COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Grace Mtn. Land Company Ltd. v. 1055249 B.C. Ltd.,* 2025 BCCA 92

Date: 20250307
Docket: CA50157

Between:

Grace Mtn. Land Company Ltd. and Herkenn Singh Kenny Braich also known as Kenny Braich

Appellants (Respondents)

And

1055249 B.C. Ltd.

Respondent (Petitioner)

And

0776423 B.C. Ltd.

Respondent (Respondent)

Before: The Honourable Justice Edelmann (In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated September 6, 2024 (*1055249 B.C. Ltd. v. Grace Mtn. Land Company, Ltd.*, 2024 BCSC 1916, Vancouver Docket H190209).

Oral Reasons for Judgment

Counsel for the Appellants:	A.M. Beddoes A. Jiwaji
Counsel for the Respondent, 1055249 B.C. Ltd.:	M.C. Sennott L. Morris
No one appearing for the Respondent, 0776423 B.C. Ltd.	

Place and Date of Hearing:	Vancouver, British Columbia March 6, 2025
Place and Date of Judgment:	Vancouver, British Columbia March 7, 2025

Summary:

The applicants seek leave to appeal the order of a chambers judge declining to extend the time for the applicants to appeal an order of an associate judge. The respondent has two mortgages over the appellants' lands. The respondent obtained an order absolute from an associate judge foreclosing on one of the mortgages. The associate judge also declined to extend the redemption period. Due to counsel errors, the applicants required an extension of time to appeal the order absolute. The chambers judge dismissed the applicants' application for an extension of time. The applicants argue the associate judge erred by incorrectly weighing their misconduct against the respondent's conduct when considering whether to extend the redemption period. They also say the judge erred by considering the value of one mortgage when assessing the potential windfall the order absolute in relation to the other mortgage may give the respondent.

Held: Application dismissed in part. The chambers judge did not err in finding that the proposed ground of appeal that the associate judge erred in refusing to extend the redemption period was bound to fail, as there was only about 3% equity left in the property. The application for leave to appeal based on that ground of appeal is dismissed. Leave to appeal based on the second ground of appeal, which alleges that the respondent would receive a windfall if the order absolute were granted, is adjourned generally. The question of whether merger extinguished the debt owing on the mortgage when the order absolute was granted should be decided in the parallel bankruptcy proceedings of one of the applicants. Depending on the outcome of that proceeding, it may be in the interests of justice to grant leave to appeal on that ground and to hear the appeals together.

EDELMANN J.A.:

Overview

[1] The applicants, Grace Mtn. Land Company Ltd. (“Grace Mtn.”) and Mr. Braich, seek leave to appeal the order of a chambers judge who declined to extend the time for the applicants to appeal an order from an associate judge.

Background

[2] The proposed appeal concerns a mortgage granted over six properties in Mission, B.C. (the “Lands”). Grace Mtn. had title to five of the properties and Mr. Braich had title to one property.

[3] There were two mortgages on the Lands. The mortgage that is the subject of this proceeding, (the “Street Mortgage”), is for $7,450,000. The other mortgage (the “105 Mortgage”) is for $10,050,000 and was the subject of separate foreclosure proceedings. While the names of the mortgages reflect the different parties to whom they were initially granted, the respondent 1055249 B.C. Ltd. (“105”) has been assigned both the mortgages and has conduct of both proceedings. That was also the situation at the time the matter was before the associate judge.

[4] There is a lengthy background to this matter, which was summarized by the chambers judge in the decision under review. I do not propose to repeat that here.

[5] On February 14, 2019, 105 commenced foreclosure proceedings in respect of the Street Mortgage. An order absolute was made by the associate judge on May 11, 2023.

[6] On December 8, 2023, Justice Stephens allowed an appeal of the order absolute for reasons indexed at 2023 BCSC 2339. Central to this decision was the non-disclosure of an agreement (the “Commitment Letter”) between 105 and 1347851 B.C. Ltd. (“134”) in which 134 agreed to advance $7.6 million to enable 105 to buy out the Street Mortgage and take assignment of the action. The repayment specified in the Commitment Letter was a transfer of 85% of the Lands to the lender

and contemplated that the total purchase price for the Lands would be approximately $18 million. Justice Stephens remitted the matter to the associate judge for a rehearing.

[7] On May 22, 2024, the associate judge granted the second order absolute and dismissed the application for an extension of the redemption period, for reasons indexed at 2024 BCSC 880 (the “Order Absolute”).

