IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1055249 BC Ltd. v. Grace Mtn. Land Company, Ltd.,* 2024 BCSC 880

Date: 20240522
Docket: H190209
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: Associate Judge Robertson

Reasons for Judgment

Counsel for the Petitioner:	M.C. Sennott L. Morris
Counsel for the Respondents:	P.J. Reardon
Place and Date of Hearing:	Vancouver, B.C. March 15 & 26, 2024
Place and Date of Judgment:	Vancouver, B.C. May 22, 2024

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Introduction

[1] These proceedings involve the foreclosure of approximately 64 acres of bare land in Mission, B.C. (the "Lands") comprised of six separate titles, which have been the subject of various foreclosure proceedings since 2015.

[2] The matter came on for hearing before me on April 27, 2023 (the "Initial Hearing") at which time the petitioner sought order absolute and, by cross application, the respondents Herkenn Singh Kenny Braich ("Mr. Braich") and Grace Mtn. Land Company, Ltd. (collectively, with Mr. Braich, the "Grace Mtn. Respondents"), who are a covenantor and mortgagor respectively, sought an extension of the redemption period to enable them to continue to market the properties for sale themselves.

[3] I delivered oral reasons for judgment on May 11, 2023, granting the order absolute, and dismissing the Grace Mtn. Respondent's application. Those reasons are indexed at 2023 BCSC 867 (the "Prior Reasons").

[4] The Grace Mtn. Respondent's appealed those decisions, with the appeal coming on for hearing over 5 days from October 20, 2023 to November 3, 2023. By order pronounced on December 8, 2023, with reasons for judgment indexed as 2023 BCSC 2339 (the "Appeal Reasons"), the appeal was granted, order absolute set aside and the applications remitted back for redetermination, with the following comments:

> [113] I am satisfied that I have the power on an appeal of a master to remit it back to the master for reconsideration: see e.g., *414152 B.C. Ltd. v. J.W. Timber Co. Ltd.*, 79 A.C.W.S. (3d) 1129, 1998 CanLII 6645 (B.C.S.C.) at paras. 30–31.
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> [114] The appropriate remedy in this case is to set aside the order absolute and remit the application for order absolute and to extend the redemption period back to the master for rehearing and reconsideration. The master was not informed of certain evidence relevant to the matter of value, and the application should be reheard with the benefit of that evidence. At that hearing or rehearing, the master may consider evidence not before the master previously, including the Commitment Letter (Exhibit A); share pledge (Exhibit B); and statutory declaration; (Exhibit C); the Second and Third Chan Affidavits; the Mr. Yue affidavit; and the cross-examination transcript of Ms. Chan.

> [115] In addition, during the hearing of this appeal before me, counsel for the Appellants provided to me a letter from the insolvency trustee of the estate of Mr. Braich to counsel for the Appellants and for 105. That letter referred to a redacted form of the Commitment Letter which it described as "akin to an offer to purchase the foreclosure lands for an amount in excess of $18 million." Counsel for the trustee stated in his letter, among other things, "If this agreement is in fact the equivalent of an offer showing value in excess of $18 million, it poses a material concern for the Trustee…," and that "the Trustee is interested what, if any, impact the offer may have on 105's entitlement to the Foreclosure Lands, and ultimately its claim against Braich."
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> [116] I have found that a remittal of the application for an order absolute and extension of the redemption period for rehearing before the master is the appropriate remedy on other grounds. However, a remittal for rehearing will also permit the insolvency trustee to consider if it wishes to seek to participate in that hearing and, if so, take steps to seek to do so.

[5] In making that order, the court also referred the issue as to costs of that appeal to also be determined on this re-hearing.

Background

[6] Given that the full background of these proceedings has been fully set out previously, and that there is no dispute as to those facts as confirmed in the Prior Reasons (subject to typographical errors as to some numbers) and the Appeal Reasons, for the sake of convenience, I will not repeat them.

