

Court of Queen's Bench of Alberta

Citation: Singh v. 862500 Alberta Ltd., 2009 ABQB 293

Date: 20090515
Docket: 0603 09837
Registry: Edmonton

Between:

Paramjit Singh

Plaintiff

- and -

**862500 Alberta Ltd. Carrying on Business Under the Firm Name and Style of
Super-Tec Homes**

Defendant

**Memorandum of Decision
of the
Honourable Mr. Justice Sterling Sanderman**

[1] Evidence was heard by me for three days in relation to a real estate transaction that was not completed. The subject matter of this lawsuit is a residential property located in the north east area of Edmonton. The purchaser and vendor give differing reasons for the failure to complete the purchase agreement entered into on March 8th, 2006. Supporting evidence of differing quality was called by both sides.

[2] The Plaintiff, Mr. Singh, seeks an order in the nature of specific performance requiring the Defendant to complete the transaction and transfer the house to the Plaintiff upon the Plaintiff paying the agreed upon purchase price. If this remedy is not available to him he seeks damages representative of his loss. He also seeks punitive damages alleging extremely high handed conduct on the part of the Defendant.

[3] The Defendant denies that there was a binding agreement between the parties and asks that the lawsuit be dismissed in its entirety. A counterclaim has been filed. The Defendant seeks damages from the Plaintiff in relation to a subsequent agreement for the sale of this land that was frustrated by the Caveat and a Certificate of Lis Pendens filed against the land by the Plaintiff. The Defendant, also seeks indemnification by the Plaintiff for any amount that the Defendant may be obliged to pay to the subsequent purchaser as a result of a lawsuit started by that party. These are the issues that are raised by the parties.

[4] The two main witnesses in this matter were the individuals who entered into the purchase agreement. Mr. Singh intended to purchase a home situated at 6027 - 166 Avenue to serve as a residence for his family. Mr. Deol, the principle of the Defendant, entered into the agreement on behalf of the builder. A number of individuals were called by both parties to support the evidence given by the two main witnesses. None of these witnesses could shed light upon how the purchase agreement came into existence or why title to the residence was not transferred to Mr. Singh as contemplated. They were called by the parties in order to establish whether the residence was ready for occupation towards the end of the month of April of 2006. They gave evidence in relation to the condition of the home at that time.

[5] Other than the expert witnesses called by the Plaintiff, his witnesses were immediate or extended family members. Their allegiance was clear. They were supportive of Mr. Singh's position but their evidence was extremely imprecise and uncertain. It cannot be acted upon in relation to the condition of the home in the last week of the month of April in 2006. The evidence of the various tradesmen called by the Defendant is accepted in this regard. An electrician, painter and cabinet supplier all gave evidence that this home was ready for occupation by April 28, 2006. Their evidence was given with clarity, certainty and in a positive fashion. I accept that this home was ready for occupation. The only aspect of the interior construction that needed attention was replacing a temporary counter top with the special order counter top chosen by Mr. Singh's son. The special order had yet to be provided by the supplier. Certainly, exterior work dictated by the seasons needed to be completed.

[6] Sidewalks, concrete steps, the installation of the driveway and stuccoing were required to be completed. None of these deficiencies made this house uninhabitable. These were all matters that would have been addressed in the very near future. They could not be completed before the end of the month of April because of weather conditions. This is the nature of the home construction industry in Alberta.

[7] Harban Deol is the president of the corporate defendant. He is the controlling mind of this company. He is a residential home builder. He conducts his business in Edmonton, Alberta. He has been building homes in Edmonton for the past two decades. He was building a number of homes, very similar in appearance and floor plan, in the neighbourhood in which the residence 6027-166 Avenue is located. The Defendant company had designed a home that could be built quickly and efficiently. It formed the basis for the floor plan of the home located at 6027-166 Avenue. The Defendant was building a number of homes on the same block utilizing this plan. This home was not unique in any fashion because of its floor plan, construction or location in the city of Edmonton.

