck out. Neither the agreement nor any of the amendments refer to a deposit being paid by Ms. Sutherland. Yet, Ms. Sutherland's affidavit refers to a deposit. She says that she paid Mr. Dorey $1,000 a month as a deposit towards the purchase price of the properties – and that she ultimately paid Mr. Dorey $6,000 which was to be deducted from the purchase price upon closing the sale of Parcel 1.

[24] At the hearing, counsel for Ms. Sutherland advised that Ms. Sutherland began paying Mr. Dorey the so-called deposit funds in late 2022 but then stopped paying in February 2023 out of a concern that Mr. Dorey might not close the transaction – even though this is the same month when the original agreement was actually signed.

[25] In any event, the point is that Ms. Sutherland claims that a $6,000 deposit was paid and must be accounted as a reduction in the purchase price although, again, the paragraph confirming a deposit was struck from the agreement. I revisit this issue below.

March 22, 2023 Amendment

[26] This amendment is recorded on the Nova Scotia Real Estate Commission's standard form. This amendment refers only to the sale of Parcel 1.[2] For present purposes, it is relatively inconsequential except that it extended the closing date for Parcel 1 from May 22, 2023 to June 29, 2023.

April 2, 2023 Amendment

[27] Ms. Sutherland states that on April 2, 2023 the agreement was amended a second time. It is only a single typed page but it is important because, through this second amendment, Ms. Sutherland contends that the agreement was significantly expanded such that Mr. Dorey was now obliged to sell all the lands described above (i.e. Parcels 1 – 8).

[28] This amendment was signed by Mr. Dorey and Jason or "Jay" Sutherland. And it refers to "Genniene & Jay Sutherland Purchase of DUBLIN SHORE – JOHN DOREY Listed Properties" even though, again, Ms. Sutherland was the only purchaser. Jason or "Jay" Sutherland was not the buyer.

[2] By this point, Mr. Dorey had committed only to selling Parcel 1 to Ms. Sutherland. This amendment confirms that fact, despite some inconsistent language contained in Schedule "A" to the original agreement dated February 22, 2023. See footnote 1 above.

[29] In her affidavit filed in support of this application, Ms. Sutherland states that her son, Jason or "Jay" Sutherland, negotiated and signed this second amendment on her behalf and with her authority.

[30] The relevant terms of this amendment include:

1. Ms. Sutherland's right of first refusal over Mr. Dorey's remaining lands was replaced with an agreement to purchase not just Parcel 1 but Parcels 1 – 8 representing all of Mr. Dorey's lands described above;
2. Mr. Dorey's parcels of land were divided into four separate groups:
    a. Group 1 was Parcel 1 and Parcel 2;[3]
    b. Group 2 was Parcels 3 – 6;
    c. Group 3 was Parcel 7; and
    d. Group 4 was Parcel 8.
3. A particular value (or sale price) was attached to each individual parcel. The sum of the assigned values for individual parcels of land was the purchase price for the related group.
4. An anticipated closing date was attached to each group. Thus:
    a. Although the amended closing date for Parcel 1 was June 29, 2023, Group 1 (Parcels 1 and 2) were now scheduled to close within a "timeline" described as "ASAP".
    b. Group 2 (Parcels 3 – 6) was scheduled to close in accordance with a "timeline" described as "Migration and House" – meaning that this transaction would close once all of Parcels 3 – 6 were migrated and, as well, a new home for Mr. Dorey was built. I return to the issue of Mr. Dorey's home below;
    c. Group 3 (Parcel 7) was scheduled to close "1 yr – after 22 acres" with the "acres clearing referring to Parcel 1. Thus, Group 3 would close one year after Group 1;
    d. Group 4 was scheduled to close "depending on [Mr. Dorey]", introducing an element of uncertainty. The amendment explains that this uncertainty is due to the fact that "[Mr. Dorey]

[3] Recall that in the original agreement, Mr. Dorey agreed to sell Parcel 1. Now, the first lands to be sold were Parcel 1 and Parcel 2.

wants to keep [Parcel 8]. But, we have first to purchase for the amount of $125,000." The amendments do not make clear why Ms. Sutherland believed she must purchase Parcel 8 – or why Mr. Dorey could not retain it. In any event, as indicated, Ms. Sutherland seeks to specifically perform this term of the agreement.

