IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1055249 B.C. Ltd. v. Grace Mtn. Land Company, Ltd.,* 2024 BCSC 1916

Date: 20240906
Docket: H-190209
Registry: Vancouver

Between:

1055249 B.C. Ltd.

Petitioner

And

Grace Mtn. Land Company, Ltd., Herkenn Singh Kenny Braich also known as Kenny Braich, and 0776423 B.C. Ltd.

Respondents

Before: The Honourable Justice Jones

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	M.C. Sennott L. Morris
Counsel for the Respondents Grace Mtn. Land Company, Ltd. and H.S. Kenny Braich:	I.G. Nathanson, K.C. C. Chen
Not other appearances	
Place and Date of Trial/Hearing:	Vancouver, B.C. August 20 and 30, 2024
Place and Date of Judgment:	Vancouver, B.C. September 6, 2024

Introduction

[1] **THE COURT:** These are my oral reasons for judgment on the application of the respondents Grace Mtn. Land Company Ltd. and Herkenn Singh Kenny Braich also known as Kenny Braich (collectively the "Grace Mtn. Applicants") for an extension of time to appeal an order of Associate Judge Robertson on May 22, 2024 (*1055249 BC Ltd. v Grace Mtn. Land Company, Ltd*., 2024 BCSC 880), which dismissed their application for an extension of the redemption period, and granted the petitioner, 1055249 B.C. Ltd. ("105") order absolute (the “Order”).

[2] The application also seeks a stay of the Order.

Background

[3] The proceedings relate to foreclosure proceedings concerning approximately 64 acres of land located in Mission, British Columbia. The lands comprise six individual titles owned by the Grace Mtn. Land Company Ltd. (the “Lands").

[4] 105 is the mortgagee and petitioner in this proceeding.

[5] In their intended appeal, the Grace Mtn. Applicants contend that the associate judge failed to properly assess the evidence, relied on an irrelevant factor, and erred in the assessment of costs.

[6] If a transcript of these reasons is ordered, I reserve the right to edit the transcript for errors, clarity and citations, but the substance of the decision will not change. I note that the notice of application and the reply memorandum of the Grace Mtn. Applicants refer to the “Street Mortgage” as “$7.54 million”; however, the correct figure is “$7.45 million” as per the order *nisi* dated August 19, 2021. In these reasons, I have corrected to “7.45” or “$7,450,000” any references I may have made to “7.54”, but I have left the $7.54 reference followed by “[*sic*]” when referring to the specific documents filed by the Grace Mtn. Applicants where that number is used.

The Proceedings

[7] For the purpose of this application, I will not set out the full background of the extensive proceedings in this matter. The associate judge set out a summary of the context in her reasons cited at 2024 BCSC 880, a portion of which I quote as follows:

> [8] The foreclosure proceedings that have been ongoing since 2015 have been contentious in that any applications brought relating to the sale or disposition of the lands were opposed by the Grace Mtn. Respondents.
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> [9] The proceedings, and parties participating, have evolved during that time through redemptions and assignments being taken by creditors such as Ms. Street, the prior petitioner in these proceedings, and the current petitioner both in respect of a subsequent ranking mortgage that is the subject of other proceedings, and as assignee to Ms. Street in these proceedings. The petitioner described these transactions, which took place around 2018 to 2019, as an overall informal debt and restructuring by Ms. Street and the petitioner to assist the Grace Mtn. Respondents to preserve the development potential, and equity, in the Lands based upon a statement made by Mr. Braich that re-financing was expected to be in place by January 2020.
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> [10] As no formal agreements were entered into, the terms of these agreements are mostly taken from email exchanges between the parties.
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> [11] When that date passed, Ms. Street entered into a forbearance with the Grace Mtn. Respondents after being specifically told by Mr. Braich that, if redemption did not occur as promised, she could take order absolute. Similarly, the petitioner entered into an informal forbearance and settlement terms with the Grace Mtn. Respondents in May 2021 by which it was agreed that $10,050,000 would be owing and again, payment promised by a new date.
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> [12] These subject proceedings were commenced and order *nisi* pronounced August 19, 2021, with the amount to redeem being $7,450,000, that amount being an agreed upon amount, with no interest accruing, and a six month redemption period expiring February 19, 2022, as was agreed to.
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> [13] Pursuant to the agreement with the petitioner in respect of its other mortgage, a draft order *nisi* was signed on behalf of the Grace Mtn. Respondents on November 10, 2021 which provided for a six month redemption period expiring May 2022, and set the amount to redeem that mortgage at $10,050,000 plus costs (again, no interest is noted to be owing). For reasons that are not entirely explained, that order *nisi* has never been entered.
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> [14] As there was no redemption in accordance with the terms of the agreement, the petitioner took steps to re-market the Lands under an order for conduct of sale it had obtained in 2018 in earlier foreclosure proceedings, by listing the Lands for sale on March 18, 2022 through MLS.

[8] As a result, there are two mortgages on the Lands, one being the $7,450,000 mortgage in which the mortgagee is 105 and is the subject of this Court proceeding identified as Vancouver Registry Supreme Court Action No. H-190209. That mortgage was referred to by the parties in this application as the "Street Mortgage", so named because the Grace Mtn. Applicants granted a mortgage of the Lands to Ms. Street on April 28, 2014.

[9] Ms. Street commenced this foreclosure proceeding on March 13, 2019, over five years ago. The Street Mortgage has since been assigned to 105, which has assumed conduct of this proceeding.

[10] As previously noted, 105 obtained order *nisi* with respect to the Street Mortgage on August 19, 2021, fixing the amount of the mortgage at $7,450,000 and providing a six-month redemption period which expired on February 19, 2022, over two years ago. The Street Mortgage has not been redeemed.

[11] A second mortgage on the Lands for $10,050,000 is also referenced in the quote from the associate judge's reasons above, with an order *nisi* having not been entered. The mortgage was referred to by the parties in this application as the "105 Mortgage". The 105 Mortgage is the subject of proceedings in Vancouver Registry Supreme Court Action No. H-190129.

