



# Civil Resolution Tribunal

Date Issued: March 1, 2018

File: SC-2017-005464

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *German v. Faber*, 2018 BCCRT 57

BETWEEN:

Albin German

**APPLICANT**

AND:

Theo Frank Faber

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Shelley Lopez, Vice Chair

## INTRODUCTION AND JURISDICTION

1. This final decision of the Civil Resolution Tribunal (tribunal) has been made without the participation of the respondent, due to the respondent's non-compliance with the tribunal's directions as required, as discussed below. The parties are each self-represented.
2. Section 36 of the *Civil Resolution Tribunal Act* (Act) applies if a party to a dispute fails to comply with the Act or its regulations. It also applies if a party fails to comply with tribunal rules in relation to the case management phase of the dispute, including specified time limits, or an order of the tribunal made during the case management phase. After giving notice to the non-compliant party, the case manager (facilitator) may refer the dispute to the tribunal for resolution and the tribunal may:
  - a. hear the dispute in accordance with any applicable rules,
  - b. make an order dismissing a claim in the dispute made by the non-compliant party, or
  - c. refuse to resolve a claim made by the non-compliant party or refuse to resolve the dispute.
3. These are the formal written reasons of the tribunal. The tribunal has jurisdiction over small claims brought under section 3.1 of the 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.
4. 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

5. Is the applicant entitled to reimbursement of \$1,232.39 in damages for boat repairs, plus tribunal fees?

## EVIDENCE & ANALYSIS

### Non-compliance

6. On October 25, 2017 the respondent Theo Frank Faber provided a Dispute Response to the tribunal, but he has since failed to participate in the tribunal proceeding as required.
7. Through the tribunal facilitator, I previously told the parties of my February 15, 2017 summary decision to hear the dispute without the respondent's participation, due to his non-compliance. The details supporting that decision are set out below.
8. As noted, the respondent is the non-compliant party in this dispute and has failed to participate in the case management phase, as required by sections 25 and 32 of the Act and tribunal rules 94 to 96, despite multiple attempts by the facilitator to contact him with a request for a reply. In this decision, the terms facilitator and case manager are used interchangeably.
9. The facilitator has advised me that he made the following attempts at contact with the respondent, with no response:
  - a. *January 12, 2018*: the case manager emailed the parties, scheduling a teleconference for February 8, 2018 at 3:00 pm. In his email, the case manager advised the parties that attendance was mandatory and if a party failed to attend the case manager may refer the matter to a tribunal member for non-compliance without further notice, in accordance with section 36 of the Act. The case manager also warned that refusal by the respondent to participate could result in an order granting all of the applicant's claims, without further notice.

- b. *January 24, 2018*: the case manager emailed the parties re-scheduling the teleconference for February 7, 2018. In his email, the case manager asked the respondent to advise within 7 days if the new proposed date conflicted with his schedule. The case manager wrote that if there was no response within that timeframe he would proceed on the basis that the respondent was available on February 7, 2018. The case manager included a copy of the original email with the warnings about non-compliance.
  - c. *January 31, 2018*: having received no response from the respondent, as a courtesy the case manager telephoned him at the number the respondent had provided to the tribunal and left a voice mail message about the rescheduled teleconference date for February 7, 2018, and asked that the respondent contact the case manager to confirm his attendance. The respondent did not reply.
  - d. *February 7, 2018*: the case manager and the applicant remained on the phone from 3:00 to 3:30 p.m., and the respondent did not attend the teleconference. The respondent has not contacted the tribunal.
10. The facilitator referred the respondent's non-compliance with the tribunal's rules to me for a decision as to whether I should hear the dispute in the absence of participation from the respondent.
11. Should the tribunal hear the applicants' dispute? As noted, the respondent filed a response but provided no explanation about why it suddenly stopped communicating with the tribunal as required. I find the facilitator made a reasonable number of attempts to contact the respondent. Parties are told at the beginning of a tribunal proceeding that they must actively participate in the dispute resolution process. Given the respondent provided his contact information in late October 2017, about 2.5 months before the facilitator's first attempt at contact, I find it is more likely than not that the respondent was aware of the facilitator's attempts to contact him.