Counsel Error and Subsequent Applications

[8] On May 23, 2024, counsel for the applicants announced at a creditors’ meeting related to bankruptcy proceedings against Mr. Braich that the applicants would be appealing the Order Absolute. Counsel for 105 attended the meeting.

[9] Counsel (not the same counsel before me on this application) deposes to being under the mistaken belief that he had 30 days to file a notice of appeal, rather than the 14 days prescribed by Rule 23-6(8.1) of the *Supreme Court Civil Rules*.The time to file the appeal expired on June 6, 2024.

[10] Upon discovering the error, counsel filed a notice of appeal in this Court on June 21, 2024. He says he filed in this Court believing it was the most expeditious course of action as the parties would likely end up in this Court eventually. He argued that it was permitted, with leave, under the *Court of Appeal Act*, S.B.C. 2021, c. 6 (the “*Court of Appeal Act*”). On July 19, 2024, Justice Saunders dismissed the applicants’ application for leave in this Court concluding that the *Court of Appeal Act* does not permit a direct appeal of an order made by an associate judge to the Court of Appeal.

[11] On July 17, 2024, the applicants filed a notice of application in the Supreme Court to extend time to appeal the Order Absolute, 41 days after the 14-day period had expired.

[12] On September 6, 2024, the chambers judge dismissed the application for an extension of time which is the order before me on which leave is sought before me for reasons indexed at 2024 BCSC 1916.

Applicable Legal Tests

Leave to Appeal

[13] Under Rule 11(e) of the *Court of Appeal Rules*, B.C. Reg. 120/2022, leave is required to appeal an order granting or refusing an extension of time. Section 31(1) of the *Court of Appeal Act* gives a single justice in chambers jurisdiction to grant or refuse leave to appeal. The party seeking leave has the onus of satisfying the conditions for leave (*British Columbia Teachers' Federation v. British Columbia (Attorney General*), 1986 CanLII 1089 (B.C.C.A.) at para. 5).

[14] The four-part test for granting leave to appeal is well established and set out in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326:

1) Whether the point on appeal is of significance to the practice;

2) whether the point raised is of significance to the action itself;

3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

4) whether the appeal will unduly hinder the progress of the action.

[15] These factors are "all considered under the rubric of the interests of justice" (*Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10).

[16] In my view, the central question on this application is the merit of the underlying appeal. I will briefly set out the law applied in the courts below.

Extension of Time

[17] The relevant criteria for assessing whether to grant an extension of time is set out in *Davies v. Canadian Imperial Bank of Commerce* (1987), 15 B.C.L.R. (2d) 256 (C.A.) at 259–260, and can be summarized as follows:

1) Was there a *bona fide* intention to appeal?

2) When were the respondents informed of the intention?

3) Would the respondents be unduly prejudiced by an extension of time?

4) Is there merit in the appeal?

5) Is it in the interest of justice that an extension be granted?

[18] The applicants raised a number of issues with the manner in which the interests of justice were balanced in the case under appeal. In my review of the decision, the decisive issue before the chambers judge was that the grounds of appeal were bound to fail. I do not understand the applicants to suggest that it was an error in principle not to grant an extension for an appeal that was bound to fail. Even if that were the position of the applicants, I find it has no merit. I find it difficult to conceive of circumstances in which it would be in the interests of justice for a frivolous appeal to proceed. This would most certainly not be one.

[19] I will therefore turn to the underlying judgement.

Underlying Decision of Associate Judge – Extension of Redemption Period

[20] The test for extending a redemption period (or opposing an order absolute) is the two-part test set out in *Canada Permanent Mortgage Co. v. Dan-Al Construction Co*., [1982] B.C.J. No. 2339 (C.A.) at para. 12. The mortgagor must establish:

a) That the property has sufficient value by way of security for the amount outstanding; and,

b) A reasonable prospect of repayment within an extended period.

[21] However, notwithstanding its findings on the two elements, the court retains a discretion to consider the application on the merits and whether the results of the order will be inequitable, as foreclosure is an equitable remedy: *Forjay Management Ltd. v. 0981478 B.C. Ltd*., 2022 BCSC 1314 at paras. 80–81. One of the factors that can be considered in this analysis is whether the mortgagor will gain a windfall if the order absolute is granted: *Winters v. Hunking*, 2017 ONCA 909 at para. 40.

[22] The extension of a redemption period is an order made in the exercise of judicial discretion and may only be interfered with "where the judge acted on a wrong principle or failed to give sufficient weight to all relevant considerations": *1103969 B.C. Ltd. v. 1069185 B.C. Ltd.*, 2019 BCCA 73 at para. 23, citing *LaFontaine v. University of British Columbia*, 2018 BCCA 307 at para. 45.

