

**In the Court of Appeal of Alberta**

**Citation: 1279017 Alberta Ltd. v. 1257613 Alberta Ltd., 2009 ABCA 364**

**Date: 20091109**

**Docket: 0803-0320-AC**

**Registry: Edmonton**

**Between:**

**1279017 Alberta Ltd.**

Respondent  
(Applicant/Defendant)

- and -

**1257613 Alberta Ltd.**

Appellant  
(Respondent/Plaintiff)

- and -

**Ranjit Dhanoa, Sukwinder Randhawa, Balihar Bains,  
Rajinder Parmar and Galkar Renhawa**

Not Parties to the Appeal  
(Defendants by Counterclaim)

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**The Court:**

**The Honourable Madam Justice Constance Hunt  
The Honourable Mr. Justice Keith Ritter  
The Honourable Mr. Justice J.D. Bruce McDonald**

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**Memorandum of Judgment of  
The Honourable Madam Justice Hunt and  
The Honourable Mr. Justice Ritter**

**Dissenting Memorandum of Judgment of  
The Honourable Mr. Justice McDonald**

Appeal from the Order by  
The Honourable Mr. Justice D.R.G. Thomas  
Dated the 30th day of September, 2008  
Entered on the 7th day of November, 2008  
(Docket: 0803-05203)

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## Memorandum of Judgment

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### The Majority:

[1] The appellant 1257613 Alberta Ltd. (“125”) appeals the chambers judge’s decision to discharge a caveat and certificate of *lis pendens* registered against land owned by the respondent 1279017 Alberta Ltd. (“127”).

[2] The appeal is dismissed.

### Facts

[3] The background to this dispute is outlined in the dissenting reasons of McDonald J.A. We wish to underscore a few critical points.

[4] It is without controversy that a portion of the purchase price (\$700,000) for the land purchased by 127 from 125 was to take the form of shares in 127 paid to the principals of 125. It is also without controversy that share certificates were in fact delivered to seven 125 shareholders. Thereafter title to the land was transferred to 127.

[5] Subsequently, a group of 127 shareholders (Thind group) commenced an action against 127 and the 125 shareholders who had received the shares in 127 (individual defendants). The Thind group alleged that the individual defendants did not pay for the shares and that the shares were therefore issued without consideration. Alternatively, they alleged a conspiracy, breach of fiduciary duty and false representations. The thrust of their statement of claim is that 125 had “flipped” the land and made a secret and wrongful profit of \$718,000 to the detriment of the Thind group. They also claimed oppression against 127. Their prayer for relief requested the individual defendants to surrender their shares in 127 and sought a declaration that they had never been shareholders in 127. Among other things, the Thind group also sought to set aside the contract whereby the individual defendants had become shareholders.

[6] Shortly afterward, 125 filed a caveat against the land claiming “[t]he Caveator has not received from the purchaser payment for the full purchase price of the aforesaid lands and claims an interest therein by virtue of an unpaid Vendor’s lien pursuant to [a real estate purchase contract between 125 and 127].” A few months later 125 sued 127, alleging that 127 had refused to issue the shares or “refused to acknowledge that valid shares had been delivered” to 125, with the result that 127 had failed to pay \$700,000 of the purchase price. 125’s prayer for relief sought, among other things, judgment for that amount.

[7] 127 filed a statement of defence and counterclaim, the latter including as defendants five of the seven 125 shareholders. The statement of defence alleged a conspiracy by 125 to artificially inflate the price of the land and claimed that 125 had made a secret profit through the transaction. It also asserted that the \$700,000 was an unenforceable illegal transaction. Similar allegations were

repeated in the counterclaim, which among other things sought judgment against 125 and its five shareholders in the amount of secret profits and an order extinguishing any interest of 125 or the named shareholders in 127 or in the lands. The counterclaim also sought to have the caveat discharged.

[8] The decision under appeal was made when the parties appeared in morning chambers on the return date of 127's motion to discharge the caveat. At an early stage of the hearing the chambers judge suggested that the matter was too complex for morning chambers and ought to be dealt with in a special chambers application. After being informed clearly by both parties that valid share certificates in 127 had been delivered, however, he determined that the caveat should be discharged. Unfortunately he did not explain why, but it can be inferred that he was persuaded 125 had not shown a *prima facie* interest in the land, the prerequisite for maintaining a challenged caveat: *Main v. Jeerh*, 2006 ABCA 138, 384 A.R. 276 at paras. 17-18.

### **Standard of Review**

[9] The parties agree that the question of whether the appellant is entitled to maintain a caveat is a question of law reviewable on a standard of correctness: *Main* at paras. 12-13.

