

CANADA / JUDGMENT

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

2020 BCCA 67

COURT

British Columbia Court of Appeal

DECIDED

25 February 2020

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2020 BCCA 67 0742848 B.C. Ltd. v. 426008 B.C. Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

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

2020 BCCA 67

Date: 20200225

Docket: CA46655

Between:

0742848 B.C. Ltd.

Appellant

(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.

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Abrioux

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated November 1, 2019 (0742848 B.C. Ltd. v. 426008 B.C. Ltd., 2019 BCSC 1869, Vancouver Docket S1812158).

Representative for the Appellant Company,
appearing in person:

D. McCargar

Counsel for the Respondents,
426008 B.C. Ltd. and 0714185 B.C. Ltd.:

A. Sabur

Counsel for the Respondents,
Andrew A. Bury and Andrew Bury Law
Corporation:

V. Critchley

Counsel for the Respondents,
Manjit Claire, Manjit Claire Personal
Real Estate Corporation, Kurtis Claire,
RE/MAX Real Estate Services,
Andrews Realty Ltd., and David N. Andrews:
S.G. Cordell

Counsel for the Respondents, Neil Hahn
and Garnett Wilson Realty Advisors Ltd.:

K. Paciorek

Place and Date of Hearing:

Vancouver, British Columbia

February 6, 2020

Place and Date of Judgment:

Vancouver, British Columbia

February 25, 2020

Summary:

The corporate applicant seeks an extension of time to bring an appeal. The notice of appeal was filed seven weeks late, arguably in part, due to the applicant's absence from the country. Held: Application dismissed. As the underlying appeal is without merit, it is not in the interests of justice to grant an extension of time to bring the appeal.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

INTRODUCTION

[1] The applicant, 0742848 B.C. Ltd. ("074"), seeks an order extending the time to appeal the orders of Justice Horsman pronounced on November 1, 2019, which struck or dismissed certain of the appellants' claims pursuant to Rule 9-5 and 9-6 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR]. The notice of appeal was filed by 074 seven weeks late on January 20, 2020.

BACKGROUND

- [2] This application arises in the context of a foreclosure proceeding involving land owned by 074, which was the plaintiff in the court below and is the proposed appellant in this court. The land at issue is located in Squamish, British Columbia (the "Property"). Donald McCargar is the sole director and shareholder of 074 and appeared on its behalf in this court.
- [3] The background of this proposed appeal was set out in the judgment of Justice Horsman, which is indexed at 2019 BCSC 1869 (the "Reasons"). The procedural background is summarized at paras. 7-18 of the Reasons:

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

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.
- [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.
- [4] The respondents, who were the defendants in the court below, had not yet obtained court approval of the proposed sale when 074 filed a notice of civil claim on November 9, 2018. The underlying civil action was described at paras. 19-20 of the Reasons:

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".

[Emphasis added.]

[5] In response, each of the respondents brought an application to strike the pleadings pursuant to Rule 9-5(1) of the SCCR or dismiss the claims against them by way of summary judgment pursuant to Rule 9-6 of the SCCR.

[6] In the result, at para. 109 of the Reasons, the judge made the following orders against 074:

- 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.

[7] The judge described the basis of these orders at para. 108 of the Reasons:

- [108] 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.
- [8] With respect to the negligence claims, the judge found that none of the defendants owed a duty of care in negligence to the plaintiff in the context of a court-supervised sale in a foreclosure proceeding.
- [9] While the judge granted leave to amend the pleadings on the conspiracy claim against the Mortgagees, the Realtors and the Bury Defendants, this was in large part due to the plaintiff being self-represented. The judge found this claim to be "entirely speculative and hypothetical" until a sale of the Property is approved at a price below \$10 million: Reasons at para. 91. Finally, the judge declined to find that the claim as a whole was an abuse of court process on the existing record.

