

CANADA / JUDGMENT

Saran v. Cartonio, Inc.

2020 BCSC 556

COURT

Supreme Court of British Columbia

DECIDED

6 March 2020

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2020 BCSC 556 Saran v. Cartonio, Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Saran v. Cartonio, Inc.,

2020 BCSC 556

Date: 20200306

Docket: S198281

Registry: Vancouver

Between:

Iqbal Sing Saran

Plaintiff

And

Cartonio, Inc., Vincenzo A. Carnovale and Maria G. Levallois

Defendants

And

Iqbal Sing Saran

Defendant by Counterclaim

Before: The Honourable Madam Justice Matthews

Oral Reasons for Judgment Re Application for a Summary Trial

In Chambers

Counsel for the Plaintiff and Defendant by Counterclaim:

G.P. Forrester

C. Law

Appearing as Agent for Counsel for the Defendants:

M.C. Stacey

K. Buecker (A/S)

Place and Date of Hearing:

Vancouver, B.C.

February 27, 2020

Place and Date of Ruling:

Vancouver, B.C.

March 6, 2020

[1] THE COURT: These reasons were given orally. I have since edited them without changing the substance.

Introduction

- [2] The plaintiff, Iqbal Sing Saran, brings this summary trial application for judgment against the defendants based on promissory notes they signed and general security agreements related to the promissory notes. Mr. Saran asserts that the promissory notes and the general security agreements were made in conjunction with a settlement of claims between a trust, Solex Trust 1, which I will refer to as "Solex," made with the corporate defendant Cartonio, Inc. and the individual defendants Vincenzo A. Carnovale and Maria Gabrielle Levallois.
- [3] Mr. Carnovale is the principal and sole director of Cartonio. Ms. Levallois is his wife. Mr. Saran describes himself as having a management and consulting agreement with Solex. His wife is the trustee of Solex. There is no evidence as to who the beneficiaries of Solex are. Mr. Saran is the plaintiff in this action pursuant to an assignment of Solex's claims to him.
- [4] The defendants assert that the matter is not suitable for summary trial determination because the conflicting evidence will not permit the court to find facts in relation to some of the defendants' defences, including duress. The defendants point to the conflicting evidence and submit that credibility of the main witnesses, especially Mr. Carnovale and Mr. Saran, must be decided. The defendants argue that the duress defence is based on a factually complex chain of events, and so examinations for discovery are required before trial.

- [5] The defendants assert that their counterclaim is factually related to their defences of Mr. Saran's claim and so there is a real of risk of findings of fact being made at a summary trial of Mr. Saran's claims that will affect the counterclaim and could result in inconsistent findings of fact and or credibility once that claim goes to trial. The defendants submit that because the counterclaim remains to be tried, a summary trial will result in litigation in slices.
- [6] Mr. Saran argues that the case is suitable for summary trial determination because even though some evidence conflicts, the key facts are that an agreement was made to repay certain funds and the funds have not been repaid. Those facts are not the subject of conflicting evidence. Mr. Saran acknowledges that there is conflicting evidence pertaining to the defence of duress, especially whether he threatened Mr. Carnovale. He submits that conflict does not prevent the court from deciding the matter summarily because Mr. Carnovale has not led evidence on essential elements of the defence of duress and so the defence cannot succeed even if he made the threat asserted by Mr. Carnovale. Mr. Saran also argues that the court should reject Mr. Carnovale's evidence as illogical and implausible.
- [7] The defendants argue that if the matter is suitable for summary trial determination then Mr. Saran's claim must fail. They raise several defences including that they were coerced into the promissory notes and security agreements; there was no debt that gave rise to the promissory notes and security agreements and so no consideration for them; the promissory notes and security agreements were unconscionable; Mr. Saran and his colleague, Mr. Aquilino made misrepresentations that induced them to enter into the promissory notes and security agreements; and the stock purchase agreement to which all of these matters are connected has an arbitration clause that should govern the resolution of any disputes.

Background

- [8] Given the factual disputes, I will summarize the evidence led but this background does not contain of findings of fact.
- [9] While much is in dispute about the facts of the events that give rise to this claim, the parties both led evidence that the matters that bring them to court involve a 2018 stock purchase agreement pursuant to which Solex purchased class B non-voting preferred shares in Cartonio, a Nevada based company. There is a dispute as to the currency in which the original investment was made. Mr. Saran's claim and evidence does not stipulate a currency denomination other than dollars, and so it is deemed to reference Canadian dollars.
- [10] The defendants assert that Solex's investment was US \$3 million. Mr. Saran's pleadings and submissions appear to seek a return of CDN \$1.4 million plus interest. There is documentary evidence showing that Solex transferred funds to make the stock purchase on June 6, 2018, in the amount of US \$3 million.

