IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***British Columbia (Attorney General) v. Malik,***
2009 BCSC 595

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:	January 29 and 30, 2009 Vancouver, B.C.

I

[1] The plaintiff applies for an order striking out certain paragraphs in the Amended Statement of Defence of Ripudaman Singh Malik (the defendant).

[2] This action concerns the recovery of sums paid by the plaintiff on behalf of the defendant for his defence in what is often called the “Air India” case. These advances were made pursuant to a series of funding agreements which required the defendant to repay the plaintiff, but allowed time for an orderly liquidation of assets to do so, while at the same time permitting the prosecution to proceed. The context of these advances includes an explicit finding by the court in 2003 that the defendant did not qualify for state funding because resources were available to fund his own defence.

[3] The defendant was acquitted of the charges against him in March 2005. In March of 2007 he initiated proceedings against the plaintiff for malicious prosecution and other relief in an action filed in New Westminster.

[4] The plaintiff commenced these and related proceedings in October 2007, claiming that sums advanced pursuant to the funding agreements had not been paid, and alleging that the defendant and others had made arrangements to avoid or to assist the defendant in avoiding his responsibilities under the agreements, and to frustrate recovery of the advances.

[5] The defendant's answer in this proceeding is to claim that the agreements were executed under duress and are voidable, and to claim entitlement to a stay or an equitable set-off of the sums advanced upon a determination of the damages, if any, owing to him in the New Westminster action.

II

[6] The starting point in such an application is Rule 19(24). It provides:

> (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[7] Our courts have repeatedly expressed a strong reluctance to deprive a party of the right to pursue a claim unless it is "plain and obvious" that the pleading discloses no reasonable cause of action (see ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959).

[8] It is often said that the court should not look behind the pleadings to see if there is evidence in support of the claims made. There are some limitations to this general proposition. In ***Operation Dismantle Inc. v. Canada***, [1985] 1 S.C.R. 441 at 455, para. 27, Dickson J. observed:

> …The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.

[9] Respecting Rules 19(24)(b), (c), and (d), ***McNutt v. A.G. Canada***, 2004 BCSC 1113, is a useful summary of the law. There, at paras. 40-42, Allan J. said the following:

> **40** In contrast to the bar prohibiting evidence on the first branch of Rule 19(24), evidence is admissible on an application brought pursuant to Rule 19(24) (b) through (d). Ms. Dickson submits that the statement of claim, which erroneously alleges serious wrongdoing against Ms. Maley, is frivolous, vexatious and embarrassing. A pleading is frivolous if it is without substance, is groundless, fanciful, "trifles with the court" or wastes time: *Borsato v. Basra* (2000), 43 C.P.C. (4th) 96, 2000 BCSC 28. In that case, the defendant's solicitor had filed a statement of defence that Master Baker described as "a triumph in minimalism that would gladden the heart of John Cage." It read as follows: "Except where expressly admitted, the defendants deny the allegations of fact in the Statement of Claim." No admissions were made. Master Baker dismissed the defence as frivolous.

He also found the pleading vexatious and embarrassing.

> **41** A pleading is embarrassing if it does not state the real issue in an intelligible form. It is also embarrassing if it is prolix, includes irrelevant facts, argument or evidence. It is prejudicial if it is constructed in a manner calculated to confuse the defendants and make it difficult, if not impossible, to answer: *Kuhn v. American Credit Indemnity Co.*, [1992] B.C.J. No. 953 (S.C.) (QL). In *Kuhn*, the statement of claim, which was 456 numbered paragraphs in length, consisted of irrelevant facts, argument or evidence. It was almost impossible for the defendant to reply to the document and the facts, even if proven, would not make out the cause of action that the plaintiff sought to advance.
>
> **42** A pleading is an abuse of process if the litigation process is used for an improper purpose; e.g. where the proceedings constitute a sham, where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose: *Babavic v. Babowech*, [1993] B.C.J. No. 1802 (S.C.) (QL); *Drinking Driving Awareness Corp. v. British Columbia* (5 December 2003), New Westminster Registry S78513. In *Babavic*, the Court found that the plaintiffs' action was an abuse of the court's process because it was a vexatious suit without merit brought with the sole motive and intent to harass one of the defendants and interfere with her ability to enforce a judgment. In *Drinking Driving Awareness Corp.*, the Court struck out the plaintiffs' claims against a number of defendants including Her Majesty the Queen, the Premier, the Provincial and Federal Attorney Generals and a Crown counsel. The plaintiffs did not attend the application, which was brought by some, but not all, of the defendants. Madam Justice Koenigsberg found the statement of claim and particulars incomprehensible and incapable of amendment. Invoking her inherent jurisdiction, she dismissed the action in its entirety, even against the defendants who had not brought an application to strike.

[10] Evidence may be addressed with respect to applications under subrules (b) and (d) (see ***347202 B.C. Ltd. v. Canadian Imperial Bank of Commerce***, [1995] B.C.J. No. 449).

[11] In ***Young v. Borzoni***, [2007] B.C.J. No. 105, the Court of Appeal discussed material facts, per Thackray J.A., at para. 20:

> **20** The Rules of the Supreme Court of British Columbia provide as follows:
>
> > 19(1) A pleading should be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.
> >
> > 19(9.1) Conclusions of law may be pleaded only if the material facts supporting them are pleaded.
>
> "Material fact" is defined in *Delaney & Friends Cartoon Productions Ltd. v. Radical Entertainment Inc.*, [2005] B.C.J. No. 573, 2005 BCSC 371 at paragraph 9 as, "one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pleaded."

[12] In ***Babavic v. Babowech***, [1993] B.C.J. No. 1802, this Court, per Baker J., made the following observations respecting abuse of process:

> The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression.

[13] The plaintiff summarizes the law applicable to his motion as follows:

> …[The Defendant] must plead the material facts to support its cause of action. the Court in certain situations can analyze the pleadings to see if they are incapable of proof, and the Court can look at

evidence in determining whether the case is an abuse of process to determine whether the claim is brought with the motive of delaying or hindering legitimate claims, or when it is aimed at a collateral attack of another judgment.

