

Seong Yun Ko (respondent/plaintiff) v. Hillview Homes Ltd. (appellant/defendant)
(0803-0212-AC; 2012 ABCA 245)

Indexed As: Ko v. Hillview Homes Ltd.

Alberta Court of Appeal
Côté, Rowbotham and McDonald, JJ.A.
August 22, 2012.

Summary:

The plaintiff was a licensed realtor, and the defendant was a registered home builder. Their written agreement incorporated five documents, including: (a) a two-page printed signed form of contract to sell a house to be built, plus the lot in question, for about \$1.2 million (included an "entire agreement" clause); and (b) a one-page "Addendum A", listing some 16 extra items with prices. This lawsuit was about one of the 16 extra items, priced at \$133,280. It read in full: "add 1666 x \$80 " (1666 more square feet, at \$80 per square foot). The house to be built was the builder's existing standard plan "Los Cabos II"; a house 1666 square feet bigger was about 59% bigger. The agreement did not address where the extra square footage was to be put on the Los Cabos design. No part of the agreement was ever performed. The plaintiff sued.

The Alberta Court of Queen's Bench, in a decision not reported in this series of reports, gave the following relief: a declaration that the contract was valid and enforceable; a declaration that the defendant had unilaterally breached the contract; specific performance of only the part of the contract for sale of the lot, on payment of an unspecified price; damages (to be assessed at a second trial) "for the increased cost of construction" of the home; a declaration of a caveatable interest in the land; and damages. The defendant appealed.

The Alberta Court of Appeal allowed the appeal. The trial judge's reasons contained error on the broad outlines of the basic principle of uncertainty. The supposed contract was invalid. There was no contract. No part of the alleged contract was left standing, given the developer's position about not getting a lot without an approved house; a house was a vital topic for the defendant and not separable. No remedy for breach was possible. In view of the court's conclusions, the caveat was to be discharged at once. The defendant was entitled to costs of the trial and of the appeal.

Building Contracts - Topic 527

Contract - Formation - Design-built contracts - This case was about a \$1.2 million written agreement to build a house and to convey it and the lot in question - The pivotal issue was whether the contract was too uncertain to be valid or enforceable - The trial judge's reasons found that "clearly one cannot tell from Addendum A where the additional square footage [1666] was to be put on the Los Cabos design" - The reasons also stated that the contract "allowed for additions, removals, corrections and variations to the designs" - The Alberta Court of Appeal held that this was not a contract to supply a design - The contract's wording made it plain that it was a construction (and sale) contract - The contract forbade changes to the design except by written further agreement - Further, a design-build contract

for an expensive large detached dwelling house would require extensive description of design criteria - More seriously, no construction involved more individual taste and subjective features than an expensive residence - The trial judge's conclusion that "there was a design element to the contract" was wrong in fact and law - In the end result, there was no contract - See paragraphs 47 to 55.

Building Contracts - Topic 807

The contract - Variation - Extras - General - [See **Building Contracts - Topic 527**].

Contracts - Topic 3

General principles - General - Purpose of contract law - [See first **Contracts - Topic 5643**].

Contracts - Topic 1106

Formation of contract - General principles - Duty to negotiate in good faith - [See ninth **Contracts - Topic 5643**].

Contracts - Topic 1444

Formation of contract - Agreements that are not contracts - Agreements to agree - [See sixth **Contracts - Topic 5643**].

Contracts - Topic 5643

Unenforceable contracts - Uncertainty and vagueness - Uncertainty - This case was about a \$1.2 million written agreement to build a house and to convey it and the lot in question - The pivotal issue was whether the contract was too uncertain to be valid or enforceable - The Alberta Court of Appeal stated that "[t]he overarching aim of contracts is to let two or more parties predictably govern themselves by their own self-imposed rules. That aim fails if one cannot tell whether they have a binding contract or not ... So the rules to create a contract must be known and straightforward. A putative contract of unpredictable validity is almost useless. Almost as bad is a contract of unpredictable contents. Commerce needs predictability. So do ordinary Canadians about to commit their future earnings and life savings, especially to acquire a house." - See paragraph 2.

Contracts - Topic 5643

Unenforceable contracts - Uncertainty and vagueness - Uncertainty - The pivotal issue in this case was whether a contract to build a house and then convey it and the lot, was too uncertain to be valid or enforceable - The Alberta Court of Appeal stated that "usually certainty and predictability are more important than fairness in any particular contract. If a contract proves unfair, the parties will negotiate better wording for the next contract. Doubly dangerous is an uncertain contract leaving title to land in doubt. The contract sterilizes the land." - See paragraphs 4 and 5.

