

CANADA / JUDGMENT

Chu v. Chen

2004 BCCA 209

COURT

British Columbia Court of Appeal

DECIDED

16 April 2004

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2004 BCCA 209 Chu v. Chen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Chu v. Chen,

2004 BCCA 209

Date: 20040416

Docket: CA030373; CA030376

Docket: CA030373

Between:

Peter Kong Chu, Mei Yee Sung,

Kan Chak Wan, Yun Mui Lui,

Lam Chan, Shui Ying Wong Chan

and Frank Cheuk Man Lai

Appellants

(Plaintiffs)

And

Francis Chok-Yan Chen and

Margaret Ming Wai Lee

Respondents

(Defendants)

- and -

Docket: CA030376

Between:

Peter Kong Chu, Mei Yee Sung,

Kan Chak Wan, Yun Mui Lui,

Lam Chan, Shui Ying Wong Chan

and Frank Cheuk Man Lai

Respondents

(Plaintiffs)

And

Francis Chok-Yan Chen and

Margaret Ming Wai Lee

Appellants

(Defendants)

Before:

The Honourable Madam Justice Southin

The Honourable Mr. Justice Braidwood

The Honourable Mr. Justice Mackenzie

K. J. MacDonald

Counsel for the Appellants in CA030373 and for the Respondents in CA030376

G. F. Gregory

Counsel for the Respondents in CA030373

F. Chen

Appearing in person for the appellants in CA030376

Place and Date of Hearing:

Vancouver, British Columbia

24th and 25th November, 2003

Place and Date of Judgment:

Vancouver, British Columbia

16th April, 2004

Written Reasons by:

The Honourable Madam Justice Southin

Concurred in by:

The Honourable Mr. Justice Braidwood

The Honourable Mr. Justice Mackenzie

Reasons for Judgment of the Honourable Madam Justice Southin:

- [1] There are before us two appeals arising from the same action.
- [2] In the first appeal, at issue is that equitable interest or remedy known as the vendor's lien. The plaintiffs in the court below asserted a lien for "purchase" money undoubtedly unpaid by the defendants. The Honourable Mr. Justice Stewart dismissed the claim. The parties are not *ad idem* as to his *ratio decidendi*. The plaintiffs now appeal.
- [3] In the second appeal, the defendants, who appeal from the dismissal of their counterclaim, appear to me to be asserting that they are entitled to damages from the filing by the plaintiffs of a certificate of pending litigation. If that is the correct way to categorize the claim, then it is a claim in abuse of process. See *Marshall v. Heidi* (1984), 56 B.C.L.R. 107 (C.A.).

THE FIRST APPEAL

- [4] As I shall explain more fully hereafter, I have found myself in writing this judgment in the unhappy state of being bound to apply a line of authorities adopted by the majority of the court (*Robertson and Bird JJ.A.*) in *Gordon v. Hipwell* (1952), 5 W.W.R. (N.S.) 433, [1952] 3 D.L.R. 173 (B.C.C.A.), which if the issue were *res integra* I would say, as did *O'Halloran J.A.* in that case, has no place in the law of this Province, at least in cases where as here the purchasers, there being no fraud, have become the registered owners of the land pursuant to a transfer of the fee simple. If it were open to me, I would follow *O'Halloran J.A.* and thus arrive at the same destination but by a different route.
- [5] But as the decision has stood without legislative intervention for over 50 years, I cannot adopt that course.
- [6] I shall set out hereafter in detail the relevant facts but before doing so, I shall summarize them for the reader to whom the minutiae are of no consequence.
- [7] Shortly put, the appellants, who had among them a 4/5ths interest in a parcel of land in Vancouver, transferred, in 1996, those interests to the respondents, each of whom had a 1/10th interest, without obtaining a mortgage back for the "purchase" price of approximately

\$1,000,000.00. The respondents did not pay the money they owed the appellants and so in late November 1997 the appellants sued, claiming a vendors' lien and personal judgment, and registered a certificate of pending litigation. In the spring of 2000, the appellants brought a motion pursuant to Rule 18A for judgment but it did not come on for hearing until April 2002. In the meantime, a mortgage was registered against the respondent Chen's 7/10ths interest in the lands purportedly for \$1,788,870.00 subject to the certificate of pending litigation. There is no such charge against the interest of the respondent Lee. In the summer of 2002, the appellants obtained judgment for the amounts due but their claim for a vendors' lien was sent by the chambers judge, Bouck J., to be tried. Hence the proceeding before the Honourable Mr. Justice Stewart.

[8] After the hearing of this appeal, the Court was concerned that those who had registered charges against the land after the registration of the certificate of pending litigation, were not represented in this Court.

[9] The Court then sent a memorandum to counsel of the 19th January, 2004:

The Court invites submissions from counsel as to whether the mortgagees should be added as parties to this appeal or in some manner given notice so that they can make their own arguments against the existence of vendors' liens.

As we understand it, the relevant entries in the register are:

1.

3rd November, 1997

- registration of Certificate of Pending Litigation;

2.

October 2001

- registration of mortgage;

3.

? 2002

- registration of judgment of Bouck J.

I refer counsel to Daniell's Chancery Practice, 7th ed., vol. 1 (London: Stevens and Sons, 1901) at pp. 163, 216:

It was the aim of the Court of Chancery to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the Court perfectly safe to those who were compelled to obey it, and to prevent future litigation. For this purpose, it was necessary that all persons materially interested in the subject should generally be made parties to the suit, either as plaintiffs or defendants.

* * *

And so, to an action by a vendor to establish his lien for unpaid purchase-money, all the persons interested in the property who are subsequent in date to him, and who are to be foreclosed by him, must be made parties.

[footnotes omitted]

It would be helpful if the parties would provide us with a State of Title Certificate.

If counsel propose to make submissions, they should be in our hands within three weeks. We leave it to counsel to arrange the order of those submissions between them.

[10] As I understand the thrust of Ms. MacDonald's submission for the appellants, it is that those who acquire interests in the land after the filing of a certificate of pending litigation need not be joined in the proceedings.

[11] To that, Mr. Gregory replies that, "... insofar as the appellants seek an order that would bind anyone but the immediate parties to the appeal, it is necessary that they be joined as respondents. The subsequent charge holders should be joined." He notes, also, that the subsequent charge holders were content to let Mr. Chen and Ms. Lee argue the appeal. Further, "it is not fair on the one hand to allow the appeal because there is no third party present but deny those third parties audience on the grounds that Frances Chen and Margaret Lee are speaking for them."

[12] I shall return to this question of parties at the conclusion of the reasons in this appeal. But in paragraphs 13 to 74, I shall address the question of whether, as between the appellants and the respondents, the appellants are entitled to a lien.

The Facts

[13] In 1995, the respondent Chen proposed to the appellant Lai the purchase of 71-77 East Pender Street, a commercial property in the area of Vancouver known as Chinatown, with a view to its redevelopment. Lai took the proposal up with others and, in July 1995, the present appellants and respondents bought the property for \$1,000,000.00, half payable at completion and the balance by a mortgage to the vendor. That mortgage was discharged in early 1996. The interests of the parties in the land were:

Peter Kong Chu and Mei Yee Sung 1/5 interest

Frank Cheuk Man Lai 1/5 interest

Lam Chan and Shui Ying Wong Chan 1/5 interest

Kan Chak Wan and Yun Mui Lui 1/5 interest

Margaret Ming Wai Lee 1/10 interest

Francis Chock-Yan Chen 1/10 interest

- [14] Thus, at the time of the discharge of the mortgage, each holder or pair of holders of a 1/5th interest had invested \$200,000.00 plus a share of legal fees and property transfer tax. At some time, whether before or after the discharge of the mortgage, each holder or pair of holders had also invested some \$50,000.00 in development costs.
- [15] In 1995 or 1996, the respondent Chen, on behalf of the group, consulted architects and instructed them to prepare plans for a 28 unit concrete strata title building. It is, I think, common ground that at the outset of the transaction, the parties contemplated that monies would be borrowed on a mortgage to provide funds for the construction.
- [16] Sometime after matters were underway, a meeting took place in Hong Kong. In consequence of that meeting a minute was drawn up of which this is a translation:

Place: (Illegible) Restaurant

Attendance: CHU Kong, CHEN Lam, B, LAI Cheuk Man, WAN Chak, CHEN Chok Yan

Meeting: For the \$110,000 Canadian which each person invested subsequently, CHEN Chok Yan will return \$110,000 Canadian to each person before 15/7/96.

Land Title Office: CHEN Chok Yan suggested that \$250,000 Canadian plus interests be returned to each shareholder within a year (CHAN Lam, WAN Chak, CHU Kong, LAI Cheuk Man). CHAN Lam suggested that it would be best that \$250,000 be returned to each person within 6 months, plus interest payable. However, only if it is not possible to pay back within 6 months then it will be paid back within 12 months.

All four of us shareholders (CHAN Lam, WAN Chak, CHU Kong, LAI Chak Man) agreed that the aforesaid share-holders should be removed from the registration at the Land Title Office, and a contract would be executed at a law firm. If CHEN Chok Yan is not able to pay back the share capital within a year, it will be stipulated in the contract that said property will be used as security. If proceeds from the auction of said property fails to cover the return of the share capital plus interest, then CHEN Chok Yan will take personal responsibility for the entire balance.

In addition, the \$250,000 Canadian share capital from each person shall be calculated from 1/7/96 onwards. The sum total of share capital from CHAN Lam, CHU Kong, WAN Chak and LAI Cheuk Man is one million dollars Canadian.

It is finally agreed that the amount of loss of \$6197.13 Canadian under each person be calculated and settled at the time of the final return of the principal and interest.

Agreed to the aforesaid points:

CHEN Chok Yan, CHAN Lam, CHU Kong, WAN Chak, LAI Cheuk Man

(Signatures affixed)

[17] At trial, a dispute occurred that was not resolved concerning the proper interpretation of the word which is represented in the English version in the second paragraph as "security". The evidence is inadequate to permit a finding as to what this word conveys to a Cantonese speaking businessman.

[18] In October 1996, a series of instruments identical in form were drawn up and executed by which the original owners sold the lands to the respondents. This is one of those instruments:

This Agreement effective June 30, 1996.

BETWEEN:

PETER KONG CHU, Businessman and

MEI YEE SUNG, Businesswoman, as Joint

Tenants, both of 2237 East 55th Avenue, Vancouver, British Columbia, V5P 2A2

(the "Lenders")

OF THE FIRST PART

AND:

FRANCIS CHOK-YAN CHEN, Businessman, of

201 - 79 East Pender Street, Vancouver,

British Columbia, V6A 1S9

(the "Borrower")

OF THE SECOND PART

WHEREAS:

A. The Lenders own an undivided 1/5 interest in those certain lands and premises in the City of Vancouver, Province of British Columbia, legally known and described as:

Parcel Identifier: 014-690-411

Lot D, Block 13, District Lot 196, Plan 22415

(the "Lands")

B. The Lenders have agreed to transfer all of their right title and interest in the Lands to the Borrower on the terms provided in this Agreement.

C. The Lenders have paid FIFTY THOUSAND DOLLARS (\$50,000.00) in costs associated with the develop-ment of the Lands (the "Development Costs") and the Borrower agrees to reimburse the Lenders for the Development Costs on the terms provided in this Agreement.

