

CANADA / JUDGMENT

Kaila v. Mehta

2013 BCSC 2370

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 2370 Kaila v. Mehta

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kaila v. Mehta,

2013 BCSC 2370

Date: 20131204

Docket: S090727

Registry: Vancouver

Between:

Nachatar Singh Kaila and Kalvinder Singh Kaila

Plaintiffs

And

Raj K. Mehta, Sukhdev Singh Dhaliwal and DM Farms Ltd.

Defendants

Before: The Honourable Madam Justice Adair

Oral Reasons for Judgment

Counsel for the Plaintiffs:

S.H.P. Visram

Appearing on their own behalf:

R.K. Mehta

S.S. Dhaliwal

Place and Date of Trial:

Vancouver, B.C.

October 2-4 and

November 20-22, 2013

Place and Date of Judgment:

Vancouver, B.C.

December 4, 2013

- [1] THE COURT: This action arises out of a lease of a blueberry farm in Surrey. The plaintiffs (father and son) are the lessors, and the defendants Mr. Mehta and Mr. Dhaliwal are the lessees. In 2008, the year in question, the farm was leased pursuant to a lease agreement in writing dated April 1, 2008. The plaintiffs are seeking judgment for \$31,600, which they say is the balance of the unpaid rent under the 2008 lease, together with court-order interest. The claim for interest pursuant to the terms of the lease was abandoned during the trial.
- [2] On the first day of trial, the action was dismissed as against the defendant DM Farms Ltd.
- [3] There is no dispute that the defendants signed the lease. There is no real dispute about the amount of the unpaid rent. However, Mr. Mehta says that he should not be found liable because he signed the lease under duress. Mr. Dhaliwal says that the plaintiff Mr. Nachatar Kaila ("Mr. Kaila") owes him money, and he raises set-off as a defence. Mr. Dhaliwal says that the amount owing by Mr. Kaila to him exceeds any amount owing under the lease.
- [4] At this point, I will set out the background facts.
- [5] In May 2005, Mr. Kaila advertised the farm for lease in a local newspaper. Mr. Mehta and Mr. Dhaliwal met Mr. Kaila at his home in Burnaby, where he has a home office, to discuss leasing the farm. Mr. Kaila and Mr. Dhaliwal were acquainted with one another as a result of prior dealings concerning the lease of a farm property in Delta. That business relationship ended badly. However, in May 2005, Mr. Kaila was prepared to do business with Mr. Dhaliwal again, but only because Mr. Mehta was also going to be involved.
- [6] Mr. Mehta was introduced to Mr. Dhaliwal in 2004 through Mr. Mehta's spiritual advisor, who asked Mr. Mehta to help Mr. Dhaliwal through some hard times by providing both moral support and financial support to Mr. Dhaliwal. Mr. Mehta did this, although it appears now very much to his regret.
- [7] The blueberry farm was leased by the plaintiffs to the defendants in 2005, 2006 and 2007, pursuant to written leases dated May 28, 2005 (for 2005), November 28, 2005 (for 2006) and November 28, 2006 (for 2007).

- [8] The first lease for 2005 was drafted by a notary, and the parties reviewed and signed that lease at the notary's office.
- [9] At trial, Mr. Dhaliwal and Mr. Mehta indicated that at their initial meeting with Mr. Kaila to discuss leasing the farm, they gave him \$5,000. Mr. Kaila denied this. There is no documentary evidence that such a payment was made, and if it had been, there was no good reason not to mention it in connection with the preparation of the 2005 lease. I conclude that it is unlikely any such payment was made.
- [10] The 2005 lease set out the amounts to be paid by the lessees (that is, the defendants), and the due dates for payments. A portion called the "Advance amount" was to be paid up front, and a final payment was due at the end of the lease term. The lease also included a term giving the defendants the option to renew the lease for a further year on the same terms, except that the parties would negotiate the rent for the new lease year.
- [11] The 2005 lease was then used as a template for the following years. The plaintiff Kalvinder Singh Kaila (who I will refer to as Kevin Kaila) created a copy on his computer. Once the parties had agreed on the rent to be paid and the due dates, changes to the rent, the payment terms and the term of the lease were made as necessary. For example, under the 2006 lease, the total rent (including G.S.T) payable was \$58,300. The lessees were required to pay an Advance Amount of \$10,000, leaving a balance (the "Final Total") of \$48,300.
- [12] The lease agreements for 2006 and 2007 were both signed at the Kaila home by the plaintiffs and by the defendants, Mr. Mehta and Mr. Dhaliwal, and the signatures were witnessed by Mrs. Avninder Kaila, Mr. Kaila's wife and Kevin Kaila's mother.
- [13] The rent owing under the 2005, 2006, and 2007 leases was paid in full each year. Cheques were drawn on the account of DM Farms. Sometimes the rent was paid a little late. Sometimes Mr. Kaila was asked not to deposit a post-dated cheque and was given a replacement cheque. However, although the accounting is not necessarily straightforward, I find that all rent was paid and there were no overpayments.
- [14] The key factual disputes concern events relating to the 2008 lease.
- [15] There is general agreement that Mr. Kaila met with Mr. Dhaliwal and Mr. Mehta in the early part of 2008 concerning leasing the farm in 2008. There is agreement that the meeting took place when Mr. Kaila was at another of his rental properties in Surrey. There is also general agreement that money, on account of the Advance Amount for the 2008 lease, changed hands. There is disagreement about the amount of money.
- [16] According to Mr. Kaila, at this meeting, he received \$5,400 in cash as an advance payment on the 2008 lease. Mr. Kaila had in mind the same rent, that is, \$70,000, as in 2007, and the advance payment in 2007 was \$10,000. Mr. Kaila explained that when he met with Mr. Dhaliwal and Mr. Mehta at the Surrey house, the defendants told him that all they had was \$5,400, which they paid to him in cash. He asked if the defendants wanted a receipt for the \$5,400 and told them, if they did, he would have to go to his car to get his receipt book.

