In the Court of Appeal of Alberta

Citation: Main v. Jeerh, 2006 ABCA 138

Date: 20060502
Docket: 0501-0365-AC
Registry: Calgary

Between:

Ian Kenneth Main

Appellant (Applicant)

- and -

Sohan Jeerh

Respondent (Respondent)

- and -

Venture West Properties Ltd.

Not Party to the Appeal
(Respondent)

Corrected judgment: A corrigendum was filed on May 3, 2006; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Madam Justice Elizabeth McFadyen
The Honourable Madam Justice Barbara Romaine

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice L. D. Wilkins
Dated 30th of November, 2005
Filed 9th of December, 2005
(Docket: 0501-16110)

Memorandum of Judgment

The Court:

I. Introduction

[1] The appellant challenges the dismissal of applications to discharge a caveat and certificate of *lis pendens* from his property. We are required to determine whether this is an appropriate case to discharge either or both of the encumbrances.

II. Background

[2] The appellant, Ian Main ("Main"), owns a piece of property in the City of Calgary. In June of 2005, he decided to sell. He signed an exclusive three-month listing agreement with a realty company, Venture West Properties ("Venture"), that introduced him to a potential purchaser, the respondent, Sohan Jeerh ("Jeerh"). Mel Maschmeyer ("Maschmeyer"), a real estate agent from Venture, acted on Main's behalf.

[3] Jeerh made several offers to purchase which were refused. Main refused to sign any of these offers indicating he would not sell for less than the full list price. Finally, Maschmeyer obtained an unconditional offer from Jeerh for the full list price, but Main still refused to sign. The listing agreement expired and Main found another buyer.

[4] Both Venture and Jeerh filed caveats against the property claiming an interest in the land. In response, Main applied to the Court of Queen's Bench to have the caveats removed. A hearing was scheduled for November 18, 2005, but it was later adjourned to November 30, 2005. On November 29, 2005, the day before the hearing, Venture discharged its caveat and filed a statement of claim, while Jeerh filed a statement of claim, and then further burdened the land by filing a certificate of *lis pendens* (the "CLP"). Thus, when the chambers hearing took place the next day, the appellant made an oral application to discharge the CLP, along with Jeerh's caveat.

[5] Jeerh attempted to justify his caveat, and the CLP, by submitting he had a completed agreement for sale based upon an offer to sell, made by Maschmeyer, which he had accepted. In making this argument, Jeerh alleged that the listing agreement gave Maschmeyer the authority to act as Main's agent. The learned judge accepted that there was evidence which, if believed, could lead to both conclusions. He stated, at 21 of the transcript of proceedings:

> He is saying Main authorized him to sell exclusively at a given price, and he brought an offer to purchase on the same price, which was accepted by the other side. Offer to sell, offer to purchase, matter of contract, ...

[6] Given this finding, the chambers judge did not feel it necessary to deal with the application to discharge the CLP, although it is clear from the transcript that he knew this issue was before him.

In the end, the chambers judge dismissed the applications. We are asked to overturn his decision, and discharge both the caveat and the CLP.

III. Grounds of Appeal

[7] The appellant submits the learned chambers judge erred by:

(a) finding the respondent had shown cause why his caveat should not be discharged, and

(b) failing to discharge the CLP.

[8] He argues, in the alternative, the chambers judge erred by failing to direct the respondent to provide security for costs.

IV. Decision

[9] The appeal is allowed. With respect to the application to discharge the caveat, the exclusive listing agreement did not give Venture, or Maschmeyer, the authority to enter into a binding agreement without Main's signature. In addition, even if we accept the allegations of fact most favourable to the respondent, there is nothing in the evidence to indicate Main gave that authority to Maschmeyer in some other fashion. Furthermore, it is apparent from reviewing the offer to purchase, and Maschmeyer's actions with respect to it, that Maschmeyer did not purport to either make or accept an offer on Main's behalf. Finally, even if Maschmeyer entered into an agreement with Jeerh, the agreement is not enforceable because it does not satisfy the requirements of s. 4 of the *Statute of Frauds,* 1677 (29 Cha. 2), c. 3, nor was there sufficient part performance to dispense with the requirements of writing as required by the statute. Accordingly, the caveat must be discharged.

