

Southcott Estates Inc. (appellant/respondent on cross-appeal) v. Toronto Catholic District School Board (respondent/appellant on cross-appeal)
(33778; 2012 SCC 51; 2012 CSC 51)

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

Supreme Court of Canada
McLachlin, C.J.C., LeBel, Deschamps, Abella, Rothstein, Cromwell and Karakatsanis, JJ.
October 17, 2012.

Summary:

The defendant school board agreed to sell 4.78 acres of surplus land to Southcott Estates Inc. The agreement was conditional on the board obtaining a severance by the closing date. This failed to happen. The board refused Southcott's request to extend the closing date and returned Southcott's deposit. Southcott brought an action for specific performance or damages.

The Ontario Superior Court, in a decision reported at [2009] O.T.C. Uned. 281, allowed the action. Southcott was awarded damages of \$1,939,500. The board appealed.

The Ontario Court of Appeal, in a decision reported at (2010), 261 O.A.C. 108, allowed the appeal, setting aside the judgment below and substituting a judgment for Southcott for nominal damages of \$1.00. Southcott appealed and the board cross-appealed.

The Supreme Court of Canada, McLachlin, C.J.C., dissenting, dismissed the appeal and the cross-appeal.

Damages - Topic 1001

Mitigation - General principles - The Supreme Court of Canada discussed the general principles regarding mitigation - As a general rule, a plaintiff will not be able to recover for those losses that could have been avoided by taking reasonable steps - Where it was alleged that a plaintiff failed to mitigate, the burden of proof was on the defendant, who needed to prove both that the plaintiff failed to make reasonable efforts to mitigate and that mitigation was possible - On the other hand, a plaintiff who did take reasonable steps to mitigate loss might recover, as damages, the costs and expenses incurred in taking those reasonable steps, provided that the costs and expenses were reasonable and were truly incurred in mitigation of damages - Mitigation was a doctrine based on fairness and common sense, which sought to do justice between the parties in the particular circumstances of the case - See paragraphs 23 to 25.

Damages - Topic 1002

Mitigation - General principles - Duty to mitigate - [See first **Damages - Topic 1065**].

Damages - Topic 1043

Mitigation - In contract - Where specific performance claimed - [See second **Damages - Topic 1065**].

Damages - Topic 1065

Mitigation - In particular matters - Sale of land - The defendant school board agreed to sell 4.78 acres of surplus land to Southcott Estates Inc., a single purpose company with no assets other than the deposit paid for the purchase - Southcott was wholly owned by Ballantry Homes Inc. - The board breached the agreement - Southcott sued for specific performance or damages - The trial judge's award of damages of \$1,939,500 was set aside on appeal on the basis of a failure to mitigate - A judgment for Southcott for nominal damages of \$1.00 was substituted - At issue on Southcott's appeal was whether a single-purpose company had to mitigate its losses - The Supreme Court of Canada rejected Southcott's argument that, as a single-purpose company, it was impecunious and was unable to mitigate without significant capital investment, that it was reasonably foreseeable to those contracting with it that it would have finite resources and that, in any event, Southcott acted reasonably - In the absence of actual evidence of impecuniosity, finding that losses could not be reasonably avoided, simply because it was a single-purpose corporation within a larger group of companies, would give an unfair advantage to those conducting business through single-purpose corporations - Further, 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 - As a separate legal entity, Southcott had to mitigate by making diligent efforts to find a substitute property - Those who chose the benefits of incorporation bore the corresponding burdens - Southcott was entitled to the benefits of limited liability, but it was also saddled with the responsibilities - The requirement to take steps to mitigate losses was one such responsibility - See paragraphs 26 to 30.

Damages - Topic 1065

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Damages - Topic 1081

Mitigation - Evidence and proof - General - [See third **Damages - Topic 1065**].

Evidence - Topic 217

Inferences and weight of evidence - Inferences - Inference of fact - General - [See third **Damages - Topic 1065**].

Sale of Land - Topic 7414

Remedies - General - Mitigation - Duty of injured party - [See all **Damages - Topic 1065**].

Specific Performance - Topic 5

General - Specific performance v. mitigation - [See second **Damages - Topic 1065**].

