COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lepage v. Bowen Island (Municipality),* 2023 BCCA 308

Date: 20230614
Docket: CA47616

Between:

Joel Alexander Martin Lepage

Appellant
(Plaintiff)

And

Bowen Island Municipality

Respondent
(Defendant)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated June 4, 2021 (*Lepage v. Bowen Island Municipality*, 2021 BCSC 1077, Vancouver Docket S170935).

Oral Reasons for Judgment

Counsel for the Appellant:	M. Nied
Counsel for the Respondent:	C.L. Paterson
Place and Date of Hearing:	Vancouver, British Columbia June 13, 2023
Place and Date of Judgment:	Vancouver, British Columbia June 14, 2023

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Summary:

The appellant sued Bowen Island Municipality for conversion after the boat he possessed was salvaged and destroyed. At the trial, he was awarded $5,000 in damages. Mr. Lepage appeals the damages award as being inordinately low and not reflective of the actual extent of damages that Bowen Island Municipality is responsible for. Held: Appeal dismissed. The judge was alive to all of the relevant issues. Mr. Lepage has not demonstrated palpable and overriding error in the judge's factual findings or error in his reasoning, such that appellate intervention is warranted.

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DEWITT-VAN OOSTEN J.A.:

Introduction

[1] In January 2016, Bowen Island Municipality ("Bowen Island"), wrongfully destroyed a 32' sailboat that broke loose from its mooring and required salvaging. The appellant, Joel Lepage, had possession of the sailboat for many years. For much of that time, it was his residence. He was away from Bowen Island when the salvaging took place. Upon his return, he learned that the sailboat had been destroyed and he sued Bowen Island for the tort of conversion. His claim was allowed and a Supreme Court judge awarded him $5,000 in damages.

[2] Mr. Lepage says $5,000 is inordinately low. He contends that the judge made a number of errors in deciding the case. He says these errors resulted in an award that does not properly reflect the extent of damages for which Bowen Island is properly responsible, Mr. Lepage's sentimental attachment to the sailboat, or the cumulative value of his loss. He asks that the damages award be set aside and that the matter return to the Supreme Court for reassessment.

Trial Judgment

[3] The judge's reasons are indexed as 2021 BCSC 1077. The salient facts were succinctly stated:

> [7] On or about January 19, 2016, the [sailboat] had come loose from its mooring. Bonnie Brokenshire was a senior bylaw officer and manager of parks and the environment for [Bowen Island] at the time. A resident whose dock was nearby informed her about the vessel. Ms. Brokenshire was sent

> pictures of the vessel in which it appears to have run aground near the dock and an additional picture where the vessel was submerged by water.
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> [8] Ms. Brokenshire arranged to check [Bowen Island's] electronic system to see if there was a record of the owner of the vessel. The results of a survey of vessels completed in the fall of 2015 did not list an owner for the vessel. No further attempts were made to locate or contact the owner …
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> [9] The same day, Ms. Brokenshire sent an email advising the Transport Canada official designated as a receiver of wreck about the vessel. Her email attached the photos of the vessel both before and after being submerged. Ms. Brokenshire expressed concern about potential damage to the dock, as well as the impact the vessel might have on ecologically sensitive eel grass in the area. She requested permission to salvage the vessel.
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> [10] On January 20, 2016, the receiver of wreck provided a direction by email for [Bowen Island] to proceed with salvaging the vessel and to submit a notice to the receiver of wreck. [Bowen Island] hired a tug and barge company to salvage and dispose of the vessel. The barge removed the vessel from the water.
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> [11] … I accept on the evidence before me that the vessel was underwater before the salvage operation.
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> [12] On January 21, 2016, the vessel and its contents were destroyed, placed in bins, and shipped off of Bowen Island for disposal.

[4] Mr. Lepage did not prove he was the legal owner of the sailboat: at para. 23. He testified that he purchased the sailboat for approximately $40,000. However, he acknowledged that in a previous court proceeding (*R. v. Lewis*, 2009 BCPC 386), he represented that his sister owned the sailboat: at para. 20. The judge held that Mr. Lepage could not "come before the courts of this province and make contradictory representations about the ownership of a vessel as it suits him": at para. 22. He did not adduce evidence from which the judge could "conclude that [the sister] transferred the ownership of the vessel to [Mr. Lepage] after 2009": at para. 23.

