IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sabok Sir v. Hill,*
2024 BCSC 924

Date: 20240530
Docket: S30349
Registry: Cranbrook

Between:

Manigeh Sabok Sir

Appellant

And

Kurt Hill

Respondent

Before: The Honourable Mr. Justice Tindale

On appeal from: An Order of the Provincial Court of British Columbia (Small Claims Court) dated December 20, 2020 (File No.: 28124, Cranbrook Registry)

Reasons for Judgment

The Appellant, Manigeh Sabok Sir, appearing on her own behalf:	M. Sabok Sir (Attending via teleconference)
Counsel for the Respondent:	E. Szilagyi (Attending via video conference)
Place and Date of Hearing:	Williams Lake, B.C. June 22 & December 7, 2023
Place and Date of Judgment:	Cranbrook, B.C. May 30, 2024

[1] The appellant Manigeh Sabok Sir appeals the Reasons for Judgment of the Honourable Judge W.G. Sheard of the Provincial Court of British Columbia (Small Claims Court) pronounced on December 30, 2020 (the "Reasons").

[2] The appellant also appeals the costs award made by the Honourable Judge W.G. Sheard pronounced on May 19, 2021 (the "Costs Award").

[3] The respondent Kurt Hill opposes this appeal.

Background

[4] The Small Claims trial took place on August 19 and 20, October 20 and December 29 and 30, 2020.

[5] The background circumstances relating to the dispute between the appellant and the respondent were summarized at paras. 4–11 of the Reasons which read:

> [4] The claimant appears to be about 60 years of age. She is a German citizen. The defendant is 83. He was born in Germany. He retired from Canada Post in Calgary and moved to Yahk, B.C. near Creston, in 1982 and he has lived in Yahk ever since.
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> [5] The claimant and the defendant first met in 2006 or 2007 in Manitoba. The two had some contact with each other, continuing to March 3, 2016, when the claimant was in Bonners Ferry, Idaho, just south of Creston, seeking to come to Canada. The defendant went to Bonners Ferry to bring her here. When they got to the Canadian border at the Kingsgate port of entry, the claimant was denied entry to Canada. In fact, she was issued an Exclusion Order (Exhibit 1) by the Canadian Customs and Immigration Service that prohibited her from entering Canada for the ensuing year.
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> [6] At that time, the claimant had personal effects stored in Paddockwood and Prince Albert, Saskatchewan, and in Edmonton, Alberta. The parties do not agree on how it came about, but in any event, the defendant travelled to those locations in about April 2016 and transported those belongings back to his property in Yahk, B.C. He placed her belongings in a shed or barn that was open on one side as depicted in photographs filed collectively as Exhibit 10.
>
> [7] The claimant returned to Canada in May or June 2017 and she began staying at the defendant's residence in about mid-June. By July 6, 2017, their relationship had deteriorated to the point that the defendant gave her written notice to vacate his residence; that is, to remove her person by the next day and to remove her possessions by July 10, 2017 (see Exhibit 11). Subsequent to that, but still on July 6, 2017, both the claimant and the defendant signed a note agreeing that the claimant would remove her belongings by July 12, 2017.

> [8] On July 10, 2017, the claimant called the RCMP requesting that they investigate her assertion of missing belongings including cash. Cpl. Sliworksy met the claimant a short time later at the defendant's residence and took photographs of the shelter where the claimant identified items as her belongings (Exhibit 10) and the belongings themselves (Exhibit 4).
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> [9] During this time, the claimant located a tin among these effects and, opening it, the corporal saw that there was cash in it. He also noted what appeared to be rodent damage to some of the items.
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> [10] Cpl. Sliworsky met and spoke with the defendant on July 12, 2017. The defendant told the corporal that he was not aware of any money that the claimant had in her possessions (in her belongings stored on his property).
>
> [11] Cpl. Sliworsky also spoke on the phone with the defendant's granddaughter, Amy Hill. He then spoke with the claimant again and informed her of his investigation and that he had nothing further to proceed on.