[12] The Street Mortgage is a first mortgage against three parcels of the Lands and a second mortgage against the other three parcels. The 105 Mortgage is a first mortgage against the three parcels on which the Street Mortgage is the second mortgage, and a second mortgage against the three parcels on which the Street Mortgage is the first mortgage.

[13] The more recent background relevant to the Grace Mtn. Applicants' application for an extension of time to file a notice of appeal of the Order is summarized as follows.

The decision of Master Robertson dated April 27, 2023

[14] On April 27, 2023, the parties appeared before Master Robertson on two applications to the Court, one by 105 for order absolute and one by the Grace Mtn. Applicants to extend the redemption period so as to enable them to continue to market the properties for sale themselves.

[15] In oral reasons dated May 11, 2023 (*1055249 B.C. Ltd. v. Grace Mtn. Land Co. Ltd*., 2023 BCSC 867), Master Robertson found that the Grace Mtn. Applicants failed to meet the test for an extension of the redemption period as they could not establish that there was sufficient value in the Lands such that the security was not at risk, and they were unable to satisfy the Court that there was a reasonable probability of an ability to redeem during the proposed extended redemption period.

[16] Master Robertson granted the order absolute in favour of 105, also noting that the Grace Mtn. Applicants specifically agreed during the 2021 negotiations that if they failed to redeem by March 2022, an order absolute would be issued by consent. The position taken by the Grace Mtn. Applicants was contrary to that agreement and there was no basis on which it could be said they ought to be entitled to resile from that.

The decision of Justice Stephens dated December 8, 2023

[17] The Grace Mtn. Applicants appealed Master Robertson's decision of April 27, 2023. Justice Stephens heard the appeal over five days in late October and early November 2023, and gave his oral reasons for judgment on December 8, 2023 (*1055249 B.C. Ltd. v. Grace Mtn. Land Company, Ltd.,* 2023 BCSC 2339), finding that the master's order was clearly wrong and should be set aside because 105 did not inform the master that it had signed a Commitment Letter with a third party on September 16, 2022, which, among other things, contemplated a sale of 85 percent of the Lands and identified a value of the Lands as $18.37 million, which was more than both the amount of the subject Street Mortgage of $7.45 million set out in the order *nisi*, and also the total amount of the two mortgages at $17.5 million, if added

to the amount of the unentered order *nisi* relating to the 105 Mortgage of $10.05 million in the other proceeding.

[18] Justice Stephens found that 105 ought to have disclosed the Commitment Letter to the master, and its failure to do so resulted in an order absolute which is clearly wrong.

[19] Justice Stephens also found that 105's omission to disclose the Commitment Letter was a misrepresentation and stated that he "need not, and do not, find that 105 intentionally misled the master", 105 having made an inaccurate representation and misled the master on a factual matter relating to the evidence of the value of the Lands: at para. 75.

[20] Justice Stephens set aside the order absolute and remitted it back to the master for rehearing.

[21] Justice Stephens also referred to the Grace Mtn. Appellants' submissions that the master erred by referring to the unentered order *nisi* for $10.05 million, the Grace Mtn. Appellants contending that the only amount of debt at issue was the $7.45 million in this proceeding and not the $10.05 million which is the amount of the 105 Mortgage from a different foreclosure proceeding which was not before the master.

[22] Justice Stephens declined to address that issue, because nothing turned on it for the purpose of the appeal and it was not a reviewable error arising out of the master's reference to the second unentered order *nisi* or the $10.05 million amount, because the master found that it did not matter to her determination, highlighting the relevance of the $18.37 million value of the Lands in the Commitment Letter, that submission of the Grace Mtn. Appellants to be considered at the rehearing.

[23] That point is, of course, one of the grounds for the Grace Mtn. Applicants' intended appeal of Robertson A.J.'s decision on the rehearing.

The rehearing before Robertson A.J. on May 22, 2024

[24] The rehearing before Robertson A.J. was heard on March 15 and 26, 2024, with the associate judge's reasons and Order dated May 22, 2024, the subject of the Grace Mtn. Applicants' intended appeal.

[25] In that decision, the associate judge referred to the new evidence of the Commitment Letter and other new evidence regarding the prospects for redemption.

[26] The associate judge reheard the application and considered again the two-part test for extending the redemption period, first finding that she was satisfied that the Grace Mtn. Applicants had met the onus of showing sufficient equity in the lands over and above the amount owed to 105 under both mortgages, considering it not necessary to address whether it is only the balance owing under the $7.45 million mortgage, as the value appeared to be sufficient to cover both it and 105's original mortgage for $10.05 million, emphasizing the Commitment Letter's evidence of value being the sale of an 85% interest in the Lands for $15,614,500 based on an ascribed value of the Lands at $18.27 million, as a further relevant indicator of value and one that is material, as it represented a recent indication of what an arm's length purchaser was willing to consider as the basis of consideration of a purchase of interest in the Lands, or 105's shares: at para. 48.

[27] On the second part of the test for extending the redemption period regarding the probability of redemption, the associate judge found that the Grace Mtn. Applicants did not satisfy the test, as there was no evidence before the court of a probability of any refinance or sale at any value, with no evidence of any party willing to purchase the Lands at a price to pay out the mortgage: at para. 60.

[28] The associate judge then turned to the question of whether there were equitable considerations that ought to bar the order absolute from proceeding, notwithstanding the failure of the Grace Mtn. Applicants to meet the onus upon them. The first argument raised by the Grace Mtn. Applicants regarding equitable considerations was that the Commitment Letter established there will be an unreasonable windfall if the order was granted.

