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Perhaps the Last Court of Appeal Decision on the Availability of Specific Performance for Agreements for the Sale and Purchase of Land

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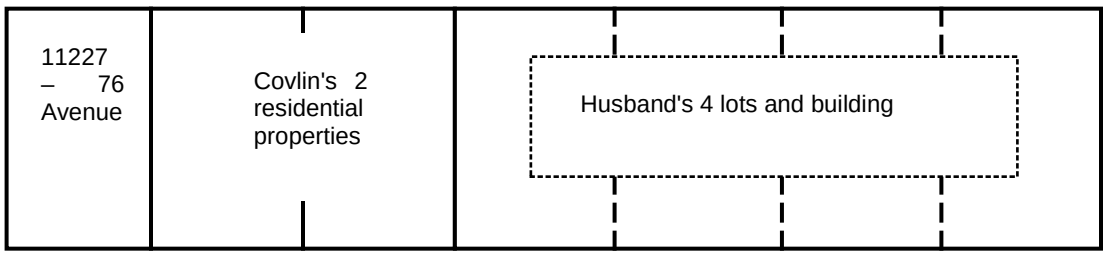
Cases Considered:

Covlin v. Minhas, 2009 ABCA 404

If the recommendations in the October 2009 Alberta Law Reform Institute (ALRI) Final Report No. 97, entitled "Contracts for the Sale and Purchase of Land: Purchasers' Remedies," are implemented, cases like *Covlin v. Minhas* will disappear from Alberta court dockets. ALRI recommended that the law governing remedies for breaches of such contracts be restored to what it was prior to the 1996 Supreme Court of Canada decision in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415. The only issue in *Covlin v. Minhas* was whether the plaintiff, Verna Covlin, who was the purchaser under a contract for the sale and purchase of land, was entitled to the remedy of specific performance. Prior to *Semelhago*, specific performance for breach of a real estate contract was granted as a matter of course. Post-*Semelhago*, however, Covlin had to prove the land she offered to purchase was "unique" in the sense that no substitute is available for it. ALRI's Final Report No. 97 recommends that legislation be enacted to provide that any land which is the subject of a contract for sale and purchase is conclusively deemed to be unique at all material times.

The subject matter of the contract for the sale and purchase of land in this case was a dwelling house located at 11227 - 76 Avenue in Edmonton. Mrs. Covlin owned two residential properties immediately to the east of 11227 - 76 Avenue and her husband owned four lots on which a commercial building sat to the east of the plaintiff's other two residential properties. With the addition of 11227 - 76 Avenue, Covlin and her husband would own seven adjacent properties.



On December 22, 2004, the owners agreed to sell and Mrs. Colvin agreed to purchase 11227 – 76 Avenue for a price of $187,000, with a closing date of January 17, 2005. On January 17, 2005, a contractor, hired by Mrs. Colvin to clean and repair the property in order to make it rentable, visited the property and discovered that a pipe had frozen and burst, causing major water damage to the house. By the time the matter was heard by Mr. Justice A.M. Lutz at the Court of Queen's Bench level, the parties had agreed that the damages amounted to $10,000. None of the closing documents were ever provided to Mrs. Colvin and the owners admitted they were liable for a breach of their agreement to sell. The sole issue, therefore, was whether Mrs. Covlin was entitled to a decree of specific performance.

In *Semelhago v. Paramadevan*, the majority of the Supreme Court of Canada stated (at para. 20):

> 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.

Because damages for the breach of a real estate contract would not be an inadequate remedy where the land has "no peculiar or special value" (*Semelhago*, at para. 21), the majority concluded 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": *Semelhago*, para. 22. Those comments were *obiter* and made without the benefit of argument on the topic, but the new principles set out in *Semelhago* have been applied in many subsequent decisions, including the leading Alberta case of *1244034 Alberta Ltd. v. Walton International Group Inc.*, 2007 ABCA 372, 422 A.R. 189, leave to appeal denied, [2008] S.C.C.A. No. 43 (*Walton International*).

Was 11227 - 76 Avenue "unique" in the sense that its substitute would not be readily available? This is largely a factual matter and the evidence was summarized in the decision of Mr. Justice A.M. Lutz: see *Covlin v. Minhas*, 2009 ABQB 42. Mrs. Covlin's evidence was that the property is located within walking distance of the University of Alberta. It is located across the street from a mini strip shopping centre and two blocks from an LRT line and station being constructed. Mrs. Covlin expected to develop the property in conjunction with the six Covlin-controlled lots into apartments or commercial premises at some point in the future. Until then, she planned to lease the property to students, as she had done with the two adjoining houses. No steps had, however, been taken toward that development plan. Both Mr. and Mrs. Covlin were in their mid-60s at the relevant time and Mrs. Covlin conceded that the plan was a retirement dream.

