

Buyer's Claim for Lost Value Damages of a Residential Subdivision Home

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The party seeking damages arising from a failed real estate transaction is often the seller, who seeks to recover the agreed-upon sale price from a buyer. Conversely, when a seller breaches the agreement to complete the transaction, what are a buyer's remedies when they lose out on the purchase of a much sought-after home?

One option is for the buyer to seek an order for "specific performance" requiring the seller to complete the transaction and transfer the property to them. As with all litigation, a claim for specific performance can be time-consuming (and expensive), and a buyer may not be able to wait for months or years while a court finally determines who is right. In those cases, the buyer may need to buy another substitute property, particularly if they were concurrently selling their existing home.

If a buyer no longer wishes to seek title for the property that the seller had failed to convey, can they still claim damages based on the value of the lost opportunity to purchase the specific home? A recent decision of the Ontario Superior Court of Justice shows how this can be done.

In *Datta v. Eze*, 2020 ONSC 1240 (CanLII), the Plaintiffs brought a claim against the seller for breach of an Agreement of Purchase and Sale (APS).

The transaction had been terminated as a result of a dispute that arose between the property owner and his son, who had signed the APS pursuant to a power of attorney. The owner was alleged to have been suffering from certain medical conditions which affected his mental capacity and did not have the capacity to execute the APS. There was no evidence, however, that the power of attorney authorizing the son to deal with the property was invalid or had been revoked. Accordingly there was no question that the seller had no legal right to refuse to complete the transaction to the Plaintiffs.

The Plaintiffs had agreed to buy the property for \$940,000. Rather than waiting for litigation to sort out whether they were entitled to the property, the Plaintiffs looked for another home as the market was hot (the fall of 2016) and they feared they would be priced out due to their budgetary constraints. Four months after the aborted transaction, the Plaintiffs purchased another home for \$945,000.

The Plaintiffs were unable to find any other properties available in the same price range having the characteristics similar to the characteristics of the property at issue. As a result, Justice Ricchetti found that the Plaintiffs paid \$5,000 more for another home that had no finished basement, was around 400 square feet smaller, and on a lot that was nearly 44% smaller.

In a subsequent decision in this case, *Datta v. Eze*, 2020 ONSC 4796 (CanLII), Justice Ricchetti addressed the appropriate measure of the Plaintiffs' damages which turned on whether or not the subject property was "unique" even though the Plaintiffs were no longer seeking title to the property. The Plaintiffs sought damages based on what would have occurred had they obtained title to the property under an order of specific performance.

The remedy of specific performance is one that is peculiar to real estate transactions and is based on the fact that real estate is regarded as unique and of particular importance to the buyer. In certain cases, specific performance is ordered because there is no other suitable substitute property available for the buyer's purposes. That reasoning often does not often apply when land is purchased merely as an investment as any loss of profits can be measured and compensated for in monetary damages. However, in the case of a residential home how does one measure the loss of profit in the same way as one could for a

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commercial investment?

The starting point is *Semelhago v. Paramadevan*, 1996 CanLII 209 (SCC), in which the Supreme Court of Canada confirmed that, in cases where specific performance is an appropriate remedy, the plaintiff may elect to claim damages instead. In such cases, the innocent party may recover damages equal to the difference between the purchase price specified in the APS and the value of the property as at the date of trial.

In the matter at hand, the Plaintiffs' evidence was that the property was unique to them and that it had satisfied a number of specific requirements:

- It was in the area they wanted;
- It was close to a religious temple;
- It was close to a school;
- It was close to a golf course;
- It was close to a highway;
- It had four bedrooms;
- It had a finished basement; and
- It had a large lot size.

In Justice Ricchetti's view, none of these characteristics were unique by themselves. However, when considered in total together, with the sole availability of a property with these characteristics during "a hot and rising market," the property was indeed unique.

There was some discussion as to whether a home in a 'subdivision' could be considered unique in contrast to other available homes in the same or similar subdivision. Justice Ricchetti did not agree that a subdivision home could not be unique. "Uniqueness," in His Honour's view, must take into account all the surrounding circumstances, including the buyer's "wish list," the market conditions, the location, the type of home, the condition of the home, the lot, the finished areas of the home, the quality of finishes, the availability of comparable homes with the same attributes in the same price range, the proximity to certain amenities, and similar factors. One wonders whether the same analysis could be used for condominiums in a residential tower or similar properties which may at first blush appear to be less than unique.

The Plaintiffs were awarded \$150,000 as a result based on the appraised value of the subject property as at the date of trial, which had increased in value in the years since the seller had failed to complete the transaction. Essentially, the Court awarded the Plaintiffs damages representing what could be characterized as the "profit" that would have been retained by the seller in failing to complete the sale, even though the property was not being purchased or sold as a commercial investment.** The Plaintiffs were also awarded their "out-of-pocket" expenses in connection with the aborted transaction, and legal costs of almost \$30,000 for their successful claim.

Even though it took almost four years for the Plaintiffs to obtain Justice Ricchetti's decision after the seller's breach of the APS in 2016, it demonstrates that it may be worthwhile for buyers to pursue damages resulting from a seller's failure to complete the transfer of a residential property, even in a subdivision of similar homes.

Addendum - Appeal May 20, 2021

**On May 20, 2021, the Court of Appeal reduced the damages awarded from \$150,000 to \$56,000, on the basis that the motion judge ought to have used the date of July 2020, when the property was sold, rather than the value as at the date of trial: *Datta v. Eze*, 2021 ONCA 340.

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