

CANADA / JUDGMENT

0742848 B.C. Ltd. v. 426008 B.C. Ltd.

2019 BCSC 1869

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1869 0742848 B.C. Ltd. v. 426008 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0742848 B.C. Ltd. v. 426008 B.C. Ltd.,

2019 BCSC 1869

Date: 20191101

Docket: S1812158

Registry: Vancouver

Between:

0742848 B.C. Ltd.

Plaintiff

And

426008 B.C. Ltd., 0714185 B.C. Ltd., Andrew A. Bury,

Andrew A. Bury Law Corporation, Manjit Claire,

Manjit Claire Personal Real Estate Corporation,

Kurtis Claire, RE/MAX Real Estate Services,

Andrews Realty Ltd., David N. Andrews, Neil Hahn,

and Garnett Wilson Realty Advisors Ltd.

Defendants

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

Appearing as a representative for 0742848 B.C. Ltd.:

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Place and Date of Hearing:

Vancouver, B.C.

September 16 and 17, 2019

Place and Date of Judgment:

Vancouver, B.C.

November 1, 2019

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I. INTRODUCTION

- [1] Each of the defendants in this action brings an application to strike and/or dismiss the plaintiff's claims against them pursuant to Rules 9-5(1) and/or 9-6 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR].
- [2] The claims advanced in this action arise out of an ongoing foreclosure proceeding involving land owned by the corporate plaintiff in Squamish, British Columbia (the "Property"). Donald McCargar is the sole director and shareholder of the plaintiff. Mr. McCargar appeared for the plaintiff on the present applications.
- [3] The defendants are the mortgagees, their legal counsel, realtors retained by the mortgagees to assist in the sale of the Property, and an appraiser retained to provide a valuation of the Property. The plaintiff alleges that throughout the foreclosure proceeding the defendants were negligent in their marketing, appraisal, and attempted sale of the Property, and conspired to reduce the value of the Property.
- [4] The defendants apply to strike the claims on the basis that the notice of civil claim discloses no reasonable cause of action, is scandalous, frivolous and vexatious, or is an abuse of court process. Alternatively, the defendants say the plaintiff's claims should be dismissed pursuant to Rule 9-6 of the SCCR.

- [5] While each of the four groups of defendants filed a separate application, there are some common themes. The defendants all say that they do not owe a duty of care to the plaintiff in the context of a foreclosure proceeding, that the conspiracy pleading is speculative, and that the notice of civil claim is an abuse of the court's process to the extent that it undermines the foreclosure proceeding.
- [6] The plaintiff says the defendants, collectively and individually, acted negligently and in bad faith in dealing with the sale of the Property. The plaintiff acknowledges that there are some drafting deficiencies in its notice of civil claim, particularly in respect of the claim of conspiracy. However, the plaintiff says it ought to be allowed to proceed with oral and documentary discovery in order to determine the true facts, at which point the plaintiff can amend its pleading.

II. FACTUAL BACKGROUND

A. The Order Nisi and Order for Conduct of Sale

- [7] The defendants 426008 B.C. Ltd. and 0714185 B.C. Ltd. (the "Mortgagees") hold a registered mortgage on the Property (the "Mortgage"). At the time it was registered, the Mortgage ranked second in priority to a mortgage held by the Royal Bank of Canada ("RBC"). The Mortgagees have since paid RBC out and are the first priority mortgagees on the Property.
- [8] The plaintiff defaulted on the Mortgage in 2017 and the Mortgagees commenced a foreclosure proceeding: Vancouver Action No. H-170069 (the "Foreclosure Proceeding"). On June 12, 2017, Master Tokarek issued an Order Nisi in the Foreclosure Proceeding declaring the Mortgage to be in default, and setting a redemption date of November 29, 2017. The Order Nisi granted judgment to the Mortgagees against the plaintiff in the amount of \$2,655,865 plus costs.
- [9] The defendant Andrew Bury, Q.C. was counsel for the Mortgagees on the application for an Order Nisi, and has been counsel throughout the Foreclosure Proceeding. It remains an active proceeding that has not been concluded by order absolute or an order approving a sale of the Property to a third party purchaser.
- [10] On January 15, 2018, Master Harper issued an Order for Conduct of Sale which ordered that the Property be offered for sale and that the Mortgagees have conduct of the sale. The following terms of the Order are relevant to some of the allegations advanced by the plaintiff in the notice of civil claim:
3. any person or persons in possession of the Property, including any tenant or tenants, shall, on or after April 16, 2018, permit any duly authorized agent of the Petitioners to inspect or appraise the Property, and show the Property to prospective purchasers, between the hours of 8:00 a.m. and 8:00 p.m. on any day including Sundays and statutory holidays, and to post signs on the Lands, indicating that the Property is offered for sale.

4. the listing price for the Property shall not be less than \$10,000,000, prior to June 16, 2018.
- [11] Although the notice of civil claim refers to the Order for Conduct of Sale as a "consent order", it is not, in fact, on its face a consent order. It does appear from the material that no party opposed the order. The plaintiff alleges in the notice of civil claim that the terms of the Order for Conduct of Sale were the product of negotiation between the plaintiff's lawyer and Mr. Bury. I must assume this to be true for the purpose of the present applications.

B. The application for approval of sale

- [12] After the Order for Conduct of Sale was issued, the Mortgagees retained the defendant realtors Manjit Claire and Kurtis Claire to market and sell the Property, and the defendant Neil Hahn to prepare an appraisal. Mr. Hahn attended the Property on February 15, 2018, and produced an Appraisal Report dated March 12, 2018. Mr. Hahn estimated the market value of the Property as of February 15, 2018 at \$2,758,000 (the "Appraisal").
- [13] The Property was listed on April 16, 2018 at \$10 million. On June 18, 2018, the list price was dropped to \$5.9 million. On May 30, 2018, an offer was made on the property at \$5 million. There was an exchange of counter-offers before a price of \$5.3 million was agreed to between the purchaser and the Mortgagees on June 8, 2018. The subjects were removed on June 27, 2018.
- [14] The Mortgagees then brought an application for court approval of the sale. The application was heard by Master Scarth on August 27, 2018. On August 30, 2018, Master Scarth issued reasons for judgment declining to approve the sale: 426008 B.C. Ltd. v. 0742848 B.C. Ltd., 2018 BCSC 1475.
- [15] At the hearing before Master Scarth, the Mortgagees conceded that the Appraisal was inaccurate, in part because the appraiser did not have the correct facts about the Property and, as such, the Appraisal was too conservative. The Mortgagee relied instead on a letter from the realtors to establish that the marketing of the Property was businesslike and the sale provident. Mr. McCargar, in opposing approval of the sale, argued that the marketing efforts fell short and sale was not provident. He relied on a \$10 million appraisal of the Property from 2016.
- [16] In declining to approve the sale, Master Scarth concluded that the evidence did not establish that the marketing efforts were businesslike and the sale provident. She found there were gaps in the evidence of the realtors. First, there was no explanation for the significant drop in the list price from \$10 million to \$5.9 million in June 2018.[1] Second, there was no evidence as to what marketing efforts occurred after the contract with the purchaser was signed on June 8, 2018.
- [17] The notice of civil claim alleges that, subsequent to Master Scarth's judgment, the Property was listed at \$9 million on August 30, 2018, \$8 million on October 1, 2018, and \$7.29 million on November 5, 2018.