- [11] Mr. Saran deposed that Solex transferred \$3 million (no currency stipulated) to Cartonio on May 24, 2018 pursuant to the stock purchase agreement. Apparently, the physical shares purchased by Solex were not delivered to Solex until the same day as this application was argued. There is no sworn evidence on this point, and so it is not clear whether physical shares are typically delivered through a transaction such as the stock purchase agreement for purchase of shares of Nevada companies, whether there was an oversight or whether there was some other failure that relates to the stock purchase agreement.
- [12] Mr. Saran deposed that the parties agreed that the investment funds were to be used for the development of mutually agreed-upon real estate projects in the United States. As evidence of this, he relies on recitals in the settlement agreement and he submits that Mr. Carnovale and the defendants are bound by what is stated in the recitals because the settlement agreement was signed by Mr. Carnovale on his own behalf and on behalf of Cartonio. Mr. Carnovale and Cartonio do not agree that the recitals are evidence that the parties agreed that the investment was for the purpose of real estate transactions. The defendants take the position that the investment was made purely for the acquisition of shares and did not provide Solex with any rights greater than those of a class B non-voting shareholder.
- [13] Mr. Carnovale deposed that there were discussions about what the funds would be used for between Mr. Saran, Mr. Carnovale and Mohamed Verjee, a venture capitalist whom, according to Mr. Carnovale, Mr. Saran invited to participate in business activities of Cartonio. According to Mr. Carnovale, one of the ventures discussed was a marijuana cultivation venture.
- [14] Mr. Saran deposed that on June 30, 2018, "duly authorized representatives of Solex" discovered that \$1.4 million of the funds invested in Cartonio had been misappropriated by vendors related to and/or hired by Cartonio. Cartonio takes the position, and Mr. Carnovale deposed, that no funds were stolen or misappropriated.
- [15] Mr. Carnovale deposed that the stock purchase agreement did not have any limitations or directions on how Solex's investment would be used. He deposed that Cartonio invested CDN \$1.6 million of Solex's US \$3 million investment into the marijuana cultivation operation that the parties had discussed. He deposed that the balance of the funds invested by Solex were invested by Cartonio in the normal and ordinary course of Cartonio's business.
- [16] Mr. Carnovale deposed that the funds for the marijuana cultivation operation investment were transferred from Cartonio to Mr. Verjee's company at the direction of Mr. Saran. He deposed that Mr. Verjee's company paid those funds to Mr. Saran directly. Mr. Carnovale deposed that in August 2018, Mr. Saran advised that the marijuana cultivation operation was not proceeding. According to Mr. Carnovale, that was a decision made by Mr. Saran with Mr. Carnovale's input. Mr. Carnovale deposed that Mr. Saran did not return the CDN \$1.6 million that Cartonio had advanced to Mr. Saran through Mr. Verjee's company. That is the subject of the counterclaim.

- [17] Mr. Saran deposed that subsequent to his allegation of misappropriation, Cartonio returned CDN \$1.6 million to Solex.
- [18] In summary, Mr. Saran says that Cartonio returned CDN \$1.6 million of Solex's investment to Solex after the allegations of misappropriation were made but \$1.4 million remains outstanding. Mr. Carnovale and Cartonio assert that the same CDN \$1.6 million was paid by Cartonio to Mr. Verjee's company and then to Mr. Saran personally at the direction of Mr. Saran for the purpose of the marijuana cultivation operation investment and never returned to Cartonio. There is no amount owing because the whole USD \$3 million investment was made pursuant to the stock purchase agreement which does not provide for it to be repaid to Solex in these circumstances.
- [19] For these reasons, the defendants assert that there was no debt that could give rise to the settlement agreement and associated promissory notes and general security agreements and the \$1.6 million must be repaid to Cartonio. In answer to this argument, Mr. Saran asserts that the settlement agreement was entered into and the signatories to the promissory notes and general security agreements made those agreements with the opportunity to have independent legal advice. He argues that they have not made the payments they committed to make under those agreements.
- [20] Mr. Carnovale asserts in his amended response to civil claim that he entered into the settlement agreement under duress. He deposed that in December 2018, Mr. Saran began to threaten him saying that he would sue him for the funds that Solex invested in Cartonio unless Mr. Carnovale personally paid him CDN \$1.4 million. Mr. Carnovale deposed that Mr. Saran further threatened him that if he did not make the payment, he would report Mr. Carnovale and Cartonio to the BC Securities Commission for stealing the funds. Mr. Carnovale deposed that Mr. Saran told him that if he reported Mr. Carnovale to the BC Securities Commission, pre-existing regulatory issues that Mr. Carnovale had with the Quebec Securities Commission and the United States Securities and Exchange Commission would be complicated.
- [21] Mr. Carnovale deposed that Mr. Saran also implied that if he was reported to the BC Securities Commission, Mr. Carnovale would be barred from entering the United States or may be arrested if he went to the United States. Mr. Carnovale deposed that he regularly did business in the United States, especially as Cartonio was a Nevada-based company. Mr. Carnovale also deposed that Mr. Saran's business colleague, Mr. Aquilino, told him that his spouse was required to guarantee his debts and would have to sign the promissory note and enter into a general security agreement.
- [22] Mr. Carnovale deposed that commencing in September 2018, he suffered a series of head injuries and had concussion-like symptoms which affected his memory, vision, balance, sleep, demeanour and gave him headaches. He deposed that during this time he was suffering from anxiety and lack of sleep and was taking prescription antidepressant and anxiety medications. Mr. Carnovale testified that he was not his usual self, and during late