[8] In March of 2006 this home was substantially completed. A friend of Mr. Singh's family was interested in purchasing this home. Mr. Deol had been dealing with this individual when he agreed to step aside and allow Mr. Singh to purchase the home. Mr. Singh was looking for a new residence as his home had been sold and he was to give up its possession some time in April of 2006.

[9] Mr. Deol was confident that the residence at 6027 - 166 Avenue would be completed by April 30, 2006. Mr. Atwal, the man originally interested in purchasing the residence, stood aside and Mr. Deol and Mr. Singh entered into a purchase agreement on March 8th, 2006. A price of \$309,500.00 was agreed upon. Mr. Singh provided Mr. Deol with a deposit of \$5,000.00. A completion date of April 30, 2006 was agreed upon. Mr. Singh agreed to have his mortgage approval obtained by March 10, 2006. Both parties appeared to be satisfied with this basic understanding. Construction continued. Mr. Singh began to look at certain upgrades for the residence. He ordered a special counter top. He began to look for appliances that would suit the residence. It is apparent that Mr. Singh and his family had access to the residence as its construction entered the final phases. The relationship between Mr. Singh and Mr. Deol was harmonious up until the end of the month of April of 2006.

[10] Mr. Singh approached Mr. Deol to see if the possession date could be moved forward from April 30, 2006. Mr. Singh and his family had vacated their previous residence and wanted to take possession before the 30th. Mr. Deol checked with his tradesmen and ascertained that this was possible. He indicated to Mr. Singh that possession of the residence could be moved to April 28th, 2006.

[11] On April 26th, 2008 Mr. Singh and his family wanted to move furniture into the residence. They were not allowed to do so by Mr. Deol. Tradesmen were still in the residence at that time putting the final touches to certain aspects of the construction. Mr. Deol did not want them disturbed. In addition to this, Mr. Deol had not heard from his solicitor that the documentation had been sent to him from Mr. Singh's solicitor so that the property could be transferred. Mr. Deol did not object to the Singhs placing furniture and appliances into the garage of the residence. These articles were placed there on April 26th and 27th.

[12] Title to this home was never transferred to the Singhs. The deal was not completed. Mr. Singh claims that the house was not ready for occupation on the 28th of April. I reject that contention. The reliable evidence reveals that it was.

[13] Mr. Deol asserts that the reason the deal collapsed was because of Mr. Singh's failure to provide the Defendant with the funds required to complete the transfer.

[14] There was very little communication between Mr. Deol and Mr. Singh in relation to the financial aspect of this deal. Mr. Deol built this residence on speculation. He was happy to have found a buyer prior to its completion. He expected the deal to go through. He expected Mr. Singh's lawyer to get in touch with his lawyer to complete the deal. The Defendant was represented by Mr. Ragiv Bhalla, a barrister and solicitor who had acted for Mr. Deol's company on a number of transactions. Mr. Bhalla gave evidence at this trial that is accepted.

[15] Mr. Bhalla received the purchase agreement from the Defendant and opened a file on April 13, 2006 and prepared for an end of the month closing. On April 27, 2006 Mr. Singh called Mr. Bhalla to ask if he acted for Super-Tec. When Mr. Bhalla answered in the affirmative, Mr. Singh asked him to send the documents to his lawyer. Mr. Bhalla declined the invitation. He instructed Mr. Singh to have his lawyer send him a letter confirming that he was acting for Mr. Singh and that he would be prepared to accept the documents required to close the deal. Mr. Bhalla wanted confirmation that Mr. Singh had indeed instructed someone for the purpose of closing the deal in accordance with Mr. Bhalla's practice.