5. Importantly, through these amendments, Ms. Sutherland also entered into a contractual obligation to build Mr. Dorey a new home. By way of background, the original agreement indicates that Mr. Dorey lived in a blue house on Parcel 1. When Parcel 1 (Group 1) was sold, Mr. Dorey would be required to leave his home so that the Applicant could begin the process of subdividing and developing Parcel 1. To ensure Mr. Dorey would have a home after moving from his home on Parcel 1, the amended agreement including the following terms:

    a. As indicated, Ms. Sutherland would first purchase Parcel 1 and Parcel 2 (Group 1). As will be seen, Mr. Dorey's new home was to be built on Parcel 2. Acquiring Parcel 2 as part of the initial Group 1 transaction presumably gave Ms. Sutherland the necessary access to the land to build Mr. Dorey's new home;

    b. Mr. Dorey would continue living in his blue house on Parcel 1 "for not more than 3 months after closing for free until the Sellers Tenant vacates and moves out of the residence on [Parcel 7]";

    c. At the end of this three months, Mr. Dorey would move into the currently leased residence located on Parcel 7. Presumably the tenant who was living in that residence would have vacated by that time;

    d. Ms. Sutherland would then build a new home for Mr. Dorey on Parcel 2;

    e. Unfortunately, the description of this new home is extremely sparse. There are no descriptions, details, or construction specifications beyond stating that the house would be worth approximately $325,000. There is no indication as to the location of the new home beyond saying that it would be on Parcel 2. There is no clear indication as to when the house would be completed. The amendments simply conclude with both

Parcel 2 and Mr. Dorey's newly constructed home being transferred (or "traded") back to Mr. Dorey "when complete";

f. The idea was that the sale of the Group 2 lands (Parcels 3 – 6) would close once Mr. Dorey's new home was built on Parcel 2. Thus, the amendment confirmed that the purchase price for Group 2 would be reduced by $325,000 representing the value of the home. Specifically, this amendment confirmed that the sale price for Group 2 (Parcels 2 – 6) was a total of $350,000. $325,000 would be deducted from that value. The deduction was described as "Trade for New UNIT 3 – HOME - 325k". The net amount due on closing Group 2 was $25,000 ($350,000 for Group 2 lands minus $325,000 for Mr. Dorey's new home). The amendment characterized the net amount of $25,000 due on closing as "TOTAL BUYING ON CLOSING". (capitalized in the document) Again, the transfer (or "trade") of Parcel 2 back to Mr. Dorey would occur when the sale of the parcels included within Group 2 closed and when Mr. Dorey's new home was constructed, with the purchase price being adjusted accordingly.

[31] At this point, it is relevant to review an exchange which occurred during oral argument. The draft order presented by Ms. Sutherland as part of her application materials included a preamble which stated, *inter alia*, that that Mr. Dorey agreed to sell the Group 2 lands for $350,000. There is no mention in the draft order of Ms. Sutherland's corresponding obligation to build Mr. Dorey a new home on Parcel 2 – or the fact that the actual purchase price for Group 2 lands was $25,000 (i.e. the $350,000 value of the Group 2 lands minus the $325,000 value of Mr. Dorey's new home).

[32] I asked Ms. Sutherland's counsel if the Court could amend the agreement to remove the obligation to build Mr. Dorey a new home and, instead, simply require Ms. Sutherland to pay $350,000 for the Group 2 lands (Parcels 3 – 6). Legal counsel conferred with his client at the hearing and advised that, if the Court was concerned about Mr. Dorey's new home, his client had already "ordered" the "modular home" referred to in the agreement and that this modular home could be provided to Mr. Dorey and thus "trigger the purchase of Group 2".

[33] Setting aside the fact that the information provided by Ms. Sutherland was not evidence before the Court, I have no details regarding the nature or value of the modular home in question or whether it conforms with the parties' contractual intentions. I return to this issue.

