

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***British Columbia (Attorney General) v. Malik***,
2009 BCSC 603

Date: 20090501
Docket: S077088
Registry: Vancouver

Between:

**Her Majesty the Queen in Right of
the Province of British Columbia as represented by
The Attorney General for 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.,
0760887 B.C. Ltd., and 0772735 B.C. Ltd.**

Defendants

Before: **The Honourable Mr. Justice McEwan**

Reasons for Judgment

Counsel for the Plaintiff:

F.G. Potts
R.N. Hamilton

Counsel for the Defendant, Ripudaman Singh Malik:

B.E. McLeod

Dates and Place of Trial/Hearing:

March 10 and 19, 2009
Vancouver, B.C.

[1] The plaintiff seeks, by way of summary trial under Rule 18A, that:

1. Judgment be granted in favour of the Plaintiff as against the Defendant, Ripudaman Singh Malik, in debt in the amount of Five Million Two Hundred Thousand One Hundred and Thirty Two Dollars (\$5,200,132.51) and Fifty One Cents plus prejudgment interest in the amount of Six Hundred and Forty Nine Thousand, Nine Hundred and Sixty Three Dollars (\$649,963.61) and Sixty One Cents calculated from May 2, 2005 until January 29, 2009, for a total judgment of Five Million Eight Hundred and Fifty Thousand and Ninety Six Dollars (\$5,850,096.12) and Twelve Cents;

2. The Judgment granted herein be without prejudice to the Plaintiff's further claims against the Defendant, Ripudaman Singh Malik, and/or the other Defendants in this action;
3. Costs.

[2] The hearing of this matter proceeded on January 29 and 30, 2009, and resumed on March 19, 2009, by way of an application by the plaintiff to re-open to tender an additional affidavit and to submit an authority decided since the January hearing, and to make submissions on those matters.

[3] The summary trial application was heard at the same time as an application to strike out certain parts of the pleadings. In reasons released under 2009 BCSC 595, I dealt with the pleadings matters first. The defendant, Ripudaman S. Malik (hereinafter "the defendant" because he is the only defendant concerned in this application) had objected to hearing both matters at the same time, on the basis that until the pleadings were settled, it was premature to proceed with the summary trial. He submitted that this was because the plaintiff had not completed document production consequent upon the pleadings as they then stood. I was of the view that any prejudice to proceeding with submissions on both issues could be addressed, if necessary, once I had ruled on the pleadings. Having done so, I am prepared to rule on the 18A.

[4] The plaintiff's claim is for advances made pursuant to two agreements with the defendant, an "Interim Funding Agreement" and a "Defence Counsel Agreement". Both related to payment of counsel fees for what is called the "Air India" trial.

[5] The defendant opposes the application on the basis that the court should decline to give judgment if it is unable to find the necessary facts or if it would be unjust in the circumstances to do so.

[6] The defendant asserts that the contract is void or voidable on the basis of duress. The reasons on the pleadings issues set out why the defendant's pleading of duress was struck. He has not placed before the court any material supportive of such a plea, or addressing the several indices of duress canvassed in those Reasons. Duress is not, therefore, a basis upon which this application can be opposed.

[7] The second basis upon which the summary trial application is opposed is the failure of the plaintiff to produce a list of documents responsive to the issues raised in the pleadings as they were then constituted. The ruling on the pleadings' motion has significantly reduced the documentary scope of the case.

[8] The question of whether it is premature for the plaintiff to seek relief on a summary trial given the absence of a list of documents on all aspects of the case must be assessed in light of the law that was developed in recognition of the purposes of summary trial. It is open for the court to grant judgment on a discrete issue on a summary trial even though all discoveries of documents and parties have not been completed, if it is just to do so. The rule is explicit: "a party may apply to the court for judgment, either on an issue, or generally....". The question is really whether, on an issue, the court can find the facts as it would upon a trial. If so, it should give judgment unless it would be unjust to do so (see: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at pp. 214-215).

