

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Costello v. Hornby Island Local Trust
Committee,*
2009 BCSC 1334

Date: 20090930
Docket: S100043
Registry: New Westminster

Between:

Joan Costello

Plaintiff

And

**Hornby Island Local Trust Committee and
The Islands Trust and The Islands Trust Council
and Penny Griggs and Tony Law**

Defendants

Before: The Honourable Madam Justice Stromberg-Stein

Reasons for Judgment

Counsel for the plaintiff:

Lawrence E. Pierce
Andrew C.K. Oh

Counsel for the defendants:

Donald J. Smith
Alexander D.C. Kask

Place and Date of Trial:

New Westminster, B.C.
March 16 – 20; 23 – 27; 30; 31;
April 1 – 3; 6; 7; 14 – 16; 20 – 22;
and Vancouver, B.C.
April 24, 2009

Place and Date of Judgment:

New Westminster, B.C.
September 30, 2009

INTRODUCTION

[1] In March 1999, Joan Costello, the plaintiff, purchased a Department of National Defence building that was slated for immediate demolition and had it barged to her property on Hornby Island. Ms. Costello applied for a Siting and Use Permit [“SUP”] in advance of the building’s arrival, indicating the intended use of the building was both as a residence and in some other commercial, agricultural or cultural capacity, and asserting the building was below the residential height restriction as stipulated in the *Hornby Island Land Use Bylaw No. 86, 1993* (25 November 1993) [Bylaw]. Once the building arrived, it was evident that it far exceeded the Bylaw’s height restrictions. The defendants informed Ms. Costello of the necessary steps to take to bring her building into compliance. In the ensuing years leading up to this litigation, Ms. Costello made applications and applied for a number of permits with the overall purpose of bringing the building into compliance with the Bylaw. Throughout, there was widespread community opposition toward Ms. Costello, her husband, John Grayson, and the building. Eventually, with an amendment to the Bylaw, the building was brought into conformity with the height requirements.

[2] Ms. Costello advances a number of claims against the defendants, the Hornby Island Local Trust Committee [“HILTC”], the Islands Trust, the Islands Trust Council, and two trustees of the HILTC, Penny Griggs and Tony Law. The scope of Ms. Costello’s pleadings has evolved both prior to and during the trial itself. In essence, Ms. Costello’s allegations are based primarily in abuse of public office, negligence, and include claims for breach of trust, mental distress and punitive damages.

THE ISSUES

[3] The following issues require determination:

1. Do the actions of some or all of the defendants constitute an abuse of public office?

2. Were some or all of the defendants negligent during the course of their duties?
3. Are the defendants trustees who owe Ms. Costello a duty to protect her building, and as such are liable for breach of trust?
4. Did Ms. Costello suffer mental distress as a result of the actions of some or all of the defendants?
5. Does the conduct of some or all of the defendants, except Ms. Griggs, give rise to punitive damages?

BACKGROUND

[4] In 1996, Ms. Costello bought an 18.9 acre property on Hornby Island, zoned Rural Residential, which was surrounded by smaller lots. In 1999, for \$1.00, Ms. Costello and Mr. Grayson rescued from immediate demolition an admittedly ugly, yellow vinyl-sided Department of National Defence office building called Flanders, which they perceived to be a heritage building. In fact, the building had no heritage value. The building was intended to be (and presently is) Ms. Costello's and her husband's personal residence. As she was required to remove the building quickly, Ms. Costello arranged to barge it to Hornby Island without investigating the Bylaw to determine any potential restrictions or issues in the siting or use of the building on her property.

[5] Hornby Island is part of the Islands Trust, a designated area to preserve and protect the unique amenities and environment of the approximately 5,200 square kilometres of land and water between the British Columbia mainland and southern Vancouver Island. The Hornby Island trust area is subject to the Bylaw that regulates, among other things, the use, location and size of buildings and structures permitted on the island.

[6] Ms. Costello applied for a SUP prior to landing the building on Hornby Island. The application for a SUP clearly states that the applicant should obtain and read copies of the Hornby Island Official Community Plan and the Bylaw. Neither

Ms. Costello nor Mr. Grayson obtained copies of either document or measured the height of the building.

[7] Two and a half weeks before the building landed on Hornby Island, and before Ms. Costello obtained the first SUP, she clear cut a large swath of trees on her land to create a 60 foot driveway in order to locate and site the building. In doing so, she disturbed the natural ground surface required to measure building height in accordance with the Bylaw in force at the time.

[8] Before the building landed on Hornby Island, Ms. Costello was advised by an Islands Trust employee, in writing, that the building exceeded the height restrictions stipulated in the Bylaw.

[9] The first SUP was approved on April 16, 1999, after the building landed around April 14, 1999, on the understanding the building was not over 26 feet in height. In fact, from the outset the building was over height, in violation of the Bylaw. Ms. Costello moved the building onto Hornby Island in violation of the height restriction in the Bylaw and now argues that by attempting to regulate the height of her building the defendants were attempting to drive her off Hornby Island and into financial ruin. Ms. Costello asserts that the building, once landed on Hornby Island, became a unique amenity of the Island deserving of protection and preservation.

[10] It is without dispute that Ms. Costello had an obligation to ensure her building was bylaw compliant in the first instance. I agree with the defendants that all the events and all the costs that ensued were the product of Ms. Costello's failure to exercise due diligence. Although Ms. Costello is the only plaintiff, her husband, an apparently astute businessman, was instrumental in orchestrating the events that unfolded, and he is the primary force driving this litigation. Mr. Grayson's excuse for not reading the Bylaw, or exercising even a modicum of due diligence, was that it was his vacation property. Ms. Costello offers no excuse except that she relied on her husband to take care of matters.

THE ISLANDS TRUST

[11] The conduct of the defendants must be viewed in the context of their respective statutory obligations or functions as delineated in the *Islands Trust Act*, R.S.B.C. 1996, c. 239 [Act].

[12] In 1974, the province enacted legislation to create the Islands Trust to ensure the preservation and protection of the trust area, through land use planning and regulation for the benefit of the 25,000 residents of the trust area and of the province generally. Hornby Island, which has a permanent population of less than 1,000, is one of 13 major islands designated a trust area that, along with 450 smaller islands, comprise the Islands Trust.

[13] The object of the Islands Trust is stated in s. 3 of the *Act*:

[T]o preserve and protect the trust area and its unique amenities and environment for the benefit of the residents of the trust area and of British Columbia generally, in cooperation with municipalities, regional districts, improvement districts, other persons and organizations and the government of British Columbia.

[14] Two policies to carry out the protection and preservation of the trust area are relevant to these proceedings. The first is an advocacy policy, directed at ensuring cooperation between other government agencies and local governments in fulfilling the object of the trust. This policy permits communication and advocacy on the part of local government and local trustees with government agencies about how best to address various issues and community interests which are otherwise outside the jurisdiction of local governments.

[15] The second policy relates to preserving and protecting the unique amenities and environment of the trust area by having regard to aesthetic and overall visual qualities and the preservation of a rural, scenic environment. The principal goal of this policy is to retain the rural residential character of the trust area. Therefore, home occupations such as Ms. Costello's proposed winery are permitted, but with restrictions and/or limitations that are designed to protect the integrity of the quiet, residential and rural neighbourhoods.

[16] The Official Community Plan plays a critical role in assessing community objectives and is reviewed every 5-10 years to re-evaluate community objectives.

[17] Section 4 of the *Act* outlines the organization and structure of the Islands Trust “for the purpose of carrying out the object of the trust”:

4 (1) The trust council, executive committee, local trust committees and trust fund board are continued for the purpose of carrying out the object of the trust.

(2) The trust council is intended to establish the general policies for carrying out the object of the trust and to be responsible for the financial management of the trust, other than financial management of the trust fund.

(3) The executive committee is intended to carry out the daily business of the trust, to review the activities of the local trust committees and to act as a local trust committee for that part of the trust area that is not in a local trust area or municipality.

(4) The local trust committees are intended to regulate the development and use of land in their local trust area by exercising powers conferred by this Act, including powers that would otherwise belong to the regional district for each area.

(5) The trust fund board is intended to administer the trust fund and to manage the real and personal property assets of the trust fund.

[18] The Islands Trust is effectively a federation of independent local governments which plan land use and regulate development by developing official community plans, zoning and bylaws for each of the local trust areas. The original *Islands Trust Act* was replaced on April 1, 1990 by the *Islands Trust Act*, S.B.C. 1989, c. 68 which is substantially the same as the current version of the *Act*.

[19] Each designated trust area elects two local trustees every three years. The 26 local trustees comprise the Trust Council, which elects three trustees, one chair and two vice-chairs, to be members of the Executive Committee. The Trust Council's mandate is to establish land use policy within the trust area. The two elected local trustees of each designated trust area, with a chair from the Executive Committee, form the Local Trust Committee.

[20] The headquarters of the Islands Trust is located in Victoria. There are approximately 44 employees. There are three planning teams with the one for

Hornby Island located on Gabriola Island. The budget of the Islands Trust, raised mostly from property taxes, is just over \$6 million a year. The annual budget of the HILTC is about \$3,000. A small amount of money is garnered through fees and grants. At the relevant time, local Trustees were paid an annual salary of approximately \$6,500.

[21] Local Trust Committees have the same powers as regional districts to regulate land use. The bylaws of Local Trust Committees are subject to review by the Executive Committee and the Minister, and they must comply with established land use policy. There is no authority to deliver building inspection on permitting functions, which is handled by Regional Districts. The Regional District assigned to Hornby Island in 1999 was the Comox Strathcona Regional District.