[10] As for the application to discharge the CLP, we acknowledge that normally an application to remove a certificate of *lis pendens* is made by applying to strike the pleadings under Rule 129 of the *Alberta Rules of Court*, or by applying for summary judgment under Rule 159. In this case, however, where the claim to an interest in the property under the CLP is exactly the same interest that is claimed under the caveat, and the CLP was filed after the application was made to show cause, we are satisfied that we can make an order discharging the CLP under the authority found in s. 141 of the *Land Titles Act*, R.S.A. 2000, c. L-4, allowing us to make "any order in the premises...the court considers just." In our view, even accepting all of the evidence favourable to the respondent, Jeerh has not established a *prima facie* claim to an interest in the land. There is no point in maintaining the CLP, therefore, and it must be discharged along with the caveat.

[11] Given these findings, it is not necessary to discuss the appellant's alternative ground of appeal dealing with security for costs.

V. The Standard of Review

[12] The appellant made two applications at the chambers hearing. The first was an application under s. 141 of the *Land Titles Act* calling upon the respondent to show cause why his caveat should not be discharged. As we will discuss at greater length later in these reasons, this involved determining whether the respondent had made out a *prima facie* claim to an interest in the land that was subject to his caveat. This is the same test that applies in a non-suit application. In ***Foley v. Administrator, Motor Vehicle Accident Claims Act (Alta.)*** (2002), 330 A.R. 1, 2002 ABCA 297, Fruman J.A., at para. 35, made the following statement, which we adopt for the purposes of this appeal:

> The judge correctly held that she was to decide whether any facts had been established from which liability might be inferred. This determination is a question of law, not a ruling upon the weight or believability of the evidence: John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada,* 2nd ed. (Toronto: Butterworths, 1999) at 139; ***Roberge v. Huberman***, [1999] 9 W.W.R. 45 at 54 (B.C.C.A.); ***MacDonell v. M &M Developments Ltd.*** (1988), 165 N.S.R. (2d) 115 at 125 (C.A.). It is reviewable by this court on a standard of correctness: ***Housen v. Nikolaisen*** (2002), 211 D.L.R. (4th) 577 at 584 (S.C.C.).

[13] The second application was to discharge the CLP. This involved interpreting the court's powers under ss. 141 and 152 of the *Land Titles Act* which is a matter of law invoking the correctness standard (***Housen***, *supra*).

VI. Analysis

A. Ground 1– did the learned judge err by failing to discharge the caveat?

1. The appellant's position

[14] Main submits the learned judge erred by finding the respondent had shown cause why his caveat should not be discharged. According to the appellant, even allowing Jeerh the most favourable interpretation of all of the evidence, there was no evidence of agreement for sale or purchase that could be considered an interest in land. In making this argument, Main submits there is no evidence that Maschmeyer had either the actual or ostensible authority to make a deal on Main's behalf. Moreover, says Main, there was no evidence that Maschmeyer purported to make or accept an offer. Indeed, it was Jeerh who made the offer to purchase and Maschmeyer did not sign it to signify acceptance. Finally, the appellant submits that even if an oral agreement was made, the requirements of the *Statute of Frauds* were not met and, furthermore, because the property is not unique, and no attempt was made to forward the funds, a court would deny specific performance.

2. The respondent's position

[15] The respondent submits the listing agreement gave Maschmeyer the express authority to sell the property on Main's behalf at the list price. This fact, coupled with Main's instruction to Maschmeyer that he would accept nothing less than the list price, gave Maschmeyer the ability to make an offer that Jeerh accepted on September 29, 2005. This meant an agreement was formed creating an interest in land that supported both the caveat and the CLP.

3. The legal test the chambers judge was required to apply

[16] The application to discharge the caveat was brought pursuant to s. 141(1) of the *Land Titles Act* which reads:

> 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, by originating notice, 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.

[17] In ***Thomas C. Assaly Corporation Ltd. v. Alberta Industrial Developments Ltd.*** (1982), 41 A.R. 436, this court considered the burden lying on a caveator when a "show cause" application is made. Speaking for the majority, Belzil J.A. held at para. 2:

> The matter was decided in chambers on affidavit evidence. The owner took the position before us that the caveator's material did not sustain the respondent's claim to an interest in the land. For the purpose of this appeal, it is common ground that the caveator on this application need only show a *prima facie* claim to an interest in the land.