[5] Nonetheless, the judge was prepared to find that Mr. Lepage had physical possession of the sailboat from 2004–2016 and that he personally occupied it for many of those years: at para. 24. When it was destroyed, Mr. Lepage had not been living on the sailboat for some time. However, he had not abandoned it: at para. 26. The judge also accepted that Mr. Lepage had "either a legal or a beneficial interest in the contents and several improvements to the vessel": at para. 24.

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[6] The judge found that although the salvaging of the sailboat was properly authorized, its destruction did not comply with statutory requirements. This latter fact was conceded by Bowen Island: at para. 17. Consequently, the judge concluded that "the destruction and disposal of the vessel and its contents was a wrongful act": at para. 18, emphasis added. The term "destruction", as used here, refers to taking the sailboat apart after it had been salvaged, placing the parts in bins, and removing the bins to another destination.

[7] Specific to damages, Bowen Island adduced expert opinion evidence indicating that prior to salvage, "wooden vessels of this type and size would generally fetch a range of values from virtually free for a vessel which is in poor condition and sparsely equipped to a high of approx. $10,000.00 for a vessel in generally good condition and in running order". If a sailboat had sunk or "at least partially flooded, the market value would diminish to virtually zero". Based on this evidence, the judge accepted that the sailboat had "no realistic market" value after it was salvaged: at para. 31.

[8] Mr. Lepage testified that the sailboat had sentimental value to him. He also said he put considerable work into it and he claimed damages for items that were on the sailboat when it was destroyed. In his evidence, Mr. Lepage described what he was asking for:

> And what I'm asking for is not only the work I've done I want to be covered for -- and the price of the vessel -- but I'm going to have to do it again, right. So this … should be doubled if I want to get back to my original stage …

[9] Mr. Lepage did not adduce evidence independently confirming the amounts claimed. In addition to testifying about the $40,000 purchase price, he presented a list of work done and items lost that he cumulatively valued at approximately $95,000. He testified that he quantified this value by "loo[king] up the pricing … this is basically an estimation. A summary of … [his] estimation. Basically, if [he] were to exhibit this as a bill for services this is what it would show". He did not present receipts in support of these claimed expenses or a professional appraisal confirming his estimates based on past or present market value.

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[10] The judge found that the sailboat sank prior to being salvaged. From his perspective, Bowen Island was therefore not responsible for any damage that occurred to the sailboat while it was submerged. For some of the items claimed (such as upholstery, clothing and bedding), the judge found that they would have had no value after the sailboat sank. Ultimately, the judge concluded that $5,000 would adequately compensate Mr. Lepage for the loss he proved at trial that was directly attributable to the wrongful conduct of Bowen Island: at paras. 32–35. He described this amount as “justified in the circumstances”: at para. 35.

[11] After he closed his case, Mr. Lepage applied to reopen for the purpose of calling his sister as a witness. Bowen Island had given notice to Mr. Lepage that it intended to call the sister “if necessary” and had served her with a subpoena. However, it later decided not to. Mr. Lepage said his sister would testify about ownership of the sailboat, namely, that at some point she held a receipt for a $10,000 down payment made by Mr. Lepage to the previous owner. (This evidence would be inconsistent with the representation to the Provincial Court in 2009). The sister would also say that she had been on the sailboat several times before the events that gave rise to the lawsuit, including sailing with Mr. Lepage.

[12] The judge dismissed Mr. Lepage’s application to reopen, finding that the sister’s evidence was of limited (if any) relevance. Moreover, she was a witness that Mr. Lepage could have called as part of his case, but chose not to.

Issues on Appeal

[13] Mr. Lepage does not take issue with the judge’s articulation of the legal principles that govern an action in conversion, which is a strict liability tort. See *ICBC v. Atwal*, 2012 BCCA 12 at paras. 24–25. Instead, his appeal is predominantly focused on the judge’s factual findings and the quantification of damages.

[14] Mr. Lepage alleges that the judge committed a number of errors. They are stated this way in his factum:

> The trial judge erred by concluding that the sailboat had already sunk.

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> The trial judge erred by not applying the legal maxim *onmia praesumuntur contra spoliatorem* in favour of the appellant.
>
> The trial judge erred in concluding that the appellant did not own the sailboat.
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> Alternatively, the trial judge erred in his approach to concluding that the appellant did not own the sailboat.
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> The trial judge erred by not considering sentimental value.

[15] Bowen Island asks that the appeal be dismissed. It says Mr. Lepage has not established reversible error.

Discussion

[16] I will address each of the grounds of appeal in turn.