12. The tribunal's rules are silent on how it should address non-compliance issues. I find that in exercising its discretion, the tribunal must consider the following factors:
  - a. whether an issue raised by the claim or dispute is of importance to persons other than the parties to the dispute;
  - b. the stage in the facilitation process at which the non-compliance occurs;
  - c. the nature and extent of the non-compliance;
  - d. the relative prejudice to the parties of the tribunal's order addressing the non-compliance; and
  - e. the effect of the non-compliance on the tribunal's resources and mandate.
13. First, there is no evidence before me that this claim affects persons other than the parties involved in this dispute.
14. Second, the non-compliance here occurred at the outset of the facilitation process and no substantive discussions between the parties occurred. The respondent has effectively abandoned the process after providing a response. Third, given the facilitator's attempts at contact and the respondent's failure to respond despite warnings of the consequences, I find the nature and extent of the non-compliance is significant.
15. Third, I find the prejudice to the respondent of proceeding to hear the dispute is outweighed by the circumstances of its non-compliance. If I refused to proceed to hear the dispute, the applicant would be left without a remedy and that would be unfair to him.
16. Finally, the tribunal's resources are valuable and its mandate to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly is severely impaired if one party does not want to participate. I find that it would be wasteful for the tribunal to continue applying its facilitation resources on this

dispute, such as by making further attempts to seek participation from the respondent.

17. In weighing all of the factors, I find the applicant's claims should be heard. In deciding to hear the applicant's dispute I have put significant weight on the following factors:
  - a. the extent of the non-compliance is significant;
  - b. the applicants are not prejudiced if such an order is made; and
  - c. the need to conserve the tribunal's resources.

### **Assessment of damages**

18. In early August 2017, the applicant bought a boat from the respondent for \$10,000. The applicant says that as soon as he put the boat in the water he discovered the engine had serious mechanical issues. The applicant claims reimbursement of \$1,232.39, the sum he paid to repair the boat's motor.
19. In his Dispute Response, the respondent stated that he told the applicant the motor worked "fine" so long as there was water flowing through it, and that the applicant should service it before running the motor. The respondent also stated in his Dispute Response that the applicant should clean the fuel tank, and that the applicant put the boat in the water without servicing it first.
20. Having decided to hear the dispute without the respondent's participation, I turn then to the merits of the dispute. Where a respondent filed a response but has since failed to comply with the tribunal's directions as required, as is the case here, an adverse inference may be drawn against that respondent. This simply means that if the person or organization refuses to participate, then it is generally reasonable to assume that the applicant's position is correct on the issue at hand. This concept is similar to where liability is assumed when a respondent has failed to provide any response at all to the dispute and is in default.

21. While private sales are generally 'buyer beware', a respondent is responsible for an applicant's damages if the respondent misrepresented the item sold. I am not prepared to accept the respondent's Dispute Response assertion that he told the applicant that the boat needed to be serviced first, which the applicant disputes, given the respondent's later non-compliance. Instead, I prefer the applicant's submission that the respondent expressly told him that the boat was in excellent mechanical condition and that such statement was a misrepresentation of the boat. I find the repair invoices in evidence support the applicant's claim for \$1,232.39. Accordingly, I find the applicant is entitled to an order for the \$1,239.39 claimed.
22. In keeping with the Act and the tribunal's rules, I further order the respondent to pay the applicant \$125 for tribunal fees, along with pre-judgment interest under the *Court Order Interest Act* (COIA) on the \$1,232.39, calculated from September 23, 2017.

## **ORDERS**

23. Within 30 days of this decision, I order the respondent to pay the applicant a total of \$1,362.16, comprised of:
  - a. \$1,232.39 for reimbursement for the claimed boat repairs,
  - b. \$4.77 in pre-judgment interest under the COIA, and
  - c. \$125 in tribunal fees.
24. The applicant is also entitled to post-judgment interest.
25. 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.

26. 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.

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Shelley Lopez, Vice Chair