[18] The court did not go on to describe what it meant by a "*prima facie* claim". In that regard, we adopt the reasoning of Hutchinson J. in ***Acquest/Alberta Mining Inc. v. Barry Developments Inc.*** (1999), 241 A.R. 1, 1999 ABQB 511, where his Lordship stated at para. 65:

> I find the test to be that of a *prima facie* claim that is to say "on the face of it" or "a fact presumed to be true unless disproved by some evidence to the contrary" (Black's Law Dictionary 5th ed.). **A claim must be based upon facts which if they are believed are complete and sufficient to justify the claim** (***Re Ontario Human Rights Commission et al. v. Simpson-Sears Ltd.,*** *supra*). [Emphasis added.]

4. Does the respondent have a *prima facie* claim?

[19] The respondent's position before the chambers judge was that the exclusive listing agreement and certain representations made by Main during negotiations gave Maschmeyer the actual or ostensible authority to act as Main's agent. Acting on that authority, Maschmeyer took an offer to purchase the property for $429,000 to Jeerh, which he accepted unconditionally giving rise to a right of specific performance. The chambers judge accepted there was evidence to support this position and dismissed the application.

[20] We respectfully disagree with this conclusion. The evidence does not support a finding that an enforceable agreement was reached. In our view, Maschmeyer did not have authority to make a deal on Main's behalf. Even if he did, however, he did not exercise that authority by entering into an agreement with Jeerh. Finally, even if Maschmeyer had the authority to make a deal, and he made an offer Jeerh accepted, the agreement did not satisfy the *Statute of Frauds*, or the alternate requirement that it be partly performed.

(a) The issue of actual or ostensible authority

[21] Jeerh submits the exclusive listing agreement gave Maschmeyer the authority to make a deal on Main's behalf. He relies primarily on the preamble, which reads:

> In consideration of your listing and offering for sale the property noted below and agreeing to list it for sale, as Owner or Authorized Agent for the Owner, **I hereby give you the sole and exclusive listing thereof, with sole authority to dispose of same irrevocably**, until and including the 30 day of September, AD. 2005, ... [Emphasis added.]

[22] The respondent submits the words "with sole authority to dispose of same irrevocably" show a clear intention on Main's part to give actual authority to either Venture or Maschmeyer to enter into a contract for sale or purchase on his behalf. Such an interpretation, however, contradicts the usual interpretation of exclusive listing agreements given by the courts. In ***Peacock v. Wilkinson*** (1915), 51 S.C.R. 319, Duff J. held at 333:

> Some confusion, no doubt, has arisen from the use of the term "real estate agent" which describes, of course, not the legal relation between the two parties, but merely the nature of the so-called agent's occupation. **The mere listing of property with such an agent implies nothing more than a representation that the proprietor is prepared to do business upon those terms and is not in itself an offer to sell which may be accepted and converted into a binding agreement by any purchaser saying to the agent that he will take the property on those terms. The agent's business is to procure a purchaser, that is to say, to bring into contact with the vendor a person willing to purchase on the terms mentioned. Having done that**

> **he has performed his function and earned his commission**, provided his authority is not in the meantime revoked by the sale of the property by the proprietor. The listing alone gives him no authority to bind the proprietor by a contract of sale. [Emphasis added.]

[23] In ***Lumely-Jones v. Greenway***, [1995] B.C.J. No. 217 (S.C.), an exclusive listing agreement gave the realtor the "sole and exclusive authority to sell the property." Justice Shaw held this was not a grant of authority to dispose of the property on the vendor's behalf. He stated at para. 12:

> In my opinion, the word "sell" in the context of the listing agreement is used in the sense of authorizing the agents to use their selling skills to find prospective buyers for Mr. Greenway, as opposed to granting them the power to make a binding offer or to enter into a contract on Mr. Greenway's behalf.