[16] On April 28, 2006 someone identifying himself as Mr. Junega left a message with Mr. Bhalla's office that he had been approached by Mr. Singh to act for him. No confirmation letter was sent to Mr. Bhalla by Mr. Junega. In the interim, Mr. Deol had been making inquiries of Mr. Bhalla as to whether or not Mr. Singh's lawyer had been in touch with him. Nothing further took place until Mr. Bhalla sent a fax transmission to Mr. Junega on May 9, 2006 inquiring if Mr. Singh was ready, willing and able to complete the transaction. Mr. Bhalla pointed out to Mr. Junega that this transaction was to have been completed on April 30, 2006. Mr. Bhalla requested information in relation to the status of the transaction.

[17] On May 11, 2006 Mr. Bhalla received a rather generic letter from Mr. Junega indicating that Mr. Singh had been unconditionally approved for a Royal Bank mortgage and that he expected the mortgage instructions to arrive immediately. Mr. Junega also indicated that he had received his client's shortfall in relation to the transaction. This letter did not answer the direct question posed by Mr. Bhalla. Accompanying this letter was a letter from the Royal Bank of Canada indicating approval for financing in the sum of \$239,625.00.

[18] There was no further communication between the lawyers until May 15, 2006. On that day, Mr. Bhalla sent a letter to Mr. Junega asking two specific questions. He wanted Mr. Junega to confirm that the mortgage had been approved and that Mr. Singh was ready, willing and able to proceed with the transaction on that date. Mr. Bhalla indicated that upon confirmation of those two points, he would be in a position to deliver the documents to arrange for the transfer to Mr. Junega's office that day. Mr. Bhalla received a response on May 17, 2006. Mr. Junega sent him a letter that did not answer either one of the posed questions. Instead, it requested an extension to close the deal to the end of the month. Mr. Bhalla sought the instructions of Mr. Deol in relation to this request. Mr. Deol was not prepared to agree to the extension. On May 19, 2006 Mr. Bhalla sent a letter to Mr. Junega refusing the request to extend the closing date to the end of the month of May. Instead, Mr. Bhalla indicated that the transaction was collapsed and there was no contract in existence.

[19] On the same day that Mr. Bhalla informed Mr. Junega of the Defendant's position, another lawyer instructed by Mr. Singh entered the picture. Raj Abbi sent a letter to Mr. Bhalla on May 19, 2006 indicating that he was acting for the Singhs and had funds in trust well in excess of the contract price and that his clients were ready, willing and able to complete the purchase. In the interim, the Defendant, believing that the deal with Mr. Singh was not going ahead, entered into negotiations with a potential purchaser. Mr. Manget, a representative of the Defendant entered into an agreement with a family from Calgary on May 18, 2006 to sell the

same property. From that day onward, the Defendant was not in a position to honour its agreement with Mr. Singh.

[20] Mr. Singh was notified personally by Mr. Deol on May 16, 2006 that he was not going to sell the property to Mr. Singh. Mr. Deol told Mr. Singh that he had not fulfilled his end of the bargain and he would not deal with him any further. Towards the end of the month of April, Mr. Deol had had dealings with Mr. Singh. They talked on the telephone. During that period of time, Mr. Singh was attempting to get Mr. Deol to complete the transaction. Mr. Deol would not do so unless he was satisfied that all of the appropriate legal work had been done in order to effect the transfer. Mr. Singh told Mr. Deol on the telephone that everything was with his lawyer and that the lawyer was in a position to complete the transaction. He indicated to Mr. Deol that the lawyer had funds to complete the deal.

[21] This was not a true statement. Mr. Junega, in the middle of the month of May was asking for an extension in time. Mr. Junega had been talking about mortgage funds received at his office. The letter from Mr. Abbi on behalf of Mr. Singh indicated that this would be a cash transaction. One can certainly understand Mr. Deol's frustration in attempting to close the deal. He was receiving contrary information and one could not blame him for coming to the conclusion that he was being stalled. This indeed appears to be the case.