Post-Contractual Relationship

[34] Within a month of signing this second amendment on April 2, 2023, the relationship between the Sutherlands and Mr. Dorey deteriorated. The reasons for this breakdown are unclear. However, on May 1, 2023, Mr. Dorey sent a one-sentence email to Jay Sutherland saying, "Any deals due to obvious factors are cancelled." I understand that neither the buyer, Ms. Sutherland, nor her son, Jay have had any further communications with Mr. Dorey.

[35] In her application materials, Ms. Sutherland points to this email as clear confirmation that Mr. Dorey repudiated the agreement and had no intention of honouring his contractual commitment to sell Parcels 1 – 8.

[36] That same day (May 1, 2023), Jay Sutherland (on behalf of his mother, Ms. Sutherland) wrote back to Mr. Dorey stating that he was not entitled to unilaterally terminate their agreement and would be liable for their damages. The next day, May 2, 2023, Mr. Sutherland (presumably on behalf of Ms. Sutherland) wrote to Mr. Dorey's legal counsel (Matthew Fancey) and calculated what those damages would be, to date. They included $660,000 in "loss of sales" apparently related to contractual commitments to buy 16 lots; repayment of the $6,000 deposit, legal fees, appraisal and surveying costs, and septic testing. The "GRAND TOTAL TO date" was $684,000. Mr. Sutherland told Mr. Fancey that "it would be good for him [Mr. Dorey] to understand our damages and you can reference these losses below".

[37] On May 31, 2023, as indicated, Ms. Sutherland filed this Notice of Application in Chambers seeking specific performance.

[38] The evidence before me indicated that the application materials were personally served upon Mr. Dorey on June 1, 2023. Despite receiving notice, Mr. Dorey did not respond by filing a Notice of Contest; and he did not appear in Court on the day of the hearing.

DECISION

[39] Specific performance is an equitable remedy where the repudiating party is compelled to perform his contractual duties – as opposed to simply paying monetary damages for the breach. However, there are circumstances in which specific performance is neither an equitable nor practical response to contractual breach. In this case, the following concerns arise:

1. In my view, financial damages are an adequate remedy. Indeed, upon receiving Mr. Dorey's repudiation, Ms. Sutherland's agent (Mr. Sutherland) quickly and precisely calculate the financial repercussions associated with Mr. Dorey's breach.
2. Key terms of the agreement are simply too uncertain to enforce – particularly in terms of Mr. Dorey's new home although there are other uncertainties;
3. The terms of the agreement are also uncertain as reflected by Ms. Sutherland's request to amend the express terms of the agreement including amending the agreement to add a deposit provision so that the purchase price for Group 1 would be reduced by $6,000 previously paid to Mr. Dorey – even though the deposit paragraph in the original agreement (paragraph 1.1) had been struck out.

[40] There are other issues. I address these concerns in greater detail below.

Damages are not an Inadequate Remedy

[41] The party seeking specific performance must establish that there was a valid and enforceable contract and that monetary damages would not comparatively compensate for the repudiation.

[42] In the leading Supreme Court of Canada decision of *Semelhago* v. *Paramadevan*, [1996] 2 S.C.R. 415, Sopinka, J. wrote at paragraphs 20-22:

> While 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. Residential, business and industrial properties are all mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.

> It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. 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. The common law recognized that the distinction might not be valid when the land had no peculiar or special value. In *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239, Sir John Leach, V.C., stated (at p. 240):
>
> > 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. Thus a Court of Equity decrees 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.
>
> …
>
> Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available.

[43] The vast weight of authority confirms that specific performance is frequently denied where property is being purchased for development or investment purposes. (CED, Specific Performance, §9 "Damages Adequate as Remedy". See, in particular, the numerous cases and authorities referenced at footnote 5). The reason is that the underlying interests are primarily commercial in nature and, therefore, damages are typically viewed as an adequate remedy.

