COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***British Columbia (Attorney General) v. Malik,***
2009 BCCA 202

Date: 20090507
Docket: CA036407; CA036517

Docket: CA036407

Between:

**Her Majesty the Queen in right of
the Province of British Columbia as represented by
the Attorney General of British Columbia**

Respondent
(Petitioner)

And

Khalsa Developments Ltd.

Appellant
(Respondent)

And

**Ripudaman Singh Malik, 0772735 B.C. Ltd.,
Gurdip Singh Malik and Balbir Singh Bajwa**

Respondents
(Respondents)

- and -

Docket: CA036517

Between:

**Her Majesty the Queen in right of the
Province of British Columbia as represented by
the Attorney General of British Columbia**

Respondent
(Petitioner)

And

Ripudaman Singh Malik

Appellant
(Respondent)

And

**0772735 B.C. Ltd., Gurdip Singh Malik,
Balbir Singh Bajwa, and Khalsa Developments Ltd.**

Respondents
(Respondents)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Tysoe

J.C. McKechnie	Counsel for the Appellant, Khalsa Developments Ltd.
B.E. McLeod	Counsel for the Appellant, Ripudaman Singh Malik
F.G. Potts and R.N. Hamilton	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia March 5, 2009
Place and Date of Judgment:	Vancouver, British Columbia May 7, 2009

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] Her Majesty the Queen in right of the Province of British Columbia (the "Crown") took mortgages from each of the appellants as security for advances made by the Crown to fund part of the legal costs of the appellant, Ripudaman Singh Malik, in defending himself against criminal charges that were tried in what became commonly known as the Air India trial.

[2] The Crown was not repaid any of its advances after it demanded payment and, in October 2007, it commenced foreclosure proceedings with respect to the two mortgages. The foreclosure petition was heard in January 2008, at the same time as other applications in an action by the Crown to recover the unsecured advances made to fund Mr. Malik's defence costs. On July 31, 2008, the chambers judge granted an order nisi with a three-month redemption period in respect of the mortgages.

[3] The appellants challenge the order nisi on several grounds. Mr. Malik also says that the order nisi should have been stayed pending the hearing of another action.

Background

[4] Mr. Malik was charged in 2000 in connection with the 1985 Air India catastrophe. In 2002, the Crown entered into two agreements to provide funding for Mr. Malik's defence costs. The first agreement was interim in nature and was replaced by the second agreement. In the second agreement, which was called the Defence Counsel Agreement, it was recited that Mr. Malik had agreed to transfer all of his assets to the Crown; it also contained a provision by which the Crown could terminate the agreement if Mr. Malik failed to comply.

[5] In January 2003, three months before the Air India trial began, the Crown gave notice that it would be terminating the second agreement if Mr. Malik did not sign an indemnity with respect to the defence costs funded by the Crown. Mr. Malik declined to sign an indemnity in a form satisfactory to the Crown, and made a court application in August 2003 pursuant to the decision in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 25 O.A.C. 321, for relief should the Crown not agree to continue funding his defence costs. On September 19, 2003, Madam Justice Stromberg-Stein dismissed Mr. Malik's application on the basis that he failed to discharge the onus of establishing he was not in a position to contribute to the funding of his defence costs (2003 BCSC 1439, 111 C.R.R. (2d) 40).

[6] Negotiations between Mr. Malik and the Crown ensued, leading to a third agreement dated October 17, 2003 called the Payment Agreement. It was pursuant to the Payment Agreement that the mortgages were granted by the appellants.

[7] Under the Payment Agreement, the Crown agreed to fund 50% of the legal fees of Mr. Malik's principal lawyers, 100% of their disbursements and other miscellaneous costs from September 19, 2003 to the completion of the Air India trial. The amount funded by the Crown under the Payment Agreement was defined as the "Reimbursement Amount". As security for payment of the Reimbursement Amount, Mr. Malik agreed to execute and deliver or cause to be executed and delivered several documents that were defined as the "Security Documents", which included the following:

(a) a mortgage against Mr. Malik's one-half interest in property jointly owned by him and his wife, and located on Hamilton Street in Vancouver (the "Hamilton Street Mortgage");

(b) a guarantee (the "Guarantee") from Khalsa Developments Ltd. ("Khalsa"), a company that owned a hotel in Harrison Hot Springs (the "Hotel Property") and the shares of which were held by Mr. and Mrs. Malik; and

(c) a mortgage against the Hotel Property (the "Hotel Mortgage").