[22] It is abundantly clear that the Plaintiff was not ready, willing and able to complete the transaction until May 19, 2006 at the earliest. Specific inquiries in relation to his ability to do so prior to that date were never answered in the affirmative. It appears that he did not have the funds in his possession to fulfill his end of the bargain until well after the beginning of the month of May. This was in excess of a full two weeks past the closing date.

[23] It appears as if Mr. Deol was doing everything in his power to keep this deal alive. He did not want to turn possession of the residence over to Mr. Singh until the proper documentation had been prepared by the lawyers. He encouraged Mr. Singh to take care of this requirement. He did not attempt to terminate the deal until he had given his lawyer the opportunity to check with counsel originally retained by Mr. Singh.

[24] Mr. Singh claims that there was a valid contract in place and that the letter sent by Mr. Abbi on May 19th, 2006 clearly indicates that he was ready, willing and able to complete the transaction and that the Defendant refused to do so. The Defendant takes a contrary position. The Defendant claims that there is no contract to enforce as Mr. Singh's conduct made the contract null and void. It is important to look at the terms of the purchase agreement in order to see which position can be maintained on the basis of the facts that I have found.

[25] The parties entered this agreement for one specific purpose. Mr. Deol was building a house that he hoped to sell. He was looking for a purchaser to buy the house once it was completed. Mr. Singh was in need of a new family residence. His previous residence had been sold. He needed a replacement home. The anticipated completion date of the Deol project suited Mr. Singh. He was prepared to purchase this home whose construction was almost complete. He agreed to pay \$309,500.00 for this home. He expected to take possession of it on April 30, 2006.

He needed possession by that date as his former residence was to be given up to its new owners before then. This in essence is the agreement reached between Mr. Deol and Mr. Singh on March 8, 2006.

[26] The purchase agreement signed by both parties is a three-page document containing 30 clauses. Both parties were in breach of some of them. Neither party attempted to repudiate the agreement at any time before April 30, 2006. Mr. Deol overlooked breaches of the agreement by Mr. Singh. Some of them were important.

[27] The original agreement was subject to Mr. Singh obtaining a mortgage by March 10, 2006. He never did. Mr. Singh was obliged to make an additional deposit of \$5,000.00 upon the removal or satisfaction of the condition requiring mortgage approval. Mr. Deol never complained to Mr. Singh about these matters. He was prepared to complete the deal at the end of the month of April as originally agreed. In fact, he was prepared to turn over possession of the premises to Mr. Singh two days earlier as Mr. Singh had requested if Mr. Singh came up with the total purchase price.

[28] Clause 18 of the purchase agreement states in part:

POSSESSION OF PREMISES - It is strictly agreed between the Parties that the Land and Residential Unit provided by the Builder may not be possessed and/or occupied by the Purchaser until the Total Price and all other monies payable to the Builder under this Agreement have been received by the Builder or by its solicitor.

[29] As indicated earlier, even though Mr. Deol had not received the balance of the purchase price by April 30, 2006, he was more than prepared to make efforts to keep this deal alive. He undertook the construction of this house in order to sell it to a purchaser. He believed he had a purchaser. He wanted to complete the deal as long as it appeared to him there was some prospect of doing so. On the 30th day of April, he did not rely upon Clause 26 of the agreement which states:

TIME ESSENCE - It is agreed that time is to be considered by the essence in this Agreement.

[30] Mr. Singh claims that the agreement was still in effect between the parties when he indicated to Mr. Deol that he was ready, willing and able to complete the transaction on May 19, 2006. Even though he did not provide the funds to close the transaction on April 30, 2006, he claims that the failure of Mr. Deol to comply with Clause 14 of the purchase agreement kept the deal alive. Clause 14 states:

DEFAULT BY PURCHASER - If the Builder is not in default of its obligations herein and if the Purchaser shall default in payment of the Total Price or interest or any part of the payables agreed to be paid by the Purchaser, or should the Purchaser default in the

observance or performance of any of the covenants, conditions or provision of this Agreement, then the Builder may at its sole discretion and option after the happening of any such event declare this Agreement null and void by providing seven (7) days written notice to that effect served on the Purchaser or mailed by registered letter addressed to the Purchase at their address shown on this Agreement. On the expiration of the time limit in the notice, the rights and interest hereby created or then existing in favor of the Purchaser or derived under the provisions of this Agreement shall cease and determine without any legal proceedings being taken or other act being performed by or on behalf of the Builder and the Land shall revert to and be transferred to the Builder and the Purchaser shall have no right to reclaim any monies paid with respect to this Agreement and the same may retained by the Builder as liquidated damages.

[31] Mr. Deol made efforts to comply with Clause 14. On May 2, 2006, his wife prepared a letter addressed to Mr. Singh at the address provided by Mr. Singh when he signed the purchase agreement. Mr. Deol took the letter to serve it upon Mr. Singh at that residence. The occupants of the residence on that day indicated to Mr. Deol that Mr. Singh had relocated and had left no forwarding address. Mr. Deol was not in a position to effect personal service upon Mr. Singh as he did not know where he resided. He did not send a registered letter addressed to the address on the purchase agreement. Not being able to comply with the clause, he continued to instruct his solicitor to close the deal if possible. Mr. Deol turned the matter over to Mr. Bhalla to have Mr. Bhalla deal with the solicitor acting for Mr. Singh. Those efforts have been outlined earlier in this decision.

[32] Did the failure of Mr. Singh to comply with Clause 14 continue to breathe life into the purchase agreement until May 19, 2006? If it did not, was Mr. Deol permitted to declare the agreement null and void?

[33] Before dealing with the effect of the failure of Mr. Singh to comply with Clause 14, I have to decide whether the doctrine of *res judicata* applies in any fashion to this case. Mr. Singh submits that it does.

[34] In 2006, Mr. Deol asked this Court to discharge the Caveat filed by Mr. Singh on this land. Justice Veit, in a written decision dated December 12, 2006, refused to do so. She did so on the basis that in order to validate a Caveat, the underlying claim “must be based upon facts which if they are believed are complete and sufficient to justify the claim”. She decided that the decision is not one of weight or credibility but one of formal sufficiency: Is there evidence which, if accepted, would demonstrate that the Caveator is entitled to an interest in the subject land. Applying that test, she declined to discharge the Caveat.

[35] *Res judicata* is only applicable if the previous decision was (a) a final decision pronounced by a Court of competent jurisdiction over the parties and the subject matter, (b) the

decision was, or involved, a determination of the same issue or cause of action as that sought to be controverted or advanced in the present litigation; and (c) the parties to the prior judicial proceeding or their privies are the same persons as the parties to the present action or their privies. *420093 B.C. Ltd. and Bank of Montreal* (1995) 34 A.L.R. (3rd) 269 (C of A).

[36] The application heard by Veit, J. was not a final decision over the parties and the subject matter. It was a discrete application brought in order to remove a Caveat. It was not a determination of the same issue or cause of action advanced in the present litigation. Two of the prerequisites for the doctrine to apply are missing in this case. This argument has to fail.

[37] In addition, Mr. Singh claims that he did not know how much he had to pay because he was not aware of the exact cost of the extras placed in the home and what necessary adjustments would have to take place between the lawyers. He submits that it was incumbent upon Mr. Bhalla to tell him what amount had to be paid. He takes the position that only after having been provided with that information would he have to insure that he had funds to complete the deal.

[38] It is abundantly clear from the evidence that was led at this trial that Mr. Singh had not secured financing to close the deal until May 18, 2006. This was a full two days after Mr. Deol told him that he would not sell him the house as he was tired of waiting to get paid the price agreed upon. Mr. Deol had been waiting for more than two weeks by this time.

