COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Culos Development (1996) Inc. v. Baytalan,* 2025 BCCA 265

Date: 20250728
Docket: CA50010

Between:

Culos Development (1996) Inc.

Appellant/
Respondent on Cross Appeal
(Plaintiff)

And

Gregory Steven Baytalan

Respondent/
Appellant on Cross Appeal
(Defendant)

Before: The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Grauer
The Honourable Justice Gomery

On appeal from: An order of the Supreme Court of British Columbia, dated June 17, 2024 (*Culos Development (1996) Inc. v. Baytalan*, 2024 BCSC 1037, Kelowna Docket S133186).

Counsel for the Appellant:	J.A. Hall
Counsel for the Respondent:	W. Thiessen
Place and Date of Hearing:	Kelowna, British Columbia May 30, 2025
Place and Date of Judgment:	Vancouver, British Columbia July 28, 2025

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Mr. Justice Grauer
The Honourable Justice Gomery

Summary:

The appellant and the respondent (respondent and appellant on the cross appeal, respectively) entered into an option to purchase ("OTP") land in Kelowna, B.C. The trial judge found that the respondent/cross-appellant had breached the terms of the OTP, but declined to order specific performance of the agreement and limited the appellant's recovery to reliance damages. On appeal, the appellant submits that the judge erred in concluding that specific performance would not be an appropriate remedy for the breach and, in the alternative, in declining to order expectation damages. On the cross appeal, the respondent/cross-appellant submits that the judge made several legal and factual errors in finding that he breached the OTP.

Held: The cross appeal is dismissed and the appeal is allowed. The judge did not err in finding that the respondent/cross-appellant breached the terms of the OTP, but did make reviewable errors in determining that specific performance was not an appropriate remedy in the circumstances. In light of these errors, the Court substitutes an order for specific performance of the OTP.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] This appeal arises out of a dispute relating to what the trial judge found was the respondent Mr. Baytalan's, breach of an option to purchase lands located in Kelowna, B.C. (the "OTP" and the "Property", respectively). The appellant purchaser, Culos Development (1996) Inc. ("Culos"), sought specific performance of the OTP or, in the alternative, damages. The judge declined to award specific performance and concluded that Culos had failed to lead sufficient evidence to assess damages based on a loss of anticipated profits or a loss of the Property's value as of the date of the breach. Accordingly, the judge limited the award to reliance damages: the reasons for judgment are indexed as *Culos Development (1996) Inc. v. Baytalan,* 2024 BCSC 1037.

[2] On appeal, Culos submits that the judge erred in deciding not to order specific performance of the OTP. In the alternative, it submits that the judge erred in declining to award expectation damages based on the value of the Property at the time of the breach and in limiting the recovery to reliance damages.

[3] On the cross appeal, Mr. Baytalan submits that the judge erred in concluding that he breached the OTP. In particular, he challenges the judge's conclusion that the OTP constituted a bilateral as opposed to a unilateral contract, which contract required strict compliance, and further submits that the judge allowed the contract's factual matrix to overwhelm the text of the OTP, in particular the meaning of "Appraised Market Value".

[4] For the reasons that follow, I would dismiss the cross appeal. I would allow the appeal and order specific performance of the OTP.

Background

[5] The judge's extensive factual findings are summarized at para. 92 of the reasons for judgment.

[6] The Property is located in the Glenmore area of Kelowna, which has recently seen "massive urban growth": at para. 4. In late 2019, Mr. Baytalan, who owns the Property, approached Culos to see whether it would consider buying the site. Pre-OTP discussions between the parties included an understanding that the Property would be used to develop non-profit social housing: at paras. 7–8.

[7] On March 26, 2020, the parties agreed to the OTP. Prior to this agreement, four versions of the OTP were exchanged. The OTP gave Culos one year to exercise the option, with an optional six-month extension.

[8] The final version of the OTP provided that the Property's purchase price was to be the higher of $1.3M (the floor price) or the appraised market value of the property "as of the date of execution of this Agreement" (i.e., March 26, 2020). The appraisal was to be obtained within six months of the OTP. Both parties were to agree on the appraiser and the instructions provided to them. The final version of the OTP also stated that if Mr. Baytalan took issue with the appraisal, he could obtain an appraisal of his own and the Property's purchase price would be the average of the two appraisals. The OTP did not specify a timeframe for Mr. Baytalan to obtain his

own appraisal. However, if he did so, his appraisal was also to value the Property as of March 26, 2020.

[9] Upon registering the OTP, Culos proceeded with a series of development activities, seeking to have the Property rezoned and to propose a social-housing development to BC Housing. In the process, Culos incurred expenses and significant in-house time and overhead.