[8] Mr. Malik agreed in the Payment Agreement that he would use his best efforts to sell at the highest price all of his assets (which included his one-half interest in the Hamilton Street property) and the Hotel Property. He also agreed to pay the Reimbursement Amount, without set-off or deduction, on the earlier of the occurrence of one of the events of default specified in the Payment Agreement and 45 days following completion of the Air India trial. The Payment Agreement provided that upon the occurrence of one of the events of default (which included the failure to pay the Reimbursement Amount when due), the Crown had the option, among other things, to demand payment of the Reimbursement Amount and all other monies advanced by the Crown in payment of Mr. Malik's defence and to take steps to realize on the security provided by Mr. Malik under the Payment Agreement.

[9] The Hamilton Street Mortgage, the Guarantee and the Hotel Mortgage were executed and delivered to the Crown. There is no issue on these appeals regarding the validity of the Hamilton Street Mortgage, and its terms need not be reviewed.

[10] The relevant provisions of the Guarantee are as follows:

> FOR VALUABLE CONSIDERATION, the receipt and sufficiency of which is hereby acknowledged, the undersigned KHALSA DEVELOPMENTS LTD. (the "Guarantor") HEREBY IRREVOCABLY GUARANTEES payment by RIPUDAMAN SINGH MALIK (Malik) of all obligations present or future, at any time owing by Malik to Her Majesty the Queen in Right of the Province of British Columbia represented by the Attorney General, Parliament Buildings, Victoria, B.C. V8V1X4 (the Attorney General) in respect of the Reimbursement Amount (the "Reimbursement Amount") as set forth in a Payment Agreement dated for reference the 17 day of October, 2003, made between, *inter alia*, the Attorney General and Malik (the "Payment Agreement"), a copy of which is hereby acknowledged by the Guarantor, it being understood that the obligation of the Guarantor and recourse under this Guarantee hereunder shall be limited to the lesser of $1.8 million or the amount of the Malik Net Sale Proceeds, and shall be payable only from the proceeds of sale of the Hotel Property as defined below.
>
> In this Guarantee "Malik Net Sale Proceeds" means the total sale price realized from the sale of the property described in Schedule "A" attached (the Hotel Property)
>
> (i) less real estate commission …
>
> …
>
> (vi) less fifty percent (50%) of the remaining balance of the total sale price of the Hotel Property after making the deductions and adjustments described in (i) to (v).

> The Guarantor further understands and agrees that:
>
> 1. If the Hotel Property sells after the date the trial of the proceeding referred to in the Payment Agreement has completed, the Malik Net Sale Proceeds shall be paid to the Attorney General to be applied against the Reimbursement Amount by Malik to the Attorney General under the Payment Agreement, and any balance remaining after the Reimbursement Amount has been finally determined and paid in full will be paid to Malik or as directed by court order; and
> 2. If the Hotel Property sells prior to the completion of the proceeding referred to in the Payment Agreement such that the Reimbursement Amount to be paid by Malik to the Attorney General under the Payment Agreement is not known, the Malik Net Sale Proceeds will be held by the Attorney General in an interest bearing account with the irrevocable authority of the Attorney General to apply the Malik Net Sale Proceeds and any interest earned thereon against the Reimbursement Amounts owing by Malik under the Payment Agreement as those amounts are determined until the full amount of the Reimbursement Amount owing by Malik under the Payment Agreement has been satisfied, and any balance remaining after the Reimbursement Amount has been finally determined and paid in full will be paid to Malik or as directed by court order.
>
> PROVIDED THAT this Guarantee shall terminate automatically and shall be of no further force and effect immediately upon payment of the amount set out in the immediately preceding paragraph.
>
> Unless the Guarantor has made payment to the Attorney General as contemplated above, the Guarantor shall make payment to the Attorney General of the amount payable hereunder forthwith upon receipt of a written demand for payment delivered to the undersigned by the Attorney General …
>
> …
>
> The liability of the Guarantor hereunder is direct and may be enforced by the Attorney General upon the earlier of a date which is 45 days after the date of the completion of the trial referred to in the Payment Agreement or upon a sale of the Hotel Property without first being required to pursue or exhaust any right or remedy against Malik or any other party.
>
> This Guarantee and the Payment Agreement contain the entire agreement between the Attorney General and the Guarantor relating to the subject matter hereof and none of the parties shall be bound by any other representation, agreement or compromise made by any other party which is not embodied herein or in the Payment Agreement.
>
> [Emphasis added.]