Positions of the Parties

Appellant

[6] The appellant argues that Judge Sheard made the following errors in the Reasons:

a) in determining that the factor of consideration was missing in the bailee relationship between the appellant and the respondent and, therefore, no legally binding agreement existed;

b) in finding that the appellant had not proven that the respondent had breached his duty of care and was grossly negligent;

c) in failing to consider that the respondent changed the terms of the agreement unilaterally and without the consent of the appellant;

d) in failing to consider all of the evidence and ignoring inconsistent statements of the respondent and his witnesses;

e) there was procedural unfairness in:

   i. not allowing the appellant to introduce certain documentary evidence during the trial, such as an affidavit the appellant had sworn in the Federal Court;

ii. not allowing the appellant to complete her cross examination of the respondent and other witnesses;

iii. basing his decision on the erroneous evidence; and

iv. permitting the respondent's counsel to ask leading questions during examination in chief of the respondent;

f) by accepting the respondent's testimony despite the respondent's numerous misrepresentations as noted at para. 34 of the Reasons;

g) in finding that the appellant had not proved that the respondent committed theft on a balance of probabilities and in not considering that the tort of conversion had occurred;

h) in making several factual errors which led to an erroneous finding of fact and an erroneous finding of law;

i) in concluding that the appellant had failed to prove pecuniary and other damages;

j) in awarding costs against the appellant when her claim had a basis for success, and the respondent's costs were not justified nor supported by the evidence; and

k) there was no authority to award costs against the appellant almost six months after the Reasons were pronounced.

[7] The appellant seeks an order quashing the Reasons and awarding her $27,868 in damages as well as her costs for both the trial and this appeal.

Respondent

[8] The respondent argues that the appellant's claim is simple. That is, the appellant's claim alleges the respondent was grossly negligent in failing to take appropriate steps to prevent theft and damage to her belongings.

[9] The respondent argues that Judge Sheard provided a succinct review of the law and evidence in the Reasons in finding that the appellant had failed to prove on a balance of probabilities her claim.

[10] The respondent argues that it is open to a trial judge to place less weight on certain evidence and accept other conflicting evidence that the trial judge may find to be more convincing.

[11] The respondent argues that a court of appeal should not interfere with the trial judge's reasons unless there is a palpable and overriding error. The appeal is not a rehearing of the trial.

[12] The respondent argues that Judge Sheard correctly found that the duty of care that the respondent owed to the appellant was not to be grossly negligent in storing her belongings.

[13] The respondent argues that the burden of proof rested with the appellant in proving her claim on a balance of probabilities. The appellant did not provide any supporting evidence other than her assertions during the Small Claims trial.

[14] The respondent argues that with regard to the appellant's submissions regarding procedural fairness that under s. 2 (1) of the *Small Claims Act,* R.S.B.C. 1996, c. 430 it is open to a trial judge to limit the time a party takes in presenting their case so that these proceedings can be determined in a just and speedy fashion.

[15] The respondent argues that the appeal should be dismissed.

Decision

Standard of review

[16] In *Housen v. Nikolaisen*, 2002 SCC 33, the Supreme Court of Canada stated the following when discussing the role of a court of appeal:

> [1] A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and

> overriding error. This same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.
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> …
>
> [3] The role of the appellate court was aptly defined in *Underwood v. Ocean City Realty Ltd.* (1987), 1987 CanLII 2733 (BCCA), 12 B.C.L.R. (2d) 199 (C.A.), at p. 204, where it was stated:
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> > The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

[17] The Supreme Court of Canada went on to discuss the definition of palpable error at para. 5 of *Housen*:

> What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). *The Random House Dictionary of the English Language* (2nd ed. 1987) defined it as "readily or plainly seen" (p. 1399).

[18] The Supreme Court of Canada in *Housen* stated the reasons for deferring to a trial judge's findings of fact:

> [15] In our view, the numerous bases for deferring to the findings of fact of the trial judge which are discussed in the above noted authorities can be grouped into the following three basic principles.
>
> (1) Limiting the Number, Length and Cost of Appeals
>
> [16] Given the scarcity of judicial resources, setting limits on the scope of judicial review is to be encouraged. Deferring to a trial judge's findings of fact not only serves this end, but does so on a principled basis. Substantial resources are allocated to trial courts for the purpose of assessing facts. To allow for wide-ranging review of the trial judge's factual findings results in needless duplication of judicial proceedings with little, if any improvement in the result. In addition, lengthy appeals prejudice litigants with fewer resources, and frustrate the goal of providing an efficient and effective remedy for the parties.
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> (2) Promoting the Autonomy and Integrity of Trial Proceedings
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> [17] The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. Frequent and unlimited appeals would undermine this presumption and weaken public confidence in the trial process. An appeal is the exception rather than the rule.

