

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1305788 B.C. Ltd. v. Sodhi Dream Homes Ltd.*,
2023 BCSC 445

Date: 20230324
Docket: S02857
Registry: Abbotsford

Between:

1305788 B.C. Ltd.

Plaintiff

And

Sodhi Dream Homes Ltd.

Defendant

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

Counsel for Plaintiff:

I. Gill
G. Dulay

Counsel for Defendant:

J. Singh

Place and Date of Hearing:

New Westminster, B.C.
March 8, 2023

Place and Date of Judgment:

Abbotsford, B.C.
March 24, 2023

Table of Contents

I. INTRODUCTION 3

II. BACKGROUND 4

 A. Contract for the Sale of the Property 4

 B. Procedural History 7

 i. Pleadings History 7

 ii. Current Applications 7

III. LEGAL ANALYSIS AND DETERMINATION 8

 A. Should Sodhi Dream Homes be permitted to Amend its Pleadings? 8

 a) Legal Principles 8

 b) Parties’ Positions 10

 c) Determination 11

 B. Is it plain and obvious that Sodhi Dream Homes’ claim for a purchaser’s lien is doomed to fail? 13

 C. Conclusion 16

IV. ORDER 18

I. Introduction

[1] This is an application by the defendant (plaintiff by way of counterclaim), Sodhi Dream Homes Ltd. (“Sodhi Dream Homes”), for leave to amend its Amended Counterclaim to plead it has an equitable interest that attaches to property by way of a purchaser’s lien. At first blush, the matter before the court thus appears to be a straightforward application for leave to amend pleadings. What complicates this application is the need to consider the nature of a purchaser’s lien—an obscure, seldom used equitable remedy. Doing so is necessary to determine if it would be reasonable for Sodhi Dream Homes to claim a purchaser’s lien, as it seeks to claim in its proposed amended pleading.

[2] Underlying Sodhi Dream Homes’ present application is a failed real estate transaction. The plaintiff (defendant by way of counterclaim), 1305788 B.C. Ltd. (“Number Co.”), owns a single-family residential dwelling property (recently re-zoned to consist of three single-family residential lots) in Abbotsford, British Columbia. Number Co. intended to sell the property to Sodhi Dream Homes, and the parties entered into a contract on February 2, 2022 (the “Contract”), under which Sodhi Dream Homes agreed to purchase the property for \$2,800,000. Sodhi Dream Homes paid a deposit for the property of \$210,000 comprised of an initial deposit of \$150,000 and a second deposit of \$60,000.

[3] After some amendments to the terms of the original Contract, including reducing the sale price to \$2,700,000, the deal was to close on August 31, 2022. However, it did not close and both parties now assert that the other party is to blame. Neither party seeks specific performance and each have brought actions against each other. Number Co. filed a claim for damages it says it incurred because the transaction failed. Sodhi Dream Homes filed a Counterclaim for the return of its \$210,000 deposit and for damages it incurred.

[4] The litigation is in its early phases. Trial dates have not been set. Discoveries have not been scheduled. The blame for why the transaction failed will be the question at issue in the trial of this matter, should one occur. That determination is,

of course, not to be made at this application. What is also not to be determined at this application—although the parties appeared to encourage the court to do so—is a finding of whether Sodhi Dream Homes will be able to encumber title to Number Co.’s property with a purchaser’s lien.

[5] Instead, the narrow issue in this application is whether Sodhi Dream Homes has met the test to be permitted to further amend its Amended Counterclaim. As discussed below, amendments should not be permitted if the proposed amendments disclose no reasonable cause of action. Accordingly, as I have referenced, it is necessary at this stage for the court to consider, to some extent, the nature of a purchaser’s lien.

[6] I will first address the background facts of the real estate transaction and Contract, and then set out the procedural history of this matter before turning to my legal analysis and determination.

II. Background

A. Contract for the Sale of the Property

[7] On February 2, 2022, Number Co. and Sodhi Dream Homes entered into the Contract under which Number Co. agreed to sell to Sodhi Dream Homes real property with a civic address of 2550 Alderview St., Abbotsford, BC, legally described as PID 001-949-802 Lot A Section 22 Township 16 New Westminster District Plan 22890 (the “Property”).

