Date: 20221220
Docket: CI 16-01-00830
(Winnipeg Centre)
Indexed as: Koeneman v. Horne et al.
Cited as: 2022 MBKB 243

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

RICHARD DAVID KOENEMAN,	)	Alain J. Hogue
	)	for the plaintiff
plaintiff,	)	
	)	
- and -	)	
	)	
KEITH ALLEN HORNE, EVRAZ INC. NA CANADA and EVRAZ MATERIALS RECYCLING, INC. carrying on business under the style of GENERAL SCRAP PARTNERSHIP,	)	Nathaniel Day for the defendants, Evraz Inc. Na Canada and Evraz Materials Recycling, Inc. carrying on business under the style of General Scrap Partnership
	)	
defendants,	)	
	)	
- and -	)	
	)	
JOHN HENRY DEMARS,	)	Melanie M. LaBossiere
third party.	)	Jarrod R. Sundmark
	)	for the third party
	)	
	)	
	)	JUDGMENT DELIVERED:
	)	December 20, 2022

GRAMMOND J.

INTRODUCTION

[1] The plaintiff alleges that the defendants converted for their own use four pieces of his equipment, as follows: a 1975 Cat 235 backhoe, a 1970 Ford dump truck, a Dynapac

asphalt roller and a Calrco asphalt elevator (collectively the "Equipment"). At the material time, the Equipment was situate at the property of the defendant Keith Allen Horne ("Horne") in International Falls, Minnesota, United States of America. Horne was noted in default in this proceeding and did not participate in the trial.

[2] The parties agree that the third party purchased the Equipment from Horne, cut it into pieces, and transported it from Horne's property to Winnipeg, Manitoba, where the defendants Evraz Inc. Na Canada and Evras Materials Recycling, Inc. carrying on business under the style of General Scrap Partnership (the "Evraz Defendants") purchased it as scrap.

BACKGROUND

[3] The plaintiff testified that Horne was his friend and former employee, and that most of the Equipment was used at Horne's property in late 2011 to prepare the site for the erection of a building. The plaintiff agreed to leave the Equipment at the site so Horne could continue the project. Thereafter, a dispute arose between Horne and the plaintiff because, among other things, Horne blew the motor on the backhoe.

[4] In early April 2013 the plaintiff discovered that the Equipment was missing, and reported the matter to the Minnesota Police. Horne was charged with and pleaded guilty to theft, and was sentenced in June 2014 to 10 years of supervised probation, the payment of a $100.00 USD fine, and the payment of restitution to the plaintiff in the amount of $7,937.12 USD.

LAW AND ANALYSIS

[5] The law with respect to the tort of conversion is well settled. In ***Vale v. Schwartz et al.***, 2020 MBQB 127 (CanLII), (upheld by the Court of Appeal in ***Vale Canada Limited v Urbanmine Inc***, 2022 MBCA 18 (CanLII)), McCarthy J. stated:

> [27] According to G.H.L. Fridman, *The Law of Torts in Canada*, 3rd ed. (Toronto: Carswell, 2010), at pp. 117-118:
>
> > Conversion consists of the wrongful taking, using or destroying of goods or the exercise of dominion over them that is inconsistent with the title of the owner.
>
> [28] … As stated by the Supreme Court of Canada in *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, 1996 CanLII 149 (SCC), [1996] 3 S.C.R. 727, 1996 SCC 149, (at para. 31):
>
> > ….The tort is one of strict liability, and accordingly, it is no defence that the wrongful act was committed in all innocence…. .
>
> …
>
> [30] As stated by the Ontario Court of Appeal in *Westboro Flooring and Décor Inc. v. Bank of Nova Scotia*, 2004 CanLII 59980 (ON CA), 71 O.R. (3d) 723, (at para. 14):
>
> > …the "wrongful" aspect of the tort of conversion consists of acting in a manner that is "inconsistent with the owner's right of possession" and … blameworthy conduct going beyond that is not an essential requirement…..
>
> [31] Further, as stated by the Saskatchewan Court of Queen's Bench, in *Battlefords Credit Union Limited v. Korpan Tractor & Parts Ltd et al.*, (1983), 1983 CanLII 2375 (SK QB), 28 Sask. R. 215, (at paras. 8-9):
>
> > ….Any person who receives and disposes of personal property without satisfying himself as to the state of title does so at his peril.

