

## Is every vendor of land an “unpaid vendor”?

By Jonnette Watson Hamilton

### Cases Considered:

[1279017 Alberta Ltd. v. 1257613 Alberta Ltd.](#), 2009 ABCA 364

In *1279017 Alberta Ltd. v. 1257613 Alberta Ltd.*, the Alberta Court of Appeal split 2:1 on the question of whether 1257613 Alberta Ltd. had an interest in land that would support the caveat and certificate of *lis pendens* that it had filed against an 80 acre parcel of land registered in the name of 1279017 Alberta Ltd. The vendor's interest in land was said to be an unpaid vendor's lien that arose as a result of a real estate purchase contract between 1257613 and 1279017. Had the dissenting opinion of Mr. Justice J.D. Bruce McDonald prevailed in this case, virtually every vendor of land, paid in full or not, would be an unpaid vendor and entitled to caveat another's land. Fortunately, the majority position of Madam Justice Constance Hunt and Mr. Justice Keith Ritter won through. The unpaid vendor's lien only continued until payment by the purchaser.

### The facts

1257613 Alberta Ltd. (the vendor) owned an 80 acre parcel of land. They had bought it in 2004 for \$3.176 million. In 2006, the vendor agreed to sell it to 1279017 Alberta Ltd. (the purchaser) for \$3.84 million. The purchaser had been incorporated for the specific purpose of purchasing and developing that 80 acre parcel of land owned by the vendor. Seven of the individuals who own shares in the vendor were or are also directors or officers of the purchaser. The \$718,000 difference between the 2004 and 2006 prices was to be paid by issuing shares in the purchaser to the principals of the vendor. Seven shares of the purchaser were issued to those seven principals — the "vendor's shareholders" — in October 2006. Those shares were also delivered to the vendor's shareholders at some unspecified point in time. Title to the 80 acre parcel was transferred to the purchaser in January 2007.

The case arose because some of the individuals who held shares in the purchaser were not shareholders in the vendor. That group of shareholders was known as the Thind Group; their spokesperson was Piara Thind.

In November 2007, the Thind Group sued the purchaser and the vendor's shareholders. They claimed that the vendor's shareholders did not pay for the shares of the purchaser that they received. Alternatively, they alleged conspiracy, breach of fiduciary duty and false

representations. The idea behind these alternative claims was that the vendor had “flipped” the 80 acre parcel and made a secret and wrongful profit of \$718,000 to the detriment of the Thind Group. They also claimed oppression against the purchaser. They sought an order that the vendor’s shareholders be required to surrender their shares in the purchaser and a declaration that they had never been shareholders in the purchaser. The vendor’s shareholders defended on the basis that there was no secret profit and the Thind Group was not misled about the circumstances of the share issuance.

In January 2008, the vendor filed a caveat against the title to the 80 acre parcel, claiming an interest as an unpaid vendor. In April 2008, the vendor sued the purchaser, alleging that the purchaser refused to issue or acknowledge that valid shares had been issued to the principals of the vendor and as a result, the purchaser had failed to pay the \$718,000 for the purchase of the 80 acre parcel. The purchaser counterclaimed against the vendor and five of the seven vendor’s shareholders, alleging virtually the same matters as those raised by the Thind Group.

The purchaser then sought an order under section 141(1) of the [Land Titles Act](#), RSA 2000, c. L-4, discharging the vendor’s caveat, which brings us to the lower court judgment in this case.

### **The procedural history**

The Chambers judge, Mr. Justice D.R.G. Thomas, did not issue written reasons for his decision. However, he issued an order in the fall of 2008 declaring that the shares issued by the purchaser to the vendor’s shareholders were validly issued. Importantly, he refused to confirm that the vendor’s shareholders were the legal and beneficial owners of the shares, thereby leaving open the question of the equities among all of the parties. He directed the caveat and the certificate of *lis pendens* filed by the vendor be discharged.

The vendor appealed on the grounds that the Chambers judge erred in discharging their caveat. Two of the three Court of Appeal judges — Madam Justice Constance Hunt and Mr. Justice Keith Ritter — agreed with the Chambers judge and dismissed the appeal. The points of divergence between the majority and the dissent of Mr. Justice J.D. Bruce McDonald centered on the legal effect of delivery of the shares in the purchaser to the vendor's shareholders and the relevance of the Thind Group seeking a declaration that the vendor's shareholders had never been shareholders in the purchaser.