[18] On May 27, 2019, the Mortgagees obtained an order in the Foreclosure Proceeding which vacated the Order for Conduct of Sale and gave conduct of sale to the plaintiff. The Property had not sold at the time of the hearing of these applications.

III. THE NOTICE OF CIVIL CLAIM

[19] The plaintiff filed the notice of civil claim on November 9, 2018. The claim is against the following groups of defendants:

- i) the Mortgagees;
- ii) Manjit Claire and Kurtis Claire, in addition to Manjit Claire's personal company (Manjit Claire Personal Real Estate Corporation), their brokerage firm (RE/MAX Real Estate Services), and the owners of RE/MAX Real Estate Services (Andrews Realty Ltd. and David N. Andrews). I will collectively refer to these defendants as the "Realtors";
- iii) the lawyer, Mr. Bury, who acted for the Mortgagees in the Foreclosure Proceeding, and his personal law corporation (Andrew A. Bury Law Corporation). I will collectively refer to these defendants as the "Bury Defendants"; and
- iv) the appraiser, Mr. Hahn, and his employer (Garnett Wilson Realty Advisors Ltd). I will collectively refer to these defendants as the "Hahn Defendants".

[20] The notice of civil claim advances causes of action against all of the defendants in negligence and conspiracy. The notice of civil claim generally alleges that all defendants "breached their duty of care and were grossly negligent" [notice of civil claim, Part 1, para. 22]. The particulars of the claims in negligence as against each group of defendants may be summarized as follows.

- i. The plaintiff alleges that the Realtors were negligent in failing to take adequate and reasonable steps to market the Property in a businesslike manner and in accordance with the standards expected of competent realtors. It is alleged that the Realtors had no valid reason to drop the list price to \$5.9 million on June 18, 2018, and also that the Realtors encouraged and entertained an offer for \$5.3 million prior to June 16, 2018 [notice of civil claim, Part 1, paras. 22, 25].
- ii. The plaintiff alleges that Mr. Bury was negligent through his participation in the acceptance of the \$5.3 million offer, the selection of the Realtors to list the Property, and his selection of, and direction to, Mr. Hahn. It is alleged that Mr. Bury deliberately abused his authority in the foreclosure proceedings in order to cause financial loss to the plaintiff [notice of civil claim, Part 1, para. 23].
- iii. The plaintiff alleges that the Mortgagees breached their duty of care to exercise their power of sale in good faith [notice of civil claim, Part 1, para. 25].
- iv. The plaintiff alleges that Mr. Hahn was negligent in failing to conduct an appraisal of the Property in an accurate manner [notice of civil claim, Part 1, para. 26].

- [21] The notice of civil claim also alleges that all of the defendants committed the tort of civil conspiracy in deliberately and unlawfully colluding and conspiring to sell the Property quickly for less than its market value [notice of civil claim, Part 1, para. 17]. The particulars of the conspiracy in para. 20 of Part 1 of the notice of civil claim essentially replicate the negligence allegations that I have summarized above. It is alleged that the defendants entered into negotiations with a potential buyer prior to April 16, 2018, failed to adequately market the Property, manufactured incorrect appraisal evidence, and advocated for court approval of an offer that the defendants knew to be less than the market value of the Property.
- [22] There is an additional allegation of trespass against Mr. Bury and Mr. Hahn. The plaintiff alleges that Mr. Bury trespassed on the Property to conduct an inspection in December 2017 without the plaintiff's authorization [notice of civil claim, Part 1 para. 23(vi)]. Mr. Hahn's attendance on the Property in February 2018 is alleged to be a trespass because the Order for Conduct of Sale only permitted access to the Property for the purpose of an appraisal on or after April 16, 2018 [notice of civil claim, Part 1 para. 20(vi)].
- [23] The relief sought by the plaintiff in Part 2 of the notice of civil claim includes (at para. 1) judgment against the defendants, jointly and severally, for pecuniary damages arising from the difference between \$10 million and "the realized sale price of the Property".
- [24] The defendants have not yet filed responses to civil claim and there has been no oral or documentary discovery. On March 11, 2019, Master Schwartz issued a case plan order which provides that discovery of documents shall occur within 45 days of judgment being rendered on the present applications if the defendants are unsuccessful in having the claims dismissed. The case plan order also provides that all examinations for discovery shall be completed no later than 120 days before trial.

IV. ANALYSIS

A. The tests under Rule 9-5(1) and 9-6

- [25] The relevant provisions of Rule 9-5(1) and Rule 9-6 are as follows:

Rule 9-5 - Striking Pleadings

Scandalous, frivolous or vexatious matters

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
- (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

(d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Rule 9-6 - Summary Judgment

Application by answering party

(4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

Power of court

(5) On hearing an application under subrule (2) or (4), the court,

(a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,

(c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly,

[26] The test to be applied on an application to strike pleadings under Rule 9-5(1) is whether it is plain and obvious that the impugned pleading violates one or more of subrules (a)-(d) of Rule 9-5(1).

[27] On an application under Rule 9-5(1)(a), the question is whether it is plain and obvious that the pleading discloses no reasonable claim. The approach on a motion to strike is generous; novel but arguable claims are permitted to proceed: *Krist v. British Columbia*, 2017 BCCA 78 at paras. 22-23 [Krist]; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 [Imperial Tobacco] at para. 17. The facts as pleaded are assumed to be true for the purpose of determining the existence of a reasonable claim. Rule 9-5(2) provides that no evidence is admissible on an application under Rule 9-5(1)(a).

[28] In contrast, applications under Rule 9-5(1)(b), (c) and (d) permit consideration of external facts or evidence. This is because applications under these subrules are contextually driven: *Krist* at para. 24. The defendants in the present case rely particularly on Rule 9-5(1)(d) which codifies the court's residual discretion to prevent a misuse of the court's procedure in a way that would bring the administration of justice into disrepute: *Gonzalez v. Gonzalez*, 2016 BCCA 376 at paras. 18-19, leave to appeal refused [2016] S.C.C.A. No. 512.

