

Manitoba Law Reform Commission

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October 26, 2010

Hon. Andrew Swan
Minister of Justice and Attorney General of Manitoba
104 Legislative Building
Winnipeg MB R3C 0V8

Dear Minister:

**RE: THE REMEDY OF SPECIFIC PERFORMANCE AND THE
UNIQUENESS OF LAND IN MANITOBA**

A. INTRODUCTION

In the past, proposals for law reform short of a formal report have been forwarded by the Manitoba Law Reform Commission to the Minister of Justice and Attorney-General for consideration. In such cases, the Commission has found it effective to submit by letter what is referred to as an informal report. The following is such a report and contains our review and recommendations regarding the availability in Manitoba of the remedy of specific performance to a purchaser for a breach of a contract for the sale and purchase of land.¹

A brief overview of the remedy of specific performance in relation to contracts for the sale and purchase of land might be useful. Historically, the common law provided that the most appropriate remedy for a breach of contract was an award of damages in that a monetary award was best able to put plaintiffs in the position that they would have been in had the contractual obligation been fulfilled. In equity, wherever the remedy of damages was considered incomplete or inadequate, the remedy of specific performance could be awarded on a discretionary basis. With respect to contracts for the purchase and sale of land, it was often considered that land is unique so that monetary damages could not properly compensate a purchaser for their loss given the unavailability of an

¹ The Commission appreciates the comments and assistance received from Mr. Edward D. (Ned) Brown, Pitblado LLP.

equivalent replacement property. Specific performance was generally available as a remedy without an onus to prove uniqueness.²

The historic presumption that land is unique and the tendency towards specific performance changed as a result of the Supreme Court of Canada decision in *Semelhago v. Paramadevan*³ and subsequent appellate decisions.⁴ The state of the law in this regard has caused uncertainty and has been the subject of a significant amount of litigation in other common law Canadian jurisdictions.⁵ The Manitoba Law Reform Commission has considered whether clarification of the remedy of specific performance might be beneficial in Manitoba.

B. OVERVIEW OF THE SEMELHAGO DECISION

Ironically, *Semelhago* was not about specific performance; rather, it was about the quantification of damages in a breach of contract for the sale and purchase of a house and the principles that ought to apply to the assessment of damages in lieu of specific performance. The parties concurred that specific performance was an appropriate remedy, but at the time of trial the purchaser elected to take damages in lieu of specific performance. Speaking for the majority, Justice Sopinka indicated that while he had

² This paragraph is based upon Anger and Honsberger, *Law of Real Property*, 3rd ed. looseleaf, (Aurora: Canada Law Book, 2007) at 23-16 to 23-22. Anger and Honsberger observe that some cases imposed restrictions upon the availability of specific performance, such as where plaintiff purchasers speculated on an increase in market value for investment purposes or where plaintiff vendors failed to mitigate their loss by not returning property to the open market. Further, in the 1970s, courts began limiting the availability of specific performance for disputes involving personal property to cases where a plaintiff could establish a “substantial and legitimate interest” in seeking to have the contract enforced, *as per, Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 2 S.C.R. 465, wherein the court imposed this limitation. However, the general trend had been to regard land as unique and specific performance was routinely available as a remedy.

³ *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 [*Semelhago*]. It is noted by Anger and Honsberger, *ibid.*, at 23-16, that while “some academics have debated the significance of this decision, most jurists have concluded that the legal inquiries relevant to a plaintiff’s entitlement to specific performance have changed, and that this case is the genesis of that shift.”

⁴ For example, *1244034 Alberta Ltd. v. Walton International Group Inc.* (2007), 422 A.R. 189 (C.A.) leave to appeal to S.C.C.A. refused, [2008] S.C.C. No 43, *Covlin v. Minhas*, 2009 ABCA 404, *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* 63 O.R. (3d) 304 (S.C.J.), leave to appeal to S.C.C. dismissed without reasons, [2003] S.C.C.A. No. 145, where clarification of the principles laid down in *Semelhago* was sought.