[8] Under the Contract, Sodhi Dream Homes agreed to purchase the Property for \$2,800,000 on the following terms:

- a) the defendant would pay a \$150,000 deposit (the “First Deposit”) directly to Number Co. within 24 hours of acceptance by Number Co.;
- b) the Contract would complete on July 15, 2022; and
- c) time would be of the essence, and unless the balance of the payment was paid and such formal agreements to pay the balance as may be

necessary were entered into on or before the completion date, Number Co. may, at Number Co.'s option, terminate the Contract and, in such event, the amount paid by Sodhi Dream Homes would be non-refundable and absolutely forfeited to Number Co., subject to the *Real Estate Services Act*, S.B.C. 2004, c. 42, on account of damages, without prejudice to Number Co.'s other remedies.

[9] On or about February 3, 2022, Sodhi Dream Homes paid the deposit of \$150,000 directly to Number Co. I note that the deposit was not paid into a trust and it was agreed between the parties that the deposit would be paid directly to Number Co.

[10] On or about May 1, 2022, Sodhi Dream Homes, through its realtor, requested approval from Number Co. to list the property for sale as Sodhi Dream Homes advised that it would likely not be able to complete the Contract. Number Co. denied Sodhi Dream Homes' request.

[11] On June 14, 2022, Sodhi Dream Homes requested an extension to complete the Contract. The parties agreed to a written addendum to the Contract that included, among other things, the following terms:

- a) Sodhi Dream Homes would pay an additional \$60,000 deposit directly to Number Co. by June 15, 2022;
- b) the completion date of the contract was changed from July 15, 2022, to August 31, 2022; and
- c) unless part of this amendment, all other terms in the Contract would remain the same.

[12] On June 14, 2022, Sodhi Dream Homes paid the second deposit of \$60,000 to Number Co.

[13] Sodhi Dream Homes, through its realtor, repeatedly communicated to Number Co. that it would not be able to complete the Contract due to trouble

arranging financing at the contemplated purchase price contained in the Contract. As a result, on or about August 23, 2022, the parties agreed to a further written addendum to the contract that included, among other things, the following terms:

- a) Number Co. would reduce the purchase price of the Property from \$2,800,000 to \$2,700,000;
- b) in the event that Sodhi Dream Homes did not complete the Contract on August 31, 2022, damages would accrue based on a \$2,800,000 purchase price; and
- c) unless part of this amendment, terms in the Contract would remain the same.

[14] Under the Contract, Number Co. was to provide the executed transfer documents to complete the sale of the Property on August 30, 2022. Another condition of the Contract was that Number Co. would provide vacant possession of the Property by the possession date. By vacant possession, Sodhi Dream Homes understood that there would be no tenant occupying the Property at the date of closing.

[15] Number Co. was unable to have the tenant removed from the Property by the date of closing. Number Co.'s counsel wrote to counsel for Sodhi Dream Homes on August 31, 2022. I will reproduce the contents of this letter, as it is relevant to Sodhi Dream Homes' argument that the reason the deal did not close was because Number Co. was unable to provide vacant possession of the Property as required by the Contract:

We write further to your letter of August 31, 2022, despite various efforts, our client has been unable to vacate the Property.

It is our client's position that vacant possession of this development property is not a fundamental breach of the contract of purchase and sale dated February 7, 2022, and your client is not entitled to rescind the same.

We put you on formal notice that our client remains ready, able and willing to complete subject to the tenancy at the Property.

[16] I note that there appears to be a typographical error in Number Co.'s counsel's letter. The letter indicates that the date of the Contract was February 7, 2022, when the Contract was, in fact, dated February 2, 2022.

[17] In letters exchanged around August 30, 2021, both parties indicated to the other that each were "ready, willing and able to complete the transaction", and that the other party was in breach of the Contract and the cause of the failure of the completion of the Contract.

[18] No further steps were taken in completing the Contract and litigation ensued.