Cases Noticed:

Asamera Oil Corp. v. Sea Oil and General Corp. - see Baud Corp., N.V. v. Brook.
Baud Corp., N.V. v. Brook, [1979] 1 S.C.R. 633; 23 N.R. 181; 12 A.R. 271, refd to. [paras. 23, 72].
British Westinghouse Electric et al. v. Underground Electric Railways Co. of London Ltd., [1912] A.C. 673 (H.L.), refd to. [paras. 23, 72].
British Columbia v. Canadian Forest Products Ltd., [2004] 2 S.C.R. 74; 321 N.R. 1; 198 B.C.A.C. 1; 324 W.A.C. 1; 2004 SCC 38, refd to. [para. 24].
Michaels et al. v. Red Deer College, [1976] 2 S.C.R. 324; 5 N.R. 99, refd to. [paras. 24,

73].
Evans v. Teamsters Union Local No. 31, [2008] 1 S.C.R. 661; 374 N.R. 1; 253 B.C.A.C. 1; 425 W.A.C. 1; 2008 SCC 20, refd to. [para. 24].
Redpath Industries Ltd. v. Ship Cisco et al., [1994] 2 F.C. 279; 163 N.R. 161 (F.C.A.), refd to. [para. 25].
Kosmopoulos et al. v. Constitution Insurance Co. of Canada et al., [1987] 1 S.C.R. 2; 74 N.R. 360; 21 O.A.C. 4, refd to. [para. 30].
Semelhago v. Paramadevan, [1996] 2 S.C.R. 415; 197 N.R. 379; 91 O.A.C. 379, refd to. [paras. 38, 95].
Adderley v. Dixon (1824), 1 Sim. & St. 607; 57 E.R. 239, refd to. [para. 38].
Housen v. Nikolaisen et al., [2002] 2 S.C.R. 235; 286 N.R. 1; 219 Sask.R. 1; 272 W.A.C. 1; 2002 SCC 33, refd to. [paras. 48, 76].
Dunkirk Colliery Co. v. Lever (1878), 9 Ch. D. 20 (C.A.), refd to. [para. 72].
Janiak v. Ippolito, [1985] 1 S.C.R. 146; 57 N.R. 241; 9 O.A.C. 1, refd to. [para. 72].
Darbishire v. Warran, [1963] 1 W.L.R. 1067 (C.A.), refd to. [para. 72].
Roper and another v. Johnson (1873), L.R. 8 C.P. 167 (C.A.), refd to. [para. 73].
Lagden v. O'Connor, [2003] UKHL 64; [2004] 1 All E.R. 277, refd to. [para. 74].
General Securities Ltd. v. Ingram (Don) Ltd., [1940] S.C.R. 670, refd to. [para. 74].
Andros Springs v. World Beauty, [1970] P. 144 (C.A.), refd to. [para. 75].
Windmill Place v. Apeco of Canada Ltd., [1978] 2 S.C.R. 385; 19 N.R. 124, refd to. [para. 86].

Authors and Works Noticed:

Bates, P., Mitigation of Damages: A Matter of Commercial Common Sense (1991-92), 13 Advocates Q. 273 [para. 25].
McGregor, Harvey, McGregor on Damages (18th Ed. 2009), para. 7-088 [para. 74].
Siebrasse, N., Damages in Lieu of Specific Performance: Semelhago v. Paramadevan (1997), 76 Can. Bar. Rev. 551 [para. 36].
Yorio, E., A Defense of Equitable Defenses (1990), 51 Ohio St. L. J. 1201 [para. 93].

Counsel:

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

Solicitors of Record:

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Miller Thomson, Toronto, Ontario, for the respondent/appellant on cross-appeal.

This appeal and cross-appeal were heard on March 20, 2012, by McLachlin, C.J.C., LeBel, Deschamps, Abella, Rothstein, Cromwell and Karakatsanis, JJ., of the Supreme Court of Canada. On October 17, 2012, the court's judgment was released in both official languages, including the following opinions:

Karakatsanis, J. (LeBel, Deschamps, Abella, Rothstein and Cromwell, JJ., concurring) - see paragraphs 1 to 63;
McLachlin, C.J.C., dissenting - see paragraphs 64 to 99.

Appeal dismissed;
cross-appeal dismissed.