Contracts - Topic 5643

Unenforceable contracts - Uncertainty and vagueness - Uncertainty - The agreement in question was in writing and signed six years ago - The suit was commenced within a few months, as soon as the dispute emerged - The first trial judgment, rendered over four years ago, enforced only one corner of the contract, worth but a fraction of the total price - The

Alberta Court of Appeal stated that "Canadian courts sometimes give the public and businesses certainty in contractual disputes. But too often they do not. ... Some courts go thus astray by encouraging parol evidence, ignoring whole-contract clauses, inventing collateral unwritten obligations, and implying far-reaching terms. ... Courts also err by reluctance to hold any agreement too uncertain to enforce. Often they do so by inventing terms which the parties never imagined. Or worse, courts leave the parties with a binding contract of unknown and unstated content. ... If that truly is Canadian contracts law, it needs fixing." - See paragraphs 6 to 10.

Contracts - Topic 5643

Unenforceable contracts - Uncertainty and vagueness - Uncertainty - The Alberta Court of Appeal discussed the centrality of the principle of certainty, the key issue in this lawsuit and appeal - "Certainty of terms is not a separate self-contained defence Quite the contrary; certainty is an integral part of the very heart of contract. A contract is but one jewel with several inseparable facets. The rule is far from a technicality The rules of certainty of terms and the rules of offer and acceptance overlap Requiring that a contract be certain is thus far from a freestanding concept; it is the diametric opposite of a technical requirement divorced from principle, policy, or logic A supposed contract with an uncertain material term is not a contract, and not even an agreement, and is usually impossible to perform or enforce. ... For a court to order a litigant to do the impossible, or to order it to guess what to do and then do it, would be unjust and futile." - See paragraphs 72 to 82.

Contracts - Topic 5643

Unenforceable contracts - Uncertainty and vagueness - Uncertainty - Uncertainty was the key issue in this lawsuit and appeal - The Alberta Court of Appeal reviewed "uncertainty" authority binding in Canada - See paragraphs 83 to 108 - In affirming and clarifying the correct law, the court stated that "One important point must be noted. In some of these cases of uncertainty, the parties to the agreement neither stayed silent upon some term or topic, nor clearly provided for it. Instead, they expressly or impliedly stated that the topic would be fixed by their later agreement. The House of Lords settled the special rule for that situation years ago. In a few cases, the parties called for a future formal contract, but all its terms were fixed at once. That is a valid enforceable contract. But usually the terms are not all fixed, and often on one topic none of them are. Then that agreement to agree is unenforceable; it is no contract at all. ... Binding Canadian authority adopts that distinction and those rules" - In the end result, the court held that the trial judge's reasons contained error on the broad outlines of the basic principle of uncertainty - See paragraphs 109 and 110.

Contracts - Topic 5643

Unenforceable contracts - Uncertainty and vagueness - Uncertainty - This case was about a \$1.2 million written agreement to build a house and to convey it and the lot in question - The pivotal issue was whether the contract was too uncertain to be valid or enforceable - The trial judge's reasons found that "clearly one cannot tell from Addendum A where the additional [1666] square footage was to be put on the Los Cabos design. However I do not find that to be an essential term of this contract." - The approach of the plaintiff had been

that he had an idea what he wanted in the house, and that he and the defendant builder would in due course work out plans covering the extra square footage (59% of the house) - The Alberta Court of Appeal stated that, "[a]t best, that is a very clear example of an unenforceable agreement to agree. That is especially true here, where the 'property' to be built and sold was a very large expensive dwelling house, where personal preferences for a two- or three-generation family, and aesthetics and taste, would be important. ... A mere statement of 59% more house to be built, referring to no existing document, is far worse than the various agreements held void [in the case law]. ... They show that in a contract to build, what to build is vital, not non-essential. I repeat that uncertainty is a question of law." - See paragraphs 114 and 115.

Contracts - Topic 5643

Unenforceable contracts - Uncertainty and vagueness - Uncertainty - The Alberta Court of Appeal noted that the case law recognized some ways that uncertainty of terms could be saved: "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. 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." - In the present case, none of those four methods was supported by the evidence, nor suggested in argument - See paragraph 120.