B. Procedural History

i. Pleadings History

[19] On September 8, 2022, Number Co. filed a Notice of Civil Claim against Sodhi Dream Homes for damages. On October 7, 2022, Sodhi Dream Homes filed a Response to Civil Claim as well as a Counterclaim for the return of its \$210,000 deposit and damages. On October 7, 2022, Sodhi Dream Homes also registered a Certificate of Pending Litigation ("CPL") on title to the Property.

[20] On October 21, 2022, Sodhi Dream Homes filed an Amended Counterclaim. On November 10, 2022, Number Co. filed a Response to Amended Counterclaim.

ii. Current Applications

[21] The current application involved two applications brought before the court to be heard together. The first application was filed January 26, 2023, by Number Co. and sought an order cancelling the CPL registered against the Property. Sodhi Dream Homes consented to removing the CPL on the condition that its application for leave to amend its pleadings would be heard at the same time. The parties consented, and I granted the order removing the CPL from the Property at the hearing on March 9, 2023. The parties then argued the second application.

[22] The second application, that is the subject of these reasons for judgment, is the application brought by Sodhi Dream Homes for leave to amend its pleadings. It

wishes to amend its pleadings to allow it to plead that it has an equitable interest in the Property by way of a purchaser's lien.

[23] To reiterate, despite the relatively complicated procedural history and the obscurity of the purchaser's lien, this application involves a narrow issue of whether, given the circumstances of this case, Sodhi Dream Homes has met the test to be granted leave to amend its pleadings. However, in making that assessment, I must address, at least at a cursory level, whether the equitable remedy of a purchaser's lien is available to Sodhi Dream Homes in this case. If the claim is plainly and obviously unavailable then the amendment is not warranted and leave to amend should be denied.

[24] I will now address the legal issues and my determination regarding whether Sodhi Dream Homes has met the test to amend its Amended Counterclaim.

III. Legal Analysis and Determination

[25] As stated above, as a starting point, I am not to determine on this application the ultimate issue of which party breached the Contract or is to blame for the failure of the transaction. Those issues will be determined at trial should the matter proceed to trial. The application before me is only to consider whether Sodhi Dream Homes has met the test to amend its Amended Counterclaim, having consideration for the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], and the governing authorities.

A. Should Sodhi Dream Homes be permitted to Amend its Pleadings?

a) Legal Principles

[26] Sodhi Dream Homes applies to amend its pleadings pursuant to R. 6-1 of the *Rules*. Sodhi Dream Homes has already amended its Counterclaim once, and Number Co. will not provide written consent for the amendment. As such, to further amend its Amended Counterclaim, Sodhi Dream Homes requires leave of the court pursuant to R. 6-1(1)(b)(i) of the *Rules*.

[27] Justice Kent helpfully summarized the principles governing amendments to pleadings in *Thomas v. Rio Tinto Alcan Inc.*, 2019 BCSC 107:

[18] Some of the basic principles governing applications for leave to amend pleadings have been summarized in *Continental Steel Ltd. v. CTL Steel Ltd.*, 2014 BCSC 104 at para. 26 and in *British Columbia (Director of Civil Forfeiture) v. Violette*, 2015 BCSC 1372 at para. 41 [citations deleted]:

1. the court has a wide discretion to permit amendments so as to enable the real issues between the parties to be determined;
2. the discretion to permit amendments is unfettered, subject only to the general rule that it be exercised judicially;
3. the overriding consideration is the interests of justice generally and to direct what is just and convenient between the parties;
4. while useless amendments that do not advance a reasonable cause of action or defence are to be avoided, justice is generally best served by permitting amendments that will allow the real controversy between the parties to be decided on the merits;
5. amendments may not be allowed if they will cause actual and meaningful prejudice to the opposing party—mere potential prejudice is insufficient. Rather the party resisting an amendment must prove actual and significant prejudice;
6. additional considerations include any delays in applying for the amendment, the reasons for such delay and whether deliberate or voluntarily dilatory conduct is involved, particularly when a new cause of action is proposed to be added that would otherwise preclude the operations of a limitation defence;
7. costs are the general means of protecting against prejudice unless it would be a wholly inadequate remedy; and
8. courts should only disallow an amendment as a last resort.

