

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Grace Mtn. Land Company, Ltd. v.*
1055249 B.C. Ltd.,
2026 BCCA 349

Date: 20260819
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 Warren
The Honourable Justice MacNaughton
The Honourable Justice Brundrett

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).

Counsel for the Appellants:

J.K. McEwan, K.C.
M. Ghorayeb

Counsel for the Respondent, 1055249 B.C.
Ltd.:

M.C. Sennott
L.B. Morris

Place and Date of Hearing:

Vancouver, British Columbia
February 19, 2026

Place and Date of Judgment:

Vancouver, British Columbia
August 19, 2026

Written Reasons by:

The Honourable Justice Brundrett

Concurred in by:

The Honourable Justice Warren

The Honourable Justice MacNaughton

Summary:

The appellant mortgagors appeal from the order of a chambers judge refusing an extension of time to appeal an associate judge's order. The respondent mortgagee holds two mortgages over the appellants' lands. The associate judge granted an order absolute of foreclosure respecting one of the mortgages and refused an extension of the redemption period. Due to errors by the appellants' previous counsel, the appellants required an extension of time to appeal the associate judge's order. The chambers judge dismissed the appellants' application for an extension of time to appeal, citing, in part, the lack of merit in the appeal. The appellants argue that the chambers judge erred in his consideration of the potential windfall resulting from the order absolute.

Held: Appeal dismissed. There was no reviewable error in the chambers judge's conclusion that the appellants' intended ground of appeal was bound to fail. Courts may appropriately consider the value of other mortgages on a property when deciding whether to extend the redemption period for the subject property. Here, any windfall was purely hypothetical, and the appellants failed to establish a reasonable prospect of redemption.

Reasons for Judgment of the Honourable Justice Brundrett:**Introduction**

[1] This appeal concerns foreclosure proceedings in relation to mortgages granted over six titles comprising approximately 64 acres in Mission, BC (the "Lands"). The appellants, Grace Mtn. Land Company, Ltd. ("Grace Mtn.") and Mr. Herkenn Singh Kenny Braich, appeal an order of a chambers judge refusing an extension of time to appeal an order absolute respecting the Lands.

[2] The appellants owned the six titles. They granted two mortgages with overlapping priorities on the Lands: one to Ms. Jennifer Street and another to the respondent, 1055249 B.C. Ltd. ("105"). Ms. Street was the first mortgagee on three of the six titles and the second mortgagee on the remaining three titles, on which 105 was the first mortgagee. 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. 105 was assigned both mortgages.

[3] Foreclosure proceedings concerning the Lands have been ongoing since 2015. In March 2019, Ms. Street commenced foreclosure proceedings against the appellants and obtained an order *nisi* on the Street Mortgage in August 2021. The

order *nisi* provided that the Court could grant an order absolute if no redemption occurred before the redemption period expired on February 19, 2022. The appellants did not redeem the Street Mortgage by the February date.

[4] On May 22, 2024, Associate Judge Robertson granted an order absolute and dismissed the appellants' application for an extension of the redemption period, with reasons indexed at 2024 BCSC 880 ("Associate Judge's Reasons"). The appellants sought to appeal her order. They had 14 days to file a notice of appeal in the Supreme Court of British Columbia, but due to a combination of then-counsel's misunderstanding of the appeal period and the appeal being filed in the wrong court, a proper notice of appeal was filed 41 days late. On September 6, 2024, Justice Jones in Supreme Court chambers dismissed the appellants' application for an extension of time to file a notice of appeal, citing in part a lack of merit in the appeal: *1055249 B.C. Ltd. v. Grace Mtn. Land Company, Ltd.*, 2024 BCSC 1916 ("Chambers Reasons").

[5] The appellants argue that they would have filed an appeal as of right but for an error made by their then counsel (not counsel on appeal). Counsel missed the deadline to file in the proper forum and then appealed the order absolute to the Court of Appeal of British Columbia. The appellants submit that the chambers judge erred in finding the grounds of appeal advanced by the appellants to be without merit and in declining to grant an extension of time to appeal.

[6] On May 5, 2025, Justice Edelmann granted leave to appeal on one issue. The issue advanced is whether the associate judge erred in law in assessing the magnitude of a windfall to 105 by failing to properly assess the evidence; in other words, whether 105 was taking extra equity above what it was owed. The appellants argue the chambers judge erred by concluding that the appeal of the windfall issue was without merit.

[7] The respondent submits that any windfall here is purely hypothetical and that neither the chambers judge nor the associate judge misapprehended the evidence.

[8] For the reasons that follow, I agree with the court below that it is not in the interests of justice to grant an extension of time. I would dismiss the appeal.

Background

Foreclosure Proceedings

[9] On February 14, 2019, 105 commenced foreclosure proceedings in respect of the Lands.