Mrs. Covlin's expert in property planning and development prepared a report on development potential using one model for six lots and a second model for seven lots. He gave the opinion that the addition of 11227 – 76 Avenue provided a little more flexibility in terms of the type of development and would make the development a fairly attractive marketable item in that particular area of Edmonton. The additional lot would mean a higher density building could be

constructed, which would be in keeping with the City of Edmonton's policies. Mrs. Covlin's real estate appraisal expert testified that the value of 11227 – 76 Avenue by itself was $326,000 as of the summer of 2008, just before the matter was heard by Mr. Justice A.M. Lutz. Combined with the two lots adjacent to it and owned by Mrs. Covlin, he valued the property at $380,000. Finally, combined with the six adjacent lots and assuming a zoning change to RA7, the expert valued the subject lot at $435,000.

In the Court of Queen's Bench, Justice Lutz concluded that he was required to apply a subjective - objective test to determine whether or not the property was of special value to the purchaser based on the purchaser's business plan. In support of this test, Justice Lutz had relied upon Anger and Honsberger, *Law of Real Property*, 3rd ed. looseleaf (Aurora: Canada Law Book, 2007), at pp. 23-24 (which had been quoted with approval in the majority decision in *Walton International*, at para. 6):

> In the post-*Semelhago* era, purchasers seeking to specifically enforce contracts for the sale of land in Canada bear the onus of establishing that damages would be an inadequate remedy in the particular circumstances. Should the purchaser be attempting to obtain the lands merely for investment purposes such onus would be exceedingly difficult to satisfy.
> ....
> 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. (at para. 44, footnote omitted)

Justice Lutz had found (at para. 52) that 11227 – 76 Avenue was part of a group of properties that, taken together, formed a commercially unique opportunity for Mrs. Covlin and that the property was uniquely situated for the purposes of her plan to develop an apartment and commercial complex in the long term, with the use of the existing house on the property as a rental unit in the interim. He also found (at para. 54) that there was a strong objective nexus between 11227 – 76 Avenue and Mrs. Covlin's business plan. A key fact for Justice Lutz appeared to be that 11227 – 76 Avenue made a significant addition to other properties already owned by Mrs. Covlin. She was aggregating a parcel of land to other parcels already owned by her or her husband. While 11227 – 76 Avenue was not unique on in and of itself or to another purchaser, it was unique to Mrs. Colvin.

The vendors argued that 11227 – 76 Avenue could not be considered unique on the basis of Mrs. Covlin's redevelopment plans because she had taken no steps toward fulfilling those plans. Justice Lutz held (at para. 57) that whether or not her plan could be achieved was irrelevant. What mattered was whether or not a substitute property was readily available. Mrs. Covlin's business plan could not go forward without 11227 – 76 Avenue. Therefore, Justice Lutz

concluded that 11227 – 76 Avenue was unique for Mrs. Covlin's purposes and that a substitute property was not readily available. He granted her an order of specific performance.

On the appeal, the owners argued that Justice Lutz had erred by failing to properly apply the appropriate test for specific performance for a property acquired for investment purposes; erred in finding that the subject property was unique; and erred in concluding that damages would not be an adequate remedy.

Because the owners' first quarrel was with the way Justice Lutz applied the test for specific performance to the facts of the case, his analysis was reviewable on the standard of palpable and overriding error. The owners argued that it is difficult for a purchaser to prove uniqueness when property is obtained for investment purposes and when the development could proceed with six lots instead of seven. They also reiterated that Mrs. Covlin's business plan was not sufficiently real and substantial and enjoyed little evidentiary support. The Court of Appeal held there was evidence to support his findings of fact on these matters and, as a result, his findings did not show palpable and overriding error.

On the related alleged error – that of concluding that damages would not be an adequate remedy – the owners reiterated an argument made to Justice Lutz. The owners had argued that the difference between owning six and seven lots for development is in the number of units that could ultimately be constructed and the lost revenue potential from the decreased number of units would be "mathematically ascertainable." Justice Lutz had concluded (at para. 53) that even assuming that the difference in value was ascertainable, it did not follow that damages would put Mrs. Covlin in the same position that she would have been in if she had title to 11227 – 76 Avenue. To project the overall value of that property, in light of Mrs. Covlin's plan to rent out the house on the property in the short term and to redevelop all the lots together in the long term, would be a highly speculative exercise. The Court of Appeal agreed, finding that Justice Lutz's conclusion that it would be highly speculative to project the over all value of the property to Mrs. Covlin was reasonable on the evidence.

After stating the facts and the grounds of appeal, it took the Court of Appeal only two short paragraphs to dismiss the owners' appeal. The palpable and overriding error standard of review undoubtedly had something to do with the brevity of their reasons. However, one has to wonder whether or not the release of the ALRI Final Report No. 97 on this very issue, shortly before the appeal was heard, had any impact. If the ALRI recommendations are accepted, all land, including 11227 – 76 Avenue, would be conclusively deemed to be unique. The owners would have had no argument.

It is not yet known whether the recommendations in ALRI Final Report No. 97 on "Contracts for the Sale and Purchase of Land: Purchasers' Remedies" will be enacted by the Alberta legislature. If they are, it will put an end to a fairly large body of litigation engendered by the Supreme Court decision in *Semelhago*, at least in Alberta.