[22] Hornby Island is a local trust area where there is no building bylaw in force so s. 31 of the *Act* applies and sets forth the process for granting SUPs. In this case, the HILTC required Ms. Costello to obtain a SUP pursuant to s. 31(2)(a). Section 31(3) provides that the permit must be refused if the construction does not comply with the applicable zoning bylaw.

[23] The Islands Trust is a unique creature of statute. While similar to local governments, its actions must be viewed through the statutory framework and stated objects in s. 3 of the *Act*: “to preserve and protect the trust area and its unique amenities and environment”. This was highlighted in *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee* (1995), 10 B.C.L.R. (3d) 121, 28 M.P.L.R. (2d) 157 (C.A.) [*MacMillan Bloedel Ltd.*]. Madam Justice Southin, at para. 22, commented on the uniqueness of s. 3: “no comparable provision is to be found in any other legislation of this Province concerning municipal government”. In the context of considering whether a Local Trust Committee had acted lawfully in “down zoning” with the intention of preventing development, she held, at para. 130:

If there were no s. 3 of the *Islands Trust Act*, I might be of a different opinion but s. 3 is not a mere piety. To put it another way, these by-laws were enacted for the purposes or the objects of s. 3 as well as for the health and welfare of the inhabitants of Galiano Island. They therefore had a lawful purpose.

[24] Further, Finch J.A. (as he then was), commented on the increased powers conferred on democratically elected local trust committees by the legislature, at paras. 177-178:

The history of the *Islands Trust Act* indicates a legislative intent to increase the powers of local trust committees. It also shows an intent to give increased effect to the object statement now contained in s. 3 by setting out the object statement in a separate section of the *Act*. I think it a clear inference that local trust committees exercising the powers conferred under the *Act*, including the powers conferred in both s. 4(4) and s. 27(1)(a), have a legislative mandate to act in conformity with object statement in s. 3.

Moreover, all members of the Islands Trust Committees are now elected, either directly or indirectly. In my view courts should be slow to find bad faith in the conduct of democratically elected representatives acting under legislative authority, unless there is no other rational conclusion.

SUMMARY OF THE PLAINTIFF'S PLEADINGS AND PARTICULARS

[25] The 28 day trial proceeded on the Fourth Amended Statement of Claim. Ms. Costello's pleadings and submissions were unclear and throughout much of the trial it was difficult to appreciate the legal or evidentiary foundations upon which she based her claims. Ms. Costello's claims, and the particulars in support of her claims, evolved as the evidence at trial unfolded and even during closing submissions.

[26] The main argument Ms. Costello advances is that having moved her building onto Hornby Island in violation of the Bylaw, the defendants, by attempting to enforce bylaw compliance, were seeking to drive her off the Island and into financial ruin.

[27] Ms. Costello claims the Islands Trust and Islands Trust Council were negligent in failing to oversee and supervise the activities of the HILTC, including the two trustees named personally as defendants, Mr. Law and Ms. Griggs. Further, Ms. Costello alleges abuse of public office against the HILTC and the two personal defendants. Ms. Costello asserts the Islands Trust and Islands Trust Council are vicariously liable for the actions of the HILTC and the personal defendants, based on ss. 4(3) and 1 of the *Act*. Ms. Costello claims \$1.7 million for damages, which

includes \$1.5 million for punitive damages due to the conduct of the defendants (except Ms. Griggs).

[28] In a number of the allegations, it is unclear whether a specific allegation is directed against a specific defendant or all of the defendants collectively. However, given Ms. Costello's claim regarding vicarious liability, this may not, in effect, have a significant impact.

[29] In respect of abuse of public office, Ms. Costello alleges the HILTC and the two personal defendants engaged in wilful and deliberate conduct and targeted malice against her, which interfered with the use and enjoyment of her property. Ms. Costello claims those defendants sought to prevent her from enjoying the use of her property by engaging in conduct that was "outrageous, highhanded and vexatious". The particulars of these allegations may be summarized as follows:

- (a) Commencing an action against Ms. Costello to have her building removed from her property;
- (b) Refusing to grant a development variance permit on the basis of a number of factors, including that the HILTC did not have the statutory authority to regulate certain issues, such as the appearance of Ms. Costello's home;
- (c) Providing information to residents of Hornby Island about Ms. Costello's plans to operate a winery and trying to prevent her from operating such a business;
- (d) Contacting various government agencies regarding Ms. Costello's property;
- (e) Changing the definition of "height" in the Bylaw to obstruct Ms. Costello;
- (f) Writing "threatening and coercive" letters to Ms. Costello;
- (g) Interfering with the functions of the Islands Trust staff to obstruct investigations; and

- (h) Attempting to “drive Ms. Costello to financial ruin” and “off Hornby Island”.

[30] In particular Ms. Costello alleges, as against Mr. Law, that he engaged in deliberate and unlawful conduct against her with targeted malice and personal animosity. In the alternative, Ms. Costello alleges he acted recklessly and was wilfully blind. Ms. Costello states Mr. Law disclosed and circulated confidential and inaccurate information about her and her plans for her property to various people; acted with an improper purpose on a number of occasions, including at the development variance permit hearing by insisting Ms. Costello change the colour of the building, voting to provide funding to commence legal action against Ms. Costello and voting on a motion requiring further information from Ms. Costello about her proposed winery; and, acted with personal animosity towards Ms. Costello on a number of occasions, such as attempting to prevent the issuance of SUPs, and providing information to bylaw enforcement personnel about Ms. Costello’s health and finances.

[31] As against Ms. Griggs, an elected Hornby Island Trustee who served on the Hornby Island Local Trust Committee for less than one term, from December 2002 to November 2004, Ms. Costello advances similar allegations. Ms. Costello alleges Ms. Griggs acted outside the scope of her office by engaging in reckless, wilfully blind, and unlawful conduct. Ms. Costello alleges Ms. Griggs had a personal animosity towards her and her husband, which was demonstrated through Ms. Griggs failure to acknowledge Ms. Costello’s growing support at a subsequent development variance permit hearing, and failure to follow-up on a request from Mr. Grayson to discuss road access.

[32] In respect of the negligence claim Ms. Costello’s allegations are that the Islands Trust and the Islands Trust Council were negligent in failing to properly supervise the activities of the HILTC as follows:

- (a) Failure to properly supervise the Local Trust Committee;

- (b) Authorizing legal action against her without a proper or any investigation of the facts;
- (c) Informing her that her building had to be used solely for agricultural purposes;
- (d) Failing to have in place adequate or any procedures for issuing Siting and Use Permits;
- (e) Failing to grant her an extension of time to build the tear-drop building;
- (f) Failing to supervise the Local Trust Committee in the conduct of the Petition action against her;
- (g) Allowing Trustee Tony Law to participate in the vote on the Executive Committee on the motion to provide funding for the Petition action against her;
- (h) Failing to issue a Siting and Use Permit in April 1999 for a building with a maximum height of 33 feet;
- (i) Misinforming her in April 1999 that her building could only be 26 feet;
- (j) Failing to advise her that its employee, Ed Pickard, could not properly determine the height of the building;
- (k) Failing to make a proper survey of the height of the building;
- (l) Causing a Notice of Board of Variance Hearing to be circulated on Hornby Island saying that the height of her house was 34 feet;
- (m) Failing to answer Ms. Costello's inquiries about various issues including how they calculated the height of her house;
- (n) Arbitrarily refusing to grant Siting and Use Permits;
- (o) Setting up a scheme for Siting and Use Permits that was defective;
and

- (p) Misrepresenting to Ms. Costello in March and April of 2006 the contents of the Bylaw by stating that the building had to be used solely for agricultural purposes.

[33] Ms. Costello claims damages for breach of trust, a claim which was neither properly pled or particularized. She admits breach of trust is a weak claim.

[34] In addition, Ms. Costello asserts she “has suffered and continues to suffer mental distress and aggravation of damages” as a result of the actions of the defendants.

[35] Ms. Costello further alleges the conduct of the defendants gives rise to punitive damages (except against Ms. Griggs).

POSITION OF THE DEFENDANTS

[36] The position of the defendants is that this lawsuit is motivated by Mr. Grayson’s efforts to eliminate the Islands Trust and the land use and development control contemplated by the *Act*. The defendants assert these efforts include:

- (a) On November 23, 2001 Mr. Grayson wrote a letter to then Minister of Community, Aboriginal and Women’s Services George Abbott calling for the elimination of the Islands Trust;
- (b) Mr. Grayson distributed a pamphlet criticizing the Official Community Plan just before it was to be passed;
- (c) Mr. Grayson did not participate in a review process of environmentally sensitive areas;
- (d) On November 17, 2005, Ms. Costello published an article suggesting Mr. Law had a “secret agenda to spend energy and money on a court battle”, and she described the bylaw enforcement litigation as an “abuse of power and a waste of taxpayers’ money” and suggested voters elect candidates other than Mr. Law (in fact, Mr. Law was

defeated in the election but was re-elected in 2007 in a by-election; shortly after, in 2008, Ms. Costello added Mr. Law as a defendant in this lawsuit); and

- (e) Ms. Costello published an article in October 2008, a month before the last election of local trustees (where Mr. Law was re-elected), suggesting the consent dismissal of bylaw enforcement proceedings against her was an admission her building was not over-height and that she was claiming damages against the HILTC for actions “in bad faith, with malice and in abuse of office”.

[37] The defendants argue that the Costello/Grayson course of conduct demonstrates hostility on the part of Ms. Costello and Mr. Grayson toward the Islands Trust and the local trustees, and under the guise of a tort action they are doing what they did not achieve at the ballot box. In the defendants’ words, this lawsuit is “politics in the wrong venue”.