[11] The Hotel Mortgage contained three additional or modified terms in addition to the prescribed standard mortgage terms that were incorporated into the Hotel Mortgage by reference. The first of these terms provided that the Hotel Mortgage secured the obligations of Khalsa under the Guarantee. The second provided that the obligations secured by the Hotel Mortgage became forthwith due and payable if the Hotel Property and the shares in Khalsa were sold or transferred to a person not approved by the Crown. The third read as follows:

> Notwithstanding anything contained herein (including the Prescribed Standard Mortgage Terms forming Part 2 of this Mortgage), the only obligations the Mortgagor has to the Mortgagee are pursuant to the Guarantee and recourse of the Mortgagee hereunder shall be limited in accordance with the terms of the Guarantee.

[12] The Crown made advances aggregating $1,681,526.33 under the Payment Agreement. It received a payment of $72,498.81 that was credited against the Reimbursement Amount, leaving a balance of $1,609,027.52 owed by Mr. Malik to the Crown under the Payment Agreement.

[13] On March 16, 2005, Mr. Malik and his co-accused were acquitted of the charges. On December 13, 2005, the Crown sent a letter to Mr. Malik's counsel demanding payment of all monies advanced by the Crown to pay for

Mr. Malik's defence costs. On January 3, 2006, the Crown sent a letter to Khalsa demanding payment on the Guarantee in the amount of $1,609,027.52.

[14] On March 14, 2007, Mr. Malik commenced an action against, among others, the Crown, claiming that he had been maliciously prosecuted and wrongfully imprisoned as a result of the Air India charges. No steps were taken in this action prior to the commencement of the present proceedings.

[15] On October 23, 2007, the Crown commenced the action against Mr. Malik and others with respect to the unsecured advances made by it to fund his defence costs and, on the same day, the Crown obtained two *ex parte* orders, a *Mareva* injunction and an *Anton Piller* order. Among other things, the *Mareva* injunction restrained Mr. Malik from mortgaging or disposing of any of his assets and ordered Mr. Malik and Mrs. Malik not to cause Khalsa to mortgage or dispose of any of its assets other than in the ordinary course of business. The foreclosure proceeding was commenced on the following day.

[16] The defendants in the Crown's first action made application to set aside the *Mareva* injunction and the *Anton Piller* order, and the applications were heard in January 2008, concurrently with the hearing of the petition in the foreclosure proceeding. Prior to the hearing, Mr. Malik filed an amended writ of summons in his malicious prosecution action to claim an indemnity and set-off in respect of legal costs incurred in his defence of the Air India charges. He also filed a statement of claim in the malicious prosecution action and a counterclaim to like effect in the Crown's first action. The counterclaim has since been discontinued, but I mention it because, in addition to applying to set aside the *Mareva* injunction and the *Anton Piller* order, Mr. Malik made applications in the Crown's first action and the foreclosure proceeding to have them consolidated and stayed pending the hearing of his counterclaim. One of the issues raised on these appeals is related to those additional applications.

Decisions of the Chambers Judge

[17] In his reasons for judgment issued jointly in the Crown's first action and the foreclosure proceeding (indexed as 2008 BCSC 1027), the chambers judge dismissed the applications to set aside the *Mareva* injunction and the *Anton Piller* order, and dismissed Mr. Malik's applications to consolidate the foreclosure proceeding with the Crown's first action and to stay them pending the hearing of Mr. Malik's counterclaim. He held that the Payment Agreement was unrelated to the subject matter of the Crown's first action concerning advances under an earlier, and distinct, agreement, and unrelated to the counterclaim. He also concluded that the security given under the Payment Agreement was not so closely related to the Crown's first action or the counterclaim as to be inextricable from it.

[18] In his reasons for judgment issued in the foreclosure proceeding (indexed as 2008 BCSC 1033), the chambers judge rejected Khalsa's argument that no demand could properly be made on the Guarantee prior to the sale of the Hotel Property. He also rejected Khalsa's alternate argument that the proceeding should be referred to the trial list on the basis there was a triable issue on the point. The chambers judge did not grant the one-month redemption period requested by the Crown, but he fixed a three-month redemption period on the basis that representations had been made on behalf of Mr. Malik that his family had the ability to pay. He also dealt with miscellaneous matters that are not in issue on these appeals.

Issues on Appeal

[19] The issues raised by the appellants are as follows:

(a) Should the foreclosure petition have been referred to the trial list to permit a full inquiry into the proper construction of the Guarantee and the Hotel Mortgage?

(b) Is the Hotel Mortgage void as being a clog on the equity of redemption?

(c) Should the order nisi be stayed pending removal of the impediment to redemption created by the *Mareva* injunction?