### **Discussion**

[10] 125's ground for maintaining the caveat is that 127, and the Third Group, question its entitlement to the shares. It admits that if "the shares in 127 issued to the 125 Shareholders [are] inalienable then the Learned Chambers Judge would be correct including [sic] that 125 as Vendor had been paid in full for the land. No interest in land existed and the Caveat could be discharged on a summary basis": Factum at para. 25.

[11] It is doubtful whether, on any view of the facts, 125's caveat was valid when it was filed. Section 141(1) of the *Land Titles Act*, R.S.A. 2000, c. L-4 provides "the applicant or owner may at any time apply to the 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 ... that the court considers just.". Similarly worded legislation was considered in *Gaar Scott Co. v. Giguere* (1909), 12 W.L.R. 245, 2 Sask. L.R. 374 at 376 (Sask. C.A.). That Court concluded this gave the judge the jurisdiction to decide whether the caveator had "at the time of the filing [the right to file the caveat]" and "whether he had at the time of the application the right to have the caveat continued". Similarly, in *Fuhr Farms Ltd. v. Melcor Developments Ltd.*, [2005] A.J. No. 854 (Q.B.), the Court concluded "[t]he caveat is to be considered as of the date of its filing": at para. 32.

[12] When the caveat was filed, the Third group had commenced proceedings questioning 125's entitlement to shares in 127. However, the land subject to the caveat is owned by 127, not the Third group.

[13] In any event, the post-caveat litigation does not support the proposition that 125 has a *prima facie* claim as unpaid vendor. 125 alleges in para. 4 of its Statement of Claim that 127 agreed that \$700,000 of the purchase price would be covered by the issue of shares in 127 to the principals of 125. A vendor may stipulate any lawful substitute for a cash payment: Victor Di Castri, *The Law of Vendor and Purchaser: The Law and Practice Relating to Contracts for Sale of Land in the Common Law Provinces of Canada*, 3rd ed. (looseleaf), (Toronto: Thomson Carswell, 2007) at §621. Thus, no attack could be mounted on the transaction solely because the parties agreed to cover part of the purchase price through the transfer of shares.

[14] 125 further alleges in para. 5 of its Statement of Claim that 127 failed or refused to issue the shares. This position cannot be maintained given 125's concession that share certificates were delivered. This leaves only its additional allegation in para. 5 that 127 has "refused to acknowledge that valid shares had been delivered". It is true that 127 takes this position in the prayer for relief in its counterclaim. That alone, however, does not create a *prima facie* interest in land based on an unpaid vendor's lien.

[15] A vendor's lien exists "until actual payment, even where the purchase-money is expressed to have been paid and received in the conveyance, when, in fact, it remains wholly or partly unpaid": *Ahone v. Holloway (Gravelle), Gravelle, Robinson Estate and Stevens* (1988), 30 B.C.L.R. (2d) 368 at 376, 12 A.C.W.S. (3d) 41 (C.A.). A vendor's lien can be the subject of a caveat: *Denny v. Nozick*, [1919] 3 W.W.R. 366, 48 D.L.R. 310 (Alta. C.A.), reversed on other grounds, [1921] 2 W.W.R. 157, 60 S.C.R. 646. When part of the purchase price takes the form of promissory notes and the vendor has endorsed the notes to his bank, his caveat can nevertheless be maintained because he is still liable to the bank: *Bentivoglio v. Roccio*, [1992] O.J. No.1129 citing *Colborne v. Thomas* (1853), 4 Gr. 102 at 105 - 106 (C.A.). Similarly, the fact that a vendor has taken a mortgage back for the balance of the purchase price does not show an intention that there should be no lien: *Lang v. McMillan*, [1958] O.W.N. 341 at 341-342.

[16] Shares in a company, however, are not akin to a promissory note or a mortgage, both of which require that outstanding indebtedness be discharged through future payment. Shares, in contrast, are not to be issued "until the consideration for the share is fully paid in money or property or past service that is not less in value than the fair equivalent of the money that the corporation would have received if the share had been issued for money." : *Alberta Business Corporations Act*, R.S.A. 2000, c. B-9, s. 27(3). See also section 48(7) which outlines the requirements of share certificates.

[17] In this case, once the share certificates were delivered 125 no longer had a vendor's lien because its principals had been fully paid for the land. 127's subsequent assertion by counterclaim that the shares ought to be extinguished did not revive the vendor's lien.

[18] The chambers judge correctly discharged the caveat because 125 failed to demonstrate it had a *prima facie* interest in land.

[19] The appeal is dismissed.

Appeal heard on September 30, 2009

Memorandum filed at Edmonton, Alberta  
this 9th day of November, 2009

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Hunt J.A.

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Ritter J.A.

**McDonald J.A. (dissenting):**

### **I. Introduction**

[20] I am unable to agree with my colleagues in this matter. For the reasons set out below, I would have allowed the appeal.

### **II. Background Facts**

[21] In September 2006, 125 agreed to sell an 80 acre parcel of land to 127 for \$3.84 million.