THE PARTIES AGREE AS FOLLOWS:

1. The Lenders shall concurrently with the execution of this Agreement transfer all of their right title and interest in the Lands to the Borrower by execution, in registerable form, of a Freehold Transfer Form A and delivery of same to the Borrower.
 2. The purchase price for the sale of the Lands shall be TWO HUNDRED THOUSAND DOLLARS (\$200,000.00) (the "Land Price").
 3. The Borrower hereby agrees to pay to the Lenders the sum of FIFTY THOUSAND DOLLARS (\$50,000.00) to reimburse the Lenders for the Development Costs (the "Development Costs Price").
 4. The total amount of the Land Price and the Development Costs Price, namely TWO HUNDRED AND FIFTY THOUSAND DOLLARS (\$250,000.00) is hereinafter referred to as the "Loan Amount".
 5. The Borrower agrees to pay the Loan Amount to the Lenders, on June 30, 1997 (the "Due Date"), at the addresses set out in this Agreement or at such other address as the Lenders may notify the Borrower in writing, together with interest thereon at the rate of three and 875/1000 percent (3.875%) per annum, calculated half-yearly not in advance, as well after as before maturity, until the Loan Amount shall be fully paid. Interest shall be computed from June 30, 1996 and shall become due and payable on the Due Date.
 6. The parties agree and acknowledge that the sum of SIX THOUSAND ONE HUNDRED NINETY-SEVEN DOLLARS AND THIRTEEN CENTS (\$6,197.13) represents the amount of property taxes and other expenses pertaining to each one-tenth (1/10) interest in the Lands as of the date of this Agreement. Therefore the parties agree that the Loan Amount and accrued interest to be paid by the Borrower to the Lenders shall be reduced by TWELVE THOUSAND THREE HUNDRED NINETY-FOUR DOLLARS AND TWENTY-EIGHT CENTS (\$12,394.28) (the "Deducted Amount").
 7. The Borrower shall have the privilege when not in default in any of its obligations in this Agree-ment, without notice or penalty, to prepay all or any part of the monies owed by the Borrower to the Lenders, or any of them, under this Agreement. Such pre-payment shall be at the Borrower's discretion.
- 7A. The Lenders acknowledge receipt from the Borrower of a post-dated cheque dated June 30, 1997 in the amount of TWO HUNDRED FORTY-SEVEN THOUSAND TWO HUNDRED NINETY-THREE DOLLARS AND TWENTY-TWO CENTS (\$247,293.22) being all of the monies owed by the Borrower to the Lenders as of the Due Date calculated as follows:

Loan Amount

\$250,000.00

plus Interest to June 30, 1997

+ 9,687.50

\$259,687.50

Less Deducted Amount

- 12,394.28

Total due on June 30, 1997

\$247,293.22

8. In the event that the Borrower should become bankrupt or insolvent or should the Borrower be subject to the provisions of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, or any other Act for the benefit of creditors or should the Borrower go into liquidation either voluntarily or under an order of a court of competent jurisdiction or make a general assignment for the benefit of its creditors or otherwise acknowledge its insolvency, then the Lenders may, at their option, require the unpaid balance of the Loan Amount and all accrued interest, less the Deducted Amount, to become immediately due and payable.
9. Each party, upon the request of the other, shall do, execute, acknowledge and deliver or cause to be done, executed, acknowledged or delivered all such further acts, deeds, documents, assignments, transfers, conveyances, and assurances as may be reasonably necessary or desirable in order to give full effect to this Agreement.
10. This Agreement shall be binding on and enure to the benefit of the Borrower, the Lenders, and their respective successors and assigns, heirs, executors and administrators.

IN WITNESS WHEREOF the parties have affixed their hands and seals this 10 day of OCT , 1996.

[Here followed the signatures duly witnessed.]

[19] The appellants executed the necessary transfers which were registered on 27th December, 1996. At the same time, the respondents delivered the post-dated cheques.

[20] We were not enlightened as to when construction actually commenced but we were told that a contract for the construction was let. Something went wrong, however, and in March and April 1997, builders liens were filed:

Claimants

LTO

Registra-tion No.

Date Filed

Amount of

Lien

Claimed

Poemen Enterprises Ltd.

BL081878

Mar 7, 1997

\$1,075,000.00

K & C Electric Ltd.

BL99298

Mar 21, 1997

49,472.03

Inderjit Rattan dba Target Stone Slinger

BL132258

Apr 17, 1997

7,100.00

Lafarge Canada Inc. dba Lafarge Construction Materials

BL105468

Mar 26, 1997

238,404.87

Pacific Blasting Ltd.

BL106655

Mar 26, 1997

57,384.55

T O T A L

\$1,427,361.30

[21] The cheques when presented were dishonoured and, on 3rd November, 1997, the appellants commenced this action asserting a vendors' lien and registered in the Land Title Office against the lands, under No. BL373544, a Certificate of Pending Litigation.

[22] This is the prayer for relief:

WHEREFORE the Plaintiffs claim:

- a. a declaration that there exists in favour of the Plaintiffs an unpaid vendors' lien against the Land in the amount of \$884,297.88;
- b. a Certificate of Pending Litigation to be registered against the Land at the Land Title Office;
- c. an order for sale of the Land;
- d. judgment against the Defendant Chen in the amount of \$884,297.88;
- e. judgment against the Defendant Lee in the amount of \$247,293.22;
- f. pre-judgment interest;
- g. costs and
- h. such further and other relief as to this court may seem just.

For the discrepancy between the amount in subparagraph "a.", on the one hand, and the combined amounts of subparagraphs "d." and "e.", on the other, no explanation was given to us.

[23] For whatever reasons, the appellants did not pursue their litigation vigorously. On 28th May, 1998, in the builders' lien action, the Supreme Court of British Columbia ordered that the liens be discharged upon the granting of security in the sum of \$400,921.00. Some months thereafter, presumably the security having been posted, the liens were discharged.

[24] On the 1st March, 2000, the appellants applied pursuant to Rule 18A for judgment.

[25] On the 30th October, 2001, an application was accepted "subject to CPL's BL373544 and BR184421" at the Land Title Office to register a mortgage from the respondent Chen to a number of persons in the amount of \$1,788,870.00 against his 7/10ths interest in the land which is payable on demand and bears interest at 8% per annum. It allocates the principal amount among the "collective Mortgagors" [sic] as follows:

NAME OF MORTGAGEE

AMOUNT:

a) GABRIEL MAK and LILY MAK

\$342,870.00

b) CHI WAH KWAN and RAYSIALINA KWAN

\$150,000.00

c) ALAN CHI WAI LAU and LISA FUNG

\$ 80,000.00

d) WAI SHING CHIU and CHOI CHING LAM CHIU

\$250,000.00

e) NANCY LAU and WENDY KAM CHEE CHOW

\$100,000.00

f) ERIC YUE FAT CHEUK

\$150,000.00

g) WILLIAM CHEN

\$ 55,000.00

h) HUNG SHUN FONG

\$ 50,000.00

i) KEN WONG

\$ 9,000.00

j) YUEN FONG LAU and BILL WAH CHAN

\$200,000.00

k) MAY MEE LUEN WONG and HANS WING HANG WONG

\$100,000.00

l) WINNIE LAM

\$ 20,000.00

m) BI YAN MIMI CHAN

\$ 15,000.00

n) DAVID CHIEN and CONNIE CHIEN

\$ 50,000.00

o) KAN POR LAM

\$ 20,000.00

p) FREDERICK CHAN

\$ 20,000.00

q) MARTIN CHAN,

\$ 32,000.00

r) JIM LEE,

\$ 45,000.00

s) WAI CHIU

\$100,000.00

TOTAL:

\$1,788,870.00

[26] The address of all the mortgagees is given as care of Unit 108 - 11782 River Road, Richmond, British Columbia.

[27] I infer that after the Rule 18A application was brought, a war of affidavits broke out.

[28] By April 2002, these were the pleadings:

Further Amended Statement of Claim

[The first seven paragraphs identify the parties.]

8. On or about July 1, 1996 Chen, Lai, Chu on behalf of the Chus, Wan on behalf of the Wans and Chan on behalf of the Chans entered into a written agreement (the "Agreement") under which Chen agreed to purchase, and the Plaintiffs agreed to sell, the Plaintiffs' interest in the Land in consideration of \$250,000.00 to be paid to each of the Chus together, the Wans together, the Chans together and Lai, for a total of \$1,000,000.00 (the "Purchase Price").
9. The Agreement included the following terms:
 - a. the Plaintiffs would transfer registered title to their interest in the Land to Chen;
 - b. Chen would pay the Purchase Price within six months or, if that was not possible, within one year;
 - c. if Chen could not repay the Purchase Price within one year the Land would be held as security for such obligation;
 - d. Chen would pay interest on the Purchase Price commencing July 1, 1996 and
 - e. at the time of the final payment of the Purchase Price, the amount of certain expenses incurred in respect of the Land, being \$6,197.13 for each one-tenth interest in the Land, would be deducted from the amount payable to the Plaintiffs (the "Expenses").
10. In or about October of 1996 Chen proposed that the Agreement be varied, including in particular that the Wans sell their interest in the Land to Lee, rather than to Chen; the Wans agreed to this variation on the condition that Chen guarantee payment by Lee of the amount payable to the Wans pursuant to the Agreement.

11. Pursuant to the Agreement, as varied, the parties executed the following documents in or about October of 1996:
 - a. the Chus and Chen executed an agreement under which the Chus agreed to transfer to Chen their one-fifth interest in the Land upon execution of such document and Chen agreed to pay to the Chus the sum of \$247,293.22 on June 30, 1997, which amount consisted of \$250,000.00, plus interest to June 30, 1997 less one-fifth of the Expenses;
 - b. the Chans and Chen executed a document under which the Chans agreed to transfer to Chen their one-fifth interest in the Land upon execution of such agreement and Chen agreed to pay to the Chans the sum of \$247,293.22 on June 30, 1997;
 - c. Lai and Chen executed a document under which Lai agreed to transfer to Chen his one-fifth interest in the Land upon execution of such agreement and Chen agreed to pay to Lai the sum of \$247,293.22 on June 30, 1997;
 - d. the Wans and Lee executed a document under which the Wans agreed to transfer to Lee their one-fifth interest in the Land upon execution of such agreement and Lee agreed to pay to the Wans the sum of \$247,293.22 on June 30, 1997 and
 - e. Chen executed a guarantee under seal in which he guaranteed payment to the Wans of the amount payable by Lee as set out in the preceding clause.
12. Concurrent with delivery of the said documents:
 - a. the Chus, the Chans and Lai each delivered executed transfers of their registered interest in the Land to Chen;
 - b. the Wans delivered an executed transfer of their registered interest in the Land to Lee;
 - c. the Defendants delivered the following cheques dated June 30, 1997 and drawn on the account of Chen:
 - i. one cheque payable to the Wans in the amount of \$247,293.22;
 - ii. one cheque payable to the Chus in the amount of \$247,293.22;
 - iii. one cheque payable to the Chans in the amount of \$247,293.22;
 - iv. one cheque payable to Lai in the amount of \$143,418.22;(which four cheques are hereinafter referred to as the Plaintiffs' cheques) and
 - v. one cheque payable to Lai's wife, Grace Tsang in the amount of \$103,875.00.
13. The Plaintiffs' cheques were duly presented for payment on or about June 30, 1997 and were dishonoured.

14. On or about October 17, 1997 the Plaintiffs gave written notice of the dishonour to the Defendants and demanded payment of the amount of the Plaintiffs' cheques but the Defendants have refused or neglected to pay such amount or any part thereof.
15. It was an express, or in the alternative an implied term, of the Agreement, or in the alternative of the documents referred to in clauses 11(a) to (d) above (the "Closing Agreements"), that the amounts due under the Agreement, under the Closing Agreements and/or under the Plaintiffs' cheques would attach to the Land and that the Land would be held as security for the Defendants' obligations under the Agreement, under the Closing Agreements and/or under the Plaintiffs' cheques, if the amounts due thereunder were not paid on or before June 30, 1997.
16. By reason of such express or implied term, and the Defendants' failure to pay the total amount due under the Agreement, under the Closing Agreements or under the Plaintiffs' cheques on or before June 30, 1997, the Chus, the Wans, the Chans and Lai each hold an equitable mortgage or charge of the Land as security for the outstanding amount.
17. Further and in the alternative, upon the transfer by the Plaintiffs of their interest in the Land an unpaid vendors' lien arose in favour of the Plaintiffs which attached to the Land in respect of the amount due under the Agreement, the under Closing Agreements and/or under the Plaintiffs' cheques.
18. At no time have the Plaintiffs or any of them waived, abandoned or discharged their rights pursuant to the unpaid vendors' lien.