[10] Both parties discussed and agreed to use Mr. Lionel Hoffman, a licensed and accredited appraiser, to appraise the Property. However, Mr. Baytalan was not consulted on the specific instructions provided to Mr. Hoffman. On August 21, 2020, through an error by Culos, Mr. Hoffman was given the third draft of the OTP, not the final version. The third draft did not specify that the appraisal was to be based on the value of the Property on March 26, 2020. Accordingly, Mr. Hoffman did not value the Property as of March 26, 2020, as the final version of the OTP required, and his appraisal (the "First Hoffman Appraisal") valued the property at $1,505,000 as of September 23, 2020. The First Hoffman Appraisal was based on a specific development proposal according to which the property was to become non-profit social housing.

[11] In March 2021, the one-year option was extended by agreement to 18 months, expiring on September 30, 2021.

[12] Mr. Baytalan was initially "quite happy" (at para. 24) with the First Hoffman Appraisal, which valued the Property above the $1.3M floor. However, by the summer of 2021, he was experiencing what the judge referred to as "seller's remorse" due to a surge in Kelowna property values: at para. 92(v). At that time, Mr. Baytalan obtained his own appraisal, by Mr. Rizzo (the "First Rizzo Appraisal"). Despite knowing the OTP provided that the valuation date was to be March 26, 2020, Mr. Baytalan instructed Mr. Rizzo to prepare a current market value appraisal. His purpose in giving these instructions was to attempt to renegotiate the option price. The First Rizzo Appraisal valued the property at $3,950,000 as of August 30, 2021.

[13] Culos decided to exercise the OTP and, in the weeks leading to the September 30, 2021, deadline, repeatedly attempted to deliver notice to Mr. Baytalan, who was aware of these attempts and took steps to avoid being personally served. Mr. Baytalan also did not deliver the First Rizzo Appraisal to Culos until after Culos had exercised the OTP. On October 2, 2021, Mr. Baytalan took the position the OTP was at an end because Culos had failed to give proper notice as provided for in the OTP.

[14] To secure bank financing to complete the purchase, Culos obtained a current value appraisal from Mr. Hoffman dated October 29, 2021, valuing the Property at $2,800,000 (the “Second Hoffman Appraisal”).

[15] In early December 2021, Culos attempted to close on the sale in accordance with the OTP’s terms. However, Mr. Baytalan refused to complete the transaction.

[16] At Mr. Baytalan’s request, Mr. Rizzo prepared a second appraisal dated December 21, 2021 (the “Second Rizzo Appraisal”), valuing the Property retrospectively as of September 23, 2020 (the same date as the First Hoffman Appraisal) at $3,300,000. That appraisal was promptly provided to Culos.

[17] On January 31, 2022, Culos filed a Notice of Civil Claim seeking, *inter alia*, specific performance of the OTP.

The Reasons for Judgment

[18] The judge first considered and dismissed Mr. Baytalan’s contention that the OTP was a unilateral contract. Mr. Baytalan had relied upon a series of older cases standing for the proposition that options to purchase are typically unilateral contracts and that a party seeking to enforce such an option must demonstrate strict compliance with the contract’s terms and that owners of land have no obligation to sell unless “conditions precedent” are fulfilled: at para. 88. Relying on the Supreme Court of Canada’s more recent decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the judge concluded that the OTP, when considered in its context, amounted to a bilateral contract; accordingly, strict compliance was not

required: at paras. 88–90. In concluding that the OTP constituted a bilateral contract, the judge noted that "the OTP describes how the Property's price is to be determined (which requires steps to be undertaken by both parties) and contains provisions setting out both parties' obligations and covenants": at para. 90.

[19] He then turned to Mr. Baytalan's argument that the First Hoffman Appraisal did not comply with the OTP. He acknowledged that Culos had failed to obtain Mr. Baytalan's written agreement on the instructions given to Mr. Hoffman and that the appraisal was as of September 23, 2020, rather than March 26, 2020 (as per the OTP). But the judge found that the instructions provided to Mr. Hoffman ultimately accorded with the OTP. He noted the later date at which the property was appraised only benefited Mr. Baytalan: at paras. 102–104, 122–124.

[20] Mr. Baytalan also argued that the First Hoffman Appraisal failed to comply with the OTP because it was not a "Market Value Appraisal", as contemplated by the OTP, but rather was an appraisal based on a proposal for a specific social housing project. He claimed that the First Hoffman Appraisal significantly undervalued the Property by failing to account for its full development potential. The judge rejected this argument, noting that the process involved in appraising a property is an art, not a science, and that in any case it was Mr. Baytalan who had made it clear that he wished for the Property to be used for public housing. He concluded that Mr. Baytalan could not "now complain that the First Hoffman Appraisal which appraised the Property for precisely that purpose, was not a proper appraisal": at paras. 106–125.