[29] On an application under Rule 9-6 of the SCCR, the court is not limited to a review of a party's pleadings. Rule 9-6 permits the court to grant judgment on the basis of a limited review, but not weighing, of the evidence. A defendant can succeed on an application under Rule 9-6 by showing that the case pleaded by the plaintiff is unsound, or by adducing sworn evidence that provides a complete answer to the plaintiff's claim: *Beach Estate v. Beach*, 2019 BCCA

277 [Beach] at para. 48. If the court is satisfied, based on the evidence, that the plaintiff has no chance of success then summary judgment may be granted under Rule 9-6. If a determination of the merits of the plaintiff's claim requires weighing of the evidence then judgment cannot be granted under Rule 9-6: Beach at paras. 48-49.

B. The plaintiff's claims in negligence

[30] Each group of defendants applies to strike the negligence claim against them on the basis that the notice of civil claim does not disclose a reasonable claim. The nature of the arguments differ among the defendants, but a central theme of all of the arguments is that the defendants did not owe the plaintiff a duty of care.

1. The Anns/Cooper framework

[31] The governing framework for analyzing the existence of a duty of care in negligence is set out in the judgment of the Supreme Court of Canada in *Cooper v. Hobart*, 2001 SCC 79 [Cooper]. Cooper refined the traditional two-stage "Anns test" for the existence of a duty of care from the decision of the House of Lords in *Anns v. Merton London Borough Council*, [1978] AC 728 (H.L.). Specifically, Cooper revised the Anns test by distinguishing more clearly between foreseeability and proximity, and by placing greater emphasis on a more demanding first stage of the duty of care analysis: *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 [Livent] at para. 22.

[32] At the first stage of the Anns/Cooper analysis, the plaintiff must establish that the harm suffered was a foreseeable consequence of the defendant's acts or omissions, and also that there is a sufficient relationship of proximity between the parties that it is just and fair to impose a duty of care. If the relationship falls within a previously established, or analogous, category in which a proximate relationship has been recognized then the requisite close and direct relationship is established. Where there is no established or analogous category, the court must undertake a full proximity analysis. This involves looking at factors arising from the relationship between the parties, including "expectations, representations, reliance, and the property or other interests involved": Cooper at para. 34.

[33] In cases of pure economic loss arising from the alleged negligent performance of a service, two factors are determinative in the proximity analysis: the defendant's undertaking and the plaintiff's reliance. Where the defendant undertakes to provide a service in circumstances that invite the plaintiff's reasonable reliance, the defendant is obligated to take reasonable care in doing so: Livent at para. 30.

- [34] If a prima facie duty of care is established at the first stage of the Anns/Cooper framework then the analysis shifts to stage two of the inquiry, which asks whether there are residual policy considerations outside of the relationship between the parties that may negate the imposition of a duty of care. The distinction between the policy considerations relevant to the first and second stage of the duty of care analysis was explained by the Supreme Court of Canada in *Livent*:
- [40] What, then, remains to be considered at the second stage of the Anns/Cooper framework? In *Cooper*, this Court identified factors which are external to the relationship between the parties, including (1) whether the law already provides a remedy; (2) whether recognition of the duty of care creates "the spectre of unlimited liability to an unlimited class"; and (3) whether there are "other reasons of broad policy that suggest that the duty of care should not be recognized" (para. 37). In this way, the residual policy inquiry is a normative inquiry. It asks whether it would be better, for reasons relating to the legal or doctrinal order, or reasons arising from other societal concerns, not to recognize a duty of care in a given case.
- [35] An issue on these applications, then, is whether it is plain and obvious that the defendants did not owe a duty of care to the plaintiff, having regard to the Anns/Cooper framework.

2. The plaintiff's negligence claim against the Mortgagees

- [36] The plaintiff argues that the Mortgagees owed it a duty of care at common law to deal with the Property prudently and in good faith in assuming the conduct of sale. In the Legal Basis section of the notice of civil claim, the plaintiff cites a number of cases in support of the existence of such a duty, including: *Middleton v. "Ocean Tribune" (The)*, 2004 BCSC 32 [Middleton]; *J. & W. Investments Ltd. v. Black* (1963) 38 D.L.R. (2d) 251 (B.C.C.A.) [J. & W. Investments]; *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.*, [1971] 2 All E.R. 633 (C.A.) [Cuckmere Brick]; and *Columbia Trust Co. v. Larsen*, [1986] B.C.J. 677 (S.C.) [Columbia Trust]. As I understand the argument, the plaintiff says that the case law already establishes the existence of a duty of care between a mortgagor and mortgagee when a mortgagee takes steps to realize on its security by way of a sale of the property.
- [37] In my view, the cases cited by the plaintiff do not support the existence of a duty of care in negligence on the part of the mortgagee within the context of a foreclosure proceeding in British Columbia. To understand the case law that grounds the plaintiff's claim in negligence, it is first necessary to trace the historical duties of a mortgagee exercising a power of sale, which have their origin in equity.
- a) The equitable duties of a mortgagee exercising the power of sale
- [38] The equitable duties of a mortgagee exercising the power of sale on a mortgagor's default have evolved over time. Courts of equity have long recognized a mortgagor's vulnerability in such circumstances. A mortgagee wishes to recover on the debt and may have little interest in the increased effort and time that would be required to also realize a surplus on the sale. The mortgagor is vitally interested in generating a surplus on the sale but, absent judicial or

statutory intervention, has no ability to control the conduct of sale. Left unsupervised, the mortgagee is free to pursue its self-interest at the expense of the interests of the mortgagor.

- [39] By the 19th century, the Court of Chancery had decided that a mortgagee was not a trustee for the purpose of exercising a power of sale. The debate that remained was over the scope of the equitable duties owed by a mortgagee, even if they fell short of the full duties of a trustee. It was generally accepted that the mortgagee had to act in good faith in conducting the sale. The point of controversy was whether a mortgagee should also have a duty of care to ensure that the property was sold at market value.
- [40] The issue appeared to be resolved, at least for a time, by the decision of the House of Lords in *Kennedy v. De Trafford et al.*, [1897] A.C. 180 [Kennedy], where the Court defined the duty of a mortgagee in exercising the power of sale as one of good faith rather than reasonable care. In an often quoted passage from Kennedy, Lord Herschell stated at 185:

My Lords, I am myself disposed to think that if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor. Lindley L.J., in the Court below, says that "it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor." Well, I think that is all covered really by his exercising the power committed to him in good faith. It is very difficult to define exhaustively all that would be included in the words "good faith", but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith.

