

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia (Attorney General) v. Malik*,
2009 BCCA 511

Date: 20091118
Docket: CA036407; CA036517

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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 -

Between:

Docket: CA036517

**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

Supplementary Reasons to: Court of Appeal, May 7, 2009
(*British Columbia (Attorney General) v. Malik*, 2009 BCCA 202,
Docket CA036407; CA036517)

Counsel for the Appellant, Khalsa Developments Ltd.:	J.C. McKechnie
Counsel for the Appellant, Ripudaman Singh Malik:	B.E. McLeod
Counsel for the Respondent:	F.G. Potts and R.N. Hamilton
Place and Date of Hearing:	Vancouver, British Columbia March 5, 2009
Place and Date of Judgment:	Vancouver, British Columbia May 7, 2009
Written Submissions Received:	September 28, October 13 and 16, 2009
Date of Supplementary Judgment:	November 18, 2009

Supplementary Reasons of the Court

Supplementary Reasons for Judgment of the Court:

[1] In reasons for judgment dated May 7, 2009 (2009 BCCA 202), we dismissed each of the appeals brought by Khalsa Developments Ltd. and Ripudaman Singh Malik. The parties subsequently requested leave to make submissions with respect to costs. Leave was given, and we have now received submissions on behalf of Mr. Malik and the respondent.

[2] Khalsa Developments Ltd. has not made submissions with respect to costs, and we are advised it acknowledges there is no basis to depart from the usual order, as embodied in s. 23 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, that the party successful on the appeal is entitled to the costs of the appeal.

[3] Mr. Malik says we should depart from the usual order and direct that each party should bear their own costs of his appeal. He relies on the fact that the main ground of his appeal was decided on an alternate argument of the respondent raised for the first time in the respondent's factum, which was filed ten days prior to the hearing of the appeal. He refers to a number of decisions in which the Court has deprived successful parties of their costs where the point on which the appeal was decided had not been argued in the trial court

(e.g., *Henry v. Columbia Securities Ltd.*, [1942] 4 D.L.R. 596, [1943] 3 W.W.R. 422 (B.C.C.A.); *Sierra Club of Western Canada v. British Columbia (Chief Forester)* (1995), 7 B.C.L.R. (3d) 375 (C.A.)). He also points to the fact that we agreed with his second ground of appeal challenging the shortened redemption period granted by the chambers judge.

[4] The principal issue raised by Mr. Malik was that the chambers judge erred by concluding that he did not have a right of equitable set-off in respect of the amount secured by the mortgage under foreclosure. The respondent took the position that the chambers judge's conclusion was correct and it also raised for the first time on appeal an alternate argument that Mr. Malik had contracted out of his right to assert a set-off. We agreed with the respondent's alternate argument and did not deal with the issue of whether Mr. Malik had a right of equitable set-off.

[5] In our view, the respondent should not be deprived of costs against Mr. Malik for two reasons. First, this is not a situation where the action was decided by the trial or chambers judge on the basis of one issue and where the appeal was unsuccessful on the basis of a different issue raised for the first time on appeal. Here, the same issue that was before the chambers judge was before this Court. We agreed with the chambers judge's conclusion but relied on different reasoning.

[6] Secondly, we did not disagree with the chambers judge's reasoning but preferred to deal with the issue on the basis of the respondent's alternate argument. The respondent should not be deprived of costs as a result of our preference.

[7] The fact that the respondent's alternate argument first appeared in its factum filed ten days prior to the hearing of the appeal is of no moment. This was an expedited appeal, and the respondent's factum was filed in accordance with the consent order agreed to by the parties setting out the filing deadlines.

[8] We did agree that the chambers judge should not have ordered a redemption period of shorter than six months. We did not give effect to the ground of appeal in this regard, however, because the appellants had not moved expeditiously to obtain leave to appeal and a stay pending appeal, none of the other grounds of appeal were successful and more than six months had passed since the chambers judge's decision. The result was the appellants did not succeed on this ground of appeal.

[9] In our view, there is insufficient reason to depart from the usual costs order in the case of Mr. Malik's appeal as well as the appeal brought by Khalsa Developments Ltd. The respondent is entitled to the costs of each of these appeals, to be assessed under Scale 2 set out in Appendix B to the *Court of Appeal Rules*.

“The Honourable Chief Justice Finch”

“The Honourable Mr. Justice Frankel”

“The Honourable Mr. Justice Tysoe”