2018 and up to the end of April 2019, he was cancelling business meetings and avoiding social gatherings. Mr. Carnovale deposed that Mr. Saran was aware of these issues.

[23] Mr. Carnovale deposed that during the same timeframe, Mr. Saran pressured Mr. Carnovale into demanding that Mr. Verjee repay funds that had been invested through him by Cartonio and which investments had not been successful. Mr. Carnovale testified that Mr. Saran pressured Mr. Verjee into signing a promissory note in the amount of \$300,000 in favour of Cartonio. Mr. Carnovale deposed that Mr. Saran then pressured Mr. Carnovale into issuing a demand letter on behalf of Cartonio threatening to sue Mr. Verjee. Mr. Carnovale deposed that because he was fearful of the consequences that Mr. Saran said would ensue if Mr. Saran reported Mr. Carnovale to the BC Securities Commission, ultimately he agreed to pay Mr. Saran. He deposed that because he believed what Mr. Saran threatened and what Mr. Aquilino told him, he told his wife to sign the promissory note and general security agreement even though she has nothing to do with Cartonio or his business.

[24] On March 18, 2019, several documents were executed:

- a) A shareholder's consent providing that Cartonio enter into a settlement agreement and mutual release of claims with Solex relating to the stock purchase agreement and authorizing Cartonio to enter into and execute a promissory note between Cartonio and Solex, Mr. Saran and Lakhbir K. Saran, Mr. Saran's spouse and the trustee of Solex, in the amount of \$1.4 million plus interest. The shareholders' consent also authorized Cartonio to enter into and execute a general security agreement between Cartonio, Solex, Mr. Saran and Ms. Saran.
- b) A settlement agreement between Cartonio, Mr. Carnovale and Solex rescinding the stock purchase agreement and providing for payment by Cartonio and Mr. Carnovale to Solex in the amount of \$1.4 million.
- c) A secured promissory note by which Cartonio promised to pay Solex, Mr. Saran and Ms. Saran the principal amount of \$1.4 million plus 10 percent interest a year.
- d) A secured promissory note by which Mr. Carnovale and Ms. Levallois promised to pay Solex, Mr. Saran and Ms. Saran the principal amount of \$1.4 million and 10 percent per year interest.
- e) A general security agreement securing the Cartonio promissory note.
- f) A general security agreement securing the Carnovale and Levallois promissory note.

[25] No payments have been made under the settlement agreement, promissory notes or general security agreements. In July 2019, Solex and Ms. Saran assigned their interests in the promissory notes and the general security agreements to Mr. Saran. Accordingly, Mr. Saran is the plaintiff in this claim.

- [26] The notice of civil claim was filed on July 23, 2019, and amended on July 31, 2019 and February 12, 2020. In the further amended notice of civil claim, Mr. Saran seeks declarations that the defendants are in breach of the promissory notes and the general security agreements that they entered into, a declaration that the general security agreements are charges on the collateral specified in them, judgment against the defendants for damages in the amount of \$1,423,430.56 and judgment in the amount of 10 percent interest set out in the promissory notes from July 2019 to the date of judgment.
- [27] In the amended response to civil claim, the defendants raise the following defences:
- a) lack of consideration with regard to the promissory notes and the general security agreements;
 - b) as a consequence of duress and/or economic duress, the defendants did not consent at law to entering into the promissory notes and security agreements or their consent is vitiated loss such that they are not bound by the contract or the contract is void ab initio;
 - c) there was an unequal bargaining position between the parties arising from their ignorance as well as from Mr. Saran taking advantage of Mr. Carnovale's circumstances surrounding his mental health such that the contracts are unconscionable and should be avoided or declared void ab initio; and
 - d) there is no jurisdiction in this court because the stock purchase agreement governs and there was no dispute under the stock purchase agreement.
- [28] The stock purchase agreement was made in accordance with the laws of Nevada. The jurisdiction issue was not argued as a defence at this summary trial application.
- [29] In addition, Mr. Saran raises the issues that the shares were not delivered as a factual matter, but since Mr. Saran relies on the settlement agreement in which the parties agreed to rescind the stock purchase agreement and since Mr. Saran's claim is for debts owing under promissory notes and general security agreements related to the settlement agreement, the non-delivery of the shares is a non-issue so far as the basis on which he brings this claim is concerned.