[39] Is Mr. Singh's position tenable? Was there an obligation placed upon Mr. Deol's solicitor to provide the documentation to Mr. Singh before he was required to provide the funds to close the deal? The short answer is no. This very point was central to the decision in *Centurian Ridge Farms Ltd. v. McCallum Estate* (1978) 14 A.R. 391 (Alta. Supreme Court Trial Division). In that decision at para. 32 Miller, J., as he then was, stated at paras. 32 and 33:

The second question that must be examined is the problem of who has the obligation, as between the vendor and purchaser to initiate the steps required for a normal closing? There is no doubt in my mind that it is common practice in this Province for the vendor to instruct his solicitor to prepare the documents required to close the transaction and for the vendor to execute the same before all of the funds required to close are delivered to the vendor or his solicitor. The vendor's solicitor then typically sends the executed conveyances to the purchaser's solicitor under trust conditions imposed upon the latter who can accept or reject the documents and the conditions imposed. If he accepts the conditions he can be held personally responsible for any damages which the vendor might suffer as a result of proffering the conveyances before receiving his funds.

While this may be accepted and common practice the root question is whether it is a legal requirement in this province for a vendor to deliver his documents before the purchaser tenders the balance of

the funds required to close. I am certain that the parties can agree to resolve this chicken and egg type of dilemma by mutual agreement but in the absence of such agreement what is the situation?

[40] Miller, J. resolved the dilemma at para. 34 where in part he stated:

... there is no legal obligation upon a vendor to produce executed documents of transfer to the purchaser before the purchase monies are tendered unless there is agreement to the contrary. To take that proposition a step further I hold that there is no legal obligation upon a vendor to provide documents of transfer in order to assist the purchaser in obtaining financing to enable him to meet the closing deadline unless there is agreement to the contrary. In most transactions the vendor, being anxious and willing to sell, will usually be prepared to assist the purchaser by delivering documents as long as the vendor is protected through trust conditions, but I can find nothing in the Alberta Statutes or any decided cases which imposes a legal obligation upon a vendor to deliver in advance of a tender of the funds required to close.

[41] At para. 37 the purchaser's obligation is clearly stated:

In summary it is my view that the law of the Province of Alberta relating to this point is the same as that expressed by the Courts in Manitoba and Saskatchewan, namely, that the onus is upon the purchaser to make a tender of the funds required to close on or before a stipulated closing date in order to establish that he is ready, willing and able to complete the transaction and this, in the absence of agreement to the contrary, must be done if the purchaser does not wish to lose his rights under the contracts irrespective of whether the vendor proffers in trust the conveyances which will ultimately be required to conclude the sale.

[42] The application of this principle to the facts in this case clearly indicated that Mr. Singh failed to live up to his fundamental obligation of providing the necessary funds to close the deal in a timely fashion on April 30, 2006. Mr. Deol never waived the "time is of the essence" aspect of the purchase agreement. Quite simply, Mr. Singh never offered the funds to Mr. Deol to complete the transaction in spite of the specific inquiries made by Mr. Bhalla. It is obvious from the evidence led that Mr. Singh was never in a position to provide the funds until later in the month of May.

[43] Mr. Deol was ready, willing and able to turn possession of the residence over to Mr. Singh as early as April 28, 2006. The failure to turn over possession was a direct consequence of

Mr. Singh not being able to provide the purchase price as required. This is why the transfer did not take place.

[44] Does Mr. Singh's failure render the purchase agreement null and void thereby causing Mr. Singh to lose his rights under the contract, or can his position be maintained that there was a valid agreement in place in the middle of the month of May when he was ready, willing and able to complete the contract because of Mr. Singh's failure to comply with Clause 14 of the agreement? The purchase agreement that was signed by the two individuals was a standard purchase agreement used by Mr. Deol in the past. It was a preprinted form that allowed the parties to fill in the blanks. It was provided to Mr. Singh by Mr. Deol.