[6] In ***BMW Canada Inc. (Alphera Financial Services Canada) v. Mirzai***, 2018 ONSC 180 (CanLII), the court stated:

> [18] The crux of the tort of conversion is the defendant committing a wrongful act with respect to the property. Evidence must show or permit an inference to be drawn that the defendant acted in such a way as to deny the Plaintiffs title or

> possessory right. (*Simpson v. Gowers* (1981), 1981 CanLII 1884 (ON CA), 32 OR (2d) 385 (C.A.) at 387, per MacKinnon A. C. J. O.).
>
> [19] The tort is one of strict liability ... Diplock L.J. asserted this principle in *Marfani & Co. v. Midland Bank, Ltd.*, [1968] 2 All E.R. 573, at pp. 577-78:
>
> > … the moral concept of fault in the sense of either knowledge by the doer of an act that is likely to cause injury, loss or damage to another, or lack of reasonable care to avoid causing injury, loss or damage to another, plays no part.
>
> [20] … The philosophy behind strict liability is that a defendant cannot use or convey anything which is no title to use or convey.

[7] As set out in Lewis N. Klar et al., *Remedies in Tort* (Toronto: Thomson Reuters, 1987) (loose-leaf updated 2021) at § 4:7, § 4:9:

> The following elements are essential in an action for conversion …:
>
> i) the property must be specific personal property;
>
> ii) the plaintiff must have a possessory interest in the chattel; and
>
> iii) the defendant must commit an intentional and wrongful act in respect of the chattel.
>
> In an action for conversion, the wrongful act may take the form of an intentional dealing or interference with the chattel inconsistent with the rights of the person entitled to its possession.

[8] The plaintiff acknowledged that Horne asked him to remove the Equipment from his property, but he was unable to do so because without a functioning backhoe he had no means of loading the Equipment on to a transport trailer. The plaintiff also testified that after their falling out, Horne would not take his phone calls, and did not notify him that the Equipment would be removed from the property.

[9] The third party testified that when he purchased the Equipment there was nothing out of the ordinary in his dealings with Horne. The third party knew that the Equipment had been sitting on Horne's property for some time because he saw it from the main

highway when driving by the property. Since the Equipment was on Horne's property, the third party assumed that Horne owned it, and he did not question Horne about the ownership of the Equipment.

[10] Similarly, the Evraz Defendants did not conduct any due diligence or request any declaration of ownership from the third party. Instead, they purchased the Equipment as scrap on a "no questions asked" basis, and processed it. The third party received two payments from the Evraz Defendants for the Equipment, totaling $11,686.50 USD, together with a third payment in an unknown amount, for which no documentary evidence was advanced at trial. The third party testified that he paid to Horne one-half of the revenue received for the Equipment.

TITLE OR POSSESSORY RIGHT

[11] The only real issue raised at trial with respect to liability was whether the plaintiff owned the Equipment at the material time. The plaintiff testified that the backhoe, dump truck and asphalt roller[1] were owned previously by Minnesota corporations in which he was a shareholder, together with one other person who was a silent partner, uninvolved in the operation of either business.

[12] More particularly, the backhoe and dump truck were purchased by Falls Ready-Mix Concrete Co. ("Falls"), in 1993 and 1977, respectively, and the asphalt roller was purchased by Northern Minnesota Paving, Inc. ("Northern") in 1986. The evidence reflects that Falls was dissolved in March 2003 and Northern was dissolved in April 2005,

[1] The plaintiff purchased the asphalt elevator in his personal capacity between 2007 and 2009, such that this issue does not pertain to the elevator.

both for failing to file annual renewal documents. In other words, no active steps were taken to dissolve either corporation.