RELEVANT FACTS

[38] Ms. Costello’s claims against the defendants must be viewed in the context of the entirety of the extensive evidence presented during the course of these lengthy proceedings. I do not intend an exhaustive review of all the evidence. Suffice it to say I have carefully considered all of the evidence although I may not have referenced it.

[39] On March 16, 1999, Ms. Costello purchased Flanders on terms that required it to be removed by April 9, 1999. The proposed moving date of the building was the week of April 13-14, 1999. The building was expected to land on Hornby Island around April 14-15, 1999.

[40] Ms. Costello applied for a SUP on March 29, 1999. Printed on the application form was the following statement:

The Hornby Island Local Trust Area is subject to a land use bylaw that regulates; (i) the use of land and (ii) the use, location and size of buildings

and structures permitted on the land. In lieu of building permits, Siting and Use Permits are required under Section 31 of the Islands Trust Act. These permits verify that any proposed construction/siting/use would comply with requirements of the Hornby Island land use bylaw and must be obtained prior to construction or any change in use of the land or existing structures.

The requirements of the Bylaw are expressed in both the General Regulations that apply to all lands in the Hornby Island Local Trust Committee Area and in the zone-specific regulations that apply to land within the zone. It is recommended that, prior to seeking a SUP, the applicant: (i) obtain and read copies of the Hornby Island Official Community Plan and Land Use Bylaw; (ii) establish a water supply, and (iii) obtain a sewage disposal permit.

[41] The procedure for a SUP involves a desktop review to ensure compliance with zoning bylaw regulations. It is the responsibility of the applicant to provide reliable, accurate and truthful information.

[42] In her application, Ms. Costello described the present use of the property as “Residence – artist”. She noted an existing “900 sq. ft. cabin - used as a residence” and described the proposed use of property, including a description of any home occupations, as “agriculture, silviculture, advanced technology, consulting, art”. She provided the dimensions of the two story “L” shaped building as 27 feet high with a footprint of 3,300 square feet. Ms. Costello had no way of knowing the actual height because she never measured the building.

[43] On March 30, 1999, Ms. Costello was informed that it could take one to four weeks to issue a SUP. Ms. Costello’s first application for a SUP was rejected by Steve Lee, an Islands Trust employee in the Victoria office who was the processing officer for the SUP, because the proposed use of the building was not stated and Mr. Lee concluded, rightfully, it was an accessory building.

[44] On April 7, 1999, Mr. Lee wrote Ms. Costello:

As the intended use of this structure is for activities that are not entirely related to farming, the building must be considered as an accessory building and under Section 3.6 of the Hornby Island Land Use Bylaw #86, 1993, the maximum height is restricted to 20 feet. As the building you propose to move onto the site is 27 feet we cannot issue a permit to site it on your property.

[45] Ms. Costello's clarified by fax on April 13, 1999, that the use of the building would be residential and "after the building is placed on a foundation the building height will be 26' [feet] maximum". As stated, the building would be in compliance with the height Bylaw.

[46] By fax on April 13, 1999, Ms. Costello submitted an amended SUP application indicating:

1. The proposed building will become my primary residence;
2. After the building is placed on a foundation the building height will be 26' [feet] maximum; and
3. The current residence, a 860 sq. ft. cabin will be converted to accessory use once the new primary residence is completed and is ready for occupancy.

I trust that these three changes result in this siting application to be in complete compliance with the bylaws governing Hornby Island.

[47] On the basis of the information provided by Ms. Costello, Mr. Lee approved the SUP on April 16, 1999, one or two days after the building had landed, with the following condition:

[S]ubject to this dwelling being not more than 26 feet in height and that any home occupations carried out within this dwelling comply with all applicable Home Occupation Regulations in the Hornby Island Land Use Bylaw #86, 1993.

[48] Mr. Grayson, on behalf of Ms. Costello, read and understood the limitation of the SUP, namely that the building could not exceed 26 feet in height once placed on the foundation. Neither Ms. Costello nor Mr. Grayson measured the height of the building, or obtained dimensions or measurements of the building from the Department of National Defence, or the barging company. The Motor Vehicle Branch permit to move the building on land indicated the height of the building was 32 feet.

[49] Prior to siting the building, not only did Ms. Costello fail to review the applicable land use Bylaw, she failed to follow Mr. Lee's advice to obtain a proper survey (and did not obtain one until 2004), and she failed to heed Mr. Lee's offer to

attend her property prior to the building being placed on its foundation to ensure the building was in compliance with the Bylaw.

[50] As early as May 4, 1999, Mr. Lee contacted Ms. Costello about her over-height building. Mr. Lee wrote:

I have received several inquiries from Hornby Island residents concerning the height of the proposed dwelling permitted under Siting and Use permit HO-SUP-04-99 that was recently issued to you. There seems to be some concern that your building being relocated to your Hornby Island property may exceed the 26' maximum height specified in the Hornby Island Land Use Bylaw.

As previously discussed, a development variance permit is required in the event that any portion of your dwelling is to exceed this maximum height. I would suggest that prior to the final placement of this structure on its footings, that an accurate survey be carried out to assure that this maximum building height will not be exceeded. We would be pleased to come on site prior to the final placement of this building to verify its compliance with the bylaw provisions. Please advise at least one week in advance if you wish us to do this. In the absence of this prior inspection you may expect our bylaw investigations officer to determine compliance with this height restriction following placement of the building.

[51] Had Ms. Costello determined the height of the building before it was placed on the foundation, she may have been able to take steps to ensure it was within the 26 foot height restriction.

[52] At trial, Ms. Costello asserted Islands Trust staff should have issued a permit that would have allowed her building to be 33 feet in height. Mr. Grayson contended that in order to get a SUP he was "forced" to write a letter to Mr. Lee stating that the building would be used as a residence. Ms. Costello maintains the intended use of the building was agricultural as she planned to live in an existing cabin and use the building for a number of possible purposes, including agriculture. This assertion is self-serving and contrary to the evidence, which clearly indicates the building was to be used as Ms. Costello's and Mr. Grayson's personal residence.

[53] At trial, the following evidence was led from Mr. Grayson and Ms. Costello:

(a) Mr. Grayson described the building as his vacation property;

- (b) He wrote to Mr. Lee that the building would be used as a residence;
and
- (c) Ms. Costello wrote a letter to the local newspaper on April 17, 1999, stating, “[my] partner and I have the task ahead to restore Flanders to her former glory and to make it our home”.

[54] The suggestion that the building was intended to be used for agricultural purposes is a reconstructed account and contrary to the evidence in light of the clear statements from Ms. Costello and Mr. Grayson in 1999 that it was their residence.

[55] There was never any dispute that the building was subject to the 26 foot height limitation in the Bylaw. Nor was there any dispute that the building was over height. The fact that Ms. Costello now says she intended to use part of the building for a home occupation winery, as permitted by the Bylaw, does not make the building subject to the height permitted for an agricultural building. This interpretation is inconsistent with the intent of the Bylaw. The lower of the two height restrictions must apply, otherwise the residential height Bylaw would be rendered virtually meaningless: *Weyerhaeuser Company Ltd. v. Assessor of Area No. 4*, 2008 BCSC 550, [2008] B.C.J. No. 780, applying *Eccom Developments Ltd. v. Assessor of Area No. 9*, [1989] B.C.J. No. 69 (S.C.), 1989 CarswellBC 1094, aff’d [1989] B.C.J. No. 2107 (C.A.), CarswellBC 1363.

[56] Almost immediately upon landing on Hornby Island, and perhaps even prior to, Ms. Costello’s building attracted negative attention due to concerns of the neighbours of the introduction of an obviously over-height, large, yellow vinyl sided, military building in a rural residential area on the small island. Ms. Costello described her building as clad with “ugly vinyl siding” covering “all natural first growth timber”.

[57] There were immediate concerns about the proposed uses for the building: as visitor accommodation or a bed and breakfast that would require a change to the Official Community Plan and a zoning amendment; an artists’ colony; a cultural centre; and later as a winery. Some of the neighbours felt Ms. Costello and

Mr. Grayson had misrepresented their support for the building and misrepresented the “heritage” value of the building. In response they drafted a petition in opposition to the building.

[58] Other than perhaps the school, Flanders was the biggest building on the Island, at over 10,000 square feet. The plaintiff’s immediate neighbours were devastated as they felt the massive building interfered with their use and enjoyment of their property. Clearly this building did not fit in with the accustomed rural residential island size and ambiance.

The Board of Variance Hearing

[59] As early as February 2000, Ms. Costello was told by Islands Trust staff that she would have to apply for a variance for her over-height building. She was provided an application form for a Board of Variance [BOV] hearing. The plaintiff submitted the application seven months later and applied to relax the height requirement of 26 feet to allow for 30.5 feet. Material distributed to the BOV indicated the height was 34 feet. This measurement appears to be an approximation of height measurements taken by one of two Islands Trust employees: one employee measured with an inclinometer and the other employee measured by counting the siding. Whatever the actual height, there is no dispute the building was over height, even if it could not be accurately measured because Ms. Costello had disturbed the natural ground surface before she applied for a SUP.

[60] The BOV met on February 16, 2001. The BOV was established pursuant to s. 901 of the *Local Government Act*, R.S.B.C. 1996, c. 323. The HILTC must establish a Board of Variance with one person appointed by the HILTC, one by the Minister of Municipal Affairs and Housing and one appointed by the other two appointees. A decision of the BOV is discretionary. The BOV may order a variance from a bylaw where the applicant establishes undue hardship if forced to comply with a bylaw.

[61] Ms. Costello complains the BOV meeting was conducted improperly for two reasons. First, she says the chair did not control the overt hostility and “venom” directed toward her and her husband. Second, George Buvyer was on the BOV when he should have disqualified himself as he was a trustee when the building landed and apparently agreed with Mr. Law that the police should be called.