[22] In 2004, 125 had acquired the land for \$3.176 million. The \$700,000 increase in the sale price to 127 was shown as a “deposit” on the purchase price and the parties agreed it would be accounted for by issuing shares in 127 worth approximately \$700,000.

[23] 127 was set up to purchase and develop the land. The purchase price for the land to be bought from 125 was raised by issuing capital shares in 127.

[24] Some of the individuals who own 125 were or are also directors or officers of 127. Seven shares of 127 were issued to selected individuals on October 11, 2006.

[25] On January 22, 2007, title to the land was transferred.

[26] Piara Thind is spokesman for some of the 127 shareholders who are not shareholders in 125 (the Thind Group). The Thind Group was aware of the \$700,000.00 increase in the land purchase price prior to closing.

[27] In November 2007, the Thind Group commenced an action against 127 and the individual shareholders of 125 seeking, among other things, a declaration that the 125 shareholders surrender their 127 shares on the basis of breach of fiduciary duty and conspiracy to make a secret profit from the land transaction. The individuals defended on the basis there was no secret profit and the Thind Group was not misled about the circumstances of the share issuance.

[28] On January 8, 2008, 125 filed a caveat against the title to the land claiming an interest as an unpaid vendor. On April 15, 2008, 125 commenced an action against 127 alleging that 127 refused to issue or acknowledge that valid shares had been issued to the principals of 125 and as a result, 127 failed to pay \$700,000 for the purchase of the lands. 127 counterclaimed against 125 and the individual shareholders of 125 alleging virtually the same claims as raised in its earlier action.

[29] 127 sought an order discharging the caveat.

### III. Decision of the Chambers Judge

[30] The chambers judge did not issue written reasons but declared that the shares issued by 127 to the individual shareholders of 125 were validly issued. The order, however, makes it clear that he was not addressing the issues involving the equities amongst all the parties. He declined to confirm that the individuals were the true legal and beneficial owners of the shares. He directed the caveat and any certificate of *lis pendens* be discharged.

### IV. Issue

[31] The appellant 125 submits the chambers judge erred in discharging the caveat.

### V. Standard of Review

[32] Whether a caveat should be discharged is a question of law reviewable on a standard of correctness: *Main v. Jeerh*, 2006 ABCA 138, 384 A.R. 276 at para. 12.

### VI. Relevant Legislative Provisions

[33] The *Land Titles Act*, R.S.A. 2000, c. L-4, provides at section 130:

130 A person claiming to be interested in land for which a certificate of title has been issued ...

- (c) by virtue of
  - (i) having acquired through the owner or any prior owner of that land, mortgage or encumbrance, otherwise than under clause (a) or (b), an interest in that land, mortgage or encumbrance after the first certificate of title was issued for that land,
  - (ii) being the owner or previous owner of an interest in that land, otherwise than under clause (a) or (b), when that interest arose after the first certificate of title was issued for that land,...

may cause to be filed with the Registrar a caveat on the person's behalf in the prescribed form against the registration of any person as transferee or owner of, or any instrument affecting, the estate or

interest, unless the certificate of title is expressed to be subject to the claim of the caveator.

[34] *The Land Titles Act* goes on to provide as follows at subsection 141(1):

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.

## VII. Analysis

[35] Section 130 does not require that the person be able to prove an interest in land. It is therefore a low threshold and that is consistent with the test applied to section 141 to maintain a caveat, namely, the caveator must demonstrate a *prima facie* claim to an interest in the land: *Jeerh* at para. 12.

[36] In *Ahone v. Holloway (Gravelle), Gravelle, Robinson Estate and Stevens* (1988), 30 B.C.L.R. (2d) 368 (C.A.), McLachlin J. (as she then was) said at 376:

An equitable lien, also known as a vendor's lien, is defined by Halsbury, vol. 19, p.14, para. 21, as follows:

21. A vendor of land has an equitable lien on the land sold for the whole or part of the purchase-money **until actual payment, even where the purchase-money is expressed to have been paid and received in the conveyance, when, in fact, it remains wholly or partly unpaid.** [...].

The lien is based on the principle that if a person has acquired possession of property under a contract whereby he is obligated to pay for it, he will not be allowed to retain the property unless he does pay for it. It arises by operation of law and is an incident to the contract between the vendor and purchaser. There is no need for the vendor to stipulate for the lien: *Gordon v. Hipwell*, (1952), 5 W.W.R. (N.S.) 443 (B.C.C.A.) at p. 507. On the contrary, in order to avoid the creation of an equitable lien it must be shown that the parties intended that there should be no lien. (Emphasis added)

[37] The appellant 125 alleges in paragraph 4 of its Statement of Claim that 127 agreed that \$700,000.00 of the purchase price would be covered by the issuance of shares in 127 to the principals of 125. A vendor may stipulate any lawful substitute for a cash payment: Di Castri, *Law of Vendor and Purchaser*, 3rd ed., (Toronto: Thompson Carswell, looseleaf) at 621.