[21] The judge then turned to consider whether Culos provided proper notice of its decision to exercise the OTP. He concluded that Mr. Baytalan received "both actual notice and notice as provided for by the OTP": at paras. 126–134.

[22] Having established there was a binding contract, the judge then found Mr. Baytalan breached the terms of the OTP by refusing to complete the sale: at para. 147. However, the judge rejected Culos' contention that specific performance was the appropriate remedy, finding the Property was not unique for its purposes,

either subjectively or objectively, and that, accordingly, an award of damages would be adequate: at paras. 149–157.

[23] The judge also rejected Culos' argument that, at a minimum, its damages should be based on the difference between the First Hoffman Appraisal ($1,505,000) and the Second Hoffman Appraisal ($2,800,000). He concluded that Culos failed to tender any expert appraisal evidence that would assist in establishing the value of the lost bargain. He noted that the two Hoffman reports were not tendered as expert reports, instead having been admitted for the limited purpose of showing they had been obtained. The judge also found that Culos failed to lead persuasive, non-speculative evidence to prove loss or chance of profit: at paras. 158–165. Accordingly, he limited his award of damages to "reliance damages", that is, to the costs Culos incurred rezoning the Property and in preparing development plans, which expenses amounted to $181,710.69: at paras. 166–170.

[24] I will return to the judge's reasons when I consider the parties' specific challenges to his conclusions.

On Appeal

[25] Since the cross appeal focuses on whether Mr. Baytalan breached the OTP and the appeal concerns the appropriate remedy ordered by the judge, I would frame the issues, first, as whether he erred:

(a) In concluding that the OTP was a bilateral as opposed to a unilateral agreement; or

(b) In allowing the factual context to overwhelm his interpretation of the parties' intentions as set out in the OTP.

[26] Second, if no reviewable error is demonstrated regarding the judge's conclusion that Mr. Baytalan breached the OTP, then the issues are whether the judge erred:

(a) In declining to order specific performance; and, if not

(b) In failing to account for the Property's increase in value when assessing damages.

Standard of review

[27] Issues of contractual interpretation are generally questions of mixed fact and law, reviewable on a standard of palpable and overriding error: *Sattva* at para. 50. This is because the exercise of ascertaining the parties' objective intent is "inherently fact-specific": *Argo Mezzanine Financing No. 1 Ltd. v. Plaza 88 Development Ltd.,* 2025 BCCA 73 at para. 36. Not all questions of contractual interpretation, however, will be questions of mixed fact and law; where a judge has made an extricable error of law, their conclusion will be reviewable on a standard of correctness and, accordingly, afforded no deference on appeal. As this Court recently summarized in *Argo:*

> [39] While "… courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation", such questions may arise, including where a judge has applied an incorrect principle, failed to consider a required element of a legal test, or failed to consider a relevant factor: *Sattva* at paras. 53–54, *Ledcor* at para. 24, and *Richmont Mines Inc. v. Teck Resources Limited,* 2018 BCCA 452at para. 69.
>
> [Emphasis added.]

[28] The following principles of contractual interpretation, summarized in *Canaccord Genuity Corp. v. Reservoir Minerals Inc.,* 2019 BCCA 278 at paras. 19–20, are relevant to the issues raised on appeal:

a) When interpreting a contract, the court may look to objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not to evidence of the parties' merely subjective intentions;

b) While evidence of an agreement's factual matrix may be used to clarify the parties' objectively ascertainable intent, it may not be used "to contradict that intention or create an ambiguity where one did not previously exist"; and

c) While evidence of surrounding circumstances will be considered in interpreting the terms of a contract, it should not be permitted to "overwhelm" the express terms of a written contractual provision, and evidence of an agreement's factual matrix ought not be relied upon to such an extent that the court ends up effectively creating a new agreement: see also *Sattva* at para. 57.

[29] As an equitable and discretionary remedy, a judge's decision whether to order specific performance attracts a deferential standard of review: *Mill v. Orogenic Gold Corp.,* 2024 BCCA 359 at para. 19. As such, this Court will not interfere with the judge's decision to decline to order specific performance unless Culos establishes that he erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision: *Mill* at para. 22, citing *Perrier v. Canada (Revenue Agency),* 2021 BCCA 269 at paras. 45–47.

Issue #1: Whether the judge erred in concluding that the OTP was a bilateral as opposed to a unilateral contract

The Positions of the Parties

[30] Mr. Baytalan argues that the judge erred in expressly disregarding several leading authorities on option agreements on the basis that these decisions pre-dated the Supreme Court of Canada's decision in *Sattva* and were therefore only of "passing interest": at para. 89. His position is that *Sattva* did not overturn this line of authority, which was accordingly binding upon the trial judge. He submits that upon a proper application of these cases, particularly *Sail Labrador Ltd. v. Challenge One (The),* [1999] 1 S.C.R. 265, the OTP is properly characterized as a unilateral contract.

