

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jin-Ocean Mortgage Investment Corporation v. 1011066 BC Ltd.*,
2024 BCSC 847

Date: 20240503
Docket: H220368
Registry: Vancouver

Between:

Jin-Ocean Mortgage Investment Corporation

Petitioner

And:

**1011066 BC Ltd., 1032734 BC Ltd., Yan Chun Liu, iFortune Homes Inc.,
Tong Zhang also known as Tony Zhang, John Doe and Jane Doe, as tenants**
Respondents

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

B.C. Markus

Counsel for the Respondents 1011066 BC
Ltd., 1032734 BC Ltd., and Yan Liu:

M. Laity

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Place and Date of Hearing:

Vancouver, BC
April 18 & 24, 2024

Place and Date of Judgment:

Vancouver, BC
May 3, 2024

[1] **THE COURT:** When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.

[2] The petitioner in these foreclosure proceedings seeks order absolute. The application is opposed by the respondent Tong Zhang, also known as Tony Zhang (“Mr. Zhang”), deceased by his executor (the “Zhang Estate”), who is the holder of a certificate of pending litigation (“CPL”) which has been registered against title to the subject lands. The Zhang Estate brings a cross-application for conduct of sale.

[3] The Zhang Estate argues that there is insufficient evidence of lack of value to establish that, if an order absolute is granted, it will not result in a windfall to the petitioners. Further, it argues that to the extent the properties have been marketed and no offer received to date is due to a wholly inadequate marketing campaign, both by the Bank of Montreal (“BMO”), who was a prior ranking mortgagee before the petitioner redeemed their mortgage, and the petitioner itself.

Background to the Proceedings

[4] The subject properties are two adjacent properties located at 426 West 41st Street, Vancouver BC (the “426 Lands”), and 408 West 41st Street, Vancouver B.C. (the “408 Lands” and collectively with the 426 Lands, the “Subject Lands”). The Subject Lands are located in an area known as the Cambie corridor, and are currently zoned RS1 residential single family.

[5] However, the Subject Lands are potentially suitable for a land assembly as they, along with a third adjoining property located at 448 West 41st Vancouver BC (the “448 Lands”), are surrounded by other development lands such that the assembled lands would, it is argued, be well suited for multi-unit development in keeping with the overall character of the Cambie corridor as that area is being developed.

[6] The 448 Lands are owned by a third party and are not subject to the petitioner's mortgage. Each of the three properties are similar, with minor size

differences, and each having an older single-family home on the property, which is generally agreed to essentially being a “tear-down”.

[7] The petitioners were initially the holders of a second mortgage ranking in priority after BMO. They subsequently redeemed the BMO mortgage such that they now stand in first position with their amount to redeem being increased accordingly. The amounts owed to the petitioners are currently over \$11.5 million.

[8] The Zhang Estate registered a CPL against the Subject Lands in priority after both the BMO and the petitioner. The action on which the CPL is based (the “Zhang Action”) was brought by the Zhang Estate for damages arising out of alleged misrepresentations perpetrated by Hang Yin (“Mr. Yin”), the spouse of the respondent Yan Chun Liu (“Ms. Liu”).

[9] It is alleged that Mr. Yin made various misrepresentations, the effect of which was to cause Mr. Zhang to invest or advance approximately \$45 million to Mr. Yin. The further allegations include that Mr. Yin used various related parties, including Ms. Liu and his daughter, or was the *de facto* director of corporate entities such as the holding company who is the registered owner of the Subject Lands to further the scheme to misappropriate the funds obtained from Mr. Zhang.

[10] The scheme is alleged to specifically include the eventual purchase of the Subject Lands with funds invested by Mr. Zhang, with the property being registered in the name of the respondent 1011066 BC Ltd as a holding company, which then drew out the equity through financing with the BMO and petitioners' mortgage, with Mr. Yin and the other participants of the scheme, taking receipt of those funds both in respect of the Subject Lands and in respect of other transactions involving other properties. The CPLs are in respect of the allegation that, as a result of those transactions, the Subject lands are subject to a constructive trust in favour of the Zhang Estate.

[11] The named defendants in the Zhang Action deny both that the investments were as made by Mr. Zhang, and that there was any scheme to divert moneys for

their own use. There is, therefore, a live dispute as to whether or not there was any wrongdoing and whether or not the Zhang Estate has any entitlement whatsoever to an interest in the various properties, including the Subject Lands.

