

**CITATION:** MTCC No. 831 v. Khan, 2012 ONSC 652  
**COURT FILE NOS.:** CV-11-436098; CV-11-433814; CV-11-425375; CV-11-436101  
**DATE:** 20120126

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**COMMERCIAL LIST**

**RE:**

**CV-11-436098:** Metropolitan Toronto Condominium Corporation No. 831 v. Manzoor Moorshed Khan, Deacon Spears Fedson & Montizambert, Marco Djurdjevac, Royal Bank of Canada, Morrison Financial Services Limited and The Equitable Trust Company

**CV-11-433814:** Metropolitan Toronto Condominium Corporation No. 943 v. Channel Property Management Ltd., Manzoor Moorshed Khan, Canali Engineering Group Ltd., Mihaela Jurkovic, Mohammad Irfan Naeem, Deacon Spears Fedson & Montizambert, Michael J. Campbell, Royal Bank of Canada, Morrison Financial Services Limited and The Equitable Trust Company

**CV-11-425375:** Metropolitan Toronto Condominium Corporation No. 710 v. Manzoor Moorshed Khan, Channel Property Management Ltd., Canali Engineering Group Ltd., Mountview Canadian Enterprise Ltd., Lakewood Contracting Ltd., Reliance Electric Services Inc. and PMP Canada Ltd.

**CV-11-436101:** Metropolitan Toronto Condominium Corporation No. 953 v. Manzoor Moorshed Khan, Sharmin Sadia, PMP Canada Ltd., Deacon Spears Fedson & Montizambert, Michael J. Campbell, Marco Djurdjevac, Royal Bank of Canada, Morrison Financial Services Limited and Home Trust Company

**BEFORE:** D. M. Brown J.

**COUNSEL:** J. Fine and B. Rutherford, for the Plaintiffs

A. Datt, for the Defendants, Manzoor Khan and Channel Property Management Ltd.

G. Kim, for Sobermans Inc., Trustee of the Estate of Channel Property Management

B. Sachdeva, for BDO Canada, Trustee for Manzoor Khan

J. Larry, for The Equitable Trust Company and Home Trust Company

S. Sack, for Michael J. Campbell and Deacon Spears Fedson & Montizambert

A. Mercer, for Morrison Financial Services Limited

K. Kiesel, for Mihaela Jurkovic

**HEARD:** January 26, 2012

### **REASONS FOR DECISION**

#### **I. Motion to lift stays pursuant to *BIA s. 69.4***

[1] Four condominium corporations, Metropolitan Toronto Condominium Corporations Nos. 831, 943, 710 and 953, have commenced separate actions against Manzoor Moorshed Khan, and his wholly-owned subsidiary, Channel Property Management Ltd., alleging, in three of the actions, that Mr. Khan falsified documents to obtain unauthorized loans secured by mortgages on the condominiums and then converted the loan proceeds to his own use and, in the fourth action, that Mr. Khan and his related companies fraudulently overcharged the condominium for work done under certain contracts.

[2] The four actions were commenced between April, 2011 and September 28, 2011. In the MTCC 710 Action the plaintiff brought a motion for summary judgment returnable October 20, 2011. On October 19, 2011 Mr. Khan made an assignment in bankruptcy; BDO Canada Limited was appointed trustee. On September 14, 2011 Channel Property had made an assignment in bankruptcy; Soberman Inc. was appointed trustee.

[3] Five motions are before me. First, each of the four plaintiff condominium corporations moves for orders lifting the stays of proceedings imposed by section 69.3(1) of the *Bankruptcy and Insolvency Act*, as well as orders that the actions be subject to common case management. Second, The Equitable Trust Company, which made a number of the loans in question to the condominium corporations, moves for a lifting of the stay so that it can commence two actions against Mr. Khan and Channel Property. The amount of the loans which the plaintiffs and The Equitable Trust Company allege were obtained fraudulently by Mr. Khan and his company totals approximately \$17.4 million. It is alleged that those funds remain unaccounted for.