(d) Should the trial judge have directed the foreclosure petition to be heard concurrently with the malicious prosecution action in view of Mr. Malik's claim of set-off against the Reimbursement Amount or, alternatively, should the trial judge have stayed the order nisi in view of Mr. Malik's cross claim?

(e) Should a shortened redemption period have been ordered?

The second and third issues do not appear to have been raised before the chambers judge.

Discussion

(a) Interpretation of Guarantee and Hotel Mortgage

[20] The general approach to be taken to the interpretation of a written agreement was summarized in *Gilchrist v. Western Star Trucks Inc.*, 2000 BCCA 70, 73 B.C.L.R. (3d) 102:

> [17] The goal in interpreting an agreement is to discover, objectively, the parties' intention at the time the contract was made. The most significant tool is the language of the agreement itself. This language must be read in the context of the surrounding circumstances prevalent at the time of contracting. Only when the words, viewed objectively, bear two or more reasonable interpretations, may the court consider other matters such as the post-contracting conduct of the parties: *Delisle v. Bulman Group Ltd.* (1991), 54 B.C.L.R. (2d) 343 (S.C.), approved by Chief Justice McEachern in *Bramalea Ltd. v. Vancouver School Board No. 39* (1992), 65 B.C.L.R. (2d) 334 (C.A.); *Prenn v. Simmonds*, [1971] 3 All E.R. 237 (H.L.); *Eli Lilly and Co. v. Novopharm Ltd.* (1998), 161 D.L.R. (4th) 1 (S.C.C.).
>
> [18] The first inquiry, then, is to determine whether there is only one reasonable meaning to the words in the contract, or more than one. In this search one must look to the surrounding circumstances and the whole of the contract. The words of the contract must be looked at in their ordinary and natural sense and cannot be distorted beyond their actual meaning: *MacMillan Bloedel Ltd. v. British Columbia Hydro & Power Authority* (1992), 72 B.C.L.R. (2d) 273 (C.A.); *Melanesian Mission Trust Board v. Australian Mutual Provident Society*, [1997] 1 N.Z.L.R. 391 (P.C.).

This approach was most recently approved by this Court in *Victoria Drive Auto Sales Ltd. v. Cardinal Management Ltd.*, 2008 BCCA 428, 86 B.C.L.R. (4th) 2.

[21] The general principles to be utilized in interpreting the words contained in a written contract were summarized by the Supreme Court of Canada in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at 901, 112 D.L.R. (3d) 49:

> … the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation . . . which promotes a sensible commercial result.

[22] Khalsa submits the Crown can only be entitled to foreclose on the Hotel Mortgage prior to the sale of the Hotel Property if a term to that effect is implied in the Guarantee or the Hotel Mortgage. It says the implication of a term is a triable issue because there should be a full inquiry into the proper construction of the documents.

[23] Khalsa's submission is grounded on the provisions of the Guarantee that limit the liability of Khalsa to the lesser of $1.8 million and the "Malik Net Sale Proceeds" and that require Khalsa to pay "the amount payable hereunder" (which Khalsa contends is the lesser of $1.8 million and the "Malik Net Sale Proceeds"). Thus, unless a term is implied, it is said the Crown cannot foreclose on the Hotel Mortgage prior to a sale of the Hotel Property because the amount payable under the Guarantee will not be known until there is a sale.

[24] Khalsa relies on *J.G.M. Group L.L.C. v. Williams*, 2009 BCSC 85, as an analogous situation. In that case, there was an oral loan agreement. It was the common intention that the loan was to be repaid from the proceeds of a sale of the borrower's former matrimonial home. The property did not sell as quickly as anticipated, and the lender commenced action against the borrower for repayment of the loan. The lender submitted to the judge that it was an implied term of the loan agreement that the loan would be repaid within a reasonable time. Relying on the principles enunciated in *Boutsakis v. Kakavelakis*, 2008 BCCA 13, 77 B.C.L.R. (4th) 113, the judge held that such a term could not be properly implied and dismissed the action.

[25] I do not accept the proposition that there must be a trial before the court may make a determination as to whether a term should be implied in a contract. But I take Khalsa's submission to be that the meaning of the Guarantee and the Hotel Mortgage is ambiguous unless there is an implied term to the effect that the Crown is entitled to enforce the Guarantee by foreclosing on the Hotel Mortgage prior to the sale of the Hotel Property. An ambiguity can be resolved by implying a term, but it is more commonly resolved by a consideration of extrinsic evidence, which is best introduced in *viva voce* form at a trial.