[12] Trial of the Zhang Action is scheduled to commence in March 2025. There had been a previous trial date in September 2023 that was adjourned by court order pronounced on September 1, 2023.

[13] The order for the adjournment included a term that the order could be filed in BMO's foreclosure proceedings and that the defendants to the Zhang Action were to seek the highest possible price for the sale of the Subject Lands in the context of those proceedings. The Zhang Estate emphasized the terms of this order on this application, as suggesting that the ability of the petitioner to seek order absolute was dependent upon it. I do not in any way interpret that order as one that was intended to fetter or interfere with the discretion of the court on any subsequent applications in the foreclosure proceedings, such as the application being brought today. It did, however, have some relevance because the position of the registered owners is that that they do not oppose the application for order absolute.

[14] The petitioner commenced these proceedings on September 15, 2022, with BMO commencing their own proceedings (the "BMO Foreclosure Proceedings") on November 24, 2022. Each obtained their own order *nisi*, with the petitioners' being granted on December 15, 2022, and BMO's on January 23, 2023, each with a six-month redemption period expiring June 15, 2023, and July 23, 2023, respectively.

[15] The petitioner obtained conduct of sale of the Subject Lands in the BMO Foreclosure Proceedings on April 20, 2023. Upon the expiry of BMO's redemption period on July 23, 2023, BMO successfully obtained order for conduct of sale in respect of the 426 Lands on August 31, 2023, with the order being effective on September 15, 2023, and in respect of the 408 Lands on September 28, 2023, but that order being effective December 1, 2023.

[16] On March 12, 2024, the petitioner redeemed BMO's mortgage and, coincidentally, the Zhang Estate filed an application for conduct of sale in the BMO Foreclosure Proceedings. The Zhang Estate was advised that the BMO mortgage had been redeemed on March 20, 2024 such that the BMO Foreclosure Proceedings were no longer of any effect and the application for conduct of sale invalid.

[17] On April 2, 2024, the petitioner filed the subject application for order absolute, and on April 8, 2024, the Zhang Estate redrafted its application for conduct of sale to be undertaken in this action. It is that application which is the cross-application to the order absolute being sought today.

Evidence as to Marketing and Value

[18] In terms of the marketing and evidence as to value, the listing history is summarized as follows:

Listings by the Petitioner:

- a) On April 24, 2023, at the collective price of \$15.5 million, that being \$7.5 million for the 426 Lands and \$8 million for the 408 Lands.
- b) On August 9, 2023, at the reduced collective list price of \$13 million, that being \$6 million for the 426 Lands and \$7 million for the 408 Lands.
- c) On September 25, 2023, at the further reduced collective list price of \$11.8 million, that being \$5.8 million for the 426 Lands and \$6 million for the 408 Lands. That listing expired on December 31, 2023.

Listing By BMO:

- d) On February 16, 2024, but only in respect of the 426 Lands at the price of \$4,240,500. BMO did not market the 408 Lands.

[19] No offers were received by the petitioner during its listing process. BMO apparently received an offer on the 426 Lands for \$4,195,000 immediately prior to the petitioners' redemption of its mortgage.

[20] There is no evidence before the court as to BMO's marketing efforts.

[21] The realtor engaged by the petitioner has, however, provided a marketing report which is attached to the affidavit sworn by a member of the petitioners' counsel's support staff, and in that respect is hearsay.

[22] The marketing report includes a copy of the MLS listing and a photograph of a large billboard-type "land assembly" sign which the Zhang Estate does not dispute remained on the Subject Lands well after the petitioners' listing expired and until March 2024. In fact, the Zhang Estate does not dispute the contents of the marketing report itself, rather just that it does not illustrate that there was a full and proper marketing undertaken.

[23] In this respect, the marketing realtor notes as follows in its marketing report:

The City corridor plan allows for a 13-storey high-rise with a combined space of only 408 and 426 West 41st Avenue is not sufficient for such construction. For a high-rise, the adjacent lot, 448 West 41st Avenue, is necessary. This lot was recently sold for 7 million in October.

So assembling these three lots (408, 426, and 448 West 41st Avenue) might pose a challenge for potential buyers due to the necessity of acquiring multiple properties to create a space required for a high-rise development. This process can be complex and might deter some buyers, despite the potential for a high-rise construction in the future.