[4] No party opposed the relief sought; neither Trustee opposed the motions. The parties could not agree on the terms for the lifting of the stays.

## II. Governing principles

[5] Section 69.4(1) of the *BIA* provides that a court may declare that the statutory stays no longer operate, “subject to any qualifications that the court considers proper”, where the court is satisfied that the creditor is likely to be materially prejudiced by the continued operation of the stays or that it is equitable on other grounds to make such a declaration. In *Re Ma*<sup>1</sup> the Court of Appeal set out the basic considerations on a request to lift a stay under *BIA* s. 69.4:

Under s. 69.4 the court may make a declaration lifting the automatic stay if it is satisfied (a) that the creditor is "likely to be materially prejudiced by [its] continued operation" or (b) "that it is equitable on other grounds to make such a declaration." The approach to be taken on s. 69.4 application was considered by Adams J. in *Re Francisco* (1995), 32 C.B.R. (3d) 29 at 29-30 (Ont. Gen. Div.), a decision affirmed by this court (1996), 40 C.B.R. (3d) 77 (Ont. C.A.):

In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, exist for relieving against the otherwise automatic stay of proceedings.

As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the Bankruptcy and Insolvency Act" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

[6] In *Re Advocate Mines Ltd.*<sup>2</sup> Registrar Ferron identified the types of cases in which courts typically lift stays:

1. Actions against the bankrupt for a debt to which a discharge would not be a defence.
2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the Bankruptcy Act inappropriate.

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<sup>1</sup> (2001), 24 C.B.R. (4<sup>th</sup>) 68 (Ont. C.A.), paras. 2 and 3.

<sup>2</sup> (1984), 52 C.B.R. (N.S.) 277 (Ont. Bkcty), para. 2.

3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.
4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.
5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.

As well, courts have taken into account whether the trustee objects to the litigation continuing and whether the litigation involves defendants other than the bankrupt so that staying the action against the bankrupt would have the effect of seriously prejudicing the plaintiff.<sup>3</sup>

### **III. Analysis**

#### **A. Lifting the stays**

[7] In three of the actions (MTCC 831, MTCC 943 and MTCC 953) the plaintiff condominium corporations seek, as their primary relief, declarations against all defendants, including the lenders, that the loans which are alleged to have resulted from fraudulent conduct by Mr. Khan and Channel Property are null and void and that the condominiums are not liable on the loans. In the fourth action (MTCC 710) the plaintiff condominium corporation seeks damages against Mr. Khan, Channel Property and other defendants for damages allegedly suffered by reason of fraudulent overcharging by the defendants in the performance of certain contracts.

[8] All four actions plead claims for damages to which a discharge would not be a defence. In the three declaration actions the bankrupts are necessary parties given that the thrust of the claim is that they fraudulently secured loans not authorized by the condominium corporations. The fourth action involves a contingent or unliquidated debt, the proof of which will be complex and unsuited for the summary claims procedure prescribed by the *BIA*.

[9] Similarly, the two actions The Equitable Trust Company proposes to commence – an action against MTCC No. 853 and others, and one against York Condominium Corporation No. 312 and others – assert claims that the loans made to those condominium corporations are valid and outstanding, and those condominium corporations most likely will defend, in part, by asserting that the loans are not valid as against them by reason of the fraudulent conduct of Mr. Khan and Channel Property. Both bankrupts would be necessary parties to that action.

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<sup>3</sup> *Arrojo Investments v. Cardamore* (1995), 33 C.B.R. (3d) 46 (Ont. Gen. Div.), para. 4.

[10] In all the circumstances, it is quite appropriate to grant the orders sought under *BIA* s. 69.4 lifting the stays imposed by section 69.3(1) in respect of Mr. Khan and Channel Property and allowing the four existing proceedings to continue and permitting The Equitable Trust Company to commence its two proposed actions.