[26] In my opinion, however, the wording of the Guarantee is not ambiguous and there is no need to either imply a term or consider extrinsic evidence. I agree with the Crown's submission that Khalsa's position ignores the distinction between the amount payable under the Guarantee and the recourse available to the Crown to enforce payment.

[27] In normal loan transactions, the recourse of the lender is not limited and the lender may look to all the assets of the borrower and any guarantor to enforce payment of the loan. In limited recourse loan transactions, such as the one in this case, the borrower or guarantor agrees to pay the full amount of the loan but, if payment is not made voluntarily, the recourse of the lender in enforcing payment is limited to specified assets of the borrower or guarantor. A limited recourse transaction is to be differentiated from a limited guarantee, where recourse may be had to all the guarantor's assets but the amount of the guarantee is limited to an amount less than the total of the loan.

[28] There has been little judicial consideration of the concept of limited recourse loans. However, it has been recognized by the Supreme Court of Canada in *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79, where Mr. Justice Rothstein described the concept as follows:

> [29] The present case involves limited recourse debt. In the context of debt, recourse means that the creditor has a right to repayment of a loan from the borrower, not just from the collateral that secured the loan. By contrast, non-recourse or limited recourse debt limits the creditor to recovery of specified security. The creditor is not entitled to seek repayment from the borrower should the proceeds from the disposition of the security be less than the total indebtedness.

[29] The present situation is somewhat unusual because the guarantor (Khalsa) guaranteed the full amount of the loan (the Reimbursement Amount), and the recourse was limited to the lesser of a specified amount ($1.8 million) and a specified asset (the "Malik Net Sale Proceeds", being one-half of the net proceeds, after specified deductions, from the sale of the Hotel Property). As it turned out, however, the Reimbursement Amount is less than the upper monetary limit of the recourse.

[30] I disagree with Khalsa's submission that the words "the amount payable hereunder" in the Guarantee (which I have underlined for emphasis in the part of the Guarantee that I have reproduced above) does not mean the Reimbursement Amount. Although it would have been preferable if the draftsperson had used the defined term "Reimbursement Amount" rather than the phrase "the amount payable hereunder", it is my opinion that the amount

payable under the Guarantee is the payment guaranteed in the first paragraph of the Guarantee, the Reimbursement Amount.

[31] This interpretation is reinforced by the wording of the sentence containing the phrase "the amount payable hereunder". The sentence begins with the phrase "Unless the Guarantor has made payment to the Attorney General as contemplated above". That phrase is referring to payment of the Malik Net Sale Proceeds to the Attorney General pursuant to clauses 1 and 2 of the third paragraph of the Guarantee (it appears that the draftsperson inadvertently left out the $1.8 million limit in that paragraph). By stating the Guarantor was to pay "the amount payable hereunder" (rather than stating "the Guarantor shall make such payment"), it must be taken that the phrase "the amount payable hereunder" is referring to an amount that is different than the payment under the third paragraph of the Guarantee. The only other different amount is the Reimbursement Amount.

[32] There is an additional reason why Khalsa's proposed interpretation of the Guarantee is flawed. Khalsa's interpretation that the Crown cannot enforce the Guarantee and the Hotel Mortgage prior to the sale of the Hotel Property is contrary to an express provision of the Guarantee. The penultimate paragraph of the Guarantee reproduced above provided that the Attorney General could enforce the liability of Khalsa under the Guarantee upon the earlier of the date that is 45 days after the completion of the Air India trial and a sale of the Hotel Property. A contract should not be given an interpretation that renders some of its wording meaningless if another reasonable interpretation does not have the same result. Khalsa's proposed interpretation would render meaningless the portion of the paragraph enabling the Attorney General to enforce the Guarantee between the date that is 45 days after the completion of the Air India trial and the sale of the Hotel Property.

[33] This interpretation is also consistent with the Payment Agreement. It provided that upon an event of default, which included non-payment of the Reimbursement Amount 45 days following completion of the Air India trial, the Crown could elect to take steps on the security provided by Mr. Malik under the terms of the Payment Agreement (although it was Khalsa, not Mr. Malik, which granted the Guarantee and the Hotel Mortgage, Mr. Malik did provide this security in the sense that he covenanted and agreed to cause the Security Documents to be executed and delivered). The ability of the Crown to realize on the security was not expressed to be contingent on the sale of the Hotel Property.

[34] It is also the penultimate paragraph reproduced above that distinguishes this case from *J.G.M. Group L.L.C.* and makes it unnecessary to imply a term in the Guarantee or the Hotel Mortgage. The difficulty in that case was that the parties had not agreed to an outside date for the repayment of the loan if the borrower's former matrimonial home was not sold within the anticipated time frame. Here, the Guarantee contained an outside date by which the Crown was entitled to enforce the Guarantee (and the Hotel Mortgage) if a sale of the Hotel Property had not yet occurred.