- [41] The good faith standard as set out in Kennedy remained relatively settled law in 1963 when our Court of Appeal decided *J. & W. Investments*. This case concerned an alleged failure by a mortgagee to properly exercise a contractual power of sale under a chattel mortgage. The Court of Appeal endorsed the above quoted passage from the decision of Lord Herschell in Kennedy as the correct articulation of the duty of a mortgagee exercising a power of sale in the circumstances of that case. The Court in *J. & W Investments* also confirmed that the duty imposed is an equitable duty, not a tort duty. As stated by Davey J.A., dissenting on other grounds, at p. 253:

Also, I agree with my brother Sheppard that a mortgagor's cause of action for sale at an undervalue within the ambit of the power of sale is an equitable right to an account for what the mortgagee might have received but for the wilful default, and that it is not a common law cause of action to recover damages for negligence .

- [42] In 1970, the law in England further evolved with the decision of the English Court of Appeal in *Cuckmere Brick*. The Court held that the mortgagee's duty is comprised not only of a duty of good faith in the conduct of the sale, but also a duty to take reasonable care to obtain whatever the true market value of the property is at the time the mortgagee chooses to sell. The Court found that such a duty was not precluded by the judgment of the House of Lords in *Kennedy*, notwithstanding 70 years of case law which appeared to hold otherwise.
- [43] By the time of the decision in *Cuckmere Brick*, the common law of negligence had itself evolved with the decision of the House of Lords in *Donoghue v. Stevenson*, [1932] A.C. 562, establishing the "neighbour principle" as the foundation for duty of care analysis in negligence. Although the Court of Appeal in *Cuckmere Brick* was, strictly speaking, addressing the equitable duties of a mortgagee, the Court's analysis of the content of the duty was clearly informed by negligence law as well as equitable principles. At 643-644 of *Cuckmere Brick*, Salmon LJ stated:

Approaching the matter first of all on principle, it is to be observed that if the sale yield a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor. If the sale shows a deficiency, the mortgagor has to make it good out of his own pocket. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. The proximity between them could scarcely be closer. Surely they are 'neighbours'. Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale.

[Emphasis added]

- [44] *Cuckmere Brick* thus established that, in England at least, a mortgagee exercising a power of sale has a duty to "take reasonable precaution to obtain the true market value of the mortgaged property on the date he decides to sell it" (at 646 per Salmon LJ). The origin of the duty lies in equity, although it may not matter in result whether the duty is expressed as a common law tort duty or as a duty in equity: *Medforth v. Blake*, [1999] 3 All E.R. 97 (C.A.) at 110-111.
- [45] The question of whether *Cuckmere Brick* states the law in British Columbia, outside of foreclosure proceedings at least, remains an open question. In *Middleton*, a case which concerned a chattel mortgage, Davies J. found it unnecessary to resolve the issue, although he noted that the B.C. Supreme Court would continue to be bound by the Court of Appeal's judgment in *J. & W. Investments*. The difference between the approaches in *Cuckmere Brick* and *J. & W. Investments* may continue to have practical effect where a mortgagee exercises a contractual power of sale. As observed by Southin J., as she then was, in *Columbia Trust*:

[27] If J. & W. Investments Ltd. v. Black, is the law of British Columbia, the mortgagee selling under a power of sale is in quite a happy position. If the law is as in Cuckmere Brick Co. v. Mutual Finance, his position is not so happy.

[46] However, Southin J. also distinguished the circumstances of a mortgagee who obtains court approval of a sale in a foreclosure proceeding. In summarizing the relevant principles, at para. 16 of Columbia Trust, Southin J. stated:

While there appears to be no direct authority, I assume that a mortgagee who obtains judicial approval of a sale under s. 16 [of the Law and Equity Act - now s. 15], cannot be sued for an improvident sale.

[47] This, then, leads to the central question of the significance of Cuckmere Brick to the remedies available to a mortgagor in a British Columbia foreclosure proceeding who is unhappy with a mortgagee's conduct in the course of a court-ordered sale.

b) Foreclosure proceedings in British Columbia

[48] Rule 21-7 of the SCCR governs the foreclosure process in British Columbia. Rule 21-7(1) provides that a proceeding for foreclosure of the equitable right to redeem mortgaged property or for redemption must be started by petition. Pursuant to Rule 21-7(2), all persons whose interest in the mortgage property is sought to be extinguished must be named as respondents to the petition, along with all other persons against whom relief is sought.

[49] At the first court hearing on a foreclosure petition, the mortgagee will typically apply for an Order Nisi. A standard Order Nisi will, among other terms, declare that the mortgage is in default, set the redemption period, and grant personal judgment against the mortgagor(s) in the amount of the judgment debt.

[50] A common method of enforcing a mortgagee's in rem claims following the expiry of the redemption period is through a process of court-ordered sale. Section 15 of the Law and Equity Act, R.S.B.C. 1996, c. 253, provides that the court may direct a sale of the mortgaged property, on application of an interested person, at any time during the foreclosure process "on the terms the court considers just". The court's power to order a sale is also contained in Rule 21-7(5)(i) of the SCCR.

[51] Until relatively recently, the law in British Columbia was uncertain as to the obligations of a mortgagee who seeks approval of a court ordered sale: Woods Lake Development Ltd. v. Renaissance Enterprises (Woods Lake) Corp., 2011 BCSC 849 at paras. 13-16. In Mission Creek Mortgage Ltd. v. Angleland Holdings Inc., 2013 BCCA 281 [Mission Creek], the Court of Appeal synthesized the diverse case law regarding the standard to be applied on an application for court approval of a proposed sale in stating the following test:

[40] . What I take from [the cases] is that the mortgagee must go about finding a buyer in a businesslike manner and the court must be satisfied that the proposed sale is provident in all the circumstances.