[28] More guidance was provided as to the factors that should be considered in applications to amend pleadings by Madam Justice Ross in *Dawe v. B.C. Children's Hospital*, 2003 BCSC 443 at para. 17 (quoted in *Kwikwetlem First Nation v. British Columbia (Attorney General)*, 2021 BCCA 311 at para. 166):

(a) amendments should be permitted as are necessary to determine the real question in issue between the parties

The basic rule, set out expressly in the former Rules and no doubt still applicable, is that such amendments should be

permitted as are necessary to determine the real question in issue between the parties. Rule 1(5) requires an interpretation of the rules which permit the just and speedy determination of the dispute on its merits. Similarly, the *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 10, requires the court to grant all such remedies as any of the parties may appear to be entitled to “so that, as far as possible, all matters in controversy between the parties may be completely and finally determined”. *Victoria Grey Metro Trust Co. v. Fort Gary Trust Co.* (1982) 1982 CanLII 227 (BC SC), 30 B.C.L.R. (2d) 45 (S.C.);

(b) the court will not give its sanction to amendments which violate the rules that govern pleadings, including the prohibition of pleadings which disclose no reasonable claim. In considering this question, the court will apply the same tests and considerations as applicable on an application to strike claims already pleaded, see *Victoria Grey Metro Trust Co. supra*;

(c) a party is not required to adduce evidence in support of a pleading before trial, see *McNaughton v. Baker* (1988), 1988 CanLII 3036 (BC CA), 25 B.C.L.R. (2d) 17 (B.C.C.A.);

(d) on an application to amend the facts alleged are taken as established, see *Canada (Attorney General) v. Ellis-Don Ltd.*, 2000 BCCA 111 (CanLII), [2000] B.C.J. No. 492;

(e) the discretion is to be exercised judicially, in accordance with the evidence adduced and the guidelines of the authorities. Factors to be considered include: the extent of delay, the reasons for delay, any explanation put forward to account for the delay, the degree of prejudice caused by the delay, the extent of the connection between the existing claims and a proposed new cause of action. The over-riding consideration is what is just and convenient, see *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 1996 CanLII 3033 (BC CA), 19 B.C.L.R. (3d) 282 (C.A.).

[29] What is clear from the authorities is that while useless amendments that disclose no reasonable cause of action must be avoided, the overriding principle is that generally amendments should be permitted in the interests of justice, to allow the real questions in issue between the parties to be litigated. Further, a party asserting that it will suffer prejudice due to the amendments must demonstrate actual and significant prejudice.

b) Parties' Positions

[30] Sodhi Dream Homes says that because litigation is in its early stages, Number Co. suffers no significant prejudice by granting leave to Sodhi Dream Homes to amend its Amended Counterclaim. It argues that the amendments are

necessary to achieve the objectives of the *Rules*, specifically R. 1-3(2), which provides that the object of the *Rules* is to secure the just, speedy and inexpensive determination of a proceeding on its merits. It says that the proposed amendments are necessary to determine the real questions in issue between the parties, which it contends includes whether Sodhi Dream Homes has an equitable interest in the Property up to the value of the deposits it paid of \$210,000.

[31] Number Co. says that granting Sodhi Dream Homes leave to amend its pleadings is not necessary to determine the real questions in issue between the parties and that the amendments will not advance the objectives of the *Rules*. It asserts that if leave is granted to Sodhi Dream Homes to amend its pleadings, Sodhi Dream Homes will likely attempt to register a further CPL or some form of encumbrance on title to the Property. Number Co. argues that this will require Number Co. to bring an application to cancel that encumbrance. Number Co. argues that this inevitability will increase costs to both parties, does not foster a just and expedient resolution of the issues, and is not a proper use of scarce judicial resources.

[32] Finally, Number Co. argues that advancing a claim of a purchaser's lien is an attempt by Sodhi Dream Homes to use a CPL or lien on the Property to exert pressure on Number Co. to resolve the dispute. It asserts that registering a CPL or encumbrance on title to the Property for this purpose is improper.

c) Determination

[33] In my view, there would not be significant prejudice imposed on Number Co. by allowing the amendment sought by Sodhi Dream Homes. Further, any such prejudice would not outweigh the right of Sodhi Dream Homes to advance the basis for the claim it says establishes the questions to be determined at trial. Number Co. argues that if Sodhi Dream Homes is permitted to amend its Amended Counterclaim, Sodhi Dream Homes will take steps to place some form of encumbrance on title to the Property, thus clouding title and preventing Number Co.

from selling the Property or hindering refinancing. However, in my view, this concern is premature.

