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Options to Purchase and the Relentless Logic of *Semelhago*: One More Reason for the Legislative Repeal of a Disastrous Decision

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Case commented on:

Mylona Enterprises Ltd v Foundation Place Inc, 2013 ABQB 385.

Does an option to purchase that is subject to a number of contingencies afford the optionee an equitable interest in land for the purposes of establishing that the optionee has a proof of a claim under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36? In this case Justice Yamauchi held that it does so notwithstanding the decision of the Supreme Court of Canada in *Semelhago v Paramadevan*, [1996] 2 SCR 415 and the decision of the Alberta Court of Appeal in *1244034 Alberta Ltd v Walton International Group Inc*, 2007 ABCA 372.

Before *Semelhago* it was trite law that an agreement to purchase real property afforded the purchaser an equitable interest in the land of the vendor. The principal rationale was that a purchaser should be able to obtain specific performance of such an agreement since land is unique and damages would be an inadequate remedy: equity sees as done that which ought to be done. The same goes for an agreement to grant a lease: *Walsh v Lonsdale* (1882), 21 Ch D 9 (Eng CA).

It was equally clear law that an option to purchase afforded the optionee an equitable interest in land on the grounds that while an optionee's interest is more contingent than that of a purchaser under an agreement for sale, the only contingency is the decision of the optionee to exercise the option. Since that contingency is entirely within the control of the optionee the same logic should follow: *Frobisher Ltd v Canadian Pipelines & Petroleums Ltd et al*, [1960] SCR 126. More difficult was the case of the right of first refusal (ROFR). Here, the case law (see in particular *Canadian Long Island Petroleum Ltd v Irving Wire Products*, [1975] 2 SCR 715) favoured the view that a ROFR did not afford its holder an equitable interest in land since a ROFR, unlike an option, was subject to two contingencies and one of those contingencies (the decision to sell) was firmly in the hands of the putative vendor. Hence, at least until the ROFR crystallized with the vendor's decision to accept an offer, the ROFR did not give its holder an interest in land; the interest was too contingent and not specifically performable. The Alberta legislature disagreed with that conclusion and enacted an amendment to the *Law of Property Act* in 1985 (see now RSA 2000, c L- 7, section 63) which deems a ROFR to give rise to an equitable interest in land.

But *Semelhago*, with an obiter sleight of hand, changed all of this - or at least some of this, and one of the questions at issue in this case is just how much did it change? The facts of this case expose two competing logical claims. On the one hand, the internal logic of *Semelhago* must be

that if an agreement for sale doesn't create an interest in land, then neither can an arrangement (an option) that is one step removed from an agreement for sale. On the other hand, the internal logic of legislative law reform suggests that if a ROFR is an equitable interest in land, then so too must an interest (an option) that is one step less contingent than a ROFR (or alternatively, as suggested here at paras 22 - 31, if the option is a 'complex' option subject to a number of different contingencies such as obtaining sub-division approval, then it starts to look analytically quite similar to a ROFR). In any event, there is clearly something very strange going on when the legislature deems certain interests to be interests in land while less contingent (more vested) interests cease to qualify as interests in land.

I think that this case gives us one more reason for urging the legislature to restore the pre-*Semelhago* legal position as the Alberta Law Reform Institute* recommended in its Final Report Number 97, *Contracts for the Sale and Purchase of Land: Purchasers' Remedies* (available here). For a previous post by Jonnette Watson Hamilton referring to that report see here.

* I was a member of the ALRI Board when Report No 97 was adopted.