[10] On May 11, 2023, Robertson A.J. (then Master Robertson) granted an order absolute in favour of 105 and found that the appellants failed to meet the test for an extension of the redemption period.

[11] On December 8, 2023, Justice Stephens allowed an appeal of the order absolute, with reasons indexed at 2023 BCSC 2339. Central to his decision was the non-disclosure of an agreement (the “Commitment Letter”) between 105 and a third-party purchaser, 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 Ms. Street’s foreclosure action. The repayment specified in the Commitment Letter was a transfer of 85 percent of the Lands to the lender and contemplated a total purchase price of approximately \$18 million for the Lands. Justice Stephens set aside the order absolute and remitted it back to the associate judge for rehearing.

The Order Absolute

[12] On May 22, 2024, after a rehearing, Robertson A.J. granted a second order absolute (the “Order Absolute”) and dismissed the application for an extension of the redemption period.

[13] Under the first branch of the applicable test, the associate judge held that the appellants had met the onus of showing sufficient equity in the Lands over and above the amounts owed to the respondent under both mortgages (the Street Mortgage of \$7.45 million and the 105 Mortgage of \$10.05 million).

[14] Under the second branch of the test, the associate judge found that the appellants had not satisfied the Court that there was a probability of redemption to

support an extension of the redemption period. There was no evidence of a reasonable prospect of refinancing or sale of the Lands.

[15] In making the Order Absolute, the associate judge considered the issue of whether 105 would benefit from a windfall if the Order Absolute were granted. The appellants argued that the 105 Mortgage could not be considered when assessing the potential windfall to 105. The associate judge disagreed, reasoning as follows:

[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 [appellants] 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 [105]. In other words, [105'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.

...

[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, [105] 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 \$17,852,000 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 [105] 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 [105] to take order absolute would be inequitable, having regard to all of the circumstances.

[16] Thus, the associate judge concluded that, having regard to all the circumstances, there was no probability of an unreasonable windfall arising from the terms of the Commitment Letter that would make an order absolute inequitable.

[17] The associate judge characterized the appellants' conduct as illustrating "a pattern showing a lack of respect with the legal process": Associate Judge's Reasons at para. 84. She found that they had taken significant efforts to delay any ability of the mortgagees to obtain their remedies.

[18] The associate judge granted a vacant possession order along with the Order Absolute.

[19] The next day, counsel for the appellants announced at a creditors' meeting in bankruptcy proceedings against Mr. Braich that they would appeal the Order Absolute. Counsel for 105 attended the meeting.

The Subsequent Events

[20] Rule 23-6(8.1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [SCCR], prescribes a 14-day period to file a notice of appeal from an associate judge's order. Previous counsel for the appellants deposed that he was under the mistaken belief that he had 30 days to file a notice of appeal with the Supreme Court. The time to file the appeal expired on June 6, 2024. Counsel instead filed a notice of appeal in this Court on June 21, 2024, and deposed to believing it was the most expeditious course of action, given the parties' litigation history. He argued that it was permitted, with leave, under the *Court of Appeal Act*, S.B.C. 2021, c. 6 [CA Act].

[21] On July 19, 2024, Justice Saunders in Court of Appeal chambers dismissed the applicants' application for leave in this Court, with reasons indexed at 2024 BCCA 280. She concluded that s. 13(2)(b) of the CA Act precludes a direct appeal of an order made by an associate judge to the Court of Appeal.

[22] On July 17, 2024, 41 days after the 14-day period to appeal had expired, the appellants applied in the Supreme Court for an extension of time to appeal and for a stay of the Order Absolute.

The Application for an Extension of Time to Appeal

[23] In August 2024, Jones J. heard the appellants' application. The appellants argued that the associate judge erred in assessing the magnitude of the windfall to the respondent by considering both mortgages (the Street and 105 mortgages) together. Counsel did not make submissions with respect to the respondent's filing of a proof of claim in Mr. Braich's bankruptcy, or with respect to the possibility of a windfall in the bankruptcy.

[24] On September 6, 2024, the chambers judge dismissed the application for leave to extend time to appeal the Order Absolute. He considered each of the factors in *Davies v. C.I.B.C.*, [1987] 15 B.C.L.R. (2d) 256, 1987 CanLII 2608 (C.A.). In finding the value of all mortgages and orders *nisi* on the Lands to be relevant, he reasoned that the Court must assess whether the property has sufficient value by way of security for the amount outstanding. If another mortgage ranks in priority to the subject mortgage, that mortgage threatens the equity available to satisfy the subject mortgage: Chambers Reasons at para. 68.