[34] Amending the pleadings is the first step sought by Sodhi Dream Homes. It may seek to encumber the title of the Property with a CPL. Indeed, this was much of the argument before me on this application. However, if Sodhi Dream Homes decides to attempt to encumber the Property with a CPL based on a purchaser's lien, at that future application, Number Co. can argue why the Property should not be encumbered. It will be available to Number Co. to argue that an order encumbering the Property is not available to Sodhi Dream Homes because a CPL will cause undue hardship on Number Co., or because the Land Titles Registry System should not, at law, register an equitable lien on the Property. Number Co. may have other arguments as to why the Property should not be encumbered in the circumstances of this case. In my view, the prejudice expressed by Number Co. is thus premature and, if the future application comes to fruition, may be alleviated or ameliorated through an award of costs.

[35] On the other hand, the prejudice to Sodhi Dream Homes, should I not grant leave to amend the Amended Counterclaim, is that it may be unable to advance its claim of an equitable interest in the deposit money as a purchaser's lien. In my view, there would be greater prejudice suffered by Sodhi Dream Homes by refusing to allow its application than to Number Co. by granting the application.

[36] Having considered the issue of prejudice, and having determined that it favours granting leave to Sodhi Dream Homes to amend its Amended Counterclaim, I will now consider whether it is plain and obvious that asserting a claim of a purchaser's lien is doomed to fail. If it is, leave to amend should not be granted. If it is not, leave to amend the Amended Counterclaim should be permitted. Accordingly, I will briefly address the law of purchaser's liens to determine whether Sodhi Dream Homes' amendment seeking to argue it has a purchaser's lien is reasonable in the circumstances.

B. Is it plain and obvious that Sodhi Dream Homes' claim for a purchaser's lien is doomed to fail?

[37] Sodhi Dream Homes says it is entitled to a purchaser's lien because, through no fault of its own, the Contract did not complete and it has lost its deposit of \$210,000. Sodhi Dream Homes argues that this is a case of unjust enrichment and it should be able to advance that claim in its pleadings.

[38] In the application before me, I heard much argument as to which party was responsible for breaching the Contract. I presume this was in large measure in support of the parties' arguments regarding whether a purchaser's lien is available to Sodhi Dream Homes. In my view, these arguments are only be relevant to the issue of amending the pleadings if, on the pleadings, it was plain and obvious that Sodhi Dream Homes was responsible for the breach. I say this because, as described below, equity requires that to advance a purchaser's lien claim, the party making the claim must have not have been at fault for the agreement "going off."

[39] The determination of which party breached the Contract will be the issue at trial. However, on the pleadings and the evidence before me on this application, it is not plain and obvious that Sodhi Dream Homes was responsible for the breach of Contract, which would disqualify them from advancing a claim for a purchaser's lien. To the contrary, as described above, given Number Co. was unable to deliver the Property without a tenant, it may be that Number Co. will ultimately be found to be the cause of the Contract not closing. I reiterate that this will be the ultimate issue for trial and is not for me to decide on this application. A consideration of the merits is only relevant for the purpose of determining if it is plain and obvious that Sodhi Dream Homes' claim for a purchaser's lien is doomed to fail.

[40] I will now consider briefly the nature and requirements of a purchaser's lien to determine if Sodhi Dream Homes' amendment advances a reasonable cause of action.