Contracts - Topic 5643

Unenforceable contracts - Uncertainty and vagueness - Uncertainty - The pivotal issue was whether a contract to build a house and then convey it and the lot, was too uncertain to be valid or enforceable - The plaintiff argued that the defendant builder did not at once complain that the purported contract was void for uncertainty, and instead cancelled it under a clause in the contract - The plaintiff won the trial - The Alberta Court of Appeal, in allowing the appeal, stated that the defendant/appellant did not have to complain, and that it was proper later to raise invalidity because of uncertainty - The relevant case law also held that if there was initially no valid contract, how the parties later conducted themselves (short of a new contract) was irrelevant - "Again, we must recall that unenforceability for uncertainty is a question of law, and even an admission that there is a contract is thus not binding" - See paragraph 121.

Contracts - Topic 5643

Unenforceable contracts - Uncertainty and vagueness - Uncertainty - At the end of oral argument on appeal, counsel for the respondent purchaser suggested that the appellant builder had had a duty to negotiate in good faith, and that that "cured" any difficulties with uncertainty of terms - Duty to negotiate was not pleaded in the statement of claim, and the respondent did not argue that topic at trial (the respondent changed law firms after the trial decision) - A sentence in the respondent's written trial argument suggested that the term he wanted the court to imply was that the appellant would work with the respondent in

designing the house - The Alberta Court of Appeal discussed the difficulties with that new issue - Designing and negotiating were not the same thing - It was far too late to raise the new argument - "A new issue cannot be advanced after the close of evidence unless the court can be assured that no other evidence (or cross-examination) could have been adduced on this topic had it been raised in time" - In effect, it was a very late request to amend the pleadings - A duty to negotiate was not one which the courts would imply into the agreement as obvious nor as necessary for business efficacy - "The idea of such a duty is at best controversial and of limited scope. At worst, it does not exist at all." - See paragraphs 122 to 138.

Contracts - Topic 7415

Interpretation - General principles - Fairness - [See second **Contracts - Topic 5643**].

Practice - Topic 2185

Pleadings - Amendment of pleadings on appeal - New basis for action or defence not pleaded at trial - [See ninth **Contracts - Topic 5643**].

Practice - Topic 9012

Appeals - Restrictions on argument on appeal - Issues or points not previously raised - [See ninth **Contracts - Topic 5643**].

Practice - Topic 9012.1

Appeals - Restrictions on argument on appeal - Raising new causes of relief - [See **Practice - Topic 9164**].

Practice - Topic 9164

Appeals - Cross-appeals, notices of contention and notices to vary - Filing of - Effect of failure to file - Though some aspects of unjust enrichment were before the trial judge, she did not deal with the issue - There was no written mention of the topic in the Court of Appeal - The first oral mention came during the respondent's reply to the appellant's argument - The appeal was then almost four years old - The Alberta Court of Appeal refused to reopen the appeal to add unjust enrichment - "Where a respondent to an appeal does not file, or seek to file, a cross-appeal or notice of intention to vary, he cannot later request to vary the formal entered judgment" (Rules of Court, rule 509) - This was not just an omission from the respondent's factum; it was lack of an appeal - The evidence for the main appeal and the proposed cross-appeal were very different - Excusing the delay would be almost unprecedented - See paragraphs 139 to 146.

Sale of Land - Topic 871

The contract - Uncertainty - General - This case was about a \$1.2 million written agreement to build a house and convey the lot in question - The Alberta Court of Appeal held that the supposed contract was invalid for uncertainty, and that "specific performance could have very narrow scope left" - In theory, the plaintiff purchaser could try to show that the contract for the lot was severable - However, given the developer's position about not getting a lot without an approved house, a house was a vital topic for the defendant builder and not separable - So no part of the alleged contract was left standing - No remedy

for breach was possible - The contract being invalid, there was no need to discuss damages for breach of contract - See paragraph 155.

Sale of Land - Topic 2010

The contract - Validity of contract - Consensus - Uncertainty - General - [See second **Contracts - Topic 5643** and **Sale of Land - Topic 871**].

Sale of Land - Topic 8568

Remedies of purchaser - Specific performance - Bars - [See **Sale of Land - Topic 871**].

Sale of Land - Topic 8768

Remedies of purchaser - Damages - Bars - Where no contract formed - [See **Sale of Land - Topic 871**].

Specific Performance - Topic 601

When available - Contracts for building or repair - [See **Sale of Land - Topic 871**].

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Brick Protection Corp. v. Alberta (Provincial Treasurer) et al. (2011), 510 A.R. 336; 527 W.A.C. 336; 2011 ABCA 214, reld to. [para. 2].

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This appeal was heard on June 7, 2012, before Côté, Rowbotham and McDonald, JJ.A., of the Alberta Court of Appeal. In reasons written by Côté, J.A., the Court delivered the following judgment, filed at Edmonton, Alberta, on August 22, 2012.

Appeal allowed.

Editor: E. Joanne Oley