[24] Similarly, in ***Manitoba Securities Commission v. Aronovitch & Leipsic Limited and Dyck et al.***, [1981] 4 W.W.R. 344 (Man.Q.B.), the court was faced with a clause in an exclusive listing agreement giving the realtor the "sole, exclusive and irrevocable authority to sell, lease or exchange the said property at the price and/or rental and upon the terms and conditions particularly set out below... ." Justice Wilson held at 352: "Whatever its effect in other respects, clearly the contract quoted above is not, of itself, equivalent to a power to do anything on behalf of or in the name of the Dycks which would bind them to do or refrain from doing anything at all."

[25] The respondent's interpretation of the preamble is also contradicted by the remainder of the listing agreement. Paragraph 1 is a commitment by Main to pay a commission if a sale results from a negotiation commenced during the listing period. Paragraph 2 deals with defaults by the vendor and provides that if the vendor fails to complete a sale, once a purchaser has been procured who is "ready, willing and able to complete a sale...", the vendor will be liable to pay a portion of the commission that would have been payable had the deal been completed. Not only does this suggest the realtor's job is merely to procure a purchaser, it also suggests it is ultimately up to the vendor to accept or refuse an offer from a willing purchaser.

[26] Paragraph 3 of the Terms of Agreement is also useful in determining contractual intent. It reads:

> That if a purchaser as defined in the Interim Offer to Purchase shall fail for any reason whatsoever to complete a sale or exchange **after acceptance by me/us of the Interim Offer to Purchase**, 50% of any non-refundable deposit paid, to a maximum of 50% of the commission calculated in the matter as previously described in this document, may be deducted by you from such deposit, and forfeited by the Purchaser. [Emphasis added.]

[27] This clause clearly indicates that an offer to purchase must be accepted by the vendor. Thus, a proper reading of the rest of the listing agreement suggests that the exclusive rights being given

are (a) the right to find potential buyers, and (b) the right to receive a commission if the proper conditions are met. The exclusive listing agreement merely gives assurance to the realtor that the seller will not list the property with someone else during the period set out in the agreement.

[28] The respondent has supplied us with three cases which, in his submission, support the position that the exclusive listing agreement gives actual authority to make or accept an offer on the vendor's behalf. We find these cases to be of limited value. In ***Hayes v. Douglas***, [1976] 5 W.W.R. 308 (Alta. S.C.), the trial judge found that the listing agreement authorized the realtor to "sell the lands for a price of $20,500 all cash." The judgment does not include the wording of the clause, however, with the result that it is impossible to compare the agreement in that case to the one in the present litigation. Moreover, it is also clear from the trial judge's reasons that, whatever the wording, neither the vendors nor the realtor thought the property could be disposed of without acceptance of an offer to purchase by the vendor.

[29] Similar difficulties arise with respect to the decision of this court in ***Alex Duff Realty Ltd. v. Eaglecrest Holdings Ltd.*** (1983), 44 A.R. 67. In that case, the issue before the court was the meaning of a clause in a listing agreement that provided for payment of commission upon a "sale". What distinguishes this case from the one before us, however, is the fact that the realtor had procured an offer to purchase which the vendor had accepted.

[30] The third case the respondent relies upon is the decision of Master Quinn in ***Alberta Social Housing Corp. v. Sawchuk***, [1997] A.J. No. 959. The comments relied upon by the respondent, however, are obiter and the case does not refer to the decision of the Supreme Court in ***Peacock v. Wilkinson***, *supra*.

[31] In summary, we are satisfied the parties did not intend that the exclusive listing agreement would give authority to either Maschmeyer or Venture to make a deal on Main's behalf. It was intended to assure the realtor of a commission in certain circumstances, and gave the realtor the exclusive right to attempt to earn that commission for the period set out in the agreement.

[32] The respondent submits, however, that a grant of agency can also be found in the conversations between Main and Maschmeyer during the course of negotiations. He relies upon the facts set out in Maschmeyer's affidavit, the relevant portions of which read:

> 7. THAT during my meeting with Mr. Main, he indicated to me that he would agree to sell the land at a price of $100.00 per square foot which was equivalent to $429,000.00. I provided to him my Listing Agreement-Exclusive Authority to Sell and reviewed it with him in detail. During my meeting we calculated and reviewed the exact amount of the commission and the net amount he would receive after payment of the commission. To the best of my recollection, he took the Agreement with him and indicated he wanted to review it further with his lawyer or legal counsel. It was subsequently returned to me

signed by Mr. Main. Pursuant to the terms of the Listing Agreement-Exclusive Authority to Sell, I was granted the exclusive authorization to list for sale and dispose of the property at the list and sale price of $429,000.00.