[29] Since one ground of this application is that the Grace Mtn. Applicants alleged the associate judge erred in taking into account the value of both mortgages in considering whether there would be a windfall arising from the order absolute, I set out the associate judge's reasoning on this point as follows:

> [66] An unreasonable windfall is not one that is a mere possibility, but a probability, and one that is more than just a nominal amount having regard to all of the circumstances regarding the history of the matter, the property, and what risks may be taken on to gain that windfall. To find otherwise would require the petitioner to be in a likely shortfall position with no chance of a profit based on value before it would be entitled to seek order absolute. It would be contrary to general foreclosure principles to say that such is a precondition to a mortgagee exercising foundational foreclosure remedies which it has as a matter of both equity and contract. Just as a borrower does not share its equity gains with its lenders, a lender is not expected to share its loss or risk.
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> [67] Taking such an approach, and considering the overall context of the purported windfall, is consistent with the approach suggested by the Ontario Court of Appeal in *Winters*.
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> [68] In this respect, there are costs and risks in taking order absolute. First, the petitioner will be required to pay property transfer tax to have title transferred to it. At $13M (the value of the offer that was not considered) that is some $368,000. At more than $18M, that is over $518,000. Taking those amounts off the top of the stated value in the Commitment Letter equates to a net sales proceeds of $17,852,0000 and $18,002,000. At a face value of the two mortgages of $17,500,000, before any costs are taken into account, that equates to less than a 3% lift.
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> [69] In the face of that less than 3% lift, there is a risk that the Lands cannot ultimately be developed, or cannot be re-sold at a sufficient amount that the petitioner will realize on its 15% retained interest (keeping in mind that the only other binding offer received to date is $13M). There is the risk of the costs of any development eroding any profit, or in fact causing a further loss to the petitioner and 134. There is a risk that they will incur liabilities once they take possession of the Lands, including environmental liabilities.
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> [70] In my view, the terms of the Commitment Letter do not constitute a windfall of the type that establish that allowing the petitioner to take order absolute would be inequitable, having regard to all of the circumstances.

[30] The reference to the *Winters* approach at para. 67 in Robertson A.J.'s reasons refers to the associate judge's earlier quote from *Winters v. Hunking*, 2017 ONCA 909 as follows:

> [40] A windfall in itself may not be dispositive of a motion to set aside a final order of foreclosure, but it remains an important factor in the analysis: see, for example, *Namu* (B.C.C.A.), at para. 17; *Coast-to-Coast Development*

> *Co.,* at para. 19; *Ontario Housing Corp.* (H.C.), at pp. 127-128; *Platt v. Ashbridge* (1865), 12 Gr. 105 (U.C. Ch.). Where the analysis fails to take into account the magnitude of a windfall in the context of the circumstances, including any prejudice or the lack of prejudice to the mortgagee, the windfall factor has not been property assessed. It cannot be simply a matter of the weight to be given to the windfall factor when the significant magnitude of that factor has not been addressed in context.

[31] As a result, the associate judge concluded the terms of the Commitment Letter did not constitute a windfall of the type that would be inequitable if 105 were to take order absolute.

Events following the Robertson A.J. Order dated May 22, 2024

[32] For the purposes of this application, events following the day that Robertson A.J. issued her reasons for judgment and the Order on May 22, 2024, are as follows:

a) Peter Reardon, counsel for the Grace Mtn. Applicants at the hearing before Robertson A.J., explains in his affidavit filed on this application that he received instructions to appeal the Order of May 22, 2024. The next day he attended a creditors' meeting by MS Teams in the bankruptcy of Mr. Braich. That meeting included counsel for 105. Mr. Reardon advised the participants at that meeting that Mr. Braich intended to appeal Robertson A.J.'s decision.

b) Mr. Reardon deposes he believed the time for filing a notice of appeal was 30 days from the date of the Order. Before June 3, 2024, he asked an associate lawyer at his firm to do some preliminary research on grounds for appeal. The associate was then away for two weeks. Upon her return on June 17, Mr. Reardon looked at Rule 23-6(8.1) regarding an appeal from an associate judge. At that time he realized the appeal is to be brought within 14 days after the decision, that period having expired on June 6, 2024.

c) At that point, Mr. Reardon states they started preparing materials to seek an extension of the time for appealing the Order of Robertson A.J. to a

justice of the Supreme Court of British Columbia. However, they concluded that, given the litigation history between the parties, the matter would likely end up in the Court of Appeal in any event. Rather than applying to a Supreme Court justice to extend the time for filing a notice of appeal in the Supreme Court, a decision was made to file in the Court of Appeal a notice of appeal and a notice of application for leave to appeal, and for a stay of the Order, all of which were filed and served on 105's counsel on June 21, 2024.

d) I note that s. 13(2)(b) of the *Court of Appeal Act*, S.B.C. 2021, c. 6 provides an appeal to the Court of Appeal may not be made from a decision of an associate judge of the Supreme Court.

e) The hearing of the Grace Mtn. Applicants' application to the Court of Appeal for leave to appeal and a stay of the Order was set for hearing on July 8, 2024. Counsel for 105 requested an adjournment. It was agreed to be heard on July 16, 2024.

f) Mr. Reardon's affidavit was affirmed on July 15, 2024. He concludes that affidavit stating that the leave and stay applications were being opposed by 105 and, if they were dismissed, he had instructions to pursue an application to a judge of the Supreme Court to extend the time to appeal the Order.

g) The Grace Mtn. Applicant's application to the Court of Appeal was heard in Court of Appeal chambers on July 19, 2024. Madam Justice Saunders dismissed the application and issued reasons on July 25, 2024 (*Grace Mtn. Land Company, Ltd. v. 10555249 BC Ltd*., 2024 BCCA 280), stating that the language of s. 13 of the *Court of Appeal Act*, S.B.C. 2021, c. 6 appeared to be plain, concluding that the natural import of the words used in s. 13(2)(b) preclude an appeal directly to the Court of Appeal from the Order, and the subject matter of such an order may only be addressed by

the Court of Appeal after a judge of the Supreme Court has made an order in respect to it.

h) As a result, the Grace Mtn. Applicants' notice of application to extend the time to appeal the Order was filed in the Supreme Court on July 17, 2024, 41 days after the 14-day period for filing a notice of appeal expired on June 6, 2024, with the hearing of the application here a month later on August 20, continuing and concluding on August 30, 2024.