[35] On the proper interpretation of the Guarantee and the Hotel Mortgage, the Crown was entitled to take steps to enforce payment from Khalsa at any time after the 45th day following the completion of the Air India trial. The Crown is limited in its recourse in enforcing payment to the "Malik Net Sale Proceeds" resulting from the sale of the Hotel Property. Khalsa has the option of redeeming the Hotel Mortgage without selling the Hotel Property by paying the Reimbursement Amount to the Crown. In my view, therefore, the chambers judge did not err in declining to refer the Crown's foreclosure petition to the trial list.

(b) Clog on Equity of Redemption

[36] Khalsa submits the Hotel Mortgage is void because the requirement to sell the Hotel Property constitutes a clog on the equity of redemption that is not severable. This is because the courts have developed an equitable doctrine to protect mortgagors from relinquishing the right to redeem mortgages granted by them, whether the relinquishment is contained in the mortgage itself or in a collateral agreement.

[37] Khalsa cites two authorities in support of its position that the sale requirement in this case is an impermissible impediment to its ability to redeem the Hotel Property. The first is *Browne v. Ryan*, [1901] 2 I.R. 653, in which a clog on the equity of redemption was described by the dissenting judge in the decision of the three-judge

panel of the Queen's Bench Division in the following terms at 667-68:

> It is the right of a mortgagor on redemption, by reason of the very nature of a mortgage, to get back the subject of the mortgage (in the present case the mortgaged lands) to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so, that which he is entitled on redemption is prevented, and to constitute such prevention it is not necessary that the subject of the mortgage should be directly charged with whatever causes the prevention. If he be so prevented in fact, the equity of redemption is affected by what, whether very aptly or not, has been always termed "a clog".

In that case, the land was mortgaged to an auctioneer. As part of the loan transaction, the mortgagor agreed either to have the land sold through the auctioneer within the following 12 months or to pay the auctioneer five per cent of the sale price. It was held by the English Court of Appeal, in reversing the decision of the majority of the Queen's Bench Division, that the collateral advantage to the auctioneer placed a fetter on the equity of redemption that vitiated the advantage.

[38] The second authority relied upon by Khalsa is *Jarrah Timber and Wood Paving Corporation v. Samuel*, [1904] A.C. 323, 73 L. J. Ch. 526 (H.L.). There, the lender took a mortgage over the borrower's debenture stock and was also granted an option to purchase the stock at 40 per cent within the following 12-month period. It was held that the option was void and that the borrower was entitled to redeem the stock upon repayment of the loan without regard to the option to purchase.

[39] Here, there is no requirement on Khalsa to sell the Hotel Property in order to satisfy the Hotel Mortgage. Khalsa has an option: it may limit the Crown's recourse by paying it the "Malik Net Sale Proceeds" upon a sale of the Hotel Property or it may redeem the Hotel Mortgage by paying the Reimbursement Amount to the Crown. All mortgagors have the option of discharging the mortgage by selling the mortgaged property.

[40] There is no clog on the equity of redemption in this case. Khalsa is not required to sell the Hotel Property in order to discharge the Hotel Mortgage, and Khalsa does not have a continuing obligation to sell the Hotel Property following its redemption.

(c) Effect of *Mareva* Injunction

[41] The *Mareva* injunction provides that neither Mr. Malik nor Mrs. Malik may cause Khalsa to sell or mortgage any of its assets. Khalsa argues that the effect of the injunction is to prevent or impede Khalsa from redeeming the Hotel Property. If this impediment had been voluntarily agreed to by Khalsa as part of the mortgage transaction, then it would be struck down as a clog on the equity of redemption. Therefore, Khalsa submits, the equitable result is that the redemption period should not begin to run until the impediment is removed.

[42] I agree with the Crown's position that, in practical terms, the *Mareva* injunction does not impede the redemption of the Hotel Property (or Mr. Malik's one-half interest in the Hamilton Street property). The *Mareva* injunction contains a provision that the defendants are at liberty to apply to vary the terms of the order. If Khalsa (or Mr. Malik) arranged refinancing or an arm's length sale of the Hotel Property (or Mr. Malik's one-half interest in the Hamilton Street property), an application could be made to court to vary the *Mareva* injunction to permit the refinancing or sale. As long as the refinancing or sale did not have the effect of prejudicing the Crown by transferring equity to third parties, I cannot imagine the court refusing such an application.

