COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***British Columbia (Attorney General) v. Malik,***
2009 BCCA 201

Date: 20090507
Docket: CA036403; CA036406; CA036413
Docket: CA036403

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)

And

**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.**

Respondents
(Defendants)

- and -

Docket: CA036406

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

Raminder Kaur Malik

Appellant
(Defendant)

And

**Ripudaman Singh 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.**

Respondents
(Defendants)

- and -

Docket: CA036413

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

Jaspreet Singh Malik

Appellant
(Defendant)

And

Ripudaman Singh Malik, Raminder Kaur 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.

Respondents
(Defendants)

Before:	The Honourable Chief Justice Finch The Honourable Mr. Justice Frankel The Honourable Mr. Justice Tysoe
B.E. McLeod	Counsel for the Appellant, Ripudaman Singh Malik
T.R. Manson	Counsel for the Appellant, Raminder Kaur Malik
J.S. Malik	Appearing in person
F.G. Potts and R.N. Hamilton	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia March 3 and 4, 2009
Place and Date of Judgment:	Vancouver, British Columbia May 7, 2009

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] On October 23, 2007, Her Majesty the Queen in right of the Province of British Columbia (the "Crown") commenced an action against the three appellants, together with three other members of their family and four corporations owned by them, to recover monies it had advanced to fund defence costs for a trial known as the Air India trial. On the same day, counsel for the Crown attended in court without notifying any of the defendants and obtained two *ex parte* orders. These orders are commonly referred to as a *Mareva* injunction and an *Anton Piller* order, having been named after the seminal cases of *Mareva Compania Naviera SA v. International Bulk Carriers SA*, [1980] 1 All ER 213 (C.A.), and *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55, [1976] 1 All ER 779 (C.A.).

[2] The *Mareva* injunction restrained each of the appellants from selling, mortgaging or otherwise disposing of any of their respective assets. It also restrained the defendants from causing any of the corporate defendants to sell, mortgage or otherwise dispose of any of their assets.

[3] The *Anton Piller* order authorized independent lawyers to enter three premises to search for and take away any documents or computers relating to the assets and liability of the defendants, including numerous specified documents. The three premises were first, the residence of the appellants, Ripudaman Singh Malik and Raminder Kaur Malik; second, the law office at which the appellant, Jaspreet Singh Malik ("Mr. Malik Jr."), the son of Mr. and Mrs. Malik, practises law; and third, the office of the defendant, Papillon Eastern Imports Ltd. (where Mr. Malik Jr. also previously carried on the practice of law).

[4] The appellants applied to have the *Mareva* injunction and the *Anton Piller* order set aside or varied, and their applications were heard over the course of six days in January 2008. Most of their arguments related to alleged non-disclosure by the Crown in obtaining the *ex parte* orders. By reasons for judgment issued on July 31, 2008, and indexed as 2008 BCSC 1027, 46 C.B.R. (5th) 41, the chambers judge dismissed the applications with the exception of a variation of the *Mareva* injunction increasing the amount of funds available to the appellants for the purpose of paying legal fees.

[5] The appellants appeal from the dismissal of their applications and ask this Court to set aside or vary the two *ex parte* orders. They do not raise the issue of non-disclosure on the appeals, and they argue some issues that were not before the chambers judge.

Background

[6] In 2000, Mr. Malik was charged in connection with the 1985 Air India bombing. At a bail hearing in December 2000, Mr. Malik represented that he and his wife had a net worth of approximately $11.6 million.

[7] Mr. Malik approached the Crown in 2001 for assistance in the funding of his defence costs. He asserted that he was unable to fund his defence because his assets could not be readily liquidated. The Crown and Mr. Malik entered into an interim agreement in March 2002, and this was replaced in the summer of 2002 by an agreement dated for reference February 1, 2002 and called the Defence Counsel Agreement.

[8] Under the Defence Counsel Agreement, the Crown agreed to pay for Mr. Malik's defence costs until the completion of the Air India trial or the earlier termination of the Agreement. The Agreement recited that Mr. Malik had agreed to transfer all of his assets to the Crown. The Agreement provided that it could be terminated by the Crown in certain circumstances, including the failure of Mr. Malik to transfer his assets.

[9] Mr. Malik did not transfer his assets to the Crown and, in January 2003, the Crown gave notice that it would be terminating the Defence Counsel Agreement if Mr. Malik did not sign an indemnity with respect to his defence costs funded by the Crown. Mr. Malik declined to sign an indemnity in a form satisfactory to the Crown, and made a court application in August 2003 pursuant to the decision in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 25 O.A.C. 321, for relief should the Crown not agree to continue funding his defence costs. All three of the appellants gave evidence in support of the application.

[10] By reasons for judgment issued on September 19, 2003 and indexed as 2003 BCSC 1439, 111 C.R.R. (2d) 40 (the "*Rowbotham* Reasons"), Madam Justice Stromberg-Stein dismissed Mr. Malik's application on the basis that he failed to discharge the onus of establishing that he was not in a position to contribute to the funding of his defence costs. She also found that Mr. Malik had disentitled himself to *Rowbotham* funding by his actions.

[11] I will return to the *Rowbotham* Reasons presently, but I will first complete the narrative with respect to the funding of Mr. Malik's defence costs. After Mr. Malik's *Rowbotham* application was dismissed, Mr. Malik and the Crown had further negotiations that led, in October 2002, to a third agreement between them called the Payment Agreement. The Crown agreed to continue funding a portion of Mr. Malik's defence costs on the security of two mortgages: one granted by Mr. Malik against his one-half interest in property on Hamilton Street, Vancouver, he

owned jointly with his wife, and one granted by Khalsa Developments Ltd. ("Khalsa"), a company owned by Mr. Malik and Mrs. Malik, against a hotel property at Harrison Hot Springs.