⁵ *Semelhago* is generally regarded as the leading case in Canada on specific performance as it relates to real property and has been considered or followed in no less than: 43 cases in Alberta; 53 cases in British Columbia; 3 cases in New Brunswick; 1 case in Newfoundland and Labrador; 1 case in the Northwest Territories; 5 cases in Nova Scotia; 78 cases in Ontario; 1 case in Prince Edward Island and 8 cases in Saskatchewan. *Semelhago* has only been mentioned in one reported Manitoba decision, which case is not on point and pertains to an action for damages against the City for improper conduct regarding a request for proposals to develop property (*Mellco Developments Ltd. v. Portage la Prairie* (2001), 167 Man. R. (2d) 161 (Q.B)). It should be noted that specific performance has been granted in various decisions, some of which have involved commercial property; however, the parties and courts have grappled with the principles to be applied when determining uniqueness and the appropriateness of specific performance. This has arguably resulted in varied and inconsistent outcomes.

reservations about the propriety of an award of specific performance, given that the lower courts proceeded on the assumption that it was an appropriate remedy, this case would also be disposed of on the basis that specific performance was an appropriate remedy.⁶

The crux of this informal report stems from the following *obiter* comments made by Justice Sopinka regarding specific performance:

Different considerations apply where the thing which is to be purchased is unique. Although some chattels such as rare paintings fall into this category, the concept of uniqueness has traditionally been peculiarly applicable to agreements for the purchase of real estate. Under the common law every piece of real estate was generally considered to be unique. Blackacre had no readily available equivalent. Accordingly, damages were an inadequate remedy and the innocent purchaser was generally entitled to specific performance. (para. 14)

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 a deal falls through for one property, another is frequently, though not always, readily available. (para. 20)

It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. 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. (para. 21)

Courts have tended, however, to simply treat all real estate as being unique and to decree specific performance unless there was some other reason for refusing equitable relief... 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. (para. 22)

C. POST SEMELHAGO

The state of the law in what has been described by some as the “post-*Semelhago* era”⁷ can be stated as a presumption against the primacy of specific performance for defaults of contracts for the sale and purchase of land and a presumption in favour of damages being the only appropriate remedy. Notably, where a purchaser is seeking to obtain the subject property for investment purposes, the burden to prove the inadequacy of damages has become extremely difficult.⁸ As observed by some commentators:

⁶ Concern was expressed over the potential windfall that may benefit a plaintiff who obtains damages in lieu of specific performance as an alternative relief when land values increase during the litigation period.

⁷ Anger and Honsberger, *supra* note 2 at 23-22.

⁸ Anger and Honsberger, *ibid.* at 23-16 to 23-22.

As the uniqueness requirement has evolved, it is clear that both subjective and objective factors will be considered and that, likely, they will be examined differently should the subject land be residential or commercial in nature. Objective factors are those that would distinguish the particular parcel from other lands, located within a reasonable distance, through demonstrable characteristics that the market for such land would be regarded as desirable. A subjective examination would look at the nexus between the characteristics of the particular land and the purpose(s) for which the purchaser is seeking to acquire it. The cases to date have tended to take a different approach to the uniqueness requirements for residential and commercial lands.

Generally, the cases involving the acquisition of residential properties have demonstrated a greater willingness to include within their subjective analysis the idiosyncratic desires of the purchaser.

...
While the test for determining the uniqueness of commercial properties also contains subjective and objective elements, it would appear that the subjectivity element is not as idiosyncratic in nature. 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.⁹

A corollary impact of *Semelhago*, which some have seen as a significant shortcoming,¹⁰ is that absent an entitlement to specific performance, purchasers may not have sufficient interest in land with which to file a caveat against title.¹¹

The effect of *Semelhago* on real estate transactions has been the subject of a recent report issued by the Alberta Law Reform Institute¹² which recommended that legislation be enacted to overrule *Semelhago* with respect to the uniqueness requirement, so that specific performance of a contract for the sale and purchase of land would be available regardless of proof of uniqueness, and so that caveat registration in these circumstances would be ensured.

The Manitoba Law Reform Commission concurs with the following observations and recommendation made by the Alberta Law Reform Institute and suggests that similar recommendations could protect parties to real estate transactions in Manitoba:

⁹ Anger and Honsberger, *ibid.* 22-23 to 22-24.

¹⁰ ALRI Report, *infra* note 12. This concern has also been raised with the Manitoba Law Reform Commission by a Manitoba lawyer specializing in real property law, and is discussed further on page 9 of this report.

