COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Insurance Corporation of British Columbia v. Palma,* 2011 BCCA 51

Date: 20110207
Docket: CA037428

Between:

Insurance Corporation of British Columbia

Appellant
(Plaintiff)

And

Michele Palma a.k.a. Mike Palma, Creation Construction Ltd., No. 0497432 B.C. Ltd., Andras Takacs and Laszlo Majorani

Respondents
(Defendants)

And

Joszef Suska, Laszlo Balogh, Gyula Vaczi, Eric Nicholl, Andrea Muzsik, Tibor Putics, Zoltan Nadasdi, Leslie Sherart, Robert Wiliams, Lajos Fodor, Douglas Puddifant, Isabelle Poirier, Gaspar Babor Balog, Lorne Peebles, Lazslo Torzok, Andrew Vadasz, Sandor Toth, Adam Sherart, November Hayward and Aruna Mangal

Defendants

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Mackenzie
The Honourable Mr. Justice K. Smith

On appeal from: Supreme Court of British Columbia, July 31, 2009
(*Insurance Corporation of British Columbia v. Suska*, 2009 BCSC 1051, Vancouver Docket No. S064987)

Counsel for the Appellant: F. Potts, M.J. Hewitt

Counsel for the Respondents: M. Azevedo

Place and Date of Hearing:	Vancouver, British Columbia December 1, 2010
Place and Date of Judgment:	Vancouver, British Columbia February 7, 2011

Written Reasons by:
The Honourable Mr. Justice Mackenzie

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice K. Smith

Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

[1] The appellant Insurance Corporation of British Columbia ("ICBC") appeals from a judgment dismissing its claims against the respondents Michele Palma, two companies controlled by Mr. Palma, and Andras Takacs. Mr. Takacs did not participate in the appeal.

[2] The appellant claimed against multiple defendants for damages for fraud, conspiracy, and conversion of stolen vehicles insured by ICBC, in addition to a staged accident which is peripheral to this appeal. The action succeeded against seven defendants in various combinations for fraud and conversion of 17 vehicles and the staged accident fraud. One of the seven defendants, Jozef Suska, was found liable for fraud and conversion of 15 vehicles. The trial judge concluded that the evidence against Mr. Palma and Mr. Takacs was insufficient to implicate them in the conversion of any of the vehicles or in fraud or conspiracy.

[3] The issues on appeal are whether the trial judge misapplied the law of conversion and civil conspiracy to the evidence and whether he erred in refusing to permit the appellant to re-open its case to introduce evidence against Mr. Palma of witness tampering by Mr. Suska.

[4] I have concluded that the trial judge erred in limiting the evidence admissible against Mr. Palma on the issues of conversion and civil conspiracy and in refusing the appellant's application to re-open and introduce evidence of witness tampering. I would allow the appeal from that part of the judgment dismissing the claims against Mr. Palma and his companies for the reasons that follow. I would dismiss the appeal from the dismissal of the claims against Mr. Takacs. As a new trial will be required I will review the facts only to the extent necessary to address the issues.

Overview

[5] Mr. Palma was a registered motor vehicle dealer carrying on an auto sales business in Dawson City, Yukon. Stolen vehicles were registered through the

dealership and his name appeared on various documents related to the registration and transportation of vehicles from British Columbia and the Yukon to businesses associated with his brother and a nephew, Giuseppe Villacci, in Ontario. A stolen vehicle "chop shop" was operated from a property owned by Mr. Palma in Surrey, B.C. Some of the stolen vehicles, or parts thereof, were recovered from this property following a raid by the RCMP in 2005. The appellant alleged that Mr. Palma was engaged in a joint business enterprise with Mr. Suska that involved stolen B.C. vehicles that were registered in the Yukon and shipped from B.C. to Ontario.

[6] The appellant submits that the trial judge erred in his application of the law of conversion *simpliciter* and in limiting the circumstantial evidence relevant on the conversion issues. It also contends that he erred in limiting the evidence admissible against Mr. Palma for conspiracy with Mr. Suska and others, and in not drawing an adverse inference against Mr. Palma for his failure to testify. In addition it argues that the trial judge erred in refusing the appellant's application to re-open its case and admit evidence against Mr. Palma of witness tampering by Mr. Suska.