[45] How is the notice provision found in Clause 14 to be interpreted? It is a provision that is intended to give protection to the vendor. It deals with a default on the part of the purchaser. If the purchaser defaults in his obligations under the contract, the vendor is able to obtain liquidated damages. The liquidated damages come from any monies placed on deposit by the purchaser. This protection was not claimed by Mr. Deol.

[46] In fact, on August 2, 2006, he returned \$9,000.00 through his solicitor to Mr. Singh. That cheque was sent to Mr. Singh's new counsel. The \$9,000.00 was comprised of the \$5,000.00 that was deposited by Mr. Singh in the first instance and a \$4,000.00 deposit for the upgraded counter top chosen by Mr. Singh for the residence. Although the money was returned, it was not accepted by Mr. Singh as a repudiation of the contract. It was placed in trust by Mr. Singh's counsel and Mr. Deol was informed that Mr. Singh took the position that there was still an enforceable contract between the parties. It is clear that Mr. Deol did not intend to claim the protection given to him by Clause 14. He merely wanted to declare that the agreement was no longer in effect because of Mr. Singh's inability to close the deal on April 30, 2006.

[47] Mr. Deol was unable to comply with the notice provision as he could not effect personal service upon Mr. Singh nor did he send a registered letter to the address provided by Mr. Singh at the time the purchase agreement was signed.

[48] It would be ludicrous to find that Mr. Singh had the right to enforce this contract when he defaulted in his obligation to provide the purchase price for the home and then made it difficult for Mr. Deol to serve him personally by vacating his previous residence without providing a forwarding address. I find on these facts that Mr. Singh's inability or unwillingness to provide the balance of the purchase price on April 30, 2006 had the effect of making the agreement null and void and Mr. Singh lost any rights he had under the contract.

[49] He lost any interest he had in this land and the Caveat that he placed on the property must be discharged. Mr. Deol is entitled to damages in relation to this failed transaction, but they cannot be ascertained with certainty at this time because he has a right to indemnification from Mr. Singh for the lawsuit brought by the individuals who agreed to purchase the residence after Mr. Singh was not able to complete the transaction. A Hearing will have to be held in order to determine what indemnification he is entitled to. A full Hearing in relation to the total damages can be held then.

[50] If I am wrong in my determination that the purchase agreement did collapse on April 30, 2006 and Mr. Singh lost his rights under the agreement, what remedy is Mr. Singh entitled to? He asks for specific performance in relation to the purchase agreement. He is not entitled to this remedy. There is nothing unique in the property at 6027-166 Avenue that would justify granting specific performance in relation to this purchase agreement. The evidence led at this trial clearly reveals that this particular construction project was similar to many others being carried out by Mr. Deol in that very neighbourhood. This was a common plan that he employed in his business. He built many similar homes in that very neighbourhood using this basic plan. There was nothing unique about the plan or the location of the construction site. In *Semelhago v. Paramadevan* [1996] 2 S.C.R. 415, the Supreme Court of Canada held that specific performance will not be granted simply because the subject matter is real estate. There must be an evidentiary basis for determining that the property has unique qualities. Failing a finding of uniqueness, damages are an adequate remedy, if they are capable of calculation. In this case they are.

[51] The damages in this case can be ascertained by examining the evidence of Mr. Chekaluk, an expert qualified to give opinion evidence in relation to the value of real estate, who was called by Mr. Singh. He valued the property located at 6027-166 Avenue on April 30, 2006 at \$351,000.00. Mr. Singh was deprived of obtaining that property valued at that amount. He would have had to pay \$328,000.00 to obtain it. This figure is arrived at by adding the agreed upon purchase price of \$309,500.00 to the upgrades that he placed in the home. The difference in these two amounts is \$23,000.00.