> (3) Recognizing the Expertise of the Trial Judge and His or Her Advantageous Position
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> [18] The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

[19] The Reasons set out in a clear and logical fashion the issues between the appellant and respondent, a summary of the evidence, a summary of the law and Judge Sheard's analysis of the issues.

[20] It is useful to reproduce parts of the Reasons for the purposes of this appeal:

> [27] From the claimant's own witness, Lyle Kabatoff, I find that he helped the defendant load, transport and unload the claimant's possessions and he was paid $1100 by the defendant to help the defendant, who was doing all this as a favour for the claimant without remuneration.
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> [28] I accept Mr. Kabatoff's evidence that, after the defendant and Mr. Kabatoff loaded the claimant's possessions into a U-Haul truck (for which the defendant paid $1,505.45 to rent), the truck was locked.
>
> …
>
> [32] Before the claimant's possessions were placed in the barn, the defendant used a vapour barrier to "build a room" for these items. I also accept the defendant's evidence that he put mothballs in the items and that he "took great care" in storing her items. For example, he ensured that anything marked "fragile" was put on top of other boxes, not under.
>
> [33] Although Cpl. Sliworsky observed the claimant to produce cash from a tin in the items she claimed were her belongings in the shelter on the defendant's property on July 10, 2017, that is not evidence that cash was missing.
>
> [34] In a photograph (Exhibit 13) of the defendant's notes which the claimant found in the defendant's residence when she went to recover her belongings, he refers to "money". The claimant's mother testified that the defendant said to her in a phone call that he had found a box labelled "money and jewelry". At times in his evidence the defendant denied that he knew there was cash or containers marked as containing cash, but at other times he acknowledged that the claimant had told him before and after he collected her items that there was cash, jewelry and other valuable items in her effects. Similarly, in his Reply filed he stated that the claimant only wanted to store her items with him for a couple of months, but in his evidence he acknowledged that he knew on March 3, 2016 that the claimant was then prohibited from entering Canada for a year. Notwithstanding these inconsistencies, I do not find the defendant was shaken in his denial of having stolen cash or any other items. I

> will take this as nothing more than confusion arising from the lapse of time since the events occurred.
>
> …
>
> (37) On the evidence, I find that the claimant has failed to establish on a balance of probabilities that cash or jewelry was missing from her belongings when she removed her belongings from the defendant's property on July 12, 2017.
>
> …
>
> [40] I find that the claimant did not provide the defendant with a detailed list of what her belongings were or the nature them before he took possession of them for her.
>
> [41] Although she did communicate to him that there was a freezer with food items, Mr. Smith testified and I find that prior to the defendant picking those items up from Mr. Smith, water had leaked into the freezer and the contents had frozen into one solid block, which Mr. Smith had tried to thaw enough to separate them before they were transported by the defendant.
>
> [42] The claimant knew that the transportation of these frozen items would require a long drive from Saskatchewan to British Columbia. Although she asserts that she told the defendant to take a cooler and ice to transport these items he does not acknowledge and I do not find that he agreed to do so.
>
> [43] Although it is apparent that rodent damage was caused to some of the claimant's clothing, blankets and leather goods, without more, I do not find that the defendant storing these items in a covered shelter as he did was unreasonable.
>
> [44] In considering all of the evidence, I find that the claimant has failed to establish on a balance of probabilities that the defendant was grossly negligent or reckless or deliberately allowed loss or damage to the claimant's belongings. Accordingly, the claim based upon bailment is dismissed.

[21] Judge Sheard then went on to conclude that, in any event, the appellant had failed to prove that she suffered any pecuniary loss or that the respondent stole cash or anything from her: paras. 49 and 52 of the Reasons.

The relationship between the parties

Did consideration exist in the agreement between the parties?

[22] The appellant argues that Judge Sheard erred in finding that there was no consideration in the relationship between the appellant and the respondent. The appellant says that Judge Sheard did not consider that a reasonable person would expect some benefit for his services and would want to be reimbursed for his expenses.

[23] The appellant says that the respondent was well aware that the loss of the appellant's money and damage to her belongings exceeded the amount of expenses he incurred for moving her belongings and that is why he did not ask to be paid.

[24] The appellant says that if the agreement between the parties was truly a gratuitous or involuntary bailment then it cannot be explained why the respondent retrieved her belongings from Saskatchewan and stored them at his place when there is evidence before the Court that there was no deadline or emergency for moving the appellant's belongings.