[13] The parties agree, and I accept, that Falls and Northern were dissolved pursuant to Minnesota statute 302A.821, which at all material times governed corporate annual renewal filings, and of which I take judicial notice pursuant to s. 30(1) of ***The Manitoba Evidence Act***, C.C.S.M. c. E150. More specifically, statute 302A.821 provides that where a corporation has failed to file a renewal, it must be dissolved by the secretary of state.[2]

[14] The plaintiff testified that after dissolutions of Falls and Northern, he was advised by the corporations' counsel, Mr. Steven Nelson, that ownership of the Equipment reverted to him in his personal capacity. Thereafter, the plaintiff operated a business as a sole proprietor until approximately 2013, using the corporations' names for name recognition purposes. While operating this business he used the backhoe, dump truck, and asphalt roller as part of a gravel crushing and sales operation, among other things.

[15] The Evraz Defendants and the third party challenged whether ownership of the backhoe, dump truck, and asphalt roller properly reverted to the plaintiff after Falls and Northern were dissolved. At trial, they sought and were granted permission to amend their respective pleadings to include this issue.

[16] With respect to the transfer of ownership of the Equipment, the plaintiff tendered as an exhibit a letter prepared by Mr. Nelson, dated July 2019, which reflects that "…the assets were distributed in kind to the shareholders. No paperwork currently exists to my knowledge".

---

[2] As the dissolutions of Falls and of Northern were not contested, expert evidence relating to this aspect of Minnesota law was unnecessary.

[17] The plaintiff sought to call Mr. Nelson as an expert witness on the substance of Minnesota law relative to the transfer and ownership of corporate assets upon the dissolution of a corporation. After a *voir dire*, I did not permit Mr. Nelson to testify as an expert witness for reasons given orally at trial, but I permitted him to testify as a fact witness.

[18] More particularly, Mr. Nelson testified that after the dissolutions of Falls and Northern, he spoke to the plaintiff about the effect of those dissolutions. He reviewed the applicable statute with the plaintiff, told him that the corporate assets were subject to the claims of creditors, and advised him that any leftover assets would be distributed to the shareholders based on the number of shares they held. In the absence of any evidence to the contrary, I accept that Mr. Nelson made those statements to the plaintiff at the material time.

[19] The plaintiff did not produce at trial any documents relative to the shareholdings in Falls or Northern, nor did he produce any documents relative to ownership of the Equipment after the dissolution of the corporations. He testified, however, that all creditors of the corporations were paid, although no formal winding up processes were undertaken and no notices to creditors were issued. The plaintiff was not asked whether any creditors filed claims against either corporation, or whether an agreement was reached as between him and the other shareholder relative to ownership of the Equipment.

[20] Mr. Nelson testified, however, that at the material time he understood that there was an agreement between the plaintiff and the other shareholder, which provided in

essence that the other shareholder wanted no part of the Equipment and was not exercising any interest in it. No written agreement to this effect was produced at trial.

[21] In the absence of any evidence to the contrary, I accept that the plaintiff believed that he owned the Equipment after the corporate dissolutions. I also accept that at the material time Mr. Nelson understood that the other shareholder claimed no interest in the Equipment. I infer that this understanding was accurate, on the basis that the corporations were dissolved many years ago (in 2003 and 2005), and the other shareholder does not appear to have taken any action against the plaintiff relative to any issue, including ownership of the Equipment or the plaintiff's use of the Equipment after the dissolutions. I also accept, on the strength of Mr. Nelson's evidence, including his July 2019 letter, that the agreement between the plaintiff and the other shareholder was not reduced to writing. I conclude, therefore, that the Equipment reverted to the plaintiff pursuant to an agreement with the other shareholder in Falls and Northern, and as such there is no need to determine whether the Equipment would have reverted to the plaintiff by operation of law after the corporate dissolutions.