Suitability for Determination by Summary Trial

Legal Principles

- [30] Supreme Court Rule 9-6(15)(a) states that:

A matter will not be suitable for summary trial if the court is unable to find the facts necessary to decide the issues of fact or law or if it would be unjust to decide the issues summarily.

- [31] Whether the necessary facts can be found and whether it would be unjust to decide the issues raised are separate but related questions. In some circumstances it may be unjust to decide a case summarily even if on the whole of the evidence it is possible to find the necessary facts. See *Placer Development Ltd. v. Skyline Explorations Ltd.*, 1985 67 BCLR 366, at 385-386, Court of Appeal; *Foreman v. Foster*, 2001 BCCA 26, at para. 19; and *Creyke v. Creyke*, 2016 BCCA 499, at para. 45.
- [32] The onus is on the party who asserts that the matter is not suitable for a determination by a summary trial to demonstrate unsuitability: *Ekins v. Davey*, 2007 BCSC 1630, at para. 24. A party facing a summary trial is obliged to bring forward all of its case or risk having judgment go against it: *Spring Hill Farms Limited Partnership v. Nose*, 2014 BCCA 66.
- [33] Conflicting evidence is not necessarily fatal to proceeding summarily. If the conflicting evidence does not prevent the court from making the necessary factual determinations, the court may proceed. In some circumstances despite conflicting evidence, there is enough objective or corroborating evidence for one version of events to permit the court to confidently make findings of fact. See, for example, *Wei v. Mei*, 2018 BCSC 1057, affirmed on other grounds: *Wei v. Li*, 2019 BCCA 114. Where there is a conflict in evidence that cannot be resolved by reference to objective or corroborating evidence, a chambers judge has the option to adjourn the application and order that cross-examination take place or order cross-examination at the summary trial: *Spring Hill Farms Limited Partnership v. Nose*; and *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, 1989 36 B.C.L.R. (2d) 202 (C.A.) at para. 72.
- [34] However, where there is a "head on" conflict in the evidence regarding an important issue and the court either cannot resolve the issue or cannot resolve the issues without assessing the component's credibility, it will not be suitable for summary determination. A court cannot side step conflicts by relying on only a portion of the record, assuming certain facts or by taking the plaintiff's case at its highest: *Concord Pacific Acquisitions Inc. v. Oei*, 2017 BCSC 236 at para. 50.
- [35] It is a particular concern where the evidence conflicts and a subsequent court may be called upon to make findings regarding those facts giving rise to the risk of inconsistent findings of fact or the subsequent court having difficulty determining what issues remain alive: *Bell v. Levy*, 2010 BCSC 587, appeal dismissed 2011 BCCA 417, citing *Dahl v. Royal Bank of Canada*, 2005 BCSC 1263, at para. 12; and *Otter Farm and Home Cooperative v. Sekhon*, [2001] B.C.J. No. 2338 (C.A.), 2001 BCCA 636.
- [36] It is open to courts to draw adverse inferences from gaps in the evidence, but it is not mandatory: *Kingan v. Kingan*, [1995] B.C.J. No. 164 (S.C.) (QL), at para. 40, affirmed 1995 BCWLD 1596 (C.A.).

- [37] As summarized in *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30 to 31, citing *Inspiration Management*, whether it would be unjust to proceed summarily depends on the following factors:
- a) the amount involved;
 - b) the complexity of the matter;
 - c) its urgency;
 - d) any prejudice likely to arise by reason of delay;
 - e) the cost of taking the case forward to a conventional trial in relation to the amount involved;
 - f) the course of the proceedings;
 - g) the cost of litigation and the time of the summary trial management conference;
 - h) whether credibility is a critical factor in the determination of the dispute;
 - i) whether the summary trial may create unnecessary complexity in the resolution of the dispute;
 - j) whether the application would result in litigating in slices; and
 - k) any other matters which may be relevant in the particular case.
- [38] None of these factors are determinative on their own. For example, a case that is not straightforward or has some complexity is not by virtue of that feature automatically unsuitable for summary trial determination: *River Colony Estates General Partnership v. Hee*, 2003 BCSC 1327.
- [39] When deciding whether to proceed summarily, a court must interpret the summary trial rule broadly and favourably, consider proportionality, affordability and the timely and just adjudication of claims: *Crest Realty Westside Ltd. v. W & W Parker Enterprises Ltd.*, 2015 BCCA 447, at para. 30.