The Parties' Positions

Grace Mtn. Applicants' position

[33] The Grace Mtn. Applicants' submissions on the application for an order to extend the time to file a notice of appeal from the Order are that the associate judge:

a) erred in law by misapprehending the evidence in assessing the magnitude of a windfall to 105 by failing to properly assess the relevant evidence, specifically by:

   i. failing to appreciate that the only mortgage in issue in this action was the Street Mortgage, the indebtedness being only $7.54 [*sic*] million;

   ii. taking into account an irrelevant factor, being 105's $10.05 million dollar mortgage that was the subject of another action;

b) erred in finding that a deliberate misrepresentation to the court by 105 could be sufficiently addressed by an award of increased costs when the result of that misrepresentation led to 105 obtaining an order absolute which was subsequently set aside in a prior appeal; and

c) failing to determine, having regard to the Commitment Letter, that there was substantially greater value in the subject properties than the $7.54 [*sic*] million debt on the Street Mortgage.

105's position

[34] 105 opposes the application for an extension of time to file the notice of appeal and a stay, submitting there is no merit in the appeal because none of the grounds of appeal would disturb the findings of the Court with respect to the two branches of the test to be met for an extension of the redemption period: (1) the properties have sufficient value for the amount outstanding to 105; and (2) there is a reasonable prospect of repayment within the time being sought as part of the extended redemption period.

Legal Framework

Extension of time

[35] Rule 22-4(2) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*] permits a court to extend any period of time provided for in the *SCCR* as follows:

> (2) The court may extend or shorten any period of time provided for in these Supreme Court Civil Rules or in an order of the court, even though the application for the extension or the order granting the extension is made after the period of time has expired.

[36] The parties agree that the factors to be considered on an application to extend the time to file an appeal are as follows:

1) whether there was a *bona fide* intention to appeal;

2) when the respondent was informed of that intention;

3) whether the respondent would be unduly prejudiced by an extension;

4) the merits in the appeal; and

5) whether it is in the interest of justice that an extension be granted.

(the "*Davies* criteria")

See: *Davies v. Canadian Imperial Bank of Commerce*, 15 B.C.L.R. (2d) 256, 1987 CanLII 2608 (C.A.) at para. 20; and *Capital Now Inc. v. Munro*, 2022 BCSC 1044 at para. 22; and

[37] The burden is on the applicant to establish that the criteria are met: *Kedia International Inc. v. Royal Bank of Canada,* 2008 BCCA 305 at para. 8; and *Rapton v. British Columbia (Motor Vehicles)*, 2011 BCCA 71 at para. 19.

[38] The *Davies* criteria are generally applied less stringently in an application to extend the time to file materials, rather than initiate an appeal: *Aslanimehr v. Hashemi*, 2019 BCCA 421 at para. 38.

[39] In *MacLanders v. MacLanders*, 2012 BCCA 218 at para. 12, Justice Hinkson, as he then was, states that: “The fifth question is the most important as it encompasses the other four questions and states the decisive question.”

Stay of the order

[40] The Grace Mtn. Applicants also seek an order pursuant to Rule 13-2(31) and the inherent jurisdiction of the Court for a stay of execution of the Order of Robertson A.J. made May 22, 2024, pending the hearing and determination of the appeal. The parties agree that the factors to be considered are:

a) there must be merit to the appeal in the sense that there is a serious question to be tried;

b) the applicants must show that they will suffer irreparable harm if the stay is not granted; and

c) the balance of convenience must favour the granting of the stay.

[41] The threshold on whether there is a serious question to be tried is low.

[42] 105 refers to a number of cases for the factors to be considered on a stay application: *British Columbia (Attorney General) v. Trial Lawyers Association of*

British Columbia, 2022 BCCA 289; and *Cowichan Valley Regional District v. Cobble Hill Holdings*, 2016 BCCA 160. The Grace Mtn. Applicants refer to *Capital Now Inc. v. Munro*, 2022 BCSC 1297, paras. 11 and 15.

Analysis

1. Whether there was a bona fide intention to appeal

2. When were the respondents informed of the intention?

[43] The first two criteria, or factors to be considered on an application to extend the time to file an appeal are: (1) whether there was a bona fide intention to appeal; and (2) when were the respondents informed of that intention?

[44] 105 does not take issue with these first two factors.

[45] In the affidavit of Peter Reardon, counsel for the Grace Mtn. Applicants, Mr. Reardon provides evidence that he received instructions to appeal the Order the next day on May 23, 2024, and that day he attended a creditors' meeting by MS Teams in the bankruptcy of Mr. Braich, that meeting including counsel for 105. Mr. Reardon deposes that he advised those in attendance that his client would be appealing the Order, hence there was a *bona fide* intention to appeal and the respondents were informed of the intention in a timely manner.

3. Would the respondents be unduly prejudiced by an extension?

[46] The third factor to be considered on an application to extend the time to file an appeal is whether the respondent would be unduly prejudiced by an extension.

[47] 105 submits it would be unduly prejudiced by an extension of time for the Grace Mtn. Applicants to file their notice of appeal, referring to the redemption period having expired on February 19, 2022, over two years ago, and the Grace Mtn. Applicants having failed to redeem the Street Mortgage.

[48] In *Cost Plus Computer Solutions v. VKI Studios*, 2015 BCCA 467 at paragraph 40, the Court of Appeal for British Columbia stated that the question of prejudice does not relate to the appeal itself, but the length of the extension of time.

[49] The tendency is that extensions of time may be granted where the delay is short and where the delay is due to an error on the part of the solicitor: *Jory v. College of Physicians & Surgeons (British Columbia)*, 70 B.C.L.R. 143, 1986 CanLII 888 (C.A.).

[50] Here, there was an initial error by the solicitor in failing to appreciate that there was a 14-day period to file the notice of appeal, not 30 days, and the error was noticed on June 17, 2024, 11 days after the appeal period expired on June 6, 2024, but the notice of application here to the Supreme Court was not filed until a month later, July 17, 2024.

[51] Rather than apply for an extension of time with the Supreme Court, however, counsel for the Grace Mtn. Applicants prepared an application for leave to appeal the order and filed it in the Court of Appeal on June 21, 2024, and the hearing was held on July 19, 2024, with the application dismissed that day with reasons to follow.