[25] The respondent argues that Judge Sheard properly characterized the parties' relationship as that of bailee/bailor. Judge Sheard found that the respondent agreed to move the appellant's belongings and store them in his barn simply as a favour to her and he paid Mr. Kabatoff to help with the move and rented a U-Haul truck: the Reasons at paras. 27–28.

[26] The respondent notes that despite the fact that the appellant repeated several times in her evidence that the agreement was she would reimburse the respondent for his expenses, that never happened.

[27] The respondent argues that simply reimbursing the respondent for his expenses is not a reward for what he did.

[28] In essence the appellant argues that Judge Sheard should have drawn an inference that no one would have moved and stored the appellant's belongings without some form of payment and, therefore, there was consideration and a contract existed between the parties.

[29] It is open to a trial judge to place more or less weight on certain evidence, and to accept certain evidence and reject other evidence: *Toneguzzo-Novell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at 123, 1994 CanLII 106.

[30] In this case, after considering all of the evidence, Judge Sheard found that the respondent moved and stored the appellant's belongings as a favour to her. It was open to Judge Sheard to make this determination.

[31] I would not accede to the appellant's argument concerning the trial judge's misapprehension of the alleged legally binding agreement.

The bailment relationship

[32] When considering the parties' relationship, Judge Sheard cited at para. 18 of the Reasons the following quote from *McAulay v. Meise*, 2020 BCPC 135:

> A person who possesses or stores items for another is often referred to as a "bailee." A Bailee has a duty of care towards the items they are storing for someone else, but those duties are different for bailees who are paid ("bailees for reward"), and bailees who are not. Parties who agree to store someone's goods but are not paid are "gratuitous bailees," while parties who have someone else's goods on their property against their will are "involuntary bailees."

[33] The trial judge properly characterized the relationship between the parties in finding that the respondent was a gratuitous bailee.

[34] I would not accede to this argument by the appellant.

Did the respondent breach his duty of care?

[35] With regard to the duty of care of a gratuitous bailee Judge Sheard stated the following at para. 22 of the Reasons:

> [22] Thus, I find that the duty of care that the defendant owed to the claimant was not to be grossly negligent in storing her belongings or, stated another way, not to recklessly or intentionally cause or allow to be caused damage or loss to her belongings.

[36] The appellant argues that Judge Sheard made an error when he concluded that the appellant did not prove on a balance of probabilities that the respondent had acted with gross negligence and intention with regard to damage to her belongings.

[37] The appellant argues that the respondent testified that he had no interest in preserving and safeguarding the appellant's belongings. The appellant referred to the testimony of the respondent given on December 29, 2020 where the respondent states the following at page 87 lines 23–28:

> A: Page 4 and what-- let's see, what am I-- I see none of that, and if that was in the stuff that I picked up in Saskatchewan and brought to my place well, the responsibility is yours. Why-- what sense does it make? And I should have been taken extra careful this--ah, now, come on.

[38] The appellant says that any reasonable person would have known that a vapour barrier in a barn would not protect her belongings from rodents and was not a safe place to store her belongings.

[39] The respondent argues that it was open to Judge Sheard to find that the appellant had not established gross negligence on the part of the respondent because there was evidence provided at trial of the respondent's efforts in storing the appellant's goods. For example, the respondent pointed to the testimony given that the U-Haul truck that the appellant's belongings were hauled in was locked at all times.

[40] Lyle Kabatoff, who was the appellant's witness at the Small Claims trial, also gave the following evidence in relation to the storage of the appellant's belongings on October 20, 2020 at page 20 lines 8–18:

> No, because Kurt had ran out of vapour barrier. We were using that clear plastic vapour barrier and the red duct tape and we had made an enclosed room in there. But he had run out of vapour barrier. You can't just get this in Yahk. You have to drive to Creston or Cranbrook.
>
> Well luckily I had a roll. I provided that. We finished off the project. And Kurt actually went and bought me more tape. He replaced all my stuff, that I used to build the room, to protect your stuff.

[41] The appellant also argues that Judge Sheard failed to consider that the respondent did not show any remorse about the appellant's destroyed belongings. The appellant says that if the respondent truly believed that he took great care of the appellant's belongings in storing them, the reasonable reaction would have been to help the appellant clean up her belongings and show sympathy.

