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Specific Performance of Contracts for the Sale and Purchase of Land: Is Deeming Land to be Unique Enough to Return to Pre-Semelhago Days?

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Cases commented on:

Raymond v. Raymond Estate, 2011 SKCA 58

Fifteen years ago, before the Supreme Court of Canada decision in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, 1996 CanLII 209 (S.C.C.), it was taken for granted that land is inherently unique and therefore, as a matter of course, the equitable remedy of specific performance would be awarded for breaches of contracts for the sale of real property. However, in *Semelhago*, Justice Sopinka questioned those assumptions, stating in *obiter dicta* on behalf of the majority that specific performance should "not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available" (at para. 22). Subsequent confusion in the case law about under what circumstances specific performance is available and the unforeseen consequences of the loss of automatic grants of specific performance in a Torrens land titles system attracted the attention of the Alberta Law Reform Institute (ALRI). Its October 2009 Final Report No. 97 on Contract for the Sale and Purchase of Land: Purchasers' Remedies recommended (at paras. 8, 61) that "for the purpose of determining whether a purchaser under a contract for the sale of land is entitled to specific performance of the contract, the land that is the subject of the contract be conclusively deemed to be unique at all material times, and legislation should be enacted to that effect". However, no such legislation has been tabled in the Alberta legislature in the past 18 months. Now, the May 2011 decision of the Saskatchewan Court of Appeal in *Raymond v. Raymond Estate* suggests that ALRI's recommendation, even if enacted, may not be enough to return the law to its pre-*Semelhago* state. It does so by holding that *Semelhago* introduced a two part test for the granting of specific performance, with an objective component and a subjective one. It appears that the ALRI recommendation only addresses the objective component.

In *Raymond v. Raymond Estate*, Barry Raymond, the plaintiff, sued his sister, Beverley Anderson, in her capacity as executrix of the estates of his father and mother, Alfred and Barbara Raymond. Alfred, Barbara, Barry and Barry's brother, Alan Raymond, were the registered owners of a half section of farm land as tenants in common, as to each an undivided one-quarter interest. In 2002, the parents executed an Agreement for Sale of their interest in the half section in favour of Barry. Barry sued to enforce that Agreement for Sale.

In the trial court decision — *Raymond v. Raymond Estate*, 2008 SKQB 278 (CanLII) — Mr. Justice Maurice Herauf found that the Agreement for Sale was a valid and enforceable agreement. However, he awarded Barry damages for its breach, not specific performance. His reasons for doing so were succinctly put:

> . . . Barry has basically not used the property for a number of years and has been able to get along. I feel compelled to take into consideration that Barry is in his late sixties and question the sincerity of his motive to set up his cattle operation on the property. Had Barry pressed his claim in 2002 after the Agreement for Sale was prepared I might have looked at it differently. At this point, six years later, so much has happened between Barry and Alan that I cannot shake the feeling that Barry's motive may not be as genuine as it once was.
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> In essence, I have not been convinced that the property is unique or irreplacable in the sense that it cannot be compensated by damages. In my view a damage award will adequately compensate Barry for the purchase. . . . (at paras. 88-89)

The Court of Queen's Bench decision, with its focus on the very subjective element of the purchaser's suspected motivation, was overturned by the Saskatchewan Court of Appeal, which did grant Barry Raymond specific performance of the Agreement for Sale. The decision of the Court of Appeal was written by Mr. Justice Neal W. Caldwell, on behalf of himself and Justices of Appeal William J. Vancise and Robert G. Richards.

Justice Caldwell began by noting (at para. 7) that what *Semelhago* did was "remind us that a basic legal rationale based on the presumed inadequacy of expectation damages has always underpinned the availability of specific performance as a remedy in cases involving real property." In general, before *Semelhago*, courts assessed the adequacy of damages before awarding specific performance for breaches of contract. However, breaches of contracts involving land were an exception to this rule. As Justice Sopinka said in *Semelhago* (at para. 14), "Under the common law, every piece of real estate was generally considered to be unique. Blackacre had no readily available equivalent." Uniqueness did not have to be proven. The inadequacy of damages as a remedy for a breach of a contract for the sale of land was assumed.

After *Semelhago*, it was understood that the uniqueness of land did have to be proved. As Justice Sopinka put it in *Semelhago* (at paras. 20-22):

> While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Residential, business and industrial properties are all mass produced much in the same way as other consumer products. If the deal falls through for one property, another is frequently, though not always readily available.
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> . . . It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases. The common law recognized that the distinction might not be valid when the land had no peculiar or special value.…
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> … Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available. (emphasis added)

ALRI's Final Report No. 97 complained (at para. 23) that, despite the assumptions *Semelhago* did question, it did not examine the rule that specific performance of a contract for the sale of land should not be granted to the purchaser unless damages would be an inadequate remedy.