It seems that despite receiving calls from various realtors, there have not been any offers made on the listed properties. Additionally, the neighbourhood has seen several similar lands for sale, and there is a general lack of buyers in the area. High interest rates might also be impacting the market's interest in purchasing properties at the moment.

[24] Thereafter, there is a list of realtors that had reached out to the petitioner's realtor regarding the Subject Lands.

[25] The court in *Elite Mortgage Corp. v. Derewenko*, 2019 BCCA 125, at para. 28 cautioned against what is a very limited use to which such evidence can be put

where a final order is being sought, in that case an order approving sale but equally applicable to an order absolute. In this case, there is no dispute as to the facts set out in the marketing report as to what was done, including specifically the erection of the sign on the Subject Lands which was admitted by the Zhang Estate as was the general view that the Subject Lands would likely have to be dealt with in some way with the 488 Lands in order to have them dealt with as a land assembly, a point that is made by the appraiser in the report relied upon by them.

[26] I therefore accept that as evidence for the limited purpose of what was done, but not whether such efforts were in any way sufficient for the purpose of effectively marketing the property. I give no weight to the opinions expressed by the realtor as to what may be affecting the list price.

[27] The petitioner obtained an appraisal of the Subject Lands on March 21, 2023, in which the lands were valued at a collective value of \$8,920,000. That appraisal includes the following comments on page 5, under the heading highest and best use, when specifically commenting on the 408 Lands:

The subject property is located 426 West 41st Avenue. The lot has a dimension, 51.5 feet frontage and 142.59 depth, with a total lot area of 7328 square feet, which has a rectangular configuration that is situated on a level topography. The property has a one-storey building with basement single-family dwelling with 1458 square-foot main area and 1312 square-foot basement area. It features a double detached garage, which has access to the laneway.

The property is zoned as RS1, which has an intention generally to maintain the residential character of the area in the form of duplexes, single detached houses, secondary suites and laneway houses. As per client's instructions, the two parcels will be combined as potential development parcels.

[28] Further, this appraisal states:

The subject property is under the Oakridge municipality town centre plan, which promotes West 41st Avenue and Cambie Street as a frequent transit development area. It serves as an activity hub for municipal populations, according a range of job retail cultural and public spaces and a variety of housing options. It promotes ground orienting housing with higher density, transit close to proximity to Canada Line station. Proposed properties range from townhouses to high-rise condominiums. The plan includes the provision of amenities and services such as parks, child centres, schools and more. The subject property has a proposed 2.5 SFSR density.

[29] And finally in terms of the approach used in valuating the Subject Lands, it states:

The development approach provides good support for the direct comparison approach. Typically vacant land property like the subject is purchased for their development potential. As a result, the development approach is a suitable method of valuation. Development approach will be utilized in the report.

[30] As part of its proceedings, BMO obtained an appraisal of each of the two properties as at March 6, 2024. Those appraisals are the standard residential appraisals and do not contemplate any development potential whatsoever. They provide an opinion as to value of \$3,350,000 to \$3,650,000 in respect of the 408 Lands, and \$3,300,000 to \$3,600,000 in respect of the 426 Lands.

[31] Those appraisals contain the following comment:

As instructed, the appraised value based on single lot and current single family zoning. There is no assumptions made to the value if rezoned, land assembly, etc.

[32] The BMO appraisals contain four comparable properties ranging in value from \$3.1 million to \$4.2 million, but notably do not include the sale of the 448 Lands, which occurred in October 2023 at a price of \$7 million. That sale was to 426 Oakridge Holdings Ltd. The director of 426 Oakridge Holdings is Feng Luan who, the Zhang Estate alleges, is not an arm's length purchaser to Mr. Yin or the respondents as illustrated by the fact that he was also noted to be the director of iFortune Homes Inc., which was one of the companies alleged to have been involved with the investment that underlines the Zhang Action.

[33] By letter dated April 5, 2024, the Zhang Estate requested from the petitioner that they include in their response materials to their application for conduct of sale any communication with 426 Oakridge Holdings Ltd. with respect to any sale of the properties, including disclosure of any negotiations to sell the property should an order absolute be granted. No such disclosure has been given. There is no statement in any way answering that inquiry within the affidavit materials filed by the petitioner.