- [52] This is now the established test on an application for court approval of a proposed sale: Kokanee Mortgage MIC Ltd. v. 669655 B.C. Ltd., 2014 BCSC 458 [Kokanee Mortgage] at paras. 24, 27; Tekamar Mortgage Fund Ltd. v. Hegel, 2018 BCSC 1369 at paras. 26-27. In the present case, Master Scarth applied the test from Mission Creek in declining to approve the sale proposed by the Mortgagees.
- [53] The order of a master approving a proposed sale is a final order, and therefore it is subject to de novo review on appeal to the British Columbia Supreme Court: Kokanee Mortgage at paras. 14-15.
- c) Do the Mortgagees owe a duty of care to the plaintiff?
- [54] In my view, it is plain and obvious that a mortgagee does not owe a tort duty of care to a mortgagor in the conduct of a court-ordered sale in a foreclosure proceeding in British Columbia. The equitable duties imposed on a mortgagee, including the equitable duty of care recognized in Cuckmere Brick, were formulated to act as a balance on the absolute discretion of a mortgagee to determine the timing and conduct of sale where the mortgagor is exercising a contractual power of sale that is not otherwise subject to court supervision. The relationship of proximity between a mortgagor and mortgagee recognized in Cuckmere Brick is a function of the mortgagor's vulnerability to the exercise of that discretion in circumstances where the mortgagor's financial interests are directly impacted.
- [55] The same relationship of vulnerability does not arise in the context of a foreclosure proceeding in British Columbia. A mortgagor has independent standing on a petition for foreclosure under Rule 21-7 of the SCCR and thus an ability to participate in the application for court approval of the sale. The mortgagor has standing before the court to oppose a sale, as occurred in this case. Further, on an application for court approval of a sale the mortgagee must provide evidence sufficient to satisfy the court that the property has been marketed in a businesslike manner and that sale is provident. The equitable duties of a mortgagee in the conduct of sale are thus reflected in the test for court approval of a sale in a British Columbia foreclosure proceeding.
- [56] I conclude that the relationship of proximity required to establish a prima facie duty of care in negligence is plainly and obviously not present in these circumstances. The mortgagor is not reliant on the mortgagee to protect its financial interests given the mortgagor's independent standing in the foreclosure process. The mortgagor is also not vulnerable to the mortgagee's unilateral exercise of discretion in the conduct of sale because the mortgagee cannot exercise unilateral discretion. Within a British Columbia foreclosure proceeding, each party is free to pursue their independent financial interests, subject to the overarching power of the court to approve or not approve a sale of the property.
- [57] There are also considerations of policy that would negate any duty of care at the second stage of the Anns/Cooper test. A mortgagee with conduct of sale has an existing obligation to satisfy the court that a sale is provident before the sale will be approved. A mortgagor dissatisfied with a Master's decision to approve a sale has the further remedy of seeking de

novo review of the decision on appeal to the British Columbia Supreme Court.

Superimposing a tort duty of care on a mortgagee would tend to disrupt the balance that has already been struck between the interests of mortgagors and mortgagees within the context of the foreclosure process in British Columbia. The process itself could be undermined by parallel negligence claims by a mortgagor during the court approval process, or even after the court has approved a sale.

[58] Finally, I note that, to the extent that this issue has been canvassed in British Columbia, the weight of judicial authority is against the imposition of a duty of care on a mortgagee. This issue was most recently considered by Matthews J. in *Gadsby v. British Columbia (Attorney General)*, 2019 BCSC 1596 [Gadsby], in the context of a negligence claim brought subsequent to a court approved sale. In dismissing the mortgagor's negligence action against the mortgagee, Matthews J. stated:

[84] As the authorities referred to in *Woods Lake* explain, the court-ordered process and the requirement for court approval of the sale serve to protect the respondent in a foreclosure proceeding. There is no duty of care on a lender who is foreclosing to protect the borrower.

[59] I acknowledge that *Gadsby* is factually distinct from the present case in that the sale had been approved and Matthews J. concluded that the negligence action was an attempt to re-litigate the court approval. However, in my view this distinction does not impact the duty of care analysis. It is illogical to suggest that the existence of a duty of care on the part of the mortgagee in the conduct of sale turns on whether or not the sale is approved.

[60] For these reasons, I conclude that it is plain and obvious that the Mortgagees do not owe a duty of care in negligence to the plaintiff in the conduct of the court-ordered sale process.

3. The plaintiff's negligence claims against the Realtors

[61] The relationship of proximity between the Realtors and the plaintiff is even less proximate than the plaintiff's relationship with the Mortgagees. The Realtors were retained to assist the Mortgagees in exercising the exclusive conduct of sale that was granted to them by court order. The Realtors did not have a contractual relationship with the plaintiff. In order to establish proximity in these circumstances, the plaintiff must plead facts that establish these Realtors undertook, whether expressly or inferentially, to provide their services to the plaintiff in circumstances that invited the plaintiff's reasonable reliance: *Livent* at para. 30; *Burke v. Watson & Barnard (A Firm)*, 2016 BCCA 439 at para. 72.

[62] The facts alleged by the plaintiff in the notice of civil claim do not establish that the Realtors undertook responsibility to serve the plaintiff's interests. The plaintiff's negligence claim against these defendants is premised on the defendants' alleged failure to discharge their duty of care in marketing the Property; the facts pleaded do not establish the existence of the duty of care. This in itself is a sufficient basis on which to conclude that it is plain and obvious that the notice of civil claim discloses no viable claim in negligence against the Realtors.

- [63] There are additional considerations militating against the existence of a duty of care which I have already reviewed arising from the nature of the foreclosure process itself. The services provided to the Mortgagees by the Realtors were intended to assist the Mortgagees in the conduct of sale. The sale process itself is subject to court supervision. If, as I have found, the Mortgagees are not in a relationship of proximity with the plaintiff in the conduct of a court-ordered sale, the same must necessarily be true of agents retained to assist the Mortgagees in the sale process. If there are deficiencies in performance, the court will not be persuaded to approve the sale.
- [64] For these reasons, I conclude it is plain and obvious that the notice of civil claim does not disclose a reasonable claim in negligence against the Realtors.
- [65] I note that counsel for the Realtors argued during the hearing of these applications that the claim against the Realtors should be also barred on the ground of witness immunity (see discussion below in relation to the Hahn Defendants). I am not prepared to decide the claims against the Realtors on this basis on a pleadings motion. First, the Realtors did not cite witness immunity as a basis for the motion to strike in their notice of application, an omission that is particularly prejudicial when the opposing party is self-represented. Second, it is not plain and obvious to me on the application material that the claims against the Realtors are barred by witness immunity simply because a letter written by one of the Realtors was provided to the Court on the application for approval of sale.

4. The Hahn Defendants

- [66] The Hahn Defendants are in a distinct position from the other defendants in that their entire involvement in the foreclosure proceeding relates to Mr. Hahn's role as an expert witness in preparing the Appraisal. In addition to arguing that they do not owe a duty of care to the plaintiff, the Hahn Defendants also argue that the rule of witness immunity precludes the plaintiff's negligence claim against them.
- [67] The common law accords to witnesses an absolute immunity from civil liability for anything said in court, even if their evidence is false or their motives malicious. The immunity applies to in-court testimony, and also extends to out-of-court statements made for the purpose of preparing a witness' evidence. The rationale for the immunity is to protect the proper administration of justice by encouraging cooperation and candour from witnesses and preventing a collateral attack on the substance of their testimony: *Lower v. Stasiuk*, 2013 BCCA 389 [Stasiuk] at para. 48; *Elliot v. Insurance Crime Prevention Bureau*, 2005 NSCA 115 [Elliot] at paras. 112-119.