WHEREFORE the Plaintiffs claim:

- a. judgment in favour of the Chus against Chen in the amount of \$247,293.22;
- b. judgment in favour of the Chans against Chen in the amount of \$247,293.22;
- c. judgment in favour of Lai against Chen in the amount of \$247,293.22;
- d. judgment in favour of the Wans against Chen and Lee, jointly and severally, in the amount of \$247,293.22;
- e. a declaration that the Chus, the Wans, the Chans and Lai each hold an equitable mortgage or charge of the Land as security for the amount owed to them by one or both of the Defendants or for such other amount as this Honourable Court may determine;
- f. further and in the alternative, a declaration that there exists in favour of the Plaintiffs and each of them an unpaid vendors' lien against the Land equal to the amount owed to them by one or both of the Defendants, or to such other amount as this Honourable Court may determine;
- g. a Certificate of Pending Litigation to be registered against the Land at the Land Title Office;
- h. an order for sale of the Land;

- i. pre-judgment interest;
- j. costs and
- k. such further and other relief as to this court may seem just.

The reader will note that this prayer for relief is different from that in the statement of claim which is annexed to the certificate of pending litigation.

[29] For their part, the respondents put quite a different complexion on the transaction and pleaded thus:

1. The defendants specifically deny every allegation of fact set out in the statement of claim except where expressly admitted.
2. The defendant, Francis Chok-Yan Chen ("Francis Chen") and the plaintiffs, Mei Yee Sung ("Sung"), Yun Mui Lui ("Lui"), Lam Chan ("Chan"), (called "these plaintiffs"), together with Grace Yuen Lo Tsang, entered into a [sic] separate agreements dated November 18, 1994, regarding the Land described in paragraph 7 of the plaintiffs amended statement of claim, which Land is commonly known as 71 - 77 East Pender Street, Vancouver, British Columbia, whereby Francis Chen, these plaintiffs and Grace Yuen Lo Chang [sic] intended to purchase the Land and construct a five story commercial/office building with an underground parking lot on the Land (the "Project"). Subsequently, the plaintiffs, Peter Kong Chu ("Chu"), Kan Chak Wan ("Wan"), Shui Ying Wong Chan ("Ying") Frank Cheuk Man Lai ("Frank") and the defendant, Margaret Ming Wai Lee ("Margaret") joined with Frances Chen and these plaintiffs in the Project.
3. It was a fundamental term and condition of the agreement between the plaintiffs and the defendants, from the outset and after, that each party was obligated to stay with the Project to its conclusion, and if a party had to withdraw for financial reasons only, that party was obligated to have another party in the Project take his place by providing financing in the place and stead of the withdrawing party. The parties, including the plaintiffs, recognized that the defendants were persons of limited means, while the plaintiffs had considerable wealth, which was fundamental to entering into and financing of the Project, including the obtaining of first mortgage financing required to undertake and complete the Project.
4. On July 13, 1995, the Land was purchased for a consideration of \$1,000,000 and title was divided as follows:
 - (a) Chu and Sung as joint tenants - an undivided 1/5 interest;
 - (b) Frank - an undivided 1/5 interest;
 - (c) Chan and Ying as joint tenants - an undivided 1/5 interest;
 - (d) Wan and Lui as joint tenants - an undivided 1/5 interest;
 - (e) Francis Chen - an undivided 1/10 interest; and

- (f) Margaret - an undivided 1/10 interest.
5. Prior to November 1994, and until the middle part of 1996, Chu and Sung were attempting to obtain Canadian Citizenship and their involvement in the Project was the tool they used to exhibit to Immigration Canada their intention to remain in Canada in their application for Canadian citizen-ship. Once Chu and Sung applied for their Canadian citizenship in 1996, they had no further interest in the Project and not only did they want to withdraw from involvement in the Project, but they induced the other Plaintiffs to do the same, causing loss and damage to the defendants.
 6. In furtherance of completion of the Project, a first mortgage funding commitment in the amount of \$2,400,000 had been obtained and construction was commenced in 1996, with completion of the Project scheduled for the month of June, 1997.
 7. In June, 1996, Chu advised the defendants that he and his wife, Sung were no longer interested in the Project and they wanted their money back despite their original undertaking as set out in paragraph 3 hereof.
 8. The plaintiffs, who all resided and continue to reside in Hong Kong, People's Republic of China, between June and September, 1996, took the position that they would not continue with the Project, provide the required financial strength, and advance required monies to assist in its completion, taking the position that they wanted the money back that they had invested in the Project and if they could not be paid back from funds that the defendants had, then the Land would have to be sold with the un-completed building on it. The defendants, were the only ones living in Canada and were therefore, financially vulnerable to creditors, where the plaintiffs were not. To the knowledge of the plaintiffs, the defendants had very limited funds not only to complete the Project, but also to defend themselves against the plaintiffs, and the defendants were coerced into dealing with the plaintiffs, on terms basically set by the plaintiffs.
 9. The plaintiffs and the defendants negotiated individual agreements between the months of June and September, 1996, whereby the plaintiffs transferred their interest in the lands to the defendants on terms that involved individual loan agreements dated June 30, 1996, post-dated cheques dated June 30, 1997, and the guarantee of Francis Chen. Implicit in the agreements and explicitly in communications between solicitors for the parties, there was a waiving and relinquishing of vendors' liens by the plaintiffs for the purchase price, as the plaintiffs knew that any vendors' liens would prevent the defendants from being able to complete first mortgage financing for the Project required to complete the project.

10. After June 30, 1996, construction proceeded until March, 1997, when the contractor for the Project terminated the construction agreement and ceased work on the Project, while filing Builders Liens, together with five sub-contractors. The result was litigation, and work on the Project was interrupted and completion delayed, all to the knowledge of the plaintiffs. These occurrences were unforeseen by the defendants, making it impossible for them to pay the plaintiffs any monies on the due date.
11. On October 30, 1997, the plaintiffs issued the Statement of Claim herein, as amended on December 11, 1997, and claimed amongst other things a declaration that there existed in favour of the plaintiffs' unpaid vendors' liens against the Land and a Certificate of Pending Litigation to be registered against the Land at the Land Title Office. The Certificate of Pending Litigation No. BL373544 was filed against the Land on November 3, 1997.
12. The fact that the Certificate of Pending Litigation was registered against the Land on the basis of there being vendors' liens in favour of the plaintiffs, to the knowledge of the plaintiffs, made it impossible for the defendants to obtain first mortgage financing from the lender pursuant to the mortgage commitment letter, and complete the Project.
13. With respect to the matter as a whole, the defendants have suffered loss and damage and continue to suffer loss and damage due to the actions of the plaintiffs disentitling them from payment of their claims, as alleged, or at all, in that:
 - (a) The plaintiffs reneged on and thereby breached their original agreement whereby they undertook to remain involved in the Project until its completion;
 - (b) The plaintiffs were wrong in taking the position that they had vendors' liens against the Land when it was a fundamental term of the June 30, 1996, individual loan agreements that the plaintiffs had waived and relinquished their right to vendors' liens, thereby rendering the agreements null and void;
 - (c) The defendants were induced by the plaintiffs to enter into the individual loan agreements on the basis that the plaintiffs retained vendors' liens when the plaintiffs knew that to complete the Project first mortgage financing with the security of the Land was required by the defendants, rendering the individual loan agreements void;
 - (d) Chu acted in bad faith by entering into the Project only for the purpose of assisting him in obtaining Canadian Citizenship, and when it was obtained, again acted in bad faith by withdrawing from the Project and inducing the other plaintiffs to also withdraw; all contrary to the agreement between the parties as set out in paragraph 3 hereof.
 - (e) The plaintiffs acted in bad faith by reneging on the term and condition of the agreement set out in paragraph 3 hereof;
 - (f) The plaintiffs breached their fiduciary duty of good faith and loyalty owed to the defendants as joint venturers in the Project;

- (g) The plaintiffs failed to provide the defendants with reasonable notice when they insisted on terminating their involvement in the Project;
 - (h) The plaintiffs, by taking the position that they had vendors' liens against the Land and filing the Certificate of Pending Litigation, prevented and impeded the defendants from obtaining funding from the committed first mortgage financing, thereby preventing and impeding the defendants from having the ability to complete the Project and pay the monies owing, if any, to the plaintiffs;
 - (i) The circumstances set out in paragraph 10, being the termination of contract by the contractor, together with the placing of vendors' liens on the Land, released the defendants from their obligation to pay monies to the plaintiffs in accordance with the individual loan agreements, or at all.
14. The defendants ask that this action be dismissed with costs.

[30] No reply was delivered.

[31] There were also some third party proceedings but they do not require to be further noticed.

[32] On 24th and 25th April, 2002, the Rule 18A application came on for hearing before Bouck J. and resulted, as between the appellants and respondents, in this judgment, pronounced the 17th June, 2002:

THIS COURT ORDERS that:

1. the plaintiffs' application for a declaration pursuant to Rule 18A that the Plaintiffs hold an equitable mortgage, charge, or vendors lien, is dismissed;
2. judgment be granted to the plaintiffs, Kan Chak Wan and Yun Mui Lui, against the Defendant, Francis Chok-Yan Chen ("Chen"), in the amount of \$247,293.22 plus pre-judgment interest from June 30, 1997 in the amount of \$51,757.10 for a total of \$299,050.32;
3. judgment be granted to the plaintiffs, Peter Kong Chu and Mei Yee Sung, against Chen in the amount of \$247,293.22 plus pre-judgment interest from June 30, 1997 in the amount of \$51,757.10 for a total of \$299,050.32;
4. judgment be granted to the plaintiffs, Lam Chan and Shui Ying Wong Chan, against Chen in the amount of \$247,293.22 plus pre-judgment interest from June 30, 1997 in the amount of \$51,757.10 for a total of \$299,050.32;
5. judgment be granted to the plaintiff, Frank Cheuk Man Lai, against Chen in the amount of \$143,418.22 plus pre-judgment interest from June 30, 1997 in the amount of \$30,016.64 for a total of \$173,434.86;
6. the plaintiffs and the defendants will bear their own costs in relation [to] the plaintiffs' application;

- [33] Paragraph 1 of this judgment reflects Mr. Justice Bouck's conclusion that the issue arising of lien or no lien was unsuitable for disposition under Rule 18A.
- [34] As he put it (2002 BCSC 906):
- [73] I estimate it will take me about 20 to 30 working days to read, absorb, organize and fashion all of this material into an acceptable written judgment for Appeal Court purposes. The law on the right of unpaid vendors to recover a declaration for a lien or an equitable mortgage against the property in these circumstances is not simple to resolve. Nor is the application of the law on waiver. As well, counsel introduced an argument on novation during the hearing.
- [74] Taking all of these factors into consideration as best I can, I find that the application for declaratory relief is unsuitable for disposition under Rule 18A because the summary trial procedure is being used by the plaintiff for something other than its intended purpose.
- [75] In other words, the intended purpose of Rule 18A was not meant to apply to a dispute involving this amount of material and requiring such a significant amount of judicial out-of-court research and writing time. Therefore, the plaintiffs' Rule 18A declaratory application is dismissed.