POSITION OF PARTIES

Applicant

- [10] In his affidavit of January 16, 2020, filed January 20, 2020 in support of the notice of application filed that day, Mr. McCargar deposes that:
- he was out of the country from September 28, 2019 to November 22, 2019;
 - he was not aware until January 14, 2020 that the decision in *Gadsby v. British Columbia (Attorney General)*, 2019 BCSC 1596 ("Gadsby"), to which I shall return to later in these reasons, and to which the judge was referred to by counsel at the hearing of the underlying application, had been appealed;
 - he did not have the opportunity to address Gadsby at the hearing.
- [11] I also granted leave to Mr. McCargar to file an additional affidavit on February 4, 2020, which included:
- an email he sent to the judge on September 18, 2019 referencing certain additional case authorities; and
 - a copy of *Blake v. Blake*, 2019 ONSC 4062 ("Blake").
- [12] Mr. McCargar's position with respect to Blake is that Mr. Bury's counsel breached certain ethical and legal duties by not disclosing to the judge on September 17, 2019 that a notice of appeal had been filed in Gadsby.

- [13] He also argues that he indicated to the parties during the hearing of the underlying application that he intended to appeal the decision. While he had formed the intention to appeal during the appeal period, his absence from the country prevented him from taking the appropriate steps.
- [14] He acknowledged that on December 5, 2019, he was advised by the Bury Defendants that they would not consent to an extension of time to file a notice of appeal. He said it took him the better part of six weeks (that is until January 20, 2020 when this application was filed) to essentially, and I paraphrase, "get his materials together".
- [15] In so far as the merits of the appeal are concerned, Mr. McCargar submits that an independent duty of care was owed by the respondents to the appellant in this case in that there was a consent order for sale involving, effectively, a consent redemption period.
- [16] Following the completion of the hearing on February 4, 2020, Mr. McCargar contacted the Court of Appeal registry seeking leave to file further materials including email correspondence pertaining to negotiations between the parties and certain legal authorities such as *Tracy v. Atkins*, (1979) 105 D.L.R. (3d) 632 (C.A.) [Tracy]. I did not grant him leave to do so since the materials in no way assisted the Court in deciding the issues. I did, however, consider the legal authorities and will refer to Tracy below.

Respondents

- [17] The only responding party to file materials was Mr. Bury and his law corporation, referred to as the Bury Defendants. The other respondents supported the Bury Defendants' counsel's submissions and made brief supplementary arguments. An affidavit of the counsel's legal assistant indicates that Mr. Critchley advised the judge of the decision in Gadsby during the hearing of the underlying matter and the judge asked for the transcribed reasons for judgment once they were available. Mr. Critchley sent a copy of the Gadsby reasons to the judge on September 20, 2019 with a copy being forwarded to the other respondents and Mr. McCargar at that time. The notice of appeal in Gadsby was filed on August 27, 2019, after which, the affidavit states, no further steps have been taken in that proceeding.
- [18] The judge's reasons in this matter were delivered on November 1, 2019.
- [19] On December 5, 2019, in addition to advising Mr. McCargar that consent to the late filing of the notice of appeal would not be given, counsel suggested to him that he bring his application for an extension of time as soon as possible.
- [20] The respondents' position is that there was no bona fide intention during the appeal period. Furthermore, they argue there is no merit to the appeal.

LEGAL FRAMEWORK AND ANALYSIS

- [21] The time limit for bringing an appeal is 30 days, commencing on the day after the order appealed from is pronounced: Court of Appeal Act, R.S.B.C. 1996, c. 77, s. 14(1) [Act]. The notice of appeal was filed seven weeks late on January 20, 2020.
- [22] Pursuant to s. 10(1) of the Act, a justice may extend or shorten the time within which an appeal to the court may be brought. The disposition of an application for an extension is a matter of discretion: *Perren v. Lalari*, 2009 BCCA 564 at para. 9.
- [23] The criteria governing whether an extension of time ought to be granted are set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259-260 (C.A.):
- 1) Was there a bona fide intention to appeal?
 - 2) When were the respondents informed of the intention?
 - 3) Would the respondents be unduly prejudiced by an extension of time?
 - 4) Is there merit in the appeal?
 - 5) Is it in the interest of justice that an extension be granted?
- [24] The burden is on the applicant to establish that the criteria are met: *Kedia International Inc. v. Royal Bank of Canada*, 2008 BCCA 305 at para. 8 (Chiasson J.A. in Chambers); *Rapton v. British Columbia (Superintendent of Motor Vehicles)*, 2011 BCCA 71 at para. 19 (Garson J.A. in Chambers).
- [25] There is a greater willingness to extend the time to prosecute a step in the appeal than to file the notice of appeal: *Davies* at 259; *Hydro Fuels Inc. v. Moran* (1993), 25 B.C.A.C. 139 at para. 9 (Toy J.A. in Chambers).
- [26] The fifth criterion--the interests of justice--is decisive: *Davies* at 260, *Kedia* at para. 8; *Rapton* at para. 19. Nevertheless, the interests of justice cannot be considered in isolation from the other four criteria: *Perren* at para. 33.