- [68] In Canada, the rule of witness immunity extends to expert witnesses. While there is some uncertainty in Canadian law as to whether the immunity precludes civil suits by a party against their own expert, there is no uncertainty that the immunity bars actions against an opposing party's expert witness where the essence of the misconduct alleged relates to the preparation of an expert report: *Pearlman v. Critchley*, 2011 BCSC 1479 at paras. 40-42; *Stasiuk* at paras. 45-74.
- [69] I agree with the Hahn Defendants that it is plain and obvious that the plaintiff's claim against them is barred by the rule of witness immunity. The allegations against the Hahn Defendants in the notice of civil claim relate entirely to Mr. Hahn's role as an expert in preparing the Appraisal for use in the Foreclosure Proceeding. The plaintiff alleges that the Appraisal was false and misleading, and that Mr. Hahn did not fulfill his duties to the Court as an independent expert. The plaintiff does not plead that it had any interactions with the Hahn Defendants outside of the Foreclosure Proceeding.
- [70] At the hearing of the present applications, Mr. McCargar pressed his belief that Mr. Hahn had a conflict of interest arising out of his previous role as president of the British Columbia Expropriation Association. The nature of the alleged conflict is not apparent to me. In any event, such a conflict, even if it existed, does not establish a private cause of action in negligence against the Hahn Defendants at the behest of the plaintiff. If an expert witness is not sufficiently impartial this may affect the weight or admissibility of their opinion. However, any expert cannot be sued by an adverse party on the basis that the opinion was incorrect or even negligent: *Arndt v. Banerji*, 2018 ABCA 176 at para. 77.
- [71] I therefore conclude that the claim against the Hahn Defendants should be struck pursuant to Rule 9-5(1)(a) on the ground of witness immunity. For the purpose of completeness, I note that the Hahn Defendants alternatively relied on Rule 9-6 as the basis for their application to dismiss the claims against them. Mr. Hahn has sworn an affidavit in support of the application for judgment under Rule 9-6 in which he confirms that he was retained to prepare the Appraisal for the purpose of the Foreclosure Proceeding, and that he did so in conformity with his role as an expert. I agree with the Hahn Defendants that, in light of that evidence, there is no genuine issue for trial in relation to the negligence claim against the Hahn Defendants. Rule 9-6 thus provides an alternative basis for dismissing the plaintiff's negligence claim.
- [72] Finally, if I am wrong in my conclusion on the application of the witness immunity rule to the Hahn Defendants I would nevertheless strike the negligence claim against them on the ground that the plaintiff has not pleaded the existence of a proximate relationship that could give rise to a duty of care. In my view, the same considerations that lead me to conclude that the Realtors do not owe a duty of care to the plaintiff also apply to the Hahn Defendants.
- [73] Accordingly, I conclude it is plain and obvious that the notice of civil claim does not disclose a reasonable claim in negligence against the Hahn Defendants.

5. The plaintiff's negligence claims against the Bury Defendants

- [74] It is plain and obvious from the relevant case law that a lawyer generally does not owe a duty of care to an opposing litigant, even if that litigant is self-represented: *Gateway Building Management Ltd. v. Randhawa*, 2013 BCSC 350 [Gateway] at paras. 21-26; *Rassaf v. Borden Ladner Gervais*, 2015 BCSC 2413 at para. 16; *0976820 B.C. Ltd. (c.o.b. Ackroyd Pets & Aquarium) v. Leung*, 2018 BCSC 1725 at paras. 39-42; *Gadsby* at paras. 87-88.
- [75] These cases establish that while a lawyer may owe ethical duties to the Court to be candid and fair, the only person to whom a lawyer owes an actionable duty is his or her client. In exceptional circumstances, a lawyer may owe a duty to a non-client claimant where it is clear to both the lawyer and the claimant that the claimant was relying on the lawyer's special skill: *Gateway* at para. 21. There is no such allegation of a special relationship between the plaintiff and the Bury Defendants in the notice of civil claim. Nor could such an allegation reasonably be advanced in the circumstances given that Mr. Bury was acting for an adverse party in a foreclosure petition proceeding.
- [76] At the hearing of the present applications, Mr. McCargar argued that Mr. Bury had misled the Court in the Foreclosure Proceeding and misstated the law to Master Scarth. It is unnecessary for me to say anything about the merits of Mr. McCargar's untested allegations. The point for present purposes is that an alleged breach of a lawyer's ethical duties to the Court is irrelevant to the question of whether the lawyer owes a duty of care to a non-client. The duties owed by counsel to the Court do not translate into a private law duty to an opposing party in litigation: *Gateway* at paras. 23-26.
- [77] I therefore find it plain and obvious that the notice of civil claim does not disclose a reasonable claim against the Bury Defendants in negligence.

6. Summary of findings on the plaintiff's negligence claims

- [78] In summary, I conclude that the notice of civil claim does not disclose a reasonable claim in negligence against any of the defendants. I therefore grant the defendants' applications to strike the negligence claims pursuant to Rule 9-5(1)(a) of the SCCR.
- [79] I am mindful of the principle that a self-represented litigant ought generally to be granted leave to amend a defective pleading where the issues raised do not reach the "no triable issue" threshold: *Beach Estate* at para. 68. However, in the present case I have concluded that, as a matter of law: (i) the Hahn Defendants are protected by witness immunity, and (ii) none of the defendants owes a duty of care in negligence to the plaintiff in the context of a court-supervised sale in a foreclosure proceeding. Since the existence of a duty of care is a requisite element of a negligence action, a negligence action cannot be maintained against any of the defendants. This is not a defect capable of remedy through an amendment to the pleading.

[80] For this reason, I will not give the plaintiff leave to amend his claims of negligence against any of the defendants. The plaintiff's action is negligence is dismissed as against all defendants.

C. The plaintiff's claims in conspiracy

[81] The defendants all argue that the plaintiff's claim in conspiracy does not disclose a reasonable claim because the essential elements of conspiracy have not been pleaded. The Hahn Defendants additionally argue that the claim in conspiracy against them is barred by witness immunity.

[82] The elements of the tort of conspiracy were stated by the Court of Appeal in *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.*, (1993), 96 B.C.L.R. (2d) 156 (C.A.) at p. 158:

1. an agreement between two or more persons;
2. concerted action taken pursuant to the agreement;
3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
- (ii) If the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e. constructive intent);
4. actual damage suffered by the plaintiff.

[83] The notice of civil claim does not plead material facts to support the allegation of a conspiracy. The particulars of the alleged conspiracy consist of a recitation of actions taken by the various parties in the course of the Foreclosure Proceeding that the plaintiff is unhappy with. This includes the Mortgagees' alleged failure to market the Property with diligence and skill, the conduct of Mr. Bury in advocating in favour of an approval of the proposed sale before Master Scarth, and Mr. Hahn's alleged trespass on the Property and his inaccurate Appraisal [notice of civil claim, Part 1, para. 20].