[41] Our Court of Appeal in *Pan Canadian Mortgage Group III Inc. v. 0859811 B.C. Ltd.*, 2014 BCCA 113, discussed the purchaser's lien:

[1] The purchaser's lien is a relatively obscure equitable remedy with roots dating back at least to the mid-19th century: see *Wythes v. Lee* (1855) 61 E.R. 954; *Rose v. Watson* [1864] 10 H.L.C. 672. The lien is available to a purchaser who has paid all or part of the purchase price to the vendor of real or other property pursuant to a valid contract. If the transaction "goes off" without fault on the part of the purchaser, the lien provides him or her with a security interest, or charge, against the property to the extent of the money paid, plus interest and costs.[1] It exists even though specific performance may not be available (as in this case, which involves strata lots that were never created) and even though the purchaser may have (legally) rescinded the contract. The lien is said to have the same effect as if the vendor had executed a mortgage in the purchaser's favour in the amount covered by the lien; and comes into existence at the moment of payment by the purchaser. (See generally *Halsbury's Laws of England*, 4th ed., Vol. 28 at paras. 560-64; *Snell's Equity* (31st ed., 2005) at §42-25 to §42-32; C. Harpum, S. Bridge and M. Dixon, eds., *Megarry and Wade: The Law of Real Property* (7th ed., 2008) at §15-056; A. Warner La Forest, ed., *Anger & Honsberger: Law of Real Property* (3rd ed., looseleaf) at §34:80; and J.V. Di Castri, *The Law of Vendor and Purchaser* (3rd ed., looseleaf) at §781.) The Supreme Court of British Columbia has granted a purchaser's lien in at least one case, although the Court did not go on to consider how it might be affected by the land registration system: see *Lehmann v. B.R.M. Enterprises Ltd.* (1978) 1978 CanLII 276 (BC SC), 88 D.L.R. (3d) 87.

[2] True to its equitable roots, the purchaser's lien is intended to do justice in situations in which the common law does not, or cannot, do so. Thus in *Whitbread & Co., Ltd. v. Watt* [1902] 1 Ch. 835, Vaughan Williams L.J. observed that the lien "is not the result of any express contract" but is a right that may be said to have been invented "for the purpose of doing justice" (at 838). In a similar vein, it is said that the lien "supplies a remedy where the law falls short of accomplishing full justice". (See Di Castri, *supra*, at §913.)

...

[32] ... Thus the purchaser's lien developed from the principle that as between the contracting parties, *equitable title transferred to the buyer* under a contract, but closing – the transfer of legal title – failed. Provided the buyer was not at fault, Equity would not countenance the 'aggravation' of his loss by depriving him of the "only means of acquiring the repayment of his money ... by following the interest which in respect of that payment of money he had acquired in the estate." (*Rose v. Watson*, at 680.)

[42] In my view, the important element of a purchaser's lien from the above passages is that it is an equitable remedy that developed to prevent injustice. In this regard, it is important that the failure of the transfer of legal title to the land, in other words the failure of the contract to complete, was not the fault of the purchaser. Second, a purchaser's lien appears available to a purchaser who provides a deposit

for the purchase of land but has no other means to recover the funds paid as a deposit.

[43] The existence of purchaser's liens was also acknowledged by Justice Marchand (as he then was) in *Nu Stream Realty Inc. v. 1116191 B.C. Ltd.*, 2018 BCSC 911:

[40] In *Pan Canadian*, the Court of Appeal held that a pre-sale purchaser may be entitled to an equitable interest in land known as a "purchaser's lien" when the pre-sale purchaser has entered a binding contract even though the purchaser may not be entitled to specific performance. The Court of Appeal characterized the purchaser's lien as a security interest against the property to the extent of money paid plus interest and costs: paras. 1 and 32. *Pan Canadian* appears to support the plaintiffs' position.

[44] In *Nu Stream Realty Inc.*, the court was asked to determine if a CPL registered on title to a property should be removed on the basis that it was causing hardship to registered property owners, including an inability of the owners to obtain financing that would jeopardize the entire construction project. The court declined to determine whether the plaintiffs had an equitable interest in the land and, instead, determined whether the CPL should be removed based on the defendant's argument that the CPL was causing hardship. The court concluded that in the circumstances of that case, the CPL should be removed.

[45] A purchaser's lien was also recognized by the New Brunswick Court of King's Bench in *McInnis v. H. & S. Construction Ltd.*, 97 N.B.R. (2d) 229, 1989 CanLII 7733 (K.B.). Justice Creaghan described a purchaser's lien as "part of our law", but noted it is "not commonly advanced": at para. 11. In *McInnis*, similar to the case at bar, the court was asked to grant leave for the plaintiff to amend its pleadings to include a claim for a purchaser's lien. Justice Creaghan allowed the amendment and held that while he was not tasked to determine the "nature of the purchaser's lien nor indeed whether one exists in this case", he could not "see in fairness how the plaintiffs should be denied the right to make the claim": at paras. 18 and 19.