[from the submissions of the plaintiff]

III

[14] With that background in the law, the plaintiff makes specific submissions that the defendant has failed to plead material facts both in respect of the malicious prosecution and the duress aspects of his pleadings.

[15] The pleadings that advert to malicious prosecution read as follows:

Para. #		
5A		In further answer to paragraph 13, Ripudaman says that he commenced action against the Plaintiff by Writ of Summons issued 13 March 2007 in Supreme Court of British Columbia Action No. S104578 (New Westminster Registry) ("Action No. S104578") wherein he claims damages against the Plaintiff for *inter alia* malicious prosecution.
20		As to paragraph 30 of the Amended Statement of Claim, Ripudaman says that but for the ^ Plaintiff's malicious prosecution of Ripudaman, he would not have needed the benefit, the Indemnity Agreement or the DCA, or been forced by duress ^ to grant or enter into any covenant or other agreement including the Payment Agreement.
24		With reference to paragraph 34 of the Amended Statement of Claim, Ripudaman ^ denies acknowledging his indebtedness as alleged. Ripudaman further denies that there is any debt due and owing by him to the Plaintiff after set-offs for damages ^ for malicious prosecution as claimed in Action No. S104578.
26		As to paragraph 36 of the Amended Statement of Claim, Ripudaman ^ denies any fraud whatsoever, and states that any damages suffered by the Plaintiff which are not admitted but expressly denied ^ should be offset against the damages claimed in Action No. S104578.
32		As to paragraph 47 ^ Ripudaman claims an offset of any damages or costs incurred by the Plaintiff against damages awarded to Ripudaman in Action No. S104578. Ripudaman denies any fraud or conspiracy.
Prayer for relief	(d)	Set-off for any amounts awarded to Ripudaman against the Plaintiff in Action No. S104578.
	(e)	An Order for stay of all execution proceedings by the Plaintiff pending final deposition of Action No. S104578.

[16] It is clear from the nature of the defendant's averments that malicious prosecution, does not, on these pleadings, give rise to anything like a defence to the contractual arrangements alleged by the plaintiff. No material facts are pleaded beyond the existence of the other action, the anticipated consequences of success in that action, or, in the "but for" in paragraph 20, an allegation of a nexus possibly relevant to set-off. The relief sought is either a stay or a set-off.

[17] The plaintiff submits that a stay is an application, not a defence that can be the subject of pleadings. In ***Stanley v. KCL West Holdings Inc.***, [2004] B.C.J. No. 2681, Master Keighley addressed an analogous situation where an allegation of abuse of process advanced as a defence:

> **12** … the plaintiff says that the allegations contained in paragraph 16 do not amount to a substantive defence to the plaintiff's claim. He says that the appropriate remedy for a plea of abuse of process is an application for a judicial stay of proceedings and refers to the decision of Macaulay J. in the case of *Lasik Vision Canada Inc. v. TLC Vancouver Optometric Group Inc.*, [2000] B.C.J. No. 1639, in which the learned judge, at paragraph 4 said:
>
> > There is no question that the court has the jurisdiction to stay proceedings that are an abuse of process. However, an abuse of process rarely constitutes an independent cause of action on which a party may sue and does not, on any authority brought to my attention, give rise to a substantive defence to be raised in response to a claim. Instead, where the commencement of an action is an abuse of process, the remedy available to a defendant is a judicial stay of proceedings.
>
> **13** The defendants have referred me to the decisions of this Court and our Court of Appeal, respectively, in *Starbucks Corp v. Second Cup Ltd et al* (1993), 46 C.P.R. (3d) 492 and *Border Enterprises Ltd. v. Beazer East, Inc.*, [2002] B.C.J. No. 1829. These authorities establish the proposition that there exists a separate tort of abuse of process. In both cases, claims were made, rather than defences raised, on the basis on abuse of process allegations. Neither case suggests that abuse of process allegations may form the basis of a defence, as such. The Starbucks case considered whether the facts supporting an abuse of process claim, raised by way of counterclaim, could arise out of the lawsuit itself (as is alleged by this pleading), and left that issue for determination by the trial judge. An amendment may be necessary to bring this issue before the court but, at present, the issue is improperly raised by way of defence. Accordingly, paragraph 16 of the Statement of Defence and Counterclaim will be struck.

[18] The defendant did not specifically address this aspect of the plaintiff's application. I am satisfied that to the extent the malicious prosecution action is imported into this action in aid of a stay, the pleading should be struck as a matter not of defence, but for a proper application on a proper set of materials. There is no prejudice to the defendant in doing so.

IV

[19] The defendant's overall submission that he ought to be relieved of the obligations under the payment agreements until the malicious prosecution action is concluded turns largely on a theory that the two actions are essentially inextricable. This contention takes two forms and involves consideration of distinct factors. The first I will turn to is the issue of "duress" raised in the pleadings. The other is the matter of set-off.

V

[20] "Duress" is pleaded in the statement of defence in the following manner:

Para. #	
9	Further the Plaintiff was fully aware of the duress in which they had placed Ripudaman, particulars of which

include the following:

(a) Commencing 27 October 2000 the Plaintiff imprisoned Ripudaman without bail;

(b) Ripudaman was unable to properly attend to his businesses which directly caused financial loss;

(c) Ripudaman was subjected to extensive negative publicity for his alleged involvement in the Air India disaster, resulting in damage to his reputation, business, and credit, causing further financial loss.

10 The interim Funding Agreement further was obtained by duress and is therefore without force or effect. ^

11 Ripudaman repeats that he was under severe duress at all material times.

12 As to paragraph 20, Ripudaman says that while the Plaintiff may have purported to rely upon misrepresentations made by Ripudaman, it was fully aware that he did not enter into any covenants to pay, was in a state of desperation and under severe duress, as particularized in paragraph 9 above. The Defence Counsel Agreement was obtained by duress and is therefore without force or effect. ^

Alternatively, Ripudaman further says that the Defence Counsel Agreement was not relied upon by the Plaintiff in funding his defence costs, and as well, that the Plaintiff is in breach thereof and cannot rely thereon. Further, in relation to sub-paragraph c) therein, he says that he only agreed to transfer his

estate net of all creditors and not the gross estate.