[17] Some of the issues before us were not raised at trial or developed in the same way as on appeal. However, Mr. Lepage represented himself at trial and it is apparent from the record that he found it challenging to advance his case. Given this context, I consider it fair to address the appeal as currently framed. In its response, Bowen Island has not alleged prejudice arising from the manner in which the appeal has been advanced.

[18] Mr. Lepage challenges a damages award. As explained in *Ostrikoff v. Oliveira*, 2015 BCCA 351 [*Ostrikoff*]:

> [2] An award of damages is a fact-finding exercise that this Court will not interfere with lightly. In *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435, the Supreme Court of Canada stated the test for appellate review of damages awards:
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> > It is well settled that a Court of Appeal should not alter a damage award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. It is only where a Court of Appeal comes to the conclusion that there was no evidence upon which a trial judge could have reached this conclusion, or where he proceeded upon a mistaken or wrong principle, or where the result reached at the trial was wholly erroneous, that a Court of Appeal is entitled to intervene. …

A deferential standard applies.

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The Sailboat Sank Before Salvaging

[19] The judge found, as a fact, that the sailboat sank before it was salvaged. Mr. Lepage takes issue with the finding, which he describes as speculative. He contends that without this finding, the damages award would have been substantially different.

[20] Mr. Lepage argues that the factual finding was grounded in hearsay evidence relayed through Ms. Brokenshire and photographs of the sailboat that were not properly authenticated. Mr. Lepage says this evidence could not be relied upon for the truth of its contents. The judge was not entitled to infer from the emails or the photographs that the sailboat had submerged before it was salvaged. In addition, there was other evidence that Mr. Lepage contends supported his theory that the sailboat did not submerge until after the salvaging operation began. By this time, Bowen Island had already engaged with the sailboat and Mr. Lepage says it is accountable for the whole of the loss.

[21] To have this factual finding set aside, Mr. Lepage must establish palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8–10. In my view, he has not done so.

[22] Ms. Brokenshire testified that on January 19, 2016, she received information from a third party that the sailboat broke from its mooring, was banging into a dock, and had sunk. At the material time, she did not know who the sailboat belonged to.

[23] At her request, the individual who provided Ms. Brokenshire with this information sent photographs to her. Based on the material she received, Ms. Brokenshire reached out to Transport Canada on that same day by email, asking for permission to salvage the sailboat. She attached one or more of the photographs to the email. In the body of the email, she described the sailboat as “submerged”:

> This vessel has caused damage to Pat and Anne Hurlbert’s dock in that the float portion has become askew. In order to avoid any further damage to property (docks in the area and/or other vessels) and vital eelgrass beds a salvage operation needs to take place ASAP. The now submerged vessel is

> approximately 32’ (see photo included below), has a fiberglass hull (with a concrete keel) and a single mast.
>
> [Emphasis added.]

One of the photographs showed only part of a mast sticking out of the water.

[24] Transport Canada responded to Ms. Brokenshire’s request on January 20, 2016 and gave permission to salvage. According to Ms. Brokenshire’s evidence, she arranged for a company on Bowen Island to remove the sailboat from the water. On January 21, 2016, Ms. Brokenshire completed a Notice to Receiver of Wreck and sent it to Transport Canada, advising that the salvage was complete. The Notice to Receiver of Wreck asked for the “Status of Wreck at time of salvage”. Ms. Brokenshire filled in the box labelled “Sunk”.

[25] Mr. Brokenshire described the emails between herself and Transport Canada as “standard procedure” in her then role as the manager of parks and environment and a senior bylaw officer for Bowen Island. In other words, the exchange with Transport Canada was done in the ordinary course of her business as a Bowen Island employee.

[26] Given the circumstances, I consider the emails and the factual statements embodied in the emails to have been admissible as an exception to the rule against hearsay in the form of business records under s. 42(2) of the *Evidence Act*, R.S.B.C. 1996, c. 124 [*Evidence Act*].

[27] Mr. Lepage did not object to the emails and the photographs (they were included in a joint book of documents). To the contrary, he used these photographs and others in support of his own case. With reference to this material, Mr. Lepage argued that the company retained to remove the sailboat from the water likely “dragged it … over the rocks and sunk it and then barged it”. He asked the judge to draw inferences from the photographs. In his evidence, he accepted that the photographs depicted the sailboat he had possession of. The photograph of a mast protruding from the water formed part of this package. Mr. Lepage had direct knowledge of the sailboat and was someone with the capacity to identify it.