Neither did *Semelhago* give reasons why that rule should apply in Alberta today, when equity is no longer a gloss on the common law.

In *Raymond*, however, the Saskatchewan Court of Appeal did consider what is behind the idea that specific performance should not be granted unless damages would be an inadequate remedy. Justice Caldwell noted (at para. 9) that the general goal of the law of remedies, as it applies to breach of contract, "is to put the plaintiff in the same position that the plaintiff would have been in had the defendant performed under the contract." He then quoted (at para. 9) from Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora: Canada Law Book) at para. 7.180, as to the assumptions behind the idea that damages are an adequate remedy. The passage is informative and worth quoting at length:

> Where ordinary damages will not meet the goal of protecting the plaintiff's expectation, the added cost of specific performance becomes worth incurring. The assumptions which lie behind expectation damages as an adequate level of protection are that the injured party is in the position of a commercial trader, motivated to enter the contract with the aim of maximizing profit, and that the subject-matter of the bargain is a fungible good or service for which there is readily available alternate performance. The notion of "inadequacy of damages" as a rationale for specific performance reflects the desire to avoid the harshness which would result from the application of the ordinary rules where these assumptions are not met. Where expectation damages fail to reflect the interest of the plaintiff, specific relief ensures that the plaintiff gets exactly what was bargained for and, whatever the nature of the plaintiff's interest in performance, it is protected. This will usually increase the cost of breach imposed upon the defendant and the court's task should be to weigh the disadvantage of increasing the defendant's burden against the advantage of affording more complete protection to the plaintiff's expectation.…

The Court of Appeal then summarized what it took from *Semelhago*, namely, that the circumstances surrounding the contract for the purchase and sale of land have to be analyzed to see if they are consistent with the assumptions underpinning expectation damages as an adequate remedy. As Justice Caldwell put it (at para. 13), "do the facts disclose a prospective purchaser whose motivation for purchase is maximization of investment profit and a subject matter that is a fungible for which there is a readily available substitute?" (emphasis added)

Just as importantly, the Court of Appeal addressed (at para. 14) what *Semelhago* does not stand for:

> *Semelhago* does not, however, stand for the proposition that the presumption of uniqueness has been supplanted by a presumption of replaceability. . . . The only change wrought by *Semelhago* is in the approach of the courts to determining the appropriate remedy; judges must no longer presume the inadequacy of damages as a remedy whenever real property is involved. But, this assessment is not a search for uniqueness. Rather, it is appropriate to characterize a judge's assessment in cases of this nature as an inquiry into whether, in the circumstances, damages would be an inadequate remedy. (emphasis added)

In practical terms, as the Court of Appeal went on to note (at para. 15), the change wrought by *Semelhago* means the purchaser must prove two things: "that the subject property is specially

suited to the purchaser and that a comparable substitute property is not readily available." A purchaser who proves these two things proves (to paraphrase the Court of Appeal's test at para 13) that they are not a purchaser whose motivation for purchase is maximization of investment profit and that the subject matter is not a fungible interest for which there is a readily available substitute. In the Court of Appeal's approach, both "the objective attributes of the land" and "the subjective factors articulated by the prospective purchaser" are relevant (at para. 17).

In the particular case before it, the Saskatchewan Court of Appeals found (at para. 21-22) the trial judge had erred in focusing on Barry's supposed ulterior motive for wanting the land at the time of trial and in failing to assess whether the land was specially suited to Barry at the time of the Agreement for Sale or whether a comparable substitute property was readily available. In considering for itself whether Barry's expectation interest would be adequately protected by an award of damages, the Court of Appeal focused (at para. 24) on the location of the land and the relationship of Barry and his parents and grandparents to the land. The land was found to be specially suited to Barry based on his historic use of it and its location directly across the road from his home quarter and there was no comparable substitute property. Therefore Barry had met his burden of proof and was entitled to specific performance.

It is the two-part test formulated by the Saskatchewan Court of Appeal that suggests that ALRI's recommendation will not be enough to allow Alberta law to return to its pre-*Semelhago* state. ALRI recommended that "for the purpose of determining whether a purchaser under a contract for the sale of land is entitled to specific performance of the contract, the land that is the subject of the contract be conclusively deemed to be unique at all material times, and legislation should be enacted to that effect": Final Report No. 97 at para. 8. Deeming land to be unique would allow the purchaser to prove one of the two things the Saskatchewan Court of Appeal required a purchaser to prove, namely, that a comparable substitute property is not readily available. However, the recommendation addresses only what the Saskatchewan Court of Appeal called "the objective attributes of the land" (at para. 17). Deeming land to be unique says nothing about whether the land is specially suited to the specific purchaser or whether that purchaser's motivation is maximization of investment profit — what the Saskatchewan Court of Appeal called "the subjective factors articulated by the prospective purchaser."