¹¹ In *1244034 Alberta Ltd. v. Walton International Group Inc.*, *supra* note 4, an application to discharge a caveat and remove a *lis pendens* was filed. The Alberta Court of Appeal stated that "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." The court observed that property is not unique in the sense required for specific performance just because it has special attributes of location, favourable price or the possibility of further development.

¹² Alberta Law Reform Institute, Final Report No. 97, October 2009, *Contracts for the Sale and Purchase of Land: Purchasers' Remedies*.

[26] *Semelhago* and the Court of Appeal decisions cited have reversed that assumption of uniqueness in land contracts. They hold that, because times have changed, the exception allowing for specific enforcement of contracts for the sale and purchase of land on grounds of assumed uniqueness is no longer available unless it can be shown that the land in question is unique in the sense that there is no substitute that will meet the purchaser's needs. Therefore, the proposition that specific performance should not be granted unless damages is an inadequate remedy comes into play: specific performance will not be granted if damages is an adequate remedy, and damages will be assumed to be an adequate remedy unless the land is shown to be unique in the *Semelhago* sense.

[27] We pause here to note that, whether or not land is unique in the sense that there is no readily available substitute, it is unique in a number of ways. These aspects of uniqueness are as follows:

- no other land has the same boundaries and precisely the same physical characteristics;
 - the parcel is immovable and indestructible;
 - the land has been uniquely identified by the parties in a contract.
- Where the land is covered by a certificate of title, which is the usual case, the land has further aspects of uniqueness as follows:
- ownership of the land is determined by a public record;
 - ownership of the land can be changed by an entry in a public record by a public official at the instance of the court.

The cumulative effect of these aspects of uniqueness is to make specific performance peculiarly effective with relation to land as enforcement of an order of specific performance is simple and does not require extensive supervision by the court. They also help to justify the former assumption of uniqueness.

[34] We do not suggest in this discussion that the law relating to specific performance be changed in any way except for the specific recommendation we will later make, to the effect that the law, including equity, should be changed so that the lack of "uniqueness" of land will not be a bar to a purchaser's claim for specific performance... The only change will be that there will no longer be a requirement that the land be unique in order that specific performance may be available.

[41] Giving a purchaser precisely what the purchaser contracted for and the vendor agreed to convey is fairer to the purchaser than giving them a substitute amount of money.

[42] A vendor under a contract for the sale and purchase of land has freely given their promise to convey the land to the purchaser on performance of the purchaser's obligations under the contract. The vendor has exacted a promise to pay a purchase price in an amount to which they have agreed. The vendor has received the whole price or it is available to them, as specific performance would not otherwise be granted. Specific performance merely adopts the bargain freely entered into by the parties. It is entirely fair to hold the vendor to their promise to convey the land upon being paid in full. Fairness does not require that the vendor be entitled to resell the land or otherwise turn it to profit exceeding the damages the vendor will have to pay to the purchaser.

[53] The uncertainty caused by the uniqueness test will lead to inefficiency in disposing of litigation between vendors and purchasers. It is important that there be a clear rule as to when specific performance will be available. The uniqueness test as laid down in *Semelhago* and other cases is likely to require an assessment of uniqueness that, because of the complexity of the circumstances, can be made only by a court, leaving a vendor and purchaser in a state of uncertainty about the availability of specific performance. The

purchaser will be put to expense to prove their case for uniqueness. Additional judicial resources will be required to hear the case and make the determination.

[68] In our opinion, a purchaser under a contract for the sale and purchase of land should be entitled to an interest in the land from the time of the contract and should be entitled to file a caveat protecting that interest. The parties have identified the specific land; the vendor has granted the purchaser the right to receive ownership on payment of the purchase price; and the purchaser has paid part of the purchase price and has undertaken a contractual obligation to pay the balance. If the purchaser is not allowed to protect their rights under the contract by a caveat, the vendor may transfer the land to someone else, thus defeating the purchaser's claim to specific performance of the contract. These facts are sufficient to give the purchaser a legitimate claim against the land.