16 As to paragraph 26 of the Amended Statement of Claim, Ripudaman denies breaching the Restraining Order, and pleads duress. He says he only cashed his savings in order to pay legal counsel. Further, he delivered his entire tax refund cheque of $72,498.81 to the Plaintiff on request.

21 Ripudaman admits paragraph 31 of the Amended Statement of Claim but says he gave the mortgage under duress. ^ He denies that his wife Raminder gave any mortgage security.

[21] Paragraph 9 is clearly intended to suggest that there is a straight line from the situation in which the defendant found himself to avoidance of the consequences of the agreements.

[22] The plaintiff submits that the law requires more than an allegation of difficult circumstances. It submits that for there to be duress there must be some coercion of the will so as to vitiate consent. It relies on ***Ellis v. Friedland***, 2000 ABQB 657 (relying on ***Byle v. Byle*** (1990), 65 D.L.R. (4th) B.C.C.A. 641) at para. 70:

> **70** All categories of duress have the same fundamental requirement – there must be "coercion of the will so as to vitiate consent" (*Byle*, supra at 648, citing the trial decision). In this case, the plaintiff alleges several different forms of coercion.

[23] The plaintiff submits that the particulars identified in para. 9 of the statement of claim are insufficient because there are no facts pled that there was a coercion of the defendant's will. The plaintiff suggests that the court is left to infer from a series of bare assertions in the pleadings that the conditions necessary to establish duress existed, and that this is insufficient.

[24] Courts have specifically found that it is not enough to simply plead circumstances that were distressing (see ***Bossenberry v. Bossenberry***, [1994] O.J. No. 1942; ***Ferguson v. Ferguson***, [2008] B.C.J. No. 199. In the latter case, Hinkson J. made the following observations:

> **54** Although the plaintiff says that she felt pressured by the defendant and his lawyer, she left his lawyer's office and voluntarily returned later the same day to sign the agreement.
>
> **55** The onus is on the plaintiff to prove duress if she wishes to raise it as a defence based on unfairness. Emotional distress on her part is insufficient to prove duress: see *Bossenberry v. Bossenberry* (1994), 6 R.F.L. (4th) 47, 50 A.C.W.S. (3d) 269 (Ont. Ct. Gen. Div.).
>
> **56** The elements necessary to prove duress were described in *Saxon v. Saxon*, [1976] 4 W.W.R. 300, 24 R.F.L. 47 (S.C.) [*Saxon* cited to W.W.R.], aff'd [1978] 4 W.W.R. 327, 8 C.P.C. 240 (C.A.) as a physical compulsion of the person, a threat to the person's life or limb, or that of a close relative, the threat of a physical beating, or the threat of imprisonment. None of those elements have been proven in this case.
>
> **57** The plaintiff did argue economic distress after a fashion, but I do not find that her economic circumstances were sufficiently compelling to vitiate consent: see *Jonasson v. Jonasson* (1997), 95 B.C.A.C. 94, 30 R.F.L. (4th) 20 (C.A.), leave to appeal to S.C.C. refused (1998), 226 N.R. 400, [1997] S.C.C.A. No. 519 (QL).

[25] The pleadings suggest economic pressure. Although the plaintiff addressed the circumstances in which economic duress may be a viable pleading at some length with reference to the leading case law, the defendant submits that he does not suggest economic duress, despite the wording of the pleadings. Accordingly, I do not propose to review the submissions made to me concerning economic duress.

[26] The plaintiff submits that the defendant has not pleaded any pressure resulting in coercion as described in ***Permaform Plastics Ltd. v. London & Midland General Insurance Co.***, [1996] M.J. No. 322 at para. 88:

> **88** Coercion of the will implies a threat of serious consequences should the contract not be executed. Coercion, at least in its legal sense, does not arise simply out of an existing state of affairs.

[27] In addressing duress in the context of a contractual relationship, ***Ellis*** applied a series of *indicia* set out in ***Pao On v. Lau Yiu***, [1979] 2 All. E.R. 65 (P.C.):

> **79** In assessing the existence of coercion such that there was no true consent, the court stated (at 78):
>
> > ... it is material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it.

[28] In ***Hill v. Forbes***, 2007 ONCA 443, delay in raising the issue of duress was considered significant:

> Finally, the appellant did not raise any concerns about the agreement for over a year following its

signature. He simply ignored it and made none of the payments contemplated.

[29] The plaintiff submits that the pleading as constituted fail on all the factors set out in ***Pao***:

> The Plaintiff says that it was Mr. Malik's idea to approach the Government for legal funding so there is no protest, that he had independent legal advice from his counsel negotiating with the Plaintiff on his behalf, and that he has not taken any steps to set aside the contract subsequently with the exception of advancing this issue in his Amended Statement of Defence. More importantly, the Plaintiff says that Mr. Malik affirmed his obligations under the Agreements following the Plaintiff's demand for payment because of Mr. Malik's counsel responded to the demand by seeking a credit of $72,000 against the amounts owing by Mr. Malik to the Plaintiff. In this regard the Plaintiff relies upon *Engle v. Carswell*, [1995] N.W.T.J. No. 12 (CB Tab 21), and *P. (M.L.) v. P. (G.W.)* (2000), 12 R.F.L. (5th) 434 (CB Tab 22). None of these material facts have been plead to support his defence of duress.
>
> [from the plaintiff's submissions]

[30] On the question of there being no other course of action besides taking the plaintiff's money, the plaintiff submits that this has not, and could not have been established in light of the finding of Madam Justice Stromberg-Stein in the *Rowbotham* application that the defendant was in a position to pay the fees himself. The plaintiff submits that it is not possible to maintain this without impermissibly and collaterally attacking that ruling. For that reason as well the plaintiff maintains that the plea of duress is "bound to fail."