[42] The respondent concedes that there was some rodent damage to the appellant's clothing, blankets and leather goods as well as some spoiled meat. However the respondent submits that was not enough to establish that the respondent was grossly negligent in storing the appellant's belongings.

[43] Judge Sheard considered all of the evidence, including that the appellant did not provide the respondent with a detailed list of what her belongings were or the nature of them. He also found that the appellant did not communicate to the respondent that there was a freezer with food items. Judge Sheard acknowledged that some frozen items spoiled and there was some rodent damage but, ultimately, he found that the appellant failed to establish on a balance of probabilities that the respondent was grossly negligent or reckless or deliberately allowed loss or damage to the appellant's belongings.

[44] Judge Sheard in any event found that there was no evidence to establish that the respondent had stolen or was grossly negligent in the loss of any money or belongings of the appellant.

[45] I would not accede to this argument by the appellant.

Did the respondent change the terms of the agreement unilaterally and without the consent of the appellant?

[46] The appellant argues that the respondent changed the terms of the agreement without her consent. He did not ask for her consent to rent a U-Haul truck or hire Mr. Kabatoff to transport her belongings.

[47] The appellant argues that she proved that the respondent did not safeguard and store her belongings at his premises as he promised and her belongings were damaged.

[48] The appellant argues that she did not know that the respondent stored her belongings in a barn.

[49] Judge Sheard considered the nature of the agreement between the parties and concluded that the respondent was transporting and storing the appellant's belongings as a favour to her.

[50] The evidence presented in the Small Claims trial did not establish a contract or any agreement which could have been unilaterally changed by the respondent. The evidence which was accepted by Judge Sheard was that the respondent was doing the appellant a favour.

[51] I would not accede to this argument by the appellant.

Did the judge err in ignoring contravening statements in the testimonies of the respondent and his witnesses?

[52] The appellant argues that there was contravening evidence from Mr. Kabatoff and the respondent as to whether or not the U-Haul truck was locked.

[53] Further the appellant argues that the respondent in his testimony gave evidence that Mr. Kabatoff returned the U-Haul truck and only took Amy Hill with him. The appellant notes that conversely, Mr. Kabatoff gave evidence that he returned the U-Haul truck with Amy Hill and his girlfriend.

[54] The appellant says that Amy Hill testified that she did not return the U-Haul truck with Mr. Kabatoff. On December 29, 2020, Ms. Hill gave evidence at the trial and said the following at page 125 lines 17–23 of the transcript:

> Q: So that means did not-- you did not go with anyone and return U-haul truck?
>
> A: No.
>
> Q: In Creston. Not with Mr. Kabatoff. Do you-- can you recall who brought the U-Haul truck back to Creston?
>
> A: I have no idea.

[55] The appellant argues that there is also conflicting evidence between Ms. Hill and Mr. Kabatoff as to whether or not the boxes containing her belongings were open or closed.

[56] The appellant says that the respondent gave evidence that there were no numbers on the boxes however they were clearly visible and this was contrary to evidence given by other witnesses including Mr. Kabatoff.

[57] The appellant complains that Judge Sheard did not consider the conflicting evidence or why Mr. Kabatoff was reluctant to testify at trial.

[58] The underlying presumption is that "a trial judge is competent to decide the case before him or her" and is "better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce* and the judge's familiarity with the case as a whole": *Housen* paras. 17–18.

[59] A trial judge is given deference in making factual findings, credibility assessments and inferences of fact. Judge Sheard had the advantage of hearing all of the evidence and chose to accept the evidence of Mr. Kabatoff as to whether or not the U-Haul truck was locked and who accompanied him in returning the U-Haul truck.

[60] It was open to Judge Sheard to accept the evidence of Mr. Kabatoff and make the findings that he did. I would not interfere with Judge Sheard's findings in that regard.

[61] I would not accede to this particular argument of the appellant.

Procedural fairness

[62] The appellant makes a number of arguments with regard to procedural fairness. The appellant says she was not allowed to introduce an affidavit that she had sworn in the Federal Court which she said would provide evidence of how much money she had stored in Saskatchewan. She was also not allowed to introduce two emails of conversations between herself and Cpl. Sliworsky which would have assisted her in explaining why some of her money and jewelry were hidden under a bed in the respondent's basement.