[52] The filing in the Court of Appeal cannot be considered to be a solicitor's error because it was a conscious decision to skip the Supreme Court and proceed directly to the Court of Appeal. Mr. Reardon's affidavit explains that given the history of the litigation between these parties "we came to the conclusion" (presumably the "we" including Mr. Reardon's client, but not clear), that the Court of Appeal is where the issue would end up anyway.

[53] The notice of application for an extension of time was filed in the Supreme Court on July 17, 2024, two days before the hearing in the Court of Appeal, over a month after the expiry of the time to file a notice of appeal, and after requiring 105 to respond to an additional, and ultimately unneeded, application for leave to appeal in the Court of Appeal.

[54] Given that redemption periods are six months, later extensions typically a shorter duration, and the redemption period here having expired on February 19, 2022, over two years ago, a one-month delay is something more than a "short delay". Also, the error is in not commencing the appeal, which is treated more

seriously than a subsequent missed filing deadline, as in the case cited by the Grace Mtn. Applicants: *Salfinger v. Salfinger*, 2013 BCCA 217 at para. 20.

[55] The somewhat cavalier attitude of the Grace Mtn. Applicants to the appropriate filings for an appeal resulting in an extended delay in the proceedings and the additional unneeded preparation for an appearance in the Court of Appeal does, in my view, provide some evidence of some prejudice to 105, perhaps not raising to the height of unduly being prejudiced. However, there was some prejudice.

4. Is there merit in the appeal?

[56] The fourth factor to be considered on an application to extend the time to file an appeal is whether there is merit in the appeal.

[57] In *Cost Plus Computer Solutions v. VKI Studios*, 2015 BCCA 467 at para. 43, the Court of Appeal for British Columbia stated the test for granting an extension of time to file a notice of appeal is not high, with language being used such as "no reasonable prospect of success" or "an arguable point" or "bound to fail".

[58] Justice Stephens stated that the standard of review on an appeal of an order of an associate judge to deny extension of a redemption period is "clearly wrong", citing *Imor Capital Corp. v. Bullet Enterprises Ltd.*, 2014 BCSC 2540 at para. 5.

[59] The Grace Mtn. Applicants' intended appeal is of the associate judge's order which dismissed the application to extend the redemption period and grant order absolute.

[60] The Grace Mtn. Applicants submit that it is only their three grounds of appeal that are to be considered in assessing the merits of the appeal.

[61] 105 submits that what is also to be considered on the merits of the appeal is the associate judge's finding that the Grace Mtn. Applicants were unable to meet their onus of proof on the second part of the two-part test for extension of the redemption period, that is, they had met the first part of the test in establishing there was sufficient equity in the Lands over and above the amount owed to 105 under

both mortgages, but had not met their onus in failing to establish that there is a reasonable prospect of redemption, meaning a probability, not a possibility, if the redemption period is extended.

[62] In my view, the starting point for considering the merit in the appeal is the grounds upon which the Grace Mtn. Applicants intend to appeal the Order. For that reason, the following is a review of the merits of each of the three intended grounds of appeal as set out in the notice of application.

[63] 105's submission about the Grace Mtn. Applicants not meeting the second part of the test for extending the redemption period, that is, whether there is a reasonable prospect of redemption, I consider to be more appropriately considered in the fifth factor to be considered, that is, the interests of justice.

[64] The grounds of appeal need to be assessed first on their merits, since if there is merit, for example in the first alleged error regarding the mortgages to be taken into account when considering the value of the Lands and whether or not there is a windfall, that is an equitable consideration beyond the test for extending the redemption period, such equitable considerations potentially barring the Order absolute from proceeding, notwithstanding the failure of the Grace Mtn. Applicants to meet the onus upon them to prove the value of the Lands and a reasonable prospect of redemption.

First Alleged Error

[65] Here, if the Grace Mtn. Applicants' application for an extension of time is granted, according to the Grace Mtn. Applicants, the question of whether there was an unreasonable windfall would depend on an assessment of the value of the properties in relation to the single Street Mortgage of $7.45 million, not including the 105 Mortgage for $10.05 million, and, according to the Grace Mtn. Applicants, a substantially greater value of the properties or the Lands having regard to the Commitment Letter.

[66] The Grace Mtn. Applicants submit that the associate judge should not have taken into account the 105 Mortgage for $10.05 million in considering whether or not there was a windfall arising from the order absolute granted to 105, because it is a different mortgage in a different proceeding. However, the Grace Mtn. Applicants assert no authority for that proposition that the $10.05 mortgage on the Lands should not be considered.

[67] Here, it cannot be said that the 105 Mortgage for $10.05 million cannot be considered because, on an order absolute, the mortgagee has to take into account superior interest holders, here including the Street Mortgage on the three parcels where the Street Mortgage is a first mortgage superior to the 105 Mortgage as a second mortgage on the same three parcels.

[68] The value of all mortgages and orders *nisi* on the Lands are relevant on an application to extend the redemption period, because the Court must assess whether the property has sufficient value by way of security for the amount outstanding. If another mortgage ranks in priority to the subject mortgage, that mortgage threatens the equity available to satisfy the subject mortgage.

[69] Here the Street Mortgage is a first mortgage on three of the six parcels before the 105 Mortgage and the second mortgage on the other three parcels behind the 105 Mortgage.

[70] Any prospective offer to purchase the Lands would require clear title and, as such, the amount of the offer would need to be sufficient to vest off both the Street Mortgage and the 105 Mortgage, given the offsetting priorities of the mortgages. As a result, it was appropriate, in my view, and necessary for the associate judge to consider both mortgages in assessing whether the Grace Mtn. Applicants have demonstrated a reasonable prospect of redemption, and in considering the equitable considerations of a possible windfall. There cannot be an accurate picture of the equities and the equity in the Lands without considering the mortgages affecting that consideration. The fact that one mortgage is the subject of a different action, in my

view, is not relevant because it is the Lands that are the focus of the inquiry and the mortgages that impact the equity on the Lands, not separate court actions.