VI

[31] The defendant submits that the court may grant relief from a contract entered into where there are such circumstances of pressure as to prevent a party from being a free agent. He cites *Halsbury's Laws of England* (3rd Ed.), v. 8, pp. 84-85, para. 146:

> **146. Meaning of duress.** By duress is meant the compulsion under which a person acts through fear of personal suffering, as from injury to the body or from confinement, actual or threatened (e). A threat of a criminal prosecution for which there is sufficient ground is not such duress as will vitiate a contract made in consequence thereof, provided that there is adequate valuable consideration for the contract, and that there is no agreement to stifle the prosecution (f). As a general rule, a threat of civil proceedings or bankruptcy proceedings does not amount to duress, whether there is good foundation for the proceedings or not, though it may do so if it is intended and calculated, having regard to the circumstance to cause terror in the particular case (g). The question whether imprisonment or threatened imprisonment does or does not constitute duress depends upon whether the imprisonment is lawful or unlawful (h).

[32] He also cites *Halsbury's* (3rd Ed.), v. 14, at 479, para. 913, as follows:

> **913. Duress.** Where a party to a transaction enters into it under duress in the strict sense, that is, where he is compelled to it by bodily restraint or fear of bodily harm, the transaction is voidable at law(s), and in that case it will be set aside in equity (t). Relief is also granted in equity where the compulsion is not of this extreme nature, however, and to avoid the transaction it is sufficient that there were such circumstances of pressure as to prevent the party being a free agent (u). Similarly, where a transaction is voidable, a confirmation of it procured by terror is of no effect. (a)

[33] This is qualified in footnote *(t)*:

> *(t)* *Hawes v. Wyatt* (1790), 3 Bro. C.C. 156, at p. 158; *Scott v. Scott* (1847), 11 I. Eq. R. 74,487. The fact that a conveyance or contract was made in prison with a view to procuring release is not a ground for avoiding it, if it is fair and is made on proper advice (*Hinton v. Hinton* (1755), 2 Ves. Sen.

631; *Brinkley v. Hann* (1843), Drury temp. Sug. 175); and so as to bail given while under arrest by process of law (*Roy v. Duke of Beaufort*) (1741), 2 Atk.190, at p. 193; *Liverpool Marine Credit Co. v. Hunter* (1868), 3 Ch. App. 479, disapproving *Talleyrand v. Boulanger* (1797), 3 Ves. 447). If, however, owing to the arrest, there is no free consent, the court will relieve, notwithstanding that the arrest was lawful (*Nicholls v. Nicholls* (1737), 1 Atk. 409; *Falkner v. O.Brien* (1812), 2 Ball. & B. 214)

[34] The defendant refers to *Atkin's Encyclopaedia of Court Forms in Civil Proceedings* (2nd Ed.), vol. 12(2) 1996 issue at 21, para. 18:

> **18. Duress and undue influence**. Where consent is given in full knowledge of facts, the contract may still be set aside if it was made under duress or undue influence.
>
> Duress at common law may be pleaded where the end arrived at was achieved by the use of something in the nature of unlawful force or the threat of unlawful force against the person of the other contracting party, for example unlawful constraint. When the unlawful threats have been proved, the party who made them must establish that they did not induce the contract in any degree. …

[35] He then refers to the model forms of pleadings, and, in particular, Form 55:

> 1. *(The defendant should admit not admit or deny each paragraph of the statement of claim)*[2]
>
> 2. The Defendant was induced to enter into the alleged contract by duress on the part of the Plaintiff.
>
> PARTICULARS
>
> On ……. 19 … (*address*) the Plaintiff forcibly detained the Defendant in a room and refused to allow him to leave the room until the Defendant had signed the contract.
>
> 3. In the premises it is denied that the Defendant is bound by the alleged contract as set out in the Statement of Claim or at all.
>
> *(Conclude as in Form 39)*

[36] The defendant submits that this should be read as if the bare assertion of duress is sufficient for the pleading, and that particulars may follow later. This seems at odds, however, with the numeration of the paragraphs on the face of the example given. The defendant submits that in any case these are matters of evidence at trial, or in the alternative, are matters capable of amendment or matters which may be addressed by the delivery of particulars.

[37] The defendant only proposes one amendment despite the notice he has been given since the filing of the plaintiff's motion. He submits that if it made a difference he would amend his pleadings to include an allegation that his imprisonment was "wrongful." The effect of this was the subject of some discussion between counsel and the court. The authorities footnoted in *Halsbury's* suggest that that may be a material difference if the wrongful nature of the activity is a factor in vitiating consent.

[38] It is clear from the authorities tendered by the defendant, however, that consent may be vitiated in circumstances of even a lawful arrest. The *sine qua non* of such a pleading is a statement of material facts which, if true, would establish the defence. The pleadings, as constituted, with or without the amendment "wrongful" only suggest surrounding circumstances which may or may not constitute the setting for such a claim. There is nothing in the pleadings to suggest pressure vitiating consent, or any of the severally identified hallmarks such as protest, lack of independent advice, timely attempts to avoid consequences, illegitimate pressure, or no alternative course of action.

[39] The plaintiff's submission that what Stromberg-Stein J. found at the *Rowbotham* hearing renders it impossible for the defendant to plead "duress" may be so, but the defendant does not plead sufficient facts that even give rise to the question.

[40] The pleadings contain no material facts supportive of the defence of duress. Even if the "imprisonment"

alleged in the pleadings were amended to include the word "wrongful," it remains merely suggestive of an inference from a circumstance that is misdescribed—the *plaintiff* did not "imprison the defendant without bail"—far short of material facts that would support a claim of duress. As I have noted, the defendant's suggestion that such material facts may be matters of "evidence" or "particulars", have not prompted any attempt to address the deficiencies identified by the plaintiff or to provide such particulars.

[41] Given the manner in which the defendant chose to defend these pleadings I have not found it necessary to consider the circumstances, outlined above, in which *evidence* may be considered in the context of Rule 19 applications, although the plaintiff obviously dealt with those issues in submission.

[42] On the grounds that no material facts are pleaded, the defendant's pleadings respecting both "duress" and malicious prosecution are struck out in the terms sought by the plaintiff.