C. Conclusion

[46] Our Court of Appeal described the purchaser's lien as a "relatively obscure" equitable remedy. Indeed, there is little caselaw on the subject and it appears to be granted infrequently and only in very particular situations where a purchaser is without blame and the purchaser's lien may be the only means through which a purchaser can remedy unjust circumstances. However, a purchaser's lien is not unknown to our law and in my view, it would be unfair to Sodhi Dream Homes, at this juncture, to prevent it from advancing its claim for a purchaser's lien. However, allowing the amendment should not be taken as a comment by this court as to whether that claim will succeed or if Sodhi Dream Homes will be successful in taking other steps to recover its deposit.

[47] Number Co.'s primary concern with the amendment is that it will lead to Sodhi Dream Homes registering a CPL on title to the Property. In this regard, I note that in *Pan Canadian*, our Court of Appeal stated that while at least one judgment of this Court had considered a purchaser's lien, "the Court did not go on to consider how it might be affected by the land registration system": para. 1. In my view, Sodhi Dream Homes may face hurdles in taking steps to encumber the Property through a purchaser's lien. However, that may be the subject of a further application and is not an issue that is before me on this application. I expect that any such application would require notice to any party with an interest in the Property, including any party with a mortgage registered on title to the Property.

[48] Again, the application before me concerns Sodhi Dream Homes' application for leave to further amend its Amended Counterclaim to include its claim for a purchaser's lien. The application does not seek an order encumbering the Property and I will not make such an order. Should Sodhi Dream Homes wish to pursue encumbering the Property, I expect it will require a further application.

[49] In sum, based on the law reviewed above, there is a legal basis for a party to assert the equitable remedy of a purchaser's lien in circumstances when a transaction does not complete through no fault of the purchaser and the purchaser

has paid a deposit. Borrowing the language from the test to strike pleadings, it is not plain and obvious to me that Sodhi Dream Homes' claim to assert a purchaser's lien is doomed to fail as, at this point, there is no basis to determine whether the requirements for a valid purchaser's lien are met in the circumstances of this case.

[50] Accordingly, I find that Sodhi Dream Homes should be granted leave to amend its Amended Counterclaim. For clarity, I base this conclusion on several factors, that include that the litigation is at the early stages and there have been no discoveries or trial dates set. Number Co.'s main argument concerning the prejudice it will face is premature as it is grounded in an anticipated application to remove a potential encumbrance from title to the Property that may or may not materialize. In any event, the prejudice of that litigation can be alleviated or ameliorated by an award of costs. Further, in my view, it is of the utmost importance that parties should be able to advance their claims to determine the questions in issue before the court, so long as those claims are reasonable.

[51] In this case, both parties blame the other for the failure of the Contract. Indeed, that will be the question in issue at the trial. As such, it is premature to determine whether Sodhi Dream Homes is to blame for the failure of the Contract. However, I note, as I have done above, that on its face it appears that Sodhi Dream Homes has a viable argument that Number Co. was unable to deliver vacant possession of the property to Sodhi Dream Homes. This conclusion finds support in the August 31, 2022, letter of Number Co.'s lawyer. Whether this is a material breach of the terms of the Contract, and what, if any, damages flow from Number Co.'s inability to remove the tenant from the Property, will be an issue for trial. It is not for me on this application to ascribe blame or find which party ultimately should be faulted for breaching the terms of the Contract, except to the limited extent to determine that Sodhi Dream Homes has, at least, an argument that it is without blame.

[52] Ultimately, I am satisfied that Sodhi Dream Homes has met the test to amend and I grant it leave to amend its pleadings as set out in its Notice of Application.

IV. Order

[53] Given the foregoing, the court grants Sodhi Dream Homes leave to further amend its Amended Counterclaim. I grant Number Co. leave to file an Amended Response to the Amended Counterclaim.

[54] Costs of this application will be in the cause.

“Gibb-Carsley J.”