The Judgment Below

- [35] The judgment now at issue was pronounced on the 6th November, 2002, after a trial which commenced on the 7th October, 2002, and continued for a further 12 days before the Honourable Mr. Justice Stewart.
- [36] Arising from that proceeding was this judgment:

THIS COURT ORDERS that:

1. the plaintiffs' claim for an order enforcing their vendors' liens is dismissed with costs;
 2. the plaintiffs' claim for a declaration that they hold an equitable mortgage or charge of the subject lands is dismissed with costs;
 3. the defendants' counterclaim is dismissed with costs; and
 4. the defendants' third-party claim as against Peter Kong Chu and Mei Yee Sung is dismissed with costs.
- [37] The reader will note that the first paragraph does not say, "The plaintiffs' claim to a vendors' lien on the lands known as Lot D, Block 13, D.L. 196, Plan 22415, City of Vancouver, is dismissed." If it did, one would infer that the court below decided that no lien ever arose.
- [38] However, as the judgment is worded, I construe it as meaning a lien did arise but for some reason it cannot be enforced.

- [39] If a vendor's lien is an equitable interest in land, it is, in principle, difficult to see how its owner can lose the right, as against the purchaser, to enforce it save by having discharged it, any more than the possessor of an equity of redemption in the absence of a foreclosure in equity can lose it save by discharge.

The Reasons for Judgment

- [40] At the outset, it is useful to note that the learned trial judge placed no credence in the evidence of the principal witnesses (the appellants Chu and Lai and the respondent Chen) on either side:
- [21] There is no point in piling example upon example. The short point is that Chu is a witness on whom I am not prepared to rely on any point advantageous to him or to any of the plaintiffs.

* * *

- [25] The short point is that Lai is not a witness upon whom I am prepared to rely in connection with any point that is to his advantage or to the advantage of any of the plaintiffs.
- [26] I turn to the defendant Chen.
- [27] Mr. Chen's testimonial reliability was destroyed during cross-examination.
- [41] The learned judge then set out a chronology of events between 1994 and 2000, and made these findings:
- [45] ... I find that as of October 10, 1996 (at the latest) some of the plaintiffs, and thereafter all of the plaintiffs, proceeded on the basis that their various interests in the land were to be transferred, if transferred at all, to the various defendants free and clear of any security interest, thus permitting the defendants to make full use of the property by way of security for the construction loans all concerned knew would have to be obtained and/or as the subject of unit sales upon completion of the project.
- [46] I reject the submission of counsel for the plaintiffs that it makes perfect sense that all that was rebuffed by the defendants was a request for a mortgage to be registered in 1996 and that vendors' liens - such liens having arisen by operation of law and without regard to what passed between the parties - existed but were held in abeyance, as it were, until June 30, 1997. In my respectful view, it does not. And I find the existence of such liens to be totally at odds with what passed between the plaintiffs and the defendants directly and indirectly between June 23, 1996 and the signing and delivery of the documents referred to above in October/November 1996.
- [47] The short point is that yes, a vendor's lien arises by operation of law, but the ultimate issue is whether in all the circumstances the Court will exercise its equitable jurisdiction and enforce such a lien: *Freeborn et al v. Goodman* 6 D.L.R. (3d) 384 (S.C.C. 1969) at 409-410.

- [48] Here I say as the trier of fact that the irresistible inference on the whole of the evidence is that by the time each of the plaintiffs put pen to paper and transferred their interest in the land to the defendants, they had made a business decision to loan the defendants money they had sunk into the project prior to June 23, 1996 and obtained in return income in the form of interest at a rate agreed upon before the documents were executed, and the opportunity (nothing more) to escape from the project without having lost a dime of their initial investment. That is what they obtained. And all they obtained. In other words, no security beyond post-dated cheques, which were of course no security at all. They gambled. I find that every alternative reasonably open to the plaintiffs was fraught with difficulty. I conclude that the plaintiffs simply balanced what they eventually did against the alternatives and proceeded as above. So be it.
- [49] In the result, I find that the defendants have discharged the onus which is placed upon them by the law as "grantees". The Plaintiffs' Prayer, in effect, that the Court enforce their various vendors' liens is dismissed.
- [42] This is the passage from *Freeborn v. Goodman*, [1969] S.C.R. 923 at 938-39, to which I understand the learned trial judge to be referring:

With the greatest respect, I am unable to find direct authority in the cases which Mr. Justice Laskin has cited for the propositions which he had stated so clearly, but even proceeding on the assumption that an equitable charge in favour of an unpaid vendor may arise immediately upon his entering into an agreement for sale, it has, I think, been recognized in the past that there may be situations in which the conduct of the vendor or the terms under which the sale is made or other circumstances make it inequitable to allow the vendor to retain his lien. In this regard reference may be had to *Austen v. Halsey* [(1801), 6 Ves. 475, 31 E.R. 1152], per Lord Eldon at p. 483; *Rice v. Rice* [(1853), 2 Drew. 73, 61 E.R. 646]; *Mathers v. Short* [(1868), 14 Gr. 254]; *Kettlewell v. Watson* [(1884), 26 Ch. D. 501]. In my opinion the principle to be followed is well expressed in the judgment of Spragge, V.-C. in *Boulton v. Gillespie* [(1860), 8 Gr. 223], where he said at p. 228:

Prima facie, certainly the lien exists, and it lies upon the grantee to rebut it. It is the vendor's "natural equity," as it has been termed, to have a lien on his estate until he has been paid for it; but the vendee may show, I apprehend, that under the circumstances of the purchase it is not equitable that such a lien should be retained, and if he can shew that the retention of such lien would defeat or even materially interfere with the known object of the purchase, so as to clog it with difficulties which it is reasonable to conclude that the parties could not have intended that the purchase should be incumbered with; then I think he rebuts the vendor's prima facie equity and establishes a state of things under which the retention of a lien would be the reverse of equitable. It is sometimes put - that the parties indicate an intention that the lien should not be preserved - sometimes that the intention to retain a lien is negatived; but inasmuch as the right to a lien does not grow out of contract or intention, but out of the natural equity of the vendor, it seems to follow that wherever it can be shewn to be more equitable that the purchaser should have his land free from the lien, than that the vendor should retain it, no lien for unpaid purchase money can exist, for the equity against it outweighs the equity in favour of it...

The Positions of the Parties

The Claim of Vendor's Lien

[43] The appellants submit:

The basis on which Mr. Justice Stewart declined to grant an order enforcing the Appellants' vendors' liens is not entirely clear from the Reasons for Judgment; his lordship's decision may have been based on an unstated finding that the Appellants had waived their liens, or based on a determination that it would, in the circumstances of this case, be inequitable to enforce the liens.

[44] They then submit that:

... if Mr. Justice Stewart found that the liens had been waived by the Appellants, he erred in law by failing to apply the proper test for determining whether or not a vendor's lien has been waived.

and, secondly:

... if Mr. Justice Stewart found that enforcement of the liens would be inequitable, he erred in law by failing to give due recognition to the equitable principles involved and failing to take the correct approach of balancing the equities between the parties.

[45] For their part, the respondents say that the issue is:

I Was His Lordship "clearly wrong" in exercising his discretion as he did?

and put this proposition:

- 5) The short answer to this appeal is that, unless the Appellants can show that Mr. Justice Stewart was clearly wrong in following binding authority from the Supreme Court of Canada, this appeal must be dismissed.
- 6) The jurisdiction to grant relief pursuant to a vendor's lien is equitable; the granting of a lien (or the refusing to grant one) is a matter of discretion. Therefore, the test on this appeal is: was the trial judge clearly wrong?
- 7) The Honourable Mr. Justice Stewart followed the decision of the Honourable Mr. Justice Ritchie (who wrote for four of the five judges who heard the appeal) in *Freeborn v. Goodman*, [[1969] S.C.R. 923] and correctly applied that law. Mr. Justice Stewart could not have been wrong in following *Freeborn*. It is the only [sic] Supreme Court of Canada that speaks to the considerations in this appeal; this Court is bound to follow this decision in the face of any authority that is not consistent with it.

Analysis - The Law of Vendor's Liens

[46] I have already remarked that the judgment below, as drawn up, accepts that vendor's liens did arise as between the appellants and the respondents.

[47] In light of the judgment of this Court in *Gordon v. Hipwell*, supra, I do not see how the learned judge could have held the contrary although, as I understand Mr. Gregory's argument, he did at times appear to be submitting that the learned judge held that as between these vendors and these purchasers no lien ever arose.

[48] *Gordon v. Hipwell* was a hard case. The dispute in this Court was between Gordon, the vendor, who had lost the jewellery given him by Hipwell in payment by a forfeiture to the Crown, the jewellery having been smuggled into Canada, and lost his claim to the lands as unpaid vendor because the caveat which he had placed against the lands, because of a series of fraudulent acts, was removed and the land transferred into the name of a bona fide purchaser for value, and the Attorney General of British Columbia as representing the assurance fund established under the Land Registry Act.

[49] Robertson J.A. said this at 451 (W.W.R.):

Next for consideration is the question, apart from the provisions of the Land Registry Act to be referred to later, whether in equity the respondent had a vendor's lien constituting a vested interest in the land by itself without a declaration of a court of equity that such a lien existed. When the respondent conveyed the land to Hipwell, although he divested himself of all interest, legal or equitable, in the land, because of the failure to pay the purchase-price, he had a vendor's lien, "unless an intention, and a manifest intention, that it shall not exist, appears": See *Mackreth v. Symmons* (1808), 15 Ves. Jun 329 at 337 and 341, 33 E.R. 778.

In the conveyance, made pursuant to the Short Form of Deeds Act, R.S.B.C. 1936, ch. 306, from the respondent to Hipwell the former released all his claims, both at law or in equity, upon the lands in question. It is submitted that he thereby abandoned his vendor's lien. I think this provision has no application to a lien arising between the parties to the deed, by reason of the failure of the appellant to pay the purchase-price. The covenant was made in consideration of this payment, which the respondent thought had been made, and should not operate against the respondent, who certainly had no intention of giving up any rights which he had against the appellant for failure to pay the consideration. Under these circumstances I think there was no "manifest intention" that the lien should not exist.

A vendor's lien for 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.

[50] He then turned to the question which seems to have vexed some 19th century judges of whether the lien exists until declared to exist by a court of equity. In the course of his discussion, he referred again to *Rice v. Rice*, supra, and to *Kettlewell v. Watson* (1884), 26 Ch.D. 501, both cited in the passage from *Freeborn v. Goodman*, quoted supra, referred again, at p. 457, to *Mackreth v. Symmons*, supra, and concluded that such a lien arose by operation of equity and did not require a declaration to exist. The passage from *Mackreth v. Symmons* referred to, although not quoted by Robertson J.A., is this, at 339-340:

It is not however necessary to decide that point; as this is an Equity, that in ordinary cases will affect a purchaser. Upon principle, without authority, I cannot doubt that. It goes upon this; that a person, having got the estate of another, shall not, as between them, keep it, and not pay the consideration; and there is no doubt, that a third person, having full knowledge, that the other got the estate without payment, cannot maintain, that though a Court of Equity will not permit him to keep it, he may give it to another person, without payment. It is not however necessary to discuss that upon general principles; as it has been repeatedly stated by authorities, that ought at this time to bind upon that point.

[51] He then turned to the issue of whether Gordon's loss could be visited on the assurance fund. He held that it could, founding himself on the proposition (p. 460) that Hipwell, because of the vendor's lien, was a trustee of the lands for Gordon for the purchase price and thus Gordon was a cestui que trust.

[52] Bird J.A., in separate reasons, reached the same conclusions.