Conversion and Conspiracy

[7] Mr. Suska was a central participant in most of the conversions with both knowledge that the vehicles were stolen and with fraudulent intent. The evidence implicated Mr. Palma primarily to the extent that his name, properties and facilities were used to facilitate conversion of stolen vehicles. In some instances, vehicle registration and transfer documents were signed in Mr. Palma's name. Three of those vehicles were shipped to Mr. Palma's brother, Tony, in Ontario. There was evidence that Mr. Palma financed some of Mr. Suska's activities. The circumstantial evidence linking Mr. Palma with Mr. Suska also included the "chop shop" on or immediately behind the Surrey property of Mr. Palma's company, Creation Construction Ltd. where part or all of 13 other stolen vehicles were found.

[8] The claims for conversion overlapped the claims in fraud and conspiracy and the appellant contends that the trial judge erred in importing an element of wrongful intent in addressing the damages claims for conversion *simpliciter*. The trial judge in

summarizing the law of conversion stated that it was a strict liability tort but he also said that it "is a wrongful act involving the chattel of another" (para. 53). The appellant contends that the trial judge failed to distinguish between the element of wrongful intent required for the torts of fraud and conspiracy but not required as an element of the tort of conversion *simpliciter*. Mr. Palma submits that the trial judge correctly stated that conversion was a strict liability offence and dismissed the claims on lack of proof of any vehicle interference or control involving Mr. Palma.

[9] As conversion is a strict liability tort, it is no defence that the wrongful act of conversion was committed in all innocence as to the true ownership of the vehicles: *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 at para. 31, 140 D.L.R. (4th) 463. Mr. Palma's liability for conversion *simpliciter* did not depend on a finding that he knew the vehicles were stolen or that he was a participant in fraud. The appellant was required to prove only that he was linked to the exercise of control over the vehicles in a manner inconsistent with the rights of the true owner. If he accommodated Mr. Suska's activities by allowing his facilities to be used for the purposes of the conversions, I think that his liability for conversion would follow, even if he was unaware that the vehicles were stolen. As Fleming observes, this strict rule in conversion "constitutes the most effective safeguard against rogues profiting from their dishonesty, as it encourages utmost circumspection by the business community" (John G. Fleming, *The Law of Torts*, 9th ed. (LBC Information Services: Sydney, N.S.W.) at 62). Here, Mr. Palma apparently had the right to control the use of his facilities and properties. The issue in conversion *simpliciter* then involves a determination of whether he allowed Mr. Suska and others to use his facilities and properties for the exercise of a control over vehicles inconsistent with the rights of their true owners.

[10] The trial judge analyzed the claims in conversion *simpliciter* and conspiracy for each vehicle together and it is not clear from his reasons whether a distinction between an innocent intent sufficient for conversion and a wrongful intent required for conspiracy would have made any difference to his conclusions. What is clear is that he relied on *Insurance Corporation of British Columbia v. Sun*, 2003 BCSC

1059, 18 B.C.L.R. (4th) 338, at para. 35 for the proposition that conspiracies must be considered separately for each vehicle; by viewing the conspiracy and conversion claims together he extended that proposition to the conversion claims as well. For example, with respect to parts of vehicle #84 found on Mr. Palma's Surrey property the trial judge stated at para. 57:

> ... The fact that it was found on property belonging to Mr. Palma is not enough to permit an inference that he participated in any way with the vehicle when any number of individuals had access to, and used the property as a dumping or storage ground. I therefore dismiss the claim against Mr. Palma and Mr. Majorani with respect to Vehicle 84.

The trial judge followed that restricted view of the evidence in addressing the conspiracy and conversion claims related to each of 17 stolen vehicles in issue and the single staged accident.

[11] *Sun* was a jury trial involving claims against multiple defendants for damages for fraudulent claims of injury and property damages arising out of several staged accidents. Groberman J. was concerned with the application to civil cases of the co-conspirators' exception to the hearsay rule. He charged the jury that it must conduct a co-conspirators' admissibility analysis "separately not only for each defendant, but also for each conspiracy that may include a given defendant" (para. 35). The question at issue in *Sun* was the admissibility of evidence under the co-conspirator's exception to the hearsay rule and the proposition was stated in that limited context.

[12] As the trial judge viewed the claims for each vehicle separately, it does not appear from his reasons that he considered whether the cumulative evidence from the number of vehicles involved could support an inference of Mr. Palma's complicity that could not be inferred on the requisite standard of proof from the specific evidence related to each vehicle, viewed in isolation. In other words, did the cumulative effect of the number of vehicles involved support a stronger inference of complicity and make it less plausible that Mr. Palma was oblivious to the use of his facilities in the exercise of control over the vehicles?