[31] Culos submits that the judge did not disregard the Court's decision in *Sail Labrador,* but simply considered it within the context of the Court's more recent decision in *Sattva.* In any case, Culos submits, the judge's determination that the OTP constituted a bilateral rather than a unilateral contract was consistent with the principles set out in *Sail Labrador.*

Discussion

[32] The judge's determination that the OTP constituted a bilateral rather than a unilateral contract is a finding of mixed fact and law entitled to deference on appeal, absent a palpable and overriding error of fact or an extricable error of law.

[33] The difference between a unilateral and a bilateral contract may be stated plainly in principle but can become more difficult to discern in practice. Both unilateral and bilateral contracts involve a reciprocal exchange of consideration between the parties. A bilateral contract takes the general form of a promise in exchange for a promise, whereas in the case of a unilateral contract, an offer is made the *acceptance* of which also constitutes the offeree's performance of their "side" of the bargain contemplated in the offer: *Chitty on Contracts (32nd Edition): Volume 1* (Sweet & Maxwell, 2015) at ss. 27-005 and 27-082 [*Chitty on Contracts*]. In *United Dominions, etc. v. Eagle Aircraft,* [1968] 1 All E.R. 104 (cited with approval in *Baughman v. Rampart Resources Ltd.* (1995), 124 D.L.R. (4th) 252 (BCCA) at para. 27), Diplock L.J. framed the distinction between the two types of agreements as follows:

> Under contracts which are only unilateral ─ which I have elsewhere described as "if" contracts ─ one party, whom I will call "the promisor", undertakes to do or to refrain from doing something on his part if another party, "the promisee", does or refrains from doing something, but the promisee does not himself undertake to do or to refrain from doing that thing… A unilateral contract does not give rise to any immediate obligation on the part of either party to do or to refrain from doing anything except possibly an obligation on the part of the promisor to refrain from putting it out of his power to perform his undertaking in the future…
>
> [Emphasis omitted.]

[34] While an offer for a unilateral contract will not generally give rise to any obligations on the part of the promisor prior to the promisee's acceptance/performance, where an offer is made and supported by consideration flowing from the promisee to the promisor, this is often referred to as an "option" or a "firm offer", and the option will be enforceable if the promisee accepts in accordance with the offer's requirements: *Baughman* at para. 31. That being said, as the Court

noted in *Sail Labrador* (and consistent with the approach later set out in *Sattva*), not all "options" are unilateral contracts, and:

> [41] … whether a contract which contains an option clause establishes a single, bilateral contract or two separate contracts, one bilateral and the other unilateral, is a matter of construction. Courts must examine the text of the contract and the context surrounding it in order to determine the intention of the parties, keeping in mind that this Court has previously approved of the tendency by courts to treat offers as calling for bilateral rather than unilateral performance whenever a contract can fairly be so construed: *Dawson v. Helicopter Exploration Co.,* [1955] S.C.R. 868, at p. 874, *per* Rand J.
>
> [Emphasis added.]

[35] At this juncture, I would observe that *Sattva* involved a synthesis and re-statement of the contemporary common law approach to contractual interpretation. It was therefore an overstatement for the judge to reduce pre-*Sattva* authorities to being of merely "passing interest": at para. 89. That is particularly so in this case since *Sattva* did not address options or unilateral contracts.

[36] In any event, in my view, *Sail Labrador* and *Sattva* are consistent and the judge erred insofar as he concluded that *Sattva* either overruled *Sail Labrador* or rendered it otherwise superfluous. This error, however, was not material. This is because, in light of *Sattva, Sail Labrador,* and other authorities on this issue, I would not accede to Mr. Baytalan's submission that the judge erred in concluding that the OTP was a bilateral, rather than a unilateral, contract.

[37] In accordance with the authorities to which I have referred, the judge considered the text of the OTP within its context, noting in particular the mutual obligations undertaken by both parties: at para. 90. These included mutual obligations to cooperate in the selection of the appraiser. Moreover, Mr. Baytalan was obliged "to cooperate with the Buyer and support any application by the Buyer for rezoning"; this is an affirmative obligation. I see no reviewable error in this approach and in the judge's conclusion. Indeed, I would note that the judge's reliance upon the parties' mutual obligations, including necessarily cooperative ones, in characterizing the OTP as a bilateral contract is consistent with and analogous to the Court's decision in *Dawson v. Helicopter Exploration,* [1955] S.C.R. 868.

[38] Accordingly, I would not accede to this ground of the cross appeal.