Was There a Bona Fide Intention to Appeal? When Were the Respondents Informed of the Intention?

- [27] Failure to form the intention to appeal within the time required by the SCCR is not necessarily fatal: *Chaube v. Campbell*, 2004 BCCA 85 at para. 9 (Levine J.A. in Chambers). While the respondents forcefully argue that there was no bona fide intention to appeal within the appeal period, I would not dismiss the application on this ground or on the basis that the respondents were not informed of the intention in a timely manner. That is because:

- giving the most generous interpretation I can to the self-represented litigant's December 5, 2019 email, it is some indication of an intention to appeal provided four days after the expiry of the appeal period; and
- while the notice of motion to extend the time to file a notice of appeal was not filed until January 20, 2020, there has been some explanation provided by Mr. McCargar, which is not completely without merit.

Would the Respondents be Unduly Prejudiced by an Extension of Time?

- [28] Prejudice is assessed not in relation to the appeal itself, but by comparing the position of the respondent if the appeal had been filed one day earlier as opposed to the next day: *Cost Plus Computer Solutions Ltd. v. VKI Studios*, 2015 BCCA 467 at para. 40 (Bennett J.A. in Chambers) [Cost Plus].
- [29] In *Cost Plus*, the notice of appeal was one day out of time. In the circumstances of this case, the issue, in my view, is whether the respondents are prejudiced by the extent of the delay itself, as opposed to the existence of the litigation: *Fidler v. Forensic Psychiatric Institute, a Hospital*, 2016 BCCA 83 at para. 33.
- [30] Mr. Critchley, on behalf of the Bury Defendants, submits that there is some prejudice in the delay because there are serious allegations of professional negligence and conspiracy. There is always some prejudice in delay in pursuing the appeal and thus in achieving finality: *Greither v. Greither*, 2005 BCCA 339 at para. 20 (Saunders J.A. in Chambers). While there is no doubt that the allegations against all the respondents are most serious in nature, I am not prepared to find undue prejudice in the circumstances before the Court on this application.

Is There Merit in the Appeal? Is an Extension in the Interests of Justice?

- [31] In my view, the overriding considerations on this application are the merits of the appeal and whether it is in the interests of justice for it to proceed.
- [32] On the merit criterion, the threshold question is whether the appeal is "doomed to fail" or, alternatively, whether "it can be said with confidence that the appeal has no merit": *Stewart v. Postnikoff*, 2014 BCCA 292 at para. 6 (Goepel J.A. in Chambers). An extension of time to file a notice of appeal should not be granted if the appeal is without merit: *Franks v. British Columbia (B.C. Benefits Board)*, 1999 BCCA 165, aff'd 1999 BCCA 407, leave to appeal ref'd, [1999] S.C.C.A. No. 361 (Proudfoot J.A. in Chambers).
- [33] In my view, the appeal is without merit. The applicant seeks to appeal the judge's orders dismissing or striking its claims in negligence, trespass and conspiracy by essentially re-arguing the previous application in this court.
- [34] In terms of the negligence claims, the judge found that there was no basis in law to establish a duty of care. She did so, having performed a careful analysis of the applicable legal framework as it related to the various respondents.