According to Mr. Kaila, the defendants declined the offer of a receipt.

- [17] Both Mr. Dhaliwal and Mr. Mehta say that they gave Mr. Kaila \$10,000 in cash at this meeting. There is no documentary evidence to support the assertion.
- [18] In early April, and as in prior years, a meeting was arranged at the Kaila house to finalize the 2008 lease. Mr. Mehta came with Mr. Dhaliwal. According to Mr. Kaila and Kevin Kaila, when Mr. Mehta and Mr. Dhaliwal arrived, all four of them sat down in Mr. Kaila's office.
- [19] Kevin Kaila explained that in preparation for the meeting with Mr. Mehta and Mr. Dhaliwal, he had prepared a draft lease based on the 2007 lease. The draft lease showed \$70,000 as the rent and \$10,000 as the advance amount. These were the same amounts as on the 2007 lease.
- [20] Both Mr. Kaila and Kevin Kaila recall the meeting beginning with casual conversation. They recall that Mr. Mehta asked for an ashtray; however, the Kaila home is non-smoking. Mr. Kaila, Mr. Mehta and Mr. Dhaliwal then went outside, and according to Mr. Kaila, the three of them continued the discussion and negotiations concerning the rent for 2008. Kevin Kaila went upstairs and did not participate in those discussions.
- [21] According to Mr. Kaila, during the discussions, he was told that Mr. Dhaliwal and Mr. Mehta could not afford \$70,000 in rent. Eventually, the three of them agreed on rent of \$40,000. According to Mr. Kaila, he, Mr. Mehta and Mr. Dhaliwal then went back inside, and Mr. Kaila called Kevin Kaila down to the office.
- [22] Kevin Kaila returned to the office. Both Mr. Kaila and Kevin Kaila testified that Mr. Mehta calculated the dollar amounts (based on the now agreed rent of \$40,000) and told Kevin Kaila what to change on page 2 of the lease. Both Mr. Kaila and Kevin Kaila testified that Kevin Kaila then wrote in the changes by hand. Each party then initialled each of the changes.
- [23] At this point, just briefly, I will mention the changes that are on page 2 of the 2008 lease. The "Lease amount" is changed from \$70,000 to \$40,000. The "5% GST amount" is changed from \$3,500 to \$2,000. The "Total amount" is changed from \$73,500 to \$42,000. The "Advance Amount" is changed from \$10,000 to \$5,400. The "Final Total" is changed from \$63,500 to \$36,600. Then, under "To be paid as follows", "31st July 2008, \$30,000" is scratched out, and then, beside "31st August 2008," the amount of \$33,500 is changed to \$36,600.
- [24] According to Mr. Kaila, Kevin Kaila and Mrs. Kaila, as she had done in prior years, Mrs. Kaila had prepared tea for the group. She came into the office with the tea just as the changes were being made on page 2 of the lease. After everyone signed on page 3 of the 2008 lease, she then signed as the witness.
- [25] The original of the 2008 lease has been marked as Exhibit 5. Kevin Kaila testified that the handwritten changes on page 2 are in his handwriting. Mr. Kaila and Mrs. Kaila also identified Kevin Kaila's handwriting. There are four sets of initials for each of the changes: Kevin Kaila, who is "KK"; Mr. Mehta, who is "RK"; Mr. Dhaliwal, who is "SSD"; and Mr. Kaila, who is "NK". The initials and the signatures and some of the dollar amounts are in different

coloured ink. For example, Mr. Mehta's and Mr. Dhaliwal's initials and signatures are in blue ink. However, Mr. Kaila and Mrs. Kaila explained that there are typically many pens around in Mr. Kaila's office. I do not attach any significance to the different inks. The explanation given is reasonable.