### **B. Joint case management**

[11] The plaintiffs sought orders that the four existing actions be case-managed together and placed on an expedited track for trial while leaving The Equitable Trust actions to proceed in the normal fashion. Given the commonality of factual and legal issues in all six actions, in my view all six actions should be case-managed together with a view to proceeding to trial in the first half of 2013.

### **C. Limits on the plaintiffs' ability to seek judgment before trial**

[12] Mr. Datt, counsel for Mr. Khan and Channel Property in the MTCC 710 and MTCC 943 Actions, in which those defendants have filed Statements of Defence, submitted that I should impose as qualifications on the lifting of the stay terms that the plaintiffs may not note the bankrupts in default or bring motions for summary judgment against them. Mr. Datt advanced two reasons in support of these terms: (i) the impecuniosity of his clients and their resulting inability to fund a defence, and (ii) in view of the serious nature of the allegations made against his clients, their liability should be determined at trial with *viva voce* evidence.

[13] Mr. Khan left Canada some time ago. It is common ground he presently resides in Bangladesh. An affidavit filed by a law clerk in Mr. Datt's office deposed that Mr. Khan went to Bangladesh to care for his very sick wife. An attached Medical Advice document dated October 13, 2011 from the Apollo Hospitals in Dhaka stated, in respect of Mrs. Khan:

Mrs. Momtaz Morshed is currently undergoing treatment under my care since August 2011 till date & will need to continue regular follow-up for next few months in Apollo Hospitals Dhaka & she is now not in a position to take long flights overseas.

The document did not recommend the admission of Mrs. Khan into the hospital.

[14] I infer from the affidavit filed by Mr. Datt's clerk that Mr. Khan does not intend to return to Canada until his wife's condition changes, although no indication was given as to when that might be or what change in her condition would give Mr. Khan sufficient comfort to leave his wife and return to Canada.

[15] The only evidence before me about Mr. Khan's financial affairs is the report of his Trustee dated November 16, 2011 which stated that based on Mr. Khan's Statement of Affairs the Trustee had identified assets worth approximately \$260,000. The Trustee's report did not identify the source of the funds which Mr. Khan uses to cover his living expenses in Bangladesh.

[16] I do not accept Mr. Datt's submission that the plaintiffs should not be permitted to resort to the devices afforded by Rules 19 and 20 to secure judgment before a trial. Using the resources

available to him Mr. Khan filed defences in two actions using counsel. His counsel appeared before me today on these motions. Mr. Datt confirmed that he remains counsel of record in those two actions. Given the current availability of counsel for Mr. Khan and Channel Property, I see no reason to deny the plaintiffs the ability to resort to remedies made available under the *Rules of Civil Procedure*, such as Rules 19 and 20. Mr. Khan has defended two actions; whether he wishes to defend any others is a choice he must make for himself.

[17] The Court of Appeal has clarified the availability of motions for summary judgment. I have ordered the six actions case managed together. I suspect the issue of the appropriateness of motions for summary judgment may well be discussed by the parties with the case management judge. An assessment of the propriety of any such motion can be made at that time.

[18] I will allow Mr. Khan and Channel Property until March 23, 2012 to file statements of defence in those actions which they have not yet defended.

#### **D. Costs of the actions allowed to proceed**

[19] Counsel for the Trustee of Channel Property submitted that as a term of lifting the stays the Court should order that any costs awarded to the plaintiffs in the actions allowed to proceed are not claimable against the estates of the bankrupts. Counsel for the condominium corporation plaintiffs opposed such a term.

[20] According to the Statement of Affairs filed for Mr. Khan, the contingent claims associated with the plaintiffs' litigation constitute by far the lion's share of the unsecured claims against his estate, with only the BNS filing another unsecured claim in the amount of \$40,000.00. As I mentioned earlier, Mr. Khan's Statement of Affairs listed net assets of about \$260,000. Channel Property's Statement of Affairs listed assets totaling \$10,000, with unsecured claims of about \$301,000.00, excluding any contingent claims.

