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Challenging Purchasers' Ability to Obtain Specific Performance of Agreements for the Purchase and Sale of Land

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Cases Considered:

365733 Alberta Ltd. v. Tiberio, 2008 ABQB 328

365733 Alberta Ltd. v. Tiberio illustrates how commonplace challenges to purchasers' ability to claim interests in land under purchase and sale agreements have become. Before the 1996 decision of the Supreme Court of Canada in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, courts granted specific performance of agreements for the purchase and sale of land, forcing reluctant vendors to live up to bargains. Performance of the agreement was mandated because land was seen as unique, something whose loss could not be compensated for in monetary damages. Land was not like mass produced consumer goods. However, after *Semelhago*, purchasers had to produce evidence that the land they wanted to buy was unique and without a ready substitute in the market.

The *Semelhago* decision thus introduced a great deal of uncertainty into real property law. If specific performance of purchase and sale agreements would not always be granted, when would it be? What was the test? What factors were relevant? The only guidance offered by *Semelhago* is found at para. 22: "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). Lower courts across Canada have spent the past twelve years putting flesh on the rather bare bones of the new approach. The loss of the presumption that land was unique and the questions raised by the brief formulation of what replaces that presumption has resulted in a great deal of work for lower courts across Canada over the past decade.

In addition, because the *Semelhago* case was out of Ontario, the decision did not consider how the major change to the law that it ushered in would fit with a Torrens system of land titles, the system found in the Prairie Provinces and British Columbia. Before *Semelhago*, the certainty of specific performance as the remedy for breach of a purchase and sale of land agreement fit well with the certainty required by Alberta's land registration system. The Alberta Court of Appeal addressed the issue for this province last year in *1244034 Alberta Ltd. v. Walton International Group Inc.*, 2007 ABCA 372. In Walton International - a case on which the Supreme Court of

Canada just refused leave to appeal last month - the majority in the Court of Appeal said (at para. 17):

Alberta law is well settled that on an application to discharge a caveat based on an agreement for the purchase and sale of land, a finding that damages would be an adequate remedy is sufficient to discharge the caveat. … Once it has been determined that damages are an adequate remedy, there is no "interest in land" capable of protection by caveat. With no interest in land required to be protected, there is no basis to tie up development of the land pending resolution of the litigation.

Concern over the uncertainty about the test to replace specific performance as a matter of course and over the ill fit between the uncertainty of the remedy being granted and the Torrens system seem to be abating now, judging by the decision in *365733 Alberta Ltd. v. Tiberio*. *Tiberio* is a short decision - only eleven paragraphs - and Madam Justice Adele Kent had no difficulty in finding that specific performance was not justified in this case and that the purchasers therefore had no interest in land to maintain a caveat.

The application in *365733 Alberta Ltd. v. Tiberio* had been brought by the defendants, who asked the court to discharge the plaintiffs' caveat and certificate of lis pendens which were filed against the lands the plaintiffs had agreed to purchase and the defendants had agreed to sell. This was an application under s. 141 of the *Land Titles Act*, R.S.A. 2000, c. L-4. Under that section, an owner of land against whose title a caveat has been filed, may ask the court to require the caveator to "show cause" why their caveat should not be discharged from the title. In order to "show cause," one of the things the caveator must prove is that they have an interest in the land whose title their caveat is filed against. Under ss. 131 and 132 of the *Land Titles Act*, a person must have an interest in land in order to be at liberty to file a caveat against someone else's title to land. Under s. 135, subsequent dealings with that land are subject to the claim of the caveator.

Post- *Semelhago*, a purchaser who has filed a caveat to protect their interest under the agreement for the purchase and sale of land can be challenged on the basis that they have no interest in land to caveat because they are not entitled to the remedy of specific performance. That was the basis on which the defendants in this case challenged the plaintiffs. In the previously quoted words of *Semelhago*, the plaintiff must produce evidence "that the property is unique to the extent that its substitute would not be readily available." The land must be unique and unique means that a substitute for it is not readily available. If a substitute is readily available, then, to use the words of the Alberta Court of Appeal in *Walton International*, damages would be an adequate remedy; a purchaser could use the money to buy the readily available substitute property.

The land involved in the *Tiberio* case - the Bishell Lands - were undeveloped but serviced lots in the southeast industrial area of Calgary. They were suitable for subdivision and development into commercial or light industrial property. The plaintiffs claimed that they and the defendants had a binding agreement of purchase and sale for the Bishell Lands. That sale was not completed. Nevertheless, as a result of the agreement of purchase and sale, the plaintiffs claimed they were

entitled to have those lands conveyed to them. The plaintiffs therefore filed a caveat against the title to the Bishell Lands, claiming an interest in them.

If the plaintiffs were correct and the agreement for purchase and sale of the Bishell Lands between them and the defendants was a binding agreement, wrongfully breached by the defendants, were the plaintiffs entitled to the remedy of specific performance? That became the issue on the "show cause" hearing before Madam Justice Kent.

What evidence did the plaintiffs produce to prove the Bishell Lands were unique? The plaintiffs called evidence to show that, between 1999 and 2004, architects, traffic consultants and lawyers had been hired to address a number of development issues with respect to the Bishell Lands, such as the difficult access to the lands. The lands had excellent visibility from the roads that surrounded them, had unique zoning for the area, and would be suitable for a hotel/motel development. The principal of the plaintiff corporation testified that his examination of the area around the lands indicated that there was no comparable vacant property. Given that the only test set out in *Semelhago* is whether a substitute for the Bishell Lands was readily available, the evidence on comparable property, at least as recounted by Madam Justice Kent, seems weak. One might have expected some expert evidence on this matter.

