Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Carlex Import & Export Services et al v. Flying Fresh Air Freight (FFAF Cargo)*, 2018 BCCRT 44

B E T W E E N :

CARLEX IMPORT & EXPORT SERVICES and CARLEX TRADING COMPANY INC.

APPLICANTS

A N D :

FLYING FRESH AIR FREIGHT (FFAF CARGO)

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. The applicants Carlex Import & Export Services and Carlex Trading Company Inc. contracted with the respondent Flying Fresh Air Freight (FFAF Cargo) to store its frozen fruit pulp in cold storage. The issue in this dispute is whether the respondent agreed to keep the applicants' goods frozen. For ease of reference in this decision, I will refer to the applicants simply as Carlex and to the respondent as FFAF. The parties are self-represented.

JURISDICTION AND PROCEDURE

2. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

3. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing. None of the parties requested an oral hearing.

4. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

5. Under tribunal rule 121, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUES

6. The issues in this dispute are:

   a. Did FFAF agree to ensure Carlex's perishable goods would remain frozen while stored at FFAF?

   b. If so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

7. In a civil claim such as this, the applicants bear the burden of proof on a balance of probabilities. I have only addressed the evidence and arguments to the extent necessary to explain my decision. The respondent FFAF did not provide any evidence apart from its submissions.

8. Carlex is an importer and exporter of perishable goods. FFAF is a cold storage facility. Carlex first hired FFAF to store frozen fruit pulp on November 12, 2016. Carlex hired FFAF a second time on January 15, 2017, to again store frozen fruit pulp. It is this second shipment that FFAF did not keep frozen and which on May 15, 2017 Carlex discovered was defrosted and ruined.

9. As noted above, the issue is whether FFAF agreed to keep them frozen and I find that it did so.

10. I will address FFAF's liability for keeping the goods frozen first. Carlex emailed FFAF about the frozen goods. An excerpt from this email is below:

> - The samples are not kept at -18 [degrees] C, and I can accept this as pressumably the samples will be consumed in the next two or three months (maximum). I need to be sure that you can keep the frozen products at -18

[degrees] C in the other storage where you store frozen products when I receive a container.

On November 29, 2016, FFAF responded:

As advised the product is not in a freezer of -18c **but is in a freezer at -6 and this will maintain frozen**. If you this of your deep freezer at home. It works very similar. You buy from a grocery store some frozen goods when you get home you put it in your freezer which is actually about -3 but this keeps your product frozen. This is what we mean when we say maintain frozen.

(All quotes are reproduced as written, except where noted; my bold emphasis added)

11. FFAF's January 15, 2017 waybill shows receipt of Carlex's 5 cases (180 kilograms) of "frozen pulp fruits". That same day, Carlex picked up 54 kilograms of this frozen product, leaving 126 kilograms to be kept frozen in storage at FFAF. In other words, Carlex picked up 1/3 of the January 15, 2017 shipment, leaving 2/3 of it in storage at FFAF.

12. FFAF's website in part states, "We understand the importance of keeping the integrity of your product from your facility to client", and "We pay close attention to the fine details as you would". I find this supports the conclusion that FFAF ought to have been aware that the frozen fruit pulp needed to remain frozen, particularly given the email exchange above.

13. I granted the respondent's request for a "final reply" to the applicant's reply submission, with the applicant having the final surreply. FFAF submits that it "refer[s] to the meeting" between a Mr. Harnett and Carlex' principal, Mr. Lopez, at which Mr. Harnett informed Mr. Lopez of the temperature settings and that the maximum maintained temperature was -2 degrees Celsius. Beyond this submission, FFAF did not provide any evidence. Carlex denies such an agreement. Even if FFAF stated that it maintained a -2 degree Celsius temperature, this does not negate its earlier statement that it would keep Carlex'

product frozen. In any event, given the overall evidence, I do not accept that parties amended the agreement to agree to a storage temperature of -2 degrees.

14. FFAF also raised in its "final reply" an argument that there must have been something wrong with Carlex' products or packaging. There is no evidence before me to support this. I accept Carlex' submission that the portion of the product that was not defrosted was in perfect condition and that the damage to the product resulted from its not being kept entirely frozen and then spoiling. Again, I find the weight of the evidence supports the conclusion that FFAF did not maintain a frozen temperature as agreed.