[63] The appellant also complains that she was not allowed to introduce emails from her mother, Ms. Sabok Sir Senior, and a letter from Mr. Kabatoff. The appellant also asserts she was not permitted to complete her cross examination of the respondent and other witnesses.

[64] The appellant argues that the respondent had a repeating pattern of distracting from the subject he was being questioned on and then would provide a false statement.

[65] The appellant also says that counsel for the respondent asked leading questions in their examination in chief.

[66] The appellant argues that the respondent was allowed to mark photographs as exhibits even though he could not say who took the photographs and on what date they were taken.

[67] The purpose of the *Small Claims Act* is to have "… enforcement proceedings concluded in a just, speedy, inexpensive and simple manner": s. 2(1).

[68] The trial in the Small Claims Court spanned five days. On a number of occasions Judge Sheard directed the appellant, who is a self represented litigant, to the fact that many of her questions and some of the documentation that she sought to introduce were not relevant.

[69] Judge Sheard allowed counsel for the respondent to ask leading questions on non-contentious issues which is not only permissible but, given the length of time that the trial was taking, was also necessary to conclude the matter in a just, speedy, inexpensive and simple manner.

[70] I am not satisfied that there was any procedural unfairness to the appellant in the manner in which this trial was conducted.

[71] I would not accede to the appellant's argument in this regard.

Accepting the respondent's evidence

[72] The appellant argues that the respondent was not credible in denying he had any knowledge about the cash money and jewelry among the appellant's belongings. The appellant said that she had instructed the respondent to search for money and the jewelry box and there was evidence from Ms. Sabok Sir Senior that the respondent had told her that he found the money and jewelry box.

[73] The appellant says that the respondent made a number of false statements in his reply to the Small Claims action (the "Reply").

[74] For instance, when the respondent was questioned at trial about his Reply he stated he was not aware that there were dry food items within the boxes and bags of the appellant's belongings. The respondent stated the following on December 29, 2020, which can be found at page 85 lines 24–25 of the transcript:

> Q: So was this a false statement on the reply?
> A: Very likely, because it made me so angry.

[75] The appellant argues that Judge Sheard was aware of the numerous inconsistencies in the respondent's evidence, however the appellant submits Judge Sheard erred when he misinterpreted the clear intention of the respondent to mislead justice.

[76] There were clear inconsistencies in the respondent's testimony which Judge Sheard acknowledged and dealt with at para. 34 of the Reasons. Specifically, he did not find that the respondent "was shaken in his denial of having stolen cash or any other items of the claimant."

[77] Judge Sheard was aware of the inconsistencies in the respondent's evidence, considered them and made his credibility findings. Judge Sheard felt that the respondent was confused in his evidence but was resolute in his denial of having stolen the appellant's cash or other items.

[78] Judge Sheard's assessment of credibility is owed deference because he was in the best position after hearing all of the evidence to make a determination as to the veracity of the respondent's evidence.

[79] I would not accede to this argument by the appellant.

Did the judge err in finding that the appellant could not prove theft or in failing to consider the tort of conversion?

[80] At para. 126 of *Ast v. Mikolas,* 2010 BCSC 127, the Court outlined the requirements for the tort of conversion:

> The elements that must be proven to establish the tort of conversion are:
>
> (a) a wrongful act by the defendant involving the goods of the plaintiff;
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> (b) the act must consist of handling, disposing, or destroying the good; and
>
> (c) the defendant's actions must have either the effect or intention of interfering with (or denying) the plaintiff's right or title to the goods.

[81] This ground of appeal is similar to the appellant's complaint about the evidence of the respondent. If, after considering the evidence, Judge Sheard found that the respondent had taken or allowed other people to take the appellant's belongings—in particular the cash—then the tort of conversion may have applied.

[82] However, after considering all of the evidence, including that of Amy Hill, Judge Sheard concluded that the appellant had failed to establish on a balance of probabilities that cash or jewelry were missing from her belongings.

[83] Judge Sheard examined and considered the evidence as a whole in coming to his conclusions. The appellant does not accept that analysis. However the findings of Judge Sheard in this regard are supported in the evidence and the appellant has not established any palpable and overriding error.

[84] I would not accede to this argument by the appellant.

Factual errors

[85] The appellant alleges that Judge Sheard made a number of factual errors primarily with regard to his conclusion that the appellant did not have an inventory before her items were moved from Saskatchewan and that the respondent was not provided with a detailed inventory.