[34] The Zhang Estate has obtained commercial appraisals from Macintosh Appraisals, which provide an opinion as to value of the 408 Lands at \$7.2 million and the 426 Lands at \$6.6 million for a collective value of \$13.8 million. Those appraisals contain the following term, under the heading of hypothetical conditions:

The subject property has been appraised on the hypothetical condition that could it be rezoned to a CD1 zoning designation, approved by the City of Vancouver, which would produce the highest and best use of the site.

[35] Further, under highest and best use of the Subject Lands as if vacant, it is noted:

The highest and best use of a vacant site is normally decided by the zoning bylaws in effect at the effective date of the appraisal, with the demand for the uses that the site can be put. Consideration must also be given to the probabilities of changing demand and potential zoning changes or application for amendments which would suggest a change in the land-use patterns within the subject neighbourhood. The City of Vancouver designates the zoning of the subject site as R1-1(residential inclusive) zone, which allows for numerous residential uses. However, the City of Vancouver OCP-Cambie corridor plan designates the general land use for the subject property as a choice of use at grade (six-storey podium with tower element) with an area G. Columbia Street to mid block (south) of the Cambie Street in its future vision for neighbourhood. At this current time, rezoning to a CD1 (comprehensive development) use and assembly with the adjacent properties is considered its highest and best use of the subject property as if vacant.

[36] Further, under the heading "Conclusion":

Overall, after analysing the principles concerning value and the location of the subject property and based on the assumption that the subject property is conforming to all local building codes and zoning by laws, the highest and best use for the subject property is considered to be a land assembly and redevelopment towards a multi-tenant, high-density tower building. The forgoing forms the basis for this valuation.

[37] In terms of the use of the sale of the 448 Lands as a comparable, this appraiser does include that property, noting as follows:

Example number 5 at 448 West 41st Avenue, Vancouver, BC, exemplifies the October 12th, 2023 purchase of a raw development land site with R1-1 zoning in an area of 7361 square feet, which sold for 7 million and equates to \$950.96 per square foot. Overall, this sale is ranked *similar* to the subject property in terms of lot size, development potential, and location. This is [sic] example is the third part of the subject property assembly, which is required

to develop the tower. It is a very recent sale and the most similar in terms of proximity located on the same block and adjacent to the subject property.

[38] In addition, the Zhang Estate has tendered hearsay evidence in the form of a letter from a realtor, by which that realtor states that if he was listing the Subject Lands under a foreclosure process, he would take into account the sale price of the 448 lands at \$7 million.

Order Absolute

[39] The starting point of any application for an order absolute is that a petitioner is entitled to seek such an order upon the expiry of its redemption period as ordered in the order *nisi* itself. In particular, para. 6 of the order *nisi* pronounced in favour of the petitioner states:

If the [Subject Lands] are not redeemed, the petitioner shall be at liberty to apply for an order absolute and upon pronouncement of an order absolute, then the respondents 1011066 BC Ltd., 1032734 BC Ltd., and Yan Chun Liu and their heirs, executors, administrators, successors, and assigns of the said respondents and all persons claiming by, through, or under them shall henceforth stand absolutely debarred and foreclosed of and from all right, title, interest, and equity in the redemption in or to the mortgaged properties and shall immediately deliver to the petitioner vacant possession of the mortgaged properties.

[40] Thus, in order to oppose such an application, the respondent must satisfy the court that the test to extend a redemption period can be met, as an order absolute is not available during a redemption period: *1103969 B.C. Ltd. v. 1069185 B.C. Ltd.*, 2019 BCCA 73, at para. 25.

[41] Specifically, the opposing property must establish both that the property has sufficient equity to satisfy the petitioners' mortgage and that there is a reasonable prospect of redemption during the extended redemption period. A reasonable prospect of redemption denotes more than a possibility but rather a probability: *Bancorp Growth Mortgage Fund II Ltd. v. Rouleur (Woodland) Limited Partnership*, 2021 BCSC 898, at para. 23; and *Royal Bank of Canada v. Kirkpatrick*, 2022 BCSC 811, at para. 13.

[42] Granting and extension of the redemption period is ultimately an exercise of judicial discretion: *1103969 BC Ltd.* at para. 23. The onus to establish that the test is met is on the party seeking the extension..

[43] The parties do not dispute these governing principles. However, the Zhang Estate also argues that given that a foreclosure is an equitable remedy, equitable principles also apply such that the court may consider if the effect of the order absolute will be that the petitioner receives a windfall. If there is a windfall, then it is not in the interests of justice, or equitable, to make the order absolute as sought.

