

CANADA / JUDGMENT

## Saran v. Cartonio, Inc.

2020 BCCA 252

COURT

British Columbia Court of Appeal

DECIDED

29 May 2020

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2020 BCCA 252 Saran v. Cartonio, Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Saran v. Cartonio, Inc.,

2020 BCCA 252

Date: 20200529

Docket: CA46793

Between:

Iqbal Sing Saran

Appellant

(Plaintiff/Defendant by Counterclaim)

And

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

Respondents

(Defendants/Plaintiffs by Counterclaim)

Before:

The Honourable Madam Justice Griffin

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated

March 6, 2020 (Saran v. Cartonio, Inc., 2020 BCSC 556,

Vancouver Docket S198281).

Oral Reasons for Judgment

Counsel for the Appellant

(via teleconference):

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W.K. Sun

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Place and Date of Hearing:

Vancouver, British Columbia

May 29, 2020

Place and Date of Judgment:

Vancouver, British Columbia

May 29, 2020

Summary:

Application for leave to appeal an order dismissing a summary trial application. Held: Application dismissed. The summary trial application was brought in respect of the claim on certain debt instruments, and did not address the defence of duress and related counterclaim. The judge was satisfied it would be unjust to make the findings sought by the applicant, because in this case a trier of fact needed to hear viva voce evidence to resolve the disputes on the evidence, and if both the claim and counterclaim were not heard together, there was a risk of inconsistent findings. There is no arguable case that the judge erred in principle, made an order not supported by the evidence, or that the order will result in an injustice. Granting leave to appeal would unduly hinder progress of the action.

GRIFFIN J.A. (via teleconference):

## Introduction

- [1] Iqbal Saran applies for leave to appeal an order of Justice Matthews pronounced March 6, 2020, in reasons indexed at 2020 BCSC 556, dismissing his application for summary trial. If leave is granted, he seeks orders on appeal granting him judgment.

- [2] Mr. Saran, the plaintiff in the underlying action, brought a claim for damages in debt in relation to two promissory notes and related general security agreements ("GSAs") signed by the respondents. He also sought various declarations in relation to breach of agreement, default, and security interests. The claim was for approximately \$1,400,000 said to be due based on the promissory notes, plus interest.
- [3] While framed as a debt claim, the background facts relied upon in Mr. Saran's application revealed a complicated history between the parties, beginning with a \$3 million USD share purchase in 2018, and following which there were various investments and disputes about those investments and use of the funds.
- [4] The promissory notes and the GSAs were entered into as part of a settlement agreement concerning allegations by Mr. Saran that the respondents had misappropriated certain funds. All of the documents were executed together in the spring of 2019.
- [5] In the response to civil claim and amended response to civil claim ("RTCC"), the respondents pleaded, amongst other things, that due to threats by Mr. Saran or his agents, and as a result of duress, economic duress, and misrepresentation, they were coerced into signing the promissory notes and the GSAs and "other debt instruments and other related documents", which they defined collectively as the "Debt Instruments". They also pleaded that there was no consideration for the Debt Instruments.
- [6] In a reply, Mr. Saran pleaded that these defences were subject to issue estoppel and were all subject to a release given as part of the settlement agreement, which also provided consideration for the promissory notes and the GSAs.
- [7] The respondents filed a counterclaim, relying on the facts set out in the RTCC. They claimed damages for the tort of abuse of process and for fraudulent and/or negligent misrepresentation, and sought an accounting and return of monies paid to Mr. Saran in the amount of \$1,600,000. They sought a declaration that the promissory notes and the GSAs be declared null and void or rescinded.
- [8] Mr. Saran's amended response to counterclaim denied the allegations in the counterclaim, relied on the facts in the amended notice of civil claim, and pleaded the settlement agreement as estopping the claims advanced in the counterclaim.
- [9] Each side filed somewhat detailed but contradictory affidavits on the summary trial application. In their written submissions, they each took aim at perceived gaps and inconsistencies in the other side's evidence. Each side challenged the credibility of the key witnesses of the opposing side.
- [10] Mr. Saran's summary trial application sought to determine only the alleged debt claims, and did not seek dismissal of the counterclaim.

- [11] The judge gave comprehensive reasons analyzing the issues, and in the result dismissed the application, concluding the matter was not suitable for summary trial determination. She ordered that the claim be tried together with the counterclaim with viva voce evidence.
- [12] In summary, the judge determined that Mr. Saran's claim was not suitable for summary trial for the following reasons:
- a) she was unable to find the facts necessary to determine the defence of duress due to conflicting evidence and credibility issues;
  - b) the facts relevant to the other defences overlapped with the facts pertaining to duress;
  - c) the facts relevant to the respondents' counterclaim, which was not part of the summary trial application, overlapped significantly, if not entirely, with the facts pertaining to Mr. Saran's claim;
  - d) adjourning the matter to allow for cross-examination or other steps was not an appropriate solution, because the trier of fact will have to make credibility findings, and it is important in this case for the trier of fact to have the benefit of viva voce evidence to make the necessary findings of credibility, including both reliability and veracity; and
  - e) the claim and counterclaim ought to be tried together, to avoid the risk of inconsistent findings and litigating in slices.