[71] Courts appropriately take notice of the value of other mortgages against a property when considering an application to extend the redemption period on a subject property; see *Pacific Sunset Development Corp. v. Dickie*, 87 A.C.W.S. (3d) 166, 1999 CanLII 6656 (B.C.S.C.);*1299362 B.C. Ltd. v. Marine Investments Inc*., 2022 BCSC 393; and *Schindler v. Habib*, 2012 BCSC 150.

[72] An often-cited example is *Canada Permanent Mortgage Corp. v. Dan-Al Construction Co*., [1982] B.C.J. No 2339 (B.C.C.A.), where the appellant, Canadian Permanent Mortgage Corp., held a first mortgage on property in Dawson Creek with two residential apartment buildings. The respondent Chilliwack Holdings was the second mortgagee with a mortgage valued at $750,000. Canada Permanent obtained an order *nisi* with a six-month redemption period. Chilliwack Holdings, an individual guarantor of the first mortgage, and the second mortgagee, was granted an extension of the redemption period. Canada Permanent appealed, alleging that, among other things, that the chambers judge erred in holding there was a reasonable prospect that the property was worth more than what was owing.

[73] The Court of Appeal found that there was sufficient evidence before the chambers judge that the value of the property was greater than the monies owing on the two mortgages and the appeal was dismissed. The Court considered the value of the second mortgage, not just the first mortgage ranking ahead of the second mortgage, in assessing whether there was sufficient value in the property.

[74] As a result, in my view, the Grace Mtn. Applicants' intended ground of appeal alleging that the associate judge erred in law in assessing the magnitude of a windfall to 105 by failing to properly assess the relevant evidence, specifically by failing to appreciate the only mortgage in issue in the action was the Street Mortgage, the indebtedness being only $7.45 million; and by taking into account 105's $10.05 million mortgage that was the subject of another action, has no reasonable prospect of success and is bound to fail.

Second Alleged Error - Costs

[75] The Grace Mtn. Applicants' second alleged error of the associate judge is the associate judge's finding that a deliberate misrepresentation of the court by 105 could be sufficiently addressed by an award of increased costs which 105 considers to be a lower than the warranted level of costs – that is, less than special costs – with the Grace Mtn. Applicants submitting that the result of that misrepresentation led to 105 retaining an order absolute, subsequently set aside on a prior appeal.

[76] The Grace Mtn. Applicants' use of the phrase "deliberate misrepresentation" suggests intentional misrepresentation. However, neither Stephens J. nor Robertson A.J. stated that the misrepresentation occasioned by 105 for failing to disclose the Commitment Letter was intentional. Justice Stephens states at para. 75 of his reasons that: “I need not, and do not, find that 105 intentionally misled the master.”

[77] Associate Judge Robertson considers costs at paras. 88–95 of her reasons with respect to the Order, stating that 105's failure to disclose the Commitment Letter was a misrepresentation, with no reference to whether it was intentional or not, but that the misrepresentation was deserving of some rebuke.

[78] The associate judge refers to *380876 British Columbia Ltd. v. Ron Perrick Law Corp*., 2009 BCSC 1209 at para. 37, where the Court confirmed that the circumstances that justify a lift in scale for increased costs include, among other circumstances, litigation misconduct by the unsuccessful party.

[79] The associate judge's reasons specifically address special costs and why she ordered increased costs rather than special costs, stating that increasing the scale of costs is in respect of misconduct similar to special costs, available where the conduct does not quite meet the "reprehensible" level of special costs, and special costs being punitive are not appropriate, but a party should be better indemnified as a result of that conduct in this case.

[80] As a result, the associate judge ordered costs at Scale B with a value for each unit being 1.5 times that which would otherwise apply, that is, a 50-percent increase in the costs that would otherwise be assessed at Scale B.

[81] The merits of the Grace Mtn. Applicants' allegation of error in the associate judge's assessment of costs can be considered with reference to the legal principles regarding costs decisions.

[82] In *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329, the Court of Appeal for British Columbia stated as follows:

> [33] Decisions on whether to order costs and, if so, how to calculate them, are governed by a wide measure of discretion. Accordingly, costs awards attract a high degree of appellate deference. Nevertheless, the discretion to award costs must be exercised judicially and in accordance with the *Supreme Court Civil Rules* and established principles. This Court will interfere with a costs award if, but only if, the judge misdirected himself or herself on the applicable law, made an error in principle, made a palpable error in assessing the facts or otherwise made an award that is so clearly wrong as to amount to an injustice . . .
>
> [Emphasis added.]

[83] A trial judge enjoys broad discretion to award special costs where there has been reprehensible conduct within the litigation: *Eng v. Wong*, 2020 BCCA 148; and *Smithies Holdings Inc. v. RCV Holdings Ltd*., 2017 BCCA 177.

[84] In *Tisalona v. Easton*, 2017 BCCA 272, the Court of Appeal stated:

> [62] Trial judges have broad discretion in awarding costs in litigation before them. This discretion is reflected in the standard of review, described by this court in this way in *Hartshorne v. Hartshorne*, 2011 BCCA 29:
>
> > [22] The standard of review on the issue of costs was recently addressed in *Victoria (City) v. Adams*, 2009 BCCA 563:
> >
> > > [180] The general rule with respect to costs is that they follow the event and are assessed on a party and party basis unless the court otherwise orders: Rules 57(9) and 57(1) of the *Rules of Court*. Courts retain the discretion to depart from the general rule where the circumstances justify a different approach: *British Columbia (Minister of Forests) v. Okanagan Indian Band,* 2003 SCC 71, [2003] 3 S.C.R. 371 at para. 22. It

> is a broad discretion, and this Court will only interfere "if there is misdirection or the decision is so clearly wrong as to amount to an injustice": *Agar v. Morgan*, 2005 BCCA 579 at para. 26.
>
> [23] Given the discretionary nature of an award of costs, appellate review of such an award is limited. An appellate court may only interfere with an award of costs if it can be demonstrated that "the trial judge has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd*., 2004 SCC 9, [2004] 1 S.C.R. 303 at para. 27, quoted in *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 72.
>
> [Emphasis added.]