The defendants called evidence to show that the plaintiffs had, with their consent, listed the Bishell Lands for sale with one realtor in November 200, a second realtor in March 2001, and a third in October 2002. The defendants argued, therefore, that the plaintiffs' only intention in purchasing the Bishell Lands was to sell the lands for a financial profit. The land was flippable and fungible.

Madam Justice Kent, after referencing the *Semelhago* test for awarding specific performance of a purchase and sale of land agreement - that the property is unique to the extent that its substitute would not be readily available - turned to *Walton International*. She held that the case before her was factually like Walton International.

In *Walton International*, the chambers judge had found the plaintiff had "no great connection to this land other than it was a tremendous economic possibility for them." The Court of Appeal agreed that the purchaser of the property had every intention to flip the property or acquire and subdivide it. This was like the situation in *Tiberio*, according to Madam Justice Kent (at para. 10): "The fundamental reason why [the plaintiff] was purchasing the land was to sell it and make a profit." While the Bishell Lands might be unique, their uniqueness must be connected to the purchaser. Purchasing land to make a profit means the land is not unique to that purchaser (at para. 10): "There may be circumstances when land is unique to one person because it is the only land with a particular quality and the person wants to retain the land for that reason but not unique to another person who simply wants to acquire the land for profit." Because Madam Justice Kent had decided that the plaintiff was buying the Bishell Lands to sell them and make a profit, she decided that the plaintiff was interested only in the value of the land and, as a result, the land was not unique. There appeared to be no subjective and personal value placed on the

land by the plaintiffs. As a result, and to put it in the words of the Alberta Court of Appeal in *Walton International*, damages would appear to be an adequate remedy.

One thing that might be noted is that Madam Justice Kent did not consider whether a substitute for the Bishell lands was readily available, the test set out in *Semelhago*. The Court of Appeal in Walton International (at para. 6) had elaborated on this test when they quoted with approval from Anger and Honsberger, *Law of Real Property, 3rd ed.* looseleaf, (Aurora: Canada Law Book, 2007). At pages 23-24, the editor, Professor La Forest, explains: "… What is emerging is a 'business rationale' test for which the (subjective) business case for desiring the particular commercial property is examined through a due diligence (objective) appraisal by the court. Thus, the court will examine the nexus between the plaintiff's business plan and the amenities of the subject property. Specific performance may be granted if those amenities cannot readily be found elsewhere."

In *Tiberio*, there is no mention of a business plan and little discussion of the amenities of the Bishell Lands. Every feature of the land that was mentioned in the judgment has already been mentioned in this comment: difficult access, excellent visibility from the roads that surrounded it, unique zoning for the area, and suitability for a hotel/motel development. In such a short decision, it is difficult to know whether no further evidence was introduced or whether Madam Justice Kent's focus was on the question of whether damages would be an adequate remedy. The test of "damages would be an adequate remedy" is the general test for specific performance in all contexts. Thus, it is not necessarily different from or inconsistent with the test specified by the Supreme Court in *Semelhago*. It merely operates at a different level of abstraction.

The plaintiffs' cause was probably not helped by the nine or so years between the date of breach and the date of the hearing. Part of the background to this case is the rising market that existed in Calgary between 1999 (the apparent date of the purchase and sale agreement) and now. This is relevant to the rest of the decision in *Semelhago*. The main issue before the Supreme Court was when damages in lieu of specific performance should be assessed, if specific performance was available to the purchaser. The residential purchaser in *Semelhago* had opted for damages in lieu of specific performance in the rising Toronto market, as was his right. Were his damages to be assessed as of the date the vendor breached the purchase and sale agreement - as they would be if specific performance was not available as a remedy - or as of the date of trial, when the plaintiff opted for damages instead of specific performance? They would be much greater if the latter, later date was chosen. The Supreme Court held that the date of trial was the appropriate date (which also means there is no duty to mitigate the damages in lieu of specific performance). However, if specific performance is not available as a remedy, the date of assessment of the damages for breach of contract would be the much earlier date of the breach and the plaintiff would have a duty to mitigate those damages as of the breach.

Imagine the application of that rule in *Tiberio*, had Madam Justice Kent found that the Bishell Lands were unique to the plaintiffs and specific performance was available as a remedy for the defendants' breach. If the plaintiffs opted for damages as of the March 2008 date of the hearing before Madam Justice Kent, they would have been entitled to compensation for the value of the

lands as of this year - and not as of 1999. Courts are probably going to be extremely reluctant to find specific performance available as a remedy to a purchaser in the kind of rising market that Calgary has seen between then and now.

Given the rising market, one has to wonder how long it will be before some unwilling vendor uses s. 144 of the *Land Titles Act*, alleging a caveat based on a purchase and sale agreement was filed without reasonable cause and that they are entitled to compensation for the delay and lost opportunities caused by the caveat being wrongfully filed against their title. This risk will probably make purchasers more cautious about filing caveats and their lawyers leerier about recommending caveats. The risk of there being a duty to mitigate at the date of breach if specific performance is not available also means lawyers should be reluctant to advise that clients sue for specific performance.

These last few factors - the consequences of finding specific performance is available and the risk that s. 144 of the *Land Titles Act* may be triggered - when combined with the developing case law, suggest that specific performance will become less available as a remedy for breach of an agreement for the purchase and sale of land.