[44] That equitable principles apply to foreclosures was confirmed in *1055249 B.C. Ltd. v. Grace Mtn. Land Company, Ltd.*, 2023 BCSC 2339 (“*Grace Mtn*”) at paras. 63 and 64.

[45] As noted, the amount owing to the petitioner exceeds \$11.5 million. At the appraised values relied upon by the petitioner of either \$7.2 million or \$8.92 million, that being the appraised values obtained by the petitioner and BMO on an as-is/where-is basis, with one being limited to residential value only and the other being based on development potential but being dated, there is an obvious shortfall or a risk of a shortfall to the petitioners.

[46] If the values are \$13.8M as set out in the Zhang Estate's appraisals, there is potentially a \$2.3 million windfall. However, that depends on the Subject Lands being immediately sold at that appraised value and assumes that the properties are capable of development under the land assembly, which not only requires the rezoning but also acquisition of, or cooperation with the owner of, the 448 Lands.

[47] It is trite that in a foreclosure, the court is to consider the foreclosed property on an as-is/where-is basis. That there is a possibility that the properties could be developed if there is rezoning, or if a third party participates in the process, is generally not relevant. It is that sort of factor that creates a “possibility” rather than a “probability” that is generally insufficient to support the second part of the test to extend a redemption period, or defeat an order absolute application on that basis.

[48] The right to the order absolute is founded in the historical nature of the foreclosure process whereby a lender took, as security, the deed to the property, with the redemption period then being the court of equities' answer to enable a debtor a reasonable opportunity to have that deed of title re-vested to it. A subsequent mortgagee would then take, as security, the owners' right of redemption.

[49] Thus, just as the petitioner redeemed the BMO mortgage which ranked in priority in the BMO Foreclosure Proceedings, the Zhang Estate could, if it wished to, redeem the petitioner's mortgage and stand in its place. Any of the respondents have that right.

[50] As a result, the petitioner is not obligated to market the properties before seeking order absolute. The only requirement, as stated in the order *nisi*, is that the redemption period has expired, and no party has exercised its rights to redeem the mortgage.

[51] Similarly, a lender is not required to wait until it is *definitely* in a shortfall position before it can take order absolute. It would be a commercial absurdity to require a lender to suffer a loss before availing itself to its contractual and equitable foreclosure remedies.

[52] Thus, the marketing history and value of the property is not determinative as to the analysis of whether or not a petitioner is entitled to take order absolute upon the expiry of the redemption period, although such evidence may provide some insight into whether or not there will be a windfall which, as the Zhang Estate argues here, would make such an order inequitable.

[53] In order to satisfy the court that an order absolute is inequitable or against the interests of justice on the basis of there being a windfall to the petitioner, just as the test to extend the redemption period requires that the evidence be more than a possibility but rather a probability, the evidence as to a windfall must meet that same threshold. In addition, in my view that windfall must not be something of a trifling or nominal nature given that there is no requirement that the petitioner be in a shortfall

position. This is also consistent with the inherent nature of the order absolute by which all personal covenants are extinguished such that the petitioner takes possession and ownership of the lands and all risks associated with that, without recourse to any other recovery.

[54] Here, even if I accept that the Subject Lands were not adequately marketed by the petitioner or BMO as a land assembly, which would require me to ignore the large billboard-type signage that the property was, in fact, "land assembly," there is no evidence to establish that there is a probability that a significantly higher value would be realized than that owed to the petitioner, as required under the first test to extend a redemption period.

[55] The only offer received throughout the process of marketing was one for just over \$4.2 million, which assuming both properties could attract that same value, which is consistent with the development appraisal they obtained one year earlier, the petitioner would still realize an approximate \$3 million shortfall.

[56] As to the argument that the Subject Lands have not been properly marketed as development lands and that if they were, they would attract a higher offer, I do not accept that the marketing of the properties prevented potential developers from making offers based on development potential as it currently exists, that being somewhat hypothetical. There is no evidence that any particular market was prevented from doing so.

[57] If the Subject Lands were listed at a price that was lower than a value consistent with what is argued to be the development potential, a developer would surely have made an offer as the properties at the list price would have represented a bargain. In this respect, developers are sophisticated purchasers.

