



Civil Resolution Tribunal

Date Issued: April 10, 2018

File: SC-2017-002802

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Smith v. Sunwing Vacations Inc. et al*, 2018 BCCRT 122

BETWEEN:

Susan Smith

APPLICANT

AND:

Sunwing Vacations Inc. and Red Label Vacations Inc

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

R. Hoops Harrison

INTRODUCTION

1. In October of 2016, the applicant, Susan Smith, purchased a 7 day all-inclusive holiday to Cuba (the trip). The applicant went on the trip in January of 2017 but claims that the respondent tour providers, Sunwing Vacations Inc. (Sunwing) and

Red Label Vacations Inc. (Red Label), failed to adequately provided the services she purchased.

2. The applicant claims \$1,525.00 for flight, excursions, connections and hotel, inclusive of taxes. The applicant also claims reimbursement for tribunal expenses and fees paid.
3. The respondents each deny any misrepresentation or breach of contract as tour providers.
4. All parties are self-represented.

JURISDICTION AND PROCEDURE

5. 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.
6. 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 without further submissions or proceedings because I find that there are no significant issues of credibility or other reasons that might require an oral hearing. No party requested an oral hearing.
7. 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.

ISSUES

8. The **substantive issue** is whether either or both of the respondents are liable to compensate the applicant for damages from breach of contract or contractual misrepresentation respecting the trip.
9. Because the contractual agreements are at issue, there is also a **preliminary issue** as to the jurisdiction of the tribunal to hear this matter.

EVIDENCE AND ANALYSIS

10. In a civil claim such as this, the applicant bears the burden of proof, on a balance of possibilities. I have addressed the evidence and submissions to the extent necessary to explain my decision.
11. The applicant provided 18 items of evidence. They include some out of pocket receipts but mostly relate to third party reviews and complaints involving one or both of the respondents.
12. The respondents together provided 27 items of evidence which included:
 - (a) the contractual documents, terms and conditions, invoices and
 - (b) diligence and testimonials from persons employed with the respective service providers in Cuba.

Preliminary Issue: jurisdiction

13. The contractual terms and conditions provided by Sunwing contain what is commonly referred to as an “exclusive jurisdiction clause”. It states that the parties to the contract agree that any legal proceeding brought must be done so through the judicial process in the Province of Ontario. The terms and conditions provided by Red Label do not contain such a clause.
14. None of the respondents raised an objection to the tribunal taking jurisdiction to hear this matter and have participated in the tribunal process.

15. Again, because the terms and conditions of contractual agreements are central to the applicant's claim, I find it is appropriate at the outset for the tribunal to address this clause.
16. In the circumstances of this case, I find that the parties have attorned to the jurisdiction of the tribunal. Furthermore and noting the ***Court Jurisdiction and Proceedings Transfer Act***, S.B.C. 2003, c. 28, s. 3 ("**CJPTA**") and ***Club Resorts Ltd v Van Breda***, 2012 SCC 17, I also find that there are sufficient presumptive connecting factors and territorial competence for the tribunal to assume jurisdiction. Lastly, as no respondent has invoked what is known as an inconvenient forum objection (in latin '*forum non conveniens*'), I find that there is no requirement to consider declining the exercise of such jurisdiction under s. 11 of the **CJPTA**. The tribunal's jurisdiction under the Act permits me to decide this dispute.

Main Issue: The trip

17. As noted, the applicant entered into agreements in October, 2016 for a trip to take place in January, 2017. All parties agree that the fundamental elements of the trip were:
 - (a) a return flight from Vancouver to Varadero, Cuba,
 - (b) an all-inclusive 7-day stay at the ROC Arenas Doradas hotel,
 - (c) connections to and from the hotel,
 - (d) a Jeep safari excursion with Gaviota Tours.
18. The applicant obtained and participated in these fundamental elements of the trip but was not satisfied. The applicant's concerns with the trip are efficiently summarized in her tribunal Dispute Notice:

Flew to Cuba on Sunwing, Jan 21, 2017. Sat at airport in Varadero for 2+ hours waiting for bus to take us to our hotel, due to someone's luggage being

late. Food at hotel was unsanitary, hotel not up to standards as on previous trip. Excursion taken was outrageous, dangerous and staff rude and abusive. Plane flight back so uncomfortable I had to change seats. Altogether, the trip was a waste of time and money. I'm claiming partial money back on the trip and flight and full money back for the excursion.