[7] Rather, I adopt and rely upon those facts, and the defined terms as set out in the Prior Reasons for the purpose of these reasons, however, provide the following brief summary for context and readability.

[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.

[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.

[10] As no formal agreements were entered into, the terms of these agreements are mostly taken from email exchanges between the parties.

[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.

[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.

[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.

[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.

[15] The history of that listing, as well as competing marketing by the Grace Mtn. Respondents is fully set out in my Prior Reasons. After listing the property on MLS under the orders in the other foreclosure proceedings, the petitioner took an assignment of Ms. Street's mortgage and was substituted as a petitioner in these proceedings. Around that same time, Mr. Braich was assigned into bankruptcy by an unrelated third-party creditor. That order was under appeal at the time of the Initial Hearing. The appeal has now been dismissed. At the Initial Hearing, and the appeal, inquiries were made as to the interests of the trustee on behalf of the estate, however, a quit claim has now been issued by the trustee in respect of the Lands such that they are taking no position on this application.

[16] The petitioner allowed its MLS listing to expire on December 31, 2022, with the Grace Mtn. Respondents then listing the properties for sale themselves for $90M on or around January 3, 2023.

[17] By the time of the Initial Hearing on May 11, 2023, the evidence as to value included that:

a) The Lands had been listed for sale on MLS by the petitioner or other mortgagees during the period September 2015 to the fall of 2019 for over 846 days, albeit with the Grace Mtn. Respondents disputing that they were adequately marketed by the petitioner during those time periods, with the subsequent listings by the petitioner from March to December;

b) The petitioner had not received any offers during their listing efforts that were sufficient to satisfy the amount owed to them, with the only offer being received being an unconditional one at $13M (received September 2022);

c) The Grace Mtn. Respondents had no evidence as to any party that was willing to make an offer on the Lands sufficient to satisfy the petitioner's mortgage, although suggested that there was potential interest in the range of $50M; and

d) Appraisal evidence ranged from $7M to $70.1M, with the lower valued appraisals being on an "as is where is" basis, and the higher end being assuming that the City of Mission allowed a proposal by the Grace Mtn. Respondents to develop the property into one-quarter acre lots, which was a proposal that was being made as early as the 2018 opposed order for conduct of sale application and had not yet come to fruition.

New Evidence since the Initial Application

[18] Following the Initial Hearing, the Grace Mtn. Respondents filed caveats against the Lands to prevent the petitioner's use of the order absolute to transfer title while the order absolute was under appeal. Given that there was no stay in place, the petitioner had in fact attempted to register them to effect the transfer.

[19] In support of an application by the petitioner to discharge the caveats, the petitioner's principal filed an affidavit which exhibited a September 16, 2022 agreement, entered into during its MLS listing, entitled "Loan Facility", which the petitioner refers to as a commitment letter (the "Commitment Letter"), which had not been previously disclosed. As noted in the Appeal Reasons:

> [69] At pages 47 to 48 of the transcript of proceeding before the master, the master asked counsel for [the petitioner] about the result of its marketing over the last year. [The petitioner] directed the master to an affidavit which had one unconditional offer at $13 million, but there was no mention by [the petitioner] of the Commitment Letter which valued the [Lands] at $18.37 million.

[20] The Commitment Letter is between 1347851 B.C. Ltd. ("134") and the petitioner, and contemplates an initial loan of $7.6 million from 134 to the petitioner, the purpose of which is described to assist in the buyout of Ms. Street's loans and take assignments of the priority mortgages, so that the petitioner "can obtain order absolute" of the Lands.

[21] The repayment terms include that, once the petitioner is granted order absolute, it will "sell and [134] shall purchase 85% of the [Lands]" from the petitioner, and that the "total purchase price of the [Lands] is $18,370,000".