8. THAT on August 25, 2005, I met Mr. Main at his office and presented to him what he has described as the first offer provided by Mr. Jeerh for the sum of $365,000.00, which was based on a price of $85.00 per square foot. Concurrent with the delivery of the first offer to Mr. Main, I presented to Mr. Main a cheque in the sum of $10,000.00 which was the deposit being provided by Mr. Jeerh.

9. THAT at the time of my meeting with Mr. Main on August 25, 2005, when I presented the first offer, Mr. Main once again indicated to me that he would sell the property for the sum of $429,000.00, however, would not sell the property for anything less than $429,000.00. It was agreed during my meeting with Mr. Main on August 25, 2005, that I would leave the cheque for the deposit with him in the sum of $10,000.00 and I would see if I could convince Mr. Jeerh to increase the offer price for the amount of the full list of $429,000.00 so that we could conclude the deal on that basis. That was agreed to by Mr. Main at that time.

10. THAT I subsequently returned to Mr. Jeerh and indicated to him that if he wanted to buy the property, he would have to pay the full list price of $429,000.00.

11. THAT on September 14, 2005, I once again met with Mr. Main and indicated to him that Mr. Jeerh had advised me that he would increase his offer to $386,100.00 which was based on $90.00 per square foot. Once again, Mr. Main indicated that this was not agreeable and he once again advised me he would close at $429,000.00 and nothing less. I then advised Mr. Jeerh of this.

12. THAT on September 29, 2005, I met with Mr. Jeerh and he indicated that he was agreeable to buying the property for the full list price of $429,000.00 in accordance with the provisions of the Listing Agreement and authority to sell. As a result, we completed the Real Estate Purchase Contract, which is marked as Exhibit “E” to the Affidavit of Mr. Main of November 14, 2005. As Mr. Main still had the $10,000.00 initial deposit, no further deposit was required from Mr. Jeerh at that time. I then met with Mr. Main on September 29, 2005, and indicated to him that we now had a deal and provided to

> him the Real Estate Purchase Contract signed by Mr. Jeerh, dated September 29, 2005. To my surprise, Mr. Main did not appear happy with the Real Estate Purchase Contract and indicated to me that there were others interested in the property and he may have another offer. At that time, during our meeting of September 29, 2005, Mr. Main indicated to me that he would have to speak with his lawyer.

[33] According to the respondent, this evidence shows that each time Main rejected an offer to purchase he instructed Maschmeyer to go to Jeerh and make an offer to sell the property at the asking price. Implicit in this instruction is a grant of authority to act as Main's agent in making an offer that Jeerh could accept.

[34] We do not agree with this submission. While we accept that in determining whether there is a *prima facie* case the court must treat all of this evidence as if it were true, we do not think the affidavit evidence leads to the conclusion the respondent alleges. It is apparent from Maschmeyer's affidavit that negotiations between Main and Jeerh were conducted through Maschmeyer. Jeerh would make an offer to purchase, and Maschmeyer would convey the offer to Main to see if he was interested in accepting it. Using this procedure, Jeerh made two offers to purchase which Main rejected with the advice that he said he would not sell at anything less than the list price. As Maschmeyer acknowledged at para. 9 of his affidavit, however, Main's instructions, after the first rejected offer, were to try and "convince Mr. Jeerh **to increase the offer price for the amount of the full list** of $429,000.00 so that we could conclude the deal on that basis." There is no evidence in Maschmeyer's affidavit to suggest that Main changed these instructions over the course of negotiations.

[35] In the end, therefore, Maschmeyer's job, after each rejection, was simply to go out and attempt to solicit an offer to purchase, at the list price, which Main would then consider. That Maschmeyer understood this is shown by his behaviour. He kept returning to Main with offers to purchase which he presented for acceptance. This is true of the transaction at the centre of this dispute – the September 29 offer to purchase. Thus, there is simply no evidence to indicate Main was prepared to forgo his right of acceptance. We are satisfied there was no basis to conclude Maschmeyer and/or Venture had the authority to bind Main to a contract for sale.