[22] For the foregoing reasons, I am satisfied that the plaintiff has established a possessory right to the Equipment for the purposes of his claim in conversion.

[23] I will add that it is clear that a dissolved corporation can be returned to good standing in Minnesota, and statute 302A.821 provides that where a corporation is revived, its assets are restored to it, except to the extent that assets were sold or otherwise distributed. In other words, the statutory regime contemplates that not all assets may be restored to a revived corporation. In this case, neither Falls nor Northern have been

returned to good standing, but even if that had occurred, the Equipment may not have been restored to them, given the agreement between the plaintiff and the other shareholder.

[24] Based upon all of the foregoing, I reject the argument that Falls and Northern must be revived to enable the pursuit of this claim. I am satisfied that the plaintiff either owned the Equipment, or had a sufficient possessory interest in it for the purposes of establishing the second requirement of the tort of conversion in this case.

LIABILITY

[25] Since it is clear that the Equipment was specific personal property, the only other question for consideration is whether the defendants committed an intentional and wrongful act in respect of the Equipment that was inconsistent with the plaintiff's rights.

[26] It is clear that Horne intentionally interfered with the Equipment and denied the plaintiff possession of it by selling it to the third party. It is also clear that the third party interfered with, handled, and disposed of the Equipment by cutting it into pieces and selling it to the Evraz Defendants, without the proper authority to do so. The Evraz Defendants also dealt with the Equipment intentionally, by accepting it for sale as scrap, having relied upon the third party, with whom they had done business for years without issue.

[27] As set out above, conversion is a strict liability tort, and Horne could not convey to the third party proper title to the Equipment, who in turn could not convey title to the Evraz Defendants. As such, the third requirement of the tort of conversion has been established.

[28] The plaintiff has established, therefore, liability in conversion as against the defendants. The third party, who filed a statement of defence in the main action, is bound by this determination, and is liable to indemnify the Evraz Defendants.

VALUATION OF THE EQUIPMENT

[29] In ***Canada Forgings v. Riverside Excavating***, 2014 ONSC 1183 (CanLII), the court stated:

> [34] The goal of assessing tort damages is to fix upon a monetary award that will restore the plaintiff, as closely as is possible, to the position in which he, she or it would have been had the tort not occurred. In conversion cases, this usually means awarding the plaintiff the market value of the converted asset as of the date that the tort took place. Normally, replacement value is not awarded because providing the plaintiff with the cost of a new version of the asset converted would, in most cases, result in betterment, and thus overpayment. Normally, market value is put into evidence by providing estimates from reliable suppliers of the same kind of asset that was converted, with such estimates taking into consideration the age and condition of the specific asset or assets lost.

[30] The same general approach was confirmed in ***BMW Canada*** where the court stated:

> [26] In determining damages for the tort of conversion, the law as a fiction treats a conversion as resulting in a "forced sale" of the plaintiff's chattel, requiring a defendant to pay the market value of the goods at the time of the conversion.

[31] In ***AVS Transport Inc. v. van Ravenswaay et al.***, 2016 ONSC 3568 (CanLII), the court stated:

> [76] In conversion, where there is doubt as to the value of a chattel converted the onus is on the liable defendant to either produce the converted chattel or account for its nonproduction. If he does not do so it is presumed against him that it was of the highest possible value based on the principle *omia praesumuntur contra spoliatorem* (*Adler v. Jackson* [1988] B. C. J. No. 2756 (B.C.Co.Ct.) citing Salmond on Torts (1987).

[32] The law is clear, therefore, that the plaintiff should be compensated for the value of the Equipment at the time of the conversion. The only trial witness who saw the Equipment at the time of the conversion was the third party.

[33] The plaintiff testified that when he last used the Equipment on Horne's property in late 2011 it was in good, used condition and he had no problems with it. The plaintiff acknowledged that the Equipment was stored outdoors from late 2011 to April 2013, and that he did not have direct knowledge of the condition of the Equipment when Horne sold it.