- [26] According to Mr. Kaila, after the 2008 lease was signed and witnessed, he then made a copy for Mr. Mehta and Mr. Dhaliwal, which he gave to Mr. Mehta, and he kept the original for this file. Mr. Mehta then made out a postdated cheque (that is Exhibit 6, which is on the account of DM Farms) for the balance of the rent owing (\$36,600). The cheque was signed by Mr. Mehta and Mr. Dhaliwal and given to Mr. Kaila.
- [27] Mr. Kaila, Kevin Kaila, and Mrs. Kaila all describe Mr. Mehta's demeanour when he was at their house as normal and friendly, and all say that Mr. Mehta did not appear in any way to be frightened or scared.
- [28] Mr. Mehta and Mr. Dhaliwal tell a very different story about the meeting in April at the Kaila house.
- [29] Mr. Mehta says first that he did not want to lease the farm for 2008. Despite that, when Mr. Dhaliwal contacted him to go to the Kaila house, and although Mr. Mehta says that he did not want to go, he nevertheless went with Mr. Dhaliwal. Mr. Mehta and Mr. Dhaliwal say that when they arrived, Mr. Kaila and Kevin Kaila were outside the house, something that Mr. Kaila and Kevin Kaila both deny.
- [30] Mr. Dhaliwal says that he and Mr. Kaila had a discussion in Mr. Kaila's office about the rent for 2008. Both Mr. Dhaliwal and Mr. Mehta testified that, during these discussions, Mr. Mehta was not present and that he was waiting alone outside the house. At one point during his testimony, Mr. Dhaliwal denied that there was any agreement on a rent of \$40,000. Not only was this contrary to the terms of the 2008 lease, but it was also contrary to Mr. Dhaliwal's evidence on his examination for discovery where he testified that he, Mr. Mehta and Mr. Kaila - that is, the three of them - negotiated and came to an agreement on rent of \$40,000. When Mr. Dhaliwal's evidence was put to him on cross-examination, Mr. Dhaliwal confirmed it was true.
- [31] Mr. Dhaliwal testified that when he and Mr. Kaila were together discussing matters, Mr. Kaila told him to bring Mr. Mehta (referring to Mr. Mehta using a derogatory term) into the house, and that Mr. Kaila would break Mr. Mehta's legs and smash his face if he did not sign the lease. Mr. Dhaliwal says that he then went out and spoke to Mr. Mehta. Mr. Dhaliwal told Mr. Mehta that if he did not sign the lease, Mr. Kaila would break his legs and smash his face.
- [32] Mr. Mehta testified that Mr. Dhaliwal said this to him, and Mr. Mehta says that he was forced to go into Mr. Kaila's office.

- [33] According to Mr. Mehta and Mr. Dhaliwal, the draft lease was in the office. Both Mr. Dhaliwal and Mr. Mehta say that the two of them and Mr. Kaila were the only people in the office, and that no one else was there. According to Mr. Dhaliwal and Mr. Mehta, in the office, Mr. Kaila repeated his threats, to break Mr. Mehta's legs and to smash his face, directly to Mr. Mehta. Mr. Mehta testified that he was afraid, and he felt that he had to sign the lease.
- [34] Both Mr. Mehta and Mr. Dhaliwal admit that they initialled the handwritten changes on page 2 of the 2008 lease. Mr. Mehta testified that he made his initials under threat and tremendous pressure. However, Mr. Dhaliwal denies that Kevin Kaila made the handwritten changes to the lease. Moreover, at trial, both Mr. Mehta and Mr. Dhaliwal insisted that Kevin Kaila was not there when the changes were made. Indeed, both Mr. Dhaliwal and Mr. Mehta repeated a number of times in their evidence that the two of them and Mr. Kaila were the only people present in Mr. Kaila's office when the 2008 lease was signed and that neither Kevin Kaila nor Mrs. Kaila were ever there.
- [35] Mr. Dhaliwal and Mr. Mehta acknowledged that, at the April meeting, they signed a postdated cheque for \$36,600. Neither could reconcile the amount of the cheque with their evidence that they had already given Mr. Kaila \$10,000 as an advance amount. Mr. Mehta acknowledged that he was the one who made out the cheque (including writing in the words "Balance of lease paid in full") before he and Mr. Dhaliwal signed it and gave it to Mr. Kaila, although he says he did this because Mr. Dhaliwal was threatening him.
- [36] Both Mr. Dhaliwal and Mr. Mehta deny that Mrs. Kaila ever came into the office with tea, and both deny that they signed the lease in her presence. Both Mr. Dhaliwal and Mr. Mehta deny that they were given a copy of the lease.
- [37] Mr. Kaila denies ever threatening Mr. Mehta in any way. He says that he was never alone with Mr. Dhaliwal, and that he, Mr. Dhaliwal and Mr. Mehta were together all of the time that Mr. Dhaliwal and Mr. Mehta were at his house the day the 2008 lease was signed.
- [38] In early September 2008, Mr. Kaila deposited the cheque for \$36,600. However, it came back NSF. Mr. Mehta and Mr. Dhaliwal acknowledge that there were insufficient funds to cover the cheque. Mr. Kaila says that he contacted Mr. Mehta, who said that he would bring another cheque. However, he did not. Nevertheless, that Fall, Mr. Mehta made arrangements for a cash advance of \$5,000 on his MasterCard. He then gave Mr. Kaila a draft for \$5,000 on account of the amount owing on the rent and, according to Mr. Kaila, told Mr. Kaila that the defendants would be paying the balance owing. However, they never did.
- [39] This action was then filed in January 2009. A default judgment dated July 2, 2009, was set aside as against Mr. Mehta and DM Farms pursuant to the consent order pronounced March 25, 2013. That order also contained a term restricting Mr. Mehta from dealing with his interest in real property in Surrey. Mr. Dhaliwal was not included in the consent order. However, Mr. Visram, counsel for the plaintiffs, confirmed that that was a mistake and that the default judgment against Mr. Dhaliwal should be taken to have been set aside so that Mr.

