COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia (Attorney General) v. Malik,* 2012 BCCA 58

Date: 20120203
Dockets: CA037169; CA037170

Between:

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

Respondent
(Plaintiff)

And

Ripudaman Singh Malik

Appellant
(Defendant)

Before: The Honourable Madam Justice D. Smith
(In Chambers)

On appeal from: Supreme Court of British Columbia, May 1, 2009
(*British Columbia (Attorney General) v. Malik,* 2009 BCSC 595,
Vancouver Docket No. S077088)

Counsel for the Appellant:	B.E. McLeod
Counsel for the Respondent:	F.G. Potts J. Gopaulsingh
Place and Date of Hearing:	Vancouver, British Columbia December 1, 2011
Place and Date of Judgment:	Vancouver, British Columbia February 3, 2012

Reasons for Judgment of the Honourable Madam Justice D. Smith:

[1] The respondent, Her Majesty the Queen in Right of the Province of British Columbia (the "Province"), has filed two notices of motion seeking orders in each of two appeals, CA037169 and CA037170, filed by the appellant, Ripudamen Singh Malik, on May 29, 2009 (the "Appeals"). The Appeals are from two orders of Mr. Justice McEwan issued on May 1, 2009. CA037170 is from an order striking portions of Mr. Malik's statement of defence (the "Pleadings Appeal"); CA037169 is from an order following a summary trial where the Province was granted judgment against Mr. Malik for $5,869,759.90 in debt (the "Debt Appeal"). The Province's motions each seek an order that Mr. Malik's appeal from the underlying order be dismissed as abandoned, or in the alternative, that Mr. Malik post security for costs of the appeal within a certain period, failing which the appeal shall be stayed.

Background

[2] The underlying action brought by the Province on October 23, 2007, relates to a claim in debt against Mr. Malik, for recovery of sums paid by the Province on behalf of Mr. Malik for his defence in what is commonly known as the "Air India" trial. The advances were made pursuant to a series of funding agreements that required Mr. Malik to repay the Province, but allowed time for an orderly liquidation of assets to do so while at the same time permitting the prosecution to proceed. The advances were disbursed in the context of an express finding by a chambers judge in 2003 that Mr. Malik did not qualify for state funding because resources were available to him to fund his own defence, despite his claim that his net worth was "zero": *R. v. Malik,* 2003 BCSC 1439 (the "*Rowbotham* decision"). In 2005 Mr. Malik was acquitted of the criminal charges against him in the "Air India" trial: 2005 BCSC 350.

[3] The Province's statement of claim alleges that the sums advanced pursuant to the funding agreements were not repaid by Mr. Malik. It further alleges that Mr. Malik and several of his family members fraudulently conspired to avoid, or to assist Mr. Malik in avoiding, his responsibilities under the funding agreements and to

frustrate the Province's recovery of the advances by placing assets in the names of family members.

[4] Mr. Malik acknowledges he received the funds from the Province pursuant to the funding agreements. In his statement of defence, however, he claims that the agreements were executed under duress and are therefore voidable. He also claims entitlement to a stay of proceedings or an equitable set-off of the sums advanced upon a determination of any damages owed to him in a separate action he commenced against the Province for malicious prosecution and duress (the "New Westminster action").

[5] At the commencement of the Province's debt action, McEwan J. granted an *ex parte* application by the Province for a *Mareva* injunction and an *Anton Piller* order against Mr. Malik and the family members. The October 23, 2007 order restricted their ability to deal with Mr. Malik's assets, but granted liberty to apply to vary or set aside the orders on notice to the Province. Paragraph 2 of the order required Mr. Malik to make full and complete disclosure of his assets (inside or outside of the jurisdiction), including any held jointly or in trust on his behalf. To date, Mr. Malik has not complied with that disclosure order.