[25] On the issue of a possible windfall, the chambers judge reasoned as follows:

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

[67] Here, it cannot be said that the 105 Mortgage for \$10.05 million cannot be considered because, on an order absolute, the mortgagee has to take into account superior interest holders, here including the Street

Mortgage on the three parcels where the Street Mortgage is a first mortgage superior to the 105 Mortgage as a second mortgage on the same three parcels.

...

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

[26] The chambers judge concluded that the windfall issue had no reasonable prospect of success and was bound to fail because the associate judge had properly accounted for both the Street Mortgage and 105 Mortgage in her consideration of the issue: at paras. 70–74. He observed that courts appropriately take notice of the value of other mortgages against a property when considering whether to extend the redemption period: at para. 71.

Leave to Appeal

[27] On September 26, 2024, the appellants filed a notice of appeal indicating that leave to appeal was required. On May 7, 2025, Edelmann J.A. denied leave to appeal one issue relating to the associate judge’s weighing of the parties’ conduct. He adjourned the second proposed issue, which was whether the chambers judge (and by extension the associate judge) erred in assessing the significance of the 105 Mortgage to the question of whether granting the Order Absolute would result in a windfall to 105, pending the determination in Mr. Braich’s bankruptcy proceedings of whether the doctrine of merger applied such that Mr. Braich’s \$10.05 million debt to 105 was extinguished by the Order Absolute.

[28] In a continuation of proceedings on May 5, 2025, the appellants informed Edelmann J.A. that the trustee in bankruptcy decided that the doctrine of merger did

not apply, so the 105 Mortgage was not extinguished by the Order Absolute. He granted leave to appeal on the second issue.

Standard of Review

[29] The chambers judge's decision was discretionary, applying the law to the facts before Robertson A.J. As the appellants do not contend that the chambers judge applied the wrong test to determine whether an extension was warranted, they concede that a deferential standard of review is appropriate.

[30] Appellate intervention is appropriate in discretionary decisions where the judge proceeded on a wrong principle or failed to give weight, or sufficient weight, to relevant considerations: *Timberwolf Log Trading Ltd. v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2013 BCCA 24 at para. 19, citing *Stone v. Ellerman*, 2009 BCCA 294. Intervention is also appropriate where the judge made a palpable and overriding error in the assessment of the facts or misdirected herself as to the applicable law: *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2018 BCCA 214 at para. 25; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 43.

Discussion

[31] The appellants' main argument is that their appeal has merit. They submit that in assessing the merits of the issue of a windfall, the chambers judge failed to give sufficient weight to 105's \$10.05 million proof of claim in the bankruptcy proceedings in assessing whether the Order Absolute would lead to a windfall to 105. The appellants argue that the associate judge failed to consider their position that Mr. Braich remained liable on his personal covenant for approximately \$4.6 million in her assessment of whether there was a windfall to the respondent. In other words, the appellants argue that the Order Absolute could allow 105 to treat the mortgage as partly paid off for the parcels where it was the first mortgagee and maintain a claim against Mr. Braich.

[32] Thus, the appellants maintain that in light of the trustee's determination that the Order Absolute did not extinguish the appellants' \$10.05 million debt owed to 105, the Order Absolute, in tandem with 105's proof of claim, arguably results in a windfall to 105 by virtue of the existence of a possible claim against Mr. Braich.

[33] I note that this argument has a different flavour than that put before the chambers judge. In the proceeding before the chambers judge, the appellants argued that the associate judge erred in properly assessing the magnitude of the windfall to the respondent because she erroneously considered the value of both the Street Mortgage and the 105 Mortgage, when the 105 Mortgage was "not before her." They submitted that, in considering the windfall issue, the associate judge found that the total debt (including the 105 Mortgage) was \$17.5 million. In other words, the judge looked at two mortgages, even though only one was before her, in finding that the total was approximately \$17.5 million.

[34] The appellants did not submit that the associate judge erred by failing to consider a potential windfall arising from the proof of claim in bankruptcy. It is difficult to find that the chambers judge failed to give sufficient weight to 105's proof of claim when the appellants did not raise this issue before the chambers judge.

[35] In addition, the appellants raise the issue of merger. I understand that in Mr. Braich's bankruptcy proceeding, the appellants asked Justice LeBlanc to determine whether merger extinguished Mr. Braich's \$10.05 million debt to 105 and eliminated their standing in his bankruptcy. That application was adjourned so that the present appeal could proceed.

[36] I am mindful that on the leave application, Edelmann J.A. found that the doctrine of merger was a relevant consideration: *Grace Mtn. Land Company Ltd. v. 1055249 B.C. Ltd.*, 2025 BCCA 92 (Chambers) at paras. 27–28. However, the fact remains that the associate judge was not asked to make any finding on the doctrine of merger. The chambers judge did not address the merger issue. I am of the view that, as the appellants did not allege merger as an error of law before the chambers judge, they cannot now allege that he erred in refusing an extension of time when

that issue was not argued before him: *On Call Internet Services Ltd. v. Telus Communications Company*, 2013 BCCA 366 at para. 87.