[44] In this case, I was not provided any case law where a developer was granted the remedy of specific performance to develop a residential subdivision. However, Ms. Sutherland referred to certain exceptions in which specific performance was granted for other forms of real estate development. In *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.*, 2001 CarswellOnt 3984 ("*John E. Dodge Holdings*"), a purchaser sought to specifically perform an agreement to purchase land upon which a hotel would be built. Ms. Sutherland refers to the following passage from the trial judge's decision:

> It is important to keep in mind that uniqueness does not mean singularity. It means that the property has a quality (or qualities) that makes it especially suitable for the proposed use that cannot be reasonably duplicated elsewhere. To put this another way, the plaintiff must show that the property has distinctive features that make an

> award of damages inadequate. The plaintiff need not show that the property is incomparable.

[45] The trial decision was upheld on appeal (2003 CarswellOnt 342). In assessing the unique qualities of the subject property, the Ontario Court of Appeal focussed on the fact that the proposed development on the subject lands was a hotel; and that the subject lands were in close proximity to nearby attractions such as Canada's Wonderland, the Vaughan Mills Centre and a planned $250 million retail mall (at paragraph 34). These nearby attractions were critical to hotel operations and were not replicated in any proposed comparable properties.

[46] Ms. Sutherland's evidence regarding the unique features of Mr. Dorey's lands relate mainly to its location and topographical features. However, unlike the evidence in *John E. Dodge Holdings*, the evidence was general in nature and did not include details or evidence regarding comparable properties.

[47] More importantly, Ms. Sutherland's own response to Mr. Dorey's repudiation indicate that damages are, in fact, an adequate remedy. On the day of Mr. Dorey's repudiatory email (May 1, 2023), Ms. Sutherland's agent and son (Mr. Sutherland) immediately responded by telling Mr. Dorey that he would be held liable for damages. The next day (May 2, 2023), Mr. Sutherland asked that Mr. Dorey's legal counsel pass along his calculation of damages to date. They totalled $684,000 (see paragraph 36 above).

[48] Before leaving this issue, I note Ms. Sutherland also argued that the unusual contractual provisions in which, for example, Mr. Dorey surrendered sweeping powers for Ms. Sutherland's son (Jason Dorey) to act on Mr. Dorey's behalf reveal how unique and important these lands were to Ms. Sutherland. Respectfully, these provisions raise more questions than answers in terms of Ms. Sutherland's entitlement to specific performance. I discuss this concern below. For present purposes, I do not find that these provisions assist in demonstrating the uniqueness of the subject lands.

[49] Overall, the evidence is clear that damages are an adequate remedy in the circumstances of this case. I would deny specific performance on that basis alone.

Uncertainty Regarding Construction of Mr. Dorey's New Home

[50] The general rule of specific performance is that it will be denied in contracts which involve a vague obligation to build or construct a home or another structure.

[51] A specific and somewhat recent example is *Este v. Esteghamat-Ardakani*, 2020 BCCA 202. In this case, the British Columbia Court of Appeal held that a generalized obligation build cannot be remedied in a motion for specific performance which requires the parties to cooperate and come up with an agreement. It states at paragraph 53:

> An obvious problem presented by compelled participation in property construction is management of the myriad small and large decisions required of owners. The judge addressed this by ordering the parties to cooperate, with the court as the arbiter should they disagree. To state this proposition is, in my view, to demonstrate the impermissibly vague and unenforceable nature of the cooperation order, and the unsuitability of the court making those construction decisions is obvious. On what principle could a judge decide door handles or counter-tops?

[52] In my view, that same problem of uncertainty is particularly acute in this case. The agreement under which Mr. Dorey would sell all of Parcels 1 – 8 is very closely connected to a related contractual obligation whereby Ms. Sutherland would build Mr. Dorey a new, permanent home. This contractual obligation is clearly important. Under this agreement, and as part of the Group 1 sale of lands to close imminently, Mr. Dorey would be immediately compelled to leave his current home on Parcel 1 and also transfer Parcel 2 on which a new home was to be built for him. He would then be required to displace a tenant living in another residence on a neighbouring property Mr. Dorey owned; live in this previously leased premises until Ms. Sutherland completed construction of his new, permanent home on Parcel 2. At that point, the new home and parcel 2 would be "traded" back to Mr. Dorey at an agreed value of about $325,000. The symbol for approximation ("~") was put in front of the $325,000 figure.