Dhaliwal may defend the claim on its merits.

[40] The defendants' response to civil claim was filed on April 4, 2013.

[41] I will now make some comments on credibility.

[42] As I noted above, the key disputes concerning the 2008 lease are factual. There are direct conflicts between the evidence of Mr. Kaila, Kevin Kaila and Mrs. Kaila on the one hand, and Mr. Dhaliwal's and Mr. Mehta's evidence on the other. Credibility is therefore a very important feature of this case.

[43] It is the responsibility of the trier of fact (in this case, me, as the trial judge), not experts, to decide the truthfulness of witnesses. That is one of the reasons why the letter from Dr. Sandhu, Mr. Mehta's psychiatrist, that was included in the trial record that Mr. Mehta filed would not have been admitted into evidence.

[44] The court can accept some, all, or none of a witness's evidence.

[45] The assessment of a witness's credibility involves examination of various factors, such as: the witness's ability and opportunity to observe events; the firmness of the witness's memory; the witness's ability to resist the influence of interest to modify his or her recollection; whether the witness's evidence harmonizes with independent evidence that has been accepted; whether the witness changes his or her testimony during direct and cross-examination; whether the witness's testimony seems unreasonable, impossible or unlikely; whether a witness has a motive to lie; and the demeanor of a witness generally. Moreover, the assessment of a witness's credibility must reasonably subject the witness's story to an examination of its consistency with the probabilities of the surrounding conditions or circumstances.

[46] When I consider the testimony of the witnesses in the light of these factors, I prefer and accept the evidence of Mr. Kaila, Kevin Kaila and Mrs. Kaila over the evidence of Mr. Mehta and Mr. Dhaliwal, where there are conflicts concerning the events relating to the 2008 lease. In my opinion, the evidence of Mr. Mehta and Mr. Dhaliwal concerning these events is generally not credible. I will briefly explain why.

[47] The evidence of Mr. Kaila, Kevin Kaila and Mrs. Kaila concerning events in 2008, looked at in the context of the dealings concerning the lease of the blueberry farm in prior years, is logical and reasonable. Mr. Kaila's evidence concerning the negotiation of the 2008 rent at the meeting at the Kaila home is supported by Mr. Dhaliwal's discovery evidence, which he confirmed at trial was true (although he also attempted to distance himself from it). Mr. Kaila's evidence concerning the 2008 rent and his evidence about the payment of \$5,400 is also supported by the handwritten changes in fact made in the 2008 lease. Those were among the changes initialled by Mr. Dhaliwal and Mr. Mehta indicating their agreement with them. Mr. Kaila's evidence is also supported by the cheque that Mr. Mehta made out for \$36,600, the balance of the rent, which both Mr. Dhaliwal and Mr. Mehta signed.