[34] During the police investigation the plaintiff provided an unsworn affidavit for restitution which reflected that the total value of the Equipment was $126,100.00 USD. The plaintiff testified that he told police he came up with that valuation off of the top of his head, and completed the affidavit on the hood of a cruiser car, but he also testified that he made an inquiry relative to the valuation of the backhoe. I accept the plaintiff's evidence that the affidavit was provided quickly, whether or not inquiries were made, and served as a form of guesstimate. For trial purposes, the value of the Equipment was advanced through the testimony of a series of expert witnesses as referenced below.

[35] The plaintiff testified that as the prosecution of Horne progressed, he spoke with the county attorney, but was not asked to testify in court relative to the value of the Equipment or otherwise, and did not testify.[3]

[36] After a hearing, the Minnesota court ordered Horne to pay to the plaintiff restitution in the amount of $7,937.12 USD, which has been paid. I reject the third

[3] The Restitution Order reflects on its face that the plaintiff "testified" that the value of the Equipment was $126,100.00, but in the absence of any other evidence to the contrary, I accept that he did not attend court and give oral evidence.

party's submission that the plaintiff is now attempting to re-litigate the question of damages that was already decided by the Minnesota criminal court. The plaintiff was not a party to that proceeding, and I have no evidence of what occurred at the restitution hearing, including the nature and extent of the evidence called or the submissions made, prior to the court making an order. Similarly, I have no evidence as to why the court ordered restitution in the specific amount of $7,937.12 USD.

[37] I accept that as at early April 2013, most of the Equipment had not been operated in some time. The dump truck appears to have been used in 2012, but it sat, unused, over the winter preceding the conversion.

[38] The Evraz Defendants and the third party argued that the Equipment was scrap at the time of the conversion, and any damages incurred by the plaintiff should be assessed at scrap value. The Evraz Defendants sought to rely upon ***Regina (City) v. Inland Steel Products Inc.***, 2007 SKQB 417 (CanLII), which involved a fact scenario similar to this case, in that property was converted, then destroyed, and sold off to a scrapyard. The court found that the scrapyard was not liable for the damage done to the property prior to its purchase of the scrap. In my view, this decision is contrary to established law that conversion is a strict liability tort, that a purchaser who makes no inquiries about ownership acquires property at its own risk, and that a tortfeasor cannot convey title to converted goods. The law is clear that converted goods should be valued at the time of conversion, and where the converted goods are not produced, the goods are presumed to be of the highest possible value. I was not provided with any authorities, aside from ***Regina (City)***, which support the proposition that the quantum of damages to be

awarded to a plaintiff diminishes as the converted goods are altered or destroyed and change hands after the conversion. Accordingly, and I am not prepared to decrease the quantum of damages payable by the Evraz Defendants.

[39] I must determine, therefore, what value should be ascribed to each piece of the Equipment. I will address each item in turn, beginning with the backhoe.

[40] The plaintiff testified that the backhoe was purchased in used condition in 1993 for $35,000.00, after which it was used by Falls and by the plaintiff in his business. In or after late 2011, Horne advised the plaintiff that the motor in the backhoe was blown, which the plaintiff believes was caused by the engine being started in cold, winter temperatures and being "revved", without first heating the oil pan and installing winter viscosity oil. The plaintiff testified that Horne removed the engine from the backhoe but did not replace it, despite numerous requests to do so. As such, the plaintiff intended to sell off the parts of the backhoe individually, to obtain a greater return than selling the unit as a whole.

[41] The third party testified that when he took possession of the backhoe it had no motor in it, all of the tin work was off of it, and the pumps were hanging off of the back of the unit. Before transporting the backhoe, the third party cut it into multiple pieces.

[42] The backhoe was converted, however, when Horne sold it to the third party, and while it was not operable at that time, I do not accept that it could be sold only for scrap, and that any good parts could not have been sold individually. There is simply no evidence to support that conclusion, and accordingly, the plaintiff will be compensated for the backhoe parts.