[62] As I understand the evidence, the reference to calling the police when the building landed was either to ensure there was a proper transportation permit in place to move the building on land from the barge to the Costello property, or was in reference to whether the RCMP had any role in enforcing bylaw violations.

[63] At the time of the BOV meeting, no objection was taken to Mr. Buvyer being on the BOV. Ms. Costello was given an opportunity to speak at the BOV hearing. The BOV application was dismissed unanimously. A note in the final report indicated it was impossible to measure the height of the building because the natural ground surface had been destroyed. As noted, it was Ms. Costello who destroyed the natural ground surface.

[64] Only after the adverse ruling did Ms. Costello complain of “nepotism”, “cronyism” and a “kangaroo court”. The evidence of Derek Ward (a Hornby Island resident), Mr. Buvyer, Ed Picard (a retired Islands Trust planning assistant and secretary to the BOV) and Mr. Law conflicts with the evidence of Ms. Costello and Mr. Grayson that they were subjected to “two continuous hours of deceit, verbal abuse, libellous statements and threats”, and that Mr. Law made inflammatory comments. Ms. Costello and Mr. Grayson’s allegations about the BOV proceedings are a mischaracterization of the BOV proceedings and contrary to the weight of the evidence.

[65] Although Ms. Costello has alleged misconduct on the part of the BOV, Ms. Costello never sought judicial review of the BOV’s decision. The BOV is not a party to this proceeding. Given her failure to initiate judicial review proceedings of the BOV’s decision, she cannot, more than eight years later, complain she did not get a fair hearing, or that one member had a conflict of interest.

[66] In response to the rejection of the BOV application, Mr. Ward heard Mr. Grayson say, as he was leaving the meeting, “well now the fun begins”.

[67] Almost immediately thereafter Ms. Costello threatened to clear cut her 18 acres of forested property to sell the timber to pay for the cost of removing her roof. Clearly this was intended to intimidate the neighbours.

Applications for further Siting and Use Permits and Development Variance Permit

[68] On October 15, 2001, Ms. Costello was alerted to the likelihood of enforcement proceedings and cost consequences by Watson Smith, a bylaw enforcement officer. She responded at the deadline with a suggestion of using gabions.

[69] A second SUP was issued March 14, 2003 for a one-cornered “teardrop” structure, which would increase the footprint of the building to 8,000 square feet, and attach at a location where the existing natural ground surface was in tact. This would permit the new structure to be in compliance with the height restrictions of the Bylaw. A deck was built to connect to the teardrop structure, but otherwise the project was never completed.

[70] A third SUP for a 40,000 square foot structure, applied for April 22, 2003, was denied because Ms. Costello refused to decommission the cabin on the property, and only one dwelling was permitted by the Bylaw. Ms. Costello’s motivation in applying for this SUP was Mr. Grayson’s perceived infringement of his property rights arising from a schedule D1 map attached to the Official Community Plan. Only Mr. Grayson claims to have seen yellow circles on a map that he believes targeted the Costello property as an environmentally sensitive eco-system area. The weight of the evidence does not support his contention. Ms. Costello testified she never had any serious intention of building a 40,000 square foot building and the motivation for submitting this third SUP was a tactical decision “like chess”.

Mr. Grayson did not respond to a subsequent offer to participate in an advisory planning committee to study environmentally sensitive mapping.

[71] A Development Variation Permit [DVP] application was made on November 18, 2003 to the HILTC. A DVP is discretionary and site specific. Prior to the HILTC considering the application, the Advisory Planning Commission [APC], which has an advisory function only, received public submissions and recommended the approval of the DVP application. The HILTC is not bound by the APC recommendations, as it has broader components to consider: s. 4(h), *Hornby Island Local Trust Committee Advisory Planning Committee Bylaw, 1994* (8 February 1996) (as amended by *Hornby Island Local Trust Committee Bylaw No. 99*).

[72] Prior to the DVP hearing, Ms. Costello, at the request of Mr. Law, provided a letter of apology to the community and undertook to address the visual impact of her building by changing the color. The HILTC decision to defer the DVP application from February 20, 2004 to September 2004 was unanimous as Ms. Costello undertook to change the colour of the siding on the structure. However, she did not do so in the six month time frame and the HILTC rejected Ms. Costello's DVP application. Mr. Law and Ms. Griggs both agreed Ms. Costello's failure to address the visual amenities was one factor in the HILTC's rejection. Mr. Law and Ms. Griggs indicated the impact on the neighbours and the community as a whole, due to the non-compliance with the Bylaw, was another factor considered.

[73] A DVP is discretionary, and permits consideration of extrinsic factors other than mandated in the Bylaw, such as visual impact of a building, to determine if a variance of the Bylaw is in the interests of the community as a whole. Maintaining the quality of residential neighbourhoods is included in the Islands Trust Policy Statement and in the Official Community Plan as an important consideration of visual amenity in rural residential zoned areas. It matters not who could see Ms. Costello's over-height building, as the existence of a non-compliant building was a concern to the community as a whole, sight unseen. Although the Bylaw did not provide for regulation of the colour or appearance of the building, except for height, a

DVP deals with a variance from a bylaw and visual impact associated with height, to ameliorate appearance, is within the mandate of the local trustees to preserve and protect the amenities of the Island, including rural neighbourhoods. It is fundamental to a municipal law regulatory scheme that on a variance application extrinsic factors such as colour or appearance can be addressed.

[74] Mr. Law and Ms. Griggs maintain that they kept an open mind throughout the DVP process, weighing all the pros and cons when they voted in the first instance to delay the application for six months and later voted against granting the DVP. They considered the impact on neighbours and the visual amenities of the island, as was their mandate. They felt they had nothing but promises from Ms. Costello and Mr. Grayson to ameliorate the impact of the building, and they were looking for concrete action. Both Mr. Law and Ms. Griggs impressed me as fair-minded and balanced in their approach and both took their trustee duties seriously. This impression is borne out by the witnesses called by the defendants.

[75] On December 17, 2003, amendments were made to the Bylaw provision concerning height. Two days later Felicity Adams, an Islands Trust planner, sent a copy of the amended Bylaw to Ms. Costello and invited her to provide new elevation plans for a variance application based on the new height definitions. The amended Bylaw provides, as relevant:

HEIGHT REGULATIONS

3.4 Buildings and structures other than accessory and agricultural buildings and structures must not exceed a height of 8 m (26 ft).

3.5 Buildings and structures, other than accessory and agricultural buildings and structures, located within 100 m (328 ft) of the natural boundary of the sea must not exceed a height of 7 m (22 ft).

3.6 Accessory buildings and structures must not exceed a height of 6 m (20 ft).

3.7 Agricultural buildings and structures must not exceed a height of 10 m (33 ft).

In the definition section of the Bylaw “height” means the vertical distance from the grade level to the highest point of a building or structure. “Grade level” means the average of the elevations of those points where two perimeter walls of a building or structure contact each other and the natural ground surface.

[76] In this case, because the natural ground surface had been disturbed before the SUP was applied for and had been issued, it was difficult, if not impossible to measure the height of the building in accordance with the definition in the original Bylaw. Far from targeting Ms. Costello, the amended Bylaw defined height in an advantageous way so that she could readily bring her building into compliance.

[77] A fourth SUP application, filed on March 21, 2004, for decks and landscaping, went nowhere.

[78] The fifth SUP, dated January 12, 2005, to add decks, a hot tub and raised flower beds, was declined because the Islands Trust planner, Mr. Marlor, could not get an explanation about the drawings and figures supplied by Mr. Grayson, on behalf of Ms. Costello, concerning the centre point of walls and height calculations.

[79] The sixth SUP for a gambrel roof was applied for on July 9, 2005, and issued September 22, 2005. In the normal course a SUP is issued for two years. This SUP was issued for 3 months, based on legal advice received by the HILTC, given the succession of SUPs issued to Ms. Costello with no construction being attempted or completed. There was concern by the HILTC and staff whether this SUP was a legitimate attempt to bring the building into compliance with the Bylaw or simply a tactic to avoid bylaw compliance. In addition, Ms. Costello indicated on the sixth SUP application that she was anxious to begin the project and misrepresented it was a simple straightforward project that was ready to proceed with a designated contractor available. The deadline for the SUP was extended one time at the request of Ms. Costello, but no further extension was requested before the SUP lapsed.

Application to designate Flanders an agricultural building

[80] The zoning of Ms. Costello's property (Rural Residential) allows for home occupations subject to preserving the rural character and minimizing any impact on neighbours. On March 6, 2006 Ms. Costello applied to designate Flanders as an agricultural building, which had an allowable height of 33 feet, as she had received a

BC Assessment Farmland designation for tax purposes. This request was denied as Ms. Costello indicated no intention of using the building exclusively for agriculture. Rather, she intended to use the building as both a winery and her residence. Mr. Grayson's explanation for the application is that Ms. Costello felt her back was against the wall and this was another option.

[81] The planning staff properly interpreted the intent of the Bylaw to apply the height requirement for a residential building to a dual use residential/agricultural building, as to do otherwise would lead to an absurd interpretation having regard to scheme and object of the Bylaw: *Rizzo & Rizzo Shoes Ltd., (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Lazarev v. Toronto (City)* (2006), 25 M.P.L.R. (4th) 85, [2006] O.J. No. 3553 (S.C.J.).

Impact on Neighbours

[82] Ms. Costello never addressed the colour of the siding or visual impact of the building with respect to her immediate neighbours. What she did was clear cut 20-30 feet from one neighbour's property, the Graves, and built what Joan Graves described as an "unsightly, invasive, haphazard" 30 foot straight line fence, with no corners, constructed from rough boards with irregular tops and bottoms. In addition, Ms. Costello clear cut 117 feet to the Wetzel property line, telling Mr. Wetzel it was for "fire control reasons".