[84] The notice of civil claim does not allege that there was an agreement between the defendants, and does not particularize the concerted action said to have been taken by the defendants in pursuance of an agreement. There is no indication of whether the alleged conspiracy took the form of lawful action which was designed to cause injury to the plaintiff as its predominant purpose, or unlawful action undertaken by the defendants with knowledge that the action would injure the plaintiff. There is no allegation of actual damage suffered by the plaintiff because damage will only crystallize, if at all, once the Property is sold for less than \$10 million.

[85] The plea of conspiracy is plainly deficient in failing to state the material facts to establish any of the requisite elements of the tort. I did not understand Mr. McCargar to seriously contend otherwise at the hearing of these applications. Mr. McCargar's position is that the plaintiff may decide after examinations for discovery that it does not have enough evidence

to pursue the claim for conspiracy at all. However, Mr. McCargar maintains that the plaintiff should not be put to the task of pleading the material facts to support a claim of conspiracy until after the completion of oral and documentary discovery.

- [86] In my view, the plaintiff's argument conflates the material facts that must be pleaded to support a cause of action and evidence that may prove the material facts alleged. It is incumbent on a claimant to clearly plead the material facts on which it relies in making a claim. While the claimant is not required to prove the facts pleaded at the time of the motion to strike, the material facts must be pleaded. A claimant's hope that evidence might turn up in a future discovery process is not a proper basis on which to resist a motion to strike: *Imperial Tobacco* at paras. 22-24; *Waters v. Michie*, 2011 BCCA 364 [Waters] at paras. 46-47.
- [87] Given the absence of material facts in the notice of civil claim, the claim in conspiracy must be struck as disclosing no reasonable claim. The only question remaining is one of remedy: whether the plaintiff ought to have an opportunity to amend his claim or whether the claim should be dismissed without leave to amend. In my view, the appropriate remedy differs as between the Hahn Defendants and the remaining defendants. I will address each in turn.

1. The Hahn Defendants

- [88] For the reasons I have already stated, I conclude that the witness immunity principle provides an absolute immunity to the Hahn Defendants in relation to Mr. Hahn's preparation of the Appraisal. The essence of the plaintiff's allegation of conspiracy, as with the claim of negligence, is that Mr. Hahn prepared an incorrect appraisal. The claim of conspiracy is therefore also caught by the absolute immunity rule which bars all causes of action, even allegations of conspiracy to commit perjury: *Workum v. Olnick et al.*, 2005 BCSC 1262.
- [89] As I have noted, the Hahn Defendants rely not only on Rule 9-5(1)(a) of the SCCR but also on Rule 9-6 to dismiss the plaintiff's claims based on witness immunity. Mr. Hahn's affidavit confirms that his role was limited to that of expert witness in preparing the Appraisal for use in the Foreclosure Proceeding. In light of that evidence, which is not contradicted, I agree the conspiracy claim against the Hahn Defendants does not raise a genuine issue for trial. For this reason, it is not appropriate to give the plaintiff leave to amend his pleading of conspiracy as against the Hahn Defendants. The claim is dismissed.

2. The Mortgagees, the Realtors, and the Bury Defendants

- [90] The question of remedy as it relates to the plaintiff's claim of civil conspiracy against the remaining defendants is a difficult one. Once again, I am mindful of the direction of our Court of Appeal in *Beach* that self-represented litigants should generally be permitted an opportunity to cure a defective pleading by way of amendment provided there is a triable issue. The defendants, other than the Hahn Defendants, have not applied for summary dismissal of the conspiracy claim on the merits pursuant to Rule 9-6 of the SCCR.

- [91] On the other hand, I do not accept the plaintiff's position that it should not be required to plead an adequate claim in conspiracy until after the completion of pre-trial discovery steps. As I have already noted, a claimant's hope that something may in future turn up through the discovery process is not a proper basis on which to resist a motion to strike. Furthermore, it is difficult to see what utility a pleadings amendment would have at this point in time given that the plaintiff cannot claim actual damages until such time as a sale of the Property is approved at a price that is less than \$10 million. Until then, the plaintiff's claim remains entirely speculative and hypothetical: Waters at para. 45.
- [92] Balancing all of these considerations, I conclude that an appropriate order is to strike the plaintiff's claim of conspiracy against the Mortgagees, the Realtors and the Bury Defendants, with leave to the plaintiff to file an amended pleading after the Foreclosure Proceeding has concluded. This order is without prejudice to the ability of these defendants to apply to strike and/or dismiss any amended claim.
- [93] For the purpose of clarity, I direct that the conspiracy claim against the Mortgagees, the Realtors and the Bury Defendants is stayed until such time as the plaintiff files a properly pleaded claim after the conclusion of the Foreclosure Proceeding. In the interim, the defendants are not required to produce documents or attend examinations for discovery.

D. The plaintiff's claims in trespass

- [94] Finally, the plaintiff pleads that Mr. Bury trespassed on the Property in December 2017 to conduct his own inspection, and that Mr. Hahn trespassed on the Property by conducting a site inspection in February 2018 [notice of civil claim, Part 1, paras. 20(iv) and 23 (vi)]. The plaintiff alleges that Mr. Bury did not have the plaintiff's consent to be on the Property in December 2017. As for Mr. Hahn's site visit, the plaintiff says that he was precluded by clause 3 of the January 15, 2018 Order for Conduct of Sale from accessing the Property for the purpose of conducting an appraisal prior to April 16, 2018.
- [95] For ease of reference I will reproduce clause 3 of the January 15, 2018 Order for Conduct of Sale:
3. any person or persons in possession of the Property, including any tenant or tenants, shall, on or after April 16, 2018, permit any duly authorized agent of the Petitioners to inspect or appraise the Property, and show the Property to prospective purchasers, between the hours of 8:00 a.m. and 8:00 p.m. on any day including Sundays and statutory holidays, and to post signs on the Lands, indicating that the Property is offered for sale.
- [96] The defendants say that the terms of the Mortgage, and a security agreement between the Mortgagees and the plaintiff, provide a complete answer to the plaintiff's claims of trespass. They seek an order dismissing the trespass claims pursuant to Rule 9-6 of the SCCR on the basis that there is no genuine issue for trial.
- [97] Clause 24 of the Mortgage provides, in relevant terms as follows:

24. THE MORTGAGEE or the Mortgagee's Agent may, whenever the Mortgagee deems it necessary to do so, enter upon and inspect the Mortgaged Lands and any building thereon and make any repairs that the mortgagee considers necessary .

