

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (The Attorney General) v. Malik*,
2012 BCSC 477

Date: 20120402
Docket: S077088
Registry: Vancouver

Between:

**Her Majesty the Queen in Right of the Province of British Columbia as
Represented by the Attorney General of British Columbia**

Plaintiff

And

Ripudaman Singh Malik, Raminder Kaur Malik, Jaspreet Singh Malik, Gurdip Singh Malik, Hardeep Singh Malik, Darshan Singh Malik, Khalsa Developments Ltd., Papillon Eastern Imports Ltd., 072735 B.C. Ltd., and 0760887 B.C. Ltd.

Defendants

Before: The Honourable Mr. Justice McEwan

Reasons for Judgment

Counsel for the Plaintiff: F. Potts

Counsel for the Defendant
Ripudaman Singh Malik: B. McLeod

Counsel for the Defendant
Raminder Kaur Malik: T. Manson Q.C.

Counsel for the Defendants
0772735 B.C. Ltd. and 0760887 B.C. Ltd.
and Jaspreet Malik (I/P) : J. Malik

Counsel for the Defendant
Gurdip Singh Malik: G. Forrester

Place and Date of Trial/Hearing: Vancouver, B.C.
February 22-23, 2012

Place and Date of Judgment: Vancouver, B.C.
April 2, 2012

[1] On February 23, 2008 I ordered that the *Mareva* injunction issued on October 23, 2007 against R.S. Malik be varied to accommodate the sale of a property owned by Mr. Malik and his wife R.K. Malik, located at 1028 Hamilton Street, Vancouver, B.C. The anticipated completion date was February 28, 2012. I further directed that the net proceeds of the sale as it was structured (some \$470,000), be paid into court pending further order as to what amount, if any, should be held in court to secure the plaintiff's ongoing claims against Mr. Malik and others for fraud, punitive or exemplary damages and special costs.

[2] It is common ground that the sale of the property will effect the repayment of some \$6.3 million claimed in this action, leaving claims the plaintiff estimates at approximately \$1.6 million. These relate to allegations that the defendants wrongfully managed their affairs to delay, hinder and defeat recovery of the principal sum. When I ordered the balance to be held, it was on the basis that I had concluded the amount required as security for the ongoing claims would not, in any event, exceed the funds available. I indicated that I would give reasons as soon as possible concerning the distribution of that balance. These are those reasons.

[3] This action arises in the aftermath of the prosecution of Ripudaman Singh Malik for murder and other offences arising in connection with a criminal prosecution commonly referred to as the "Air India Trial".

[4] Following Mr. Malik's arrest in relation to that matter, he applied for judicial interim release. He and his wife R.K. Malik deposed, in aid of his application, that they had a joint net worth of some \$11.6 million. Notwithstanding this, on January 20, 2001, the Court ordered Mr. Malik remanded in custody.

[5] On or about November 20, 2001, Mr. Malik sought government funding for his defence costs. The plaintiff claims that in the course of negotiations he represented that he had suffered business reversals that had brought his net worth down to \$800,000 or less, and that as of January 25, 2002 he was unable to pay his legal bills.

[6] The plaintiff negotiated funding agreements that led to the advances that will be paid out as a result of the contemplated sale.

[7] The plaintiff claims that Mr. Malik breached the terms of these agreements made March 21, 2001 (the “interim funding agreement”) and August 6, 2002 (the “long term funding agreement”), by, among other things, failing to provided details of his assets and failing to transfer assets to the plaintiff in accordance with the term of the agreements, and that, instead, he and members of his family engaged in a course of conduct described as follows:

- a) Mr. Malik asserted that he had no net assets and possessed a negative net worth;
- b) Mrs. Malik, through her counsel, asserted that Mr. Malik was substantially indebted to her and that Mr. Malik had no interest, legal or beneficial, in the matrimonial home located at 6475 Marguerite Street, Vancouver, British Columbia, and that the Defendant Mr. Malik’s net worth amounted to minus TWO HUNDRED AND NINETY THOUSAND DOLLARS (\$290,000.00);
- c) The Defendants, Jaspreet, Hardeep, Darshan, and Raminder asserted that the Defendants, Papillon and Khalsa were substantially indebted to Jaspreet, Hardeep and Darshan on account of wages and that Mr. Malik was indebted to them on account of monies received in trust for their benefit;
- d) The Defendants Mrs. Malik, Jaspreet, Hardeep, Darshan and Gurdip asserted that all assets held in their respective names were their sole property and that Mr. Malik had no interest in same, and that none were prepared to assist Mr. Malik with payment of defence costs;
- e) The Defendants, Mr. Malik, Mrs. Malik, Jaspreet, and Gurdip asserted that Mr. Malik was indebted to Gurdip in the amount of THREE HUNDRED AND THIRTY THOUSAND US DOLLARS (\$330,000.00 USD), and that Gurdip was entitled to a mortgage securing an additional debt of ONE HUNDRED AND SEVENTY-FIVE THOUSAND DOLLARS (\$175,000.00), as against certain of Mr. Malik’s property; and
- f) Mr. Malik and Jaspreet asserted that Mr. Malik’s brother, Jasjit Malik, had lent Mr. Malik ONE HUNDRED AND THIRTY-NINE THOUSAND TWO HUNDRED AND TWO DOLLARS and FORTY-EIGHT CENTS (\$139,202.48) which loan had been assigned to K.S. Nagra.