[85] Here, the associate judge considered the conduct of 105, assessed that conduct in relation to the "reprehensible" level of special costs, and decided that the conduct did not quite meet that level. She considered the wording of Appendix B of the Rules regarding increased costs, and she considered the punitive nature of special costs, again finding that the conduct was not deserving of punitive measures, but that the Grace Mtn. Applicants should be indemnified as a result of 105's conduct.

[86] As a result, with reference to the wording of the legal principles on costs decisions, the associate judge's decision is to be accorded a high level of deference. Her discretionary decision cannot be considered, in my view, to be a misdirection or clearly or plainly wrong. In my view, she did not make an error in principle or a palpable error in assessing the facts or otherwise make an award that is so clearly wrong as to amount to an injustice.

[87] In my view, the Grace Mtn. Applicants' intended ground of appeal on the costs issue has no reasonable prospect of success and is bound to fail for those reasons.

Third Alleged Error – failing to determine the Lands value was greater than $7.45 million

[88] The Grace Mtn. Applicants in their notice of application allege a third error of the associate judge in her failing to determine, having regard to the Commitment

Letter, that there was substantially greater value in the subject properties than the $7.54 [*sic*] million debt on the Street Mortgage.

[89] I note as a minor point that this alleged error was not included in the Grace Mtn. Applicants' prior notice of appeal to the Court of Appeal, nor the appellant's memorandum of argument for leave to appeal.

[90] In my view this ground of alleged error is bound to fail because at paras. 46–50 of the associate judge's reasons she considers the question of whether there was sufficient value in the Lands by reviewing evidence of numerous listings, appraisals, expressions of interest, and the Commitment Letter, concluding at para. 50 that the Grace Mtn. Applicants had met the onus to show sufficient equity in the land over and above the amount owed to 105 under both mortgages, not just the $7.45 million mortgage.

[91] The associate judge highlighted the value of the Lands with reference to the Commitment Letter as follows:

> [48] The new evidence of value includes the sale of an 85% interest in the Lands for $15,614,500, based on an ascribed value of the Lands at $18,370,000, even with the evidence from 134's principal that that amount was notional, is further relevant indicator of value and one that is a material one as it represents a recent indication of what an arm's length purchaser is willing to consider as the basis for consideration of a purchase of an interest in either the Lands, or the petitioner's shares.

[92] As a result, the associate judge very clearly determined the value of the Lands as significantly more than $7.45 million. In my view, the alleged error of failing to determine, having regard to the Commitment Letter, that there was substantially greater value in the subject properties than the $7.45 million debt on the Street Mortgage has no reasonable prospect of success and is bound to fail.

5. Whether it is in the interests of justice that an extension be granted

[93] The fifth factor to be considered on an application to extend the time to file an appeal is whether it is in the interests of justice that an extension be granted.

[94] This fifth question "encompasses the other four questions and states the decisive question": *Davies* at para. 260.

[95] The Grace Mtn. Applicants cite *Salfinger v. Salfinger*, 2013 BCCA 217 at para. 30, for the proposition that an application to extend time will generally be granted where there has been a short delay and that delay is due to counsel's error, or the delay was caused by counsel and there is a demonstrable intention to pursue the appeal. However, in that case, the notice of appeal had been filed in time and the application to extend the time was related to filing the appeal record, which had been rejected by the registry because the reasons for judgment were not signed, the affidavit and transcripts were in the appeal book rather than the appeal record, and the record was improperly bound.

[96] In the case law, there is a distinction made between application for an extension of time to take a step in an appeal originally brought in time, contrasted with an application for an extension to commence an appeal, as in the case at bar.

[97] In *Schiel v. Deutschmann Estate*, 2013 BCCA 336, the respondent on an appeal relating to an application for an extension of time conceded that the appellant had met the first three of the five *Davies* criteria, but asserted on the fourth and fifth criteria that the proposed appeal had no merit and was not in the interests of justice to extend time.

[98] Justice Chiasson in Court of Appeal chambers referred to cases making the distinction between applications for an extension of time for taking the step in an appeal, which was originally brought in time, compared to an extension for bringing an appeal as follows:

> [13] In *Kedia International Inc. v. Royal Bank of Canada*, 2008 BCCA 305 at para. 27 (in Chambers), I stated:
>
> > A refusal to extend time can result in the dismissal of an appeal. It is clear that a justice in Chambers will not refuse to extend the time for taking a step in an appeal, which was originally brought in time, solely on the ground the appeal is without merit, but that is not the case where the application is to extend the time for bringing an appeal (*Dadashzadeh v. B.C.*, 2003 BCCA 463, 188 B.C.A.C. 203 at para. 8 (Rowles

> J.A. in Chambers)). In addition, the absence of merits can inform a consideration of the overriding criterion: the interests of justice (*Seiler v. Mutual Fire Insurance Co. of British Columbia,* 2003 BCCA 696, 31 C.L.R. (3d) 262 at para. 18 (Finch C.J.B.C. in Chambers)).

[14] In *MacLanders v. MacLanders*, 2012 BCCA 218 at para. 19, Mr. Justice Hinkson (in Chambers) wrote:

> An extension of time to file a Notice of Appeal, as opposed to an extension of time to take a step necessary to prosecute the appeal, should not be granted if the appeal is without merit . . .

[15] In *Deutschmann Estate v. Fallis*, 2011 BCCA 404, Rowles J.A. (in Chambers) dismissed the application of the appellant and her children for an extension of time. The observation of Rowles J.A. at para. 5 has relevance to the instant application:

> There are many cases that support the proposition that, even if the other criteria have been met, an extension of time to file a notice of appeal should not be granted if the appeal is bound to fail. See, among others: *Wilk v. Kelowna and District Boys & Girls Club* (1997), 1997 CanLII 4130 (BC CA), 86 B.C.A.C. 236 (Lambert J.A. in Chambers); *Havey v. British Columbia (Information and Privacy Commissioner)* (1996), 1996 CanLII 1798 (BC CA), 70 B.C.A.C. 146 (Hollinrake J.A. in Chambers); *Thorne Ernst & Whinney Inc. v. A. & V.P. Holdings Ltd*., (27 July 1995) Vancouver CA020015 (B.C.C.A.) (Carrothers J.A. in Chambers); and *Franks v. British Columbia (B.C. Benefits Board)*, 1999 BCCA 165, (Proudfoot J.A. in Chambers), aff'd 1999 BCCA 407, leave to appeal to SCC refused, [1999] S.C.C.A. No. 361 (Q.L.).