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[28] In my view, the business records, Ms. Brokenshire's evidence, and Mr. Lepage's testimony about the photographs, cumulatively provided a proper and sufficient evidentiary foundation from which the judge could conclude that the sailboat had submerged before it was salvaged. Ms. Brokenshire's testimony authenticated the exchange with Transport Canada, the materials sent and received, the business context in which the exchange occurred and the relevant dates. She testified about the timing of the events and that the salvage did not complete until after Transport Canada provided permission to do so. From this evidence, as a whole, the judge could reasonably infer that the sailboat was under water before it was removed from the bay at the direction of Bowen Island. Mr. Lepage put a theory forward as to how the sailboat sank, but it was a theory. The judge, as the trier of fact, was entitled to reject this theory as speculative, once considered in the context of the evidence as a whole.

Presumption Against the Wrongdoer

[29] Mr. Lepage argues that on the facts of this case, the judge should have presumed that the sailboat sank during the salvaging operation because Bowen Island's wrongful interference prevented him from gathering evidence that would have established this fact. In support of this position, Mr. Lepage cites from the judgment of Dickson J. (as she then was), in *Le Soleil Hospitality Inc. v. Louie*, 2010 BCSC 1183, aff'd 2011 BCCA 305 [*Le Soleil*]:

> [286] The burden of proving a compensable loss rests upon the plaintiff. In some cases, however, the defendant's wrongdoing renders it unusually difficult for this burden to be discharged. In such circumstances, although the burden does not shift from one party to the other it may be met by application of a presumption of adverse facts against the wrongdoer: *D. Fogell Associates Ltd. v. Esprit de Corp (1980)/Esprit de Corp (1980) Ltee.*, 1997 CarswellBC 1131 at para. 55 (S.C.); *Mark James Ltd. v. Collins* (1994), 96 B.C.L.R. (2d) 87 at paras. 37–40 (S.C.).
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> [Emphasis added.]

[30] Assuming without deciding that this presumption was available in the circumstances of this case, I am satisfied it would have made no difference to the outcome. The judge found that Bowen Island established the sailboat had

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submerged before the salvaging operation began. The “presumption of adverse facts” spoken of in *Le Soleil* had been rebutted.

Ownership: The Finding and the Process

[31] Mr. Lepage says the judge erred in concluding that he was not the legal owner of the sailboat and that this error impacted the assessment of damages. He contends that because of the ownership finding, he was given credit only for the contents of the sailboat, not the sailboat itself.

[32] I agree with Bowen Island that the judge did not limit his damages assessment to the contents of the sailboat. Rather, on a fair reading of his reasons, he compensated Mr. Lepage for the destruction of the vessel and for its contents: at paras. 18, 35.

[33] The judge instructed himself that the remedy for conversion is “that the defendant pay the value of the chattel at the time that it was wrongfully taken together with any consequential loss”: at para. 27, citing *Kostiuk (Re),* 2002 BCCA 410 at para. 66, emphasis added. Mr. Lepage does not take issue with this instruction.

[34] In my view, the award of $5,000 is easily reconciled with the judge’s instruction. The nominal amount is not the product of legal error. Rather, it reflects an unopposed expert opinion stating that the sailboat had no realistic market value after it was salvaged (which is when the wrongful destruction occurred), and the fact that Mr. Lepage did not substantiate his claimed damages with independent evidence (the consequential loss). His “estimations” were rejected:

> [34] I accept that some of the items aboard the vessel retained some value at the time it was salvaged—for example, the sails, hardware, and various equipment and tools aboard the vessel. However, Mr. Lepage did not support the alleged costs of these items with any evidence of their value. In the overall context of his evidence, I give little weight to his personal estimates of the value of those items. In any event, it was clear from his testimony that his estimates often included the original cost of items, their replacement cost and their sentimental value. As set out above, damages for conversion are based

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> on the value of the items at the time of their destruction, not their original cost or the cost of replacing them with new products.
>
> [Emphasis added.]

[35] I also agree with Bowen Island that even if the judge erred in his ownership finding, it would not have affected the outcome. The denial of damages for the value of the sailboat before it sank (which, on the evidence, was at best $10,000), was not grounded in the ownership determination. As Mr. Lepage acknowledges in his reply factum (at paras. 1–4, 20), the denial arose from the conclusion that the boat sank prior to being salvaged, and, as a result, that Bowen Island could not be held legally accountable for this loss: 2021 BCSC 1077 at paras. 32–33. The conversion occurred post-salvage, with the destruction and disposition of the sailboat. As I am satisfied the finding about when the sailboat sank was open to the judge, it renders this ground of appeal moot.