[12] The giving of one of the mortgages required the cooperation of Mrs. Malik. In exchange for her cooperation, the Crown agreed, in clause 2.1(d) of the Payment Agreement "in connection with this Agreement, to not assert any claim or entitlement to, or challenge the legal or beneficial interest of" Mrs. Malik in various assets listed in a schedule to the Payment Agreement. The listed assets included the Maliks' matrimonial home registered in the name of Mrs. Malik alone, her registered one-half interest in the Hamilton Street property and her 50% shareholding in Khalsa.

[13] Mr. Malik agreed in the Payment Agreement that he was indebted to the Crown for all payments made by the Crown under the Defence Counsel Agreement, which he acknowledged was in the aggregate amount of $3,313,518.97 as of July 31, 2003. Including payments made after July 31, 2003, the total amount funded by the Crown under the Defence Counsel Agreement was $5,200,131.31. The total amount funded by the Crown under the Payment Agreement, after crediting one repayment, was slightly in excess of $1.6 million.

[14] Mr. Malik was acquitted of the Air India charges in March 2005. By letter dated December 13, 2005, to Mr. Malik's counsel, the Crown demanded repayment of the amounts it had advanced under the Defence Counsel Agreement and the Payment Agreement. No payment was made by Mr. Malik, but he did commence an action in March 2007 against the Crown and others, alleging he had been maliciously prosecuted.

[15] The Crown commenced its action on October 23, 2007. In its statement of claim, the Crown claimed against Mr. Malik for the $5,200,131.31 owing in respect of advances made under the Defence Counsel Agreement. It alleged that Mr. Malik and his family members had made misrepresentations to the Crown and that they conspired to defraud the Crown by assisting Mr. Malik in hiding his assets and disguising his net worth and by developing a scheme to hinder the Crown in the collection of the monies owed to it. The statement of claim pleaded the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163, and the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164. In the prayer for relief, the Crown requested declarations that (i) certain mortgages are void or held in trust for Mr. Malik, (ii) certain properties are held in trust for Mr. Malik, and (iii) any assets held by any of the defendants other than Mr. Malik into which his money or assets can be traced are the property of Mr. Malik.

[16] The Crown filed several affidavits in support of its applications for the *Mareva* injunction and the *Anton Piller* order, but the evidence primarily relied upon was the findings of fact made by Stromberg-Stein J. in the *Rowbotham* Reasons. The chambers judge listed those findings, which I will refer to as the "*Rowbotham* findings" at para. 43 of his reasons, as follows:

> At his bail hearing in December, 2000, a Personal Net Worth Statement was filed on behalf of Mr. and Mrs. Malik indicating a net worth of $11,648,439.85 [p. 3, para. 5];
>
> In November, 2001, Mr. Malik approached the AG to fund his defence and asserted that he had assets but those assets were not in cash form and liquidating them would require time [p. 4, para. 6];
>
> In February, 2002, negotiations between Mr. Malik's counsel and the AG led to an interim funding agreement [p. 4, para. 6];
>
> The funding agreement was entered into so funding could commence immediately and the AG advanced funds in good faith based on Mr. Malik's representations [p. 4, para. 7];
>
> Subsequently, Mr. Malik claimed he was insolvent because his assets were insufficient to discharge his liabilities, including debt owed to unsecured creditors who were all family member[s] [p. 5, para. 10];
>
> The evidence establishes a collective effort by Mr. Malik and the Malik family members to diminish the value of his estate [p. 10, para. 21];
>
> The assets of Mr. Malik and his family are so interconnected as to be fused. The Malik family has conducted its affairs such that all assets were jointly held for the benefit of all. Assets and income are pooled for one common enterprise [p. 16, para. 25];

Title to the Marguerite Street home is in Mrs. Malik's name alone. The land was purchased and the home constructed from joint funds. The Maliks shared all expenses [p. 19, para. 35];

It appears that since Mr. Malik's arrest, Papillon's annual earnings dropped from $4 million to $2.5 million per year [p. 22, para. 42];

Regarding property in India, the Maliks provided numerous contradictory explanations concerning both the value and the ownership of this property [p. 23, para. 45];

Regarding the allegation that Gurdip Malik loaned Mr. Malik [$330,000] US, the evidence shows these funds were received from Gurdip Malik's company, Papillon Eastern Imports Ltd. in Los Angeles, and used to pay business and personal expenses, and to reduce the line of credit [p. 24, para. 48];

Jaspreet Malik was instrumental in obtaining and arranging the registration of a security agreement against Mr. Malik's shares in the hotel [p. 25, para. 49];

There is evidence of collusion to secure Gurdip Malik's loan before this hearing and to reduce Mr. Malik's equity in the hotel [p. 25, para. 50];

There is no record of outstanding wages now claimed, dating as far back as 1994 up to 1997. No formal records were kept regarding the hours worked by the children [p. 25, para. 51];

Although confusing, the evidence establishes the Maliks never intended to pay their children and the children never contemplated they would be paid [p. 26, para. 53];

Following Mr. Malik's arrest his family continued to transfer, give away and buy luxury vehicles. A 1999 $108,000 Mercedes, purchased by Mr. Malik with joint funds, was transferred to Mrs. Malik while he was incarcerated. Mrs. Malik elected to repay the car loan before it was due [p. 27, para. 56];

Mrs. Malik gave away her 1998 Land Rover of unknown value [p. 28, para. 57];

Evidence about the purchase of the Lexus is inconsistent and confusing. In March 2001 Hardeep purchased a $35,000 Lexus with joint funds. He then borrowed that amount and lent it to Khalsa Developments Ltd. The loan was paid off by Khalsa Developments Ltd. [p. 28, para. 58];