[38] The appellant submits it has a *prima facie* claim to an interest in the land because 127 or more specifically, the Thind Group disputes the validity of the shares transferred to the seven 125 shareholders and denies those individuals have any equity in the shares. The appellant maintains that if the disputed shares are subsequently divested from these individuals, then \$700,000.00 of the purchase price would remain unpaid and owing.

[39] The respondent submits that the shares issue is separate from the completed real estate transaction. It asserts the chambers judge confirmed that the shares were validly issued and therefore no amount of the purchase price is unpaid.

[40] The respondent has filed a counterclaim in this action. In paragraph (c) of the prayer for relief, the respondent sought “an Order extinguishing the equitable interest if any, of any of the individual Defendants by Counterclaim in the Plaintiff by Counterclaim [respondent] or in the subject lands.”

[41] In paragraph (f) of the prayer for relief, the respondent sought “An Order discharging the caveat #082 017 307 from the subject premises”.

[42] On the other hand, the respondent was not specifically seeking an order extinguishing the equitable interest, if any, of the appellant 125 in the subject lands.

[43] The action commenced by the Thind Group - before the caveat was sworn - attacked the entitlement of the shareholders to retain the shares issued to them in the respondent 127. If that challenge ultimately proves successful, there will remain a \$700,000.00 shortfall in the purchase price owed to 125.

[44] In his submissions before the chambers judge, counsel for the respondent stated in part:

With respect, My Lord, I think that notwithstanding my friend’s bluster, his statement my clients admit they received the shares full stop; is the resolution of the issue on the caveat. All these other things will come up in the later lawsuit, but I’m focussing on a particular thing and I think that - - and I don’t want to repeat myself, but that statement says it all. He’s trying to hoist me on my own petard in case there’s some wording in the affidavit of Mr. Finn but that really doesn’t muddy the water that - - it doesn’t - - I accept his admission that his clients have their shares.

**We may want to take them back in this later lawsuit, but that doesn’t prevent us from saying the caveat doesn’t stand anymore if he has the- -they have the**

**shares; they've been paid, unpaid vendor's lien can't stay there.** (A.B. F8 L23-37) (emphasis added)

[45] The chambers judge attempted to obviate this problem during the course of the proceedings by asking respondent's counsel:

Do you have a problem with the order that they [the individual shareholders] have received validly issued shares, strictly from a legal point of view? I'm not talking about the equitable aspect here ... (A.B. F9 L35-38)

[46] Counsel for the appellant 125 conceded that the share certificates had been physically delivered to the individuals in question. However, in paragraph 5 of the Statement of Claim issued by the appellant, it is alleged that the respondent 127 has "refused to acknowledge that valid shares had been delivered". It is obvious from the state of the proceedings, that the entitlement of the shareholders to retain their shares in 127 is very much alive.

[47] It follows therefore that at the time the caveat was sworn - in light of the challenge then being advanced by the Third Group - that the appellant did have a *prima facie* claim to an interest in land, namely an unpaid vendor's lien in the amount of \$700,000.00. This is so because the appellant has not received an unconditional, unqualified and fully completed payment in full for the land that it had sold to the respondent 127.

[48] In other words a portion of the purchase price, namely \$700,000.00 worth of shares, is subject to being divested. The Order appealed from in no way resolved the issues raised in the other lawsuit where the challenge had been first mounted.

[49] Counsel for the respondent has taken the position that the appellant cannot file a caveat on the basis of an unpaid vendor's lien and yet he reserves to his client the right to challenge the validity of the issued shares in the hands of the individual shareholders. It seems to me that he cannot have it both ways.

[50] Di Castri in *Law of Vendor and Purchaser* at 17-85 stated that the nature of the vendor's lien "is to secure to the vendor the consideration for his transfer, conveyance, or assignment".

[51] Unless and until there has been a final resolution in favour of the appellant 125 regarding the validity of the shares issued to the individual shareholders (not just that the formal legal requirements pursuant to the *Business Corporations Act Alberta*, R.S.A. 2000, c. B-9, have been met) then the appellant can legally claim its interest as an unpaid vendor pursuant to an unpaid vendor's lien.

### **VIII. Conclusion**

[52] In my view, the Chambers Judge erred in law in concluding that the appellant did not have a *prima facie* claim to an interest in land on the basis of an unpaid vendor's lien. Accordingly, I would have allowed the appeal.

Appeal heard on September 30, 2009

Memorandum filed at Edmonton, Alberta  
this 9th day of November, 2009

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McDonald J.A.

**Appearances:**

M.L. Engelking  
for the Appellant

J.R. Nickerson, Q.C.  
for the Respondent