Contractual Misrepresentation

19. There is legal authority for obtaining damages in “spoiled vacation cases” through either misrepresentation or breach of contract.
20. The leading decision for misrepresentation is *Jarvis v. Swans Tour Ltd.*, [1972] 3 W.L.R. 954 (C.A.) (Jarvis). In Jarvis, the plaintiff was induced to purchase a holiday based on misrepresentations in the brochure issued by the Defendant in that case. The court found that Defendant liable because of the misrepresentation.
21. On her own evidence, the applicant was not a stranger to this particular Cuban hotel and had stayed there previously. Other than her subjective concerns with the trip as quoted above, the applicant provided no independent evidence about misrepresentation.
22. The applicant did, however, provide in support of her concerns a number of negative travel reviews (from third parties) of the respondents. I give very little weight to these reviews made by non-parties in different situations.
23. In the case before me, I find that the applicant has failed to prove on a balance of probabilities that there was a misrepresentation by either respondent.

Breach of Contract

24. In submissions, the applicant argues that, like in a restaurant or with a mechanic, there is a reasonable expectation to receive what is reasonably contracted for up to a ‘normal standard.’ The applicant further says that the respondents failed to monitor the companies/providers that they promote.

25. The respondents emphasize that a 'normal standard' of expectation must include a limitation of their contractual liability in respect of services provided by third party operators, rather than by them. The respondents rely on a number of Ontario cases including *Garofoli et al. v. Air Canada Vacations*, 2012 ONSC 4698.

26. I find that an effective balancing between the expectations of a vacation purchaser and the reasonable limitations of liability of tour providers can be found in the Ontario Court of Appeal decision in *Craven et al v. Strand Holidays (Canada) Ltd.*, 1982 CanLII 1859 (ON CA), 142 D.L.R. (3d) 31 that dealt with injuries suffered by the plaintiffs when their bus overturned during a vacation in Colombia, South America. LaCourciere J.A. for the Court commented as follows:

If a person agrees to perform some work or services, he cannot escape contractual liability by delegating the performance to another. It is his contract. But if the contract is only to provide or arrange for the performance of services then he has fulfilled his contract if he has exercised due care in the selection of a competent contractor. He is not responsible if that contractor is negligent in the performance of the actual work or service, for the performance is not part of his contract.

27. The above passage was cited with approval in the British Columbia Provincial Court decision of *Bridges v. Classic Sports Tours Ltd.*, 2004 BCPC 366.

28. The respondent Sunwing says that it has exercised due care in its selection of operators and says that it monitors the service level of the suppliers they contract with through what are known as Destination Weekly Reports (DWRs), regular visits with the suppliers, and customer feedback. Sunwing submitted four DWRs which they say demonstrate that there were no reports of anything unusual at the hotel:

(a) two weeks leading up to the applicant's stay,

(b) during the applicant's stay and

(c) the week following the applicant's stay.

29. Sunwing also supplied two testimonials from the Cuba Office Country Director and the Sunwing representative who was present at the hotel during the trip.
30. The respondents are sympathetic to the applicant's concerns however they also say that the applicant could have mitigated any concerns if she had, at the time, brought them forward. If she had raised concerns during the trip that were not resolved by the operators, the respondents say they would have been recorded in the DWRs. The respondents say that, now, there is not much more that they can do.
31. Accordingly, based on the evidence before me I find that the applicant received substantially what she contracted for and has not proved on a balance of probabilities that the respondents fundamentally breached the contract. I find the applicant has not proven the respondents breached their respective contracts with her.
32. Given my conclusions above, the applicant's claim is dismissed. As the applicant was not successful, I find she is not entitled to reimbursement of tribunal fees or expenses.

ORDERS

33. I order that the applicant's dispute notice is dismissed.

R. Hoops Harrison, Tribunal Member