



Civil Resolution Tribunal

Date Issued: May 2, 2018

File: SC-2017-003425

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Wieser v. Coastal Peoples Fine Arts Gallery Ltd.*, 2018 BCCRT 163

B E T W E E N :

Eric Wieser

APPLICANT

A N D :

COASTAL PEOPLES FINE ARTS GALLERY LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about a piece of art, a drum, which the applicant Eric Wieser bought from the respondent, Coastal Peoples Fine Arts Gallery Ltd. (Gallery). Mr. Wieser says the drum's condition "deteriorated significantly in a short period of time".

2. The Gallery says that once the drum was sold, it is the applicant's property and they are not responsible for it. The Gallery also says it cannot be known what happened to the drum after the applicant purchased it.
3. The parties are self-represented.

JURISDICTION AND PROCEDURE

4. 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.
5. 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, and I note that neither party requested an oral hearing.
6. 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.
7. Under tribunal rule 126, 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

8. The issues in this dispute are:
 - a. Is the Gallery responsible for the drum's deterioration?

- b. If so, is the applicant entitled to the claimed \$3,225.60 refund?
- c. Is the applicant entitled to reimbursement of \$200 in tribunal fees?

EVIDENCE AND ANALYSIS

- 9. In a civil claim such as this, the applicant bears 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.
- 10. In December 2015, the applicant bought the drum from the Gallery for \$3225.60. It is undisputed that the drum is an art piece called “My Ancestors Drum” by artist Lyle Campbell, and that it was intended to be hung on a wall rather than played. I accept the applicant’s evidence that he treated the drum as a wall-hung art piece.
- 11. It is undisputed that in mid-January 2017, just over 12 months after purchase, the applicant found that the hide had peeled away from the frame of the drum. The applicant says this significantly changed its appearance. Based on the photos before me, I accept the applicant’s evidence that the hide is severed from the drum’s frame in about 50% of the drum’s circumference.
- 12. The applicant alleges that the Gallery sold him a “defective product”, and he has not been able to enjoy the drum due to “faulty craftsmanship”.
- 13. I note that the 12-month period at issue here well exceeded the Gallery’s policy of “Exchange or Store Credit within 7 days”.
- 14. The Gallery submits that whenever it sells artwork, the item is in the best condition possible. The Gallery says that many drums in its existing collection have been at the Gallery for several years and continue to be in prime condition. I find nothing turns on this, as the issue before me is the particular drum sold to the applicant.
- 15. The applicant says that the Gallery told him in January 2017 that it had had similar problems with other drums made by the same artist. I also find that nothing turns on this, given the applicant bought his drum in December 2015. In particular, to the

extent the applicant may suggest it, I find he has not proven that at the time of sale the Gallery knew the drum would have issues with its hide. I find the Gallery sold the drum in good faith.

16. In support of his claim, the applicant provided an opinion from Peter Lattimer of the Lattimer Gallery, who says he is familiar with drums similar to the one the applicant bought from the Gallery. Mr. Lattimer stated that the inside of the drum's wooden hoop frame was sharp, causing the hoop to cut into the hide. Mr. Lattimer said that typically the wooden hoop's edges are smoothed to avoid this kind of damage. Mr. Lattimer further stated that pin nails had been unusually added to the drum's outer rim, which accelerated the hide's deterioration. There is no contrary expert evidence before me, apart from the Gallery's submission that it is unknown how the applicant handled the drum in the 12 months after his purchase.
17. On balance, I accept Mr. Lattimer's opinion as expert evidence about the likely cause of the drum's deterioration, particularly given he found sharp points that he says are atypical.
18. Had the applicant commissioned the drum from the artist directly, the *Sale of Goods Act* would not apply. This is because the substance of such a contract is the skill and labour of the artist, and the addition of materials to that skill was only an ancillary or peripheral issue (see *Robinson v. Graves* [1935] 1 K.B. 579 (C.A.), as cited in *Hollis v. Birch*, 1990 CanLii 1112 (BCSC), and *Brennan v. Burrow*, 2016 BCPC 0078).
19. Here, the applicant did not commission an original work from the artist directly. Rather, he bought an existing piece of artwork from the Gallery, whose business it is to sell such things. I therefore find the *Sale of Goods Act* applies to the Gallery's sale of the drum, including its implied warranty provisions in section 18.
20. There is no suggestion the Gallery misrepresented the drum to the applicant. The Gallery made no representations about the drum's functionality, apart from providing care instructions so that it did not dry out, which is not relevant here.