[43] The plaintiff called as a witness Mr. Loren Hagen, formerly employed by the dealership from which Falls purchased the backhoe. After a *voir dire*, with oral reasons given at trial, I qualified Mr. Hagen as an expert in the valuation of used heavy equipment and parts, and specifically the backhoe.

[44] Mr. Hagen testified that this model of backhoe was popular, was made from approximately 1973 to 1991, and was still in common use in 2013. He valued the components of the backhoe by accessing several different data systems across North America listing different dealers and their parts on hand, which was the standard way of valuing parts in his business.

[45] Mr. Hagen did not see the backhoe at the time of the conversion, and could not verify how many hours were on the machine or its condition. Having said that, the plaintiff told him that except for the motor the parts were in good working condition, so he accepted that advice and assumed that the parts were complete, ready to use, and were not cut apart or disassembled.

[46] Mr. Hagen testified that the plaintiff provided to him a parts list for the backhoe comprised of 20 different parts, which was in his view was incomplete. In other words, there should have been other parts on the list. Nevertheless, he provided price estimates for the items on the list, totaling $138,757.00 USD.

[47] Mr. Hagen valued the backhoe components as at 2016, when the plaintiff asked for the valuation, not in 2013 when the Equipment was converted. Mr. Hagen testified that there was still a demand for the backhoe parts in 2016, but his evidence was unclear as to any changes in the valuation between 2013 and 2016. At trial, he testified that the

valuations as at 2016 would have been less than in 2013, by a few hundred dollars, or up to one thousand dollars per part. He also provided a letter to the plaintiff dated March 28, 2016 which provides that "…the machine is worth 15% to 20% more today than when your machine was taken".

[48] On cross-examination, Mr. Hagen acknowledged that when he prepared the parts valuation, he was not aware that the backhoe had been stored outdoors for one to two years, but he opined that, speaking generally, this factor would not cause damage. I agree, and I accept that heavy construction equipment is in most instances used and stored outdoors.

[49] It is important to note that Mr. Hagen has no formal accreditation as an estimator or appraiser. His training was provided by his former employer, the dealer from which the plaintiff purchased the backhoe.

[50] The third party called as a witness Mr. Paul Leung, a certified appraiser of personal property with over 30 years' experience in the appraisal industry. After a *voir dire* at trial, I qualified Mr. Leung as an expert in personal property appraisals.

[51] Mr. Leung was retained to review the report prepared by Mr. Hagen relative to the backhoe, and the plaintiff's other expert witness reports referenced below, to determine whether the market values they provided were supportable by documents. The essence of Mr. Leung's evidence was that where the Uniform Standards of Professional Appraisal Practice are not used to conduct a valuation, the conclusion lacks credibility. None of the plaintiff's valuators used the Standards of Practice to prepare their valuations.

[52] Mr. Leung also commented upon the breadth of the plaintiff experts' valuation reports, and noted that they do not reflect the structure of an appraisal report, including the sources consulted to arrive at the valuations. He concluded that the reports are general in nature, lack supporting documents, were incomplete, unreasonable, and unreliable, and would not instill public trust. Mr. Leung was not retained to provide any alternative valuations for the Equipment and he did not do so.

[53] I do not doubt Mr. Leung's competence in his field, but I note that each of the plaintiff's expert reports were supplemented by oral evidence explaining the process used by the valuator. I note also that each of the processes were similar, in that they involved consulting large industry databases, industry associations, and/or other individuals within the industry. Certainly, none of the plaintiff's experts used the Uniform Standards of Professional Appraisal Practice when they valued the Equipment, but since none of them are certified appraisers I would not have expected them to do so.

[54] The reality is that each of the plaintiff's valuators has worked in the equipment industry for many years, and I do not accept that there is only one method by which personal property can be valued and upon which the court can rely, particularly where there is a commonly used industry-specific method, as was the case here.

[55] In other words, in the circumstances of this case, it was not strictly necessary to have employed the formal appraisal process that Mr. Leung espoused, and I reject the third party's submission that the plaintiff's expert evidence should be discounted for that reason.