Darshan purchased a $22,000 Chevy Blazer with joint funds in 2003 [p. 28, para. 59];

The Maliks reported charitable donations for the years 1994 to 2000 of $564,729.97. Of that amount, $512,612.97 was donated to either Satman [sic] Education Society or Satnam Trust, which were headed by Mr. Malik …[p. 28, para. 60];

In violation of a court order not to dispose of any assets, $72,000 from Mr. Malik's income tax refund was placed in a joint account and used to pay business debt. This money was repaid to the province during this application [p. 29, para. 63];

About the end of December 2000, the Maliks voluntarily elected to pay a franchise cancellation penalty of $100,000 when the hotel changed its affiliation from the Quality Inn to the Executive Inn [p. 29, para. 64];

Mr. Malik's agreement to contribute to the cost of his defence, as outlined in the Defence Counsel Agreement is a compelling consideration. Malik failed to liquidate his assets [p. 30, paras. 69-70];

Mr. Malik and Mrs. Malik have manipulated facts to suit their particular needs as evidenced by the representations at the bail hearing about the value of the Maliks' assets [p. 31, para. 75];

The evidence shows that Mr. Malik and his family have tried to arrange his financial and business affairs to minimize the value of his estate, to render him insolvent, and to therefore limit the amount of his contribution, or to eliminate that obligation entirely [p. 34, para. 82];

Any perceived cash shortage is artificial and contrived [p. 34, para 83].

[17] The principal affidavit filed in support of the Crown's application contained the following additional evidence:

(a) in connection with the $330,000 loan to Mr. Malik from his brother, Gurdip, referred to in the findings contained in the *Rowbotham* Reasons, Mr. Malik Jr. had testified at the *Rowbotham* hearing that his law partner had prepared a security agreement in respect of the loan and that Mr. Malik Jr. arranged for a lawyer to act on behalf of his uncle to sue his father on the loan (who attempted to obtain a summary judgment shortly before the *Rowbotham* hearing);

(b) Mr. Malik Jr. was cited by the Law Society of British Columbia in connection with his involvement in the $330,000 loan;

(c) on or about December 28, 2003, Mr. Malik granted to Mrs. Malik a $150,000 mortgage against his one-half interest in the Hamilton Street property (which was registered in priority behind the Crown's mortgage);

(d) on or about March 14, 2005, Mr. Malik granted to his brother, Gurdip, a $175,000 mortgage against his one-half interest in the Hamilton Street property (which was also registered in priority behind the Crown's mortgage);

(e) in 2006, foreclosure proceedings were commenced by two institutional lenders on mortgages registered against the Hamilton Street property in priority ahead of the Crown's mortgage (one of which was also registered against the Malik residence) but, rather than being redeemed and discharged, these two mortgages were assigned to a company named 0772735 B.C. Ltd., the directors of which are the Maliks' five children (0772735 B.C. Ltd. subsequently released the mortgage against the Malik residence); and

(f) Mr. Malik Jr. and his law partner had certified the signatures of Mr. Malik and Mrs. Malik on numerous documents registered in the Land Title Office.

[18] On the basis of this evidence, the chambers judge granted the *Mareva* injunction and the *Anton Piller* order and dismissed the appellants' applications to have them set aside.

Standard of Review

[19] Chief Justice Finch summarized the standard of review in respect of discretionary orders such as *Mareva* injunctions and *Anton Piller* orders in *Insurance Corporation of British Columbia v. Patko*, 2008 BCCA 65, 290 D.L.R. (4th) 687:

> [22] The granting or refusal of a *Mareva* injunction is a discretionary order. The onus on a party seeking to appeal a decision based on the exercise of judicial discretion is a substantial one: *A.B. v. British Columbia (Securities Commission)*, 2004 BCCA 249 at para. 11. The order will not be interfered with unless the judge erred in principle, clearly and demonstrably misconceived the evidence, or made an order which has resulted in a clear injustice: *Canadian Broadcasting Corporation v. C.K.P.G. Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (C.A.), cited in *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, ... [1998] B.C.J. No. 2298 (QL) (C.A. [Chambers]) at para. 11.

Authority also exists for the proposition that an appellate court may interfere with a discretionary order if it is manifest the judge gave insufficient weight to all relevant considerations (see, for example, *Reza v. Canada*, [1994] 2 S.C.R. 394 at 404, 116 D.L.R. (4th) 61, and *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481, 285 D.L.R. (4th) 413 at para. 49).

***Mareva* Injunction**

[20] In *Patko*, Finch C.J.B.C. also summarized the requirements for a *Mareva* injunction:

> [25] Under the flexible *Mooney No. 2* approach, the fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case: *Mooney No. 2* at para. 43. In order to obtain an injunction, the applicant must first establish a strong *prima facie* or good arguable case on the merits. Second, the interests of the two parties must be balanced, having regard to all the relevant factors, to reach a just and convenient result. Two relevant factors are evidence showing the existence of assets within British Columbia or outside, and evidence showing a real risk of their disposal or dissipation, so as to render nugatory any judgment: *Mooney No. 2* at para. 44.
>
> [26] The root of the *Mareva* injunction is the risk of harm either through dissipation of assets or removal of assets to a place beyond the court's reach: *Tracy* at para. 45. In most cases it will not be just or convenient to tie up a defendant's assets merely on "speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted": *Silver Standard* at para. 21 …

Chief Justice Finch went on to conclude that the risk that assets will be dissipated may be inferred from evidence of a strong *prima facie* case of fraud.