[22] The Commitment Letter further provided that 134 and the petitioner would execute the necessary documents to give effect to the offer, which would include a contract of purchase and sale whereby 134 would purchase an 85% interest in the Lands for the purchase price of $15,614,500 (that being 85% of $18,370,000) with the loan being applied to the purchase price. Alternatively, once the petitioner obtained order absolute, the parties agreed that the transaction to give effect to this agreement could take the form of a purchase of 85% of the petitioner's shares, at 134's discretion. As a result of that option, which apparently has been exercised, the petitioner took the position that this was a share purchase agreement, and not a sale of the Lands. As such, in its view, the agreement was not relevant.

[23] In the Appeal Reasons, the court found as follows:

> [71] 105's omission of the Commitment Letter in its response to the master's inquiry as to their marketing efforts over the last year constituted a misrepresentation.
>
> [72] It was argued by 105 and 134 that the Commitment Letter was not a sale document; it was just a share purchase agreement. However, that is belied by the wording of the Commitment Letter itself which includes the words, among others:
>
> > Once the Borrower is granted order absolute, the Borrower shall sell and the Lender or its assignee shall purchase 85% of the [Lands].

[24] Within days of the Commitment Letter being signed, the petitioner received the offer for the Lands for $13M.

[25] In addition, at this rehearing, the Grace Mtn. Respondents introduced further evidence as to their prospects for redemption, including a commitment letter obtained October 30, 2023 from Synavest Investment Management Inc. ("Synavest") in the amount of $27.5M. In his affidavit, Mr. Braich swears that the financing available from Synavest was to be advanced to either Grace Mtn. Respondents or a purchaser, identified by Mr. Braich as O. Lalani Consulting Ltd. ("Lalani").

[26] The Lalani offer is for $50M. It is dated November 22, 2023 and contemplates a completion date of March 1, 2024 and a possession date of August 1, 2023. There is no evidence of the offer being extended. The principal of Lalani has, however,

confirmed by email that they would agree to act as a “back up” offerer, on the basis of Mr. Braich’s advice that he had entered into “good faith” discussions with the Lequamel Development Corp. (“Lequamel”) for a sale of the Lands.

[27] The alleged Lequamel transaction is one that is deposed by Mr. Braich to be one that will see five of the six lots making up the Lands sold for $50M, with the sixth being donated to the Lequamel with a stated value of that donation being $20M.

[28] The evidence exhibited to support the Lequamel offer is an email written by Mr. Braich to Lequamel summarizing the “potential” agreement as follows:

a) Lequamel or a related entity, limited partnership and/or foundation would purchase five of the six Grace Mtn. titles for $50M (matching the Lalani offer) but the largest parcel (32 acre mountain top) will be donated to Lequamel

b) The ascribed value of the donated parcel will be no less than $20M, thereby reflecting the $70.1M appraised values in aggregate;

c) The Grace Mtn. Respondents will hold a vendor take back mortgage for a significant portion of the purchase price at prime plus one with interest only payments for a term of at least two years;

d) The intention of the parties is to have Lequamel become the new owner and for the Grace Mtn. Respondents to facilitate the financial aspects allowing Lequamel to complete the purchase and secure funding from potential provincial and federal government agencies and/or internal funding sources “in due course”.

e) All terms and conditions are subject to both parties’ lawyers and consultants’ agreements, and Lequamel acknowledging that the Grace Mtn. Respondence have a $17.5M mortgage and related litigation that must be settled and paid out to complete the transaction.

[29] There is no new material filed by the Grace Mtn. Respondents to update the court as to its marketing, such as an affidavit from its realtor, or it has been continuing to actively market it with a realtor, since the Initial Hearing.

Arguments and Legal Framework

[30] The parties did not disagree or take any issue with the applicable principles with respect to the competing applications.

[31] In summary, in order to obtain an extension of a redemption period, the mortgagor must establish both that the property has sufficient value by way of security for the amount outstanding, and that there is a reasonable prospect of repayment, that being a probability not just a possibility, within that extended period (*Bancorp Growth Mortgage Fund II Ltd. v. Rouleur (Woodland) Limited Partnership*, 2021 BCSC 898 at para. 23, *Imor Capital Corp. v. Bullet Enterprises Ltd.*, 2014 BCSC 2540 at para. 9 and *Royal Bank of Canada v. Kirkpatrick*, 2022 BCSC 811, at para. 13).