[6] In January 2008, Mr. Malik and the family members applied to set aside both orders. In reasons issued on July 31, 2008, McEwan J. dismissed their applications: *British Columbia (Attorney General) v. Malik,* 2008 BCSC 1027. On appeal, this Court upheld the *Mareva* injunction but set aside the *Anton Piller* order: *British Columbia (Attorney General) v. Malik,* 2009 BCCA 201. The Province applied for and was granted leave to appeal to the Supreme Court of Canada from the decision setting aside the *Anton Piller* order (the "SCC Appeal").

[7] During this period there were additional applications in the court below. In January 2009, the Province applied pursuant to Rule 19(24) (now Rule 9-5(1)) for an order striking certain paragraphs of Mr. Malik's statement of defence. The Province submitted that Mr. Malik's defence to the debt action failed to plead any material facts to support his allegations of malicious prosecution and duress, or his claim for

equitable set-off of any damages he might receive in the New Westminster action. The Province also applied for summary judgment pursuant to Rule 18A (now Rule 9-6) in relation to its debt claim.

[8] On May 1, 2009, McEwan J. granted an order striking out those paragraphs of Mr. Malik's statement of defence that related to his claims of malicious prosecution, duress, and set-off in the New Westminster action: *British Columbia (Attorney General) v. Malik,* 2009 BCSC 595. That decision gave rise to the Pleadings Appeal.

[9] In the same order, but in separately issued reasons, McEwan J. allowed the Province's summary trial application and granted the Province judgment against Mr. Malik in the amount of $5,200,132.51, plus pre-judgment interest for a total of $5,869,756.90: *British Columbia (Attorney General) v. Malik,* 2009 BCSC 603. In those reasons he found "no dispute that the agreements were entered into, that money was advanced by the plaintiff [Province] on behalf of the defendant [Malik] under those agreements, and that the plaintiff [*sic*] has acknowledged an obligation to repay that money": para. 12. That decision gave rise to the Debt Appeal.

[10] Mr. Malik filed notices of appeal in both Appeals on May 29, 2009. At the same time he filed a notice of application for leave to appeal and a motion seeking directions whether leave was required in the Pleadings Appeal. That application was adjourned by consent on July 15, 2009 and no steps have been taken to reset the hearing of that application.

[11] Thereafter, the parties entered into various agreements pending the Province's appeal; the Province agreed not to take any steps to execute on its judgment, while Mr. Malik and the family members agreed to take no steps to secure the return of certain documents and hard drives (seized pursuant the *Anton Piller* order) pending the outcome of the SCC Appeal (the "Standstill Agreements").

[12] On May 31, 2010, while the Standstill Agreements were in effect, the Appeals were placed on the inactive list pursuant to s. 25 of the *Court of Appeal Act* (the

"*Act*"). On September 13, 2010, the parties entered into consent orders to remove the Appeals from the inactive list. Each of the consent orders stipulated that "the time limit for taking the next step required by the *Court of Appeal Act* or *Court of Appeal Rules* must commence to run as of the date that is two weeks following the date on which the Supreme Court of Canada gives judgment in [the SCC Appeal]".

[13] That decision was rendered on April 21, 2011: *British Columbia (Attorney General) v. Malik,* 2011 SCC 18, [2011] 1 S.C.R. 657. The Supreme Court of Canada allowed the Province's appeal and restored the *Anton Piller* order based on a finding "that the Province had made out a strong *prima facie* case to establish Mr. Malik's debt and the [family members'] conspiracy to defraud the Province and to assist Mr. Malik to avoid his obligations under the [funding agreements]": para. 55. That finding was based, in part, on the evidence and findings of the chambers judge in the *Rowbotham* decision: paras. 49-52, and 54-55.

[14] Following that decision, in accordance with the Standstill Agreements, the time limits for Mr. Malik to take the next steps required to prosecute the Appeals began to run on May 5, 2011. Under s. 25(4) of the *Act*, when those steps were not taken within 180 days, the appeal was returned to the inactive list. If the Appeals remain on the inactive list for a further 180 days, on the 181st day (April 30, 2012) they will stand dismissed as abandoned per s. 25(5).

