Court of King's Bench of Alberta

Citation: Gillson Homes Ltd v Chopra, 2024 ABKB 82

Date: 20240215
Docket: 2203 09059
Registry: Edmonton

2024 ABKB 82 (CanLII)

Between:

Gillson Homes Ltd

Plaintiff

- and -

Deepti R. Chopra

Defendant

Memorandum of Decision
of
Applications Judge B.W. Summers

Introduction

[1] In this case the Plaintiff home builder agreed to sell a residential lot ("Lot") to the Defendant purchaser and build a house on the Lot. Differences arose between them (regarding the price) and the sale did not go ahead.

[2] In the Special Chambers application before me I am required to consider whether the agreement between the parties is void for uncertainty and if it is not void, is the remedy of specific performance available to the purchaser.

Facts

[3] The parties signed a Residential Purchase Contract ("RPC") on or about October 20, 2021. The purchase price was $635,000.00. The Completion Date was July 15, 2022. The Defendant was required to pay two deposits totalling $25,000.00. A two page "Spec Sheet" was attached to the RPC setting out a number of the specifications for the house to be built.

[4] Three provisions in the RPC of particular significance are the following:

(a) Under the heading "Seller's Conditions": "Price is based upon today's material prices and could change if materials cost go up more than 5%" ("Price Change Clause");

(b) Under the heading "Remedies": "The seller and buyer agree that the Property is unique. On seller default, the buyer may make a claim for specific performance and other remedies" ("Unique Property Clause"); and

(c) Under the heading "Confirmation of Contract Terms": "...(a) this contract is the entire agreement between them; and (b) unless expressly made part of this contract, in writing: (i) verbal or written collateral or side agreements or representations or warranties made by either the seller or the buyer, or the seller's or buyer's brokerage or agent, have not and will not be relied on and are not part of this contract; and (ii) any pre-contractual representations or warranties, however made, that induce either the seller or buyer into making this contract are of no legal force or effect ("Entire Agreement Clause").

[5] The Defendant paid the deposits and arranged mortgage financing.

[6] With the assistance of the Plaintiff's architect Protech Home Design, plans for the house were worked on by the Defendant for several months, with contributions from the Plaintiff. Finalized plans were submitted by the Plaintiff to the City of Edmonton in support of applications for development and building permits.

[7] The draft plans the Defendant sent to the Plaintiff increased the size of the house by approximately 34 square feet (above the 2500 square feet called for in the Spec Sheet). The Defendant says that Mr. Gill (principal of the Plaintiff) told the Defendant (and her husband) that the increase in price for this increase in size would be approximately $5,000.00. Mr. Gill does not recall this.

[8] Mr. Gill stated that he had two or three discussions with the Defendant and her husband between November 2021 and February 2022 regarding the fact that the price of lumber was increasing. On March 9, 2022 Mr. Gill sent an email to the Defendant which stated:

> I just wanted to update you on our progress. Currently your house is with the City of Edmonton permits. We are hoping to start construction in April 2022. As you are aware that since we signed the contract the price of lumber has doubled and tripled. We anticipate the price of lumber to come down in the next few months. But I wanted to let you know that if that does not happen then we will have to increase the price by around 10% to 15%. I thought I should let you know.

[9] The City issued a development permit on March 18, 2022.

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[10] Apparently, some discussions occurred where Mr. Gill advised that the price to build the house would increase by $95,000.00.

[11] The testimony of the parties as to ensuing discussions varies considerably at this point. The Plaintiff says that the Defendant refused to discuss the issue of the price increase. The Defendant says that she and her lawyer repeatedly asked the Plaintiff for documentation substantiating the material price increases and it was never provided. Mr. Gill says that he told the Defendant that he would show her once materials were acquired, but in the meantime, she should check prices at Home Depot.

[12] The Defendant filed a caveat with Land Titles Office on April 4, 2022.

[13] Counsel for the Plaintiff returned the Defendant's $25,000.00 deposit to counsel for the Defendant on May 3, 2022. Counsel for the Defendant returned the cheque to counsel for the Plaintiff on May 10, 2022, stating that there was a binding agreement between the parties.

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The Action

[14] The Plaintiff commenced this action seeking a declaration that there is no binding contract between the parties and an order discharging the Defendant's caveat.