[21] The appellants challenge the *Mareva* injunction granted in this case on the following grounds:

(a) the chambers judge failed to address the balance of convenience and, in particular, he failed to consider whether there was any evidence of a real or impending threat to remove or dissipate assets;

(b) the chambers judge inappropriately relied on the *Rowbotham* findings;

(c) the chambers judge inappropriately relied on the evidence of the citation of Mr. Malik Jr. by the Law Society of British Columbia;

(d) the chambers judge failed to consider evidence of alternate security proposed by Mr. Malik and Mrs. Malik (in this regard, Mr. Malik applies to introduce fresh evidence in the form of appraisals of the Hamilton Street property and the hotel owned by Khalsa); and

(e) the chambers judge erred in including in the *Mareva* injunction the assets of Mrs. Malik in respect of which the Crown agreed, in the Payment Agreement, that it would not challenge her beneficial interest.

[22] I will deal first with the application to introduce fresh evidence. I would not admit the evidence because Mr. Malik has failed to satisfy the first branch of the test, articulated in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212, of demonstrating that the appraisal evidence could not, by due diligence, have been adduced at the hearing before the chambers judge. In addition, the appraisals are unsigned and are unlikely to have affected the outcome.

[23] On the substantive challenges to the *Mareva* injunction, it is my conclusion that the chambers judge should not have relied on all of the *Rowbotham* findings in order to support the granting of the injunction. However, it is also my conclusion that the injunction is supportable against Mr. Malik on the basis that he agreed as part of the Defence Counsel Agreement to transfer his assets to the Crown. In view of these conclusions, it is not necessary to consider the other issues raised by the appellants.

a) Issue Estoppel/Abuse of Process

[24] As I understand the reasons of the chambers judge, the submissions with respect to the use of the *Rowbotham* findings were made in the context of a non-disclosure argument. It appears the defendants argued that at the *ex parte* hearing the Crown should have disclosed to the chambers judge arguments that the *Rowbotham* findings were not binding on them because the doctrine of *res judicata*/issue estoppel did not apply or because the defendants other than Mr. Malik were protected by the witness immunity rule.

[25] While the chambers judge did review various authorities dealing with these topics, he concluded that the Crown did not have a duty to place those arguments before the court at the *ex parte* hearing and that those arguments did not negative the first branch of the test for an injunction that the plaintiff has demonstrated a *prima facie* case. His more detailed reasoning was contained in the following paragraphs of the reasons for judgment:

> [59] The precise application or extension of the witness immunity rule to this case is not the question presently before this court. It is, at this point, an arguable legal position applicable to some of the evidence. The same is true for the submissions respecting *res judicata*. The defendants have not shown that the facts asserted by the Province in respect of these matters are seriously in issue. Rather they submit that the court ought to have had their arguments put to it on the *ex parte* application, and that the Province's failure to do so in [sic] a breach of the strict terms the law imposes on a party seeking *ex parte* relief.
>
> [60] A failure to disclose material facts – that is, facts which would alter the premises upon which the court is asked to act – is dealt with strictly. Candour is essential to prevent the court from making orders which turn out to be ill-founded. Once the material facts are fairly and fully put to the court, however, it becomes the courts' task to assess the strength of the plaintiff's case, bearing in mind the possibility that the arguments advanced in the course of the plaintiff's submissions may be cast in quite a different light when the defendants have an opportunity to be heard. It is not the duty of the plaintiff to make those arguments, or for the court to weigh the case as if it were disposing of the issues. The facts which the Province outlined in its original submissions have not been shown to be materially misleading.
>
> [61] From the perspective of a court assessing the evidence with a view to ensuring that the positions of the parties are protected until the facts can be determined at trial, arguments about the legal limits of *res judicata* and witness immunity will not defeat a strong fact based *prima facie* case that the defendants have acted in ways that are inconsistent with their contractual and other legal obligations. The allegation that aspects of the defendants' dealings or behaviour have been the subject of a series of adverse rulings in another proceeding, will not, in the absence of material facts demonstrating that the rulings were effectively unfounded or irrelevant, be negated by abstract arguments unattached to actual findings of fact. The legal arguments the defendants submit the Province should have made on their behalf at the *ex parte* hearing, do not (now that they have been made by the defendants' representatives), suffice to overcome the *prima facie* case that has been put on largely uncontroverted allegations of fact.

[26] As a result of the manner in which the arguments were made to him, the chambers judge appears to have overlooked the requirement for the Crown to demonstrate a strong *prima facie* case through the introduction of admissible evidence. It was not a question of whether, as the chambers judge put it, the doctrine of *res judicata* (or the witness immunity rule) will defeat a strong *prima facie* case. Instead, it was a question of whether the evidence admissible on the application established a strong *prima facie* case. Unless the *Rowbotham* findings were admissible on the basis that the defendants were bound by them and could not challenge them, it was not sufficient for the Crown to rely on the *Rowbotham* findings as establishing a strong *prima facie* case and say that it would prove its case at trial by introducing other evidence.

[27] The Crown's position is that the appellants are bound by the *Rowbotham* findings on the basis of issue estoppel or, alternatively, that the court's ability to prevent an abuse of process prevents the defendants from relitigating the findings. These related topics were canvassed by the Supreme Court of Canada in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77.

[28] In *Toronto v. C.U.P.E.*, the appellant was convicted of sexually assaulting a boy under his care while he was working as a recreation instructor for the City. He successfully grieved his subsequent dismissal by the City when the arbitrator concluded that the presumption created by the criminal conviction had been rebutted by the appellant's testimony during the arbitration denying he had sexually assaulted the boy. The Supreme Court of Canada upheld the quashing of the arbitrator's decision on the basis of preventing an abuse of process.