15. Further, I find nothing turns on the use or lack of use of dry ice, as perhaps suggested by FFAF. I accept Carlex's undisputed submission that dry ice is only useful for 24 to 48 hours and its use is for transport only. The email exchange quoted above is clear that FFAF agreed to keep Carlex' product frozen. The waybill clearly indicates FFAF knew the product was frozen and therefore needed to be kept frozen. I reject FFAF's submission that Carlex was verbally informed about FFAF's cooler/freezer temperature settings and that Carlex knew FFAF was not promising to keep the goods frozen. This conclusion is not consistent with the weight of the evidence before me. In any event, FFAF submits that its agreement was that the products "**will be kept frozen** actually at -3 degrees Celsius" (my bold emphasis added). There is no explanation from FFAF for the differing submissions about an agreement of -3 degrees and -2 degrees. However, the point is that FFAF agreed to keep the product frozen, and it failed to do so.

16. To the extent FFAF argues that the 4-month duration of Carlex' storage was too long and therefore the cause of the defrosted product, I cannot agree. FFAF provided no explanation of how 4 months instead of 1 to 2 months (as FFAF says it expected) could make a material difference in defrosting. Further, I find the parties' agreement did not mandate that Carlex pick up its goods within 1 to 2 months, bearing in mind FFAF charged Carlex ongoing storage fees (at least until its offer to waive May and June fees given the spoiled product). While it may be

that -2 or -3 degrees Celsius, 2 temperatures referenced by FFAF, would keep "most" products frozen, that is not determinative. Again, what matters here is that FFAF failed to keep Carlex's frozen pulp fruit frozen, as agreed. I find that Carlex has proved its claim.

17. In summary, I find FFAF failed to keep Carlex's product frozen as agreed. FFAF is therefore liable for Carlex' damages resulting from the ruined product.

18. I turn now to the assessment of damages. Carlex's supporting evidence supports its claim for $1,776.23 CAD in damages. This figure represents the cost of the product, the air freight, and FFAF storage fees for the product that was defrosted and ruined. I therefore find FFAF must reimburse Carlex $1,776.23, plus pre-judgment interest from May 15, 2017.

19. I turn now then to Carlex' claim for $1,000 in damages, primarily for its "commercial" time lost in dealing with FFAF and this matter. An undefined amount of this appears to relate to the time Carlex had to spend disposing of the defrosted product. Carlex spent that time because FFAF said it could only dispose of the product if Carlex paid $750, as FFAF could not dispose of it in its regular bins. I find Carlex's claim for $101.14 to rent trailers to dispose of the defrosted product is part of its damages, rather than a tribunal dispute-related expense, which is how Carlex framed it.

20. On balance, I find an order of $750 is reasonable, to reflect Carlex' time in disposing of the defrosted product and the rental cost for the trailers. In coming to this conclusion, I have considered FFAF's own quote of $750 to remove the defrosted product. In making this $750 award, I have not included Carlex's claims for impaired commercial work or for "moral" damages, which I find are unsupported in the evidence before me.

21. Further, to the extent Carlex claims damages for the time spent in dealing with the dispute process, I find such an award would be inappropriate. As set out in several

past tribunal decisions, generally speaking the tribunal does not make these kinds of awards. I see no reason here to deviate from that practice.

22. In accordance with the tribunal's rules, as Carlex was substantially successful I find it is entitled to reimbursement of its $125 in tribunal fees. Bearing in mind that I have addressed Carlex' claim for $101.14 above as part of its substantive claims. I make no order regarding dispute-related expenses.

ORDERS

23. Within 30 days of this decision, I order the respondent to pay the applicants a total of $2,666.96, broken down as follows:

    a. $2,526.23 in damages,

    b. $15.73 in pre-judgment interest under the *Court Order Interest Act* (COIA), and

    c. $125 in tribunal fees.

24. I dismiss the balance of the applicants' claims.

25. The applicants are also entitled to post-judgment interest under the COIA.

26. Under section 48 of the Act, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.

27. Under section 58.1 of the Act, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed,

a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Shelley Lopez, Vice Chair