[15] The Defendant filed a Statement of Defense and a Counterclaim. The Counterclaim asks for specific performance of the RPC, alternatively, an order that the Plaintiff transfer the Lot to the Defendant at the price the Plaintiff paid (less the Defendant's deposit), alternatively damages for breach of contract and special and punitive damages.

The Applications

[16] In July of 2022, the Plaintiff filed an application to discharge the Defendant's caveat from title to the Lot. In October of 2022, the Plaintiff filed a further application for summary judgment. Counsel for the Plaintiff explained that the second application was brought as the Defendant had filed a Certificate of Lis Pendens ("CLP") against title to the Lot.

Issues

[17] The issues with respect to these applications are:

(a) Should the Court grant summary judgment to the Plaintiff on the basis that the RPC is void for uncertainty?

(b) If summary judgment is not granted in favour of the Plaintiff, should the Defendant's caveat and CLP be discharged from title to the Lot because specific performance is not available as a remedy to the Defendant?

Discussion

Should the Court grant summary judgment to the Plaintiff on the basis that the RPC is void for uncertainty?

[18] Counsel for the Plaintiff submitted in oral argument that summary judgment ought to be granted to the Plaintiff as the parties never had a contract. There was no house on the Lot. The

house was not going to be a stock home, but rather a custom built home with custom specifications. There never was an agreed price because the parties knew that plans for the house would have to be prepared and materials priced. Counsel for the Plaintiff argues that the RPC is nothing more than an agreement to agree.

[19] Conversely, counsel for the Defendant submitted that there was a binding contract between the parties and the conduct of the parties following the signing of the RPC reflected that fact. Mr. Gill said in writing that the parties had a contract. With the building plan being finalized and submitted to the City of Edmonton, there was no uncertainty on the house to be built. With respect to the issue as to whether there was certainty as to price, the Defendant says that the following are triable issues:

(a) Whether the Price Change Clause was triggered at all as the Plaintiff did not give any information or justification to the Defendant for any increase in the price of materials;

(b) Alternatively, the Price Change Clause is ambiguous and extrinsic evidence is required to interpret it; and

(c) Whether the Plaintiff breached the good faith provisions of the RPC in the way that Mr. Gill dealt with the Defendant on the price increase issue.

[20] The leading case in this province on the issue of certainty of contract, which was cited by both parties, is ***Ko v Hillview Homes Ltd,*** 2012 ABCA 245 ***("Ko").*** In that case the Court of Appeal had to determine whether a contract to build a house and then convey it and the lot was too uncertain to be valid or enforceable. The contract between the parties called on the builder to build a house in the "Los Cabos II" plan of the builder, which was 2834 square feet and an extra 1666 square feet (an increase of 59%). The Court of Appeal found that the contract was uncertain as the signed agreement did not give any clue as to the nature or location of the extra 59% and the agreement had an "entire agreement" clause.

[21] The decision of Mr. Justice Côté in ***Ko*** provides a very thorough and scholarly discussion on the law of certainty in contracts, including: how certainty of terms is not just a technicality, but is a central principle to the formation of a contract which is inextricably connected to other important principles including offer and acceptance; the basic principles of certainty, which go beyond "parties, property and price"; that some case law identifies ways in which uncertainty of terms can be saved; and a review of binding Canadian and Alberta case authority.

[22] ***Ko*** is distinguishable from the case before me as it deals with certainty of property, rather than price. However, a number of cases regarding certainty of price were referenced in ***Ko*** that are worthy of mention.

[23] In ***Watson v Jamieson,*** 1910 CanLII 339 (AB CA) the Court found that an owner's offer to sell a lot on the phrase "...I will take $1000 for it, half cash and the balance in six months, with interest at five percent, or I will give you ten percent discount for cash" was uncertain since it was not clear as to whether the ten percent discount applied to the entire purchase price (which was the purchaser's position) or whether it only applied to the "balance" (which was the owner's position).

[24] In ***Kelly v Watson,*** 1921 CanLII 23 (SCC) 61 SCR 482 the parties were in agreement on the purchase price of $4,800.00 and the initial payment of $300, but were in disagreement on the amount due from crop proceeds and the periodic payments of the balance. The Supreme Court of

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Canada overturned the Appellate Division of the Alberta Supreme Court and reinstated the decision of the trial judge, that the contract was void for uncertainty as to the terms of payment.