[83] Ms. Costello strung camouflage fish farm netting, using steel wire, in the trees facing the Graves' property. This was very upsetting to the Graves family who viewed this action as intimidating. Despite the fact Ms. Graves is legally blind from macular degeneration, she could still see with her peripheral vision what she perceived to be military installations around her cherished vacation property. Ms. Graves felt many promises were made by Ms. Costello to ameliorate the impact of her building that were not kept.

[84] Mr. Wetzel described the building as "abominable", "huge" and "ugly". He felt Ms. Costello and her husband were not being entirely candid in their plans for the

building. He said his life was totally disrupted so he sold one of his lots to move to a different part of the island. His other lot is for sale.

[85] Ms. Costello and Mr. Grayson suggest neighbourhood opposition stems from the neighbours using their property as a neighbourhood park with trails, and suggest the neighbours were upset that access was curtailed when they moved the building onto the property. This is not borne out by the evidence.

[86] Given the number of applications and proposals submitted by Ms. Costello and Mr. Grayson for the building and their property, many of which were overlapping and many submitted at the deadline, the Islands Trust staff prepared a chronology to assist new trustees and staff. This prompted Mr. Grayson to accuse them of preparing a secret dossier about him and Ms. Costello. However, I conclude there was nothing improper in this and it made good sense.

[87] Prior to the commencement of this action, legal action was commenced in 2005 by the defendants to enforce Bylaw compliance on the recommendation of the Islands Trust staff. This action resulted in a Consent Dismissal with each party bearing their own costs.

[88] At the time this litigation was commenced, as a result of amendments to the Bylaw, the building had been brought into compliance through the use of fill.

ABUSE OF PUBLIC OFFICE

[89] Ms. Costello's claim appears to be modeled on *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263. In *Odhavji*, police officers involved in a fatal shooting failed to cooperate in an investigation by the Special Investigations Unit. The family of the victim sued, alleging misfeasance in public office against the police officers and chief of police and negligence against the chief of police, police services board and the province. The family also claimed damages for mental distress. In addressing issues based on whether portions of the statement of claim should be struck out as disclosing no reasonable cause of action, the Supreme Court of

Canada considered the relevant principles of law applying to claims similar to those brought by Ms. Costello.

[90] In *Odhavji*, Iacobucci J. stated that the purpose of the tort of abuse of public office or misfeasance in public office is to “protect each citizen’s reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions”: at para. 30. The tort is not restricted to situations where public officers engage in unlawful conduct of a statutory power he or she actually possesses. Rather, the focus centres on whether the misconduct is deliberate and unlawful, and whether the officer is aware that it would likely harm the plaintiff.

[91] Iacobucci J. agreed with the House of Lords decision in *Three Rivers District Council v. Bank of England (No. 3)*, [2000] 2 W.L.R. 1220, [2000] 3 All E.R. 1, that the tort of misfeasance can arise in two ways, which he referred to as Category A and Category B. Category A involves situations where a public officer engages in conduct that is “specifically intended to injure a person or class of persons”; Category B involves a public officer who “acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff”: *Odhavji*, at para. 22.

[92] Whether a claim falls under either category requires the plaintiff to establish two elements, in addition to the requirements of all torts. First, the public officer must have engaged in “deliberate and unlawful conduct in his or her capacity as a public officer”. Second, the officer must have been aware that his or her conduct was “unlawful and that it was likely to harm the plaintiff”: at para. 23.

[93] The difference between the two categories rests in the manner in which the plaintiff proves each element. In Category B cases, the plaintiff must prove the two ingredients independently of each other. In Category A cases, the express conduct of the officer to harm the plaintiff is sufficient to prove the requirements of the tort, as an officer does not have the authority to exercise his or her powers for improper purposes. In both cases, “the tort involves deliberate disregard of official duty

coupled with knowledge that the misconduct is likely to injure the plaintiff”: at para. 23.

[94] In outlining the requirements of the second element of the tort Iacobucci J. was clear that the requirements to establish the tort would not result in a floodgate of claims against public officials, and would not impact upon the authority of public officers to make decisions which are adverse to the interests of certain citizens.

[95] Iacobucci J. noted that public officials often have to make decisions which harm certain segments of the population, yet do so in complete good faith, and this alone will be insufficient to establish liability. Instead, the officer’s actions must be deliberate and inconsistent with the obligations of his or her office. Iacobucci J. stated, at para. 28:

Knowledge of harm is thus an insufficient basis on which to conclude that the defendant [officer] has acted in bad faith or dishonesty. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office. [emphasis added]

[96] In addition, a public official must act with knowledge that his or her unlawful conduct will cause harm to the plaintiff. While “unlawful conduct in the exercise of public functions is a public wrong”, there is no basis for imposing liability on the officer, absent knowledge or awareness that such conduct would harm the plaintiff, as an individual: at para. 29. Thus, the plaintiff must establish a nexus between the officer’s conduct and his or her awareness of potential harm to the plaintiff. This creates a relatively high threshold for the required mental state to establish the tort. In the words of *Odhavji*, the public officer must demonstrate a conscious disregard for the interests of those affected by his or her misconduct.

[97] In *Windset Greenhouses (Ladner) Ltd. v. Delta (Corp.)*, 2007 BCCA 126, 66 B.C.L.R. (4th) 59, the Court of Appeal upheld the trial judge’s dismissal of the appellant’s claim for abuse of public office. Kirkpatrick J.A. upheld the trial decision based on the finding that the municipal officials acted under an honest but mistaken

belief that Delta was acting within the scope of its powers. Kirkpatrick J.A. stated, at para. 62:

Windset places undue emphasis on what the municipality was told and what certain public officers did or said. It is important to bear in mind the principle established in *Three Rivers* that objective recklessness does not suffice to establish the requisite mental state.

[98] In the trial decision, 2006 BCSC 339, 19 M.P.L.R. (4th) 74, Tysoe J. (as he then was) discussed the evidentiary burden required to satisfy the knowledge requirement, at para. 45:

The judgment of the B.C. Court of Appeal in *Powder Mountain [Powder Mountain Resorts Ltd. v. British Columbia]*, 2001 BCCA 619, 94 B.C.L.R. (3d) 14] followed upon the decision of the House of Lords in *Three Rivers*. As observed by Newbury J.A. at paragraph 7 of *Powder Mountain*, the House of Lords rejected the actionability of unlawful conduct based on recklessness used in the objective sense. There must be subjective recklessness in the sense that the public official did not care or was wilfully blind as to whether his or her act was unlawful or whether his or her act was likely to cause injury to the plaintiff.

[99] In the case at bar, Ms. Costello argues the HILTC and Mr. Law and Ms. Griggs engaged in wilful and deliberate misconduct, which interfered with the use and enjoyment of her property. As *Odhavji* makes clear, the evidence must demonstrate that the defendants both engaged in wilful or unlawful misconduct and knew that such misconduct was likely to harm the plaintiff. In order to determine this, it is necessary to consider the factual context relating to both Mr. Law and Ms. Griggs. In doing so, I agree with the submission of the defendant that it is important to remember that trustees are elected officials. They sit on various bodies. They are not disqualified because they have an opinion or have taken part in a decision before. They come with predisposed views. That is a function of the democratic process.

Mr. Law

[100] Tony Law, a five-time elected trustee of the HILTC, is a long time Hornby Island resident. He was born in England where he studied education before coming to Canada. He has worked as a family and addictions counsellor, a mediator, and a

special needs aide for children. He attempted to be non-partisan in his role as trustee. The evidence adduced at trial demonstrates that Mr. Law was a listener, sharing his thoughts and feelings, but always keeping an open mind as he explored ways to find a “win-win” solution between Ms. Costello and her neighbours. Mr. Law impresses me as an honest and sincere man who sought a community-based solution to a clear violation of the Bylaw that had the immediate neighbours and parts of the community incensed. There was an expectation by members of the community that the HILTC should act to enforce the Bylaw. In fact, at one point, members of the community threatened to take the HILTC to court to compel them to enforce the Bylaw.

[101] Mr. Law was the subject of personal attacks and felt assailed by both sides when he refused to take sides and attempted to provide a balanced perspective. He did not agitate the neighbours or the community against Ms. Costello or Mr. Grayson. All the neighbours called by the defendants as witnesses indicated that he had nothing to do with their petitions or alliances in opposition to Ms. Costello’s building or her intended use of the building. Ms. Costello called no evidence to suggest otherwise, instead relying on innuendo and speculation.

[102] Hornby Island is a small community prone to gossip, particularly of a political nature. From the outset, Ms. Costello upset the neighbours by suggesting she had their support for her over-height “heritage” building. This led to the first of many neighbourhood petitions, followed by perceived hostility to and ostracism of Ms. Costello and her husband by parts of the community. There was an element of fear in the community concerning proposed or potential uses of the building, and the likely impact on the community in terms of future uses affecting the quality of the rural residential neighbourhood, including possible commercial uses and the impact on scarce water resources, waste, and traffic.

[103] In the beginning, Mr. Law sought a mediated solution. When Islands Trust staff recommended litigation to enforce the Bylaw, the HILTC decided to hire a

mediator. Ms. Costello was willing to mediate but the neighbours, who felt they had done nothing wrong, were not.