[99] Here, the first two *Davies* factors regarding a *bona fide* intention to appeal and being timely informed of the intention to appeal are conceded by 105.

[100] For the third factor, regarding prejudice, I have found that the initial delay in the Grace Mtn. Applicants proceeding with the appeal was a result of counsel's error in having misunderstood the time within which to file the appeal, but the additional delay and costs associated with a conscious decision to leap frog past the Supreme Court to the Court of Appeal, was the source of some prejudice to 105, if not unduly prejudicing 105.

[101] On the fourth *Davies* factor, as discussed above, it is my view that there is no merit to the three grounds of appeal of the Order. This leads me to refer, as an

additional point regarding the interests of justice, to 105's counsel's submission on the merits of the appeal that the application to extend the redemption period is in any event doomed to failure because, throughout these proceedings, the Grace Mtn. Applicants have not satisfied the Court of the second part of the two-part test for obtaining an order for an extension of the redemption period – that there is a reasonable prospect of repayment within the time being sought as part of the extended redemption period.

[102] One ground of appeal is the amount of the mortgages to be considered on the question of whether or not there will be a windfall arising from the order absolute involves an equitable consideration.

[103] Given the history of these proceedings, I consider it to be in the interests of justice to not grant the extension of time to appeal because of the reasons given above on the *Davies* factors, with additional reasons regarding the interests of justice, expressed well by the associate judge as follows:

> [84] . . . the conduct of the Grace Mtn. Respondents, and Mr. Braich specifically, illustrate a pattern showing a lack of respect with the legal process (through evading service), a willingness to make promises to induce the other parties to compromise their own legal positions and a tendency to then completely disregard the obligation they agreed to in order to obtain that concession. I agree with counsel for the petitioner that the Grace Mtn. Respondents have taken significant efforts to delay any ability of any of its mortgagees to obtain their remedies. That Mr. Braich continues to only pursue sales that are speculative and, given their failure to proceed to any binding agreement whatsoever, are not likely at a commercially reasonable value, is further indication that Mr. Braich is choosing not to pursue any possibility of a redemption. Instead, he benefits from what are effectively, and have been since 2021, interest free loans (although some payments were initially made when the agreements were first entered into), in the hope that he can delay long enough that circumstances (such as rezoning by the District of Mission) will change and the Lands will realize a significant profit to him.
>
> [85] Put another way, he has used these proceedings in a way that has foisted all the risk to the petitioner, and all benefit to himself.
>
> [86] In the face of that history, much of which was before me at the Initial Hearing and further illustrated by the new evidence tendered at this application, as well as the fact that the Initial Hearing was scheduled on a peremptory basis as against the Grace Mtn. Respondents given previous delays, often due to changes of counsel, I do not find that the conduct of the

> petitioner, despite the concerning misrepresentation made in respect of the Commitment Letter, is such that order absolute should not be granted.

[104] Another consideration for the factor of the interests of justice is Rule 1-3 of the *SCCR* which provides that the object of the Rules is to secure the just, speedy, and inexpensive determination of every proceeding on its merits. Considering the amounts involved, the importance of the issues in dispute, and the complexity of the proceeding.

[105] Here, the amount involved is significant. The issues are important to the parties, as is the case in most proceedings. However, the proceedings here are not complex and they have not been speedy, particularly given the issue of the exceedingly lengthy redemption period without the prospect of redemption.

[106] In the *Schiel* case, Chiasson J. agreed with the opinion of the chambers judge, Justice Forth, that it was "time to end the battle". I do not maintain the illusion that this will end the battle. However, on the *Davies* fifth factor of the interests of justice, for the reasons above I consider that factor to weigh against granting the order sought to extend the time for the Grace Mtn. Applicants to file an appeal of the Order of Robertson A.J.

Stay of the Order

[107] The Grace Mtn. Applicants also seek an order pursuant to Rule 13-2(31) and the inherent jurisdiction of the Court, for a stay of execution of the Order of Robertson A.J. made May 22, 2024, pending the hearing and determination of the appeal. The parties agree that the factors to be considered are:

a) there must be merit to the appeal, in the sense that there is a serious question to be tried;

b) the applicants must show that they will suffer irreparable harm if the stay is not granted; and

c) the balance of convenience must favour the granting of the stay.

[108] The threshold on whether there is a serious question to be tried is low here.

[109] Given my decision to not grant the Grace Mtn. Applicants an extension of time to appeal the Order, it follows that a stay does not follow. However, if I am wrong on that specific point, I would dismiss the application for a stay because I have found no merit to the appeal. The Grace Mtn. Applicants have not shown they will suffer irreparable harm because they have not been in a position to redeem the mortgages over the course of these proceedings and the balance of convenience does not favour the granting of a stay. The lengthy history of these proceedings favours 105 and allowing them to proceed with order absolute.

Conclusion

[110] For all of these reasons, the application of the applicants Grace Mtn. Land Co. Ltd. and Herkenn Singh Kenny Braich also known as Kenny Braich for an order for an extension of time to file a notice of appeal of the Order of Robertson A.J. dated May 22, 2024, is dismissed.

[111] The application of the Grace Mtn. Applicants for an order of a stay of the Order of Robertson A.J. dated May 22, 2024, is dismissed.

[SUBMISSIONS ON COSTS]

[112] THE COURT: Although 105 has been successful on this application and in the normal course may be entitled to its costs, I have not been referred to any authority that would depart from the principle that costs are not payable following an order absolute, and the order absolute has been granted here, so for those reasons, I will decline to make a costs award in these proceedings.

"Jones J."