[13] In my respectful view, the overall relationship between Mr. Palma and Mr. Suska was relevant to the issue of his knowledge and acquiescence in the activities of Mr. Suska and others using his facilities. The involvement of Mr. Suska and others is undisputed on this appeal. The question whether Mr. Palma allowed others to exercise that control through the use of his facilities involved a critical examination of the relationship between Mr. Palma and Mr. Suska, including the fact that Mr. Palma financed Mr. Suska's business activities. If Mr. Palma knew and acquiesced in the use of his name, facilities and properties in connection with the registration, transfer or alteration of the vehicles it could have supported an inference of his participation in the control or dominion over the vehicles sufficient to prove the claims in conversion. For the purposes of conversion *simpliciter*, his liability would not depend upon his knowledge that the vehicles were stolen.

[14] As to the claims in conspiracy, the appellant does not take issue with a separate analysis of each conspiracy as a general proposition but submits that the trial judge failed to consider the appellant's submission that in addition to conspiracies related to particular vehicles, the appellant alleged an over-arching conspiracy to engage in the conversion of stolen vehicles. The appellant submits that the trial judge erred in failing to consider other circumstantial evidence as to the relationship between Mr. Palma and Mr. Suska in determining whether he knew Mr. Suska was involved with stolen vehicles and using his facilities for that purpose with his knowledge and acquiescence. As with conversion *simpliciter*, the appellant submits that the cumulative effect of this evidence supported an inference of his complicity with Mr. Suska and others in the use of his property and facilities for stolen vehicles that was not considered in viewing each vehicle in isolation.

[15] In my respectful view, the trial judge adopted too restrictive an interpretation of Groberman J.'s requirement of separate analysis in *Sun*. The observations in *Sun* were made in the context of a discussion of the co-conspirators' exception to the hearsay rule and were not addressed to circumstantial evidence otherwise relevant and admissible from which in the present case complicity in stolen vehicle conspiracies could be inferred. Whether a broader view of the admissible evidence

can prove Mr. Palma's involvement in the various conspiracies will be a question for the judge on the re-trial. It is sufficient for the purpose of this appeal to conclude that it could affect the result and the appellant was prejudiced by the failure of the trial judge to consider it. I think that was an error of law that requires us to order a new trial.

[16] The appellant also contends that the trial judge erred in failing to draw an adverse inference against Mr. Palma from his failure to testify. The question of an adverse inference from a failure to testify or call a witness involves the discretion of the trial judge: see *Jones v. Trudel*, 2000 BCCA 298; 74 B.C.L.R. (3d) 263 at paras. 33 and 52. As there must be a new trial, any adverse inference will depend on the evidence presented and the discretion of the retrial judge and the issue is no longer germane to this appeal.

[17] The appellant contends that Mr. Takacs was involved in conspiracies with respect to two of the stolen vehicles. His overall involvement was limited and I am not persuaded that the evidentiary issues discussed above could have affected the trial judge's rejection of the claims against him. I would dismiss the appellant's appeal from dismissal of the claims against Mr. Takacs.

The Application to Re-Open and Introduce New Evidence of Witness Tampering

[18] During an adjournment of the trial after the appellant had closed its case, it brought an application to re-open its case to tender new evidence arising from a disclosure to ICBC investigators by officers of the Toronto Police Service of a wiretapped telephone conversation between persons identified as Mr. Suska and Mr. Palma's nephew, Mr. Villacci, obtained in an unrelated police investigation. In the conversation, Mr. Suska is recorded as stating how he was going to "remanufacture" the evidence of Aruna Mangal to eliminate any of her testimony that could implicate Mr. Palma. Ms. Mangal, a sometime girlfriend of Mr. Suska, had given several statements to ICBC investigators purportedly linking Mr. Palma with Mr. Suska in activities at issue in the litigation. Mr. Suska had access to her witness

statements which had been disclosed to defence counsel. The conversation was recorded on 10 June 2008, two weeks before Ms. Mangal testified. Her testimony varied substantially from her witness statements and did not implicate Mr. Palma.

[19] The appellant sought to rely on the conversation as evidence that Mr. Suska and Mr. Palma were involved together in the conversion of stolen vehicles and to rebut any suggestion that Mr. Palma was unaware and uninvolved in what was going on.