[29] Madam Justice Arbour, for the majority, summarized the doctrine of issue estoppel in the following terms:

> [23] Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, *per* Binnie J.). The final requirement, known as "mutuality", has been largely abandoned in the United States and has been the subject of much academic and judicial debate there as well as in the United Kingdom and, to some extent, in this country.
>
> [Emphasis in original.]

Madam Justice Arbour concluded that the mutuality requirement should not be relaxed, with the result that the doctrine of issue estoppel did not apply in the arbitration because the parties were different from the ones involved in the criminal prosecution.

[30] Madam Justice Arbour then considered the topic of abuse of process, which she noted at para. 35 has been described as a concept to prevent proceedings "unfair to the point that they are contrary to the interest of justice" or "oppressive treatment". She also quoted at para. 35 the following description of abuse of process given by Madam Justice McLachlin in *R. v. Scott*, [1990] 3 S.C.R. 979 at 1007:

> ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

Madam Justice Arbour concluded the concept of abuse of process should be invoked to prevent the appellant from relitigating the issue of whether he sexually assaulted the boy.

[31] One of the limits of issue estoppel is that it applies only to the issues necessarily decided in previous proceedings, and it does not extend to collateral findings. In *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, the previous proceeding involved the Exchequer Court upholding an income tax assessment in respect of a benefit of a pool house constructed by the appellant's company with funds notionally lent by the appellant to her company. The issue in subsequent proceedings was whether the appellant owed money to her company, and she took the position that the issue was *res judicata* as a result of the earlier finding that she had received a benefit from the company. The majority of the Supreme Court of Canada held that the earlier finding was not tantamount to a finding that the company did not owe money to the appellant. In this regard, Mr. Justice Dickson applied the following reasoning, at 257:

> As long ago as 1893, Lord Hobhouse said in the Privy Council in *Attorney General for Trinidad and Tobago v. Eriché* [[1893] A.C. 518], at p. 522:
>
> > It is hardly necessary to refer at length to authorities for the elementary principle that in order to establish the plea of res judicata the judgment relied on must have been pronounced by a Court having concurrent or exclusive jurisdiction directly upon the point. In the *Duchess of Kingston's Case*, Sm. L.C. vol. ii. p. 642, which is constantly referred to for the law on this subject, it is laid down that in order to establish the plea of res judicata the Court whose judgment is invoked must have had jurisdiction and have given judgment directly upon the matter in question; but that if the matter came collaterally into question in the first Court, or were only incidentally cognizable by it, or merely to be inferred by argument from the judgment, the judgment is not conclusive.
>
> The question not being *eadem questio*, I am of the opinion that this is not a case for application of the

principle of issue estoppel.

[32] In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, Mr. Justice Binnie, after referring to the above passage and other authorities, expressed his view of the limitation:

> [24] … The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

[33] This limitation on issue estoppel applies equally to abuse of process: see *Altobelli v. Pilot Insurance Co.*, [1991] 3 S.C.R. 132, 6 C.P.C. (3d) 13, *Canam Enterprises Inc. v. Coles*, 2002 SCC 63, [2002] 3 S.C.R. 307, adopting the dissenting reasons of Mr. Justice Goudge (194 D.L.R. (4th) 648, 51 O.R. (3d) 481 (C.A.)), and *Skender v. Farley* 2007 BCCA 629, 289 D.L.R. (4th) 111.

[34] Hence, it is a requirement of each of the doctrines of issue estoppel and abuse of process that the issue in question was necessarily decided in an earlier proceeding. On the other hand, the doctrines will not prevent a person from relitigating findings that were collaterally made by the court and were not fundamental to the decision in the earlier proceeding.

[35] It is therefore necessary to consider the questions necessarily decided by Stromberg-Stein J. in the *Rowbotham* Reasons. She stated in para. 2: "The issue is whether Mr. Malik has the means to pay for his defence or to make a contribution." At para. 16, she indicated that three questions were raised but only the following one needed to be answered:

> Has Mr. Malik fulfilled the factual and evidentiary onus to establish indigency as defined in the *Rowbotham* jurisprudence; or has he disentitled himself by his action?

Before discussing the evidence in detail, Stromberg-Stein J. stated the result at para. 21:

> I agree with the Attorney General that Mr. Malik's application should be dismissed. As the discussion will show, Mr. Malik has failed to meet the factual and evidentiary onus to establish indigency as defined in the *Rowbotham* jurisprudence. Even if his financial circumstances could be classified as difficult, they are not extraordinary. Furthermore, he has not been prudent, has failed to prioritize legal fees, and has submitted erroneous, contradictory and unreliable evidence. The evidence establishes a collective effort by Mr. Malik and the Malik family members to diminish the value of his estate. If Mr. Malik is indeed indigent, it is because he has made himself so and he is not able to succeed on this application.

[36] After considering the principles established by the *Rowbotham* jurisprudence, Stromberg-Stein J. said the following about joint family assets:

> [24] This court cannot order Mrs. Malik or any family member to contribute to Mr. Malik's defence. However, their circumstances are relevant based on the principles cited above. I conclude that the income and assets of Mrs. Malik and the Malik family are relevant not only to assess Mr. Malik's financial responsibilities to his family but also to whether he might be able to obtain assistance from his family.
>
> [25] The assets of Mr. Malik and his family are so interconnected as to be fused. The Malik family has conducted its affairs such that all assets were jointly held for the benefit of all. Assets and income are pooled for one common enterprise. Title is meaningless.