- [48] Mr. Kaila's evidence is consistent with and supported by Kevin Kaila's evidence as well as the contents of the 2008 lease document itself.
- [49] Kevin Kaila's evidence, in particular his evidence about the handwritten changes in the 2008 lease, the initialling of those changes by all four parties and the signing of the lease, was supported by Mr. Kaila's and Mrs. Kaila's evidence. It is consistent with what can be observed in the 2008 lease document. It is logical and consistent with the probabilities of the surrounding circumstances. Kevin Kaila's evidence was not shaken on cross-examination.
- [50] Both Mr. Dhaliwal and Mr. Mehta were argumentative and defensive on cross-examination. Mr. Mehta, in particular, had things that he very strongly wished to communicate regardless of the questions put to him and whether or not details of his story were relevant to the issues in the case. Mr. Mehta has, by all appearances, been deeply affected by a traumatic experience in 2006. There was a sense of desperation in his evidence, and that he perceived that being found liable for the amount of the rent under the 2008 lease would have devastating consequences to him and his family, possibly involving the loss of their home.
- [51] It appears that, unlike Mr. Mehta, Mr. Dhaliwal does not have assets such as real property that could be placed at risk by a judgment against him, so the litigation stakes are different for him as compared with Mr. Mehta. From Mr. Dhaliwal's evidence-in-chief, however, during which he spoke at some length about Mr. Mehta and his circumstances, I conclude that Mr. Dhaliwal feels a significant amount of guilt and remorse for getting Mr. Mehta involved in a situation that has resulted in Mr. Mehta being sued personally and that (based on Mr. Dhaliwal's and Mr. Mehta's evidence) has caused Mr. Mehta a great deal of personal distress. I conclude that Mr. Dhaliwal is strongly motivated to try and save Mr. Mehta from the potential consequences of a judgment against him.
- [52] These are factors that in my view dictate a high degree of caution before accepting Mr. Mehta's or Mr. Dhaliwal's evidence where it conflicts with the evidence of Mr. Kaila, Kevin Kaila and Mrs. Kaila. The perceived stakes in the litigation, especially for Mr. Mehta, create a motive to be less than truthful.
- [53] In addition, there are a number of problems with the content of Mr. Dhaliwal's and Mr. Mehta's evidence concerning the events in 2008. Their stories, although consistent with one another, are neither logical nor plausible. Not only was their evidence inconsistent with Mr. Kaila's, Kevin Kaila's and Mrs. Kaila's, it was inconsistent with what is reflected on the 2008 lease document and inconsistent with what would be recognized as probable in all the circumstances. I will illustrate the point with a few examples.
- [54] Both Mr. Mehta and Mr. Dhaliwal insisted that they were alone with Mr. Kaila in Mr. Kaila's office when Mr. Kaila threatened Mr. Mehta and the 2008 lease was signed, and they insisted that neither Kevin Kaila nor Mrs. Kaila was there. Not only was this evidence contradicted by Mr. Kaila, Kevin Kaila and Mrs. Kaila, it does not make sense in the context of other evidence. Handwritten corrections on page 2 of the 2008 lease are in Kevin Kaila's handwriting, and all of the corrections quite plainly are initialled by Kevin Kaila, Mr. Mehta,

Mr. Dhaliwal, and Mr. Kaila. Both Mr. Mehta and Mr. Dhaliwal acknowledge, as they must, initialling the changes on the document, and there would be no logical reason to be initialling anything unless changes were in fact being made, as described by Mr. Kaila and Kevin Kaila. The idea that these changes would simply appear and be initialled by everyone (including Kevin Kaila), without Kevin Kaila being there, is not believable.

- [55] Mr. Dhaliwal insisted that the term in the 2008 lease concerning interest was added later after the lease was signed. However, every year, beginning in 2005, the form of the lease contained such a term. In the circumstances, Mr. Dhaliwal's evidence that the term regarding interest was added to the 2008 lease after it was signed is not believable.
- [56] Mr. Mehta's and Mr. Dhaliwal's evidence about giving Mr. Kaila \$10,000 at the Surrey house earlier in 2008 is not supported by any documentary evidence and appears to be an attempt to rely on the fact that the original draft of the 2008 lease showed \$10,000 as the Advance Amount. However, the draft in 2008 was clearly based on the rent and other terms in the 2007 lease, where the Advance Amount was \$10,000. The draft lease does not provide any support for the defendants' story about the \$10,000. The handwritten revision in the 2008 lease showing \$5,400 as the advance amount is initialled by them and is inconsistent with their version of events. The facts that they had both initialled \$36,600 as the balance of the rent owing and signed a cheque for \$36,600 which they gave to Mr. Kaila are also inconsistent with their version of events.
- [57] Mr. Mehta agreed on his examination for discovery that he told Master Young in October of 2011 that he and Mr. Dhaliwal had paid \$5,400 to Mr. Kaila. This statement is also inconsistent with his and Mr. Dhaliwal's version of events at trial, but it is consistent with Mr. Kaila's evidence. Mr. Dhaliwal's and Mr. Mehta's evidence about giving Mr. Kaila \$10,000 is not credible.
- [58] I turn, then, to my findings.
- [59] I find that the 2008 lease (Exhibit 5) shows the results of the negotiations in April 2008 between Mr. Kaila and Mr. Mehta and Mr. Dhaliwal concerning the rent. Mr. Kaila's evidence concerning the negotiations over the rent is supported by Mr. Dhaliwal's discovery evidence, which he confirmed at trial was true. I find that, once those negotiations were complete and the amount of the rent agreed, Kevin Kaila, in the presence of Mr. Kaila, Mr. Mehta and Mr. Dhaliwal, made handwritten changes, and all parties then initialled each of those changes. I find that the Advance Amount was confirmed to be \$5,400, the amount that had been paid in cash to Mr. Kaila earlier. I find that after the changes were made and initialled, the lease was then signed by all parties in April 2008 in Mrs. Kaila's presence. At the meeting, Mr. Mehta wrote out a postdated cheque for the balance of the rent (\$36,600), and both he and Mr. Dhaliwal signed it. I find that when the cheque was deposited in early September, it was returned NSF. I find that in October 2008, Mr. Mehta arranged to make a payment of \$5,000 on account of the rent owing, but the balance, \$31,600, was never paid.