[15] Between October 23, 2007 and July 15, 2010, Mr. Malik obtained a number of variations of the *Mareva* injunction that gave him access to a total of $525,000 for legal fees and representation. On May 24, 2011, he applied for a further variation of the injunction to allow him to access an additional $150,000 for legal expenses. Justice McEwan adjourned his application (rather than dismiss it) on the grounds that Mr. Malik had yet to comply with the October 23, 2007 financial disclosure order. Mr. Malik has never re-set the May 24, 2011 application or made the disclosure ordered.

[16] On August 5, 2011, the *Mareva* injunction was varied by consent to permit the listing for a sale of an office building situated at 1028 Hamilton Street in Vancouver

(the “Property”). Mr. Malik owns a half interest in the Property; the other half interest is held by Mr. Malik’s wife. In addition to the Province’s debt judgment, the Property is subject to three mortgages from family members totaling $1,601,100.12, which are also the subject matter of litigation.

[17] On November 8, 2011, Mr. Malik executed a contract of purchase and sale for $14,525,000 with a completion date of February 28, 2012. The Province consented to the sale of the Property on the condition that the sale proceeds would be held in trust until matters between the Province and Mr. Malik are resolved. The net proceeds of sale for Mr. Malik’s 50% interest, before the disputed three mortgages, are estimated at $7,171,718.75. If the mortgages are found to be valid, Mr. Malik’s net proceeds of sale after the payment of the loans is estimated at $5,570,618.64.

[18] While these applications relating to the *Mareva* injunction were taking place, on September 9, 2011, counsel for the Province wrote to counsel for Mr. Malik advising him that the Standstill Agreement had expired. By October 28, 2011, Mr. Malik had still not served counsel for the Province with the requisite materials in the Appeals, including the appeal records, factums and appeal books. Nor had counsel for the Province been served with a motion book for the leave to appeal application in the Pleadings Appeal. On November 2, 2011, the Appeals were returned to the inactive list. No application has been filed to remove the Appeals from the inactive list.

The motion to dismiss the Appeals as abandoned

[19] Section 10 (2)(e) of the *Court of Appeal Act* provides that:

> 10(2) In an appeal or other matter before the court, a justice may do one or more of the following:
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> ...
>
> (e) dismiss an appeal as abandoned where the appellant has failed to comply with a provision of this *Act* or the rules or an order extending or shortening time;

[20] Where the delay has been for less than a year, as in the case at bar, the appropriate test is the one set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 (C.A.) at 260:

> First, was there a bona fide intention to appeal? Second, when were the respondents informed of the intention? Third, would the respondents be unduly prejudiced by an extension? Fourth, is there merit in the appeal? And fifth, is it in the interest of justice that an extension be granted? ... The fifth question I think to be the most important as it encompasses the other four questions and states the decisive question.

[21] Recent jurisprudence suggests that it is appropriate to consider whether an appeal has any chance of success when deciding whether to dismiss the appeal as abandoned. In *Rainbow Country Estates Ltd. v. Whistler (Resort Municipality),* 2011 BCCA 154 at para. 15, Mr. Justice MacKenzie, for the Court, stated, "[t]he interests of justice are interdependent with the other *Davies*' rules and cannot support an appeal with no merit." See also *K & M Crane and Equipment Rentals Ltd. v. Deer Trail Development Ltd.,* 1999 BCCA 676 at para. 7 and *Biomet Mining Corp. v. NTBC Research Corp.,* 2002 BCCA 159 at para. 4.

Discussion

Intention to appeal

[22] Counsel for Mr. Malik, citing *Frew v. Frew (*1990), 44 C.P.C. (2d) 34, contends that the requirement to demonstrate an intention to appeal is not relevant where the delay has been over a year. In those circumstances, he submits the focus of the inquiry is solely on the interests of justice. With respect, I cannot agree.