(b) Was there a concluded agreement?

[36] Even if we are wrong, however, and Maschmeyer had the authority to conclude a real estate deal at the list price, there is no evidence that he did so. The document Maschmeyer presented to Main on September 29, 2005 is clearly identified as a "Real Estate Purchase Contract" (the "Contract"). Clause 13 of the Contract, which is described as the "Offer", is filled out and signed by Jeerh as the "Buyer" and reads:

> 13.1 The Buyer offers to buy the Property for the Purchase Price according to the terms of this Contract.
>
> 13.2 This offer/counter offer shall be open for acceptance in writing until 4:00 p.m. on 29/09/2005.

[37] Clause 14 of the Contract deals with acceptance and provides the opportunity for the "Seller" to respond in writing to the offer. This part of the Contract is blank – indicating that no one accepted the offer in writing as stipulated. In addition, each page of the Contract has a place, at the bottom, for the "Seller's Initials". No one has initialled these pages.

[38] Thus, even if Maschmeyer had the authority to enter into a binding agreement, the only offer to enter into legal relations came from Jeerh by way of an offer to purchase. There is no evidence whatsoever that Maschmeyer accepted the offer. Indeed, the facts disclose that Maschmeyer brought the Contract back to Main, unsigned, for his acceptance. This is the same situation that arose in ***Peacock v. Wilkinson***, where Duff J. held at 334:

> I have already mentioned that the contract signed by the appellant professing to record the transaction formally into which they intended to enter was a proposed contract between himself and Carrothers which he quite well understood was to be executed by Carrothers and not by the defendants as Carrothers's agent. That document must be taken as conclusive evidence of the character of the transaction in respect of which the sum of $400 was paid on that day to the respondents. The contemplated transaction was a contract of sale which was to be completed only when executed by both parties to it. It seems idle, in face of that, to suggest that on the day before an oral agreement of sale had been entered into between the appellant as vendee and the respondents representing Carrothers as the vendor.

[39] There is no dispute that Main did not accept the offer by 4:00 p.m. on September 29, 2005. There was no basis to conclude, therefore, on the evidence presented by the respondent, that there was a completed agreement for sale or purchase.

(c) The *Statute of Frauds*

[40] Finally, even if it was possible to find there was an oral agreement for sale, the only written documentation of the agreement was the Contract – which was not signed by the vendor or anyone purporting to be acting on his behalf. Thus, there was no evidence of a signed memorandum as required by s. 4 of the *Statute of Frauds*. Although the respondent suggested in oral argument that the agreement for sale was partly performed, removing the need for a signed memorandum, the only act of part performance alleged was the retention of the uncertified deposit cheque for $10,000 from the first rejected offer. This cheque was provided as a deposit for an entirely different proposed transaction which means there is a serious question about whether it could amount to part

performance of the disputed agreement. Even so, we do not think the act, by itself, is enough to constitute the necessary detriment to invoke the equity of part performance – particularly since Maschmeyer does not deny Main's assertion the cheque was returned on September 29.

[41] We conclude, therefore, that Jeerh has not made out a *prima facie* claim to an interest in the land, allowing him the benefit of the truth of all favourable evidence. It follows the learned chambers judge erred by failing to discharge the caveat.

B. Ground 2 – did the learned judge err by failing to discharge the CLP?

[42] In the event we conclude the chambers judge erred by failing to discharge the caveat, the appellant also submits the learned chambers judge erred by failing to discharge the CLP. The appellant acknowledges that the normal way to seek the discharge of a certificate of *lis pendens* is to apply to strike the claim, or to apply for summary judgment. He submits that neither procedure is appropriate in the present circumstances, however, because the CLP was filed in response to the application to show cause. Allowing the CLP to remain in a situation where the caveat must be discharged would mean the respondent could do something indirectly that he could not do directly. In making this argument, the appellant relies on the decisions of Master Funduk in ***Ram v. Jinnah*** (1982), 39 A.R. 40 and ***Festival City Holdings Ltd. v. Worthington Properties Inc.*** (2002), 113 A.C.W.S. (3d) 1088, 2002 ABQB 543.