Duress

- [40] The parties focused their submissions in relation to the defence of duress, and so I will start with that defence in assessing whether the matter is suitable for determination by summary trial.
- [41] Mr. Saran argues that although there is evidence that is directly in conflict as to whether the threats that Mr. Carnovale deposed to were actually made, the conflicting evidence does not render the matter unsuitable for summary trial because Mr. Carnovale has not led evidence on critical elements of the defence of duress, in particular whether his will was coerced so as to vitiate consent.

- [42] Mr. Saran argues that in order to prove coercion of the will, Mr. Carnovale must lead evidence that he protested at the time, that he did not have an alternative course open to him, that he was not independently advised on the contract and that after entering into the contract he took steps to avoid it. Mr. Saran relies on *Dairy Queen Canada, Inc. v. M.Y. Sundae Inc.*, 2017 BCCA 442, at paras. 48 to 53, citing among other cases *Pao On v. Lau Yiu Long*, [1979] 3 All E.R. 65 (P.C.); and *Bell (B.C.C.A.)* at para. 83.
- [43] The defendants assert that there are two forms of duress. The first form is the traditional form of duress in which the elements are that there is coercion of the will of the contracting party and the pressure exerted on the contracting party is exercised in an unfair, excessive or coercive manner, see *Jestadt v. Performing Arts Lodge Vancouver*, 2013 BCCA 183, at para. 54. The second form is economic duress, which has three elements: one, a threat; two, threats were wrongful in that they were unfair, excessive or coercive; and three, wrongful threats overrode the targeted party's will to the point that that party had no choice, see *Song Woon Enterprises Ltd. v. 762138 B.C. Ltd.*, 2014 BCSC 967, at paras. 107-110.
- [44] The defendants submit that it is with regard to economic duress that the court must consider the evidentiary factors referred to in *Pao On*. Those are the same evidentiary factors about which Mr. Saran argues there must be evidence, including whether there was protest, whether there was an alternative course, whether there was independent advice and whether the party arguing duress took steps to avoid the contract after entering into it.
- [45] It is not clear to me whether the cases cited by both parties are referring to two different types of duress, ie: traditional and economic (I note that it is clear that there is a type of duress called physical duress, but that is not relevant here), or whether the cases all refer to economic duress. In any event it is clear that there must be coercion of the will that is wrongful and that vitiates consent. The evidentiary factors pertaining to protest, an alternative course, independent advice and steps to avoid the contract are not determinative but considerations that inform the analysis: *Song Woon* at paras. 108-110, *Bell (B.C.C.A.)* at para. 83.
- [46] Mr. Carnovale argues that the issue of coercion of the party's will in an unfair, excessive or coercive manner such that his or her consent was vitiated must be viewed in light of all of the evidence pertaining to the other contracting party's conduct, in this case Mr. Saran. He also submitted that Mr. Saran's conduct pertaining to Mr. Verjee is relevant as that conduct is related to the events that resulted in the settlement agreement, promissory notes and general security agreements. In addition, he asserts that the evidence pertaining to his mental health and financial distress at the time are relevant as to whether there was a coercion of his will. Mr. Carnovale deposed that he encountered financial difficulties in addition to the investigations by the Securities Commissions in Quebec and the US Securities and Exchange Commission inquiries. He deposed that the lawyer he hired to assist him with the securities investigation matters was a lawyer that Mr. Saran introduced him to and paid for initially. Mr. Carnovale paid Mr. Saran back for these legal fees. Mr. Carnovale deposed that because of this, Mr. Saran was well aware of his financial difficulties.

- [47] Mr. Saran led evidence that Mr. Carnovale has taken out a permit to renovate his West Vancouver home, including a photograph of the construction permit outside Mr. Carnovale's residence taken on January 29, 2020. The title search for the property shows two mortgages registered against it. I am not persuaded that a construction permit in place in January 2020 is a basis on which I can reject Mr. Carnovale's evidence that he had financial difficulties in 2018 and early 2019 or whether he has them now.
- [48] With regard to whether there is evidence that the alleged threats made by Mr. Saran were wrongful and operated to coerce Mr. Carnovale's will, Mr. Carnovale deposed as follows at paras. 45-52:

VI. Iqbal Coerced Me into Pursuing a Debt Claim against Mohamed

45. Iqbal started threatening me in December 2018, saying he would sue me for the money that Solex paid to Cartonio for the class B non-voting preferred shares. At the time, I did feel bad about letting Iqbal down as Cartonio's investment had not been successful up to that time. I was confused, however, as to why Cartonio had to pay back the Funds since Solex received preferred shares in the company and the sale of those shares had completed.
46. Iqbal demanded that I personally pay him \$1,400,000 CAD from the Funds paid for the preferred shares or he would report me and Cartonio to the B.C. Securities Commission for stealing the Funds. I believed him when he made these threats. I do not specifically recall whether he said I should pay back Solex.
47. Iqbal was aware of my ongoing problems with the SEC, and the securities commission in Quebec. As I stated, neither I nor Cartonio stole any of the Funds, but he said he would report to the B.C. Securities Commission that we stole the Funds. Iqbal went on to say that just reporting the alleged theft to the B.C. Securities Commission would complicate my business in the United States and my issues in Quebec. I believed him when he told me this.
48. In particular, Iqbal told me about someone he knew who had a regulatory problem who was arrested when he went to the United States, implying that I could be prevented from traveling into the United States, or I that could be arrested there and brought back to Canada. I believed Iqbal when he told me this. As my business is based out of the United States, and because I was experiencing financial difficulties at this time, I was very concerned about this. Not being able to do business in person in the United States would be devastating for Cartonio, my business and my family. At the time, I was still recovering from my head injuries and the consequential anxiety, and I was not sure if the medication was working. Because of my overall circumstances, including my personal health, I was not capable of thinking straight.
49. At the same time, Iqbal said he was unhappy with how Mohamed had handled the Funds generally given to him in 2018 from Cartonio for investments. Iqbal tried to pressure me to make Mohamed sign a promissory note. I never agreed to this and never prepared one.

50. Later Iqbal told me he was able to convince Mohamed to sign a promissory note for \$300,000 plus interest. Marked and attached as Exhibit "G" to this Affidavit is a copy of the promissory note bearing Mohamed's signature which I saw Mohamed give Iqbal directly In February 2019. It is dated February 14, 2019. This promissory note was

made in favour of Cartonio. I did not prepare this document.

51. Iqbal gave me the "option" of going after Mohamed for the failed investments Mohamed made and asked me to sign this promissory note on behalf of Cartonio as the creditor. When Iqbal offered me the "option" of going after Mohamed, he knew that I was not financially able to pay him the rest of the Funds he claimed that I owed him personally. Iqbal said that he wanted me to go after Mohamed for the money lost or Iqbal would go after me immediately, reporting me and Cartonio to the B.C. Securities Commission. I felt trapped by him and his threats to report me and Cartonio.

52. I did not want to go after Mohamed for what I thought was a failed investment. Iqbal tried to convince me to do so by saying that Mohamed did some bad business deals, and he said that Mohamed should be responsible for that. I was not so sure. However, I felt like I had no choice as the alternative was Iqbal reporting me to the B.C. Securities Commission and jeopardizing my business and my family's financial security. I needed more time in order to get into a better financial situation.

[49] As well as paras. 61-69:

VII. Iqbal Coerced Me into Signing a Debt Documents under Duress

61. Iqbal was not happy that Mohamed was not paying him (through Cartonio) the money that was being demanded. Iqbal then turned his attention towards me.

62. By now, Iqbal was making allegations that I owed him \$1,400,000 CAD. I denied that I owed him this money or that Cartonio owed him or Solex this money. This figure was presented by Iqbal to me concerning what he believed were bad investments by Cartonio that had not yet or would not produce returns. He knew that Cartonio had made investments with that remaining money, and he was aware of the nature of those investments as well. Despite this, Iqbal insisted that I personally (not Cartonio) repay the rest of the money that he felt he was owed. He repeated his threats to report me and Cartonio to the B.C. Securities Commission and, because I was concerned about the consequences of this, I told him that I would pay him some of this money to try to satisfy him. As far as I was concerned, Iqbal (not Solex) wanted the money, and I felt coerced to pay him something, not fully understanding why but feeling compelled to do it.

63. Iqbal demanded that I sign promissory notes and security agreements, as well as other documents, for the full \$1,400,000 CAD in order for me to avoid being immediately reported to the B.C. Securities Commission. These are the documents attached to Iqbal's 1st Affidavit.