### **The law**

The Court of Appeal was unanimous that the question of whether a caveat should be discharged is a question of law and reviewable on a standard of correctness: [Main v. Jeerh, 2006 ABCA 138](#), 384 A.R. 276 at para. 12.

Caveats are entirely statutory creations. The relevant statute is the [Land Titles Act](#), and the relevant provision is section 130, which specifies who can file a caveat against someone else’s land. The relevant portions of that section are as follows:

130 A person claiming to be interested in land for which a certificate of title has been issued or in a mortgage or encumbrance relating to that land. . .

(c) by virtue of

(i) having acquired through the owner or any prior owner of that land, mortgage or encumbrance . . . 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 . . . 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.

When someone like the purchaser in this case wants to remove a caveat filed against their land, they apply under section 141(1) of the *Land Titles Act*, which provides in part as follows:

141(1) In the case of a caveat filed, . . . 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 and as to costs that the court considers just.

On these “show cause” hearings under section 141(1), caveators such as the vendor do not have to prove that they have the interest in land that they claimed to have. Instead, they need only prove that they have a *prima facie* claim to an interest in the land: *Main v. Jeerh* at para. 12. Both the majority and the dissent agreed on this point.

An unpaid vendor's lien is an interest in land long recognized as such at common law. A vendor's lien for an unpaid purchase price is a right created by a rule in equity without any special contract: see *Rice v. Rice*, 2 Drewry 73, at 79, 61 E.R. 646. Both the majority and the dissent cited the judgment of Madam Justice Beverley McLachlin (as she then was) in *Ahone v. Holloway (Gravelle), Gravelle, Robinson Estate and Stevens* (1988), 30 B.C.L.R. (2d) 368 at 376 (C.A.) for the definition of the lien:

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.

What the vendor in this case was claiming, in effect, was that the \$718,000 difference in the purchase prices for the 80 acre parcel which was to be paid to the vendor by the issuance of shares in the purchaser was not paid. True, the vendor had agreed that the vendor's shareholders would take shares in the purchaser in lieu of cash. True, seven shares in the purchaser had been issued and delivered to the seven vendor's shareholders. But the Third Group disputed the validity of the share issuance and, if the disputed shares were to be divested from those seven vendor's shareholders in the Third Group court action and declared to have never been theirs, then \$718,000 of the purchase price for the 80 acres would be unpaid and owing. It was the fact of the court case by the Third Group and the possibility that a court order in their favour might result in the shares being stripped from the vendor's shareholders as though they had never been issued and delivered that was the basis of the vendor's claim to be an unpaid vendor.

Both the majority and the dissent agreed that, under section 130, the caveat had to be valid at the time it was filed. And, under section 141(1), it also had to remain valid when it was challenged in "show cause" proceedings. Thus, the vendor needed to have an interest in the 80 acre parcel in January of 2008 when they filed their caveat and they needed to continue to have an interest in land when their caveat was challenged by the purchaser.

### **The majority judgment**

The majority parted way with the dissent on two issues. First, the majority expressed some doubt (at para. 12) about whether the vendor had a *prima facie* claim to an unpaid vendor's lien at the time their caveat was filed, in January 2008. While the Third Group had sued to challenge the vendor's shareholders' entitlement to shares in the purchaser in November 2007, they noted the purchaser, and not the Third Group, was the owner of the caveated 80 acre parcel. The majority says nothing more about this point, however.

According to the majority, their major disagreement with the dissent lay in how they viewed the litigation that followed the filing of the caveat. 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* at 376. The vendor had conceded during the litigation that the purchaser had issued and delivered the share certificates to the seven vendor’s shareholders. The vendor could not therefore claim that the purchaser had refused or failed to issue the shares. All the vendor could claim was that the purchaser refused to acknowledge that valid shares had been delivered. The majority held (at para. 14) that this refusal by the purchaser, in and of itself, did not create a *prima facie* interest in land based on an unpaid vendor’s lien.