[43] The respondent replies by saying that the only way to obtain the discharge of a CLP is through s. 152 of the *Land Titles Act*. This section allows for discharge where the plaintiff's claim, or that aspect of the claim supporting the CLP, has been finally dismissed. According to the respondent, the appellant did not apply for this relief and it would be inappropriate for this court to consider the matter now. He suggests, further, that if he had known that an application of this kind was going to be made, he would have introduced more evidence because an application for summary judgment is a broader application than an application to show cause, with a different onus and burden of proof.

[44] We have reviewed the transcript of proceeding and are satisfied the appellant asked the chambers judge to discharge the CLP. This application was made orally, but this procedure was made necessary by the fact that the respondent waited until the day before the hearing to file the statement of claim and CLP. Given this was a time-sensitive real estate transaction that had already been adjourned once at the respondent's request, it was appropriate for the appellant to make the application in the way he did. If the respondent was actually taken by surprise, he was entitled to ask for a short adjournment. He did not do so.

[45] The fact the appellant has asked for this relief, however, does not entitle him to get it unless the court has jurisdiction to grant the remedy sought. Section 152 of the *Land Titles Act* deals with the circumstances under which a CLP can be cancelled. It reads:

> 152 The Registrar shall cancel the registration of a certificate of lis pendens on receiving
>
> (a) a certificate under seal of the clerk of the court stating that the proceedings for which the certificate of lis pendens was granted are
>
> (i) discontinued, or
>
> (ii) dismissed and the time for commencing an appeal has expired and no appeal has been commenced, or if commenced, has been finally disposed of or discontinued,
>
> (b) a withdrawal of the certificate of lis pendens signed by the person on whose behalf the certificate was registered, or
>
> (c) where a certificate of lis pendens relates to a caveat that was signed by an attorney or an agent, a withdrawal of the certificate of lis pendens signed by
>
> (i) the attorney or the agent, as the case may be, or
>
> (ii) the person on whose behalf the certificate was registered.

[46] In ***Ritter v. Hoag*** (2004), 129 A.C.W.S. (3d) 825, Burrows J. held that this section prohibited an applicant from simply applying to the court for an order directing the cancelling of the CLP. His Lordship found that it was necessary to apply to have the claim dismissed, either under Rule 129 or Rule 159. He stated at paras. 5-6:

> Section 152 of the *Land Titles Act*, R.S.A. 2000, c. L-4, provides that the Registrar may cancel the registration of a certificate of lis pendens on receiving a certificate from the Clerk stating that the action for which the certificate was granted has been discontinued or dismissed. I have held in another case that, "... the fate of the lis pendens is inextricably tied to the fate of the action of which it gives notice. As long as the action is outstanding the lis pendens must remain on title unless voluntarily removed by the claimant." *Maull v. Maull* (2002), 315 A.R. 597 at para. 11.
>
> In my view it is not appropriate for the court to grant the relief sought in this application – an order directing the cancellation of the lis pendens. The proper procedure is for Hoag and Edwards to apply for a dismissal of Newport's action in so far as it relates to a claim to an interest in land and,

> if successful, to obtain a certificate under s. 152(a)(ii) of the *Land Titles Act* from the Clerk.

[47] We agree with the general proposition that one cannot simply bring an application to dismiss a CLP, but find it does not apply given the unique character of the present case. Unlike the situation in ***Ritter v. Hoag***, *supra*, the respondent here initially sought to protect his interests by filing a caveat. He did not file his statement of claim and his CLP until after the appellant had filed an application requiring him to show cause why the caveat should not be discharged. Master Funduk commented on the effect of a similar procedure in ***Ram v. Jinnah***, *supra*. In that case, the respondent in a show cause application filed a statement of claim and then argued the issues in his lawsuit could not be dealt with summarily at the show cause hearing. The Master disagreed, finding the court was still obliged to conduct the show cause hearing. The learned Master held at paras. 9-10:

> When a statement of claim is issued *after* a show cause application is launched and before the application is heard there is an inference of a tactical step designed to counter the show cause application. If the court accedes to the submission that the issue should be decided in the action commenced every caveator could tactically defeat a show cause application by immediately commencing an action after he has been served with notice of the show cause application. Section 139 [now 141] would be rendered sterile.
>
> The caveator could avoid the burden imposed on him by section 139 through the simple expedient of immediately issuing a statement of claim. In my view the commencement of an action by the caveator after he has been served with notice of a show cause application cannot assist the caveator. He is still required on the show cause application to meet the burden of proof imposed on him. The caveator must still show a prima facie case. The issuance of a statement of claim can never be considered as showing a prima facie case. [Emphasis in original.]

[48] While the learned Master was not dealing with a filed CLP, as we are here, we find his logic compelling and applicable. Here the respondent waited until the day before the show cause hearing before filing his statement of claim. The CLP was still in the process of being filed when the hearing took place. It is easy to infer, therefore, that these documents were filed simply to defeat the appellant's application. We find the appellant was entitled to his show cause hearing, where the onus was on the respondent to establish a *prima facie* claim to an interest in the land.

[49] If the appellant was entitled to his show cause hearing, what is the effect of our conclusion that the respondent did not produce evidence to show he had a *prima facie* claim to an interest in the land? We have reviewed the statement of claim and find that it does not offer a different, or expanded, rationale for the existence of an interest in the land. The essence of Jeerh's claim for specific performance in the statement of claim is identical to the argument mounted to defend the

caveat – that Maschmeyer made an offer of sale, as Main's agent, that Jeerh accepted. The respondent has had the opportunity to present evidence to substantiate this version of events, and he has also had the opportunity to cross-examine the appellant. He has not been able to show even a *prima facie* case. We do not see how having the opportunity to submit further evidence would assist the respondent in establishing a claim to an interest in the land. In contrast, there is a need to deal with this matter expeditiously as the existence of the CLP is preventing disposition of the land.

[50] Section 141 of the *Land Titles Act* allows the court, on the hearing of a show cause application, to "make any order in the premises and as to costs that the court considers just." In our view, "the premises" refers to the subject matter of the application, as well as its procedural basis. As the application dealt with the merits of the respondent's claim to an interest in the land, we are satisfied this section gives us jurisdiction to order the discharge of the CLP.

[51] We are aided in coming to this conclusion by the decision of this court in ***Triple Five Corporation Ltd. v. T. Eaton Company Limited and Mayson*** (1977), 4 A.R. 222 (Alta.S.C. (App. Div.)). In that case, a chambers judge discharged a caveat, and a CLP, after an application was made to show cause pursuant to s. 146 (now s. 141) of the *Land Titles Act*. This court upheld the discharges and commented on the circumstances when the court might allow such a process to be followed. Prowse J.A. held, at paras. 33-34:

> In my view the allegations in the statement of claim and those set out in the affidavits before the Court disclose that Eaton's merely exercised the rights afforded it under the Agreement. They do not support the conclusion that Triple has any interest in the land based on an alleged fraud, conspiracy, breach of trust or at all.
>
> The appellant referred to a number of cases, the effect of which are that issues of substance should not be dealt with summarily. This general principle has been stated in a number of recent decisions of this Division, including ***Cerny v. Canadian Industries Ltd. et al.***, [1972] 6 W.W.R. 38. **In my view the general rule should not be applied where, as here, all the material required to resolve the issue in question is before the Court, and where delay could cause substantial harm to one of the parties. This is particularly the case where the issue concerns land, the value of which is determined in a very volatile market**. [Emphasis added.]

VII. Conclusion

[52] The appeal is allowed and the appellant is entitled to an order directing the discharge of both the caveat and the CLP. It is not necessary to discuss the appellant's argument dealing with whether the chambers judge should have awarded security for costs.

Appeal heard on February 13, 2006

Memorandum filed at Calgary, Alberta
this 2nd day of May, 2006

Conrad J.A.

McFadyen J.A.

Romaine J.

Appearances:

D.F. Younggren
for the Appellant

A.H. Wenngatz
for the Respondent

Corrigendum of the Memorandum of Judgment

Counsel has been corrected on page 16 to read D.F. Younggren