Madam Justice Stromberg-Stein reviewed the evidence in detail and then provided a summary. The two paragraphs of her summary that were the foundation of her conclusions read as follows:

> [79] Mr. Malik has not presented evidence showing he has been prudent with his expenses. He has not shown foresight in planning his financial affairs to permit payment of his legal fees. Indeed, the facts suggest otherwise. In other words, he has failed to demonstrate that he has prioritized his legal expenses over other expenses. Failure to establish that he has made such efforts disentitles him to the *Charter* remedy sought.
>
> * * *
>
> [82] The evidence shows that Mr. Malik and his family have tried to arrange his financial and business affairs to minimize the value of his estate, to render him insolvent, and to therefore limit the amount of his contribution, or to eliminate that obligation entirely. His family's evidence that they will not assist him with his legal fees is simply unbelievable. He supports them all. He remains the driving force.

Finally, Stromberg-Stein J. said the following in her conclusion to dismiss Mr. Malik's application:

> [85] Mr. Malik has not fulfilled the factual and evidentiary onus to establish indigency for *Rowbotham* funding. Further, he has disentitled himself to *Rowbotham* funding by his actions.
>
> [86] Mr. Malik has failed to demonstrate extraordinary financial circumstances; attempts to obtain funds from family or other sources to retain counsel; prudence with expenses and prioritization of payment of his legal fees; efforts to save for the cost of counsel and to raise funds by earning additional income; and that he has made all reasonable effort to use his assets to raise funds, for example by obtaining loans.
>
> [87] He 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.

[37] The conclusion reached by Stromberg-Stein J. was that Mr. Malik had the means to pay for, or make a contribution towards, his defence costs. Her conclusion was based on her finding that Mr. Malik could look to the income and assets of his family, as well as his own assets, because the assets of Mr. Malik and his family were fused. In the alternative, Stromberg-Stein J. would have decided the application on the issue that Mr. Malik had disentitled himself to relief because he had not prioritized his legal expenses over other expenses.

[38] It follows, in my view, that the only *Rowbotham* findings admissible on the application for the *Mareva* injunction were the findings that Mr. Malik could look to his own assets to raise funds, that Mr. Malik could look to the income and assets of his family to fund his defence costs because their assets were fused and that, as a result, Mr. Malik had the means to pay for, or make a contribution towards, his defence costs. The remaining *Rowbotham* findings were not admissible because the doctrines of issue estoppel and abuse of process do not prevent the defendants from relitigating those facts. In my opinion, the admissible *Rowbotham* findings, together with the supplemental facts contained in the affidavits filed by the Crown, do not establish a strong *prima facie* case of fraud or a real risk of dissipation of assets by the defendants. Accordingly, it is my view that the injunction should be set aside, at least as against the defendants other than Mr. Malik.

b) Trust/Equitable Charge

[39] A *Mareva* injunction is a species of injunction with special requirements relating to the general rule against pre-judgment execution: see *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.* at para. 44. In the present case, however, it may be that the Crown has an interest in Mr. Malik's assets, in which case it would not be necessary for the Crown to satisfy the special requirements applicable to *Mareva* injunctions.

[40] The general test for the granting of an interlocutory injunction involves a consideration of three questions:

(a) Is there a serious question to be tried?

(b) Would the applicant suffer irreparable harm if the injunction is not granted?

(c) Does the balance of convenience favour the granting of the injunction?

See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, at para. 43.

[41] Here, there is no doubt that the Crown has a *prima facie* case that Mr. Malik is indebted to it in an amount exceeding $5 million. It is also my view that the Crown has a *prima facie* case that it has an interest in Mr. Malik's assets.

[42] Recital E of the Defence Counsel Agreement read as follows:

> E. 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.

Clause 2.08 of the Defence Counsel Agreement provided that if the amount of the defence costs funded by the Crown is less than the "amount of money realized by the Attorney General from the transfer of the Accused Person's property as described in Recital E, the Attorney General will pay the difference to the Accused Person or his order".

[43] In paragraph 20(c) of its statement of claim, the Crown pleaded the agreement of Mr. Malik to transfer his assets to the Crown in the terms of Recital E. In his statement of defence, which was filed prior to the hearing in January 2008, Mr. Malik did not deny this pleading except in the limited sense of saying that "he only agreed to transfer his estate net of all creditors and not the gross estate". The prayer for relief in the statement of claim did not request a *Mareva* injunction *per se* but, rather, requested "Interim and Interlocutory Injunctions restraining the transfer and/or encumbrance, sale, or disposition of assets pending resolution of this action".

[44] When an owner of property agrees to transfer the property to another person (usually a purchaser), courts of equity will impose a constructive trust upon the owner to hold the property in trust for the other person pending its transfer. The decision in *Martin Commercial Fueling Inc. v. Virtanen* (1997), 144 D.L.R. (4th) 290, 31 B.C.L.R. (3d) 69 (C.A.), contains an interesting discussion of the development of this constructive trust.

[45] Similarly, courts of equity have created the concept of equitable charges when there is an instrument that does not amount to a conveyance. *Falconbridge on Mortgages*, 2005, 5th ed., summarizes it in the following manner at section 5:40.30:

> An agreement in writing duly signed, however informal, by which any property is made a security for a debt or a present advance, creates an equitable charge upon the property.

See also *Elias Markets Ltd. (Re)* (2006), 274 D.L.R. (4th) 166, 25 C.B.R. (5th) 50, at paras. 63-65, for a description of the nature of equitable mortgages or charges.

[46] Hence, the Crown has a *prima facie* claim that it is entitled to either a constructive trust or an equitable charge in respect of Mr. Malik's assets. It could be viewed that Mr. Malik agreed to transfer his assets to the Crown as a form of security for the funding of his defence costs (in which case there would potentially be an equitable charge). On the other hand, there was no obligation on the Crown to transfer any of the assets back to Mr. Malik upon being repaid its advances, and it could be seen as an agreement by Mr. Malik to transfer his assets to the Crown absolutely (in which case there would potentially be a constructive trust).