[53] O'Halloran J.A. approached the case differently, at 443-444:

As I understand the modernized interpretation of the principles to be extracted from the English decisions to which we were referred, beginning with the leading case of *Mackreth v. Symmons* (1808), 15 Ves Jun 329, 33 E.R. 778, examined in 2 *White & Tudor's Leading Cases in Equity*, 9th ed., p. 1928, and subsequent decisions, such as *Rice v. Rice*, supra; *In re Albert Life Assur. Co.*, supra, at p. 178; *Lysaght v. Edwards* (1876), 2 Ch.D. 499, at 506, 45 L.J. Ch. 554; *Kettlewell v. Watson* (1882) 21 Ch.D. 685, 51 L.J. Ch. 281, at 283, affirmed 26 Ch.D. 501, 53 L.J. Ch. 717, and *Allen v. Inland Revenue Commrs.*, [1914] 2 K.B. 327, 83 L.J.K.B. 649, at 651, if the Gordon-Hipwell episode had occurred in England, Hipwell, even after registration of the conveyance to him, would have remained a trustee of the lands for Gordon so long as the purchase-price was unpaid, on the principle in equity that it is against conscience for a purchaser to retain complete title to land without paying his vendor in full. Such a conclusion need not, as I see it, have rested upon any notional or artificial concept of vendor's lien, but could be supported in quasi-contract on the principle of unjust enrichment; and see discussion in *Wessels v. Thompson* (unreported) as examined in this court on May 18, 1945. In that view it seems an English court of equity would have regarded Gordon as a cestui que trust possessing an equitable estate in the land until he received the purchase-price in full, even though Hipwell had title and possession.

But in my judgment, with respect, the British Columbia Land Registry Act, once indefeasible title issued in Hipwell's name, does not permit that principle to extend to recognize any equitable interest in Gordon beyond a judgment in personam. With certain statutory exceptions, an indefeasible title combines within itself all legal and equitable estates to give the registered proprietor a title good against the world.

[54] If it were open to me to do so, I would accept and adopt the simplicity of approach of O'Halloran J.A. that what is at stake is unjust enrichment for which 50 years later the remedy of constructive trust is well known. One would thereby avoid struggling with the authorities which led to the judgment of the Lord Chancellor in *Mackreth v. Symmons*, supra. Those

authorities begin with *Hearn v. Botelers* (1604) Cary 25, 21 E.R. 14, and end with *Hughes v. Kearney* (1803) 1 Sch. & Lef. 132. I attach to these reasons as an appendix a summary of those cases.

- [55] I come now to *Freeborn v. Goodman*, *supra*. It was an appeal by purchasers of units in a cooperative apartment building against a judgment of the Ontario Court of Appeal granting possession of their suites to a second mortgagee of the lands who had obtained judgment in a foreclosure action against the mortgagor and owner of the building, Hamilton Benvenuto Apartments Limited ("Benvenuto"). The appellants' interests were shares in the company and a grant by the company to them of an exclusive right of occupancy. This form of "tenure" was then new. Benvenuto had purchased the land from one Frisina and given the second mortgage to secure the unpaid balance of the purchase price. Ritchie J. said, at 933-34:

I think that at the very least the interest taken by the appellants in the present case was a demise secured by a covenant for quiet possession which a court of equity would undoubtedly enforce by restraining Benvenuto from ejecting any of them before default, and as the second mortgagee and its assignee Stein and the respondent who took his assignment without consideration, must all be taken to have had full knowledge of all the circumstances, including the covenant for quiet possession, I conclude that the respondent was bound by that covenant which is enforceable at equity by restraining him in the same manner as it would have been enforceable against Benvenuto.

Not only must the respondent be taken to have had notice of the interests of the appellants, but the appellants were in actual occupation of their suites when the second mortgage was given, and in this regard reference may be had to the case of *Barnhart v. Greenshields* [9 Moo. P.C.C. 18, 14 E.R. 204], decided in the Privy Council in 1853, which appears to be accepted as a modern authority. (See *Halsbury's Laws of England*, 3rd ed., vol. 14, p. 546 and vol. 34 at pp. 303 and 366, and *Hanbury's Modern Equity*, 8th ed., at p. 33.) In that case at p. 33 their Lordships accepted the statement of the rule governing such circumstances as made by Sir James Wigram in the case of *Jones v. Smith* [(1841), 1 Hare, 43 at 60.], where he said:

If a person purchases an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the party in such occupation may have in the land...for possession is *prima facie* evidence of seisin in fee.

[underlining added]

- [56] Thus, the central point in the judgment is that the second mortgagee took subject to the purchaser's prior right of possession.
- [57] The vendor's lien point arose because Laskin J.A., in the Ontario Court of Appeal had given "expression to the opinion that even if the appellants had such an equitable interest, their title was nonetheless subject to Frisina's prior equitable interest as unpaid vendor."

- [58] In my opinion, what Ritchie J. was addressing was a question of priorities between unpaid vendors and third parties who have acquired interests in the land without any knowledge of or assent to a vendor's lien.
- [59] Thus, in *Boulton v. Gillespie* (1860), 8 Gr. 223, one of the authorities cited, the contest was between the assignees in bankruptcy of the vendor and a purchaser from the original purchasers who testified he knew nothing of any unpaid notes on the original sale. Indeed, in that case, the vendor himself testified that he had never intended that there should be any lien.
- [60] In my opinion, upon a close reading, *Freeborn v. Goodman*, *supra*, does not stand for the proposition that when a lien has arisen between vendor and purchaser, the court has a "discretion" to decline to enforce the lien on any vague concept of "unfairness".
- [61] If the proposition, upon which the learned judge appears to be founding, exists, one would expect to find it elucidated in Story's *Equity Jurisprudence*, one of the great legal texts of all time, first published in 1835. The edition available to me is the 13th edition published in 1886 (Boston: Little, Brown, and Company) of which the editor, M. M. Bigelow, PH.D., said in the preface, "... the original text and notes reappear intact ... entitled to speak again with all the weight of authority of Mr. Justice Story." It is worth noting that Story (1779-1845) was a judge of the Supreme Court of the United States. He was more or less a contemporary of Lord Eldon (1751-1838) who was Lord Chancellor effectively from 1801 to 1827, and whose judgments turn up from time to time in the text, as do those of Lord Hardwicke, Lord Chancellor, 1737-1756 and Lord Thurlow, Lord Chancellor 1778-1783 and late 1783-1792. Thus, by the time Story wrote, the great work of the development of equity as we know it had been completed, although still to come were the floating charge and unjust enrichment with the remedy of constructive trust.
- [62] Passages relevant to the matter at hand are part of Chapter XXXIII, "Implied Trusts". The passage on vendor's liens begins at page 554, paragraph 1215, of vol. 2, and continues to page 579, paragraph 1232. It is, in part [footnotes have been omitted]:
1215. In the next place we may enter upon the consideration of that class of implied trusts arising from what are properly called equitable liens, by which we are to understand such liens as exist in equity, and of which Courts of Equity alone take cognizance. A lien ... is not, strictly speaking, either a *jus in re* or a *jus ad rem*; that is, it is not a property in the thing itself, nor does it constitute a charge upon the thing.
- * * *
1217. But there are liens recognized in equity whose existence is not known or obligation enforced at law, and in respect to which Courts of Equity exercise a very large and salutary jurisdiction. In regard to these liens it may be generally stated that they arise from constructive trusts. They are therefore wholly independent of the possession of the thing to which they are attached as a charge or incumbrance, and they can be enforced only in

Courts of Equity. The usual course of enforcing a lien in equity, if not discharged, is by a sale of the property to which it is attached. Of this we have a strong illustration in the well-known doctrine of Courts of Equity, that the vendor of land has a lien on the land for the amount of the purchase-money, not only against the vendee himself, and his heirs and other privies in estate, but also against all subsequent purchasers having notice that the purchase-money remains unpaid. To the extent of the lien the vendee becomes a trustee for the vendor; and his heirs and all other persons claiming under them with such notice are treated as in the same predicament.

* * *

1219. The principle upon which Courts of Equity have proceeded in establishing this lien in the nature of a trust is, that a person who has gotten the estate of another ought not in conscience as between them to be allowed to keep it and not to pay the full consideration money. A third person having full knowledge that the estate has been so obtained ought not to be permitted to keep it without making such payment, for it attached to him also as a matter of conscience and duty. It would otherwise happen that this vendee might put another person into a predicament better than his own, with full notice of all the facts.

[emphasis mine]

* * *

1221. The true origin of the doctrine may with high probability be ascribed to the Roman law, from which it was imported into the Equity Jurisprudence of England. By the Roman law the vendor of property sold had a privilege or right of priority of payment in the nature of a lien on the property for the price for which it was sold, not only against the vendee and his representatives, but against his creditors and also against subsequent purchasers from him. For it was a rule of that law, that although the sale passed the title and dominion in the thing sold, yet it also implied a condition that the vendee should not be master of the thing so sold, unless he had paid the price or had otherwise satisfied the vendor in respect thereof, or a personal credit had been given to him without satisfaction....

* * *

1224. Now the same principle is applied in English Jurisprudence. Generally speaking, the lien of the vendor exists; and the burden of proof is on the purchaser to establish that in the particular case it has been intentionally displaced or waived by the consent of the parties. If under all the circumstances it remains in doubt, then the lien attaches. The difficulty lies in determining what circumstances are to be deemed sufficient to repel or displace the lien, or to amount to a waiver of it. And upon the authorities this is left in such a state of embarrassment that a learned judge has not hesitated to say that it would have been better at once to have held that the lien should exist in no case, and that the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly that a purchaser might be able to know without the judgment of a court in what

cases it would and in what it would not exist. At present that certainty cannot be generally affirmed.

[The learned judge who found the authorities in a state of embarrassment was Lord Eldon in *Mackreth v. Symmons*, *supra*.]

* * *

1226. In the next place the taking of a security for the payment of the purchase-money is not of itself, as it was in the Roman law, a positive waiver or extinguishment of the lien. It is perhaps to be regretted that it has not been so held; as when a rule so plain is once communicated, if the vendor should not take an adequate security he would lose his lien by his own fault. But the taking of a security has been deemed at most as no more than a presumption, under some circumstances, of an intentional waiver of the lien, and not as conclusive of the waiver. And if a security is taken for the money, the burden of the proof has been adjudged to lie on the vendee to show that the vendor agreed to rest on that security and to discharge the land. Nay even the taking of a distinct and independent security, as for instance of a mortgage on another estate, or of a pledge of other property, has been deemed not to be conclusive evidence that the lien is waived. The taking of bills of exchange drawn on and accepted by a third person, or by the purchaser and a third person, has also been deemed not to be a waiver of the lien, but to be merely a mode of payment. And it has been laid down as clear doctrine that in general where a bill, note, or bond is given for the whole or a part of the purchase-money, the vendor does not lose his lien for so much of the purchase-money as remains unpaid, even though it is secured to be paid at a future day, or not until after the death of the purchaser.

[In a note to paragraph 1226, at page 567, Story says of Lord Eldon's judgment:

It is greatly to be regretted that the English Jurisprudence, instead of dealing in nice distinctions, had not followed out the plain and convenient rule of the civil law, that the taking of any security or giving any credit was an extinguishment of the lien.]

[63] The authority given by Story for the concluding passage of paragraph 1226 is the judgment of Lord Lyndhurst in *Winter v. Lord Anson* (1827), 3 Russ. R. 488, in which the facts, as set out in the head note, were these:

By an agreement for the sale of an estate, the purchase money, with interest, was to be secured by the bond of the purchaser, and was to remain so secured during the life of the vendor. The conveyance, which was afterwards executed, expressed that the purchase money had been paid, and the vendor's receipt was indorsed upon it; but, in fact, only a part of the price had been paid, and the residue was secured by the purchaser's bond, conditioned for payment of the principal with interest, within twelve months after the death of the vendor; and of interest in the mean time.

and, at 491-492:

It was said in the argument, that this was the case of an annuity; and *Mackreth v. Symmons* was cited on the part of the defendant: but the grounds of the judgment in that case do not apply to the present. In observing upon that part of the question which related to the annuities, Lord Eldon reasons upon the nature of the annuities; they were upon lives. "If the annuities," he said, "had been paid, there must have been a difference in the estimation; also, *de anno in annum*, the value was decreasing, not only as the annuities were wearing out, but also as the number of annuitants was decreasing by death. It is impossible, it is not natural," he observes, "to suppose that parties, dealing for the consideration of annuities and the purchase of a reversion, which might not take effect in possession, until all the annuitants were dead, relied on that reversion as security in addition to the indemnity by the bond." - "I have felt from the first," he said, "that there is upon the part of the plaintiff that natural justice and equity, which excite a wish that I could enforce the lien;" but as far as related to the annuities, he was of opinion, upon the particular grounds which I have stated, that he could not. I may add, that, even in the case of an annuity for lives, Lord Camden, in *Tardiff v. Scrughan*, [stated in *Blackburne v. Gregson*, 1 Bro. C.C. 423] was of opinion in favour of the lien. Here, however, what is called the annuity is in fact nothing more than the interest of so much of the purchase money as remained unpaid, and which interest was of course to continue until the principal should be discharged.