[32] If the redemption period is extended, no order absolute will be granted, an order absolute cannot be granted during a redemption period: *1103969 B.C. Ltd. v. 1069185 B.C. Ltd.*, 2019 BCCA 73, at para. 25.

[33] Thus, the test for extending a redemption period is the same test as will be applied in opposing an order absolute.

[34] The onus of establishing both of those points is on the party opposing the order absolute, or party seeking the extended redemption period, given that by the terms of the order *nisi* the petitioner is, on the face of the order *nisi*, entitled to seek order absolute once the redemption period has expired with no redemption occurring.

[35] Notwithstanding that entitlement, such an order is not automatic. The court retains its discretion to consider the application on the merits, and in doing so may consider if the result of the order will be, on its face, inequitable, as foreclosure is an

equitable remedy: *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2022 BCSC 1314 at para. 80 and 81, citing *Morguard Mortgage Investments Ltd. v. Faro Development Corp. Ltd.*, 50 D.L.R. (3d) 426 at 433, 1974 CanLII 1182 (Alta. C.A.).

[36] Thus, one of the factors that guides the analysis is whether the petitioner will benefit an unreasonable windfall if the order is granted. In *Winters v. Hunking,* 2017 ONCA 909 the court commented 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.

[37] Similarly, and having regard to equitable principles, the Grace Mtn. Respondents argue that the conduct of the petitioner ought to be considered and the application dismissed as a result of their failure to seek order absolute with clean hands.

[38] Firstly, the Grace Mtn. Respondents argue that the petitioner wrongfully interfered with their ability to redeem during the redemption period by taking conduct of sale and not actively pursuing it which is evident, they argue, by the time it was on the market under the petitioner's listing without any purchaser viewing the property, and then, upon receiving the $13M offer, which was subject only to court approval, doing nothing to advance that offer. Notably, by the time that offer came in they had entered into the Commitment Letter such that they were, arguably, under an obligation to seek order absolute and sell an 85% interest to 134.

[39] As such, the Grace Mtn. Respondents argue that it cannot be said that the petitioner was, in any way, actively marketing the Lands for sale in a business like manner, given doing so would put it in conflict with its obligations to 134.

[40] The Grace Mtn. Respondents also take issue with the fact that they were not advised of the $13M offer prior to the order absolute application materials being filed.

[41] A further point in respect of the Grace Mtn. Respondent's argument as to the petitioner's wrongful interference through the sales process arises from the petitioner's use of the orders for conduct of sale that were pronounced in 2018 in the prior foreclosure proceedings, which they argue were dormant.

[42] Finally, and most significantly, the Grace Mtn. Respondents point to the failure of the petitioner at the Initial Hearing to disclose the Commitment Letter which ought to have been disclosed as a material indicator of value in the first instance, and specifically in response to my inquiry as referenced above. The Grace Mtn. Respondents argue that by failing to disclose this information, the petitioner made material misrepresentations to the court.

[43] Counsel for the Grace Mtn. Respondents was not able to point to any authority as to what the remedy ought to be if I were to find that the petitioner had acted in an inequitable manner but did not find that the test to extend the redemption period had been otherwise met. However, they suggested that an appropriate remedy would be one that required them to purge such misconduct through, perhaps, the passage of time, which is effectively an extension of the redemption period.

[44] The petitioner denies any interference with the Grace Mtn. Respondent's ability to redeem, and argues that the Commitment Letter was not material as it would not have changed the final disposition at the Initial Hearing. In this respect, the petitioner disputes the characterization of the Commitment Letter as a committed sale of the Lands for the price noted, which the petitioner argued was a "placeholder" value only, but rather, a "exit strategy" that the petitioner reasonably pursued as part of its due diligence in deciding to take an assignment of the Ms. Street's mortgage.