[25] In ***Murphy v McSorley,*** [1929] SCR 542 the Court found that an option to purchase leased property at "a price of $45,000.00 with a cash payment of $15,000.00 and balance to be arranged" was void for uncertainty.

[26] Specific reference to the issue of certainty in price was made by Justice Côté in ***Ko*** as follows:

> [95] Though complete silence in a contract about price may sometimes let the court set a reasonable price, no one ever suggests that the court set the parties or the property. For example, a supposed sale contract is void if it sets neither a minimum nor a maximum quantity: *dicta* in ***Spur Oil v Canada*** 1981 CanLII 4674 (FCA), [1982] 2 FC 113, 42 NR 131 (FCA), leave den (1981) 39 NR 354 (SCC). And little authority suggests that the court set the other terms.
>
> [96] Indeed an oft-stated principle is that the court cannot make a bargain for the parties: ***Kelly v Watson*** (1921) 1921 CanLII 23 (SCC), 61 SCR 482, 57 DLR 363; ***Lord Wright in Hillas v Arcos***, *supra*, 494, 503I and 507H (HL(E)); Lord Wright in ***G Scammell & Nephew v HC & JG Ouston***, *supra* at pp 272, 273 (AC).
>
> [97] The court may be able to fix a reasonable price when the parties are silent, because the *Currency Act*, RSC 1985, c C-52, s 13 presumes that payment is to be made in Canadian legal tender. And evidence can be led on the market price of almost anything. Price is thus a simple two-dimensional continuum, whose "location" (Bank of Canada notes) is exactly fixed.

[27] Justice Côté provided further *dicta* that there is case law as to when uncertainty of terms may be saved, as follows (at paragraph 120):

> 1. A specific means of ascertaining them may be given, e.g. by reference to a published or to-be-published price or set of standards.
> 2. Some person, such as an arbitrator or valuator, may be authorized to fix them. Or even one of the parties acting unilaterally.
> 3. Some well-established custom of the trade is impliedly incorporated into the contract, e.g. when and where sales will close, or debts will be paid.
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> 4.(a) They may be so obvious (using as a test the "Oh, of course" reply to the officious bystander) that they must be implied in the contract.
>
> (b) Or some terms may be implied by law, e.g. use of Canadian currency, or simultaneous tenders of conveyance and price.

[28] The case before me is not one where the parties' agreement is silent on price. It is not a case where the Court can simply set a reasonable price. This would be tantamount to making the contract for the parties and the Court will not do that.

[29] In this case, if the contract simply provided that the price was $635,000.00, there is no doubt that the price would be found to be certain. But the addition of the Price Change Clause does add uncertainty.

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[30] How the parties intended that the Price Change Clause would work is unclear to me. Was it up to the seller to provide a formal notice? Or was there some external factor that automatically triggered the Price Change Clause? Did the seller have to substantiate the proposed increase? What is the relationship between the quantum of the increase in the price of materials and the increase in the contract price? Which building materials are the ones to be considered? Was it just lumber? Did the requirement in the contract that the parties act with good faith require the seller to act in a certain fashion and provide certain information? Did the parties intend to negotiate further? These are all questions that I am left with in this case.

[31] On the face of the RPC, the purchase price is uncertain. But do any of the "saving" exceptions identified by Justice Côté in ***Ko*** apply in this case?

[32] Although the reference in the Price Change Clause to an increase in the price of materials implies reference to a set of standards, there is no evidence that there is a published or to-be published set of standards. If the provincial or federal governments do publish something on construction costs that could be referenced, there is no evidence before me on that.

[33] There is no evidence that the parties intended some third party would fix the price.

[34] It is conceivable that the parties intended Mr. Gill to act unilaterally to fix the price, but that mechanism for price certainty does not help the Defendant. In any event, she rejects any such suggestion.

