

**In the Court of Appeal of Alberta**

**Citation: Covlin v. Minhas, 2009 ABCA 404**

**Date:** 20091202  
**Docket:** 0903-0156-AC  
**Registry:** Edmonton

**Between:**

**Verna J. Covlin**

Respondent/Cross-Appellant  
(Plaintiff)

- and -

**Yadvinder Minhas, Mohinder Singh,  
Rasandeep Singh and Mandeep Singh**

Appellants/Cross-Respondents  
(Defendant)

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**The Court:**

**The Honourable Mr. Justice Ronald Berger  
The Honourable Mr. Justice Peter Costigan  
The Honourable Madam Justice Patricia Rowbotham**

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**Memorandum of Judgment  
Delivered from the Bench**

Appeal from the Judgment by  
The Honourable Mr. Justice A.M. Lutz  
Dated the 26<sup>th</sup> day of February, 2009  
Filed on the 22<sup>nd</sup> day of May, 2009  
(2009 ABQB 42, Docket: 0503 06765)

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**Memorandum of Judgment  
Delivered from the Bench**

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**Costigan J.A. (for the Court):**

[1] The respondent purchaser obtained an order for specific performance of a contract for sale of a residential property and was awarded costs under Column 1. The appellants, who admitted liability under the contract, appeal the specific performance remedy. The respondent cross appeals from the costs award and the trial judge's finding that adjustments should be made as at the completion date in the contract rather than as at the date of payment of the balance of the purchase price.

[2] The respondent owns two residential properties immediately to the east of the subject property and the respondent's husband owns four properties, housing a commercial building, to the east of the respondent's other two properties. With the addition of the subject property, the respondent and her husband would own seven adjacent properties.

[3] The contract specified a completion date of January 17, 2005 and provided that adjustments would be made as of the completion date provided that payment of the outstanding balance of the purchase price and interest would be postponed if the appellants failed to provide closing documents.

[4] The subject property is located within walking distance of the University of Alberta and near a light rail transit station. In the short term, the respondent intended to renovate the subject property and rent it to university students. In the long term, she intended to redevelop the subject property along with her other two properties and, in combination with her husband's four properties, build an apartment or commercial building.

[5] The respondent had not prepared a re-development plan or made inquiries about re-zoning. She conceded that she might rent the subject property for 10 years and that the re-development was a retirement dream.

[6] The respondent's expert testified that although the respondent and her husband could re-develop with six properties, the addition of a seventh property would allow for a larger development with more density and higher value. In his opinion, the re-development would require re-zoning but it would be in keeping with the City's policy for the area.

[7] The trial judge noted that specific performance is only available where the property is unique to the extent that its substitute would not be readily available and where damages would not afford an adequate remedy. He concluded that the court 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.

[8] The trial judge found that the subject property was part of a group of properties that, taken together, formed a commercially unique opportunity for the respondent and that the subject property was uniquely situated for the purposes of the respondent's plan. He concluded:

Moreover, there is a strong objective nexus between the subject property and the Plaintiff's business plan. While the Plaintiff could arguably develop six lots instead of seven, the addition of the seventh property provides her with an opportunity that cannot be reasonably duplicated. She cannot simply go out and purchase another property that would have the same value to her as the subject property. The Plaintiff is not merely engaged in a speculative lawsuit for profit. The land in question is of particular and unique value to the Plaintiff, and for that reason damages are not an appropriate remedy in this case.

The trial judge found that whether the business plan would ultimately be realized was not the relevant inquiry. Rather, the question was whether a substitute property was readily available and he concluded that it was not.

[9] Without giving reasons for doing so, the trial judge dismissed the respondent's application to have the adjustments made as at the date of payment of the purchase price.

[10] In addition to specific performance, the trial judge awarded damages of \$10,000 for flood damage occasioned to the subject property. The respondent made a pre-trial offer to abandon the damages claim in exchange for specific performance and costs under Column 3.

[11] After trial, the respondent sought double costs under Column 3. The trial judge noted that Schedule C provides "unless otherwise ordered...matters which have no monetary value...will be dealt with under Column 1". He found that although he had a discretion to award costs on a different basis, costs under Column 1 were appropriate. The trial judge concluded that as the respondent's offer of settlement sought costs under Column 3, but she was awarded costs under Column 1, the respondent had not beaten her settlement offer and was not entitled to double costs.

[12] The appellants argue that the trial judge failed 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. On the cross appeal, the respondent argues that the trial judge erred in ordering costs under Column 1; in failing to award double costs and in finding that the adjustments should be calculated as at the closing date in the contract.

[13] Issues of law and issues of contractual interpretation are reviewable on the standard of correctness. Issues of fact are reviewable on the standard of palpable and overriding error. Costs awards are discretionary and, absent an error in principle, are reviewable on the standard of palpable and overriding error.

[14] The appellants do not argue that the trial judge articulated the incorrect test for specific performance. Rather, they argue, in essence, that the trial judge erred in applying the test because 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. Furthermore, the appellants argue that the respondent's business plan was not sufficiently real and substantial and enjoyed no evidentiary support save for an "isolated declaration". These arguments are directed at the trial judge's findings of fact. There was evidence to support his conclusion that the subject property was unique because it formed an integral part of a larger plan for re-development, the prospect of which would be enhanced by the addition of a seventh lot. The trial judge was aware that the plan might take years to evolve and that it was subject to planning and zoning requirements. Nonetheless, he was satisfied that the test was met. Those findings do not display palpable and overriding error.

[15] The appellants also argue that the trial judge erred in finding that damages were not an adequate remedy. They say the loss of revenue from not having a seventh property could be calculated. This ground of appeal cannot succeed. The trial judge's conclusion that it would be highly speculative to project the over all value of the subject property to the respondent is reasonable on this record. Accordingly, the main appeal is dismissed.

[16] On the cross appeal, the respondent argues that because the contract contemplates that the purchase price might not be paid at the closing date, the trial judge erred in finding that the adjustment date should not be postponed until the purchase price was paid. The respondent paid the balance of the purchase price on March 20, 2009. The respondent will have to pay \$10,000 more if the adjustments are calculated as at January 17, 2005 rather than as at March 20, 2009. The appellants argue that although the contract contemplates that payment of the purchase price may be postponed, it does not specifically provide for a later adjustment date. They say the trial judge did not err in declining to vary the contract.

[17] On this record, there is no reason in principle to adhere to the adjustment date of January 17, 2005. The contract provides that payment of the purchase price and interest may be postponed if the seller fails to deliver closing documents. The adjustment date may be similarly postponed where the seller fails to complete. Moreover, the appellants should not be allowed to profit from their failure to comply with their contractual obligations. Accordingly, the trial judge erred in directing that adjustments should be made as at January 17, 2005.

[18] However, the trial judge did not err in principle in exercising his discretion to award costs on Column 1 and the exercise of that discretion was reasonable. Accordingly, the trial judge was correct to conclude that the respondent was not entitled to double costs because she did not beat her offer of settlement.

[19] In the result the appeal is dismissed. The cross appeal is allowed in part and the trial judgment is varied to provide that adjustments will be calculated as at March 20, 2009. The balance of the cross appeal is dismissed.

Appeal heard on November 27, 2009

Memorandum filed at Edmonton, Alberta  
this 2nd day of December, 2009

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Costigan J.A.

**Appearances:**

E.R. Feehan/N.A. Pfeifer  
for the Appellants/Cross-Respondents (Defendants)

D.W. Hagg, Q.C.  
for the Respondent/Cross-Appellant (Plaintiff)