- [60] I turn, then, to Mr. Mehta's defence that he signed the 2008 lease under duress.
- [61] The burden of proving the defence of duress lies on the party asserting it. Duress has been described to mean the compulsion under which a person acts through fear of personal suffering, as from injury to the body or from confinement, actual or threatened. Duress in the execution of a contract occurs when there is a physical compulsion of the person (which must be very rare), or when there is a threat to the person's life or limb or a threat of physical beating or of imprisonment. Where there is duress, it renders a contract voidable, not void.
- [62] If, in fact, the threats alleged (threats of beating and physical harm) were made by Mr. Kaila to Mr. Mehta, they could qualify as duress. However, I find that no such threats were made.
- [63] I have said above that, in my view, Mr. Mehta's and Mr. Dhaliwal's evidence concerning the events in connection with the signing of the 2008 lease is not credible. Thus, I do not believe Mr. Mehta's and Mr. Dhaliwal's evidence that Mr. Kaila threatened Mr. Mehta. Mr. Kaila denies any such conduct. He describes Mr. Mehta as acting normal and friendly. His evidence is supported by Kevin Kaila's and Mrs. Kaila's evidence of their observations of Mr. Mehta's demeanour. Mr. Kaila's and Kevin Kaila's descriptions of what happened when the 2008 lease was signed are plausible and credible. Moreover, there was no reason for Mr. Kaila to threaten anyone, certainly not over the lease of the blueberry farm. For Mr. Kaila, nothing turned on whether Mr. Dhaliwal and Mr. Mehta leased the blueberry farm in 2008. He could have rented it to others.
- [64] The making out of the cheque for the balance of the rent and the payment in the Fall of \$5,000 on account of the balance owing are also more consistent with the plaintiffs' version of events, namely, that, consistent with prior years, this was a normal business transaction for the lease in 2008 of the blueberry farm, than with Mr. Mehta's story.
- [65] Mr. Mehta now, in hindsight and with all that has gone on in his life in the last five years, and because he is desperate to escape the consequences of his actions, has firmly convinced himself that he only signed the 2008 lease because he was threatened and pressured to do so. However, I find those were not the facts in 2008 when the 2008 lease was signed.
- [66] I conclude therefore that Mr. Mehta has failed to prove the defence of duress on a balance of probabilities.
- [67] I turn, then, to Mr. Dhaliwal's defence of set-off.
- [68] There cannot be a legal set-off since the debts in issue are not mutual. The debt that is the subject of this action is owed jointly to the plaintiffs, Mr. Kaila and Kevin Kaila, not Mr. Kaila alone, and it is owed jointly by the defendants Mr. Mehta and Mr. Dhaliwal, not Mr. Dhaliwal alone.