[58] Given the signage on the property, I am satisfied that there was notice of land assembly potential such that the real estate developer's market would have sufficient opportunity to make inquiries and make an offer on the Subject Lands had they been interested at that price point.

[59] I also do not accept that the sale of the 448 Lands at \$7 million is an indicator of value that is any more persuasive than the other indicators of value.

[60] By the Zhang Estate's own admission, or rather the argument they make, this does not appear to be an arm's length transaction. As such, it is questionable whether or not it can be an indicator of typical market value, as market value is generally considered to be the price a willing purchaser will pay to a willing buyer, in an arm's length transaction.

[61] As to the appraised value of \$13.5 million as relied upon by the Zhang Estate, it is, as noted, hypothetical based on there already being development potential in place. It is reasonable to assume that the "as is where is" market would discount any offer from that amount to account for the risk that either development or rezoning was not approved or that the 448 Lands could not be acquired in some fashion or an agreement reached the owner in order to provide for the land assembly, which appears to require all three of those properties. As such, it is not such an indicator of value that all others ought to be ignored.

[62] If I were to average out the appraisals on the basis that there is likely some value to the development potential which has not been taken into account by the BMO appraisals, which I accept to be the case, and some discounting which has not been taken into account by the Zhang Estate's appraisal, which I also take to be the case, the average, including the petitioners' higher appraisals, is \$9.89 million.

[63] If I average only the petitioner's \$8,920,000 appraised value and Zhang Estate's \$13,800,000 appraised value (the two highest appraised values), that equates to a mean value of \$11,360,000. That still represents a shortfall to the petitioners.

[64] I recognize that the court's averaging of appraisals is not a proper indicator of value. I make this comment only to illustrate the speculative nature of all appraisals, as noted in *Romspen Mortgage Corporation v. Lantzville Foothills Estates Inc.*, 2013 BCSC 2222, at para. 20:

[20] An appraisal is no more than an expert's opinion on what a property's sale [price] is likely to be if properly exposed to the market for an appropriate length of time...

[65] Appraisals are ultimately not much more than a well-meant prediction, and just one of many indicators of value that the court may consider. Having regard to all of those indicators, I cannot find that that Zhang Estate has met the onus upon it to establish that there is sufficient value in the Subject Lands to satisfy the petitioner's mortgage or a probability of a redemption if the order absolute is not granted.

[66] That being said, I do share the Zhang Estate's concern as the lack of evidence from the petitioner as to any agreement with the owner of the 448 Lands being in place, which, if it is the case, could be an indicator of value.

[67] The foreclosure process is a summary one, which has developed in keeping with the overall purpose of the *Rules of Court* to provide for the timely and efficient resolution of matters, with a summary determination for those matters suited to such a resolution. Foreclosures have fallen into that category largely because the gross majority of them go undefended.

[68] Unless the court finds that a triable issue has been raised, which generally goes to the root of the mortgage itself meaning, typically, an issue arises at the order *nisi* stage, the disclosure is generally modest, including only the basic facts as to the granting of the mortgage, the default, the amount required to redeem and calculations for that, and beyond order *nisi*, that there has been no redemption in the redemption period and, for a sale to be approved, marketing and value information to establish that any such sale is provident.

[69] Foreclosures can, however, involve complicated commercial matters which would, but for the summary process, likely include greater disclosure than the typical residential foreclosure. I would classify this application, or these proceedings, as potentially falling into that category.

[70] In my view, the trade-off of the summary process is the expectation that the petitioner will provide disclosure of all matters which could affect the court's

consideration of the relevant factors, particularly when seeking an order absolute, the effect of which is to foreclose off the rights of all other parties with an interest in the properties.

[71] If a third party has expressed an interest in acquiring either the lands, directly or indirectly, which is a relevant indicator of value, that should be disclosed.

[72] Such a scenario was considered by this court in *Grace Mtn* where the petitioner successfully obtained an order absolute but had not disclosed an agreement, referred to as a “commitment letter”, which the petitioner had entered into with a third party which contemplated a sale of an 85% interest in the lands once order absolute was obtained based on a stated assumed value of the lands at a significantly higher value than the other indicators of value that had been presented to the court.

[73] On appeal, the court found that the evidence was relevant and ought to have been disclosed, and therefore remitted the matter back for a rehearing with that further evidence to be considered.