Issue #2: Whether the judge erred in allowing the factual matrix to overwhelm the exercise of contractual interpretation

The Reasons for Judgment

[39] In assessing whether the First Hoffman Appraisal complied with the terms of the OTP (that is, whether it departed from its terms in a "material way", at para. 119 citing *Jones v. Sherwood Computer Services Plc.* (1989), [1992] 1 W.L.R. 277, [1992] 2 All E.R. 170 (Eng. C.A.)), the judge found that:

> [120] … what the parties intended for the Property throughout was that the plaintiff would be developing social housing as set out in the Concept Drawings, or something similar, that would meet Freedom's Door or BC Housing requirements, and that the market value appraisal was to reflect that. In other words, it was not about obtaining 'highest and best use' of the Property, but a market value appraisal with that type of project in mind…
>
> [Emphasis added.]

The Positions of the Parties

[40] Mr. Baytalan submits that the judge erred because, having acknowledged that the appraisal did not address the highest and best use of the property, he ought to have found that it did not comply with the OTP; this is because, in his submission, the OTP's reference to "market value" must be taken to refer to its highest and best use. Accordingly, he argues that the judge's conclusion allowed the OTP's factual matrix to overwhelm its terms. This, he says, is an extricable error of law reviewable on a standard of correctness.

Discussion

[41] At trial, Mr. Baytalan relied upon *Musqueam Indian Band v. Glass,* 2000 SCC 52, for the proposition that an appraisal that does not reflect a property's "highest and best" use is not a market value appraisal but, rather, a "use valuation for a particular purpose": see the judge's reasons at para. 110, referring to *Musqueam* at para. 38. In *Musqueam,* which concerned the meaning of "current land value" in a lease of reserve land, the Court noted that, "in real estate law", the term "value" "generally means the fair market value of the land": at para. 37. In interpreting the

lease's reference to "land value", the Court observed further that market value "generally is the exchange value of land, rather than its use value to the lessee": at para. 38 [emphasis in original].

[42] It is important to emphasize that the OTP simply refers to the "Appraised Market Value of the lands", and makes no reference to an appraisal based on the land's highest and best use. Accordingly, this ground of appeal must turn upon whether the judge erred insofar as he interpreted "Appraised Market Value" as encompassing "a market value appraisal with" a social housing "type of project in mind": at para. 120.

[43] In the OTP, the term "Appraised Market Value" was not defined, and I can see no error in the judge's decision to look to the OTP's broader factual context, including pre-contractual discussions between the parties, in determining its meaning. It should be borne in mind that the fundamental question in a contract interpretation analysis is the mutual and objectively ascertainable intention of the parties; if no such intention could be determined based upon the OTP's text and the factual matrix, then *Musqueam* may have been of assistance to the judge in his analysis regarding the proper interpretation to be given to "Appraised Market Value".

[44] This was not the case, however, as there was ample evidence to support the judge's conclusion that the parties intended that the Property be developed as social housing and entered into the OTP with that purpose in mind. In my view, the judge's interpretation of the phrase "Appraised Market Value" was entirely in accordance with the principles identified in *Sattva.*

[45] No reviewable error has been identified and I would not accede to this ground of appeal. It follows that I would dismiss the cross appeal.

Issue #3: Whether the judge erred in declining to order specific performance

The Reasons for Judgment

[46] At paras. 140–155, the judge summarized the law relating to specific performance:

a) Specific performance is an “exceptional remedy” that requires evidence that a property is unique to the extent that a substitute would not readily be available: at paras. 150–151, citing *Lal v. Grewal,* 2024 BCCA 149 at para. 49, and at para. 152 citing *Semelhago v. Paramadevan,* [1996] 2 S.C.R. 415 at para. 22.

b) The “essential question is whether damages can compensate the loss and whether an accurate assessment of damages is possible”: at para. 151, citing *Aulakh v. Nahal*, 2019 BCCA 57 at para. 10*; Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.,* 2014 BCCA 388 at paras. 44–45.

c) Typically, “investment-type properties are candidates for damages rather than specific performance”: at para. 154, citing *Youyi* at para. 45.

[47] The judge’s reasoning as to why specific performance should not be ordered was brief. Essentially, he held that Culos had not established that the property was unique, as it “led no evidence that a suitable substitute location was not readily available”: at para. 156. In particular, he observed that:

> [156] … Although, as a triangle, it is unusual in shape as compared to typical development properties, it is not unique in the sense of substitute development properties available to the plaintiff from which it could derive a profit…
>
> [Emphasis added.]

The Positions of the Parties

[48] Culos submits that the trial judge erred in failing to order specific performance of the OTP on the basis that it had not led evidence that a suitable substitute property would not be readily available. In its submission, the judge overlooked “the very substantial amount of evidence demonstrating that the Property had qualities of particular utility to Culos and the expert evidence of the scarcity of comparable development sites”. Culos also submits that, in addition to ignoring or misapprehending this evidence, the judge erred in law insofar as he treated the question whether to order specific performance as “a search for uniqueness” in the

sense of there being “no available alternative”, rather than as an inquiry as to whether an equivalent property would be readily available.