[45] The principal of 134 swore an affidavit in support of the petitioner's application in which he deposes that the Commitment Letter was entered into for the purpose of granting the loan, with the repayment terms being tied to the order absolute, namely that it would then be repayable at 134's option of a share or land purchase as noted. He further deposes that the noted consideration of $18,370,000 was arrived at as "being the approximate total amount of the judgments under the orders *nisi*, which was notionally equated to the petitioner's enterprise value as of the time the Commitment Letter was entered into.".

Analysis

[46] As this is a rehearing, I am considering the application on the basis of the full evidentiary record, including the Commitment Letter and further evidence led by the Grace Mtn. Respondents regarding the Synavest commitment letter, the more recent Lalani offer, and the email exchange with Lequamel. I am specifically not considering this on the basis of whether or not the disclosure of the Commitment Letter would have changed my decision.

Sufficient Value in the Lands

[47] The evidence as to value at the Initial Hearing, as summarized in the Prior Reasons, was as follows:

a) The properties were marketed in the prior foreclosure proceedings from September 26, 2018 to September 13, 2019, that being 340 days at a price of $16.8 million;

b) 105 listed the properties for sale with Sutton West Coast Realty pursuant to the 105 Conduct Orders at a list price of $19,999,900 on March 15, 2022 until December 31, 2022, on both the commercial and residential MLS websites, which resulted in over 1,600 hits on the residential listing and over 1,100 on the commercial, with the information package being emailed to 200 potentially interested parties. The listing described the

property as having "development potential." During this listing, the only offer received was for $13,000,000, which 105 deemed unreasonably low.

c) The Grace Mtn. Respondents have, through their own agent, listed the properties at $90 million from March 30 to April 21, 2022. Mr. Preston deposes that the $90 million price was based upon the per-acre price that they were able to realize on adjoining lands, described as the “Clark property”. He deposes that the same purchaser was "in negotiations with Mr. Braich to purchase the upper portion of the Grace Mtn. lands for $50 million." The principal of that purchaser, who has also sworn an affidavit in these proceedings, indicates that he made an offer on those lands on "Mr. Braich's guarantee" that he would join in a rezoning application to permit full development as permitted by the City of Mission, and that the sale of the Clark lands did not close because of 105's listing at $19.9 million, the fact that order absolute application had been brought and that Mr. Braich was petitioned in bankruptcy and that those issues had to be resolved before he would purchase the adjoining property. He does not, notably, disclose the value of his offer, exhibit an offer to his affidavit or indicate that he will in fact make an offer, or if so, for any particular amount.

d) The Grace Mtn. Respondents listed the one property, but referencing all of them, for $90M for the abbreviated period of March 30, 2022 to April 21, 2022, when it was terminated by the Fraser Valley Real Estate Board.

e) The Grace Mtn. Respondents listed the properties again on MLS at $90 million on January 9, 2023. That listing was set to expire on July 31, 2023. Mr. Preston deposes in a subsequent affidavit that on April 5, 2023, he decided to list the lands in a different way, with them being listed as three separate parcels at prices of $15 million, $12 million, and $55 million, instead of the collective $90 million. Those new listings are also set to expire on July 31, 2023.

f) As noted, there was also the private direct marketing process undertaken by Mr. Preston at the beginning of 2022.

g) There is no evidence from Mr. Preston that any party has expressed an interest in making an offer in these proceedings today, arising from his marketing efforts.

h) There is appraisal evidence whereby the properties were appraised at:

i. $14.7 million in 2015 on an as-is basis;

ii. $48 million as of July 24, 2018, on an as-is basis;

iii. $7 million to $7.7 million as of March 23, 2018, based on a street inspection only, as-is value as obtained by either 105 or one of the petitioning mortgagees at the time of the earlier proceedings; and

iv. $70.1 million as at March 9, 2023, which was done assuming that the City of Mission allows the Grace Mtn. Respondent's proposal to develop the property into one-quarter acre lots.