[23] *Frew* was a review of an order of a chambers judge that dismissed an appeal as abandoned as a result of a finding of inordinate and unexplained delay of over a year. Chief Justice McEachern, speaking for the majority in dismissing the review application, offered the following comments (at para. 10):

> I think the tests for this sort of thing are that there must first be inordinate delay; secondly, the delay must be unexplained or inexplicable; and thirdly, there must be prejudice. In my view, the only question here is whether there is prejudice. It seems to me that a delay of the nature we are concerned with

> in this case, of over a year after the matter is brought to the attention of the parties in the way that it was, must lead to prejudice in the failure of the parties to have their rights settled in a timely and reasonable way by the procedures that are provided by the Rules of Court and by the Statute.

[24] The test in *Frew* has not been applied in circumstances where the delay at issue was less than a year. While the unique circumstances of this case make it difficult to categorize the length of delay, in my view the only fair reading of the consent order is that the relevant period of delay is that commencing on May 5, 2011. The order provided that the time limit for "taking the next step" required by the *Act* or *Rules* would commence two weeks after the decision in the SCC Appeal was released. Mr. Malik's obligations to prosecute the Appeals did not therefore arise until that time and as such it cannot be said that there was any delay before that date. In finding that the period of delay for determining whether the Appeals should be dismissed as abandoned is less than a year, I find it unnecessary to address Mr. Malik's argument that the *Davies* factors are irrelevant where the delay is longer than a year.

[25] Counsel for the Province contends that, regardless of which period of delay is considered, Mr. Malik has failed to demonstrate any *bona fide* intention to pursue the Appeals. Counsel submits that Mr. Malik has taken no action to prosecute the Appeals since they were filed, or since the Standstill Agreements expired, even after receiving the Province's September 9, 2011 letter advising him that the Standstill Agreements had expired. More significantly, he has offered no explanation for his dilatoriness nor provided any affidavit evidence from himself as to his *bona fide* intention to pursue the Appeals or with regard to the merits of the Appeals. Nor has he filed an application to remove the Appeals from the inactive list or set down a motion for leave to appeal the Pleadings Appeal.

[26] The Province has provided evidence of at least eight other actions commenced by Mr. Malik between January 18, 2008, and May 4, 2011, including claims against the Attorney General of British Columbia, the Attorney General of Canada, a CBC journalist, and a former politician. All of this unrelated litigation, the Province submits, demonstrates an apparent ability by Mr. Malik to access monies to

fund litigation; Mr. Malik provides no explanation for why he is unable to do the same in prosecuting the Appeals.

[27] Counsel for the Province further submits that Mr. Malik also has the ability to re-set his May 24, 2011 application before McEwan J. to vary the *Mareva* injunction. Counsel for Mr. Malik acknowledged in submissions that Mr. Malik is not inclined to do so as he is unlikely to be successful. I agree with that assessment. In my view, as was made clear by McEwan J. when he adjourned Mr. Malik's application, the reason Mr. Malik is not likely to be successful is because he has consistently failed or refused to comply with McEwan J.'s October 27, 2003 order, requiring him to provide the full and complete financial disclosure. In effect, Mr. Malik is seeking assistance in this application by ignoring the obvious remedy for his stated lack of funds to pursue the Appeals; to do so, however, would condone his ongoing contempt of the terms of the *Mareva* injunction, an order which this Court upheld on appeal. With respect, such a submission is untenable.

[28] In the absence of any evidence from Mr. Malik to explain his failure to prosecute the Appeals or to set out a plan and schedule for their prosecution, I am unable to find that he has a *bona fide* intention to pursue the Appeals.

Prejudice

[29] While the time for calculating the delay in prosecuting the Appeals may be extended to May 5, 2011, the criteria for demonstrating whether the Province has suffered prejudice as a result of the delay cannot ignore the fact that it has had an outstanding judgment against Mr. Malik of over $5 million since May 1, 2009. In such circumstances prejudice to the Province may be inferred, although it is not a significant factor in the application as the Appeals have not delayed the related proceedings and are not preventing the Province from executing on its judgment.

Merit

[30] Counsel for Mr. Malik argues the merits of Mr. Malik's claims for malicious prosecution, duress and equitable set-off. However, those claims are the subject matter of other proceedings and can be pursued by Mr. Malik in the New Westminster action.