VII

[43] The last issue is the question of set-off. The plaintiff has addressed the distinctions between legal and equitable set-off in its materials. The defendant accepts that the only basis of his assertion of a right to set-off is equitable, so it will not be necessary to address legal set-off.

[44] The plaintiff submits that the defendant has not pled material facts to support his claim for an equitable set-off and that, in any event, he is not entitled to an equitable set-off because the necessary conditions do not arise in the circumstances of this case.

[45] The leading authority is ***Cobra [Coba] Industries Ltd. v. Millie's Holdings (Canada) Ltd.*** [***Cobra***], 20 D.L.R. (4th) 689; [1985] 6 W.W.R. 14; 65 B.C.L.R. 31; 36 R.P.R. 259, where the Court of Appeal, per MacFarlane J.A., set down the following principles applicable to equitable set-off:

> **23** From that review of the law, which I accept as accurate, can be extracted the following principles.
>
> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands – *Rawson v. Samuel* (1841), 41 E.R. 451.
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed – *British Anzani*.
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim – *Federal Commerce and Navigation Ltd.*
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract – *Bankes v. Jarvis*, [1903] 1 K.B. 549; British Anzani.
> 5. Unliquidated claims are on the same footing as liquidated claims - the Newfoundland case.

[46] The plaintiff submits that these principles, as they apply to this case, break down as follows:

(a) Mr. Malik cannot show an equitable ground for being protected against the Plaintiff's demands. He signed the various funding agreement with the advice of counsel;

(b) There are no equitable grounds pled by Mr. Malik and it is not clear what equitable ground he is relying upon. In any event, the roots of the Plaintiff's claims are two-fold. First the funding Agreements Mr. Malik signed with the Plaintiff and there is no equitable ground raised by Mr. Malik to defend against the Plaintiff's claims in that regard. Second, the Plaintiff's claims are based upon the misconduct of Mr. Malik, his family, and close associates to fraudulently misrepresent his wealth to induce the Plaintiff to fund his defence. It is trite to say that those who seek equity from the courts must have clean hands. The Plaintiff submits that Mr. Malik

cannot meet this threshold requirement.

(c) There is no clear connection between the Plaintiff's claims and Mr. Malik's cross-claims. Further the Plaintiff submits that Mr. Malik's cross-claims are simply designed to frustrate and delay the Plaintiff's efforts to collect on the money clearly owed by Mr. Malik. It would be manifestly unjust to allow Mr. Malik to avoid his legal obligations to the Plaintiff pursuant to the Agreements based upon his claims as pled in his Amended Statement of Defence.

(d) This is a case where there are merely cross-claims made one against the other with nothing more. As stated by the Court of Appeal in *Cobra Industries* [supra], "The mere existence of cross demands is not sufficient" (para 19).

[from the plaintiff's submission)

[47] The plaintiff submits that the defendant cannot show that "the cross-claim flows out of and is inseparably connected with the dealings and transactions that give rise to the claim [or]…goes to the very root of the claim in such a way that it would be manifestly unjust to allow the plaintiff to enforce his claim without taking into account the cross-claim" as MacFarlane J. observed in ***Cobra*** at para. 24. Nor, it submits, has it shown, "such a relationship between the respective claims that the claim by one party was caused by, or contributed to, or is so intertwined with the claim by the other party that it would be unconscionable to allow the party to proceed with its claim", as Warren J. articulated the test in ***Cerescorp Inc. v. Baseline Industries Ltd.***, [1992] B.C.J. No. 1699 (unrep) at page 3.

[48] In ***Restore International Corp. v. K.I.P. Kuester International Products Corp.***, [1999] B.C.J. No. 257, Martinson, J. aptly summarized the principles as follows:

> **27** It has since been held that the ultimate question is whether it would be manifestly unjust to allow the plaintiff to recover, without taking into consideration the defendant's cross claim. If that is the case, then, and particularly where the parties are the original parties, the court should be less concerned with such matters as exactly how closely connected the contracts, transactions or events giving rise to the defendant's cross claim are connected to the plaintiff's claim. If there is some connection, and in all of the circumstances of the case it is fair or just that the defendant's cross claim be taken into consideration, then the equity is made out: *Monsanto Canada v. Victor Carpet Distributors Ltd.*, [1994] B.C.J. No. 2876 (QL) (S.C.).

[49] The plaintiff cites a series of cases as examples of the court's assessment of the necessary connection between causes of action to set up an equitable set-off.

[50] In ***Royal Bank of Canada v. Wilton***, [1995] A.J. No. 247, the bank was found liable in damages for interference with contractual relations. It told a prospective purchaser of a parcel of land about to go into foreclosure that the purchase had to be completed within seven days—too short a time for the purchaser to organize financing—or the bank would commence foreclosure proceedings. A jury found for the owners in their counterclaim for this interference and awarded $250,000 in damages. A judge of the Court of Queen's Bench set this amount off against the money the owners owed the bank in the foreclosure. The Court of Appeal reversed on the following basis:

> **32** It is true that both actions are related to the mortgages of the Wiltons' land held by the Bank. However, the actions are not so closely related that one goes to the root of the other. The Bank's action is an action in contract while the Wiltons' action is an action in tort. In Holt the claim and cross-claim were both in respect of debts owed because of contracts. Point four mentioned above states: "The plaintiff's claim and the cross-claim need not arise out of the same contract". Although it is true the claims need not arise out of the same contract, all the cases mentioned in Holt, dealing with the subject of equitable set-off, involve situations where two contracts exist. In this case the one action is in contract and one is in tort and considering these facts it cannot be said they are so closely related so as to justify equitable set-off; although this is not to imply that two actions arising from tort and contract could not attract equitable set-off. However, in this case the conduct complained of by each party is completely different and unrelated.