64. Iqbal said that I should "move the debts" to British Columbia in order to avoid issues with the SEC. He said that these documents did that, and "moving this debt" would help me avoid further SEC problems.
65. Iqbal also demanded that my wife, Gabriela, sign documentation as well. I was very concerned about this. Gabriela had nothing to do with Cartonio's business or Iqbal. I told him many times that this was unfair and that I should not be required to do this. A business colleague of Iqbal, Mr. John Aquilino, was present at one of the instances in which Iqbal demanded that I get my wife to sign these documents as well. Mr. Aquilino said that it was required in British Columbia to have spouses guarantee debts of their husbands. Iqbal concurred with him. I did not question them about this as I was being coerced.
66. I felt trapped again and I did not know what else I could do. His immediate demand did not give me a reasonable amount of time to consult a lawyer given my finances but, even if I had the time and money, I was not in a proper state of mind to think clearly and seek advice. My anxiety was overwhelming at this point and all I could think to do was to protect my family by agreeing to sign whatever Iqbal put in front of me to make this go away.
67. I signed the documents in early April 2019. I did not prepare any of these documents. I was hoping that this could buy me some more time to deal with this and my business' financial concerns. I have read Iqbal's 1st Affidavit where he said I signed these documents on March 18, 2019. This is not correct.
68. I also got my wife to sign these documents. I told Gabriela that she had to sign these documents because spouses had to guarantee debts of their husbands in British Columbia (as Mr. Aquilino had said and as Iqbal had concurred), and I did not provide any further explanation. She trusted me, and she signed where I asked her to sign.
69. Currently, I am unhappy and frankly ashamed at how this has unfolded. Iqbal has not yet reported me to the B.C. Securities Commission to my knowledge. As my health has slowly returned to normal, I began to regret signing the debt documents described above, all of which were signed under duress and threats from Iqbal.
- [50] Mr. Saran argues that as a matter of logic, I should not accept Mr. Carnovale's assertion that he believed and was coerced by threats that if Mr. Saran reported him to the BC Securities Commission, he would be prevented from entering the United States or arrested once he was there. Mr. Saran argues that such an outcome is too implausible for such a threat to be coercive. Mr. Saran argues that the assertion that Mr. Aquilino represented that spouses have to guarantee each other's debts did not occur, but even if it did, it could not have been relied upon by Mr. Carnovale or alternatively, Mr. Carnovale did not reasonably rely on it because Mr. Aquilino is not a lawyer and is clearly aligned with Mr. Saran. He asserts that there is no evidence proffered by Mr. Carnovale that demonstrates a coercion of Mr. Carnovale's will because there is no evidence that he protested. There is evidence that he had the opportunity to have independent legal advice, and there is no evidence that he felt he had no alternative.

- [51] Mr. Saran refers to evidence that Mr. Carnovale negotiated the terms of the settlement agreement as evidence that he was acting voluntarily and that his will was not overcome. Mr. Carnovale asserts that the evidence above does show a coercion of his will and that given the circumstances of the stock purchase agreement, it is clear that there is no debt owing to Solex that could reasonably give rise to the settlement agreement or the promissory notes and general security agreements associated with it.
- [52] In the absence of a debt, Mr. Carnovale argues that there is no logical rationale for these agreements except his explanation of Mr. Saran's threats, which in the circumstances is plausible. Mr. Carnovale refers to certain portions of Mr. Saran's evidence that are contradicted by documentary evidence, such as the denomination of the investment that Solex made in Cartonio, the date on which the investment was made and other issues which appear to be errors in Mr. Saran's evidence or asserted by Mr. Carnovale are errors in Mr. Saran's evidence based on documentary or objective evidence which contradicts it.
- [53] He also argues that Mr. Saran's evidence that the investment in Solex was for certain types of investments is contradicted by the stock purchase agreement and the general rights that pertain to class B non-voting preferred shares. He refers to Mr. Carnovale's affidavit where he deposes that duly authorized representatives of Solex discovered misappropriation of Solex's investment followed by Mr. Saran's subsequent affidavit in which he asserts that he discovered the misappropriation. Mr. Carnovale argues that for all of these reasons, Mr. Saran's evidence is not reliable and suffers from veracity problems.
- [54] Mr. Saran refers to the settlement agreement, the recitals of which are not consistent with Mr. Carnovale's argument that there was no agreement about the purposes to which Solex's invested funds could be put and in which the parties agreed that representatives of Solex had discovered misappropriation. Mr. Saran argues that the defendants cannot resile from what they agreed were the facts and the recitals of the settlement agreement.
- [55] Mr. Carnovale's response to civil claim alleges duress and economic duress by threats and misrepresentations made by Mr. Saran to sign "promissory notes, security agreements, other debt instruments and other related documents." The evidence is that the settlement agreement and promissory notes and general security agreements were drafted at the same time and were entered into and signed at the same time all relating to the same \$1.4 million Mr. Saran asserts he was owed. In my opinion "debt instruments" is a sufficiently broad definition to include the settlement agreement, and so Mr. Carnovale's argument that the settlement agreement cannot stand for what it says because it was entered under duress is not precluded by the pleadings.
- [56] These competing arguments pertaining to whether Mr. Carnovale's evidence or that of Mr. Saran fits with the overall plausibility of the other evidence and the circumstances is a *sine qua non* of making determinations about credibility. Such assessments involve examining the witness's ability to and opportunity to observe events, the firmness of memory, whether the witness appears to be able to resist the interests at play to modify his or her recollection

and which version is the most consistent with the preponderance of probabilities: *Bradshaw v. Stenner*, 2010 BCSC 1398, affirmed 2012 BCCA 296.