[21] In the present case lifting the stays makes sense for two main reasons: (i) the civil actions offer a superior means of determining issues of liability than the bankruptcy claims process, and (ii) many of the claims, if established, would survive the discharge of the bankrupts. An argument can be made that estate assets available for distribution to other creditor claimants should not be used to assist some creditors in proving their claims through the civil process. So, too, if the claims which survive a discharge order ultimately are established, arguably the principal amount of any judgment, together with the costs of the judgment, could be enforced post-discharge against the then existing assets of the debtors/former bankrupts. On the other hand, since any defence of the actions will fall to Mr. Khan to conduct, not the Trustees, a court never likes to see a situation where one party can assume litigation positions without worrying about incurring any cost sanctions if any position is considered unmeritorious by the court.

[22] However, in the present case, I am ordering the case management of all six actions. From my initial observations of these proceedings, I think "heavy-handed" case management will be required. I think that the very broad inherent powers of judges to control the process of the courts and to case manage civil litigation should be sufficient to ensure that the practical

absence of cost sanctions against one set of defendants will not result in any misuse of the court's process.

[23] Accordingly, at this point of time I am prepared to accept the Trustee's submission, and I will impose, as a term of lifting the stays, that any costs awarded to the plaintiffs prior to the discharge of the bankrupts cannot be claimed by the plaintiffs as against the estates of the bankrupts. That said, I do not have a crystal ball and I cannot foresee the practical effect of that order on the conduct of these six pieces of litigation. Consequently, I make that order without prejudice to the right of the plaintiffs to seek a variation of it prior to the discharge of the bankrupts.

#### **IV. Conclusion**

[24] By way of summary, I grant the following orders:

- (i) The stays imposed by section 69.3(1) of the *BIA* no longer operate and are lifted in respect of the claims asserted against the bankrupts, Manzoor Moorshed Khan and Channel Property Management Ltd. in Actions Nos. CV-11-425375, CV-11-436098, CV-11-433814 and CV-11-436101;
- (ii) The stays imposed by section 69.3(1) of the *BIA* no longer operate and are lifted in respect of the two claims which The Equitable Trust Company plans to commence against the bankrupts in the proposed MTCC 853 and YCC 312 Actions;
- (iii) The Equitable Trust Company shall issue and serve on the bankrupts its proposed Statements of Claim on or before Tuesday, January 31, 2012;
- (iv) The Equitable Trust Company may serve the issued Statements of Claim on Mr. Khan and Channel Property Management Ltd. by delivering copies of them to (i) Mr. Datt and (ii) BDO Canada. Delivery of the copies of the claims to those persons shall be deemed good and proper service of them on Mr. Khan and Channel Property Management Ltd. as of the date of delivery;
- (v) Mr. Khan and Channel Property Management Ltd. may file any outstanding statement of defence in any of the actions no later than March 23, 2012, failing which the plaintiffs are at liberty to note those defendants in default;
- (vi) Neither Trustee in Bankruptcy is required to defend the actions or proposed actions, to produce an affidavit of documents on behalf of the defendant bankrupts, or to participate in an examination for discovery of the defendant bankrupts or themselves;
- (vii) No costs shall be awarded against either Trustee unless the respective Trustee chooses to take steps to defend the action or proposed actions, or any of them, in which case costs may be awarded in the ordinary course;

- (viii) No costs awarded to the plaintiffs prior to the discharge of the bankrupts can be claimed by the plaintiffs as against the estates of the bankrupts, without prejudice to the right of the plaintiffs to seek a variation of this order prior to the discharge of the bankrupts;
- (ix) All six actions shall be assigned for case management by a judge of the Commercial List. The parties shall arrange an appointment before Morawetz J. for no later than February 10, 2012 to secure the appointment of a case management judge; and,
- (x) The costs of these motions are in the cause of the respective proceedings.

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D. M. Brown J.

**Date:** January 26, 2012