### **Leave to Appeal a Discretionary Order**

- [13] The parties agree that leave to appeal is required. Under s. 7(2) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, a "limited appeal order" cannot be appealed without leave of a justice. Rule 2.1 of the Court of Appeal Rules, B.C. Reg. 297/2001 identifies that an order dismissing an application for summary trial under R. 9-7(11) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 is a limited appeal order.
- [14] In *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10 (Chambers), Saunders J.A. set out the following criteria to consider on an application for leave to appeal:
- a) whether the point on appeal is of significance to the practice;
  - b) whether the point raised is of significance to the action itself;
  - c) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
  - d) whether the appeal will unduly hinder the progress of the action.
- [15] The above criteria are "all considered under the rubric of the interests of justice": *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Saunders J.A. in Chambers).

- [16] An appeal will not usually raise an issue of significance to the practice where the area of law is well-settled: *Re Canadian Petcetera Limited Partnership*, 2009 BCCA 255 at para. 19 (Frankel J.A. in Chambers).
- [17] The merits threshold is generally low: *Bartram v. Glaxosmithkline Inc.*, 2011 BCCA 539 at para. 16 (Prowse J.A. in Chambers).
- [18] However, where leave to appeal is sought from a discretionary order, the analysis of whether the appeal is *prima facie* meritorious takes into account the standard of review from the exercise of judicial discretion: *Landmark Solutions Ltd. v. 1082532 B.C. Ltd.*, 2020 BCCA 74 (Chambers).
- [19] This means that where the order sought to be appealed is a discretionary order, the Court will only grant leave if there is an arguable case that the judge erred in principle, made an order not supported by the evidence, or that the order will result in an injustice: *Hagwilneghl v. Canadian Forest Products Ltd.*, 2011 BCCA 478 at para. 31 (Chambers); see also *Morin v. 0865580 B.C. Ltd.*, 2015 BCCA 502.
- [20] Where the appeal has no prospect of success, the Court will perform a gatekeeper function in refusing leave: *Teck Cominco Metals Ltd. v. British Columbia (Minister of Revenue)*, 2009 BCCA 3 at para. 27 (Chambers).

#### Grounds for Seeking Leave to Appeal

- [21] Mr. Saran argues leave to appeal should be granted because the judge erred:
- a) in finding that the matter was unsuitable for summary trial;
  - b) in finding that the respondents' allegation of duress was broad enough to include the settlement agreement; and
  - c) in finding that the respondents had established there was evidence of the required factors for the defence of duress.

#### Analysis

- [22] I find it unnecessary to set out the complicated factual background and the analysis of the judge in detail.
- [23] In summary, I am of the view that:
- a) the point on appeal is not of significance to the practice, as the judge self-instructed on, and applied, established legal principles regarding summary trial applications;
  - b) the points raised are not of significance to the action itself, as the judge did not make any final decisions on the law or facts going to the merits of the parties' dispute, which will remain to be determined at trial;

- c) the appeal is not *prima facie* meritorious, in the sense that there is no arguable case that the judge erred in principle, made an order not supported by the evidence, or that the order will result in an injustice. On the contrary, the judge was satisfied it would be unjust to make the findings sought by Mr. Saran, because in this case a trier of fact needed to hear *viva voce* evidence to resolve the disputes on the evidence, and if both the claim and counterclaim were not heard together, there was a risk of inconsistent findings; and
- d) granting leave to appeal would unduly hinder the progress of the action. If Mr. Saran succeeded on appeal, it is not likely that the Court of Appeal would make the findings of fact sought by Mr. Saran and award judgment to him based on the promissory notes and the GSAs. Even if successful on appeal, the more likely result would be to send the matter back to the trial court for determination with directions as to the suitability of a summary trial application. The appeal proceeding would simply delay the final determination of the issues in the proceeding, plus it would give rise to the possibility of multiple appeals for different segments of the proceeding.

### No Error in Summary Trial Principles

[24] Mr. Saran can point to no error in the judge's summary of the legal principles applicable to summary trial applications. These were set out at paras. 30-39 of her reasons as follows:

#### 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 B.C.L.R. 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.
- [25] There is no issue of interest to the practice generally arising out of the judge's recitation and application of the legal principles respecting the appropriateness of summary trial.

### Approach to Defence Pleading of Duress

- [26] I will comment further on what seems to be the nub of Mr. Saran's complaint on this application, which has to do with the judge's treatment of the defence pleading of duress. Duress was pleaded as a defence to the claim, as well as a basis for the counterclaim.
- [27] Mr. Saran submits:
- a) the respondents did not address the settlement agreement in their pleadings or claim that it was entered into under duress, and the judge improperly bridged this gap in their pleadings and argument by finding that the term "debt instruments", as pleaded by them, included the settlement agreement; and
  - b) the judge's finding that the respondents introduced evidence pertaining to the elements of duress is inconsistent with legal authority as to the elements of duress.
- [28] In my view, Mr. Saran's argument, to the effect that the judge was too liberal in reading the defence pleading of duress as applying to the settlement agreement, simply does not stand up.
- [29] The context of the pleadings is important. Mr. Saran pleaded as the basis for his claim, certain documents evidencing debt. He made no mention of the settlement agreement in his notice of civil claim. Thus, there was no issue raised in Mr. Saran's originating pleading as to the validity of the settlement agreement.
- [30] The respondents pleaded in defence that duress and threats led them to sign the debt documents pleaded by Mr. Saran, together with "other debt instruments and other related documents", all of which were signed around the same time, and this is what the respondents defined as the "Debt Instruments".