[51] In ***Royal Bank of Canada v. Brattberg***, [1987] 52 Alta. L. R. (2d); 79 A.R. 166, the Alberta Court of Appeal set out the applicable law, in the context of a foreclosure and a counterclaim based on subsequent contractual dealings:

> We regard the law applicable to the set-off claimed in this case as a defence to be that expressed by Kerans, J.A. in *Aboussafy v. Abacus Cities Ltd.* [1981] 4 W.W.R. 660 at 670 where he said:
>
> > By set-off is meant something in the way of a defence: where claim and cross-claim are merged and the lesser is thereby extinguished. True set-off must be distinguished from procedural set-off, where two unrelated claims are balanced up and a net judgment given: see *Stooke v. Taylor* (1880), 5 Q.B.D. 569. As Cockburn C.J. there observes, procedural set-off, at least in the sense of permitting a new judgment in the same cause, is a creature of the Judicature Acts. The significance of the distinction is today largely academic, as was observed by *Tucker L.J. in Morgan & Son Ltd. v. Johnson S. Martin & Co. Ltd.* [1949] 1 K.B. 107 at 108, [1948] 2 All E.R. 196 (C.A.). However, it has some significance for third parties. Procedural set-off is a shield, not a sword. It is not a defence; it therefore is not an equity subject to which an assignee takes. Unlike a true set-off, there is no charge against the fund of the original chose in action which equity can recognize.
> >
> > Originally, equitable set-off also had a procedural aspect and this has been responsible for some confusion. The Courts of Chancery enforced equitable set-off by an injunction against a plaintiff not to proceed with his suit because his claim had been extinguished by a set-off. (See *Rawson*, supra.) However, with the merger of the Courts of Equity and Law, the Supreme Court of Judicature Act, 1873 (36 & 36 Vict.), c. 66, s. 24, R. 5, provided that:
> >
> > > (5.) No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit.
> >
> > This statute, of course, did not automatically become part of the law of Alberta; however, the rule in substance is repeated in the Judicature Act, R.S.A. 1970, c. 193, s. 32(q) and (r). Parenthetically, the continuation of procedural set-off, which exists to this day by virtue of Alberta Supreme Court Rules, R. 98, and which could be used as a lever to spring from procedural to true set-off, because a judgment in a damage suit is a debt and can be set off at law: see *Lawrence v. Hayes*, [1927] 2 K.B. 111. Of course, R. 93(2), which requires that all set-off be pleaded by way of counterclaim, does not diminish rights. It has to do only with clear and convenent pleadings.
> >
> > Thereafter, the substantive rights in the law of equity were enforced by a different procedure; but there were not thereby added to or diminished: see *Stumore v. Campbell & Co.* [1892] 1 Q.B. 314 (C.A.). Specifically, the procedural change did not alter the substantial right, in the hands of the primary debtor, to charge a chose in action owed by him with set-off. The Judicature Acts did not, as Channell L.J. said, put "an unliquidated claim on the same footing as a liquidated claim". A liquidated claim, by statute, may be set off against an unrelated liquidated claim. No such absolute rule exists with regard to an unrelated unliquidated claim.

VIII

[52] The defendant, for its part, relies as well on ***Cobra*** as the leading authority in British Columbia, but notes an example he submits is closer to the situation before the court than those cited by the plaintiff. It is referred to in a lengthy quote in ***Cobra*** taken from ***British Anzani (Felixstowe) Ltd. v. International Marine Management (U.K.) Ltd.***, [1979] 2 All E.R. 1063 (Q.B.) at 1067-68 per Forbes J., [found in ***Cobra*** at para. 19]:

> It is thus necessary to consider in what circumstances a court of equity before the Judicature Act would have afforded such protection to a defendant. The *locus classicus* for the principle involved is the judgment of Lord Cottenham L.C. in *Rawson v. Samuel*:
>
> > We speak familiarly of equitable set-off as distinguished from set-off at law; but it will be found that this equitable set-off exists in cases where the party seeking the benefit of it can shew some equitable ground for being protected against his adversary's demand. The mere existence of cross-demands is not sufficient ....
>
> And then:
>
> > Several cases were cited in support of the injunction but in every one of them, except *Williams v. Davies*, it will be found that the equity of the bill impeached the title to the legal demand.
>
> It is this feature that the equity must go to the very root of the plaintiff's claim that is the essential attribute of a valid equitable set-off. An obvious example, as was emphasised in later cases, was *Piggott v. Williams* where the fees which the solicitor claimed were in relation to a suit which would never have been necessary but for the solicitor's own negligence. The principle is clear though there may have been difficulty in applying it correctly to different sets of circumstances. A felicitously expressed statement of the principle occurs in the judgment of Parker J. in *The Teno*:
>
> > …where the cross claim not only arises out of the same contract as the claim but is so directly connected with it that it would be manifestly unjust to allow the claimant to recover without taking into account the cross claim there is a right of set-off in equity of an unliquidated claim.

[53] The defendant submits that ***Piggott v. Williams*** [***Piggott***], 6 Mad. 161, is a close analogy to the situation here. He submits that had he not been wrongfully prosecuted, he would never have needed to pay lawyers and to borrow from the plaintiff for that purpose. He submits that the claim for wrongful prosecution includes claims for sums of money approximating one million dollars the defendant had spent before the making any of the agreements that are the subject of the plaintiff's claims, and will include those claims.

[54] While on first impression ***Piggott*** appears to be analogous, upon closer consideration I do not think it is of much assistance. In ***Piggott***, the unconscionable conduct, or matter giving rise to equitable grounds for protection from the solicitor's demand, was the fact that the solicitor was claiming payment for fees related to a problem he had caused.

[55] Putting the most positive construction possible on the defendant's claim, the "cause" of his expenditure on legal fees was a prosecution for which he blames the plaintiff (construing the "plaintiff" in the broadest possible terms), and others, including the Federal government. The issues he raises are complex and may or may not fully implicate the plaintiff, inasmuch as it appears possible success may be against other parties.