[23] The appellants raise issues with two of the proposed grounds of appeal assessed by the chambers judge.

[24] First, they allege that the associate judge incorrectly weighed the appellants misconduct against 105's conduct in not disclosing the Commitment Letter. It is clear from her reasons that the associate judge considered the Commitment Letter and weighed it in her overall consideration of whether to grant the extension of the redemption period. However, she found that there was only about 3% equity left in the property once the outstanding debts were paid to remove existing charges. Presumably, the appellant is suggesting that the associate judge should have ordered an extension of the redemption period of a property that was already nearly underwater. While counsel reasonably did not press this point in argument, I fail to see any merit to the allegation she erred in not exercising her discretion in that manner. I do not find the chambers judge to have erred in concluding this ground of appeal was bound to fail.

[25] The second issue is somewhat more complicated and has to do with the assessment of whether 105 would benefit from a windfall if the Order Absolute

were granted. As I understand it, the property at issue consists of six parcels of land, each with a 105 Mortgage and a Street Mortgage. On three of the parcels, the 105 Mortgage is the first mortgage and the Street Mortgage second. On the other three parcels, the Street Mortgage ranks first and the 105 Mortgage second. At the time of the hearing before the associate judge, all the mortgages had been assigned to 105. However, the foreclosure proceeding before her dealt only with the Street Mortgage with an amount owing of some $7.45 million. The 105 Mortgage, with an amount owing of some $10.05 million, was the subject of separate foreclosure proceeding. Before the associate judge, the applicants argued that the 105 Mortgage could not be taken into consideration when assessing the potential windfall to the mortgagor. The associate judge disagreed, and assessed the potential windfall in the following terms:

> [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.

[26] The applicant says it is implicit in the assessment that the associate judge considered there to have been a merger when the Street Mortgages were assigned to 105 and all the underlying debt would be extinguished upon the granting of the Order Absolute. The respondent disagrees.

[27] The question of merger is of some importance to Mr. Braich, as in parallel bankruptcy proceedings, the respondent is seeking to recover some portion of the $10.05 million on the 105 Mortgage. As I understand the respondent's position in the bankruptcy proceeding, the Order Absolute only extinguished the debt related to the 105 Mortgage on the three properties where it ranked second. On the other three properties, the Order Absolute did not affect the personal debt owed by Mr. Braich to 105. Before me, the respondent was unable to say what amount that would be, but it seemed clear to me that the proposed calculation was not the one undertaken by the

associate judge in the passage above and I was not taken to any portion of the reasons where such a calculation was undertaken.

[28] According to the applicant, if the doctrine of merger applies then his personal debt on all the mortgages has been extinguished. If the doctrine of merger does not apply, then the associate judge erred in taking into consideration the 10.050 million of the 105 Mortgage in considering windfall. I cannot say this argument would be bound to fail.

[29] The oddity of the present application, however, is the applicant's position that both the associate judge and the chambers judge were correct on this issue. For obvious reasons, it is not a ground of appeal to say a chambers judge got the law right.

[30] The parties appear to agree that the application of the doctrine of merger and the calculation of the debt owing in this case is not a pure question of law. In the circumstances, I find that it is more appropriate to allow the bankruptcy proceeding to run its course, including any relevant findings that may be made on this issue. Should the applicant allege a conflict between the ultimate decision of the bankruptcy judge and that of the chambers judge on this issue or if it were to become a live issue on an appeal of that proceeding, it may well be in the interests of justice for leave to be granted on this matter and the appeals to be heard jointly. I will therefore adjourn generally the application in relation to the second ground of appeal set out above.

[31] To be clear, nothing in these reasons should be taken as expressing a view on the decision to be made by the judge in the bankruptcy proceedings. Given that I have essentially decided part of the application, I think it is most appropriate to seize myself of this going forward. I think everyone understands when or if it were to be brought back, when that would be.

[Discussion with parties re: clarifies application can be reset once decision on the bankruptcy is available re: doctrine of merger]

[32] **EDELMANN J.A.**: You have leave to reset this before me.

[Further discussion re: first and second grounds as set out in these reasons]

[33] **EDELMANN J.A.**: On the first ground, it seemed to me that that needed to be decided now because either it is an issue, and if it was an issue, then leave should be granted now. On the second ground, for the reasons I have set out, I would not be granting leave now, but given the overall circumstances I think an adjournment is appropriate.

"The Honourable Justice Edelmann"