- [31] Mr. Saran, in responding to the respondents' pleadings, raised the fact and contents of the settlement agreement as defeating the defences to the debt instruments that were signed as part of that settlement.
- [32] Thus it is that the settlement agreement was not raised by Mr. Saran as a basis for his claim. It was raised by him in answer to the RTCC and counterclaim allegations of duress. The respondents did not then file additional pleadings, but I do not see any fault in this.
- [33] It is rare for a defendant to file a pleading in response to a plaintiff's reply pleading or to a plaintiff's response to counterclaim, and the respondents did not do so here. Rule 3-6(2) of the Supreme Court Civil Rules provides that no pleading subsequent to a reply may be filed or served without leave of the court. Further, if no reply to a response to civil claim is served, a joinder of issue on that response to civil claim is implied: R. 3-6(3). A reply that is a simple joinder of issue must not be filed or served: R. 3-6(4).
- [34] In Mr. Saran's notice of application in favour of summary trial relief, he relied in part on the settlement agreement and the background to it, as part of the factual basis for the relief sought.
- [35] The judge held:
- [55] Mr. Carnovale's [a respondent and the principal and sole director of the respondent Cartonio, Inc.] 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.
- [36] I see no error in fact or principle arising from the judge's reading of the pleadings and materials filed in respect of the application for summary trial. It is quite clear from the context that the respondents' allegations of duress, raised in defence to the main claim and as a basis for the counterclaim, relate to the entire package of documents: the settlement agreement and the debt documents relied on by Mr. Saran. It would make no sense to interpret the pleadings in any other way, and clearly that was also the essence of the respondents' evidence.
- [37] Mr. Saran also suggests that the judge in the court below made findings inconsistent with binding authority as to the test a defendant must meet to establish the defence of duress.

- [38] It must be kept in mind that there was no application for summary trial of the counterclaim before the judge, and the judge did not determine the counterclaim. She made no binding conclusions regarding the elements of duress, or on the facts as to whether those elements were established.
- [39] The judge appreciated the arguments of Mr. Saran that not enough evidence to establish the elements of duress was tendered. She clearly understood the legal authorities relied upon by Mr. Saran and the distinction between the factors that may go to the elements of duress and the actual elements of duress themselves. She accurately reviewed the parties' contentions as to the elements of duress and the case law in her reasons as follows:
- [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.
- [40] The *Bell* decision referred to in the above passage is cited earlier in the judgment as *Bell v. Levy*, 2010 BCSC 587, *aff'd* 2011 BCCA 417.
- [41] The judge also carefully reviewed the affidavits and conflicting evidence on the underlying facts and the allegations of duress. She set out the key passages of Mr. Carnovale's evidence as to the duress in her reasons at paras. 48-49. She also reviewed Mr. Saran's arguments and evidence disputing Mr. Carnovale's evidence: paras. 50-51.
- [42] Nevertheless, after considering the conflicting evidence and counter-arguments, she found that the evidence of duress was plausible. She held:
- [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.
- [43] The judge found that there was sufficient evidence to raise the issue of duress, but it required credibility assessments that in the circumstances of this case were not amenable to resolution based on the affidavit evidence. She held:

- [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.
- [44] In the end, the judge concluded that there was sufficient evidence to raise the issue, but she could not find the facts necessary to determine the defence of duress on the affidavit evidence tendered on the summary trial application. She concluded:
- [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.
- [45] The judge was also concerned that the facts pertaining to the claims made in the counterclaim overlapped significantly with the facts on the claims to be addressed on the summary trial application, and that credibility findings would have to be made by the trier of fact. For this reason, she was of the view that to avoid the risk of inconsistent findings, the claim and counterclaim should be tried together: paras. 63-64. Because there would need to be a trial of the counterclaim, having a summary trial of only part of the issues in dispute would not advance efficiency, cost savings or the ends of proportionality: para. 65.

- [46] In my view, the judge was not wrong to conclude that there was sufficient evidence in support of the RTCC and the counterclaim to raise real concerns about the appropriateness of deciding only part of the issues in dispute on Mr. Saran's summary trial application. The judge properly identified the dispute between the parties regarding duress, without deciding it, because she was of the view it was inappropriate to decide it on the summary trial application. This was within her discretion.
- [47] I do not see that the judge made an error of principle. There is no viable argument that the judge made an order unsupported by the evidence and I see no injustice resulting from her order.

## Conclusion

- [48] For all of these reasons, I am of the view that it is not in the interests of justice to grant leave to appeal. I dismiss the application.

"The Honourable Madam Justice Griffin"

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