[74] Thus, while I am not satisfied that the Zhang Estate has met the onus upon it to establish that there is sufficient equity and a reasonable prospect, that being a probability, that a further marketing period will achieve an offer higher than the amount to redeem so as to support the dismissal of the order absolute at this time, the question remains unanswered as to whether there is another indicator of value, or evidence of a likely substantial windfall that would make such an order inequitable in the circumstances.

[75] Whether there have been any such discussions at this point is speculative based on what I would assume is a level of distrust of the respondents' alleged misrepresentation and misappropriation as raised by the Zhang Estate as against Mr. Yin and his various related parties. In addition, that the fact that there has been prior dealings between the owner of the 488 Lands and the respondent mortgagors does not necessarily mean that there have been any discussions between the

petitioner and the 488 Lands. There was specifically no allegation that the petitioner has been involved in any of the alleged fraud.

[76] However, in order to ensure that the matter remains determinable on a summary basis once that question is raised, in my view it is incumbent upon a petitioner to provide evidence as to any agreement under which the interest in the land is either directly or indirectly being acquired once the order absolute is obtained or confirm in sworn evidence that no such agreement is in place.

[77] An example where such information is routinely disclosed is where an order absolute is being obtained given a non-resident withholding requirement under s. 116 of the *Income Tax Act*, R.S.B.C. 1996, c. 215 which, if the property were sold under an order for conduct of sale, would result in a significant shortfall given the requirement to withhold 25% of the sale price. In such a scenario it is entirely reasonable for a petitioner to seek, and obtain order absolute even though the property is likely to be sold at price that may exceed their mortgage balance, as to do otherwise would result in a shortfall to them. However, in such a case, that potential, or even probable, windfall is generally disclosed.

[78] I also note that, in the case of potential development property, a windfall may be possible once the petitioner takes various, and possibly costly, steps, which thereby increases their risk of loss, including, for example, payment of property transfer taxes and incurring potential liability as a result of their taking possession of such as environmental liability. As such, a *possible* windfall is not necessarily a bar to an order absolute considering all of those factors.

[79] Not every discussion or communication need be disclosed as broadly as requested by the Zhang Estate's request in its letter to the petitioner. It would be reasonable for a petitioner when considering whether or not they are going to take order absolute for them to make inquiries as to how they may ultimately realize on their loan given the risks associated with taking title. However, if an agreement has been reached, conditional or otherwise, it ought to be disclosed.

[80] Thus, in the circumstances here, it is appropriate to adjourn the order absolute application until that disclosure can be put into evidence.

Order for Conduct of Sale

[81] As to the application for conduct of sale, as noted in *BC (Minister of Competition, Science and Enterprise) v. Delta Fraser Properties Partnership*, 2003 BCSC 905, at paras. 36 and 41, while a CPL holder may apply for conduct of sale, a party with a defined interest such as a mortgagee will have preference:

[41] In circumstances where, as here, there are competing claims to an order for conduct of sale, I think the party that has a defined, registered interest, such as a subsequent mortgagee or judgment creditor, should be given conduct of sale in preference to the holder of a certificate of pending litigation in respect of an undeclared, unpaid vendor's lien.

[82] In this case, the petitioner opposes the order for conduct of sale being granted to or the Zhang Estate and, given the extant application for order absolute, which has been adjourned, it has precedence with respect to its rights over the Zhang Estate in that respect. In addition, it may be that, given that there has not been any application sought or, relief granted, whereby the redemption period has been extended the petitioner may chose to seek conduct of sale itself prior to resetting its application for order absolute, but that will be its choice.

Conclusion

[83] In summary, I make the following orders:

- a) The petitioners' application for order absolute is adjourned generally.
- b) The Zhang's application for conduct of sale is dismissed.

[84] I will hear quick submissions as to costs. It seems to me that the costs should be in the ordinary course with the petitioner being entitled to its costs at Scale B, but I will hear if anybody disagrees with that.

(SUBMISSIONS ON COSTS)

[85] THE COURT: Okay. I am not going to make the order as against the estate. In my view, they raised an issue that was not addressed by the petitioner. The application for order absolute was adjourned on that basis.

[86] The petitioner is entitled to its costs of these applications at Scale B, to be added to its mortgage balance. Of course, costs become moot if the petitioner successfully obtains order absolute at a later date, given the personal covenants will thereby be satisfied.

“Associate Judge Robertson”