[35] Counsel for the Defendant suggests that certainty of price can be determined from extrinsic evidence which is admissible because of the ambiguity in the Price Change Clause (notwithstanding the Entire Agreement Clause). She references paragraph 56 of the decision in ***Chemtrade Electrochem Inc v Superior Plus Corporation*****,** 2022 ABKB 858 ***("Chemtrade")***. That paragraph and the preceding paragraph state:

> [55] As agreed by the parties, the Supreme Court of Canada's decision in ***Creston Moly Corp v Sattva Capital Corp***, 2014 SCC 53 remains the leading authority on contractual interpretation. The guidelines for interpreting contracts were outlined in ***Sattva*** and numerous other cases, including: ***ATCO Electric Ltd v Alberta (Energy & Utilities Board)***, 2004 ABCA 215; ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing,*** 2017 ABCA 157; ***Alberta Union of Provincial Employees v Alberta Health services,*** 2020 ABCA 4; ***Orbus Pharma Inc v Kung Man Lee Properties Inc,*** 2008 ABQB 754, citing ***Consolidated-Bathurst Export Ltd v Mutual Boiler & Machinery Insurance Co,*** 1979 CanLII 10 (SCC), [1980] 1 SCR 888; and ***Eli Lilly & Co v Novopharm Ltd***, 1998 CanLII 791 (SCC), [1998] 2 SCR 129 at para. 54.
>
> [56] The following is a point form summary of the guiding principles of contractual interpretation derived from the above case law:
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> - When interpreting a contract, courts must have regard to the surrounding circumstances of the contract, often referred to as the factual matrix.
> - The court must take a practical, common-sense approach to the interpretation of the contract, not dominated by technical rules

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of construction. In undertaking this interpretation, the entire contract is to be considered, not just its individual terms.

- Commercial contracts should be interpreted in line with sound commercial principles and good business sense. The interpretation must not be divorced from the economic reality in place at the time or the parties' duty to act honestly and in good faith. The result of the court's interpretation should not be an absurdity.
- The contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.
- The surrounding circumstances must never be allowed to overwhelm the words of the agreement such that a new agreement is created.
- Surrounding circumstances will vary from case to case but should consist only of objective evidence of the background facts at the time of the execution of the contract, that is, facts that were or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Whether something was or reasonably ought to have been within the knowledge of the parties at the time of execution of the contract is a question of fact.
- Subjective intention evidence is inadmissible because it is irrelevant.
- The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing. To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties. The primary purpose of the parol evidence rule is to achieve finality and certainty in contractual obligations, and secondarily to hamper a party’s ability to use fabricated or unreliable evidence to attack a written contract.
- The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

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- Examining the context means considering the surrounding circumstances, such as the genesis, aim, purpose, and nature of the relationship created, and the nature or custom of the market or industry in which it was executed. It can include a consideration of the legal terms of art that have a common meaning to the participants in a given industry, although these terms can be modified in the agreement.
- The court can look at circumstances that would have affected the way in which a reasonable person at that time would have understood the language of the document.
- An antecedent agreement such as a memorandum of understanding agreed to in writing by the parties is objective evidence of background facts.
- While evidence of negotiations itself is not admissible as part of the factual matrix nor generally are prior drafts of the agreement, they are relevant insofar as they show the factual matrix, for example by helping explain the genesis and aim of the contract. Written evidence of negotiations is much more objective evidence of the parties' intentions than after the fact evidence about oral statements made. However, a consideration of the context does not include an inquiry into the subjective state of mind of the parties.
- This examination of the context cannot, of course, be used to create a new agreement.
- Difficulty interpreting a contract is not in and of itself an ambiguity. An ambiguity occurs when the words in the contract are reasonably susceptible of more than one meaning.
- Even if the contract is ambiguous, evidence as to the subjective intentions of the parties is generally inadmissible. However, an ambiguity in a contract allows the court to consider evidence of the parties' post-contract conduct.

[36] Both parties have put forward a considerable amount of post-contract evidence regarding what was said and done by each party. I am prepared to consider that evidence since I cannot determine whether the Price Change Clause was triggered and if so, the intent and meaning of the Price Change Clause without extrinsic evidence. However, my consideration of that evidence is subject to the guiding principles enunciated in ***Chemtrade***.

[37] The Defendant says that there is a triable issue as to whether the Price Change Clause was triggered since the Plaintiff failed to provide any documentation or justification for the triggering.

[38] Mr. Gill stated in his affidavit that: “The price of materials ... went up much more than 5% from October 20, 2021 by the time a plan was approved by ... (the Defendant).” But the Plaintiff did not provide the documentation or justification that the Defendant requested.