[20] The trial judge concluded that while the conversation was admissible against Mr. Suska as an admission, it was hearsay as to Mr. Palma and inadmissible against him. Applying the three-stage test for the admissibility of statements of co-conspirators as stated for criminal cases in *R. v. Carter*, [1982] 1 S.C.R. 938, 137 D.L.R. (3d) 385, he concluded that ICBC had failed to establish a reasonable likelihood that there was a conspiracy of which Mr. Palma was a member on other direct evidence, as a pre-condition to admissibility. As Mr. Suska was held liable on other evidence, this evidence could not have affected the result and therefore failed to meet the fourth element of the test for admissibility of fresh evidence laid down in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, 106 D.L.R. (3d) 212. The four *Palmer* requirements are:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [[1964] S.C.R. 484].
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[21] The appellant contends that the trial judge adopted too narrow a view and failed to take into account the interests of justice in dealing with interference with the court's process through witness tampering.

[22] The appellant submits that the fresh evidence should have been received as generally admissible, by being necessary and reliable, and under the co-conspirators' exception to the hearsay rule. The necessary and reliable test relates to the principled exception to the hearsay rule as formulated in *R. v. Khan*, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92 and subsequent cases. The application of the principled exception in civil conspiracy cases was not considered directly by the trial judge.

[23] In *R. v. Chang* (2003), 173 C.C.C. (3d) 397, 9 C.R. (6th) 304, the Ontario Court of Appeal discussed the principled exception at length in the context of criminal conspiracy. In brief, the court concluded that hearsay potentially admissible under the co-conspirators' exception may also be admissible as necessary and reliable under the principled exception even if it does not meet the formal requirements of the co-conspirators' exception. In my view, a similar analysis applies to civil conspiracy, keeping in mind that the civil standard of proof is the balance of probabilities. The application of that standard of proof in civil cases generally was emphasized in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R 41. *McDougall* did not consider the implications of a single standard for the co-conspirator's exception in civil conspiracy cases. A comprehensive balance of probabilities standard would effectively conflate stages two and three of *Carter* for civil cases.

[24] The necessity and reliability criteria underlying the principled exception were explored by Chief Justice Lamer, delivering the judgment of the Court in *R. v. Smith*, [1992] 2 S.C.R. 915, 94 D.L.R. (4th) 590. He concluded that necessity should be defined flexibly as "capable of encompassing diverse situations" (at 933-934). The Chief Justice quoted Wigmore on Evidence, § 1421: "[t]he assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources. ... The necessity is not so great; perhaps hardly a

necessity, only an expediency or convenience, can be predicated. But the principle is the same". Here, Mr. Suska was a defendant who might have been recalled as a witness but it would be quite unrealistic to expect him to have given evidence of the same value if he were recalled. I am satisfied that that the recorded conversation met the test of necessity.

[25] Reliability in the Wigmore terminology involves the "circumstantial guarantee of trustworthiness". The statement must be "made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken" (*Smith* at p.933). Mr. Suska was talking to a confidant, Mr. Villacci, in circumstances where he would have expected the conversation to be private and confidential and he could be candid about his stated intentions and state of mind. In these circumstances, the circumstantial guarantee of trustworthiness was met. I am therefore satisfied that the recorded conversation was generally admissible under the principled exception to the hearsay rule and in my view the evidence satisfied the fourth part of the *Palmer* test.

[24] The trial judge, having refused admissibility on that ground, did not address the other three factors in the four-part *Palmer* test for admissibility. On the first requirement of due diligence, the appellant was informed of the intercepted conversation by a Toronto police officer in November 2008, during an unrelated adjournment of the trial. The application to reopen and admit the evidence was filed in January 2009. There is no basis to conclude that the appellant could have reasonably learned of the conversation earlier and the application was sufficiently timely to satisfy the *Palmer* requirement of due diligence. Going to the second and third *Palmer* requirements, the evidence was relevant to the central issue of Mr. Palma's complicity with Mr. Suska and, for the reasons discussed above, reasonably capable of belief. Finally, if believed, when taken with the other evidence adduced at trial, it could reasonably be expected to have affected the result. In my view, the evidence satisfied all the *Palmer* requirements for admissibility.

[26] As the evidence was properly admissible against Mr. Palma under the principled exception to the hearsay rule, it is unnecessary to decide its alternative admissibility under the co-conspirators' exception, leaving for another day the impact, if any, of *McDougall* on the three part *Carter* test in civil conspiracy.

Conclusion

[27] For these reasons, I would allow the appeal and direct a new trial of the claims for damages against Mr. Palma and his respondent companies. The appeal from the dismissal of the claims against Mr. Takacs should be dismissed.

"The Honourable Mr. Justice Mackenzie"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice K. Smith"