



**SPECIFIC PERFORMANCE:**

# Compelling a Seller to Close When the Seller is Trying to Back Out of the Deal

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**Abstract**

*If a vendor attempts to back out of an agreement of purchase and sale, the purchaser may be able to still close on the deal if the purchaser can prove that the property is unique, has distinctive features or that it is so suited to the purchaser's needs that an award of damages is inadequate to uphold the purchaser's interests under the agreement. This is known as the remedy of specific performance.*

**Full Article**

*Sigrist v. McLean* 2011 ONSC 7114 concerns an action for specific performance with respect to a restaurant property located in Apsley, Ontario.

The Plaintiffs, a husband and wife team of restaurateurs, wished to move their business and family from London, Ontario to a smaller Ontario community. They sought a property which had a restaurant with living accommodation that was on a trafficked highway with growth potential, in a small city centre, with infrastructure and accessible emergency services as their youngest son experienced sporadic seizures.

The Plaintiffs found an on-line listing of a suitable property located in Apsley, Ontario that was owned by the Defendants. The listing mentioned the option to lease or purchase with a vendor take-back mortgage. The option to purchase was particularly important to the Plaintiffs as they would not uproot their family and business to another city without it. The Plaintiffs spoke with the Defendants about the option to purchase and the purchase price and it was confirmed verbally over a telephone conversation, in person and with correspondence, however an agreement was never executed by the parties.

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the purchase price and it was confirmed verbally over a telephone conversation, in person and with correspondence, however an agreement was never executed by the parties.

When the Plaintiffs subsequently submitted a written draft agreement to the Defendants, the Defendants responded by sending back a draft which omitted the option to purchase. The parties exchanged multiple drafts and the Plaintiffs continued to include the option to purchase and the Defendants continued to omit it.

At this point, the Plaintiffs had moved their family and business to the property in Apsley in reliance of the verbal agreement with the Defendants. Additionally, the Plaintiffs sold their home in London, delivered a cheque for their first month's rent of the Apsley property and readied the restaurant with equipment, furnishings and promotional materials.

Shortly after the move to the property, problems began to arise. A new sewage system had to be constructed, there were multiple plumbing problems that required emergency repairs, and much of the kitchen equipment that came with the property was broken and had to be replaced with the Plaintiffs own equipment.

Upon further investigation by the Plaintiffs, it was discovered that the land was subject to a government work order due to problems with the sewage system. The work order notice was required to be displayed on the property at all times, however the Defendants had taken it down prior to the Plaintiffs moving in.

A day prior to the opening of the Plaintiffs restaurant, the Defendants came to the property and attempted to get their draft version of the lease (with the option to purchase omitted) signed by the Plaintiffs. The Plaintiffs refused, and disclosed all of the problems they had encountered with the property. In response, the Defendants became upset and informed the Plaintiffs that all further correspondence was to be directed to their lawyer.

Months later the Plaintiffs found a Notice of Arrears of Rent affixed to the restaurant asking them to vacate the premises immediately. The Plaintiffs continued to deliver rent cheques to the Defendant and did not hear from them until a couple months later when they arrived home to find that the locks of the property had been changed and that a Notice of Termination of Tenancy had been affixed to the door.

The Plaintiffs lived in a family member's basement in Scarborough for a month until they were able to obtain relief from forfeiture on a motion.

Specific performance is an equitable remedy for breach of contract that can be awarded where the evidence establishes that the property was unique and that damages are not a suitable substitute for the Plaintiff's loss.

The court established on the facts that there was an enforceable contract, despite the fact that no written agreement was signed. Their rationale was that despite the fact that s. 4 of the *Statute of Frauds* requires that an agreement for the sale of land to be in writing to be enforceable, equitable principles may be applied to prevent the *Statute of Frauds* from being used as a tool to perpetuate fraud.

In particular, the equitable doctrine of part performance serves as an exception to the written requirement of the *Statute of Frauds*. It allows for specific performance under a contract for the sale of land or a lease despite the absence of a written agreement, if one can establish sufficient acts of part performance.

The test for acts of part performance is as follows:

- The performance must be referable to the contract;
- The acts of performance must be acts of the plaintiff;
- The contract must be one for which the law would grant specific performance if it had been properly evidenced in writing; and
- There must be a clear and proper evidence of the existence of the contract.

In regard to the first requirement, Ontario courts have generally applied the standard put forth in *Deglman v. Guaranty Trust Co. of Canada* [1954] S.C.R. 725 (S.C.C.) which held that conduct must “unequivocally” refer to the particular land in issue, and that payment of purchase money alone is not a sufficient act of part performance to merit an exception from the Statute of Frauds.

The court held that the Plaintiffs in this case made numerous acts unequivocally referable to the lands such as preparation and delivery of the written draft agreements, closing of their London business, the sale of their London home, the moving of their family, personal property and business to Apsley, and the property, equipment and goodwill investments they made towards their new business at the Apsley location. The Plaintiffs performed all of the aforementioned acts, therefore they also satisfied the second requirement of the Kang test.

The third requirement that the contract be one for which specific performance would be granted, was satisfied as it was the court’s opinion that the property and community offered unique features and amenities to suit the needs of the Plaintiff’s family and restaurant business.

The final requirement that there must be a clear and proper evidence of the existence of the contract was satisfied by documentary evidence such as the listing, the draft agreements, the correspondence and records of phone conversations.

In conclusion, the court granted specific performance to the purchaser plaintiff of the option to purchase to be exercised within three months in addition to an abatement in the purchase on account of significant damages awarded to the purchaser plaintiff.