[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.

[49] There is also the expressions of interest of Lalani and Lequamel in the amount of $50M, although only half of that is "new money", given indications of a vendor take back mortgage as a term of those sales. In addition, they are in no way binding offers.

[50] Nonetheless, based upon the totality of the evidence I am satisfied that the Grace Mtn. Respondents have met the onus to show sufficient equity in the Lands over and above the amount owed to the petitioner under both mortgages. It is not necessary for me to address whether it is only the balance owing under this mortgage for that analysis as the value appears to be sufficient to cover both it and the petitioner under its original mortgage.

Reasonable Prospect of Redemption

[51] However, the Grace Mtn. Respondents must also establish that there is a reasonable prospect of redemption, meaning a probability not a possibility, if the redemption period is extended.

[52] The Grace Mtn. Respondents point to the new evidence as to a reasonable prospect of redemption, that being the available financing from Synavest and offers from Lalani and Lequamel.

[53] The Synavest commitment letter is insufficient to meet that test. The commitment letter states that Synavest will “consider” making a loan, indicates that the term would commence December 1, 2023, and that Synavest could cancel it at any time. It is non-binding, the dates referenced therein are all expired, and there is no indication of it being extended, re-written, or a binding agreement for financing in any way whatsoever.

[54] The $50M Lalani offer is dated and has lapsed, given that the required possession and completion dates have expired and the offer is subject to court approval being given by January 15, 2024. There are no addendums to suggest any extensions being agreed to. The deposit on the offer was nominal, at only $25,000. It is not clear if it was paid. The offer was subject to a vendor take back mortgage being given by the seller in the amount of $25M, the necessary terms for which are not clear, but does show that the funds to be advanced on closing will, after adjustments, be less than half of the stated sale price.

[55] The petitioner also points to the fact that a purported offer from Lalani has been something relied upon by the Grace Mtn. Respondents since 2018. In particular, Mr. Braich provided an affidavit in one of the prior foreclosure proceedings dated May 17, 2018, in which an offer from Lalani was referenced at the same price. Subsequently, an application for approval of sale if that offer was filed on August 3, 2023. The application referenced an affidavit of Mr. Lalani, the principle of Lalani, however no such sworn affidavit was ever provided by him to support the sale. That application did not proceed.

[56] In other words, this offer at $50M from Lalani has apparently been in place since 2018 and has never become firm, close to 6 years later. Mr. Lalani has not sworn any evidence in these proceedings in support of that offer.

[57] That a sale to Lalani will occur under the terms of the expired offer is far less than a probability, as required to meet the onus upon the Grace Mtn. Respondents.

[58] With respect to the purported offer from Lequamel, notably no response to the email from Mr. Braich to Lequamel's principal is in evidence to support that there is in fact any agreement by Lequamel to what was written therein. Instead, there is only a prior request that a "non-binding" letter of intent be sent. In any event, even if the principal of Lequamel confirmed his understanding as to those terms they are vague and absent many of the necessary material terms to establish as anything other than an agreement to agree.

[59] It too fails to establish a probability of a sale as contemplated completing, and therefore a redemption. It is a speculative possibility

[60] The Grace Mtn. Respondents are unable to satisfy the two part test for an extension of the redemption period as there is no evidence before the court of a probability of any refinancing or sale, at any value. Leaving aside the values indicated in the Lalani and Lequamel offers, there is no evidence of any party willing purchase, the properties at a price to payout this mortgage.

[61] While there was one offer for $13M over a year ago that would payout the subject mortgage only, leaving a shortfall to the petitioner on its other mortgage, there is no further evidence from the Grace Mtn. Respondents to establish that this offer is still available, or that an offer at that value is available.

Equitable Considerations

[62] Turning then to whether or not there are equitable considerations that ought to bar the order absolute from proceeding notwithstanding the failure of the Grace Mtn. Respondents to meet the onus upon them, the first argument raised by them is that the Commitment Letter establishes there will be an unreasonable windfall if the order is granted.