[56] In my view, all of the plaintiff's valuation witnesses did their best to determine a fair and objective value for the Equipment, based upon the information with which they were provided. Unfortunately, because of the conversion, none of the plaintiff's valuators were able to view the Equipment or assess it in a detailed manner.

[57] Returning to the valuation of the backhoe, it is clear that because of the blown engine, this machine was inoperable in 2013, and in those circumstances it would make sense to sell it off for parts, instead of as a complete unit. Mr. Hagen acknowledged that the total value of the parts sold individually would be more than the value of the machine sold as a whole. His evidence is the only evidence before me as to the value of the backhoe parts.

[58] As noted by the third party, the report prepared by Mr. Hagen contains the phrase "I have identical machine, this machine was to be used for parts". The plaintiff admitted on cross-examination that he owned a second, identical backhoe to the backhoe at issue in this case. Having said that, Mr. Hagen was not asked how this language came to be included in his report, and there is no evidence before me that the plaintiff influenced the valuations provided by Mr. Hagen. Having considered Mr. Hagen's testimony, I accept that he valued the backhoe parts using the process that he described.

[59] I am mindful of my obligation to assess damages based upon the available evidence even where a precise calculation of the loss is uncertain or impossible (***AVS*** at para. 63), and to award the plaintiff the highest possible value (***AVS*** at para. 76). Having said that, and although I accept Mr. Hagen's valuation of the backhoe parts, in my view, many contingencies could arise in the process of selling off the 20 parts on the

list, that could impact the plaintiff's financial return on those parts. Those contingencies could include market fluctuations due to supply and demand, the time and cost required to market and sell the parts, such as freight costs, or other unforeseen factors. To account for potential contingencies I will reduce Mr. Hagen's valuation of $138,757.00 USD by one-third, such that the plaintiff is awarded $92,504.67 USD for the backhoe parts.

[60] I will now address the valuation of the dump truck.

[61] The plaintiff testified that Falls purchased the dump truck in used condition in 1977, and that it was in good and operable condition when he last saw Horne driving it in 2012. He also testified that in 2012 the engine in the truck was brand new, with less than 5,000 miles on it, and the "rear-ends" were relatively new. This evidence was not contested at trial, and I accept it.

[62] The plaintiff testified that before the conversion he agreed to sell the truck to Mr. Chuck Chaplinski for $5,000.00 USD, for which he received a $500.00 deposit that he refunded after the conversion. The plaintiff did not explain how that price was agreed upon and Mr. Chaplinski did not testify at trial.

[63] The third party testified that when he purchased the truck from Horne, it was settled or sinking in the ground, it looked like an "old junk" dump truck ready for scrap, and he assumed that it did not run. As with the backhoe, the third party cut up and destroyed the dump truck prior to transport, but the conversion occurred when Horne sold the dump truck to the third party. I accept that while the 1970 dump truck may have looked old, it had a new engine and was operable in 2012, not long before the

conversion. I reject, therefore, the argument that the dump truck was scrap and could be sold for only scrap value.

[64] After a *voir dire* at trial, I qualified Mr. Bert Downton as an expert in the valuation of used trucks, and specifically the Ford dump truck at issue in this case, with reasons given orally.

[65] The plaintiff's counsel advised Mr. Downton of the specifications for the dump truck, including that the engine was newly rebuilt. Mr. Downton consulted a national network, called several dealers and the Used Truck Association, and prepared a valuation as at 2013. He assumed that the truck was in average condition, and acknowledged that he could not verify that the engine was operational. He valued the truck at $10,000 to $15,000 USD, which he testified would not change based upon whether the truck was stored outside.