- [69] However, are the conditions for an equitable set-off established? I conclude the answer must be no. The conditions for an equitable set-off include that: (1) the party relying on a set-off, that is, Mr. Dhaliwal, must show some equitable ground for being protected against his adversary's demands; (2) the equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed; and (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. Thus, it is not every cross-claim which can be deducted by way of set-off. It is only cross-claims that arise out of the same transaction or are closely connected with it; and it is only cross-claims which go directly to impeach the plaintiff's demands, that is, they are so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim, which may be deducted.
- [70] In this case, Mr. Kaila denies that he owes any money to Mr. Dhaliwal. However, even if there was a debt owing by Mr. Kaila to Mr. Dhaliwal (as to which I draw no conclusions and make no findings), based on the evidence, it would not be a debt arising out of the same transaction, that is, the lease of the blueberry farm, or closely connected with it. Thus the conditions in which an equitable set-off might be allowed do not exist on the facts here.
- [71] In summary, the plaintiffs are entitled to judgement against Mr. Mehta and Mr. Dhaliwal, jointly and severally, for \$31,600, together with interest from and after October 21, 2008, pursuant to the Court Order Interest Act.
- [72] The order of Mr. Justice Jenkins pronounced March 25, 2013, that is, the consent order that set aside the default judgment, contained, as I mentioned, a restriction on Mr. Mehta's ability to deal with real property in Surrey. The restriction had no limits on it. The restriction is found in paragraph 2 of the March 25, 2013, order, and in the interests of time, I am not going to read it. Mr. Mehta's liability is now capped at the amount and has been reduced to a judgment. In my view, in that light, Mr. Mehta should be relieved of the restriction in the March 25, 2013, order, and paragraph 2 of the order should be vacated. As any judgment creditor can do, the judgment that has been granted in favour of the plaintiffs can be registered against a judgment debtor's property, and in my view, that is the appropriate course in these circumstances. Mr. Mehta's interest in the real property in Surrey should not be encumbered by a potentially unlimited liability.
- [73] With respect to costs, Mr. Visram asks for a higher level of costs or, alternatively, special costs. He says that the defendants advanced a contrived defence which, in his submission, had little prospect of success and which resulted in a six-day trial over a \$31,600 claim.
- [74] In my opinion, Mr. Visram has not presented any proper justification for a higher level or scale of costs. Although I have rejected the defences advanced by Mr. Dhaliwal and Mr. Mehta and found their version of events regarding the 2008 lease to be not credible, I do not see this as a case for special costs. Sometimes desperate people, and in this case, Mr. Mehta in particular, do very foolish things. Although in other circumstances the conduct of the

defendants in this case might be found to be reprehensible so as to justify an award of special costs, I am not prepared to make that finding here.

- [75] In addition, part of the length of the trial resulted from Mr. Dhaliwal and Mr. Mehta being without counsel. It is often very difficult for self-represented defendants to conduct a trial with the same level of efficiency the court is entitled to expect where parties are represented by counsel. That is unfortunate but unavoidable. It is not a basis for special costs. As the losing parties, the defendants will bear the consequences of having the trial go for six days.
- [76] I am therefore ordering with respect to costs that the plaintiffs are entitled to costs on Scale B, and there will be one set of costs for both plaintiffs.
- [77] Finally, I am dispensing with Mr. Mehta's and Mr. Dhaliwal's approval as to the form of order. Mr. Visram, you will responsible for drafting an appropriate form of order, and since this judgment is being rendered after a trial, the order must come to me for signature. In those circumstances, and since the order is straightforward, I see no basis to delay matters by requiring the draft order to be endorsed by Mr. Mehta and Mr. Dhaliwal. I am therefore dispensing with their approval as to form.
- [78] That concludes my ruling. Is there anything further we need to deal with this morning? Mr. Mehta, you wish to say something?
- [79] MR. MEHTA: Yes, Her Ladyship. I did not understand a few things. If you don't mind, can I ask, please? I could not understand a few things.
- [80] THE COURT: All right.
- [81] MR. MEHTA: Do you mind if I'm just asking --
- [82] THE COURT: Yes, briefly if you can, Mr. Mehta, because we have another matter that is scheduled to start at ten o'clock. Let me just summarize again the terms of the judgment.
- [83] I have granted judgment in favour of the plaintiffs for \$31,600. The plaintiffs are also entitled to interest under the Court Order Interest Act. That is something that, generally speaking, any plaintiff who recovers judgment, a monetary judgment in British Columbia, is entitled to under the Court Order Interest Act. The interest will be calculated from and after October 21, 2008, and you might recall that on the last day of the trial I asked Mr. Visram to do some rough calculations of the amount of court-order interest that had accumulated, and I think he gave you and Mr. Dhaliwal a copy of the calculation that he had done, and I think it was somewhere around - something less than \$2,000.
- [84] MR. VISRAM: That's correct, My Lady.
- [85] THE COURT: Yes. That amount is added to the amount of the judgment, so the total amount of the judgment will be somewhere in the order of \$33,600.