[104] Mr. Law encouraged Ms. Costello to address the concerns of her neighbours by changing the colour of the siding, thus altering the visual impact of her building, something Ms. Costello had suggested she was willing to do from the outset. In advance of the DVP application Mr. Law attempted to get Ms. Costello to address the visual impact of her building by getting a letter of commitment from her. He indicated this was “not a clean way of proceeding” and Wayne Quinn, an Islands Trust planner, suggested to Mr. Law it was dangerous to tie the two together. I accept Mr. Law’s explanation that he meant it was “not uncomplicated or less than straight forward,” and the “clean way” to proceed would have led to an immediate rejection of the DVP application rather than a deferral for six months. In fact, Mr. Law attempted to give Ms. Costello an opportunity to ameliorate the visual impact of her building so that it would lead to a successful DVP application.

Ms. Costello acceded to changing the colour of the siding; she cannot now challenge the efficacy of the procedure that attempted to balance her interests against the community interests: *Burnaby (City) v. Racanelli*, 45 M.P.L.R. (2d) 117, [1998] B.C.J. No. 545 (S.C.) at para. 34.

[105] A number of allegations have been made concerning misconduct on the part of Mr. Law. I will address only a few of these allegations.

[106] First, Mr. Law denies telling Mr. Grayson, “take your damn building off the Island”. I conclude such a comment would be out of character having regard to the weight of the evidence of how Mr. Law conducted himself as well as the evidence of a number of witnesses who said they never heard Mr. Law speak ill of Ms. Costello or Mr. Grayson.

[107] Second, there is nothing untoward in Mr. Law sending emails to an “undisclosed recipient list” having regard to his explanation that he was respecting the privacy of the recipients, and that he had various lists depending on a person’s area of interest in the many projects which he was involved in as their elected

representative. In fact, Ms. Costello was in receipt of such emails from Mr. Law. There is a perfectly reasonable explanation as to why she may not have received every email Mr. Law may have sent. There is no evidence supporting Ms. Costello's allegations of intentional concealment, or a conspiracy or plot against her or her property.

[108] Third, an email from Ron Emerson, dated March 2, 2001, suggesting that the location of an easement on the northern tip of the Costello property would be a logical point of entry to a 5 acre "community forest park" was directed to a "defendable development" of a maximum of six 400 sq. ft. self contained cabins. Despite Mr. Grayson perceiving this as "blackmail", it is obvious this is in reference to a possible zoning change and an amendment to the Official Community Plan and had nothing to do with the over-height building.

[109] Further, Ms. Costello alleged it was Mr. Law who first disseminated information about Ms. Costello's proposed winery when, in fact, Ms. Costello and Mr. Grayson first advertised it at a fall fair. The evidence establishes that Mr. Law did not oppose the winery. In 2003, he supported Ms. Costello and her winery subject to operation as a home occupation. In fact, he advocated for Ms. Costello and Mr. Grayson's position. He often demonstrated contrary positions to the neighbours and their petitions, maintaining the winery would not have the negative effect feared and disseminated information to diffuse the misinformation. Mr. Law advised Ms. Costello and Mr. Grayson what those opposing the winery were saying and he attempted to dispel misinformation. Mr. Law saw himself as a facilitator, endeavouring to open lines of communications between opponents who were mistrustful and angry. He was caught between the proverbial rock and a hard place, pleasing neither side. Mr. Law's approach was not perfect, and in retrospect may be open to criticism, but he did the best he could with the situation he faced as he tried to dispel misinformation and bring the sides together in mutual understanding. It was within the Islands Trust mandate and Mr. Law's mandate as an elected trustee to act in an advocacy role to consult with and work cooperatively with other agencies, including the Liquor Control and Licensing Board, Ministry of Transport

and Highways, and the Ministry of Health (now the Vancouver Island Health Authority) to ensure the Islands Trust statutory mandate was fulfilled. This has been wrongly misinterpreted by Ms. Costello and Mr. Grayson as conspiracy or bad faith.

[110] Far from Ms. Costello's and Mr. Grayson's suggestions that Mr. Law was trying to stir up, agitate, or rile up the neighbours against them, the evidence establishes that Mr. Law's efforts were directed at trying to calm the community and provide accurate information. He was trying to dispel misinformation and brewing problems, often advocating Ms. Costello's and Mr. Grayson's position. There was nothing improper about this.

[111] One time Mr. Law inadvertently disseminated confidential information about the winery and immediately apologized for his mistake. No harm flowed from this.

[112] It was within Mr. Law's mandate to pass on information concerning potential bylaw violations to bylaw enforcement for investigation. The Islands Trust and the trustees have the ability to investigate and determine whether the land use bylaws are being observed. In the same vein, there was nothing wrong with Felicity Adams, a planner with the Islands Trust, inquiring of Ms. Costello about her proposed home operation winery business to ensure bylaw compliance, particularly given the history of non-compliance with respect to this property. Ms. Costello does not live in a vacuum. Like it or not, her property is subject to land use regulation.

Ms. Griggs

[113] Penny Griggs was a trustee for less than one term, from December 2002 to November 2004. She moved to Hornby Island in 1995 and did not live on Hornby Island in 1999 when Ms. Costello barged her building to the island. Ms. Griggs attended Simon Fraser University but did not complete her Bachelor of Arts degree. She has worked as a manager of a food co-operative, at a gas station, a marina, a credit union, as a landscaper, a housecleaner, and a long-term care aide. She had no political experience and was encouraged to run for office to represent the interests of the younger voters.

[114] The case against Ms. Griggs is groundless. She was joined as a party eight months before trial, and possibly outside the limitation period, an issue I decline to decide given the outcome I have reached, because Ms. Costello's counsel could not get an order to examine her on behalf of the defendants. Joining her as a party was highly unusual, ill-conceived and ill-advised.

[115] The evidence of Judith Walmsley, Ms. Costello's friend, that she heard Ms. Griggs publicly comment that the Islands Trust would sue Ms. Costello, is rejected as unreliable, although she does report what was a known fact. Ms. Griggs denies she made the comments attributed to her by Ms. Walmsley and denies being the person described by Ms. Walmsley. I accept her evidence.

[116] With respect to the suggestion Ms. Griggs questioned Mr. Grayson's honesty, Ms. Griggs maintains she did have justifiable concerns about Mr. Grayson's honesty because he and Ms. Costello failed to follow through with changing the colour of the siding on the building as Ms. Costello had agreed.

[117] The evidence does not support Ms. Costello's claim that the defendants acted in bad faith and with malice, and are liable for abuse of public office. In fact, the evidence is to the contrary. Rather than showing subjective recklessness, the evidence before this Court demonstrates that all the defendants, and particularly the HILTC and trustees Law and Griggs, acted in good faith throughout their dealings with Ms. Costello. Thus, Ms. Costello has failed to establish the first element required to establish the tort of abuse of office, as outlined in *Odhavji*.

[118] In my view, the trustees have fulfilled their mandate consistent with their statutory obligations. They exhibited no bias, and they properly exercised their discretion taking care not to pre-judge the issues, keeping an open mind throughout, and trying to find a means to accommodate Ms. Costello and the interests of the community. There is no evidence of targeted malice or malicious acts.

[119] Ms. Costello has not proven on a balance of probabilities that any of the defendants acted with the necessary subjective intent or recklessness, or in a

manner inconsistent with their statutory obligations. Certainly any alleged actions by the defendants characterized as unlawful, or inconsistent with the obligations of their office, were not motivated by malice and they were not wilfully blind to potential injury to Ms. Costello. Rather, the actions of the defendants were motivated by the desire to find an amicable solution to a dispute between neighbours. Enforcement litigation was considered on the advice of staff only when these efforts failed. The evidence shows that the pursuit of enforcement was undertaken in good faith and by following proper and normal procedures.

[120] In *Powder Mountain*, Newbury J.A. noted, at para. 9, that judicial caution was “indicated” due to the factual context of that case, which involved different officials (some elected and some not) and government agencies (some bureaucratic in nature and some with executive authority), and it was important for the court to keep in mind the practical context in which the decision-makers were operating.

[121] In the case at bar, this court is being asked to second guess the decisions of local politicians, as well as staff of the Islands Trust, who were attempting to solve a very heated dispute between neighbours with entrenched views. The court is being asked to find liability from within the grassroots efforts of those elected and non-elected officials with no regard to the practical circumstances facing the officials on Hornby Island. The evidence establishes the defendants acted in good faith. No liability rests upon them for the tort of abuse of public office or misfeasance in public office.

NEGLIGENCE

[122] Ms. Costello must establish three elements in order to succeed in her claim for negligence:

- (i) that the defendants owed her a duty of care;
- (ii) that the defendants breached that duty of care; and
- (iii) that damages resulted from that breach: *Odhavji*, at para. 44.

[123] A duty is defined as an “obligation, recognized by law, to take reasonable care to avoid conduct that entails an unreasonable risk of harm to others”: *Odhavji*, at para. 45. The existence of the “general conception of relations giving rise to a duty of care” was recognized in *Donoghue v. Stevenson*, [1932] A.C. 562 at 580, [1932] All E.R. Rep. 1 (H.L.), where the court held that a duty of care is owed to one’s neighbour, and connotes a concept of proximity. It is well-accepted that establishing a duty of care must be done through the two-step analysis outlined by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, [1972] 2 W.L.R. 1024 and adopted by the Supreme Court of Canada in *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641 and further clarified in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 [*Cooper*]; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562 [*Edwards*]; *Odhavji* and *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 [*Childs*]. The two-step approach, recast in *Childs*, at para. 11, asks:

(1) is there “a sufficiently close relationship between the parties” or “proximity” to justify imposition of a duty and, if so,

(2) are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise?

[124] As a preliminary matter, the Court in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 23, 31 B.L.R. (2d) 147, noted that proximity is a broad concept that is capable of subsuming different categories of cases with different factors. Therefore, the starting point for a duty of care analysis is to determine whether there exists an analogous category of cases in which a duty of care has been recognized, thereby making it unnecessary to go through the *Anns* analysis: *Cooper*. In *Cooper*, at para. 36, the court listed examples of categories where proximity had been recognized in prior case law. The list of categories is not closed but merely captures the notion of precedent and therefore new categories may be established, through a careful consideration of the *Anns* test.