[72]...it is our opinion: 1. that an order for specific performance of a contract for the sale and purchase of land in favour of the purchaser under the contract is generally fairer to both parties, more efficiently obtained, and more effective in achieving the objectives of the law than is an award of damages;
2. that specific performance should not be denied on the grounds that the land is not "unique," in the sense that no substitute is readily available;
3. that otherwise the law relating to specific performance of such contracts, including its equitable defences, should remain the same as it was before *Semelhago*;
4. that a contract for the sale and purchase of land should confer on the purchaser an interest in the land and, if there is a certificate of title to the land, the consequent right to file a caveat protecting the interest.

[73] In our opinion, the objectives listed in the preceding paragraph will all be accomplished by a legislative provision that, for the purpose of determining whether or not the purchaser under a contract for the sale and purchase of land is entitled to an order of specific performance of the contract, land that is the subject of the contract is conclusively deemed to be unique at all material times. Such a provision would restore the pre-*Semelhago* law under which a contract for the sale and purchase of land conferred on the purchaser an interest in the land and, if there was a certificate of title to the land, the consequent right to file a caveat protecting the interest.¹³

RECOMMENDATION No. 1

That our Recommendations apply to any of the following that meet the standard criteria for the formation of contracts, all of which we include in the term "contract for the sale and purchase of land":

- (a) a contract providing for payment of the purchase price over time,
- (b) a contract entered into for closing at a future time,
- (c) an option for the purchase of land where the option has been exercised,
- (d) an offer in writing
 - (i) by a purchaser to an owner of land for the purchase of the land from the owner, or
 - (ii) by an owner of land to a purchaser for the sale of the land to the purchaser if the offer has been accepted in writing by the other party, and
- (e) an agreement to grant a lease.

RECOMMENDATION No. 2

That for the purpose of determining whether a purchaser under a contract for the sale and purchase of land is entitled to specific performance of the contract, the land that is the

¹³ In Manitoba, such a provision goes further than restoring the law as it existed prior to *Semelhago*, and modifies the law by conclusively deeming land to be unique.

subject of the contract be conclusively deemed to be unique at all material times. Legislation should be enacted to provide for the conclusive deeming.

RECOMMENDATION No. 3

That a contract for the sale and purchase of land should confer on the purchaser an interest in the land and, if the land is subject to a certificate of title, a right to file a caveat protecting that interest. The legislation provided for in Recommendation No. 2 will restore the law as it existed before *Semelhago* and will thus confer on the purchaser an interest in land and the right to file a caveat protecting the interest.¹⁴

D. CASE LAW IN MANITOBA

While *Semelhago* has not yet had the impact in Manitoba as it has had elsewhere in Canada, similar issues have arisen in Manitoba. The following is a discussion of two recent Manitoba decisions where claims for specific performance were made in connection with unfulfilled contracts for the sale and purchase of land.

Chanh Dao Vietnamese Buddhist Association of Manitoba Inc. v. Manitoba Korean Presbyterian Church Inc.,¹⁵ involved a dispute over the validity of an agreement for the sale and purchase of property used as a place of worship. The plaintiff filed a motion for summary judgment and sought specific performance as a remedy. The court held that the offer to purchase was a valid contract, and in granting summary judgment the court stated that specific performance was the only appropriate remedy and there was no reason why the plaintiffs “should not receive the premises for which it contracted.” The court noted that the defendants had not argued that specific performance would be inappropriate. An analysis based upon *Semelhago* did not occur and there was no mention of any uniqueness of the property or of any difficulty in assessing damages. The decision seems to have been decided upon a notion of fairness that the defendant should be bound by the contract it made and that the plaintiff should receive the property for which it contracted.

In *Trico Developments Ltd. v. 5117089 Manitoba Ltd.*¹⁶ the defendants failed to close a real estate sale and purchase transaction and in granting summary judgment and awarding specific performance, the court observed as follows:

The plaintiff is seeking an order of specific performance. Even if I am satisfied that the defendant was obliged to reconvey the land to the plaintiff pursuant to its agreement, it does not automatically follow that I should issue an order of specific performance. There are cases where damages are the best remedy. However, the plaintiff has satisfied me that damages would not be the appropriate remedy. From the plaintiff's perspective, there is an element of uniqueness to this land. Indeed, the parties agreed that this was so...