[86] The appellant takes issue with Judge Sheard's characterization that the appellant's belongings had limited value.

[87] The appellant also argues Judge Sheard's conclusion that the plastic vapour barrier was a reasonable protection against rodents was incorrect.

[88] In my view the appellant has failed to identify any palpable and overriding error in the factual pleadings. There was considerable direct evidence as well as circumstantial evidence before Judge Sheard which he was entitled to rely on in dismissing the appellant's case.

Did the appellant prove pecuniary and other damages?

[89] The appellant says that she gave an approximate value of her belongings which were damaged, destroyed or stolen during her testimony. This included the amount of cash money which was among her possessions.

[90] The appellant argues that it was an error to find that she had not proven that she had pecuniary damages. However in the appellant's argument she acknowledges that there was no "official" estimate of the value of her belongings.

[91] The appellant also argues that it is reasonable to conclude that an ordinary person would not have an official estimate of the value of her belongings when storing personal items with a friend.

[92] The appellant says that Mr. Nicholson's evidence that the appellant's belongings did not have much monetary value was based on Mr. Nicholson's description after her belongings had been damaged.

[93] The appellant does not accept the findings of fact by Judge Sheard. Nevertheless, none of the arguments put forward by the appellant show that there was any error in Judge Sheard's analysis of the evidence.

[94] The onus was on the appellant at trial to prove on the balance of probabilities her damages.

[95] The evidence provided in this regard was not sufficient to meet that standard and as such the appellant has not shown any palpable and overriding error.

[96] I would not accede to this argument by the appellant.

Did the judge err in the Costs Award?

[97] The appellant argues that because her claim had a basis for success she should not have to pay the awarded costs. Further the appellant takes issue with the affidavit of Ms. Durrant which was filed in support of the respondent's application for costs. Finally the appellant argues that Judge Sheard did not have the authority to award costs against her because almost six months had past since he pronounced his decision to dismiss her claim.

[98] In the Costs Award Judge Sheard ordered that the appellant pay $3,556.13 in costs to the respondent. In doing so he considered s. 19 of the *Small Claims Act* as well as R. 20 of the *Small Claims Rules*.

[99] The appellant argues that no penalty should have been awarded against her pursuant to R. 20(5) of the *Small Claims Rules* because her claim did have a reasonable basis for success. The appellant argues that if she had an official monetary assessment of her belongings prior to the respondent moving her belongings she may have been successful.

[100] Judge Sheard found that the decision of *Johnston v. Morris*, 2004 BCPC 511 supported the awarding of a penalty where a claimant failed to present any evidence proving damages. Judge Sheard was of the view that the case at bar was similar in that regard.

[101] Further Judge Sheard noted the following at para. 35 of the Costs Award: "while I accept that the claimant firmly believes the defendant breached a duty of care to her and that she has sustained a monetary loss, several of her own witnesses were not helpful to her case."

[102] Judge Sheard found that the appellant should have been aware that her claim had no reasonable basis for success: Costs Award at para. 34.

The timing of the Costs Award

[103] Judge Sheard also dealt with the argument relating to the timing of the costs application and stated the following at para. 19 of the Costs Award:

> In the case *of* *Kelly v. Lam and Ruiz*, the defendants filed their application for costs after the claimant's appeal had been dismissed. Judge Rae in no way stated the application had to await the outcome of the appeal. Indeed, the case appears to support the position that an application can be filed and heard well after the decision at trial. While it may be preferable that an application for costs is made as soon as possible after a decision at trial, I find nothing in the *Act* or *Rules* that limits the time within which such an application must be made or if there is an appeal, the application must await the outcome of the appeal.

[104] I agree with the above noted statement of the law with regard to the awarding of costs after a Small Claims trial.

[105] Judge Sheard also considered in detail which costs would be awarded and I find that the costs awarded were reasonable. The appellant did raise some issues with regard to service of the respondent's case law and the affidavit provided by the respondent in support of his application for costs. However, the appellant was given time to review the documents and did not request an adjournment of the hearing.

[106] I am not satisfied that there was any procedural unfairness in proceeding with the hearing regarding costs.

[107] I find no palpable and overriding error with regard to the assessment of costs as awarded against the appellant by Judge Sheard.

[108] I would not accede to this argument by the appellant.

Conclusion

[109] The appeal is dismissed.

[110] The respondent is entitled to his costs of the appeal.

"The Honourable Mr. Justice Tindale"