As in this case, then, there was no agreement for the extinguishment of the lien, and as, in my judgment, there is nothing in the transaction itself, as evidenced by the instruments, leading to a clear and manifest inference that such was the intention of the parties, I think it should be declared, that the plaintiffs have a lien upon the estate in question for the residue of the purchase money.

[emphasis mine]

[64] I now turn to a modern scholar, the late Malcolm M. MacIntyre, who in the *Canadian Bar Review*, in an article "Modern Consequences of Earlier Confusion between a Vendor's Lien and the Interest of a *Cestui Que Trust*" (1952), 30 Can. Bar Rev. 1016, was critical of the reasoning of this Court in *Gordon v. Hipwell*, *supra*, saying, in part, at 1016:

The case of *Gordon v. Hipwell* presents interesting and unusual facts and raises fundamental problems concerning the nature of an unpaid vendor's equitable lien. The case also demonstrates that legislation (such as the British Columbia Land Registry Act) providing for modified Torrens land titles registration does not make obsolete all rules of law and equity relating to land which might be covered in a general analytical course in real property. On most of the problems raised in *Gordon v. Hipwell* the British Columbia Court of Appeal divided and I found myself disagreeing with both sides of the divided court.

[65] Later he said, at 1022-24:

... the majority assumed that *Gordon* was entitled to an unpaid vendor's lien, but might have reached the same result had it given that question consideration. There are cases which deny a lien when the circumstances in which the conveyance was made offer manifest evidence of intention not to rely on a lien. There was in fact clear evidence of such intention in *Gordon v.*

Hipwell. But in the great bulk of the cases the courts yield to the impulse to assist the vendor applying for the declaration of lien. He needs help, and the lien is available only against the purchaser and those claiming through him otherwise than as bona fide purchasers for value. No great harm is done to anyone in *Gordon v. Hipwell* who has any moral right to object. The declaration gives the unpaid vendor the right to have the land he has incautiously conveyed sold to pay as much of the unpaid purchase money as it will fetch. The vendor can get a deficiency judgment for the balance. The knowledge that the court will declare a lien is an effective inducement to payment without resort to the courts.

On some such basis the Chancellor first intervened to create the doctrine, which at the time of its origin was much more necessary for the protection of the vendor than it is today, because land then was not available for the satisfaction of a debt. Without the doctrine of vendor's lien the unfortunate grantor would have parted with his land and been without effective remedy for his price. For these reasons courts have been generous in granting the lien.

[Dr. MacIntyre was referring to the fact that until the Judgments Act 1864 the vendor had no effective remedy at law because land could not be sold at law to answer a judgment.]

Unfortunately, in cases which did not involve any problem connected with the unpaid vendor's lien, judgments purporting to explain it were delivered. These judgments, through our all too common method of preparing factums and writing judgments by means of scissors and paste, have engulfed the whole subject in a mass of confusion.

The two chief offenders have been cases in which the vendor under an agreement for sale has been pursuing his remedies for specific performance or cancellation, and cases in which someone sees fit to expound the metaphysical mysteries of equitable conversion. The following quotation demonstrates the confusion from the first class of cases as set forth in one of the second class of cases:

[The settled doctrine of equity is] that from the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchase of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money...

It is of course impossible to prove that this reference to vendor's lien by the Master of the Rolls as "arising at the moment you have a valid contract for sale" is a slip. One can only say that since (1) the vendor by hypothesis has at this stage his legal title and (2) the purchaser may well pay cash in full against delivery of the deed or may execute a mortgage to secure the unpaid purchase price, it is unnecessary to talk about giving the vendor a lien, at least until we have seen what happens when the vendor conveys. The vendor who still has legal title needs an equitable lien much less than a cat needs two tails. Such a vendor has his remedies for specific performance or cancellation.

That situation is obviously very different from the case in which the vendor has conveyed away his land without having received payment. Here the vendor may need a lien. The question whether he has a lien at the moment the contract is entered into never has and never will come up but, on the construction which the court in *Gordon v. Hipwell* made of the nature of the vendor's lien, the question whether the lien came into existence before a declaration by the court may be said to have come up....

[66] Much of the article is addressed to the Court of Appeal's finding that Gordon was a cestui que trust, a conclusion with which Dr. MacIntyre thoroughly disagreed, albeit making no reference to Story. But he plainly did not disagree with the proposition that an unpaid vendor who has conveyed without receiving security may very well need a lien and there is no need for him not to have one.

[67] On all these authorities, I conclude that as between the appellants and the respondents a vendors' lien did arise. The respondents "cannot in good conscience keep the land without paying for it".

[68] Thus, this appeal must be allowed.

[69] But the question which then arises is what is the order of the Court to be?

[70] I appreciate that Ms. MacDonald will rely on s. 250 of the Land Title Act, R.S.B.C. 1996, c. 250 and assert that the lien affects all those on the title after the certificate of pending litigation.

[71] This is the section:

31 If a caveat has been lodged or a certificate of pending litigation has been registered against the title to land,

- (a) the caveator or plaintiff, if that person's claim is subsequently established by a judgment or order or admitted by an instrument duly executed and produced, is entitled to claim priority for that person's application for registration of the title or charge so claimed over a title, charge or claim, the application for registration, deposit or filing of which is made after the date of the lodging of the caveat or registration of the certificate of pending litigation, and
- (b) if proof of service of notice of claim to priority on the subsequent applicant is provided to the registrar before registration is effected, the registration of the title or charge claimed by the caveator or plaintiff relates back to and takes effect from the time of the lodging of the caveat or registration of the certificate of pending litigation, and that time, as well as the time of the application for registration of the title or charge so claimed, must be endorsed on the register.

[72] She may be right but I think it would be wrong not to give the charge holders the opportunity to address the question of the order of this Court.

[73] Therefore, counsel for the appellants is to draw up what she says is the proper order of this Court and submit it with whatever suggestion she may have as to fixing a time for a further hearing and giving notice to the charge holders.

[74] Counsel for the respondents may reply. The Court will then decide on the further proceedings. We leave to counsel the timing of these further submissions but should appreciate their being in our hands no later than the 15th May, 2004.

THE SECOND APPEAL

[75] These are the pleadings at issue in this appeal:

The counterclaim -

- 1) The Defendant, Francis Chok-Yan Chen ("Francis Chen") and the Plaintiffs, Mei Yee Sung ("Sung"), Yun Mui Lui ("Lui"), Lam Chan ("Chan"), (called "These Plaintiffs"), together with Grace Yeun Lo Tsang, entered into a [sic] separate agreements dated November 18, 1994, regarding the Land described in paragraph 7 of the Plaintiffs amended statement of claim, which Land is commonly known as 71 - 77 East Pender Street, Vancouver, British Columbia, whereby Francis Chen, These Plaintiffs and Grace Yuen Lo Chang [sic] intended to purchase the Land and construct a five story commercial/office building with an underground parking lot on the Land (the "Project").
- 2) Subsequently, the Plaintiffs, Peter Kong Chu ("Chu"), Kan Chak Wan ("Wan"), Shui Ying Wong Chan ("Ying"), Frank Cheuk Man Lai ("Frank") and the Defendant, Margaret Ming Wai Lee ("Margaret") joined with Francis Chen and These Plaintiffs in the Project with a view of profit (the "Joint Venture Agreement"). Accordingly, the parties were partners or joint venturers and owed each other fiduciary duties of honesty and disclosure respecting the basis upon which the parties formed the Joint Venture Agreement. These duties extended to representations and non-disclosures, which predated the formation of the Joint Venture.
- 3) Before November 1994, and until the middle part of 1996, Chu and Sung were attempting to obtain Canadian citizenship and their involvement in the Project was the tool they used to exhibit to Immigration Canada their intention to remain in Canada in their application for Canadian citizenship. They did [sic] were not truly committed to the project, except as a vehicle to obtain their citizenship status in Canada. In breach of their fiduciary obligations to the Defendants, Chu and Sung told the Defendants that they were committed to the project. Further, Chu and Sung and [sic] did not tell the Defendants that they viewed the Project as a tool to aid them (Chu and Sung) in immigrating to this country.
- 4) It was a fundamental term and condition of the Joint Venture Agreement that:
 - a) each party was obligated to stay with the Project to its conclusion,

- b) if a party had to withdraw for financial reasons only, that party was obligated to have another party in the Project take his place by providing financing in the place and stead of the withdrawing party.

In the alternative, it was an implied term of the Joint Venture Agreement that none of the joint venturers would leave the joint venture except on ample notice.

- 5) The parties, including the Plaintiffs, recognized that the Defendants were persons of limited means, while the Plaintiffs had considerable wealth, which was fundamental to entering into and financing of the Project, including the obtaining of first mortgage financing required to undertake and complete the Project.
- 6) On July 13, 1995, the Land was purchased for a consideration of \$1,000,000.00 and title was divided as follows:
 - a) Chu and Sung as joint tenants - an undivided 1/5 interest;
 - b) Frank - an undivided 1/5 interest;
 - c) Chan and Ying as joint tenants - an undivided 1/5 interest;
 - d) Wan and Lui as joint tenants - an undivided 1/5 interest;
 - e) Francis Chen - an undivided 1/10 interest; and
 - f) Margaret - an undivided 1/10 interest.
- 7) In furtherance of completion of the Project, a first mortgage funding commitment of \$2,400,000.00 had been obtained and construction was commenced in 1996, with completion of the Project scheduled for the month of June 1997.
- 8) Once Chu and Sing applied for their Canadian citizenship in 1996, they had no further interest in the Project and not only did they want to withdraw from involvement in the Project, but they induced the other Plaintiffs to do the same, causing loss and damage to the Defendants.
- 9) In June 1996, Chu advised the Defendants that he and his wife, Sung were no longer interested in the Project and they wanted their money back despite the terms of the Joint Venture Agreement.
- 10) The Plaintiffs all resided and continue to reside in Hong Kong, People's Republic of China. Between June and September, 1996, they took the position that they would not continue with the Project, provide the required financial strength, and advance required monies to assist in its completion. The Plaintiffs took the position that they wanted the money back that they had invested in the Project and if they could not be paid back from funds that the Defendants had, then the Land would have to be sold with the uncompleted building on it. The Defendants were the only Joint Venturers living in Canada and were therefore, financially vulnerable to creditors, whether [sic] the Plaintiffs were not. To the knowledge of

the Plaintiffs, the Defendants had very limited funds not only to complete the Project, but also to defend themselves against the Plaintiffs, and the Defendants were coerced into dealing with the Plaintiffs, on terms basically set out by the Plaintiffs.