(d) Set-off/Stay

[43] Relying on the general principles articulated in the leading decision of *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 20 D.L.R. (4th) 689, 65 B.C.L.R. 31 (C.A.), and an analogous situation in *Piggott v. Williams* (1821), 6 Madd. 95, Mr. Malik says the chambers judge erred in concluding that he did not have an equitable set-off against the Crown's claim to be paid the Reimbursement Amount. Mr. Malik submits the chambers

judge should have done what was directed in *Northland Bank v. Kocken* (1993), 100 D.L.R. (4th) 753, 77 B.C.L.R. (2d) 377 (C.A.); namely, the foreclosure petition should be dealt with at the same time as the mortgagor's claim of set-off is tried.

[44] The Crown responds that the chambers judge was correct in his conclusion and that, in any event, Mr. Malik contracted out of his right to assert a set-off. As I agree with the Crown's alternate argument, it is not necessary to examine the doctrine of equitable set-off, and I will proceed on the assumption that Mr. Malik does have a claim of equitable set-off as a result of his malicious prosecution action.

[45] The law recognizes the ability of borrowers and guarantors to contract out of defences or set-offs they may have against the lender's claim. If a borrower or guarantor does contract out of defences or set-offs, the courts will generally hold them to the bargain they have made. This was confirmed by the Supreme Court of Canada in *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, 139 D.L.R. (4th) 426, where Mr. Justice Cory, for the majority, said the following in the context of guarantees:

> [4] Generally, it is open to parties to make their own arrangements. It follows that a surety can contract out of the protection provided to a guarantor by the common law or equity. See for example *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p. 107. The Ontario Court of Appeal, correctly in my view, added that any contracting out of the equitable principle must be clear. See *First City Capital Ltd. v. Hall* (1993), 11 O.R. (3d) 792 (C.A.), at p. 796.

[46] In the present case, Mr. Malik agreed, in s. 5.4 of the Payment Agreement, to "pay the Reimbursement Amount without set-off or deduction".

[47] The Crown cites four decisions in which the British Columbia Supreme Court has upheld a "contracting out" clause in the context of a foreclosure proceeding: *Bate v. 287443 B.C. Ltd.*, [1988] B.C.J. No. 272 (S.C.); *Bate v. 287443 B.C. Ltd.*, [1988] B.C.J. No. 3063 (S.C.); *KKBL No. 348 Ventures Ltd. v. Vancouver Tech Park Corp.*, 2003 BCSC 164, 8 R.P.R. (4th) 312; and *Royal Bank of Canada v. Parmar*, 2005 BCSC 1155, 36 R.P.R. (4th) 300.

[48] In *KKBL No. 348 Ventures Ltd.*, the mortgagor argued that the amounts claimed by the mortgagee should be reduced by way of set-off as a result of certain actions taken by the president of the mortgagee. I respectfully agree with the following comments made by Madam Justice L. Smith:

> [13] Mr. Poisson, counsel for the petitioners, referred me to the following British Columbia authorities illustrating the enforcement of provisions in mortgage agreements excluding the right of set-off: *Bate v. 287443 B.C. Ltd.*, [1988] B.C.J. No. 272 (Q.L.) (S.C.) ("*Bate #1*"); *Bate v. 287443 B.C. Ltd.*, [1988] B.C.J. No. 3063 (Q.L.) (S.C.) ("*Bate #2*"); and *Aetna Acceptance Corp. v. Brown*, [1995] B.C.J. No. 1108 (Q.L.) (S.C.).
>
> [14] Mr. Anderson was unable to refer me to any authorities to the contrary. As I understood Mr. Anderson's argument, however, it is that his clients are not only entitled to equitable set-off under the principles set out in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 65 B.C.L.R. 31 (C.A.) but also to a remedy by way of counter-claim against Peterson for breach of fiduciary duty. I will not review the basis for either claim in any detail because I have concluded that the mortgage agreement does not permit the mortgagors to assert a set-off (whether equitable or otherwise) or counterclaim to reduce the amounts payable under the mortgage. The parties expressly agreed as a term of the mortgage that "[a]ll amounts payable to the Mortgagee hereunder shall be made without deduction, compensation, set-off, or counterclaim". The mortgagors thereby agreed that they would have to pursue claims against the mortgagee outside of mortgage enforcement proceedings. The mortgagors have commenced a separate action setting out the claims, and they will be free to pursue that action. I note that in *Bate #2* the claim which the mortgagor wished to pursue against the mortgagee was in deceit; nevertheless, the court held the parties to their bargain. While there may be circumstances in which a provision excluding the right of set-off will not be enforced, I do not think that such circumstances exist in this case.