[9] Caution has been expressed in some contexts respecting "litigating in slices"; particularly where there appears to be a possibility that facts developed in the course of proving or disproving the remaining issues may cast a different light on those that have been found on the summary trial. Where, however, the issue appears to stand on its own and the evidence necessary to decide is available, the question of whether there has been disclosure of the evidence in the whole case will not prevent the application of Rule 18A (see: *Zaidenberg v. Hamouth*, 2005 BCCA 356 at paras. 10-14; *B.M.P. Global Distribution Inc. v. Scotiabank*, 2002 BCSC 1508; *British Columbia Ferry Corp. v. T&N plc*, (1996) 16 B.C.L.R. (3d) 115 at paras. 16-24).

[10] Here, there are formal Admissions that Mr. Malik entered into the agreements. The amount of advances of \$5,200,132.51 has been established by affidavit evidence. The defendant has not filed material disputing the amounts, or establishing a defence to the amounts claimed.

[11] On October 17, 2003, in a "Payment Agreement" that was the subject of other proceedings before this Court (2008 BCSC 1033), the defendant acknowledged that he had received a benefit from the plaintiff, and that he was obliged to pay to the extent he was able:

- A. By Agreement dated for reference 1 February 2002 amongst the Attorney General, Crossin, Smart & Williams, Barristers & Solicitors, Donaldson Jette, Barristers & Solicitors (the lawyers collectively referred to as "Counsel") and Malik (the agreement hereinafter referred to as the "Defence Counsel Agreement"), the Attorney General agreed to pay Counsel fees and disbursements with respect to legal services rendered by Counsel relating to the defence of Malik who is presently charged with first degree murder and related offences.
- B. Malik received a benefit from the Attorney General pursuant to the Defence Counsel Agreement in the form of a payment of his legal fees and disbursements by the Attorney General.
- C. Recital E of the Defence Counsel Agreement states as follows:
- Ripudaman S. Malik has agreed to transfer to Her Majesty the Queen in Right of the Province of British Columbia or on Her Majesty's direction all of his right, title and interest in and to all of his property, real or personal, and to cooperate fully in the identification and transfer of that property and the assertion in favour of Her Majesty of those rights, title and interest.*
- D. On an application before the Honourable Madam Justice Stromberg-Stein made in an action commenced out of the Supreme Court of British Columbia, Vancouver Registry, under Docket No. CC01 0287, Malik applied to the Court for Charter Relief by way of a "Rowbotham Order" in aid of his constitutional right to a fair trial. Madam Justice Stromberg-Stein provided Reasons on the application made by Malik and in dismissing Malik's application for "Rowbotham funding" the learned Judge made the following findings:
- [Mr. Malik] has demonstrated he is in a position to pay some of the costs of his defence. As well, he has demonstrated he can look to the income and assets of his spouse and family.*
- It is in the interests of justice that this trial into the deaths 18 years ago of many innocent people continues to an orderly conclusion. Nothing in this judgment precludes an agreement between the Attorney General and Mr. Malik for interim funding with appropriate security.*
- E. Malik acknowledges that he has an obligation to commit all of his own financial resources to his defence and to contribute towards the public funds advanced for his defence to the extent that he is able.
- F. Malik asserts that
- (i) he is unable to fund his defence to the end of the trial from his own financial resources;
 - (ii) the assets presently in his name may not be sufficient to cover the anticipated legal defence costs to the end of the trial;
 - (iii) due to the complexity of the trial proceedings, he is unable to defend himself personally and requires the assistance of a team of lawyers led by senior counsel to prepare for and conduct his defence.

[emphasis added]

[12] There is, therefore, no dispute that the agreements were entered into, that money was advanced by the plaintiff on behalf of the defendant under those agreements, and that the plaintiff has acknowledged an obligation to repay that money.

[13] The defendant has not raised any defence as to amount in his pleadings or by way of any affidavit material. The only issue that arose in the course of the hearing was a question of proof.

[14] That question was raised by counsel for the defendant. He noted that in an affidavit sworn January 15, 2009, Annette Gibbons, the financial officer in the Assistant Deputy Minister's Office of the Justice Services Branch of the

Ministry of the Attorney General, who was, in her previous capacity as office manager in the Legal Access Policy Division, the person responsible for administering the defendants funding arrangements, deposed as follows:

2. In my former capacity as the Office Manager of the Legal Access Policy Division of the Justice Services Branch of the Ministry of the Attorney General, I administered the defence counsel funding arrangements for Mr. Malik's defence counsel as provided for in a series of funding and payment agreements executed between Mr. Malik, his defence counsel, and the Ministry of the Attorney General. I did so under the supervision of George Faddis, legal counsel with the Ministry of the Attorney General.
3. Briefly stated, the process put in place for payment of the accounts rendered by Mr. Malik's defence counsel during the Air India prosecution, was that initially the defence counsel would render their accounts directly to the Ministry of the Attorney General for payment. Subsequently a Reviewer was appointed pursuant to a Review Agreement. The Reviewer would review the defence counsel's accounts to ensure that they complied with the funding and payment agreements, and then he would issue Reviewer's Certificates stating that the defence counsel were entitled to the payment as set out in the Reviewer's Certificates.
4. My duties included receiving the Reviewer's Certificates and generating payment for those Certificates. I also ensured that the approved amounts for payment conformed to the terms of the funding and payment agreements and conformed to government corporate policy.
5. Actual payment of the fees and disbursements of Mr. Malik's defence counsel was effected by advancing the defence counsel funds and then reconciling the Reviewer's Certificates against the funds that had been advanced. I was responsible for and did, in fact, advance the funds to the defence counsel and I reconciled those advances against the Reviewer's Certificates. I managed this funding and payment arrangement on financial spread sheets which I maintained.
6. In late 2005, I was asked to prepare a binder which was to include all of the source documents that established the total amount of money paid to Mr. Malik's defence counsel for their fees, disbursements, and taxes incurred between November, 2001 and September 18, 2003. In preparing that binder, I compiled all of the defence counsel's initial accounts that were submitted for payment prior to the appointment of the Reviewer along with confirmation from our computerized accounting system that the invoices were paid. I also compiled all of the Reviewer's Certificates that were submitted for payment by the Reviewer on behalf of Mr. Malik's defence counsel.
7. Once I had prepared the binder, I created a two page Summary Sheet cross referenced to the source documents in the binder. The two page Summary Sheet accurately sets out all of the payments made by the Ministry of the Attorney General to Mr. Malik's defence counsel for their services rendered over the period of time from November, 2001 until September 18, 2003. Now shown to me and marked as Exhibit "A" to this my Affidavit is a true copy of the Summary Sheet I prepared.

[15] The summary sheet showed that there was no certificate attached for approximately 20 of the accounts. Counsel for the defendant then referred to the terms of the Defence Counsel Agreement requiring a certificate in order to pay advances. This, he submits, means that on the face of the material upon which the plaintiff relies in asserting entitlement to judgment, material documents are missing, quite apart from those arising in relation to the matters that have lately been struck out.

[16] It was this issue that was the subject of the application to reopen the 18A summary trial brought March 19, 2009.

[17] In a brief appearance a week or so before the hearing of this matter counsel for the defendant suggested that the test for reopening might be more stringent on an 18A application than on a conventional trial. No authority was advanced for that proposition at the hearing, and I am of the view that the rule is as set out in **Clayton v. British American Securities Ltd.**, [1934] B.C.J. No. 4; [1935] 1 D.L.R. 432; [1934] 3 W.W.R. 257; 49 B.C.R. 28, per Macdonald J.A. at para. 130:

Before entry of judgment the trial judge has power to reopen the trial unfettered by any rules as to diligence, conclusiveness or otherwise and the Appellate Court cannot review that decision.

[18] **Clayton** was a case where Reasons for judgment had been delivered but formal judgment had not been entered. The application in this case comes before reasons have been released. The application relates to an argument that had no correlation in any material filed. The defendant did not suggest that he was confused by the issue of uncertified accounts. I do not think any theory of lack of due diligence in putting a case before the court would extend so far as to cover a matter not understood to be contentious that may readily be explained once it is questioned.

[19] The “new” material offers an explanation respecting the “uncertified” accounts. In an affidavit sworn February 9, 2009, Ms. Gibbons explains:

5. The binder of documents breaks down into the following two different categories;

- (a) Accounts paid pursuant to the Reviewer’s Certificate; and
- (b) Accounts paid with no Reviewer’s Certificate.