[125] The first step of the *Anns* analysis, examines whether there is a sufficiently close relationship between the parties so that the defendant owes the plaintiff a

prima facie duty of care. In determining whether a *prima facie* duty of care is established, the plaintiff must demonstrate the “harm is a reasonably foreseeable consequence of the conduct in question and there is a sufficient degree of proximity between the parties...”: *Odhavji*, at para. 48 (emphasis in original); *Cooper*, at para. 31. Proximity will not always be satisfied by reasonable foreseeability: *Odhavji*.

[126] Proximity is used to characterize the type of relationships in which a duty of care to guard against foreseeable harm may arise. The concept of proximity therefore requires courts to examine whether it is “just and fair” to impose a duty of care on the defendant. Factors which may be relevant to this inquiry include: expectations of the parties, representations, reliance and the nature of the property or interest involved: *Odhavji*, at para. 50. Furthermore, factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case: *Edwards*, at para. 9. While this inquiry does involve certain policy considerations, it is distinct from the second stage of the *Anns* analysis, as it is in relation to the parties and their relationship and whether the above factors support the imposition of a duty of care. Therefore, proximity requires a consideration of both factual closeness and policy considerations with respect to the relationship.

[127] If a *prima facie* duty of care arises through foreseeability and factors going to the relationship between the parties, the second stage of the analysis requires the court to assess whether any residual policy considerations should limit the scope of the duty or class of persons to whom it is owed, or negate it altogether. Here the focus should centre, not on the relationship between the parties, but rather on the effects of imposing a duty on other legal obligations, the legal system and society generally. Thus, despite the reasonable foreseeability of harm and proximate relationship, consideration must be given to whether there are any “broad policy considerations” that would make it unfair to impose a duty of care: *Odhavji*, at para. 51. Situations involving government policy decisions are one example of a residual policy concern that has been held to immunize government actors from liability, as such decisions are the prerogative of the legislature: *Cooper*, at para. 38.

[128] In this case, Ms. Costello's foundation for her claim in negligence is less than clear. The pleadings, as outlined earlier in these reasons, are vague and do not clearly set out a factual and legal basis for Ms. Costello's case. The essence of the pleadings appears to be that the Trust Council was negligent in its oversight, or failed to properly supervise, the HILTC during the SUP and DVP applications.

[129] It is important to note that neither the pleadings nor the evidence clearly identified the harm that was suffered as a result of these alleged breaches. The building is now in compliance with the amended Bylaw; there was no evidence to what extent, if any, the impugned actions of the defendants had on Ms. Costello's intended use for her property or the proposed winery. The evidence simply does not disclose any harm suffered by Ms. Costello.

[130] In addition to these problems, Ms Costello has not cited, nor am I aware of, any authorities which recognize a duty of care in the circumstances that she alleges in this case. The analysis must therefore turn to whether the law of negligence should be extended to establish a novel standard of care.

[131] The first question that must be asked to determine if a duty of care exists is "whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care": *Cooper*, at para. 41. Ms. Costello appears to argue that had the Trust Council properly supervised the HILTC she would not have suffered harm; although it is not clear the nature or extent of the harm. The question is, does the Trust Council owe a duty of care to an individual making permit and variance applications before the HILTC?

[132] In this case, the factors relating to proximity must arise from the *Act*, which creates the Trust Council and the Executive Committee of the Trust Council. The statute does not impose a duty of care as alleged by Ms. Costello, but rather a duty to both the citizens of the islands and the province generally to fulfill the object of the trust outlined in s. 3 of the *Act*. As Southin J.A. noted in *MacMillan Bloedel Ltd.*, s. 3 is a unique provision which is not found in other legislation concerning municipal governments. The Trust Council's powers and duties relate to the protection and

preservation of the whole trust area and its unique amenities. While the Trust Council does oversee the activities of the HILTC, its duties extend far beyond that alleged here and to impose a duty of care on the Trust Council with respect to individuals dealing with the HILTC may give rise to conflict with those overarching duties.

[133] While I agree that the Trust Council may have reasonably foreseen harm to Ms. Costello if the HILTC was negligent in assessing the permit application, there is no duty of care owed because Ms. Costello cannot point to factors in the relationship that establish proximity.

[134] Having concluded no proximity exists sufficient to found a duty of care, there is no need to proceed to the second branch of the *Anns* test.

[135] However, I would note there are strong policy reasons militating against the recognition of a duty of care under the second branch of the *Anns* test. The Trust Council is required to balance the interests of the residents, the municipalities, other organizations and British Columbians as a whole, while trying to achieve the object of the Trust which is “to preserve and protect the trust area and its unique amenities and environment”; s.3 of the *Act*. The effect of imposing a duty of care owed to individual residents would result in a conflict with the overarching duties prescribed in the *Act* and the object of the *Act*. Policy decisions of government actors that require the exercise of discretion must be given deference by the court: *Cooper*, at para. 53.

[136] Even if I could conclude a duty of care exists, I conclude the defendants did not breach this duty. Ms. Costello, bears the burden of proof and she has provided no evidence of the standard of care. Furthermore, the evidence does not support Ms. Costello’s argument that the defendants breached their duty, even assuming a high standard of care.

[137] Based on my earlier findings, all of the defendants followed established procedures and performed their duties in a *bona fide* manner. The defendants

performed all of their actions in good faith in an attempt to enforce a valid bylaw and, particularly in the case of Mr. Law, to seek an amicable solution to a very heated dispute between a group of concerned residents of Hornby Island and Ms. Costello and her husband.

[138] There is no evidence of negligent oversight by the Islands Trust of the activities of the HILTC. A member of the Executive Committee of the Islands Trust chairs the HILTC. At every HILTC meeting, staff from the Islands Trust sit in and take minutes. There are policies in place and a reporting system and procedures if wrongdoing is encountered. None was ever observed or recorded at any HILTC meeting or hearing.

[139] The plaintiff does not challenge the validity of the procedures themselves, but rather the decisions resulting from those procedures. The actions of all of the defendants, elected and non-elected, were performed to execute the required duties imposed by the *Act* and Hornby Island bylaws. In all instances, I find the defendants executed these duties properly and in good faith. Furthermore, the defendants made a number of attempts to assist Ms. Costello to bring her building into compliance with the Bylaw, by delaying hearings, extending permits, or providing general advice about bylaw compliance. Having concluded the defendants actions were all performed in the good faith exercise of their statutory duties, Ms. Costello has failed to establish a breach of the duty of care, assuming one was owed in the circumstances.

BREACH OF TRUST

[140] The breach of trust claim appears to have been an afterthought. It was neither properly pled nor particularized. Ms. Costello characterizes the trust claim such that “the Trust property is clearly the Trust area including the property the Plaintiff owns and occupies”. Ms. Costello acknowledges she has a weak argument in support of her trust claim, suggesting the defendants are trustees who owe a duty to protect her building.

[141] In fact, no such trust relationship exists in fact or in law as the defendants are not trustees of Ms. Costello's property. To the extent that Ms. Costello's property is within the jurisdiction of the Islands Trust, it is subject to the benefits of and the land use obligations of the Islands Trust outlined in s. 3 of the *Act*: "to preserve and protect the trust area and its unique amenities and environment for the benefit of the residents of the trust and of British Columbia generally".

[142] The *Act* was not intended to create a private law duty as between the Islands Trust and Ms. Costello. Rather, it intended to create a general public law duty for the Islands Trust to act in a manner to preserve the trust area. Further, local trust committees cannot be responsible as fiduciaries to individual residents, particularly in the realm of bylaw enforcement.

MENTAL DISTRESS

[143] The law for damages arising from mental distress was recently examined in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 9, [2008] 2 S.C.R. 114:

[P]sychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (Eng. C.A.), at p. 42; *Page v. Smith*, at p. 189; *Linden and Feldthusen*, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (Ont. C.A.): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal injury, and hence do not amount to damage.

[144] Iacobucci J. also addressed this issue in *Odhavji*, at para. 74, in respect of psychiatric damages arising out of misfeasance in public office:

As discussed in the context of the actions for misfeasance in a public office, courts have been cautious in protecting an individual's right to psychiatric well-being, but it is well established that compensation for psychiatric damages is available in instances in which the plaintiff suffers a "visible and provable illness" or "recognizable physical or psychopathological harm". At

the pleadings stage, it is sufficient that the statement of claim alleges mental distress, anger, depression and anxiety as a consequence of the defendant's negligence. Causation and the magnitude of psychiatric damage are matters to be determined at trial.

[145] There is no evidence to support a claim for mental distress.

[146] Ms. Costello failed to establish that conduct on the part of the defendants caused her to suffer a “visible and provable illness” or even that she suffered a “visible and provable illness”. Given the lack of evidence adduced establishing that Ms. Costello suffered from any kind of illness, her claim must fail.

PUNITIVE DAMAGES

[147] Ms. Costello seeks \$1.5 million for punitive, aggravated and exemplary damages based on the conduct of all the defendants except Ms. Griggs. A number of the decisions relied upon by the plaintiff involve insurance companies and breaches of the duty of good faith: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 [*Whiten*]; *Khazzaka v. Commercial Union Assurance Co. of Canada* (2002), 66 O.R. (3d) 390, 162 O.A.C. 293; *Plester v. Wawanesa Mutual Insurance Co.* (2006), 213 O.A.C. 241, 269 D.L.R. (4th) 624; *Phan v. Jevco Insurance Co.*, [2008] O.J. No. 5656 (S.C.J.), 2008 CarswellOnt 8754.