[53] Yet, the details surrounding Mr. Dorey's new home are extraordinary sparse and vague. All the agreement says is that Mr. Dorey's new home would be valued at about $325,000 and located somewhere on Parcel 2. The agreement does not state:

1. Precisely where the home would be located;
2. What the actual value of the home would be – as opposed to an approximation;
3. What the home would look like. In fact, there are no descriptions of construction specifications for the proposed home at all;

4. How any disputes would be resolved, which is of particular concern here because the absence of any construction details makes the likelihood of dispute is virtually inevitable.

[54] As mentioned above, during oral argument, Ms. Sutherland conferred with legal counsel and offered that a "modular home" was apparently ordered for Mr. Dorey to comply with this contractual obligation, if the Court was concerned. Respectfully, this information was not provided to Mr. Dorey and is not evidence in any event. More importantly, I have no information regarding this modular home or whether it complies with Ms. Sutherland's contractual obligations.

[55] In my view, respectfully, these problems render the remedy of specific performance entirely unsuitable.

$6,000 Deposit and Proposed Contractual Amendments

[56] There is additional uncertainty in the Agreement which would also be fatal to this request for specific performance.

[57] As indicated, Ms. Sutherland takes the position that she paid a $6,000 deposit to Mr. Dorey and that this amount should be deducted from the purchase price for Group 1 lands (Parcels 1 and 2 to close imminently).

[58] As indicated, there is no mention of a $6,000 deposit in the contractual documents and, in fact, the deposit provisions in the original agreement signed February 22, 2023 are left blank and struck out (paragraph 1.1).

[59] In my view, respectfully, Ms. Sutherland's claim to be repaid these amounts as a deposit against the Group 1 land purchase amends re-writes the agreement and introduces additional contractual uncertainty. All of this undermines her request for specific performance.

[60] There are other instances of contractual uncertainty including, for example, the suggestion that the agreement included Mr. Dorey's binding commitment to sell Parcel 8 even though the contractual amendment expressly states that Mr. Dorey wants to keep Parcel 8 and that any closing date "depends on Mr. Dorey". In fairness, the amendment also states that the buyer "[has] first to purchase for the amount of $125,000". But it is not clear why the buyer must first purchase Parcel 8, as opposed to Mr. Dorey simply keeping it. There was no evidence before me to explain or resolve these uncertainties around Parcel 8.

Other Issues

[61] As a final comment, I briefly return to the contractual provisions in which Mr. Sutherland was granted sweeping powers to act on Mr. Dorey's behalf, in good faith, and also in which Mr. Dorey offered broad personal guarantees. Ms. Sutherland agreed that these terms were unusual but argued that they ultimately confirm the importance Ms. Sutherland placed on closing this transaction and, in turn, emphasize the unique nature of the transaction which she seeks to specifically perform.

[62] In my view, the relevance of these provisions does less to highlight the uniqueness of the lands and serves more to highlight the awkward position Jay Sutherland found himself as the contractual arrangements evolved. Recall that Mr. Sutherland signed the amendment under which Mr. Dorey was to sell off the lands (Parcels 1 – 8) as agent for his mother, the buyer Ms. Sutherland. However, at that same time and if necessary, he had also been vested with broad powers to act in good faith on Mr. Dorey's behalf to complete the underlying transaction (see paragraph 22 above).

[63] Specific performance is an equitable remedy. Mr. Sutherland's role as agent for Ms. Sutherland but also possessing broad powers to act on behalf of Mr. Dorey raises concern around potentially conflicting fiduciary obligations. However, given the problems discussed above and the fact that the request for specific performance is otherwise untenable in the circumstances, it is not necessary to delve further into that matter.

CONCLUSION

[64] The Application in Chambers for specific performance is dismissed.

Keith, J.