Mr. Malik points to the last sentence of this passage and says that the present case is one in which a provision excluding the right of set-off should not be enforced.

[49] I share the view expressed by Smith J. that the door should not be closed on the authority of the court to exercise its equitable jurisdiction to decline to enforce a "contracting out" clause in certain circumstances. For example, in *Bauer v. Bank of Montreal,* [1980] 2 S.C.R. 102, 110 D.L.R. (3d) 424, the Supreme Court of Canada gave an indication that effect may not be given to a "contracting out" clause if it is onerous or unreasonable in ordinary commercial terms.

[50] However, I do not regard the present situation as one where the court should decline to give effect to s. 5.4 of the Payment Agreement. The Air India trial was in progress when Mr. Malik entered into the Payment Agreement, and its terms were negotiated by counsel for both parties. Mr. Malik believes that he was maliciously prosecuted, and would have held that belief when he agreed to pay the Reimbursement Amount without set-off or deduction. In the first *Bate* decision, Mr. Justice Meredith had regard to the fact that the alleged right was known to the mortgagor when he signed the mortgage containing the "contracting out" clause. In my view, it is not inequitable in the circumstances to hold Mr. Malik to his bargain.

[51] In the alternative, Mr. Malik submits the order nisi should be stayed pending the outcome of his malicious prosecution action. He cites *Royal Bank of Canada v. Rizkalla* (1984), 59 B.C.L.R. 324, 50 C.P.C. 292 (S.C. Chambers), and *Pacific Playground Holdings Ltd. v. Endeavour Developments Ltd.*, 2002 BCSC 126, 1 R.P.R. (4th) 280, as examples of cases where an order nisi of foreclosure was stayed in order to permit the mortgagor to pursue a claim against the mortgagee.

[52] While I have no doubt about the authority of the court to grant a stay of execution with respect to a judgment in order to allow the judgment debtor an opportunity to pursue a meritorious claim against the judgement creditor, this is not a case, in my view, where the court should exercise its discretion to grant a stay. If a stay were granted, it would render nugatory s. 5.4 of the Payment Agreement in which Mr. Malik agreed to pay the Reimbursement Amount without set-off or deduction. A stay would have the effect of preventing the Crown from recovering payment of the Reimbursement Amount until it is known whether Mr. Malik has been able to obtain a judgment against the Crown that can be deducted from the Reimbursement Amount. I am not persuaded that the chambers judge erred in declining to stay the order nisi.

(e) Length of Redemption Period

[53] The chambers judge granted a shortened redemption period (i.e., three months rather that the "usual" six months) on the basis of representations made on behalf of Mr. Malik in the foreclosure proceeding that he had the ability to pay. While a chambers judge has a discretion to order a shortened redemption, he or she must exercise the discretion on the basis of appropriate principles and, with great respect to the chambers judge, the ability of the mortgagor to pay is not a proper consideration for the shortening of a redemption period. The purpose of a six-month redemption period is to enable the mortgagor to redeem or sell the mortgaged property on as favourable a basis as the mortgagor can arrange during the redemption period. The fact that a mortgagor has the ability to redeem the mortgaged property at the outset of the redemption period is not an appropriate basis for shortening it. To the contrary, it is when the mortgagor does not have the ability to redeem the mortgaged property that the court may properly shorten the redemption period.

[54] There was no evidence of any of the factors justifying a shortened redemption period. The Crown did not introduce evidence of insufficiency of equity, abandonment or wasting. The chambers judge declined to rely on the ground that the matter had gone on for too long already, and there was no suggestion that Mr. Malik or Khalsa was responsible for delaying the proceedings.

[55] Despite my view that the chambers judge should have ordered a six-month redemption period, I am not inclined to give effect to this ground of appeal. Over a year has passed since the hearing of the foreclosure petition. The order nisi was pronounced on July 31, 2008, and the appellants did not move expeditiously to obtain leave to appeal and a stay pending appeal (which were given on November 14, 2008). The appellants have been

unsuccessful on their other grounds of appeals, and I tend to the view that mortgagors should not benefit from lengthened redemption periods as a result of bringing unsuccessful appeals. If a six-month redemption period had been ordered, it would have already expired but for the stay pending these unsuccessful appeals. In the circumstances, I would not change the length of the redemption period.

Conclusion

[56] I would dismiss both appeals.

"The Honourable Mr. Justice Tysoe"

I AGREE:

"The Honourable Chief Justice Finch"

I AGREE:

"The Honourable Mr. Justice Frankel'