[98] Clause 11.1 of the security agreement provides the Mortgagees with the following enforcement rights on default:

11.1 Upon any default under this Security Agreement has [sic] Secured party may declare any or all of the Obligations not payable on demand to become immediately due and payable and the security hereby constituted will immediately become enforceable. To enforce and realize on the security constituted by this Security Agreement the Secured Party may take any action permitted by law or in equity, as it may deem expedient, and in particular without limiting the generality of the foregoing, the Secured Party may do any of the following:

. . .

(b) enter upon any premises of the Debtor and take possession of the Collateral with power to exclude the Debtor, its agents and its servants therefrom, without becoming liable as a mortgagee in possession.

[99] The plaintiff's argument, as I understand it, is that clause 3 of the Order for Conduct of Sale supersedes any contractual authority for the Mortgagees and their agents to enter the Property. The plaintiff says that clause 3 means that the Mortgagees and their agents had no authority to enter the Property between January 15 and April 16, 2018 without the plaintiff's consent.

[100] This argument, even if meritorious, is only relevant to the trespass claim against the Hahn Defendants as Mr. Bury is alleged to have accessed the Property in December 2017. In any event, I do not consider the plaintiff's argument to be meritorious. The Mortgage and security agreement provide clear authority for the Mortgagees, and their agents, to enter the Property, and Mr. Hahn was acting as an agent of the Mortgagees in doing so.

[101] Clause 3 of the Order for Conduct of Sale is intended to ensure that no one in possession of the Property, including the tenants, could object to entry by third parties, including agents, potential purchasers, and appraisers, during the period of active marketing. Clause 3 does not purport to override the terms of the Mortgage and the security agreement. It would be illogical to read it as doing so given that this would result in the Mortgagees having more restricted rights of access after the Mortgage has gone into default, the redemption period has expired, and the Mortgagees have been assigned the exclusive conduct of sale.

[102] In my view, Mr. Bury and Mr. Hahn both had clear legal authority to access the Property as agents of the Mortgagees, and the plaintiff has no chance of succeeding on these claims at trial. The trespass claims are therefore dismissed pursuant to Rule 9-6 of the SCCR.

[103] I note that the Hahn Defendants argued, in the alternative, that the trespass claim against Mr. Hahn was barred by the rule of witness immunity. There appears to be no authority directly on point; that is, that even a cause of action in trespass could be precluded by witness immunity. In my view, this argument presents some difficulty on the facts of this case in that the trespass claim against the Hahn Defendants rests on the premise that Mr. Hahn breached a court order in accessing the Property in February 2018. In any event, I find it unnecessary to decide this point given my conclusion that the trespass claims are bound to fail and ought to be dismissed on that basis.

E. Is the claim as a whole an abuse of court process?

[104] All of the defendants advanced the alternative argument that the plaintiff's claims in their entirety ought to be dismissed pursuant to Rule 9-5(1)(d) of the SCCR as an abuse of court process. The defendants' argument, in essence, is that the plaintiff's tort action constitutes an impermissible collateral attack on the Foreclosure Proceeding and the process of court-ordered sale. The defendants argue that any complaint that the plaintiff has about the sale process can, and should be, addressed in the Foreclosure Proceeding.

[105] There is authority for the proposition that an action may be struck as an abuse of court process to the extent that it seeks to re-litigate matters previously and conclusively determined in a foreclosure proceeding: Gadsby at paras. 53-60, 84, 106-107; Nederland Holding Inc. v. British Columbia, 2018 BCCA 373. It appears that the plaintiff in each of these cases sought to simply re-litigate the question of whether the court approved sale was provident.

[106] It is not plain and obvious to me, at least at the present time, that this action amounts to impermissible re-litigation. The plaintiff's theory, as I understand it, is that the actions of the defendants in accepting a \$5.3 million offer, successively dropping the price without proper marketing efforts, and preparing an inaccurate appraisal, have permanently devalued the Property. Thus when the court eventually approves a sale as provident it will reflect a devalued market price.

[107] Given the speculative nature of the plaintiff's claim in its current form, it is difficult to fully assess the defendants' abuse of process arguments. As all of the defendants have emphasized, the plaintiff's damage has not yet crystallized and may never crystallize depending on whether the Property eventually sells for less than \$10 million. The time to assess whether a civil claim by the plaintiff constitutes an abuse of court process is when, if ever, the plaintiff's damage crystallizes. I do not accept the premise of the defendants' arguments that any civil action that arises out of a court-ordered sale process in a foreclosure proceeding necessarily constitutes an impermissible collateral attack. It depends on the facts.

[108] For these reasons, I prefer to rest my decision on the grounds I have already stated; that is, there is no reasonable claim of negligence against any of the defendants; the trespass claims against the Bury and Hahn Defendants and conspiracy claims against the Hahn

Defendants do not raise a genuine issue for trial; and the conspiracy claim against the remaining defendants should struck with leave to amend. If the plaintiff does ever file an amended conspiracy claim at the end of the Foreclosure Proceeding, it would be open to the defendants to raise an abuse of process argument at that time.

V. CONCLUSION/ORDERS

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

- a) The plaintiff's negligence claims against all defendants are struck pursuant to Rule 9-5(1)(a) of the SCCR, and the claims are dismissed.
- b) The plaintiff's trespass claims against the Bury Defendants and the Hahn defendants are dismissed pursuant to Rule 9-6 of the SCCR.
- c) The plaintiff's conspiracy claim against the Hahn Defendants is dismissed pursuant to Rule 9-6 of the SCCR.
- d) The plaintiff's conspiracy claims against the Mortgagees, the Realtors and the Bury Defendants are struck pursuant to Rule 9-5(1)(a) of the SCCR.
- e) The plaintiff has leave to file an amended pleading alleging a cause of action in conspiracy against the Mortgagees, the Realtors and the Bury Defendants after the conclusion of the Foreclosure Proceeding.
- f) The preceding term of this order is without prejudice to the right of these defendants to apply for dismissal of an amended claim on any ground, including that the claim constitutes an abuse of court process.
- g) The plaintiff's conspiracy claims against the Mortgagees, the Realtors and the Bury Defendants are stayed until such time as the plaintiff has filed an amended pleading after the conclusion of the Foreclosure Proceeding.

[110] All of the defendants are entitled to recover their costs of applications from the plaintiff at Scale B in any event of the cause.

"Horsman J."

- [1] I note that Master Scarth's reasons for judgment (at paras. 8, 10) suggest that the list price was dropped to \$5.9 million on June 16, 2018, whereas the notice of civil claim alleges that the price was dropped on June 18, 2018 (Part 1, paras. 18, 22). I do not believe that anything turns on this discrepancy. For the purpose of the present applications, I have assumed that the correct date is June 18, 2018 as alleged in the pleading.

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