[47] It is not necessary for the purposes of this appeal to determine whether the Crown is entitled to a constructive trust or an equitable charge in respect of Mr. Malik's assets. It is sufficient, in my view, that there is a serious question to be tried in that regard.

[48] In *RJR-MacDonald Inc.*, the Supreme Court of Canada made the following comments with respect to the second question regarding irreparable harm:

> [57] Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in

> deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.
>
> [58] At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> [59] "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other ... Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

[49] In my opinion, a refusal to restrain Mr. Malik from transferring or encumbering his assets could cause irreparable harm to the Crown. Subject to any defences Mr. Malik may have, the Crown is entitled to look to his assets for recovery of the funds it advanced under the Defence Counsel Agreement. There is a serious question as to whether the value of Mr. Malik's assets will be sufficient to satisfy the Crown's claim. To the extent that Mr. Malik's assets are transferred or encumbered and the value of his remaining assets is insufficient to satisfy the Crown's claim, the Crown will be irreparably harmed because it will be unable to recover the monies owing to it. There is admissible evidence that Mr. Malik has encumbered his assets after confirming in the Defence Counsel Agreement his agreement to transfer his assets to the Crown (namely, he granted mortgages against the Hamilton Street property in favour of his wife and his brother and it appears that he granted a security agreement to his brother).

[50] The final question to be considered on an application for an interlocutory injunction is the balance of convenience. This involves a consideration of which of the two parties will suffer the greater harm from the granting or refusal of the injunction: see *RJR-MacDonald Inc.* at para. 62. I have already discussed the potential harm to the Crown. In contrast, I see little or no potential harm to Mr. Malik. He has effectively admitted in his statement of defence that he agreed to transfer his assets to the Crown and the only issue raised is whether he agreed to transfer his "gross estate" or his "estate net of all creditors". In addition, it will be open to Mr. Malik to make application to the court for permission to transfer or encumber his assets if the transaction does not prejudice the Crown's position.

[51] In all of the circumstances, it is my view that the injunction is supportable against Mr. Malik even though the requirements for a *Mareva* injunction have not been met. If an injunction restraining Mr. Malik from transferring or encumbering his assets is not in place, the Crown's claim of a constructive trust or an equitable charge could be defeated and the Crown could be prevented from recovering all of the monies claimed by it. The injunction is reasonably necessary to preserve Mr. Malik's assets pending a determination of the Crown's claims.

***Anton Piller* Order**

[52] Mr. Malik Jr. says the chambers judge did not have the jurisdiction to grant the *Anton Piller* order in respect of evidence and the order was an inappropriate intrusion on solicitor-client privilege. Mr. Malik says the admissible evidence did not support the granting of the order.

[53] The Supreme Court of Canada discussed *Anton Piller* orders in *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, [2006] 2 S.C.R. 189. It is apparent from the discussion by Mr. Justice Binnie that he regarded *Anton Piller* orders to be available in respect of documentary evidence relevant to the issues in the litigation as well as to preserve property that is the subject matter of the action (see, for example, para. 32).

[54] Mr. Malik Jr. relies upon a comment under R. 46 of the Supreme Court *Rules of Court* by the learned authors of Bouck, Dillon & Turriff, *British Columbia Annual Practice 2009* (Aurora, Ontario: Canada Law Book, 2008) at 324 that *Celanese Canada* "may be limited in its application to British Columbia because of what appears to be a material difference between Rule 46(1) and its Ontario counterpart, Civil Procedure Rule 45.01", citing *Park v. B.P.Y.A. 1610 Holdings*, 2005 BCCA 545, 46 B.C.L.R. (4th) 265. Mr. Malik Jr. says there is no authority in British Columbia to grant an *Anton Piller* order to collect evidence. He is mistaken on the latter point because there is a reported case where Mr. Justice Groberman granted an *Anton Piller* order to preserve documentary evidence, although he did not specifically consider the jurisdictional issue (see *Neumeyer v. Neumeyer*, 2005 BCSC 163, 7 C.P.C. (6th) 251 (Chambers); *Neumeyer v. Neumeyer*, 2005 BCSC 1259, 47 B.C.L.R. (4th) 162 (Chambers)).

[55] There are three sources upon which a court can potentially draw for jurisdiction to grant an order such as an *Anton Piller* order. Those sources are statutes, rules of court and the court's inherent jurisdiction. There is no suggestion in this case that there is a statute from which the court could derive its jurisdiction to grant an *Anton Piller* order. If, as Mr. Malik asserts, jurisdiction cannot be found in R. 46(1), then the chambers judge will only have had jurisdiction to grant the order if it falls within the court's inherent jurisdiction. For a recent discussion of inherent jurisdiction generally, see *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 107.

[56] I agree with Mr. Malik Jr. that there is a significant difference between R. 46(1) of the British Columbia *Rules of Court* and Ontario's R. 45.01. Rule 46(1) deals with preservation of "property that is the subject matter of a proceeding or as to which a question may arise", while R. 45.01 deals with the preservation of "property in question in a proceeding or relevant to an issue in a proceeding". Mr. Justice Lowry discussed the limitations of R. 46(1) in *Park*, and I concur with his conclusion that the word "property" within the meaning of the rule does not include documentation that is relevant to an issue in the proceeding. However, *Park* related to the production of evidence in the possession of third parties (to which R. 26(11) applies), and it did not involve a discussion of the court's inherent jurisdiction to grant an *Anton Piller* order in respect of evidence.

[57] The court's jurisdiction was discussed in the case that lent its name to the remedy, *Anton Piller KG v. Manufacturing Processes Ltd.* While Lord Denning began his analysis by stating that "no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature" (at 60), he made a distinction between search warrants and orders that require defendants to give permission to allow entry and inspection at the risk of being found in contempt of court.