[49] Mr. Baytalan submits that the judge properly instructed himself as to the applicable legal framework and he stresses the discretionary nature of a judge’s decision to order or decline to order specific performance. In his submission, the judge did not require Culos to prove a total absence of substitute properties; rather, he held Culos to its onus of proving that a substitute property would not be readily available, and concluded that Culos had not led sufficient evidence to that effect.

Discussion

Introduction

[50] Respectfully, in my view, the judge erred in law and misapprehended the evidence in concluding that specific performance would not be the appropriate remedy in the circumstances of this case.

[51] Where a reviewable error is present, an appellate court may draw its own conclusions of law or fact regarding the issue in question, as far as the record permits: *Salomon v. Matte-Thompson,* 2019 SCC 14 at para. 32; *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8. A new trial will not be necessary if the court can decide an issue on the whole of the evidence before it: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217; *Schenker v. Scott*, 2014 BCCA 203. Similarly, if the “essential primary facts are plain from the record” a new trial is not necessary: *Business Depot Ltd. v. Lehndorff Management Ltd.* (1996), 24 B.C.L.R. (3d) 322 (C.A.) at para. 60, additional reasons 48 B.C.L.R. (3d) 326 (C.A.).

[52] Where an appellant has alleged that the trial judge erred in failing to make specific findings, the court should not order a new trial unless it is satisfied that there is a real possibility that the issues on which the judge made no specific findings are issues that could reasonably be resolved in the party’s favour: *Gibney v. Gilliland* (1992), 71 B.C.L.R. (2d) 314 (C.A.), aff’d [1994] 1 S.C.R. 157.

[53] Adopting this framework, I am of the view that this Court can make the necessary findings regarding whether specific performance is the appropriate remedy in this case. Notwithstanding this Court's jurisdiction to make its own findings based on the record, in doing so I shall be guided by the judge's findings of fact, unless it can be demonstrated that they constitute or cannot be extricated from a palpable and overriding error.

Analysis

(i) Overview

[54] I would conclude that the judge erred in his conclusion that specific performance was not the appropriate remedy in this case, in that he:

a) Misapprehended and/or failed to consider relevant evidence, in particular that of the appraiser Mr. Rizzo, in finding that the Property was not unique; and

b) Unduly focused on the investment purpose of the Property in his analysis;

[55] Both errors concern the concept of uniqueness, albeit considered from different perspectives.

[56] I commence by observing that, consistent with his observation that investment properties typically are not candidates for specific performance, the judge seems to have concluded that because other development properties might also generate a profit for Culos, there was nothing to distinguish the contracted-for property from any other that could be purchased for the contract price: at para. 156. He also appears to have held Culos to the standard of establishing an *absence* of suitable substitute locations, in that he concluded that it had failed to lead *evidence* of an absence of a suitable and readily available substitute: at para. 158.

[57] It is of assistance to outline the legal framework. Specific performance emerged as a doctrine when the courts of common law were restricted to the enforcement of contracts through monetary awards, and the courts of Chancery

were, accordingly, relied upon to prevent the law from generating injustice or outcomes perverse to its own purposes. Historically, the general rule was that, subject to certain equitable bars, the buyer of land was always entitled to specific performance on the theory that "land is property that has a fixed location and a special value" and, therefore, is inherently unique: *Adderly v. Dixon,* (1824) 57 E.R. 239. Under Canadian common law, this is no longer the case: *Semelhago* at 429. This is because, as the Supreme Court of Canada held in *Semelhago,* at a time when real property is routinely purchased solely for investment or re-sale purposes, it is often treated "much in the same way as other consumer products", and the assumption that each piece of land holds a "peculiar and special value" can no longer hold: at 428–429. There is no longer a special rule or presumption that applies where specific performance is sought in respect of a contract for the sale of land; the ordinary principles governing specific performance apply, such that specific performance of a contract will generally be awarded where damages would be inadequate compensation for a breach (or prospective breach) of an agreement.

[58] The issue of whether damages are an adequate remedy has been described in somewhat different, though substantively consistent, terms in both the case law and in academic writing. In his work on equitable remedies, Dr. I.C.F. Spry states the question to be asked as:

> …whether the relegation of the plaintiff to such remedies as he has in damages or other legal remedies would leave him in as favourable position in all material respects as would exist if the obligation in question were performed in *specie*: I.C.F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (Sweet & Maxwell, 2010) at 59-60.
>
> [Emphasis added.]