[36] It also renders moot the concerns raised about process and Mr. Lepage not having the opportunity to call his sister as a witness. I accept that the judge had to be cautious in denying Mr. Lepage this opportunity. As noted by Groberman J.A., writing for the Court in *Brown v. Brown*, 2020 BCCA 53 (at para. 30):

> Self-represented litigants with limited familiarity with court procedures and with the rules of evidence are particularly likely to arrive in court without having a complete evidentiary foundation for their arguments in their affidavit material. Judges should proceed cautiously in such situations, attempting to ensure that the litigant has a full opportunity to present their case, but also taking care to ensure that indulgences offered to a self-represented party do not make the proceedings unfair to others. …

[37] However, this was a matter for the judge's discretion, and, even assuming that Mr. Lepage's sister would say she held a $10,000 receipt on behalf of her brother, the loss of the sailboat's pre-submersion value was not compensable in light of the finding that the conversion occurred post-salvage. As such, Mr. Lepage suffered no real prejudice from not calling this witness.

[38] I will note that to the extent Mr. Lepage submits it was erroneous or unfair for the judge to treat the statements made by him in the 2009 Provincial Court proceedings as anything other than potentially prior inconsistent statements, he is

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mistaken. As affirmed by this Court in *Este v. Esteghamat-Ardakani*, 2018 BCCA 290, leave to appeal to SCC ref'd, 38384 (14 March, 2019) [*Este*], the principle that a litigant is "not entitled to knowingly advance inconsistent positions is longstanding": at para. 94, citing *Manley v. O'Brien* (1901), 8 B.C.R. 280 (S.C., Full Ct.), 1901 CarswellBC 78. In *Este*, the Court upheld a trial judge's finding that it is an "abuse of process for a litigant to disavow beneficial ownership of assets in one action and then claim beneficial ownership of those assets in a subsequent action": at paras. 1, 97.

No Accounting for Sentimental Value

[39] The final ground of appeal asserts that the judge erred in not awarding damages for the sentimental value of the sailboat.

[40] The judge determined that Mr. Lepage's sentimental attachment was not compensable. Citing *Smith v. British Columbia*, 2011 BCSC 298, he held that "special circumstances" are generally required before a court will compensate for this form of loss: at para. 29. The judge identified as possible special circumstances a "claim for mental distress or a deliberate act of wrongdoing": at para. 29.

[41] In my view, it was within the judge's discretion to take the approach that he did. First, Mr. Lepage did not claim damages based on sentimental value. Rather, in his amended notice of civil claim, he sought "the replacement cost of $200,000 to replace the aforesaid property by Bowen Island Municipality" (emphasis added). Second, Mr. Lepage asserted a sentimental attachment in his testimony, but it is unclear to me how that could have been measured with any degree of certainty on this evidentiary record. Finally, Mr. Lepage cites no authority in support of his position that the failure to account for sentimental value in an action for conversion constitutes a clear error in principle, such that it would justifiably displace the deferential standard of review that applies to a damages award.

[42] The judge considered $5,000 to be a fair award on a "weak" evidentiary foundation: at para. 35. On appeal, Mr. Lepage has not persuaded me that this

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conclusion is unsupported, that the assessment reflects a mistaken or wrong principle, or that $5,000 is a wholly erroneous award: *Ostrikoff* at para. 2.

Disposition

[43] This was not a complicated trial. The judge was alive to the issues raised by Mr. Lepage, including his position on ownership of the sailboat and whether the evidence established that the sailboat sank before salvaging.

[44] It is apparent that the judge carefully considered these issues. Ultimately, however, he rejected Mr. Lepage's version of events and he was left to assess damages on the basis of evidence that did not support the extent of the claimed loss. The judge was entitled to view the evidence as he did. In the absence of formal admissions of fact, he was not bound by the parties' interpretation of the evidence. Nor was he bound by their respective theories of the case. As a matter of well-established principle, he was entitled to accept all, none or part of the evidence.

[45] Mr. Lepage has not established a proper appellate basis on which to interfere with the damages award. Accordingly, I would dismiss the appeal.

[46] **HARRIS J.A.**: I agree.

[47] **SKOLROOD J.A.**: I agree.

[48] **HARRIS J.A.**: The appeal is dismissed.

"The Honourable Madam Justice DeWitt-Van Oosten"

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