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[39] The post-contract discussions between the parties is extrinsic evidence as to what they thought was required to trigger the Price Change Clause. It is clear from this evidence that the parties had completely different ideas as what was required to trigger the Price Change Clause. I think that there is a triable issue as to what was required to trigger the Price Change Clause. Connected to this issue is whether the Plaintiff had a good faith obligation regarding pursuit of a price increase. In my view, this too is a triable issue.

[40] In the event that the Price Change Clause was triggered, I am also of the view that there is a triable issue as to the interpretation of the Price Change Clause and how it was intended to work.

[41] Just because I find that there are triable issues regarding the Price Change Clause does not mean that the RPC is not void for uncertainty. A trial court may still find that to be the case.

[42] In conclusion on this point, I say that I am unable to conclude on the record before me that the Plaintiff is entitled to summary judgment on the basis that the contract between the parties is void for uncertainty with respect to price. A trial is necessary to determine this question.

If summary judgment is not granted in favour of the Plaintiff, should the Defendant's caveat and CLP be discharged from title to the Lot because specific performance is not available as a remedy to the Defendant?

[43] As summary judgment in favour of the Plaintiff has not been granted, I must consider whether the Defendant's caveat and CLP should be discharged because specific performance is not available as a remedy to the Defendant.

[44] Both parties cited the decision of Master Schlosser (as he then was) in ***Lamont (Town) v Jabneel Development Inc,*** **2014 ABQB 328** as correctly setting out the general principles to be considered. From that decision, the Court stated:

> [4] Section 141 of the *Land Titles Act,* RSA 2000, c. L-4 is as follow:
>
> Application to discharge caveat
>
> 141(1) In the case of a caveat filed, except a caveat filed by the Registrar as hereinafter provided, the applicant or owner may at any time apply to the court, subject to the *Alberta Rules of Court*, calling on the caveator to show cause why the caveat should not be discharged, and on the hearing of the application the court may make any order in the premises and as to costs that the court considers just.
>
> [5] In order to 'show cause' why the caveat should not be discharged, the caveator must show a '*prima facie'* claim to an interest in land. ***Main v Jeerh***, 2006 ABCA 138 at paras. 17, 18 (and the cases cited there). The facts are presumed to be true unless they are displaced by other evidence. In order for there to be a caveatable interest in land, the interest must be capable of being specifically performed. Damages cannot be an adequate remedy. The converse also holds true. If damages are an adequate remedy the caveat is lost.
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> [6] Specific performance will not be granted simply because the contract deals with land. It must be shown that the land is unique. ***Semelhago v Paramadevan,***

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1996 CanLII 209 (SCC), [1996] 2 SCR 415 (SCC) and ***365733 Alberta Ltd v Tiberio,*** 2008 ABCA 341.

[7] In ***1244034 Alberta Ltd v. Walton International Group Inc,*** 2007 ABCA 372 (Slatter, J.A., dissenting). Berger, J.A., writing for the majority, said,:

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. The determination of the chambers judge was thus correct in law and is supported by sound policy considerations. 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 the land required to be protected, there is no basis to tie up development of the land pending resolution of the litigation. See ***410675 Alberta Ltd. v. Trail South Developments Inc.,*** supra at para. 54-57; ***Acquest / Alberta Mining Inc. v. Barry Developments Inc.,*** 1999 ABQB 51 (Alta. Q.B.) at para.74; ***Marlo Equities Ltd. v. Cline***, 1998 ABQB 582 (Alta. Master) at paras. 24-25; ***Corse v. Ravenwood Homes Ltd.***, 1998 ABQB 380 (Alta. Master) at para 30 and ***McMurray Imperial Enterprises Ltd. v. Brimstone Acquisitions & Asset Management Inc.,*** A.J. No. 985 (Alta. Master) at para. 33-40.

[8] In order to succeed in obtaining specific performance for a contract for sale of land, the caveator must also show that it is ready, willing and able to perform. ***Roma Construction Ltd v Excel Venture Management Inc,*** 2007 ABQB 396 per Macleod J. and ***Poirier v Diamond Key Homes Ltd***, 2009 ABQB 139 at para. 21 (per Laycock, M). This is a live issue in the lawsuit. Development work was advanced under the first agreement, but very little concrete progress had been made on the other two. A central issue in the lawsuit is whether Jabneel could complete, and if it could not, whether this was the fault of the Defendants in the underlying action.