The finding of uniqueness makes it difficult to determine its present value. Specifically, the plaintiff owns property immediately adjacent to the land at issue here. The land cannot be developed without a cross-access agreement. If the plaintiff loses control of the

¹⁴ *Ibid.*

¹⁵ 2009 MBQB 307, [*Buddhist Association*].

¹⁶ 2008 MBQB 139, 229 Man.R. (2d) 79, appeal dismissed 2009 MBCA 3, 236 Man.R. (2d) 91, [*Trico*].

land, its ability to develop the adjacent property could be impaired. Moreover, assembling a larger piece of land no doubt generates more development options, and thus value. **In any event, I am satisfied that the fairest remedy is to hold the defendant to its original bargain.** I, therefore, order that it transfer title to the land to the plaintiff in accordance with the agreement.¹⁷ (emphasis added)

Although *Semelhago* was not mentioned by the court in *Trico*, a similar analysis was conducted and the decision was made based upon property uniqueness and the difficulty in assessing damages. Had *Semelhago* been applied, given that the subject property is commercial, perhaps the same conclusion would not have been reached. Moreover, similar to the decision in *Buddhist Association*, the court was influenced by the fairness of holding the parties to their original contract.

The Commission is concerned that if the post-*Semelhago* trend emerges in Manitoba, purchasers and vendors may experience uncertainty and increased litigation, as experienced in other provinces. In the consultation phase of this project, it was suggested to the Commission by a lawyer specializing in real property law that in Manitoba every piece of land is generally considered to be unique, and it was respectfully suggested that *Semelhago* and subsequent appellate decisions lack a “real world understanding” and are inconsistent with the practice and perception in Manitoba. Also during the consultation phase of this project it was submitted that the restriction on caveat filing pending the resolution of a failed transaction is extremely concerning. It was suggested to the Commission that once a sale and purchase transaction breaks down, a purchaser, as the beneficial owner, would want to immediately protect their claimed interest in order to establish their priority, long before a court determination as to specific performance could be made. It was also suggested to the Commission that a right to file a caveat in these circumstances ought to be expressly provided for in *The Law of Property Act*.¹⁸ Finally, during the consultation stage of this project, it was submitted that the subjective and objective analysis being applied for commercial property creates an unreasonably high standard to prove uniqueness for commercial purchasers who encounter renegeing vendors.

Should *Semelhago* be overridden by legislative enactment, the courts could still decline to grant specific performance in appropriate situations, such as equitable bars to relief, contractual defences or where damages are sought in lieu of specific performance.

E. RECOMMENDATIONS:

The Manitoba Law Reform Commission makes the following recommendations (which are adopted from the Alberta Law Reform Institute):

¹⁷ *Ibid.* at para. 42-43.

¹⁸ C.C.S.M. c. L90

RECOMMENDATION 1

That our Recommendations apply to any of the following that meet the standard criteria for the formation of contracts, all of which we include in the term “contract for the sale and purchase of land”:

- (a) a contract providing for payment of the purchase price over time,
- (b) a contract entered into for closing at a future time,
- (c) an option for the purchase of land where the option has been exercised,
- (d) an offer in writing
 - (i) by a purchaser to an owner of land for the purchase of the land from the owner, or
 - (ii) by an owner of land to a purchaser for the sale of the land to the purchaser if the offer has been accepted in writing by the other party,
- (e) an agreement to grant a lease.

RECOMMENDATION 2

That for the purpose of determining whether a purchaser under a contract for the sale and purchase 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. Legislation should be enacted to provide for the conclusive deeming.

RECOMMENDATION 3

That a contract for the sale and purchase of land should confer on the purchaser an interest in the land and, if the land is subject to a certificate of title, a right to file a caveat protecting that interest.

RECOMMENDATION 4

That *The Law of Property Act*¹⁹ should be amended to implement the recommendations made in this informal report.

¹⁹ *Ibid.*

This is informal report no.26 pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L96, signed this 26th day of October, 2010.

“Original Signed by”
Cameron Harvey, President

“Original Signed by”
John C. Irvine, Commissioner

“Original Signed by”
Gerald O. Jewers, Commissioner

“Original Signed by”
Perry W. Schulman, Commissioner