(a) Accounts paid pursuant to the Reviewer’s Certificates

6. In respect of the accounts that were paid by the Plaintiff pursuant to the Reviewer’s Certificates, the process was very simple. The Reviewer would obtain a copy of the defence counsel’s account and review it to ensure that it complied with the funding agreements.
7. Following that review, the Reviewer would prepare his Certificate and attach to the Certificate a redacted copy of the defence counsel’s account. Upon receipt of the Reviewer’s Certificate and the attached redacted account, the account was processed by me for payment and the amounts set out in the Reviewer’s Certificate were in fact paid.
8. When I prepared the binder of documents in respect of these accounts, I did not include in the binder a copy of the redacted account that was attached to the Reviewer’s Certificate. However, the Plaintiff has kept a copy of all of the Reviewer’s Certificates with the attached redacted accounts in what I estimate to be 8-10 bankers boxes in Victoria. The original accounts without the information redacted would presumably be available from Mr. Malik’s defence counsel.

(b) Accounts with no Reviewer’s Certificates

9. I took a slightly different approach when compiling the document binder in respect of the accounts that were not reviewed by the Reviewer.
10. On the summary sheet that was attached as Exhibit “A” to my Affidavit #1 there are a total of 23 payments that were made without a Reviewer’s Certificate. Each of these payments relates to an invoice or invoices that were received from Mr. Malik’s defence counsel.
11. In these cases, what happened was Mr. Malik’s defence counsel submitted redacted accounts for payment directly to the Ministry of the Attorney General. Those redacted accounts included amounts for fees, receipts for the disbursements claimed, or those receipts were provided separately, and taxes.
12. In preparing the binder of documents with respect to these accounts, with the exception of one payment, I included the following information:
- (a) The letter from Mr. Malik’s defence counsel submitting the account;
 - (b) A copy of the redacted account or simply the last page of the redacted account; and
 - (c) A copy of the computer screen print showing that the account had been paid and the amount paid by the Plaintiff for that account.
13. The one exception of the payments in this category was made following a telephone

conversation I had with the office manager of Crossin Coristine concerning payments for the Searchlight program that was used by defence counsel. During that conversation we determined that a disbursement for server rent was still due and owing, and that certain amounts for PST were still due and owing. I drafted a memo following our telephone conversation and included that memo in the binder of documents I prepared along with the computer screen print showing that the payment had been made. Now shown to me and marked as Exhibit "A" to this my Affidavit is a true copy of the memo and computer screen print which was included in the binder I prepared.

14. When I prepared the binder of documents with respect to these accounts I did not include the complete redacted copy of all of the accounts due to the volume of paper involved. However, the Plaintiff has kept a copy of all of these accounts submitted for payment along with the letters from Mr. Malik's defence counsel, and the receipts submitted for payment of the disbursements. These documents are included in the estimated 8-10 bankers boxes referred to in paragraph 8 above. The original accounts without the information redacted would presumably be available from Mr. Malik's defence counsel.
15. In summary, all of the payments made by the Plaintiff that are listed on the summary sheet attached as Exhibit "A" to my Affidavit #1 were paid pursuant to an invoice from Mr. Malik's defence counsel either submitted with a Reviewer's Certificate or submitted for payment directly to the Ministry of the Attorney General by Mr. Malik's counsel. I verily believe that aside from the redacted accounts, Reviewer's Certificates, correspondence from Mr. Malik's counsel, and the computer screen prints showing payment of the accounts, the only other documents relating to the payments made by the Plaintiff to Mr. Malik's defence counsel would be confirmation of the electronic transfer of those funds or copies of the Plaintiff's cancelled cheques. Our office, however, would not have received copies of the cancelled cheques.

[20] I am satisfied that the interests of justice are served by receiving this evidence and I grant the plaintiff's application to reopen its case to put this material before the court.

[21] The defendant has not filed any material in response.

[22] With this matter dealt with, there is no issue casting doubt on the amount claimed. There will therefore be judgment in favour of the plaintiff against the defendant Ripudaman Singh Malik in the amount of \$5,200,132.51 plus pre-judgment interest from May 5, 2005 to January 29, 2009 of \$649,963.61, or \$5,850,096.12 together with interest accrued after January 29, 2009 at registrar's rates.

[23] As requested in the Motion, the judgment is specifically without prejudice to any other claims arising in this action by the plaintiff against the defendant Ripudaman Singh Malik on the other defendants in this action.

[24] The plaintiff is entitled to costs.

"McEwan J."

The Honourable Mr. Justice McEwan