[66] For the same reasons set out above, I accept the methodology used by Mr. Downton to value the truck. Having said that, it is impossible to know whether a purchaser would have paid to the plaintiff in 2013 a purchase price within the range identified by Mr. Downton, particularly given that Mr. Chaplinski agreed to pay only $5,000.00 for the truck. Having said that, the details of that transaction are unclear, and I accept that the truck had a new motor, so I have concluded that it should be valued at more than $5,000.00. I award the plaintiff $7,500.00 USD for the truck.

[67] I will now address the valuation of the asphalt roller and the asphalt elevator.

[68] The plaintiff testified that Northern bought the asphalt roller in 1986 for $23,850.00, and that he did not know its model year. The roller was working when it

was taken to Horne's property but it later became inoperable because it would not propel forward.

[69] The plaintiff also testified that he bought the asphalt elevator at an auction sometime between 2007 and 2009 for $225.00, after which it was delivered directly to Horne's property for temporary storage. He does not know the model year of the elevator, but to his knowledge Horne did not use the elevator.

[70] On direct examination, the plaintiff testified that the elevator was in good shape including the chain, which was near new, and that the hydraulics worked. On cross-examination he acknowledged that he never operated the elevator on a job, but testified that he started it on six or seven occasions to make sure it worked, to check the chain, and to keep the machine "loosened up". That evidence was not challenged at trial.

[71] The third party testified that in April 2013 the asphalt roller was settled, sunk, and frozen into the ground, and looked like scrap. He does not remember the condition of the elevator.

[72] After a *voir dire* at trial, I qualified Mr. Jon Anderson as an expert in the valuation of equipment, and particularly the roller and elevator in this case, with reasons given orally.

[73] Mr. Anderson testified that he valued both the roller and elevator as at 2013. The plaintiff told Mr. Anderson that the roller was in working order, but that it would not propel, and that it had approximately 8,000 hours on it. Mr. Anderson testified that a common problem with rollers is that hydraulics become locked and the pressure must be

relieved, though he acknowledged that this roller could have had a different problem that prevented it from propelling forward.

[74] Mr. Anderson valued the roller at $7,116.00 USD, based upon multiple sources including Richie Brothers auction sales results, Machinery Trader Organization auction and sales results, Universal Commercial Code financing filings, and Equipment Watch (a web-based organization to which independent distributors subscribe). Very appropriately in my view, Mr. Anderson deducted from the value of the roller $750.00 for the service call that would be needed to assess the machine and correct the apparent hydraulics issue that prevented the roller from propelling forward.

[75] The plaintiff advised Mr. Anderson that the elevator had approximately 8,500 hours of use on it, and he valued it using a similar process to the roller, at $1,470.00 USD.

[76] Mr. Anderson acknowledged that it is difficult to assess the value of a piece of equipment that cannot be looked at, started or moved. In this case, he assumed that both items were stored outside, and were in middling condition. He did not assume that either piece had been cared for well.

[77] I am prepared to accept Mr. Anderson's assessment for both the roller and the elevator, and I reject the argument that either item should be valued as scrap at the time of the conversion.

[78] I am prepared to award, therefore, to the plaintiff as against the Evraz Defendants and Horne, jointly and severally, the sum of $100,653.55 USD, calculated as follows:

a) Backhoe parts: $92,504.67

b) Truck: $7,500.00

c) Roller: $7,116.00

d) Elevator: $1,470.00

(less restitution received: $7,937.12)

Total in USD $100,653.55

[79] Although counsel did not raise this issue at trial, pursuant to s. 12 of the ***Currency Act***, R.S.C., 1985, c. C-52, the amount of a judgment issued by this court should be expressed in Canadian currency. As such, there is a potential issue as to the appropriate date on which the award should be converted into Canadian dollars. If the parties cannot agree upon the applicable conversion date, counsel may seek an appearance to make submissions.

CONCLUSION

[80] The plaintiff's claim against the defendants is granted, jointly and severally.

[81] The Evraz Defendants' crossclaim against Horne and the third party claim are granted.

[82] The third party's crossclaim against Horne is granted.

[83] If costs cannot be agreed upon, counsel may seek an appearance to make submissions.

_____ J.