- [35] With respect to the negligence claims against the respondent Mortgagees, the judge considered whether a mortgagee owes a duty of care to a mortgagor in the context of conducting a sale in foreclosure proceedings in British Columbia. The judge noted that unlike the equitable duties imposed on a mortgagee exercising a contractual power of sale where the mortgagor is vulnerable to the mortgagee's absolute discretion, there is court supervision over a court-ordered sale in a foreclosure proceeding in this province. The judge concluded that no duty of care exists in this situation, stating at paras. 58-60:
- [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.
- [36] I do not accept Mr. McCargar's submission that the fact he was unable to address *Gadsby* and/or that it is under appeal leads to the conclusion that the appeal has merit.
- [37] First of all, Mr. McCargar did not seek to make any submissions on *Gadsby* after he was provided a copy of the decision on September 20, 2019. He was also provided the opportunity to address *Gadsby* in this court and did not make any substantive arguments that it had been wrongly decided. Essentially, his position is that *Gadsby*, which is under appeal, may lead to a different result from what the judge in this case found to be a legal analysis consistent with other authorities on the point. The judge could only consider the legal framework within the context of the law as it existed in September 2019. That legal framework has not changed simply by virtue of the decision in *Gadsby* being under appeal.
- [38] I also do not accept the appellant's argument that, from a duty of care perspective, a material difference exists in this case in that the court ordered sale was by way of a consent order.

- [39] The consent order for sale, which was made on January 15, 2018, arose out of negotiations between the Mortgagees and their legal counsel on the one hand, and the appellant, which was represented by counsel, on the other. This case is unlike *Tracy*, where a special relationship was found between a solicitor and an opposing party because the solicitor undertook to carry out work that would normally be performed by the opposing party's solicitor. As the judge below noted, absent a plea of a special relationship, and there was none in this case, there could be no duty of care: *Reasons* at paras. 74-75. Moreover, the judge relied on case authority distinguishing *Tracy*, which stands for the proposition that no duty of care exists between a lawyer and a non-client where it is clear to both parties that the lawyer is not providing its special legal skill and knowledge to the non-client: see e.g., *Gateway Building Management Ltd. v. Randhawa*, 2013 BCSC 350 at paras. 21-22.
- [40] Furthermore, the judge conducted a thorough review of the *Anns/Cooper* analysis: *Reasons* at paras. 31-34, citing *Anns v. Merton London Borough Council*, [1978] AC 728 (H.L.) [*Anns*] and *Cooper v. Hobart*, 2001 SCC 79 [*Cooper*]. The judge concluded that none of the respondents had any special relationship with the applicant so as to create a duty of care on the first step of that framework, and I see no error in her approach or conclusions.
- [41] The trespass claims, as pleaded, arose from Mr. Bury attending at the Property in December 2017, that is before the consent order for sale of January 15, 2018, and the appraiser Mr. Hahn, on Mr. Bury's instructions, conducting a site inspection in February 2018. The appellant alleges that the consent order precluded any access to the Property for three months, that is, until April 15, 2018.
- [42] The judge also thoroughly reviewed this issue pointing to the contractual wording in the mortgage and a separate security agreement. The judge concluded as follows at paras. 99-103 of the *Reasons*:
- [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.

[43] In my view, the appellant has demonstrated no error in this analysis.

[44] In so far as the conspiracy claims are concerned, the judge referred to authority from this court in *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* [1993] B.C.J. No. 2958. She found that the pleadings were deficient in several respects. Although she decided that the claims were bound to fail, the judge granted leave to the appellant to file an amended notice of claim to properly plead a civil conspiracy against all the respondents, but for Mr. Hahn.

[45] The appellant has not pointed to any error in the judge's analysis.

[46] In *Cost Plus* at paras. 60 and 62, Justice Bennett summarized the interests of justice factor as follows:

[60] An analysis of the interests of justice takes into account factors including the length of and reasons for the delay, and whether the appeal raises issues of broad importance, such as a constitutional issue (see e.g., *House of Sga'nisim v. Canada (Attorney General)*, 2006 BCCA 413 at para. 10). It also takes into account whether appeals that are without merit should be permitted to proceed and force the defendants into incurring needless costs. Sometimes an "injustice" will occur if the opposing party is required to defend a meritless appeal.

[62] The matter turns, in my view, on whether there is any point in permitting the appeal to proceed. As is apparent, I have gone through the material filed to a considerable degree, as well as obtained material that was not filed, such as the application before Blok J., the affidavits and expert report of Mr. Shearer amongst other things. I have attempted to divine a ground of appeal that may have some merit. I could find none.

[Emphasis added.]

[47] I, too, have attempted to divine a ground of appeal that may have some merit, but can find none.

CONCLUSION

[48] In my view, it is not in the interests of justice to grant an extension of time. The application is dismissed.

"The Honourable Mr. Justice Abrioux"

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