[63] Given that 134 has only committed to purchasing 85% of the Lands, it appears that it wishes to purchase the Lands in a joint venture with the petitioner. In other words, the petitioner's receipt of $15,614,500, that being far less than it is owed under its mortgages, with it retaining 15% of the Lands, and taking on some role and therefore cost and risk in the Lands' development is not as obvious of a windfall if 134 was buying 100% of the lands for the stated price $18,370,000.

[64] It is not entirely evident that if 134 were advised that it was required to submit an offer for purchase 100% of the Lands to be considered in the context of a court ordered sale process, outside of the transaction set out in the Commitment Letter, that it would still do so at the same price. Of course, that conclusion is speculative as the petitioner has not tendered any evidence from 134. That absence of evidence from 134 is noteworthy in that respect.

[65] Regardless, in considering whether the closing of the transaction contemplated with 134 constitutes an unreasonable windfall, emphasis ought to be had on the word "unreasonable".

[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.

[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.*

[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.

[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.

[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.

[71] As to the arguments concerning the interference with the ability to redeem, and whether or not there was a duty to advise as to the $13M offer, I note that by the terms of the orders it was acting upon the petitioner had exclusive conduct of sale. As such, there is no duty to consult with any other party on the offers received.

[72] In addition, $13M would not payout the petitioner. I agree with the petitioner that it was not unreasonable to not pursue the offer at $13M in favour of order absolute given the amount of the shortfall it represented to the petitioner in respect of its overall indebtedness. While the parties disagree as to whether, in assessing the application to extend the redemption period, the amount of this mortgage is the only one to consider, for the purpose of considering whether or not to accept an offer under a conduct of sale, the petitioner is entitled to compare an offer as against its ability to be paid out all of its debt.

[73] The issue as to the petitioner's failure to disclose the Commitment Letter however, is concerning. As noted in the Appeal Reasons, the failure to comment upon it was a misrepresentation.

[74] Foreclosures are a somewhat unique area of law in that despite that they can, as is the case here, involve significant commercial transactions and financial interests, the Rules of Court have been developed to allow them to be determined on a summary basis.

[75] A final order, such as an order absolute, is typically granted without there being any disclosure outside of what the petitioner has chosen to place before the court. For that reason, there is an expectation that the petitioner will be forthcoming in presenting their evidence when coming before the court. While I would not go so far as to say that the obligation is as stringent as that on an *ex parte* application, particularly where the other parties are represented by counsel, it is expected that the petitioner will put forward all evidence that is in any way relevant to the issues before the court on that application. That evidence is, in all likelihood, evidence that is solely in their possession.

[76] To put it bluntly, that is the trade off for an efficient summary process that generally benefits petitioners in foreclosure proceedings by enabling them to exercise their foreclosure remedies in a quick and efficient manner, both as to time and cost.

[77] Although the issue as to value of the Lands may not be dispositive on an application for order absolute after expiry of the redemption period, value is one of the factors considered in assessing the equities, as noted. In assessing value for the purpose of those applications there is no one piece of evidence that established that point. Rather, the courts often have to consider various indicators of value, such as the marketing history, offers that might have been received, realtors' comparative market analyses and appraisals.

[78] There is little doubt that the petitioner had the Commitment Letter in its mind when it chose to proceed with order absolute. If it was a factor guiding its own consideration, it is hard to understand why it believed that it was not relevant to put before the court. It is of no moment that, as I have outlined above, it ultimately did not change the result.

[79] The Commitment Letter ought to have been before the court at the Initial Hearing and the failure to put it into evidence is a serious lapse.

[80] However, the conduct of the borrower is equally relevant when considering the equities in respect of the order being sought. In this case, as noted, various foreclosure proceedings have been in place in respect of these properties since February 2015. It is of note that in each of the prior foreclosure proceedings, the petitioners had to obtain orders for alternative service to service Mr. Braich, although it was not required in this action, presumably due to Ms. Street having agreed to forbear from taking any action, albeit on the promise of an order absolute being agreed to by the Grace Mtn. Respondents if payment was not made as promised.