- 11) The Plaintiffs and the Defendants negotiated individual agreements between the months of June and September 1996, whereby the Plaintiffs transferred their interest in the lands to the Defendants on terms that involved individual loan agreements dated June 30, 1996, post-dated cheques dated June 30, 1997, and the guarantee of Francis Chen. At the time of negotiating these agreements, the Plaintiffs knew that their breach of the Joint Venture Agreement had placed the Defendants in a position of intense vulnerability. At all material times when the parties were negotiating the agreements to which this paragraph refers, the parties understood and agreed that, if the transaction completed, the Defendants would continue to build the project out. In order to do so they would be free to:
 - a) mortgage the property to finance the building;
 - b) presell units in the Project in order to finance the project's construction;
 - c) mortgage, sell or presell all or part of the Project to pay the Plaintiffs; or
 - d) any combination of the above.
- 12) After June 30, 1996, construction proceeded until March 1997, when the contractor for the Project terminated the construction agreement and ceased work on the Project, while filing Builders Liens, together with five sub-contractors. The result was litigation, and work on the Project was interrupted and completion delayed, all to the knowledge of the Plaintiffs. These occurrences were unforeseen by the Defendants, making it impossible for them to pay the Plaintiffs any monies on the due date.
- 13) On October 30, 1997, the Plaintiffs issued the Statement of Claim herein, as amended on December 11, 1997, and claimed amongst other things a declaration that there existed in favour of the Plaintiffs' unpaid vendors' liens against the Land and a Certificate of Pending Litigation to be registered against the Land and the Land Title Office. The Plaintiffs filed Certificate of Pending Litigation No. BL373544 against the Land on November 3, 1997 (the "CPL"). At all material times the Plaintiffs were aware of the facts that indicated that they had no basis for claiming a vendor's lien. Their conduct in filing the CPL was without reasonable justification, and abusive. It has substantially nullified the contractual benefits the Defendants reasonably expected to accrue to them, that is, their ability to deal with the Project.
- 14) The fact that the Certificate of Pending Litigation was registered against the Land on the basis of there being vendors' liens in favour of the Plaintiffs, to the knowledge of the Plaintiffs, made it impossible for the Defendants to obtain first mortgage financing from the lender pursuant to the mortgage commitment letter, and complete the Project.

- 15) With respect to the matter as a whole, the Defendants have suffered loss and damage and continue to suffer loss and damage due to the actions of the Plaintiffs as set out below:
- a) The Plaintiffs reneged on and thereby breached their original agreement whereby they undertook to remain involved in the Project until its completion;
 - b) The Plaintiffs were wrong in taking the position that they had vendors' liens against the Land when it was a fundamental term of the June 30, 1996, individual loan agreements that the Plaintiffs had waived and relinquished their right to vendors' liens, thereby rendering the agreements null and void;
 - c) The Defendants were induced by the Plaintiffs to enter into the individual loan agreements on the basis that the Plaintiffs retained vendors' liens when the Plaintiffs knew that to complete the Project first mortgage financing with the security of the Land was required by the Defendants, rendering the individual loan agreements void;
 - d) Chu acted in bad faith by entering into the Project only for the purpose of assisting him in obtaining Canadian citizenship, and when it was obtained, again acted in bad faith by withdrawing from the Project and inducing the other Plaintiffs to also withdraw; all contrary to the Joint Venture Agreement;
 - e) The Plaintiffs acted in bad faith by reneging on the term and condition of the Joint Venture Agreement;
 - f) The Plaintiffs breached their fiduciary duty of good faith and loyalty owed to the Defendants as joint venturers in the Project;
 - g) The Plaintiffs failed to provide the Defendants with reasonable notice when they insisted on terminating their involvement in the Project;
 - h) The Plaintiffs, by taking the position that they had vendors' liens against the Land and filing the Certificate of Pending Litigation, prevented and impeded the Defendants from obtaining funding from the committed first mortgage financing, thereby preventing and impeding the Defendants from having the ability to complete the Project and pay the monies owing, if any, to the Plaintiffs;
 - i) The circumstances set out in paragraph 10, being the termination of contract by the contractor, together with the placing of vendors' liens on the Land, released the Defendants from their obligation to pay monies to the Plaintiffs in accordance with the individual loan agreements, or at all.
- 16) The Plaintiffs breached their fiduciary obligations and the terms of the Joint Venture agreement as set out above, thereby causing the Defendants loss and damage. The Defendants claim the right to set off their damages for those breaches against any claims the Plaintiffs may have against them.

- 17) The Defendants, relying on the course of negotiations (that is the discussions concerning their right to presell and mortgage the Property as set out in paragraph 11, above) did in fact presell portions of the property and borrowed money on the strength of their ownership in the property. This Counterclaim refers to these buyers, lenders, etc. collectively as the "Later Lenders."
- 18) In the circumstances, it is inequitable that the Plaintiffs would be entitled to vendor's liens. In the alternative the Plaintiffs by their conduct referred to above waived any lien rights they had.

WHEREFORE THE DEFENDANTS CLAIM:

- A. An order setting aside the contracts that are in issue in this transaction;
- B. General damages against each of the Plaintiffs, Peter Kong Chu, Mei Yee Sung, Kan Chak Wan, Yun Mui Lui, Lam Chan, Shui Ying Wong Chan and Frank Cheuk Man Lai, for breach of the joint venture agreement.
- C. General damages against Chu and Sung for their conduct that induced the Defendants to enter into the joint venture agreement in this lawsuit.
- D. General damages against the Plaintiffs for filing their Vendor's liens;
- E. General damages at large;
- F. A set off any claim the Plaintiffs may have against the Defendants.
- G. Special Damages.
- H. An order directing the Registrar of Land [Titles] to remove the CPL from the title to the Project.
- I. In the alternative to H, a declaration that any vendor's lien is subject in priority to the claims of the Later Lenders.
- J. Costs.

The statement of defence to counterclaim -

1. The Plaintiffs deny each and every allegation of fact contained in the Counterclaim.
2. The Plaintiffs repeat and rely on the allegations of fact set out in the Statement of Claim.
3. Further, if the Plaintiffs were ever party to an agreement with the Defendants which included the term set out in paragraph 4 of the Counterclaim, which is denied:
 - a. such agreement was expressly or by implication terminated or rescinded by agreement of the parties on or about July 1, 1996 or, in the alternative, in or about October of 1996 or

- b. the Plaintiffs were released of their obligations under such agreement by way of accord and satisfaction which accord was entered into by the parties on or about July 1, 1996 or, in the alternative, in or about October of 1996 and was satisfied by the Plaintiffs in or about October of 1996.
- 4. In further answer to paragraph 14 of the Counterclaim, the Plaintiffs say that the Defendants did not at any time have a binding commitment letter from a lender and did not meet, and were not able to meet, the conditions to which their construction financing was subject; the Plaintiffs' registration of a Certificate of Pending Litigation was not the ultimate cause of the Defendants' failure to obtain construction financing.
- 5. Further and in the alternative, the Plaintiffs say that if the Defendants have suffered any loss or damage, which is denied, such loss or damage was not caused by any actions of the Plaintiffs or any of them but arose from other causes including one or more of the following:
 - a. problems with their construction contractor, or a dispute or disputes with their construction contractor, which resulted in numerous claims of builders lien being registered against the Land;
 - b. the Defendants' delay in resolving their dispute with their construction contractor and delay in obtaining discharges of the claims of builders lien registered against the Land;
 - c. the Defendants' decision to proceed with the Project, rather than agreeing to the Land being sold;
 - d. the Defendants' inability to meet the conditions required to obtain construction financing;
 - e. the Defendants' inability to raise the additional equity funding required to proceed with the Project;
 - f. the Defendants' decision to proceed with construction of the Project in the absence of a binding commitment regarding construction financing, without the ability to meet the specified conditions of their proposed construction financing and without the ability to raise the necessary additional equity funding; and
 - g. the Defendants' lack of skill and experience in matters of financing and construction.
- 6. Also further and in the alternative, if the Defendants have suffered any damages as a result of the conduct of the Plaintiffs or any of them, which is denied, the Defendants have failed to mitigate their damages.
- 7. In answer to clause "I." of the prayer for relief in the Counterclaim, the Plaintiffs say that the Defendants do not have standing to seek relief on behalf of the alleged "Later Lenders."

WHEREFORE the Plaintiffs submit that the Counter-claim be dismissed with costs.

[76] As to the counterclaim, the learned judge said:

- [57] ... In a nutshell the counterclaim (as pressed by counsel at the end of the case) turns on the submission that the plaintiffs, on and after July 1, 1996, were in breach of the agreement that bottomed the business relationship between the partners/joint venturers and that what occurred on and after July 1, 1996 was not in law a binding, consensual rearranging of the relationship. Counsel also asserted a claim for damages for abuse of process. This claim is grounded in the filing of the Certificate of Pending Litigation by the plaintiffs on November 3, 1997.
- [58] The whole of the counterclaim is without merit.
- [59] To begin with it is overwhelmed by the fact - which I say is plain and obvious - that regardless of what the detail was of the business relationship between the plaintiffs and the defendants before June 23, 1996, what occurred thereafter was simply a contracting away from the prior relationship and the substitution of new relationships. It is just that simple.
- [77] On the abuse of process claim, he added:
- [64] As far as the state of the evidence is concerned I say this. The elements of the tort of abuse of process are found in cases such as *Border Enterprises Limited v. Beazer East Inc.* 2002 B.C.C.A. 449 (August 9, 2002) para. 51. I will take that case as read. Not only is there no convincing evidence of the essentials of that cause of action in the case at bar, but in my recollection counsel for the defendants never confronted the plaintiffs squarely with this allegation. I hasten to add that I know that lack of confrontation is not necessarily fatal. It is but a factor for the trier of fact to take into account. (*Steele-Wells v. Mahood C.A.* 018597 January 17, 1995, para. 5).
- [65] In the result, on the whole of the case, the defendants - plaintiffs by counterclaim - have not established that the plaintiffs or any of them were guilty of abuse of process.

The Positions of the Parties

The Counterclaim

- [78] Mr. Chen appeared in person on the counterclaim. His factum is very difficult to follow but as I understand it the thrust of his position is that the filing of the certificate of pending litigation made it impossible for him and Ms. Lee to continue with the construction project. He says this:

Mar. 1999 Thereafter the builders' liens removed from the title, we are intended to resume the construction as soon as possible. Due to the respondents and his/her counsel of Ms. K. MacDonald and his/her law firm of Loh & Co. refused to discharge the vendors lien, which prevented us to continue to finish the project and caused us day after day of incurring all the expenses, such as interest, property taxes, additional cost to repairs the T-bars due to corrosive which exposed in air during the period, legal fees, etc.

- [79] To that, the plaintiffs below say as to the issues on appeal on the dismissal of the counterclaim:
11. As the Appellants' appeal appears to be based on alleged errors of fact, the issue on appeal is whether the trial judge, in arriving at his findings of fact, committed palpable and overriding error.
 12. As the Appellants allege that the Respondents' counsel misled the court, and appear to allege at paragraph 24 of their Factum that they were denied the opportunity of a full hearing, another issue is whether or not the Appellants had a fair trial.
- [80] The registering of a certificate of pending litigation does not give rise to a cause of action even if the action fails but only if some ulterior purpose or malice is shown; a fortiori, if the action succeeds.
- [81] Persons against whose land a certificate of pending litigation is registered, if that registration is impeding them, may seek relief under s. 256 of the Land Title Act.
- [82] I do not know why that course was not followed here.
- [83] Insofar as the counterclaim asserts abuse of process, it fails.
- [84] As to the other causes of action asserted in it, I agree with the learned trial judge that whatever occurred between the parties prior to the instruments referred to in paragraph 18 was laid to rest by them.
- [85] It follows that the second appeal must be dismissed.

SUMMARY

- [86] To sum up, the second appeal is dismissed, the first appeal is allowed, but what the order of the Court should be in the unusual circumstances is to be dealt with on further consideration as indicated earlier in these reasons.
- [87] All issues of costs will be dealt with at the time of further consideration.

"The Honourable Madam Justice Southin"

I agree:

"The Honourable Mr. Justice Braidwood"

I agree:

"The Honourable Mr. Justice Mackenzie"

APPENDIX

Referred to in Paragraph 54

SUMMARIES

of cases cited in

Mackreth v. Symmons,

15 Ves. Jun. 329, 33 E.R. 778

Hearn [Hearle] v. Botelers (1604), Cary 25, 21 E.R. 14

Upon a sale of land a bond was given for the purchase price, or a part thereof. Upon the death of the seller, some of the money due on the bond, which had been lost, was unpaid. The land was charged with the amount unpaid.