[9] The Respondent to an application to discharge a caveat must 'show cause' why the caveat should not be discharged (section 141 *LTA* above). This appears to put the onus on the Respondent.

[10] In a summary application such as this, the onus is on the Applicant throughout. If the Applicant satisfies its evidentiary burden, the onus then shifts to the Respondent. The Respondent is not obliged to call evidence but they are required to put their best foot forward.

[45] The test of "uniqueness" is primarily subjective, from the point of view of the purchaser, especially so for residential purchases where profit is not the main motive: ***Neher v Marathon Homes Ltd,*** 2011 ABQB 92.

[46] The Defendant says that the Lot is unique. She says that the parties' stated agreement that the Lot is unique and that specific performance would be available under the Unique Property Clause is substantial evidence of that fact. She also states that the Lot, being an east facing inverted pie shaped corner lot met her spiritual and cultural needs (which include numerology, Vaastu and Feng Shui). The Defendant consulted with her spiritual adviser with respect to this purchase.

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[47] The Plaintiff states that the Lot, having no house, is just “dirt”; that the Lot is just one of many available lots in the Keswick subdivision. However, the Defendant responds that the Plaintiff’s evidence on available lots has been shown to be incorrect and in any event there are no corner lots in Keswick with the features that the Defendant is looking for.

[48] Given the Unique Property Clause in the contract, given the highly subjective test for this residential purchase, given the Defendant’s evidence on the unique aspects of the Lot that met her own particular spiritual and cultural needs, and given the Plaintiff did not provide evidence of availability of a similar lot, I conclude that the Lot is sufficiently unique that an award of damages would not be an adequate remedy for the Defendant’s counterclaim against the Plaintiff.

[49] However, this does not necessarily mean that an order for specific performance is available to the Defendant in this case. In this case an order for specific performance of the RPC would entail ordering that the Plaintiff construct the Defendant’s house. Courts are very reluctant to order specific performance with respect to a construction contract as it may require constant supervision: ***Chan v Chadha Construction,*** 2000 BCCA 198. In that case the Court noted:

> [11] In ***Tanenbaum v. W.J. Bell Paper Co. Ltd.*** (1956), 1960 CanLII 119 (ON SC), 4 D.L.R. (2d) 177 (Ont. H.C.J.) Gale J. said, at p.197:
>
> > Generally the Court will not order a contract to build or to repair to be specifically performed.
>
> And, at p.204, he continued:
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> > The basis of equity's disinclination to enforce building contracts specifically is the difficulty of enforcing a decree without an expenditure of effort disproportionate to the value of the result.

[50] I think that an order for specific performance of the RPC is not a remedy available to the Defendant in this case. There is no trust between the parties. There are allegations of bad faith. For the Court to order that the Plaintiff build the Defendant’s house would be a very bad idea. I would anticipate it extremely likely that the parties would be back before this Court on many occasions, seeking direction on building and cost issues as they arose.

[51] The Defendant argues that the Court could grant partial specific performance by granting an order that the Plaintiff sell the Lot to the Defendant at the price the Plaintiff paid for it (the evidence indicates that the Plaintiff acquired title to the Lot at a price of $200,000.00 or $205,000.00).

[52] But I do not think that such an order for partial specific performance is a remedy available to the Defendant. The contract between the parties was for the construction of a house on the Lot and a transfer of the Lot. As the Court of Appeal found in ***Ko***, the parties did not intend that these two things be separable. Furthermore, this would be tantamount to the Court making a contract for the parties.

[53] As I find that the remedy of specific performance is not available to the Defendant in this case, and the only remedy available to her is for damages, the Defendant’s caveat filed against the title to the Lot must be discharged. Discharge of the CLP from title to the Lot should also follow: ***Main v Jeerh,*** 2006 ABCA 138.

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Conclusion

[54] The Plaintiff's application for summary judgment is dismissed. The Plaintiff's application to discharge the Defendant's caveat and CLP from title to the Lot is granted.

[55] If the parties cannot agree on costs, an application may be made before me in morning chambers.

Heard on the 12th day of January, 2024.
Dated at the City of Edmonton, Alberta this 15th day of February, 2024.

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B.W. Summers
A.J.C.K.B.A.

Appearances:

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