[59] Courts have also asked "whether specific performance will 'do more perfect and complete justice than an award of damages'": Mindy Chen-Wishart, "Specific Performance and Injunction" in *Chitty on Contracts*, citing *Tito v. Waddell* (No. 2) [1977] Ch. 106 at 322; see also *Evans Marshall & Co. Ltd. v. Bertola SA* [1973] 1 W.L.R. 349. In *Youyi*, Justice Newbury described adequacy as, fundamentally, a question of which remedy "better serves justice between the parties": at para. 45.

[60] The court's inquiry into whether monetary damages would constitute adequate compensation begins with an assessment of uniqueness in the sense of whether substitutes are "readily available, but does not end there": *Youyi* at para. 45. Uniqueness "means that the property has a quality (or qualities) that make it especially suitable for the proposed use that cannot be reasonably duplicated elsewhere": *Youyi* at para. 45. As such, a party seeking specific performance "need not show that the property is incomparable" and is not required to "prove a negative and demonstrate the complete absence of comparable properties": *Youyi* at para. 45; see also *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), 56 O.R. (3d) 341 (S.C.J.), aff'd [2003] 63 O.R. (3d) 304, leave to appeal dismissed [2003] S.C.C.A. No. 145.

[61] Damages "are considered to be an adequate remedy where the claimant can readily get the equivalent of what he contracted for from another source" (*Chitty on Contracts* at s. 27-010); accordingly, a property will be unique where its characteristics are such that an equivalent may not be readily obtained. Establishing uniqueness requires evidence of these characteristics: *Guraya v. Kaila*, 2019 BCCA 367 at para. 52.

(ii) Misapprehension/ failure to consider relevant evidence

[62] I am of the view that the judge erred when he held that Culos "led no evidence that a suitable substitute location was not readily available": at para. 156. The error is in the nature of a misapprehension of the evidence or a failure to consider relevant evidence—it is not evident in reading the reasons, whether the judge considered and rejected the evidence before him or failed to consider that evidence in the first place. The only characteristic of the Property that the judge appears to have considered is its triangular shape: at para. 156. The conclusory nature of the reasons on this point renders appellate review difficult: *F.H. v. McDougall,* 2008 SCC 53 at paras. 97–100.

[63] Moreover, there was evidence on the record that was relevant to the question of uniqueness:

(a) The judge accepted as fact that at the time Culos exercised the OTP, the contemplated development was well into the planning stages, with the completion of a geotechnical investigation, an ongoing building design process, and a rezoning application reaching its third reading: at paras. 20–51.

(b) There was also testimonial evidence from Mr. Rizzo, who was called as a witness in Mr. Bataylan's case, which included that "the property has an excellent location near shopping centers, pubs, and a dog park and it is on a bus route…It's a very popular area…there is a very limited supply of multifamily land in this area" [emphasis added].

[64] In assessing the adequacy of damages, the judge did not engage with Mr. Rizzo's evidence, nor with his own findings about the site-specific work that had already been undertaken with respect to the Property. In my view, this evidence was nonetheless relevant to the issue of whether a substitute for the Property could be readily obtained and, relatedly, whether damages would serve justice between the parties by leaving Culos in as favourable a position, in all material respects, as would performance *in specie.*

(iii) Undue focus on investment purpose

[65] While uniqueness may be more rarely established with respect to properties purchased solely for investment purposes, there is no "presumption of replaceability" in such cases: *Youyi* at para. 56, citing *Raymond v. Anderson,* 2011 SKCA 58 at paras. 13–15 (*sub nom Raymond v. Raymond Estate*); *Guraya* at para. 52.

[66] When I review the judge's reasons on this issue contextually and as a whole, he appears to have treated the Property as presumptively replaceable: see paras. 154, 156. Respectfully, the reasons are conclusory on this point; he does not analyze the relevant factors in a way that would sustain his conclusion.

[67] The Court's discussion of investment properties in *Semelhago* is instructive on the question of uniqueness, especially given the judge's reliance upon his

conclusion that the Property "is not unique in the sense of substitute development properties available to [Culos] from which it could derive a profit": at para. 156.

[68] *Semelhago* was primarily concerned with the proper date for assessing damages where the innocent purchaser of a unique asset has a legitimate claim to specific performance but elects to take damages instead. In *Semelhago,* discussing the law governing specific performance, the Court cited with approval from the Newfoundland Court of Appeal's decision in *Chaulk v. Fairview Construction Ltd.* (1977), 14 Nfld. & P.E.I.R. 13. In *Chaulk,* a vendor breached a contract to build and sell five residential duplexes. The trial judge ordered specific performance of the agreement, but the Court of Appeal substituted an award for monetary damages on the basis that what had been contracted for "were merely subdivision houses, all of the same general design…which the respondent was purchasing for investment or re-sale purposes only" as compared to "houses which were of a particular architectural design, or…situated in a particularly desirable location": *Chaulk* at 21 as cited in *Semelhago* at 429.