Chapman v. Tanner (1684), 1 Vern. 267, 23 E.R. 461

Dispute between assignees of a bankrupt purchaser and the vendor. The assignees wanted the creditor to be required to prove as a creditor under the Bankruptcy Act, thereby making the proceeds of the sale of the lands available to all the creditors. It was held that the vendor had a "natural equity" but it may also be that the vendor still had in his possession some or all of the title deeds as a form of agreed upon security.

Bond v. Kent (1692), 2 Vern. 281, 23 E.R. 782

The purchaser gives a mortgage to the vendor for part of the purchase money and a note for the balance. Held: no lien for the balance.

Gibbons v. Baddall, 2 Eq. Ca. Abr. 682, 22 E.R. 573

This is simply a note and what it says is:

If A. sells an Estate, and takes a promissory Note for Part of the Purchase Money, and then the Purchaser sells to B., who has Notice that A. had not received all his Purchase Money, the Land in Equity is chargeable in the Hands of B. with the Money due on the Note.

The term and year of that decision apparently are unknown but probably early 18th century.

Coppin v. Coppin (1725), Sel. Cas. T. King 28, 25 E.R. 204

The vendor sold lands to his brother. He retained the deeds. Part of the purchase money was unpaid at the brother's death. As the brother's will was invalid under the Statute of Frauds, the vendor was entitled to the estate by descent and not devise. The vendor asserted a right to receive the balance of the purchase money from the personal estate even though the result would be to defeat other creditors. In other words, he sought and got both the estate he had sold and the purchase money despite an argument by the creditors in effect that the brother should look to the lands for the purchase price. It is not clear whether the vendor was asserting a vendor's lien or an equitable charge arising from retention of the deeds.

Pollexfen v. Moore (1745), 3 Atk. 272, 26 E.R. 959

A sale takes place, the vendor keeping the executed conveyance as security for the residue of the purchase price. The purchaser, by his will, leaves a legacy to X and gives his estate, real and personal, to Y whom he appoints as executor. Y, who misapplies the personalty and does not pay the legacy, dies, leaving the purchased estate to his son. The Lord Chancellor directed that the estate should bear the obligation of the defaulting executor, his father, and the plaintiff should "take his satisfaction upon the purchased estate." At the root of this case is the equitable doctrine of marshalling.

Harrison v. Southcote (1751), 2 Ves. Sen. 389, 28 E.R. 249

This case is incomprehensible unless one knows that:

1. Under s. 4 of 11 & 12 Will. 3, an Act for the further preventing the Growth of Popery, every "Papist or Person making profession of the Papist Religion" was incapable of purchasing land of any tenure and incapable of inheriting. Thus, if land came to a Papist under a settlement, the nearest next-of-kin, presumably of the settlor, who was not a Papist became entitled.
2. No one could be required to give discovery on the question of whether he was a Papist. An issue was addressed as to whether a purchaser could be required to give discovery as to whether the person under whom he claimed was a Papist.

In order to avoid the Act, A, allegedly a Papist who became entitled upon his wife's death to a settled estate "sold" the estate to the defendant Moreland but Moreland had not paid the whole consideration. The plaintiffs argued that the purchaser, Moreland, was trustee for the husband and therefore, "the real interest remains in him [the husband] until payment." The Lord Chancellor said, "Though in general it is so, where vendor labours not under any incapacity: it is not in this case, for that would be giving an interest in land to a papist." Thus, this case is authority only for the proposition that a purchaser may hold in trust for the unpaid vendor.

Walker v. Preswick (1755), 2 Ves. Sen. 622, 28 E.R. 396

The plaintiff, who had title to a ship by virtue of a bill of sale from the builder, sold to others but "kept all the documents, &c." and was not paid in full. The Lord Chancellor remarked, "If the conveyance had been made of land, the money not paid, as against vendee, his heir or any claiming under him as purchaser, with notice of this equity, the land may be resorted to." He then held for the plaintiff on the ground that he had never parted with the property, i.e. title. Thus, it can be said that the Lord Chancellor's remark quoted is obiter dicta.

Burgess v. Wheate (1759), 1 Black. W. 123, 96 E.R. 67

This case is on its facts of no relevance, for it had to do with whether there was an escheat but, in the course of his judgment, the Master of the Rolls, Sir Thomas Clarke, said, at 79 (E.R.):

Another case is put of a purchase, and the money paid by the purchaser, who dies without heir before any conveyance. Here 'tis said, if the lord could not claim the estate, and pray a conveyance, the vendor would hold the estate he has been paid for, and keep the money too. I think the lord could not pray a conveyance; to say he could, is begging the question. And as to the vendor's keeping both the estate and the money, 'tis analogous to what equity does in another case; as where conveyance is made prematurely, before money paid; the money is considered as a lien on that estate in the hands of the vendee. So where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor, for the personal representatives of the purchaser; which would leave things in statu quo.

Fawell v. Heelis (1773), Amb. 724, 27 E.R. 468

The plaintiff conveyed lands to her son who gave bonds for the purchase price. She signed a receipt on the deed for the purchase money. The condition of one bond was half the price and the consideration of the other was an annuity to the plaintiff for life in remainder as she should direct. The son, upon becoming bankrupt, conveyed to the defendants in trust for creditors. Held: no lien:

In this case it does not appear that it was the intention of the parties, that the vendor should have such a lien, but a receipt taken for the consideration-money, on the back of the deed, and the bond was accepted as a satisfaction for the purchase-money.

If the vendor parts with his estate, and takes a security for the consideration-money, there is no reason for a court of equity to assist him against the creditors of the purchaser. [E.R. p. 469]

Beckett v. Cordley (1784), 1 Bro. C.C. 353, 28 E.R. 1174

This case is about the priorities of equitable mortgages and agreements for mortgages and turns on issues of notice and time. Thurlow L.C. remarked (at E.R. 1176-77):

The time when the money was advanced is that at which the notice is material. In order to postpone this charge, he insists that this was the old debt. It is compared to the case of a person selling an estate, and not receiving the money; and that therefore there is a lien: but it is not like that case....

Blackburn v. Gregson (1785), 1 Bro. C.C. 420, 28 E.R. 1215

This was a contest between the assignees in bankruptcy of A and the assignees in bankruptcy of B over an estate which A had conveyed to B. It appeared that B had, as part of the purchase price, agreed to pay an existing mortgage and then gave bonds to A for the balance. The plaintiffs sought a vendor's lien. The defendants said there was no lien, arguing, "When the vendor takes a personal security, the lien does not remain, because the vendee appears to all the world as owner of the estate." In the end, there was no final conclusion as to whether that was so because the case did not go off on that issue but on a finding by a jury that the conveyance was intended to defeat A's creditors. Thus, when the cause came back to the Lord Chancellor on the equity

reserved, he declared on that finding that the purchase be set aside.

Austen v. Halsey (1801), 6 Ves. 475, 31 E.R. 1152

A testator, having extensive property, real and personal, made a complex will including legacies out of personalty to two daughters. The real estate was essentially for his son. Subsequently, he executed a codicil referring to a proposed purchase of an estate and providing that if he died before completion, his trustees were to complete the purchase, to settle the lands in accordance with his will, and to apply the personal estate for such purpose. Trustees on behalf of the daughters sought an order that their legacies be secured. The trustees of the will asserted that the personal estate was exhausted by, among other things, the purchase price referred to in the codicil. A question was whether the legatees, by marshalling, could stand in the shoes of the vendor who, at the time of death, had a vendor's lien. The Lord Chancellor did not find it necessary to give an opinion but remarked (at Ves. 483):

... but without that authority I consider it clearly settled, that the vendor has a lien for the purchase-money, while the estate is in the hands of the vendee: I except the case, where upon the contract evidently that lien by implication was not intended to be reserved. That is in equity very like a charge;

Nairn v. Prowse (1802), 6 Ves. 752, 31 E.R. 1291

A agreed to sell to B an estate in consideration of so much of the Long Annuities as would produce the sum of £100 per annum and in case "the average selling price of Long Annuities should not rise within two years, so that the stock so to be transferred might be sold for 2200l., [the purchaser] would pay to the Defendant the sum of 2200l. on receiving from him a re-transfer of the said annuities...." [I understand Long Annuities to be the 18th century version of government bonds, see (1751) 24 Geo. 2, c. 2, and would therefore fluctuate with market interest rates.] The Long Annuities were sold for less than £2200 and the vendor claimed a lien for the balance. At pp. 759-60, the Master of the Rolls remarked:

Upon the question as to the claim set up by Michell to a lien, it is now settled, that equity gives the vendor a lien for the price of the estate sold without any special agreement. But, supposing he does not trust to that, but carves out a security for himself, it still remains matter of doubt, and has not received any positive decision, whether that does or does not amount to a waiver of the equitable lien; so as to preclude the vendor from resorting back to that lien, the security proving insufficient. Without entering into that question, whether every security necessarily amounts to a waiver, it is impossible to contend, that there may not be a security, that will have that effect; that will be a waiver. By conveying the estate without obtaining payment a degree of credit is necessarily given to the vendee. That credit may be given upon the confidence of the existence of such a lien. The knowledge of that may be the motive for permitting the estate to pass without payment. Then it may be argued, that taking a note or a bond cannot materially vary the case. A credit is still given to him; and may be given from the same motive; not to supersede the lien, but for the purpose of ascertaining the debt, and countervailing the receipt indorsed upon the

conveyance. But, if the security be totally distinct and independent, will it not then become a case of substitution for the lien, instead of a credit given because of the lien. Suppose, a mortgage was made upon another estate of the vendee: will equity at the same time give him what is in effect a mortgage upon the estate he sold: the obvious intention of burthening one estate being, that the other shall remain free and unincumbered? Though in that case the vendor would be a creditor, if the mortgage proved deficient, yet he would not be a creditor by lien upon the estate he had conveyed away. The same rule must hold with regard to any other pledge for the purchase-money. In this case the vendor trusts to no personal security of the vendee; but gets possession of a Long Annuity of 100l. a-year; which according to the rise or fall of stock might or might not be sufficient for the purchase-money. He has therefore an absolute security in his hands, not the personal security of the vendee. Could the vendee have any motive for parting with his stock but to have the absolute dominion over the land? It is impossible, it could be intended, that he should have this double security, an equitable mortgage, and a pledge, which latter, if the stock should rise a little, would be amply sufficient to answer the purchase-money.

Elliot v. Edwards (1802), 3 Bos. & Pul. 181, 127 E.R. 100

Action for money had and received by a purchaser of a leasehold estate to recover his deposit. He objected to title on the ground that his vendor on his purchase had covenanted not to assign until the purchase price was paid and had in fact not paid the purchase price to the previous vendor. Thus, the plaintiff said that the land was encumbered by a vendor's lien and this objection was upheld on the ground that it was a reasonable objection.

Hughes v. Kearney (1803), 1 Sch. & Lef. 132

This was an Irish case. A deed was executed with a receipt on the back for the purchase price. Only part of the price was paid at the time of execution. A note was given for the balance. Partial payments were made. Some 60 (!) years after the execution of the deed, the court decreed that the balance of the note with interest should be a charge on the land in favour of the vendor's heirs. At p. 135:

But is there any case where the heir of the vendee has been permitted to hold what his ancestor unconscientiously obtained? and is not a thing unconscientiously obtained, when the consideration is not paid?...

But in this case the purchaser's note is nothing but a mere memorandum, put into the hands of a Trustee, to enable the purchaser first to pay off incumbrances, and then to be subject to an account, and the balance only to be received by the vendor. It cannot be considered that the vendor relied on it as a security. Suppose Bills given as part of the purchase money, and suppose them drawn on an insolvent house: shall the acceptance of such Bills discharge the vendor's lien? they are taken, not as a security, but as a mode of payment.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/04/02/2004bccca0209.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/chu-v-chen-2004-bcca-209>

Prepared on 28 October 2026 · Esheria