[31] The Province submits that the Appeals are bound to fail as Mr. Malik has failed to demonstrate any arguable grounds of appeal for either of the orders. I agree. In regard to the Debt Appeal, McEwan J. held that there was no dispute that Mr. Malik had entered into the funding agreements with the Province, and that Mr. Malik had acknowledged an obligation to repay that money. Justice McEwan also found (2009 BCSC 603 at para. 13): "[Mr. Malik] has not raised any defence as to the amount [of the debt] 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." These are findings of fact that, absent palpable and overriding error, which is not alleged by Mr. Malik, are entitled to appellate deference.

[32] In regard to the Pleadings Appeal, McEwan J. found that Mr. Malik had not pled any material facts to support his defence of duress (2009 BCSC 595 at para. 40) or identified any basis for the equitable set-off (para. 67). He concluded that there were no pleadings of material facts, evidence, or submissions to support those portions of Mr. Malik's statement of defence which were struck. Again, these are findings that are entitled to deference absent palpable and overriding error, a misapprehension of the evidence, or an error of principle, none of which have been alleged in any material filed by Mr. Malik.

Interests of Justice

[33] The "interests of justice" is, of course, the overriding factor in any application to dismiss an appeal as abandoned. In my view, this factor is the most compelling in this application.

[34] The findings of the Supreme Court of Canada in the SCC Appeal, in support of its conclusion that the Province had made out a strong *prima facie* case for its claims in debt, fraud, and conspiracy are significant and bear repeating. Writing for the Court, Mr. Justice Rothstein noted the following:

> [54] What the chambers judge termed a very strong "case" included evidence that (1) Mr. Malik owed the Province over $5.2 million; (2) Mr. Malik's net worth had gone from a joint interest (with his wife) in $11,648,439.85 in December 2000 to alleged insolvency in August 2003 with no explanation other than intra-family transfers of assets; (3) Mr. Malik had neither identified nor transferred assets to the Province as he had undertaken to do; (4) the Malik family has made numerous transfers of assets including luxury vehicles and Mr. Malik's $72,000 income tax refund, in violation of a court order not to dispose of any assets (this amount was belatedly repaid to the Province); (5) the particular transfers of property within the family up to the time of the *Rowbotham* hearing had been examined judicially in the course of that proceeding; (6) the pattern of shuffling assets within the family and loading the remaining assets with debt continued after the *Rowbotham* application in respect of Mr. Malik's home at 6475 Marguerite street and the commercial property on Hamilton Street, where some of the mortgages ranging in priority to the Province's claim had been shuffled back to a Malik family company, 0772735 B.C. Ltd., in an effort to obtain priority over the Province's claim. These mortgages had a combined value of about $1.9 million; (7) the circumstances of the transfers raised a legitimate concern that their purpose was to facilitate Mr. Malik escaping his financial obligations under the agreements for defence funding that he had entered into with the Province; (8) Jaspreet played an active role in attempting to obtain a default judgment against his father at the suit of his uncle Gurdip Malik on a $330,000 loan that was not due for another year; (9) the intra-family transactions included a security interest registered by Jaspreet in favour of Gurdip Malik against Mr. Malik's shares in Khalsa, a company that owned a $3 million hotel, one year before the $330,000 loan was due and one month after Tysoe J. ordered Mr. Malik not to dispose of or encumber any of his assets; and (10) the Malik children claimed unpaid wages in the amount of $260,000 that had never been recorded or claimed before Mr. Malik's legal troubles.

[35] In all of the circumstances, including a failure by Mr. Malik to demonstrate any *bona fide* intention to pursue the Appeals, no apparent merit to the Appeals, and Mr. Malik's history of attempting to defraud the Province and admitted contempt of court orders, in my view it would not be in the interests of justice to grant an extension of time to Mr. Malik for the filing of the requisite appeal materials.

[36] In my view the interests of justice support an order dismissing the Appeals as abandoned. I would grant the applications by the Province and dismiss both Appeals as abandoned.

"The Honourable Madam Justice D. Smith"