[69] In the case at bar, while Culos' purposes in entering into the OTP without question related to profit, the parties also shared the intention of developing the Property as social housing, "particular architectural design[s]" had been prepared for the Property, and there was evidence that it was located in a "particularly desirable location".

[70] The Supreme Court of Canada's decision in *Southcott Estates Inc. v. Toronto Catholic District School Board,* 2012 SCC 51, is also of assistance. *Southcott* was principally concerned with the obligation to mitigate damages where specific performance is claimed by the non-breaching party. The Court held that 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": at para. 41. In that case, the ostensibly unique qualities of the contracted-for property "related solely to the

profitability of the development", and, as such, "damages were an adequate remedy": at para. 40.

[71] As Newbury J.A. observed in *Youyi,* however, *Southcott* was a fact-specific appeal from a trial judgment on the question of mitigation "rather than specific performance *per se*": at para. 46. In my view *Southcott* stands for the proposition that unique features relating *solely* to profitability will not be a proper basis for an award of specific performance. This case is very different from *Southcott* in that its features go not only to the profitability of the development project but also to its feasibility and its degree of progress at the time that Mr. Baytalan breached the OTP.

[72] At the time that Mr. Baytalan breached the OTP, the Property was not simply land that, for the purposes of development and profit, could be exchanged for any other. Rather, it was land in respect of which a significant amount of site-specific planning had already been performed. Substantial investment in due diligence and pre-development work as well as, amongst other factors, the completion of the relevant rezoning and planning process are all factors that can be taken into account in considering the propriety of an order for specific performance: see *Qi v. Qin,* 2024 BCSC 1830 at para. 176; *1247249 B.C. Ltd. v. 1098212 B.C. Ltd.,* 2022 BCSC 1230 at paras. 250–254.

[73] I would add that in this case, involving as it did an OTP as distinct from a contract based entirely on pre-contractual "reliance"—pre-development work may constitute a unique feature of land, insofar as the completion and necessity of such work may mean that it will be difficult to readily obtain a suitable substitute. There was also evidence that the Property was situated in a particularly desirable location, with a low supply of alternative properties.

[74] In my view, there is no reason to suppose that these attributes could simply be purchased in short order with the monies received through a damages award. To the extent that such benefits could be re-acquired, based on the timing of the

planning process that has already taken place it is reasonable to assume that doing so would encompass a not insignificant amount of time, coordination and expense.

[75] I am mindful that, owing to the passage of time, the zoning application will need to be repeated, and that there is some evidence to suggest that Culos may seek to use the Property for market rather than social housing. In my view, however, this does not detract in a material way from the significant time, effort, and expense that Culos had undertaken in respect of the development of the Property as of the time of the breach.

(iv) Conclusion

[76] These considerations, in my view, were all relevant to the question of whether to order specific performance. Accordingly, it was a material error for the judge to conclude that the failure to adduce expert evidence was fatal to Culos' claim for specific performance of the OTP.

[77] Having found that the judge committed reviewable errors, I would conclude, for the reasons I have outlined, that the circumstances of this case militate in favour of an award for specific performance. Accordingly, I would grant the appeal and order specific performance of the OTP.

[78] Since I would uphold the judge's conclusion that the First Hoffman Appraisal complied with the OTP, and that the OTP specifies that the purchase price will be the higher of the Property's "Appraised Market Value" or $1,310,435.75, I would order that, in accordance with the First Hoffman Appraisal, the purchase price be $1,505,000.

[79] The OTP contemplates certain closing and adjustment dates for the sale of the Property. The transaction was to close three months after Culos delivered notice to Mr. Baytalan of its intention to exercise the OTP. Adjustments between Culos and Mr. Baytalan were addressed as follows:

> 14. **Adjustments**. All adjustments with respect to taxes, utilities and licences, and all other items normally adjusted between a vendor and

> purchaser on the sale of similar property will be made with respect to the purchased property to and including the Closing Date.

[80] Given the significant amount of time that has passed since Culos gave notice to Mr. Baytalan, I see no reason to set a closing date for the sale that is three months from the date this judgment is released. However, to preserve Mr. Baytalan's right to seek leave to appeal from this decision, I would order that the sale will close 60 days from the date of this judgment, (or an earlier date as may be agreed in writing between the parties) with adjustments "to and including" that date, in accordance with the terms of the OTP.

Issue #4: Did the judge err in failing to account for the increase in the Property's value in assessing damages?

[81] In light of my conclusion that specific performance should be ordered, it is not necessary to consider this ground of appeal.

Disposition

[82] I would dismiss the cross appeal.

[83] I would allow the appeal and order specific performance of the OTP in the terms set out above.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Justice Gomery"