The majority noted that Alberta’s *Business Corporations Act*, R.S.A. 2000, c. B-9, section 27(3) states that shares 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.” The majority therefore held (at para. 17) that once the share certificates were delivered to the vendor’s shareholders, the vendor “no longer had an unpaid vendor’s lien because its principals had been fully paid for the land.” We do not know when the shares were *delivered* to the vendor’s shareholders. We are told they were *issued* in October 2006, well before the caveat was filed in January 2008. We are told by the majority that it is the post-caveat litigation that is decisive, with the vendor conceding that the shares were delivered, so presumably they were delivered after January 2008. According to the majority decision, once the shares were delivered, the vendor was paid and the unpaid vendor’s lien could not be maintained. The purchaser’s subsequent claims that those shares ought to be taken away from the vendor’s shareholders did not revive the unpaid vendor’s lien.

### **The dissent**

Justice McDonald, in dissent, held that the vendor had a *prima facie* claim to an unpaid vendor’s lien in the amount of \$718,000 “because the [vendor] has not received an *unconditional, unqualified and fully completed payment in full* for the land that it had sold to the [purchaser]” (at para. 47, emphasis added). He focused (at para. 48) on the idea that the shares were subject to being divested by court order and (at para. 46) the fact that the entitlement of the shareholders to retain their shares in the purchaser was a live issue. Thus, Justice McDonald concluded that until the Third Group’s challenge — and any other challenge the purchaser might care to make — was finally resolved in favour of the vendor, the vendor was entitled to maintain its caveat. For him, the vendor was “unpaid” because the vendor had not received “unconditional, unqualified and fully completed payment in full.”

The fact the Third Group sought a declaration that the vendor's shareholders had never been shareholders in the purchaser appears to be crucial to Justice McDonald's conclusions. Also apparently crucial was a submission made by the lawyer for the purchaser in argument before the Chambers judge (quoted in para. 44). The purchaser's lawyer was arguing that the vendor's lawyer's statement that the vendor had received the shares resolved the caveat issue — his clients had been paid. Then he added that the purchaser might want to “take back” the shares held by the vendor's shareholders. Justice McDonald seized on this submission (at para. 49) to say that the purchaser's lawyer could not have it both ways; he could not say the vendor was paid and say the purchaser might want to take that payment back in the future. He also emphasized (at para.

51) that compliance with the "formal legal requirements" of section 27(3) of the *Business Corporations Act*, R.S.A. 2000, c. B-9, which the majority had relied upon, was not enough.

For the dissent, the vendor had to be both legally and equitably entitled to retain the shares that were issued and delivered to them in payment of the purchase price. And their entitlement had to be beyond question. An ongoing lawsuit challenging the vendor's entitlement to payment and raising the mere possibility of a type of relief that would overturn the payment as though it had never happened was enough for a *prima facie* case that the vendor was unpaid.

Another question that might be asked about Justice McDonald's reasons (with thanks to my colleague, Nigel Bankes, for the point) is about the source for his requirement of "an unconditional, unqualified and fully completed payment in full for the land." Is Justice McDonald not re-writing the parties' contract? If the parties agreed that seven shares of the purchaser issued and delivered to the vendor's shareholders was payment for the 80 acres, where does his requirement for an unconditional, unqualified and fully completed payment come from? The common law of unpaid vendor's liens requires "actual" payment, but it doesn't require bullet-proof payment.

## **Conclusion**

Forty-some years ago, it was said to be "trite law" that "a vendor of land has a lien on the land for unpaid purchase-money; that such lien arises by operation of law at the moment when the contract is signed; that the lien continues until actual payment or performance by the purchaser unless it appears that the vendor, at the time of the sale or subsequently, intentionally waived or abandoned it": see *In Re Bak* (1966), 59 D.L.R. (2d) 75 at 77 (Man.), per Dickson J. (as he then was). The issue in this case was whether there had been "actual payment or performance." The majority held that, with delivery of the agreed upon purchase price, there was "actual payment or performance."

Had Justice McDonald's reasoning prevailed, one could imagine that no purchase would be considered unconditional, unqualified and fully completed until the limitation period had passed for claims that might entitle one to relief that declared a transaction void as if it had never happened. Every vendor might be an unpaid vendor for years.