

# KEEPING CURRENT

December 06, 2024

## Specific performance ordered in dispute between father and son over family home (*Gill v. Gill*)

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In some cases where a seller has breached an agreement to transfer title to a property, a buyer may seek an order for "specific performance" requiring that the transaction be completed instead of monetary damages. A key factor in such claims is the uniqueness of the property at issue. While this involves an assessment of the property's physical attributes and location, the personal circumstances of the buyer must also be considered, as demonstrated by the Court of Appeal for Ontario decision in *Gill v. Gill*, [2024 ONCA 877 \(CanLII\)](#).

The litigation involved a dispute between a son, his father and his stepmother over title to a property in Brockville, Ontario. In 2011, the son purchased the property for \$218,000, with financial assistance from the parents, including a \$15,000 gift and a \$5,000 loan. To assist with the purchase, he took out a mortgage in the amount of \$174,400.

The son subsequently ran into financial challenges because he lost his job. He entered into two agreements with the parents, in January and April 2018, which

provided that the parents would move into the property and take over the expenses, including the mortgage payments in exchange for the son transferring the property to them once the mortgage became due and paid. The April 2018 agreement added an additional term allowing the son to temporarily occupy the lower house level and pay \$700/month rent and 50% of the utility costs until he relocated elsewhere. The agreements stated, amongst other things, that they were being made due to the son's financial challenges.

The parents moved into the property in March 2018, and took over the property's expenses as agreed.

In August 2018, the son moved out of the property and stopped paying rent and his share of the utilities, or the loan payments provided for in the agreements. The parents continued to live in the property while their son lived in Acton and worked in Guelph, Ontario.

When the mortgage became due in November 2022, the son refused to transfer title and instead renewed the

mortgage under his name and made the mortgage payments.

The son commenced an action against his father and stepmother seeking to terminate any agreements he had with them and for possession of the property. In response, the parents sought title to the property by way of specific performance. They continued to live in the home until trial and paid all expenses, except for the mortgage and insurance that the son had taken over.

After trial in October 2023, the parents' claim for specific performance was dismissed and they were ordered to vacate the property. They appealed the decision to the Court of Appeal for Ontario.

Specific performance of an agreement is an equitable remedy granted where damages cannot afford an adequate and just remedy in the circumstances: *Matthew Brady Self Storage Corp. v. InStorage Limited Partnership*, [2014 ONCA 858](#), at paragraph 29, leave to appeal refused, [2015] S.C.C.A. No. 50.

In the leading case of *Semelhago v. Paramadevan*, [1996 CanLII 209 \(SCC\)](#), at paragraph 22, the Supreme Court of Canada affirmed that specific performance was not to be ordered automatically as the default remedy for breach of a contract for the sale of lands, "absent evidence that the property is unique to the extent that its substitute would not be readily available" or absent "a fair, real and substantial justification" for the claim to specific performance. Accordingly, the key issue in an action for specific performance is whether monetary damages are an adequate remedy rather than a conveyance of title.

The Court of Appeal noted that this is a discretionary and highly fact-specific inquiry that typically involves the following governing factors:

- the nature of the agreement and the property;
- the objective uniqueness of the agreement and the property, and their subjective uniqueness to the purchaser at the time of purchase;
- the adequacy of damages as a remedy; and
- the behaviour of the parties having regard to the equitable nature of the remedy.

In the Court of Appeal's view, the trial judge correctly referenced the governing factors to be considered but erred in applying them. The trial judge "lost sight" of the subjective uniqueness of the property, as the parents' home, and of the nature of the transaction as provided in the two agreements. In that regard, the trial decision focused too narrowly on the stated reason in the agreements that the parents were helping the son financially rather than on whether the property had any unique quality or features for them.

The factors relating to the parents' own relationship with the property were not given sufficient attention. At trial, the parents' uncontested evidence was that the property had been their family home for over five years during which time, they paid all expenses and made improvements. As noted by the Court of Appeal, few purchases are as important to anyone as their family home.

In this regard, the trial judge erred by focusing solely on the property's physical attributes rather than the parents' subjective interests or "the circumstances of the underlying transaction": *Lucas v. 1858793 Ontario Inc. (Howard Park)*, [2021 ONCA 52](#), at paragraph 73.

The underlying purpose of the transaction in the agreements was to provide for the parents to live at the property before title was transferred. By performing their obligations under the agreement, including paying all expenses and agreeing to



discharge the son's mortgage when it came due, the parents were supposed to subsequently acquire title to the property. The transaction needed to be considered as a whole for the purposes of objective and subjective uniqueness of the property.

Lastly, there was no unfairness in awarding specific performance to the son's father and stepmother in the circumstances given the parties' respective behaviour. They had performed their obligations as they had agreed and it was the son who, without excuse, breached the agreement to convey title to them. While the property was the parents' settled home, the son had not lived in or maintained the property since he left in 2018, and there was no suggestion that he wished to return to reside at the property. For the son, it was the investment value of the property that was meaningful; for the parents, it was their home.

The Court of Appeal therefore ordered specific performance of the parties' April 2018 agreement.

The decision offers a good illustration of the overall factors that must be taken into account when considering the appropriateness of specific performance as a remedy for breach of an agreement to convey property.

## Contact us

If you have a litigation matter and are in need of legal advice, please contact [James Cook](mailto:jcook@grllp.com), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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