[8] The plaintiff claims that in August and September 2003, Mr. Malik sought government funding by way of a so-called *Rowbotham* application. This was dismissed on September 19, 2003 by Stromberg-Stein J. on the basis that:

- a) Mr. Malik had submitted erroneous, contradictory, and unreliable evidence [and that there had been] a collective effort by Mr. Malik and the Malik family members to diminish the value of his estate;
- b) The assets of Mr. Malik and his family are so interconnected as to be fused. The Malik family has conducted its affairs such that all assets are jointly held for the benefit of all. Assets and income are pooled for one common enterprise. Title is meaningless;
- c) The family is now attempting to artificially impose a segregation of their assets and income so as to diminish the values of Mr. Malik's interest;
- d) Mr. Malik's assertion of insolvency is unsupported by the evidence;
- e) There is evidence of collusion to secure Gurdip's THREE HUNDRED AND THIRTY THOUSAND US DOLLARS (\$330,000.00 USD) loan before this hearing and to reduce Mr. Malik's equity in the hotel;
- f) The debts claimed to be owing to the children and to Mr. Malik's brothers are not bona fide or so imprecise or inconsistent as to be disregarded...there is evidence of collusion in efforts to secure Gurdip's loans; and
- g) Mr. and Mrs. Malik manipulated facts.

[9] The plaintiff has pled and relies on these findings of fact as evidence of its claims for special damages, punitive or exemplary damages, and special costs.

[10] The plaintiff estimates its claims associated with the *Rowbotham* application to be in the realm of \$200,000, largely for legal expenses.

[11] The plaintiff estimates its claim for punitive damages to be in the realm of \$200 - \$250,000, on the basis of the facts it expects to prove. Examples include allegations of various forms of obstructive behaviour and attempts to mislead the plaintiff and the Court.

[12] The plaintiff estimates its claim for special costs to be up to \$1.5 million, 80% of which is \$1.2 million, which it submits is the approximate amount that should be secured for special costs, for a combined total claim of approximately \$1.6 million.

[13] At the outset of these reasons I alluded to the order of February 3, 2012 varying the extant *Mareva* injunction in this matter. It was issued by this Court on October 23, 2007, and affirmed on July 31, 2008, following an application to set it aside.

[14] On May 7, 2009 the Court of Appeal found that this Court had granted the *Mareva* injunction inappropriately. It set aside the injunction against all of the defendants except Mr. Malik. In his case, the Court of Appeal found the injunction to be justified on the basis of a constructive trust or an equitable charge, in light of the agreements Mr. Malik had made with the Crown concerning the transfer of his assets. An *Anton Piller* order made concurrently with the *Mareva* injunction was struck as against all defendants.

[15] The Court of Appeal found that this Court had entertained inadmissible evidence in considering the findings in the *Rowbotham* application to be evidence contributing to a strong *prima facie* case of fraud and a real risk of disposition of assets. The Court of Appeal concluded that absent that evidence there was an inadequate foundation for the orders made.

[16] The plaintiff appealed the ruling with respect to the *Anton Piller* order. The Supreme Court of Canada reversed the Court of Appeal on the basis that the *Rowbotham* reasons were evidence that this Court *could* consider on an interlocutory application. It should be noted that the original order was granted, in part, on the basis that the defendants had not put the facts found by Stromberg-Stein J. in issue. That remains the case to the present time.

[17] It is arguable that the Court of Appeal's finding that an injunction was justified against Mr. Malik on the basis of trust or an equitable charge extended only to the sums payable under the fee agreements and not to the elements of the claim characterized as frauds or conspiracies. Despite the fact that the rationale for the restored *Anton Piller* order was the same as for the originally issued injunction – that the uncontradicted *Rowbotham* findings were evidence supportive of a *Mareva* injunction – the injunction as it stands could be viewed as limited to those parts of the plaintiff's claim that could be associated with the terms of the funding agreement. If that is the situation, the present injunction would be extant on the limited basis articulated by the Court of Appeal, because its ruling respecting the *Mareva* injunction was not appealed, although the rationale for the ruling was the same as

for the original *Anton Piller* order. It may, therefore, be debatable to refer to the injunction I varied on February 23, 2012 as a “*Mareva*” injunction.

[18] The issue presently arises because the plaintiff takes the position that the *Mareva* injunction should remain in place in respect of its remaining claims. The plaintiff accepts that should its entire estimated claim be secured in some other manner there would be no need for an ongoing injunction.