[58] Lord Denning specifically addressed the court's jurisdiction to grant such orders. The following passage, at 61, makes it clear that the jurisdiction was derived, not from rules of court, but from the court's inherent jurisdiction:

> This is not covered by the Rules of the Supreme Court and must be based on the inherent jurisdiction of the court. There are one or two old precedents which give some colour for it, *Hennessy v. Rohmann, Osborne & Co.* [1877] W.N. 14, and *Morris v. Howell* (1888) 22 L.R.Ir. 77, an Irish case. But they do not go very far. So it falls on us to consider it on principle. It seems to me that such an order can be made by a judge ex parte, but it should only be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties: and when, if the defendant were forewarned, there is a grave danger that vital evidence will be destroyed, that papers will be burnt or lost or hidden, or taken beyond the jurisdiction, and so the ends of justice be defeated: and when the inspection would do no real harm to the defendant or his case.

[59] The point is made that *Anton Piller* involved an order to preserve the property that was the subject matter of the litigation. However, in *Yousif v. Salama*, [1980] 3 All ER 405, [1980] 1 W.L.R. 1540 (C.A.), Lord Denning left no doubt that the discretion to grant an *Anton Piller* order extended to the preservation of a document that did not itself form the subject matter of the litigation. Although Lord Denning did make reference to a rule of court in his

reasons, he did not rely on the wording of the rule, and he stated that the destruction of documents before the date of the hearing is "the sort of danger which the Anton Piller order is designed to prevent" (at 406).

[60] More illuminating, however, is the dissent of Lord Justice Donaldson in *Yousif v. Salama*, who made it clear, at 407, that the court has the inherent jurisdiction to issue *Anton Piller* orders in relation to documentary evidence:

> Of course there is precedent for doing it. It is in the line of cases descended from *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] 1 All ER 779, [1976] Ch 55. The essential feature of those cases, as I understand them, is that there is a very clear prima facie case leading the court to fear that the defendant will conceal or destroy essential evidence in the grossest possible contempt of the court, and (this is an important second limb) that should he do so the whole processes of justice will be frustrated because the plaintiff will be left without any evidence to enable him to put forward his claim. In that limited class of case I, for my part, think that the Anton Piller order is absolutely right. No court can stand by and see the processes of justice totally frustrated by a defendant in contempt of its order.

Lord Justice Donaldson's dissent was based on his view that the evidence of an intention to destroy the documentation in that case was "flimsy in the extreme" (at 407).

[61] I return now to *Celanese Canada*. Mr. Justice Binnie did not refer to the Ontario rule in making his comments about *Anton Piller* orders. On my reading of the decision, he was speaking of the ability of courts generally to issue *Anton Piller* orders. He spoke of the orders being originally "developed" as an "exceptional remedy" in the context of trade secrets and intellectual property and observed that such orders "are now fairly routinely issued in ordinary civil disputes" (para. 29), citing *Neumeyer* as one of several examples. He stated that, while draconian in nature, there is a proper role for *Anton Piller* orders "to ensure that unscrupulous defendants are not able to circumvent the court's processes by, on being forewarned, making relevant evidence disappear", and he referred to such orders as an "equitable tool" (para. 32). In my view, the comments of Binnie J. did not turn on the wording of a rule of court, and his comments are consistent with my conclusion that the court has the inherent jurisdiction to issue *Anton Piller* orders to preserve documentary evidence.

[62] In view of my conclusion that the chambers judge had the inherent jurisdiction to grant the *Anton Piller* order in this case, the question becomes whether the Crown satisfied the test for the issuance of such an order. Mr. Justice Binnie set out the test at para. 35 of *Celanese Canada*:

> There are four essential conditions for the making of an *Anton Piller* order. First, the plaintiff must demonstrate a strong *prima facie* case. Second, the damage to the plaintiff of the defendant's alleged misconduct, potential or actual, must be very serious. Third, there must be convincing evidence that the defendant has in its possession incriminating documents or things, and fourthly it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work: …
>
> [Citations omitted.]

[63] It was incumbent on the Crown to satisfy the test by introducing admissible evidence. For the reasons I explained when dealing with the *Mareva* injunction, the only *Rowbotham* findings that were admissible, on the basis that they were binding on the defendants as a result of the doctrines of issue estoppel and abuse of process, were the findings that Mr. Malik could look to his own assets to raise funds, that Mr. Malik could look to the income and assets of his family to fund his defence costs because their assets were fused and that, as a result, Mr. Malik had the means to pay for, or make a contribution towards, his defence costs.

[64] The admissible evidence before the chambers judge established a strong *prima facie* case for the claim against Mr. Malik for reimbursement of the advances made by the Crown under the Defence Counsel Agreement, but the documentation supporting this claim is already in the possession of the Crown. In my opinion, the admissible evidence did not establish a strong *prima facie* case of fraud or show a real possibility the defendants

will destroy any incriminating documents that may be in their possession.

[65] Therefore, it is my view that the *Anton Piller* order should not have been granted on the basis of the admissible evidence before the court. As the order should be set aside on this basis, it is not necessary to deal with the issue regarding solicitor-client privilege.

Conclusion

[66] I would allow the appeal to the extent of setting aside the *Mareva* injunction as against the defendants other than Mr. Malik and setting aside the *Anton Piller* order in its entirety. I would direct the supervising solicitors under the *Anton Piller* order to return all documents and computer images, and all copies of them, to the persons to whom they belong (if known) or to the locations from which they were taken.

"The Honourable Mr. Justice Tysoe"

I AGREE:

"The Honourable Chief Justice Finch"

I AGREE:

"The Honourable Mr. Justice Frankel"