

BCCA Confirms Specific Performance in Pre-Development Land Deals

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In [*Culos Development \(1996\) Inc. v. Baytalan*, 2025 BCCA 265](#), the British Columbia Court of Appeal (the Court) granted specific performance of a property in Kelowna (the Property) and held, among other things, that the trial judge made reviewable errors in determining that specific performance was not an appropriate remedy in the circumstances.

The Court emphasized that specific performance is a contextual remedy which requires consideration of all factors relevant to the propriety of an order for specific performance.

Background

In late 2019, Mr. Baytalan approached Culos to see whether Culos would consider buying the Property, which would be used to develop non-profit social housing.¹ The parties agreed to an option to purchase (the OTP) the Property. 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 March 26, 2020.²

Through an error by Culos, the appraiser 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, 2020.³ Subsequently, there were two appraisals conducted, one by Mr. Lionel Hoffman on behalf of Culos, that valued the property at \$1,505,000 as of September 23, 2020⁴ (the First Hoffman Appraisal), and another by Mr. Rizzo on behalf of Mr. Baytalan that valued the property at \$3,950,000 as of August 30, 2021.⁵

Culos exercised the OTP and repeatedly attempted to deliver notice to Mr. Baytalan, who was aware of these attempts and took steps to avoid being personally served.⁶ In early December 2021, Culos attempted to close on the sale in accordance with the OTP's terms, but Mr. Baytalan refused to complete the transaction. Culos then filed a Notice of Civil Claim seeking, among other things, specific performance of the OTP.⁷

The Supreme Court of BC (the Supreme Court) held that the OTP, when considered in its context, amounted to a bilateral contract; accordingly, strict compliance with its terms was not required.⁸ The fact that the First Hoffman Appraisal did not comply with the OTP was rejected by the Supreme Court, which held that the later date at which the property was appraised only benefited Mr. Baytalan.⁹ 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.¹⁰ 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.¹¹

The Appeal

On appeal, the issues were, among other things, whether the Supreme Court erred (i) in concluding that the OTP was a bilateral as opposed to a unilateral agreement; (ii) in declining to order specific performance; and (iii) if not in failing to account for the Property's increase in value when assessing damages.¹²

Mr. Baytalan argued 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*.¹³ Regarding specific performance, Mr. Baytalan submitted that the judge properly instructed himself as to the applicable legal framework and he stressed the discretionary nature of a judge's decision to order or decline to order specific performance.¹⁴

Culos argued that the judge's determination that the OTP constituted a bilateral rather than a unilateral contract was consistent with the principles set out by the Supreme Court of Canada in *Sail Labrador*¹⁵ and considered in the context of *Sattva*.¹⁶ Regarding specific performance, Culos argued the judge overlooked evidence demonstrating that the Property had qualities of particular utility to them and the expert evidence of the scarcity of comparable development sites.¹⁷ They also argued the judge erred in treating 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.¹⁸

The Court held that the judge erred in concluding that *Sattva* either overruled *Sail Labrador* or rendered it otherwise superfluous.¹⁹ However, this error was not material as the Court held the OTP was a bilateral, rather than a unilateral, contract.²⁰

The Court accepted Culos' argument and held that the judge erred in law, misapprehended the evidence, and unduly focused on the investment purpose of the Property in concluding that specific performance would not be the appropriate remedy in the circumstances of this case.²¹ The Court restated the legal framework for specific performance and held the only characteristic of the Property that the judge appears to have considered is its triangular shape. The judge failed to consider other evidence on the record that was relevant to the Property's uniqueness, such as:²²

1. the fact that the contemplated development was well into the design and planning stages, with the completion of a geotechnical investigation, and a rezoning application reaching its third reading; and

2. testimonial evidence from Mr. Rizzo that the property is in an excellent location and there is a very limited supply of multifamily land in this area.

While uniqueness may be more rarely established with respect to properties purchased solely for investment purposes, there is no “presumption of replaceability.”²³ The Court held that the trial judge appears to have treated the Property as presumptively replaceable while failing to analyze the relevant factors in a way that would sustain his conclusion.²⁴ 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.²⁵

The Court held that in the context of an OTP, 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.²⁶ These attributes could not simply be purchased with the monies received through a damages award.²⁷

Key Takeaways

- There is no presumption of replaceability for properties that are purchased solely for investment purposes and there must be consideration of factors relevant to the propriety of an order for specific performance.
- In the context of an option to purchase, 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.
- Land subject to a significant amount of site-specific planning, investment in due diligence, pre-development work, and 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.

¹ [*Culos Development \(1996\) Inc. v. Baytalan*, 2025 BCCA 265](#) at para. 6 [*Culos Development*].

² *Ibid* at para. 8.

³ *Ibid* at para. 10.

⁴ *Ibid*.

⁵ *Ibid* at para. 12.

⁶ *Ibid* at para. 13.

⁷ *Ibid* at para. 17.

⁸ *Ibid* at para. 18.

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⁹ *Ibid* at paras. 19-20.

¹⁰ *Ibid* at para. 22.

¹¹ *Ibid*.

¹² *Ibid* at para. 25.

¹³ *Ibid* at para. 30.

¹⁴ *Ibid* at para. 49.

¹⁵ [*Sail Labrador Ltd. v. Challenge One \(The\)*, 1999 CanLII 708 \(SCC\).](#)

¹⁶ *Culos Development*, *supra* note 1 at para. 31.

¹⁷ *Ibid* at para. 48.

¹⁸ *Ibid*.

¹⁹ *Ibid* at para. 36.

²⁰ *Ibid*.

²¹ *Ibid* at paras. 50 and 54.

²² *Ibid* at paras. 57-61, 63-64.

²³ *Ibid* at paras. 65.

²⁴ *Ibid* at paras. 66.

²⁵ *Ibid* at paras. 72.

²⁶ *Ibid* at paras. 73.

²⁷ *Ibid* at paras. 74.

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