The problem with ALRI's recommendation arises because land has both intrinsic and instrumental value and the test formulated by the Saskatchewan Court of Appeal looks at both. Land is unique in the material or physical sense. No two parcels are ever the same, no matter how a developer might bulldoze all features into a flat mudscape. Although each parcel of land may look substantially similar, each differs geographically because each has a different location. Each differs geologically, ecologically and in other visible ways, not to mention their biological, metallurgical and other microscopic distinctions. Land has its own inherent value, apart from any use value to humans. This is what ALRI's recommendation addresses.

But land also has instrumental value to humans. Aside from providing shelter and habitat for species that provide food and clothing and oxygen, land also has the instrumental value that Justice Sopinka emphasized in *Semelhago*. I have already quoted this passage from his judgment, but I think it is worth repeating in order to focus on how narrow its conception of the value of land is, even as an account of instrumental value:

> While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Residential, business and industrial properties are all mass produced much

> in the same way as other consumer products. If the deal falls through for one property, another is frequently, though not always readily available. (at para. 20)

What Justice Sopinka's *obiter* comments in *Semelhago* did was shift the focus away from the subject matter of the contract alone to the subject-matter and the purchaser's intentions for that subject-matter, i.e., from the intrinsic nature of land to its intrinsic and instrumental value to the purchaser. This shift is, of course, entirely in keeping with the dominant market-based perspective in contracts (although it is often a poor fit with property law which pre-dates modernity).

My concerns with respect to ALRI's Final Report No. 97 can be summarized as follows. The Report recommends legislation that would provide that land which is the subject matter of a contract for the sale and purchase of land is conclusively deemed to be unique at all material times for the purpose of determining whether or not the purchaser under the contract is entitled to an order for specific performance of the contract. However, if the correct approach to the availability of specific performance for breach of contracts for the sale of land post-*Semelhago* is as the Saskatchewan Court of Appeal stated, then uniqueness of land is not enough for an award of specific performance. The issue according to the Saskatchewan Court of Appeal in *Raymond* (at para. 13) is whether damages would be an inadequate remedy and a purchaser proves this by proving "that the subject property is specially suited to the purchaser and that a comparable substitute property is not readily available." A determination that land is unique only addresses whether a comparable substitute property is or is not readily available. It does not address whether or not the purchaser's "motivation for purchase is maximization of investment profit" (*Raymond* at para. 17). In other words, ALRI's proposed "fix" only specifies "the objective attributes of the land" but not the equally relevant "subjective factors articulated by the prospective purchaser." As such, the recommended legislative amendment cannot guarantee specific performance will be the appropriate remedy if *Raymond v. Raymond Estate* is the correct interpretation of *Semelhago*.

In my opinion, the Saskatchewan Court of Appeal's interpretation of *Semelhago* is a persuasive one. Its focus on both the objectives attributes of the land and the subjective factors important to the purchaser strikes a balance between the pre-*Semelhago* approach and *Semelhago*'s new focus on instrumental market value. That new focus cannot be ignored, but the old focus need not be abandoned.

The two part test in Raymond is, to my mind, preferable to the prevailing test in Alberta which focuses too much on the subjective. The prevailing test in this province has been the "business rationale test" — in which the (subjective) business case for desiring the particular commercial property is examined through a due diligence (objective) appraisal by the court — which places too little emphasis on the objective attributes of the land. It is true that Justice Sopinka wrote only about instrumental value in *Semelhago* and the "business rationale test" which has been used in Alberta, with its examination of the nexus between the purchaser's business plan and the amenities of the property, easily flows from his focus: see e.g., *1244034 Alberta Ltd. v. Walton International Group Inc.*, 2007 ABCA 372 at para. 6. However, the "business rationale test" does not address residential properties, even though the property in Se*melhago* was a residential property. More importantly, the only attention the business rationale test pays to the land is to its "amenities", i.e., the features useful to a purchaser's desire to maximize its investment profit. The amenities may be assessed objectively for a fit with a subjective business plan, but the essential focus of the business rationale test is a subjective one.

It must be admitted, however, that the Saskatchewan Court of Appeal's two part test does retain the uncertainty that has plagued Alberta's Torrens system since *Semelhago* was decided. Specific performance is not a certain thing and so it cannot be said that a purchaser has an interest in land that can be the basis of a caveat. The ALRI recommendation was intended to do away with this uncertainty, a commendable objective. However, the Saskatchewan Court of Appeal's interpretation of *Semelhago* suggests that the ALRI recommendation will not achieve this certainty as it addresses only one of two parts to the test for specific performance in the contract for the sale and purchase of land context.