[148] Punitive damages are restricted to exceptional cases where advertent wrongful acts are so malicious and outrageous that the court concludes they are deserving of punishment on their own: *Honda Canada Inc. v. Keays*, 2008 SCC 39 at para. 68, [2008] 2 S.C.R. 362; *Whiten*. To succeed in a claim for punitive damages there must be evidence of serious “moral blameworthiness and culpability...sufficient to attract a condemnatory response usually characterized as ‘outrageous’”: *Greaves v. Grace*, 2009 BCSC 394 at para. 8, 2009 CarswellBC 746.

[149] In this case there is no evidence that any of the defendants engaged in malicious or outrageous conduct. In fact, the evidence is to the contrary.

[150] It is important to note that Mr. Law was only one of three members of the HILTC. The decisions made concerning Ms. Costello's property were made by the HILTC, not by Mr. Law or Ms. Griggs as individuals.

[151] Furthermore, the evidence simply does not support Ms. Costello's contention that Mr. Law engaged in conduct that was "outrageous, highhanded and vexatious". This is borne out in the evidence given by a number of individuals associated with the Islands Trust or HILTC, and or Hornby Island.

[152] Gary Richardson, a planner who worked for the HILTC, never heard Mr. Law or Ms. Griggs speak negatively of, or act with malice toward, Ms. Costello or her husband. He never perceived either to attempt to influence his role as a planner. He found Mr. Law to be an extremely dedicated and caring person who tried to do the very best for the HILTC and The Islands Trust and who took his role very seriously. He found Ms. Griggs to be a dedicated person who wanted to do the best and make the best decisions for Hornby Island.

[153] Felicity Adam, a planner, did not recall either Mr. Law or Ms. Griggs saying anything negative about Ms. Costello or Mr. Grayson. She stated that neither attempted to influence her in her dealings with the property.

[154] Watson Smith, a retired Islands Trust Bylaw Investigations Officer, never heard Mr. Law speak ill of Ms. Costello or Mr. Grayson, or anyone. He described Mr. Law as conscientious in doing his job.

[155] Ed Picard, a retired Islands Trust Planning Assistant and secretary to the BOV, never heard Mr. Law say anything negative about Ms. Costello or Mr. Grayson. He never believed Mr. Law attempted to influence any tasks or undertakings, and he was never concerned about any activities of Mr. Law, regarding Ms. Costello's property.

[156] George Buvyer, a former Trustee of the HILTC, described Mr. Law as having a desire to see a mediated resolution between Ms. Costello and her neighbours to

try to get harmony in the community. He never heard Mr. Law speak ill of Ms. Costello or Mr. Grayson.

[157] Derek Ward, a Hornby Island resident, never heard Mr. Law say anything inflammatory or negative about Ms. Costello, although at one point Mr. Law said he was getting tired of the constant work Ms. Costello and Mr. Grayson presented to him and the Islands Trust. While the neighbours were very vocal, upset, and angry about the building and concerned about possible future uses, Mr. Ward found Mr. Law very conciliatory and always trying to reach a consensus.

[158] Leigh Farrell, a member of the Advisory Planning Committee, was active in opposing a winery on the plaintiff's property in the belief that it was a commercial enterprise within a small lot area and because there were concerns about the impact on the environment and water supply. Neither Mr. Law, Ms. Griggs nor any Islands Trust staff were involved in the creation of the group opposing the winery. In fact, Mr. Law supported the idea of the winery. He had answers for all the community concerns about traffic and contamination of ground water. He was trying to be the honest broker to get the community to understand who made the decisions and the basis for the decisions, trying to impress on the community that other agencies had the primary decision-making role. Mr. Law felt if the community understood they would be more accepting of the winery proposal. Mr. Law never made any negative personal comments about Ms. Costello or her husband. Mr. Law always behaved in a professional manner, trying to do what was best for the Island in accordance with his mandate. Mr. Farrell could not recall Ms. Griggs making any negative comments either.

[159] Kurt Wetzel, a Hornby Island resident with property adjacent to Ms. Costello's, said no trustee or member of the Islands Trust asked him to write any letters in opposition to the Costello property. He was not very impressed with Mr. Law because Mr. Law disliked conflict and kept trying to mediate instead of enforcing the Bylaw. Mr. Wetzel did not want to mediate because he did not feel he had done anything wrong. He wanted the Bylaw enforced. Mr. Wetzel never heard

Mr. Law say anything negative about Ms. Costello or Mr. Grayson. Mr. Wetzel felt Ms. Costello and her husband were not being entirely candid, as their story and plans for the property kept changing. Mr. Wetzel sold his property to get away from Ms. Costello and her husband, saying it totally disrupted his life. Commenting on any community support Ms. Costello may have generated, Mr. Wetzel commented, “[e]ven a skunk has friends”.

[160] Joan Graves, a neighbour of Ms. Costello, spoke of promises made and constantly broken, intimidating actions, and a great deal of distress for her family. She said Mr. Law listened intently to her concerns. Ms. Graves described Mr. Law as a highly principled person. She felt if she could make him aware of the seriousness of the problem, he would initiate some action to deal with it. That did not turn out to be correct as she felt Mr. Law “talked the talk but did not walk the walk” as he listened and treated everyone with respect but took no steps to correct the problem. She described Mr. Law as impeccable in his attempts to reason with people and negotiate a resolution, but felt he seemed to think that promises made would be kept and they were not. She felt Ms. Griggs heard her concerns but did nothing about them. She felt there was a need to take action. Joan Graves denied that Mr. Law, Ms. Griggs or anyone from the Islands Trust asked her to send any letters or emails about her concerns about the Costello property. She felt Ms. Costello and Mr. Grayson made promises, raised people’s expectations and didn’t follow through; as a result, her view of Mr. Grayson was he was not being honest with her.

[161] As the above evidence demonstrates, there is simply no evidence of “advertent wrongful acts” “so malicious and outrageous that the court concludes they are deserving of punishment”; or “of serious moral blameworthiness and culpability” or of “malicious or outrageous conduct”. While Ms. Costello has highlighted a few emails from the extensive volume of emails in support of her case, the weight of the whole of the evidence does not support the very serious allegations made by her.

[162] There is no evidence that Mr. Law was part of some neighbourhood conspiracy to interfere in the use of the Costello property. No witnesses were called in support of Ms. Costello's contention and there is simply no evidence Mr. Law wrongfully interfered with the health, liquor or highway authorities in respect of her winery application. The Islands Trust advocacy policy envisions communication and cooperation with such agencies and government organizations.

CONCLUSION

[163] Ms. Costello barged the building to Hornby Island in March 1999 and placed it on her property shortly thereafter. At no point prior to barging or siting the building, did she or Mr. Grayson examine the height restrictions outlined in the Bylaw, or measure the actual height of the building. While she did obtain a SUP for the building shortly after its arrival at Hornby Island, this was based on erroneous information she provided to Islands Trust staff.

[164] Over the course of the six and a half years prior to this litigation, Ms. Costello submitted seven SUP applications, of which only one (the teardrop building SUP) was substantially commenced, for the apparent purpose of attempting to bring the building into Bylaw compliance. It is clear, however, that not all of the SUP applications were genuine attempts to bring the building into Bylaw compliance and at least one was admittedly a tactical decision, "like chess". Ms. Costello and Mr. Grayson's actions and reactions were, in fact, calculated like a game of chess, with Ms. Costello at one point unsuccessfully seeking to bring the building into bylaw compliance by applying to designate Flanders as an agricultural building.

[165] Mr. Grayson was quite candid when he said he began to see "daggers in the dark" as he perceived opposition to the multiple proposed uses for the property. The evidence establishes that often he mischaracterized or misinterpreted a number of steps in this sad saga.

[166] In the end, an amendment to the Bylaw with respect to the definition of height permitted compliance by using fill. This is the same amended Bylaw Ms. Costello

alleged, initially, singled her out and attempted to obstruct her from bringing the building into compliance with the Bylaw.

[167] I agree with the defendants that Ms. Costello was obliged to obtain proper permits and to ensure compliance with the Bylaw. The consequence of her failure to do so falls at her own feet. By ignoring Mr. Lee's advice, she is responsible for all of the costs she incurred to make her building Bylaw compliant. She is, plain and simple, the author of her own misfortune: *Foley v. Shames*, 2008 ONCA 588, 297 D.L.R. (4th) 287. The over-height issue was not "unexpected and unforeseen" as Ms. Costello suggested at the APC, but was, rather, the consequence of being unconcerned about the requirements of the Bylaw and its potential enforceability.

[168] I agree with the defendants that the claims brought by Ms. Costello are very serious stigmatizing accusations against the HILTC, the Islands Trust, the Islands Trust Council, Ms. Griggs and Mr. Law without any legitimate foundation. The evidence fails to establish Ms. Costello's claims for negligence, abuse of public office, breach of trust, mental distress and punitive damages.

[169] There is no evidence the defendants engaged in deliberate, unlawful conduct and targeted malice against Ms. Costello or her property. To the contrary, the defendants attempted to facilitate a compromise, weighing the interests of all parties in conjunction with the community interest to preserve and protect community values, resources and rural character. The local trustees did their best to serve their community for minimal compensation but, as Mr. Law commented, in the highly charged emotional environment they could not please everyone; in fact, at the end of the day, they could not please anyone. However, the end result is that Ms. Costello's building is in compliance with the Bylaw and Mr. Grayson is closer to establishing his winery.

[170] Ms. Costello's action is dismissed.

COSTS

[171] The defendants are entitled to their costs. If the parties cannot agree on costs, they may make submissions in writing within 45 days.

“The Honourable Madam Justice Stromberg-Stein”