[56] The possibility that the defendant will be able to show that the plaintiff is liable to him for some or all of the costs and damages attributable to its alleged wrongful prosecution of him, does not convert expenditures on *his* behalf assuming *his* responsibilities to his lawyers into an equitable set-off. At various times the defendant represented that he had significant means to pay, and the premise leading up to the various agreements was that it seemed to be advantageous to the defendant, and in the interests of the plaintiff, that liquidation of the defendant's estate to pay the fees be orderly, while the prosecution proceeded. There is no question about the fact that the plaintiff performed the contract by paying the plaintiff's lawyers, although the amounts are not formally admitted. The defendant, in return, promised to commit his assets to the payment of his defence expenses.

[57] Mr. Malik was represented throughout the negotiations that led to the funding agreements. In a November 20, 2001 letter, counsel for Mr. Malik set out the premises on which Mr. Malik sought funding:

> The objective of the proposal is to find a way that would permit Mr. Malik to mount a defence on the same basis as his co-accused, and with a level of resources commensurate with the resources the province has devoted to the investigation and prosecution.
>
> An irony in this case is that until Mr. Malik was arrested he and his wife had a sizeable net worth, but he has been unable to liquidate his estate at a rate that would permit him to fund preparations for trial at the same level as the other accused or the Crown. Since his arrest there has been a general economic slowdown which is being felt in the commercial real estate market. In addition, the stigma that has attended Mr. Malik's arrest has resulted in potential lessors of office properties, including a government, being unwilling to have him as a landlord. As a result, it is extremely doubtful that his entire estate will be sufficient to pay for counsel preparations, much less the trial itself. We understand that his counsel simply could not remain on record if they are not properly retained. This case will require a year or more of full time work, which no lawyer could afford to do without pay.
>
> This raises the prospect that Mr. Malik will be deprived the opportunity to make a full answer to the case the Crown has prepared, and raises the real risk that the trial would be delayed or disrupted.
>
> There is a further issue, which involves the interests of both the province and Mr. Malik. If, as appears inevitable, the Crown will have to take over funding Mr. Malik's defence when he has exhausted his assets, it would be in the interests of both the Crown and Mr. Malik to ensure that his assets are sold at a reasonable price. This means avoiding a fire sale, and ensuring that the assets are sold in a manner and at a time that will produce a reasonable return. If Mr. Malik does not have assured government funding, he will have to sell his assets for whatever he can get, which may be much less than their value. To give an extreme example, if Mr. Malik were to sell his entire estate for $1.00 tomorrow, he would be eligible for *Rowbotham* funding the day after tomorrow. The province, however, would not have the opportunity of offsetting a significant portion of the costs of funding through the sale of the assets at their true value. Mr. Malik has no intention to throw his assets away, and one can see how there is a convergence of interest in ensuring that Mr. Malik's estate is sold in an orderly manner. But there would be a convergence of interests only if Mr. Malik is assured of funding in the very near future.
>
> Mr. Malik is already having considerable difficulty paying his monthly legal bills. At the rate that Mr. Malik is currently able to fund his defence, his counsel are not able to undertake preparations at level sufficient to enable them to provide Mr. Malik with a proper defence. We are therefore concerned that these issues be dealt with as quickly as possible.

[58] I cite this as an example of the active nature of the many representations on his behalf.

[59] These dealing were summarized by Stromberg-Stein J. in the *Rowbotham* ruling on September 19, 2003 as follows:

> **6** In November 2001, Mr. Malik approached the Attorney General to fund his defence as his trial was imminent and trial preparation was necessary. He asserted that he had assets, although those assets were not in the form of cash, and liquidating them for his legal fees would require time. In February 2002, negotiations between counsel for Mr. Malik and the Attorney General led to an interim funding agreement ("the Defence Counsel Agreement"). This agreement acknowledged that Mr. Malik had assets to contribute to his defence, which assets would be liquidated or funds from those assets would otherwise be obtained and applied to his legal fees. It was simply a matter of ascertaining the exact amount of Mr. Malik's interest in the assets and canvassing options to maximize value.
>
> **7** The Defence Counsel Agreement was entered into so funding could commence immediately. …

[60] Stromberg-Stein J. concluded those Reasons with the following observation:

89 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.

[61] The subsequently negotiated "Payment Agreement" dated October 17, 2003 includes the following recitals:

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 a 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 s 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.

[62] The material before the court demonstrates that these agreements were the result of considerable negotiation between the parties. There is no reservation on Mr. Malik's part concerning repayment in the event that the prosecution proved unnecessary or improper. Given his present assertions, such matters must have been in his contemplation at the time. Whether his failure to set this context was strategic or for some other reason, the fact remains that, fully advised by counsel, the defendant made certain representations that he expected the plaintiff

to act upon, and which the plaintiff apparently did act upon, to his benefit. He now comes before the court not in any sense demonstrating that he has made good faith efforts to fulfill his part of the bargain he made, or that the plaintiff is somehow responsible in some causative or connected way for his failure to do so, but arguing on an entirely different basis that his obligations ought to be indefinitely suspended while he pursues his action for malicious or wrongful prosecution.

[63] The pleadings filed in that action make sweeping allegations against several public agencies and ministries (and one minister personally) that the court is now advised will be significantly narrowed by recent amendments.

[64] The onus is very high in such cases. In the leading case, ***Nelles v. Ontario***, [1989] S.C.J. No. 86, the Supreme Court of Canada set out the test for proof of a malicious prosecution case, at paras. 42-47:

> **42** There are four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution:
>
> a) the proceedings must have been initiated by the defendant;
>
> b) the proceedings must have terminated in favour of the plaintiff;
>
> c) the absence of reasonable and probable cause;
>
> d) malice, or a primary purpose other than that of carrying the law into effect.
>
> (See J. G. Fleming, The Law of Torts (5th ed. 1977), at p. 598.)
>
> **43** The first two elements are straightforward and largely speak for themselves. The latter two elements require explicit discussion. Reasonable and probable cause has been defined as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed" (*Hicks v. Faulkner* (1878), 8 Q.B.D. 167, at p. 171, Hawkins J.)
>
> **44** This test contains both a subjective and objective element. There must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances. The existence of reasonable and probable cause is a matter for the judge to decide as opposed to the jury.
>
> **45** The required element of malice is for all intents, the equivalent of "improper purpose". It has according to Fleming, a "wider meaning than spite, ill-will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage" (Fleming, op. cit., at p. 609). To succeed in an action for malicious prosecution against the Attorney General or Crown Attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution, and malice in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney, a use inconsistent with the status of "minister of justice". In my view this burden on the plaintiff amounts to a requirement that the Attorney General or Crown Attorney perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice. In fact, in some cases this would seem to amount to criminal conduct. (See for example breach of trust, s. 122, conspiracy re: false prosecution s. 465(1)(b), obstructing justice s. 139(2) and (3) of the Criminal Code, R.S.C., 1985, c. C-46.)
>
> **46** Further, it should be noted that in many, if not all cases of malicious prosecution by an Attorney General or Crown Attorney, there will have been an infringement of an accused's rights as guaranteed by ss. 7 and 11 of the Canadian Charter of Rights and Freedoms.
>
> **47** By way of summary then, a plaintiff bringing a claim for malicious prosecution has no easy task. Not only does the plaintiff have the notoriously difficult task of establishing a negative, that is the absence of reasonable and probable cause, but he is held to a very high standard of proof to avoid a non-suit or directed verdict (see Fleming, op. cit., at p. 606, and *Mitchell v. John Heine and Son Ltd.* (1938), 38 S.R. (N.S.W.) 466, at pp. 469-71). Professor Fleming has gone so far as to conclude that there are built-in devices particular to the tort of malicious prosecution to dissuade civil suits (at p. 606):

> The disfavour with which the law has traditionally viewed the action for malicious prosecution is most clearly revealed by the hedging devices with which it has been surrounded in order to deter this kind of litigation and protect private citizens who discharge their public duty of prosecuting those reasonably suspected of crime.

[65] The defendant's present submission that he was prosecuted when there was no evidence against him was not asserted to qualify his obligations under the agreements. There is no connection between these claims and the mutual undertakings in the agreements. The defendant would not have been entitled to refuse to pay his lawyers in the event of a successful defence, and all the plaintiff did, in consideration of certain covenants, was to step into his shoes and pay on his behalf. He manifestly got value for what the plaintiff provided on his behalf. This arrangement stood completely apart from any question respecting the *bona fides* of the prosecution itself.

[66] Apart from this lack of a clear connection between the fee payment transactions and the manner in which the prosecution was undertaken (i.e. nothing about the prosecution is a foundation of the agreements, except that it is was ongoing), the defendant has failed to clearly assert an equitable ground for protection from the plaintiff's demands under the contract, let alone a ground going to the "very root" of the plaintiff's claims. Money was advanced on certain terms. Those terms have allegedly been breached, and the plaintiff seeks its money back. This is not the ***Piggott*** case. The plaintiff is not seeking an *advantage* out of its wrongdoing (assuming for the moment that that term applies to the prosecution), it is simply seeking reimbursement in terms negotiated during, and within, the context of that prosecution.

[67] The defendant has not identified any equitable basis for the set-off. An equitable set-off cannot arise out of circumstances where a contract is negotiated between competent parties, one of whom reserves a grievance against the other that it later asserts to avoid the consequences of the contract it made. It would, in fact, be *inequitable* to countenance that kind of dealing.

[68] The defendant pled not guilty and was found not guilty. He has, and had always, had his own knowledge of his circumstances relative to the charges. He is free to assert the claims he has. He is not entitled to stand those claims against contractual arrangements he made that stood completely apart, and was founded on premises he actively asserted, but which he now characterizes differently.

[69] The defendant's position is, ultimately, merely an *efficiency* argument—the court should hear it all, so that at the end, one party will write one cheque. Given the complexity of the questions involved and the relative paces at which the two proceedings seem to be moving, this is entirely superficial: justice will best be done by leaving each party to proceed with its own action independently.

[70] The defendant's claim to set-off will be struck from the statement of defence.

IX

[71] In summary, I order the following paragraphs or parts of paragraphs struck from the Amended Statement of Defence of Ripudaman Singh Malik filed on November 3, 2008:

(a) Paragraph 5A;

(b) Paragraph 9 except "Ripudaman, with reference to paragraph 17 of the Amended Statement of Claim, states that the Plaintiff was in fact fully satisfied with its knowledge of the state of his financial affairs and entered into the interim funding agreement to provide his defence costs. In funding such costs, the Plaintiff did not in fact rely upon the representations of Ripudaman";

(c) Paragraph 10 except "With reference to paragraph 18, Ripudaman says and the fact is the Plaintiff only purported to rely upon the Interim Funding Agreement and the said representations";

(d) Paragraph 11 except "Ripudaman has no knowledge of the allegations contained in paragraph 19. He denies that the Plaintiff relied upon any representations";

(e) Paragraph 12: "was in a state of desperation, and under severe duress as particularized in paragraph 9 above";

(f) Paragraph 16: "and pleads duress";

(g) Paragraph 20;

(h) Paragraph 21: "but says he gave the mortgage under duress";

(i) Paragraph 24 except "With reference to paragraph 34 of the Amended Statement of Claim, Ripudaman denies acknowledging his indebtedness as alleged";

(j) Paragraph 26 except "As to paragraph 36 of the Amended Statement of Claim, Ripudaman denies any fraud whatsoever";

(k) Paragraph 32 except "Ripudaman denies any fraud or conspiracy"; and

(l) Paragraphs (d) and (e) from the prayer for relief.

[72] The plaintiff is entitled to costs unless there are circumstances respecting costs that should be drawn to the attention of the court.

[73] At the outset of the hearing of this application, the defendant had objected to having it heard at the same time as an application for a summary trial under Rule 18A respecting the amounts allegedly due and owing under the contract. I ruled that both motions could proceed. The defendant's objection was that until there was a ruling respecting the pleadings as they were, there had not been full documentary disclosure. My view was that any prejudice could be addressed once this ruling had been made. In view of the outcome of this application, I see no impediment to proceeding to determine the summary trial application.

"McEwan J."

_____

The Honourable Mr. Justice McEwan