- [57] I do not accept that I should reject Mr. Carnovale's evidence as implausible out of hand. I do not accept that the evidence of renovations on his residence is such that I must find that he was not under financial distress, nor that the lack of an opinion from a doctor that Mr. Carnovale was suffering from depression and anxiety means that I should not accept Mr. Carnovale's evidence that he was taking prescription medication for depression and anxiety. I do not accept that I should reject the evidence that he suffered injuries to his head from which he was suffering symptoms of a concussion.
- [58] Given the lack of objective or corroborating evidence and the conflicting evidence about whether Mr. Saran made threats, and Mr. Saran's submissions that Mr. Carnovale's evidence about his financial circumstances and mental health should not be believed, the trial judge will have to make a credibility assessment. The conflicting evidence and the nature of the credibility issues are not amenable to resolution without cross-examination. I will return to the issue of whether that can be accomplished by measured short of a conventional trial.
- [59] I conclude that Mr. Carnovale has tendered evidence that pertains to at least the elements of duress, including coercion of his will such that his consent to enter into these agreements may have been vitiated. Given the conflicting evidence on whether Mr. Saran made the threats alleged and the conflicting evidence about the context which Mr. Carnovale says operated to make him vulnerable to having his will coerced to the extent of vitiating his consent, I cannot find the facts necessary to determine the defence of duress on the affidavit evidence tendered on the summary trial.
- [60] Mr. Saran points to the fact that Ms. Levallois entered into promissory notes and a general security agreement and has not deposed that she was under duress. Mr. Carnovale deposed that he directed his wife to sign because he believed she was responsible for his debts based on what Mr. Aquilino told him, and she signed at his direction. In my view, the claim against Ms. Levallois should be determined at the same time as the claim against Mr. Carnovale.

Other Defences and the Counterclaim

- [61] Duress is of one of several defences. The others are whether there was consideration for the promissory notes and general security agreements, unconscionability, misrepresentation and abuse of process. The latter defence was not addressed in detail at this summary trial application but it is clear that the facts that are relevant to the other defences overlap with the facts that must be found pertaining to the duress defence.

- [62] The counterclaim is not raised to be determined at this proposed summary trial. The defendants' counterclaim seeks a stay of the plaintiff's claim in favour of the arbitration provisions in the stock purchase agreement, damages for abuse of process, declarations that the promissory notes and general security agreements are null and void, damages for fraudulent and/or negligent misrepresentation and an accounting and return of moneys that were repaid to Mr. Saran, Ms. Saran or Solex in the amount of CDN \$1,600,000.
- [63] In the response to counterclaim, Mr. Saran pleads facts pertaining to the written shareholders' consent to enter into the settlement agreement, the promissory notes and the general security agreements. It is apparent on the pleadings that the facts pertaining to the claims made in the counterclaim overlap significantly and perhaps entirely with the facts on the claims sought to be addressed at this summary trial.
- [64] In my view the overlap between the claims and the counterclaims are such that adjourning this summary trial to permit cross-examination or other steps is not the appropriate solution since the nature of the conflicts in the evidence are such that a trier of fact will have to make credibility findings and because the claim and counterclaim ought to be tried together. There is an obvious down side to litigating them separately because of the risk of inconsistent findings and avoiding litigating in slices.
- [65] In reaching the conclusion that the inability to find facts necessitates a conventional trial as opposed to adjourning and permitting steps that will allow the findings of fact to be made, I have considered the Gichuru factors as to whether it would be just to proceed by summary trial once examinations for discovery and/or cross-examinations on affidavits have occurred. I have already discussed the problems of the potential of inconsistent findings of fact and litigation in slices. I do not view the claim or counterclaim as particularly complex, either factually or legally, but I do view it as important that the trier of fact have the benefit of viva voce evidence in order to make the necessary findings of credibility, including both reliability and veracity. The amounts in issue are significant. A summary trial is not necessary for economic reasons. On the other hand, significant sums do not detract from the favourability of a summary trial, all other things being equal. Since there will be a trial of the counterclaim, a summary trial on the claim does not advance efficiency, cost savings or the ends of proportionality. Mr. Saran wishes his claim to be resolved now. That invokes the speedy element of the goal of just, speedy and efficient justice built into the Supreme Court Civil Rules. This case pertains to events that took place in 2018 and 2019. The claim was commenced in the summer of 2019. It would be ideal if cases could be resolved within short timeframes, but not all can and in this case, the timeframes are not such that the prejudice of taking the time to proceed along a conventional timeframe to a conventional trial outweighs the compelling reasons to have a conventional trial of the claim and counterclaim together.

Conclusion

[66] I conclude that this matter is not suitable for summary trial determination. I direct that it be tried with the counterclaim at a trial with viva voce evidence.

[67] I order costs to the defendants in the cause.

"Matthews J."

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