[86] The order from March of 2013 that set aside the default judgment restricted your ability to deal with your house in Surrey. It prevented you from selling, mortgaging, transferring, really doing anything with your interest in the house. I have vacated or set aside that term because now your liability has been crystallized in a judgment, and there is no good reason for your liability to be treated as unlimited, so if, for example, your equity in this property in Surrey was worth \$100,000, based on the terms of this order, you would not be able to access that equity even though your liability might be much less. Now your liability has been crystallized. Mr. Visram's clients will be in a position where they can register the judgment against your interest in the property. In that respect, again, they are in the same position as anyone else who holds a monetary judgment in British Columbia. A judgment creditor with a monetary judgment can register that judgment against an interest in real property that the judgment debtor has. So they are in a position to do that now. That is one of the reasons why I have set aside the restriction in the March 2013 order.

[87] MR. MEHTA: You were - sorry. So Her Ladyship, it means that you are taking that condition out of the title, right?

[88] THE COURT: Well, I do not know if there was some registration of this -

[89] MR. MEHTA: Yes -

[90] THE COURT: - the injunction -

[91] MR. MEHTA: - they registered it -

[92] THE COURT: Sorry, Mr. Mehta, just -

[93] MR. MEHTA: - Her Ladyship.

[94] THE COURT: Mr. Mehta, I do not think I ever saw a copy of the title, so I do not know whether there was anything that was actually -

[95] MR. MEHTA: I think -

[96] THE COURT: - registered on the title. Mr. Visram, perhaps you can help me there.

[97] MR. VISRAM: It was, My Lady. Mr. Justice Jenkins' order was registered.

[98] THE COURT: All right. Well, that needs to be -

[99] MR. MEHTA: Taken out.

[100] THE COURT: Yes, that needs to be vacated and discharged, and it needs to be done promptly since my order is effective from today.

[101] MR. VISRAM: Yes.

[102] THE COURT: All right.

[103] MR. MEHTA: Thank you. Mr. Visram, you will take that to Her Ladyship?

- [104] THE COURT: I have also ordered costs in favour of the plaintiffs. The usual order is that the successful party is entitled to costs. The plaintiffs have been successful in this case. They are entitled to costs. I have awarded costs on Scale B, which is the normal scale, so even though Mr. Visram asked for costs at a higher level than that, I disagreed with his submission. So I have awarded costs on the usual scale, and in due course, Mr. Visram will be preparing what is called a bill of costs, and those costs will be, if there is no agreement, they will be assessed in front of a court official called a registrar.
- [105] So that summarizes the orders that I have made today. Now, do you have anything else that you want to ask me, and quickly, Mr. Mehta?
- [106] MR. MEHTA: Her Ladyship, thank you very much for everything. Like, okay, that if - there will be no condition on our house; then whatever the money my share will be, right, with Mr. Visram, then -
- [107] MR. VISRAM: We can discuss that outside.
- [108] THE COURT: Mr. Mehta, the judgment is against you and Mr. Dhaliwal, and I said jointly and severally, so each of you is liable for the whole amount.
- [109] MR. MEHTA: Yes.
- [110] THE COURT: All right.
- [111] MR. MEHTA: Like 50 percent he is liable? No?
- [112] THE COURT: No. Each of you is liable for 100 percent.
- [113] MR. MEHTA: Okay.
- [114] THE COURT: Once the plaintiffs collect 100 percent, and it does not matter who pays it, then the judgment has been satisfied.
- [115] MR. MEHTA: So like Mr. Dhaliwal is not in the picture anyway, and like our house is that we have to - Her Ladyship, like, our mortgage renewal is on December the 15th. Like, if there will be - you know, like there will be no restriction, then we won't sell the house. We won't get any taint upon my name. Then we will be defaulted if we do anything under the law. So in order to get remortgaged, there should be no condition on that.
- [116] THE COURT: All right. I am sorry, Mr. Mehta. Those are matters that I cannot advise you on. You may wish to see if you can contact duty counsel or get some assistance through some of the free legal advice services that are available, but I cannot give you legal advice on those issues.
- [117] MR. MEHTA: No, I'm not seeking legal advice. I'm seeking that the condition which Mr. - that I could not understand, please. The judgment is set aside by the court -
- [118] THE COURT: No, I have dissolved -

[119] MR. MEHTA: - and then there was a condition on it.

[120] THE COURT: I have set aside the injunction that was in the March 2013 order. It can be replaced. That charge can be replaced, if Mr. Visram's clients are inclined to do so, with a judgment in the amount that I have stated. They can register that judgment as a charge against your interest in that property. Whether they do that or not is up to the plaintiffs. I have no control over that and I am not -

[121] MR. MEHTA: The full amount will be - please, just - I just want -

[122] THE COURT: The amount of judgment that you are liable for is the full amount.

[123] MR. MEHTA: Not 50 percent?

[124] THE COURT: No, it is 100 percent.

[125] MR. MEHTA: Both. He and me both.

[126] THE COURT: Both of you are liable for 100 percent, and I am going to now adjourn court.

"Adair J."

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