[52] As he could not obtain 6027-166 Avenue, he was forced to purchase another residence. He did so in the month of June of 2006. He paid \$427,000.00 for this home. It was a superior home to 6027-166 Avenue but he paid more than its value. He was forced to do so because of the volatile real estate market in Edmonton in the summer of 2006. Mr. Chekaluk values this home on April 30, 2006 at \$400,000.00. Mr. Singh was forced to pay \$27,000.00 more than the market value. This figure added to the \$23,000.00 difference in the value of 6027-166 Avenue brings the ascertainable damages in relation to the failed transaction to \$50,000.00.

[53] In order to accommodate the Singhs, Mr. Deol allowed them to move furniture into the garage of the residence before the anticipated possession date of April 28, 2006. When the deal collapsed, Mr. Deol requested that the Singhs remove their furniture from the garage. He did so in two ways. He had Mr. Bhalla send a letter to Mr. Junega indicating that the furniture should be removed. Secondly, he contacted Mr. Singh directly by telephone and made the same request. Mr. Singh was told that if the furniture was not removed that it would be placed outside the garage and exposed to the elements.

[54] Mr. Singh and his family declined to remove the furniture from the garage. Mr. Deol was true to his word and had the furniture removed from the garage and placed outside. It was exposed to the elements. This damaged the furniture. Some of it was also damaged during the course of its removal from the garage.

[55] Mr. Singh claims damages for the destruction of his furniture.

[56] In order to establish the damage suffered, he had a family member take photographs of the furniture that was placed outside when they picked it up. He then had an accredited personal property appraiser, Mr. Chymyshyn examine these photographs and assess the damage.

[57] Mr. Chymyshyn was able to perform this task by looking at the photographs and determining the replacement cost for the furniture as depicted in the photographs. He was able to carry out this exercise by checking with suppliers to see what the cost would be to replace this furniture. He fixed a replacement cost to each of the items. He added the appropriate GST. He then factored in a delivery cost. His total replacement cost was \$19,355.42. That amount cannot be accepted.

[58] It cannot be accepted for a variety of reasons. A fairer approach would have been to assess the fair market value of the furniture as revealed by the photographs. Mr. Chymyshyn did not take this approach. A fair market value approach would have reduced the total considerably. A second problem with Mr. Chymyshyn's approach was that he had to rely upon information provided to him by the Singhs. Not all of this information could be considered reliable.

[59] There is nothing wrong with the methodology employed by Mr. Chymyshyn. He did the best he could in the circumstances. His opinion is only as good as the veracity of the underlying facts he relied upon.

[60] Thirdly, the Singhs continue to use much of this furniture. It has not been replaced.

[61] A fairer assessment of the damage caused by the removal and abandonment of the furniture would be \$5,000.00. That is the amount of damage that I set if I am in error in finding that Mr. Singh lost the protection of Clause 14 in the purchase agreement. His total damages would be \$55,000.00.

[62] Mr. Singh claims punitive and exemplary damages for the high-handed manner in which Mr. Deol chose to deal with the furniture that had been placed in the garage. On the evidence I heard, it is not possible to make a finding that would attract such a remedy. Mr. Singh was adequately warned that this course of action would be followed unless he took steps to remove the furniture. He was notified by letter to his solicitor and by a telephone call from Mr. Deol. He conceded that he was well aware of Mr. Singh's position. He made a conscious choice to leave the furniture there knowing full well what might happen. No punitive damages could be awarded on the basis of Mr. Singh's calculated choice to leave the furniture there.

[63] Mr. Singh gave some evidence in relation to the emotional stress that this matter had upon his wife. Her evidence was silent on this point. There is no reliable evidence presented on this point to even consider an award of this sort.

[64] On my findings of fact and interpretation of the contract, I find that the Plaintiff has failed to make out his claim and this lawsuit should be dismissed in its entirety.

Heard on the 27th, 28th and 29th days of April, 2009.

Dated at the City of Edmonton, Alberta this 14th day of May, 2009.

Sterling Sanderman
J.C.Q.B.A.

Appearances:

Mr. Brian Doherty
for the Plaintiff

Mr. Murray L. Engelking
for the Defendant