[37] The only issue before the associate judge was whether the appellants could satisfy the two-part test for an extension of the redemption period. She and the chambers judge were not asked to rule on how the Order Absolute would impact 105's proof of claim in the bankruptcy, or on whether the doctrine of merger applied.

[38] There is no question that the chambers judge applied the correct legal test on an application to extend time to file an appeal, being the five factors from *Davies*.

[39] As noted above, the chambers judge considered the Lands collectively, reasoning that an accurate picture of the equities could not be obtained without considering all the mortgages at play. He found that the fact that one mortgage is the subject of a different action was not relevant because the Lands, and the mortgages that impact the equity on the Lands, are the focus of the inquiry: Chambers Reasons at para. 70.

[40] As the chambers judge noted at para. 71, courts appropriately take notice of the value of other mortgages against a property when considering an application to extend the redemption period: see *Pacific Sunset Development Corporation v. Dickie*, 87 A.C.W.S. (3d) 166, 1999 CanLII 6656 (B.C.S.C.); *1299362 B.C. Ltd. v. Marine Investments Inc.*, 2022 BCSC 393; *Schindler v. Habib*, 2012 BCSC 150; *Canada Permanent Mortgage Corp. v. Dan-Al Construction Co.*, [1982] B.C.J. No. 2339, 16 A.C.W.S. (2d) 224 (C.A.).

[41] An order absolute may result in a windfall to the mortgagee if, and to the extent that, the value of the property exceeds the amount owing under the mortgage.

[42] Here, however, any windfall was purely hypothetical and, as the associate judge found, amounted to at most a three percent lift. The associate judge reasoned that this was not a "windfall of the type that establish[es] that allowing [105] to take [an] order absolute would be inequitable": Associate Judge's Reasons at para. 70. An unreasonable windfall cannot be a mere possibility but must be a probability: *Jin-*

Ocean Mortgage Investment Corporation v. 1011066 BC Ltd., 2024 BCSC 847 at para. 53; *Imor Capital Corp. v. Bullet Enterprises Ltd.*, 2014 BCSC 2540 at para. 9; *Royal Bank of Canada v. Kirkpatrick*, 2022 BCSC 811 at para. 13.

[43] Moreover, I see no error in the chambers judge's conclusion that the appellants failed to satisfy the Court of a reasonable prospect of redemption. The associate judge considered new evidence from the appellants of offers for the Lands, which varied from a \$13 million offer made in 2022 to a \$50 million offer in 2023. She found that the \$50 million offer had lapsed with no evidence of an extension and that the appellants had not established that the \$13 million offer was available: Associate Judge's Reasons at paras. 51–61. The chambers judge concluded that an extension would not be in the interests of justice, citing the associate judge's finding that the appellants chose not to pursue any possibility of a redemption and instead had taken significant efforts to delay any ability of mortgagees to obtain their remedies: Chambers Reasons at para. 103, citing Associate Judge's Reasons at para. 84.

[44] I agree with the chambers judge that the appellants' intended ground of appeal (that the associate judge erred in assessing the magnitude of the windfall to 105) had no reasonable prospect of success and was bound to fail. In my view, the chambers judge properly considered the *Davies* factors.

[45] I note that it has now been four years since the redemption period expired. The appellants hope to overturn the Order Absolute, but at this point they have already had the benefit of a four-year extension to the redemption period, and there is no evidence of any possibility of redemption.

[46] As the chambers judge noted at paras. 104–106, R. 1-3 of the *SCCR* reflects the interests of justice and provides that the object of the *SCCR* is to secure the just, speedy, and inexpensive determination of every proceeding on its merits. Considerations include the amount involved, the importance of the issues in dispute, and the complexity of the proceeding.

[47] The chambers judge considered these factors and stated as follows:

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

[Emphasis added.]

[48] The parties advised that the trustee determined in the bankruptcy proceeding that the doctrine of merger does not apply to the respondent's proof of claim. The appellants are free to challenge the trustee's merger determination and the respondent's standing as a creditor in that proceeding. However, a subsequent decision by the trustee in a separate proceeding does not give rise to an error in the chambers judge's decision in the proceeding at issue.

[49] In relation to this proceeding, I can discern no reviewable error in the findings of the chambers judge in weighing the relevant factors and ultimately holding that it was not in the interests of justice to grant the appellants an extension of time to appeal from the associate judge's order.

Disposition

[50] I would dismiss the appeal.

"The Honourable Justice Brundrett"

I AGREE:

"The Honourable Justice Warren"

I AGREE:

"The Honourable Justice MacNaughton"