[19] Counsel for the defendants have referred to *Blue Horizon Energy Inc. v. Ko Yo Development Co.*, 2012 BCSC 58, a decision of Savage J., which reviews the requirements for a *Mareva* injunction. At paras. 20, 29-30, the Court notes that a strong *prima facie* case must be accompanied by an analysis of the balance of convenience:

[20] Assuming that the first requirement is met, the failure to give detailed consideration to the balance of convenience will be an error in principle: *First Majestic Silver Corp.*, at para. 24. Any remedy given must be proportionate to that balance, and not tie up assets beyond the value necessary to satisfy any likely judgment or remedy: *Tracy*, at para. 56, and *First Majestic Silver Corp.*, at para. 28.

...

[29] The Court of Appeal in *Patko* discussed the two-part test to be applied and relevant factors to consider at paras. 25-26:

Under the flexible *Mooney No. 2* approach, the fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case: *Mooney No. 2* at para. 43. In order to obtain an injunction, the applicant must first establish a strong *prima facie* or good arguable case on the merits. Second, the interests of the two parties must be balanced, having regard to all the relevant factors, to reach a just and convenient result. Two relevant factors are evidence showing the existence of assets within British Columbia or outside, and evidence showing a real risk of their disposal or dissipation, so as to render nugatory any judgment: *Mooney No. 2* at para. 44.

The root of the *Mareva* injunction is the risk of harm either through dissipation of assets or removal of assets to a place beyond the court's reach: *Tracy* at para. 45. In most cases it will not be just or convenient to tie up a defendant's assets merely on "speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted": *Silver Standard* at para. 21. Thus,

though a party may apply for and obtain an injunction as security for damages sought in the litigation without showing that there is a real risk the defendant will dissipate assets, in most cases a real risk of dissipation must be established before a party will be granted a Mareva injunction in British Columbia.

[30] From this I infer that there is no list of factors which necessarily enter into the two part analysis described above and, in my opinion, each case goes to be decided in its own factual matrix by the flexible approach favoured by the authorities. Thus, decisions in one case may be less helpful in the analysis of others than may first appear.

[20] In the present case the plaintiff justifies the continuation of the injunction (or the substitution of security) on the basis of an estimate of total claims that includes claims for punitive damages and special costs. None of the parties were able to provide authority for the proposition that injunctive relief has ever extended to claims of that nature.

[21] The plaintiff submits that the record in the *Rowbotham* case and the course of the litigation in this Court provides ample grounds for the continuance of the injunction on the grounds that a *prima facie* case of fraud and conspiracy has been made out, and that *prima facie* any judgment that may be obtained will be very difficult to collect if it is not secured. The plaintiff contends that nothing prevents the Court from ordering relief against disposition of assets or security for punitive damages and special costs in the circumstances, and that the balance of convenience warrants such an order.

[22] I find it difficult to conceive of circumstances where a court would make an order enjoining disposition of assets in connection with either punitive damages or special costs. Given the onus on the plaintiff and the degree of discretion involved, a case would have to be very clear – I think virtually unanswerable – before a court could responsibly make such an order without creating a fatal appearance of pre-judgment.

[23] For this reason, I do not think it necessary to address the defendants' contentions based on the quality of proof of the estimates of punitive and exemplary damages and special costs that has been offered, although these are serious

issues. I simply do not think punitive damages and special costs can be secured in the circumstances.

[24] That leaves the claims for damages and costs related to the *Rowbotham* hearing. The defendants have arguments respecting whether the costs and expenses related to that proceeding should be dealt with in this proceeding. I am satisfied, however, that the allegation that the *Rowbotham* hearing was a step in an ongoing series of collaborative attempts to hinder the recovery of the plaintiff's claims means that, at this juncture, it is arguably an issue to be tried in this proceeding. I am also satisfied that although the rationale for the injunction changed in the Court of Appeal from one based on a *prima facie* case of fraud, to one based in trust or an equitable change, the injunction itself remains in place. As a result of the decision in the Supreme Court of Canada the rationale for the original grant of the injunction has been shown to be viable, and the *Rowbotham* evidence would be available to inform this Court's present consideration of whether the injunction should continue, or on what terms it should be replaced or released.

[25] I note again that Stromberg-Stein J.'s findings of fact in the *Rowbotham* application have not been put in issue. None of the defendants have identified how, or with respect to which findings of fact they contend Stromberg-Stein J. was wrong, such that those facts may be relitigated in this proceeding. For reasons articulated in the original grant of the injunction and in the hearing to set it aside, the injunction continues as against Mr. Malik to the extent of that part of the claim and costs, subject to its replacement by adequate security.

[26] Although I am dealing only with estimates of the value of those claims, it appears that they may total something in the range of \$300,000. Inasmuch as there will be more than that in the amount held back from the sale and the conveyance approved on February 23, 2012, the payment into court, or into a trust account satisfactory to the plaintiff of \$300,000, will serve as sufficient security to discharge the injunction against Mr. Malik's assets. The balance of the funds held may be paid out to him or as he directs.

[27] Costs will be in the cause.

“McEwan J.”

The Honourable Mr. Justice McEwan