Editor: Sharon McCartney

Damages - Topic 1002

Mitigation - General principles - Duty to mitigate - The defendant school board agreed to sell 4.78 acres of surplus land to Southcott Estates Inc., a single purpose company with no assets other than the deposit paid for the purchase - Southcott was wholly owned by Ballantry Homes Inc. - The board breached the agreement - Southcott sued for specific performance or damages - The trial judge's award of damages of \$1,939,500 was set aside on appeal on the basis of a failure to mitigate - A judgment for Southcott for nominal damages of \$1.00 was substituted - At issue on Southcott's appeal was whether a single-purpose company had to mitigate its losses - The Supreme Court of Canada rejected Southcott's argument that, as a single-purpose company, it was impecunious and was unable to mitigate without significant capital investment, that it was reasonably foreseeable to those contracting with it that it would have finite resources and that, in any event, Southcott acted reasonably - In the absence of actual evidence of impecuniosity, finding that losses could not be reasonably avoided, simply because it was a single-purpose corporation within a larger group of companies, would give an unfair advantage to those conducting business through single-purpose corporations - Further, 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 - As a separate legal entity, Southcott had to mitigate by making diligent efforts to find a substitute property - Those who chose the benefits of incorporation bore the corresponding burdens - Southcott was entitled to the benefits of limited liability, but it was also saddled with the responsibilities - The requirement to take steps to mitigate losses was one such responsibility - See paragraphs 26 to 30.

Damages - Topic 1043

Mitigation - In contract - Where specific performance claimed - The defendant school board agreed to sell 4.78 acres of surplus land to Southcott Estates Inc., a single purpose company with no assets other than the deposit paid for the purchase - Southcott was wholly owned by Ballantry Homes Inc. - The board breached the agreement - Southcott sued for specific performance or damages - The trial judge's award of damages of \$1,939,500 was set aside on appeal on the basis of a failure to mitigate - A judgment for Southcott for nominal damages of \$1.00 was substituted - At issue on Southcott's appeal was whether Southcott was required to mitigate losses despite its claim for specific performance - The Supreme Court of Canada agreed with the courts below that this was not a case where the plaintiff could reasonably refuse to mitigate - The overriding issue was whether Southcott's inaction was reasonable - Southcott argued at trial that the fact

that the property was uniquely well situated gave it the unique character required to constitute a fair justification for specific performance - However, the trial judge found that the land was nothing more unique to Southcott than a singularly good investment - A plaintiff deprived of an investment property did not have a "fair, real, and substantial justification" or a "substantial and legitimate" interest in specific performance unless money was not a complete remedy because the land had "a peculiar and special value" - 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 could not therefore justify its inaction - See paragraphs 31 to 41.

Damages - Topic 1081

Mitigation - Evidence and proof - General - The defendant school board agreed to sell 4.78 acres of surplus land to Southcott Estates Inc., a single purpose company with no assets other than the deposit paid for the purchase - Southcott was wholly owned by Ballantry Homes Inc. - The board breached the agreement - Southcott sued for specific performance or damages - The trial judge's award of damages of \$1,939,500 was set aside on appeal on the basis of a failure to mitigate - A judgment for Southcott for nominal damages of \$1.00 was substituted - Southcott appealed - The Supreme Court of Canada dismissed the appeal - The court agreed with the Court of Appeal's determination that the trial judge made a palpable and overriding error in finding that there were no comparable profitable mitigation opportunities - 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, including an adverse inference against Southcott that could have been drawn from the fact that it led no evidence about the profitability of the alternative development opportunities - Further, the trial judge also erred in failing to consider whether purchases of land for development by the other Ballantry corporations provided evidence of profitable properties available in mitigation - The Ballantry purchases established that there were opportunities to mitigate by purchasing other development land in the area - The trial judge's finding that there were no comparable properties was not open to him on the evidence - See paragraphs 42 to 59.

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Sale of Land - Topic 7414

Remedies - General - Mitigation - Duty of injured party - The defendant school board agreed to sell 4.78 acres of surplus land to Southcott Estates Inc., a single purpose company with no assets other than the deposit paid for the purchase - Southcott was wholly owned by Ballantry Homes Inc. - The board breached the agreement - Southcott sued for specific performance or damages - The trial judge's award of damages of \$1,939,500 was set aside on appeal on the basis of a failure to mitigate - A judgment for Southcott for nominal damages of \$1.00 was substituted - At issue on Southcott's appeal was whether a single-purpose company had to mitigate its losses - The Supreme Court of Canada rejected Southcott's argument that, as a single-purpose company, it was impecunious and was unable to mitigate without significant capital investment, that it was reasonably foreseeable to those contracting with it that it would have finite resources and that, in any event, Southcott acted reasonably - In the absence of actual evidence of impecuniosity, finding that losses could not be reasonably avoided, simply because it was a single-purpose corporation within a larger group of companies, would give an unfair advantage to those conducting business through single-purpose corporations - Further, 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 - As a separate legal entity, Southcott had to mitigate by making diligent efforts to find a substitute property - Those who chose the benefits of incorporation bore the corresponding burdens - Southcott was entitled to the benefits of limited liability, but it was also saddled with the responsibilities - The requirement to take steps to mitigate losses was one such responsibility - See paragraphs 26 to 30.

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Specific Performance - Topic 5

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