[81] The first promise to Ms. Street and the petitioner following the 2015 foreclosures was that payment would be made 4 years ago. The negotiated

forbearance agreement required the Grace Mtn. Respondents to pay out the subject mortgage in full by January 31, 2020. Under the terms of the order *nisi* pronounced on August 19, 2021, the redemption period expired February 19, 2022, over two years ago.

[82] In other words, the Grace Mtn. Respondents have had the effective benefit of, arguably a four year redemption period, and technically a two year one in respect of Ms. Street and the petitioner. A nine year redemption if you include the prior proceedings. Despite that time, they have not entered into any agreement which would satisfy their obligations. Even if they arguably could, perhaps by selling at a lower price, it appears they simply do not want to.

[83] Further, it is also significant that the Grace Mtn. Respondents have, in exacting concessions from the petitioner, agreed to order absolute going both in Ms. Street and the petitioner's favour, an agreement they now resile from. Specifically, although later found to be invalid in reasons indexed at 2018 BCSC 2355, in 2016 the Grace Mtn. Respondents signed a consent order absolute in favour of the petitioner, in its other proceedings. Mr. Braich also promised one to Ms. Street in an email exchange from February 23, 2020 to March 3, 2020, in which he stated 'I am willing to sign a Consent Order Absolute giving you ownership of the 3 titles (you are secured against by way of a first mortgage) effective May 31, 2020 in the event that I do not pay you the Settlement Amount pursuant to our agreement by that date."

[84] In other words, 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.

Conclusion

[87] For the reasons noted above, I dismiss the application to extend the redemption period, and grant order absolute as sought by the petitioner.

[88] While I considered adjourning the application on the basis that it not be reset for a specified period of time, given the petitioner's conduct in failing to disclose the Commitment Letter, however, when balanced against the overall conduct of the Grace Mtn. Respondents, and my findings that there is no reasonable prospect of redemption, I did not conclude that I ought to exercise my discretion to do so, particularly given that the court's displeasure in that respect could be addressed through costs.

[89] Costs the petitioner are rendered moot given that the personal covenants to pay are no longer enforceable pursuant to s. 32 of the *Property Law Act*, R.S.B.C. 1996, c. 377.

[90] However, as noted, the failure to disclose the Commitment Letter was a misrepresentation which is deserving of some rebuke. In this respect, if the Commitment Letter had been disclosed at the Initial Hearing the appeal, and this rehearing, may have been unnecessary.

[91] As such, the Grace Mtn. Respondents are entitled to their costs of the appeal and this application.

[92] Given the conduct which amounted to a misrepresentation to the court, it is appropriate that those costs be assessed on an increased basis as allowable under s. 2(5) of Appendix B of the Rules, which provides as follows:

> If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding […] be 1.5 times the value that would otherwise apply to a unit in that scale under section 3(1).

[93] In *380876 British Columbia Ltd. v. Ron Perrick Law Corp.*, 2009 BCSC 1209 at para. 37, the court confirmed that the circumstances that justify a lift in scale include, among other circumstances, litigation misconduct by the unsuccessful party.

[94] While the factors to consider in increasing the scale of costs are, in that respect, similar to that in a special costs award, they are available when the conduct does not quite meet the “reprehensible” level such that special costs, with such costs being punitive, are not appropriate, but where the conduct is such that a party should better indemnified as a result of that conduct: *Heffel v. Cole,* 2023 BCSC 2140 at para. 27 and 28.

[95] In my view, this is such a case. As such, I order that the Grace Mtn. Respondents are entitled to their costs as against the petitioner in respect of the

appeal and this rehearing at Scale B, with the value for each unit being 1.5 time that which would otherwise apply.

"Associate Judge Robertson"