21. The material point in this dispute is that the Gallery sold a piece of art, not a functioning drum. The question then is this: what was the implied warranty given for that art, under section 18 of the *Sale of Goods Act*?
22. Section 18 of the *Sale of Goods Act* says there is no implied warranty “as to the quality or fitness for any particular purpose of goods”, except under specified circumstances. One such exception is if the seller deals in the goods, there is an implied condition that the goods are of “merchantable quality”, but if the buyer has examined the goods there is no implied condition about defects that the examination ought to have revealed. I do not find the sharp edges on the hoop would have been disclosed to the applicant upon inspection.
23. Was the drum of merchantable quality or reasonably fit for the purpose of being hung on the wall as art? I find that it was. However, at the time the drum was sold, it was suitable as a piece of wall-hung artwork, given it hung without issue for over 12 months.
24. This brings me to another exception in section 18, which is that the goods will be “durable for a reasonable period of time” given the use to which they would normally be put “and to all the surrounding circumstances of the sale”.
25. In *Borek v. Hooper*, 1994 CanLii 10559 (ON SC), the plaintiff had commissioned a predominantly white painting for \$4,000, to be hung in a specific space in her home. About 3 years after delivery, the painting’s surface began to crack and its white areas began to yellow. The artist acknowledged that this should not have occurred. The court found there was ample evidence to support a conclusion that the implied condition of merchantability was breached, if the *Sale of Goods Act* had been applicable. The court in that case concluded the painting should have reasonably had a ten-year life span, rather than less than 5 years. The Ontario *Borek* decision is not binding upon me, but I consider it useful.
26. It is true the Gallery made no representations about Mr. Campbell’s workmanship in creating the drum or how long the drum would last. However, the applicant’s

drum was not a degradable piece of art, like an ice sculpture. Mr. Lattimer's opinion was that drums like the applicant's "eventually deteriorate" and are not designed to last forever. His opinion is that some First Nations drums survive intact longer than others, depending on a variety of factors: humidity, hide type and thickness, heat, tension, and the way the hide is mounted to the frame. He stated that "many artists realize that the tension of the hide is so high" that the drum's frame must be designed with smoothed edges so the frame does not "expedite a rip or split". As referenced above, Mr. Lattimer wrote that the hoop's inside edges were sharp and had the "unusual" addition of pin nails along its outer rim, which expedited the hide's wearing. I accept Mr. Lattimer's uncontroverted expert opinion that the applicant's drum fell short of a drum's expected lifespan.

27. I find the applicant had a reasonable expectation that the drum would be durable for at least a few years, and certainly more than 12 or 13 months. I find that the hide's severance from its frame has left the drum no longer fit for its purpose, namely a piece of wall-hung art.
28. I find the applicant is entitled to a refund of the \$3,225.60 he paid for the drum. Given this conclusion, I also find the applicant must return the drum to the respondent.
29. Given the applicant has not yet returned the drum, I find he is not entitled to pre-judgment interest under the *Court Order Interest Act*.
30. In accordance with the Act and the tribunal's rules, as the applicant was successful, I find he is entitled to reimbursement of the claimed \$200 in tribunal fees.

ORDER

31. I order that:

- a. Within 45 days of this decision, the Gallery must pay the applicant \$3,425.60, broken down as a \$3,225.60 refund for the drum and \$200 in tribunal fees, and
 - b. The applicant must immediately return the drum, in its current condition, to the Gallery upon receipt of the \$3,425.60.
32. The applicant is entitled to post-judgment interest, as applicable.
33. 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.
34. 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