



# Civil Resolution Tribunal

Date Issued: June 27, 2018

File: SC-2017-004781

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Super Save Disposal Inc. v. K.M.I. Holdings Ltd.*, 2018 BCCRT 285

**B E T W E E N :**

Super Save Disposal Inc.

**APPLICANT**

**A N D :**

K.M.I. Holdings Ltd.

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Graeme Nunn

### **INTRODUCTION**

1. The applicant Super Save Disposal Inc. provides waste disposal services. The applicant seeks damages against the respondent K.M.I. Holdings Ltd. for an alleged breach of a service agreement.
2. The parties are self-represented.

## **JURISDICTION AND PROCEDURE**

3. 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.
4. 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.
5. 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.
6. Under tribunal rule 126, in resolving this dispute the tribunal may make one or more of the following orders:
  - a. order a party to do or stop doing something;
  - b. order a party to pay money;
  - c. order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

7. The issues in this dispute are:
  - (a) Did the parties have a binding agreement?

- (b) Did the respondent breach the agreement?
- (c) Is the applicant entitled to liquidated damages?

## **EVIDENCE AND ANALYSIS**

- 8. 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.
- 9. The applicant provided a service agreement (agreement) dated June 20, 2014. The agreement appears to be signed by both parties, which is undisputed.
- 10. The relevant provisions of the waste removal services agreement follow:
  - (a) The service charges were:
    - i. \$40.52 per month for waste removal;
    - ii. \$10.00 per month for cardboard service; and
    - iii. \$135.00 per bin for removal.
  - (b) The agreement is for a term of 5 years. (clause 2)
  - (c) The respondent can only terminate the agreement by providing the applicant written notice within 120 days of the end of the term. (clause 2)
  - (d) The term of the agreement began on the first date of the delivery of waste removal equipment, or upon the termination of the respondent's prior waste removal contract(s) with other non-parties. (clause 3)
  - (e) The respondent had an obligation to notify any existing waste removal services providers of the agreement. (clause 3)

- (f) If the respondent unlawfully terminated the agreement before the end of the term, the applicant could elect to accept termination of the agreement and receive liquidated damages. The liquidated damages are calculated as the entire amount of the remaining monthly payments owing under the agreement, plus taxes. (clause 11)
11. The applicant provided a credit application dated June 20, 2014. It is undisputed that the respondent signed a June 20, 2014 credit application.
  12. The term of the agreement started when the respondent terminated their pre-existing waste removal contract(s). The respondent had an existing waste removal contract with another contractor at the time the agreement was executed. The applicant provided several form letters addressed to that contractor signed by the respondent and sent via registered mail. The applicant also provided a copy of the respondent's service agreement with that contractor. Based on my review of these documents I find that the respondent's service agreement with that contractor ended on February 14, 2017. I further find that the term of the agreement between the parties began on February 14, 2017 and ran for 5 years (60 months) from that date.
  13. The applicant provided an October 26, 2016 letter addressed to the respondent, which was sent by registered mail. The letter gave the respondent notice of delivery of waste containers to their premises on February 14, 2017. I accept that the respondent received this letter and had notice of the delivery of the containers.
  14. The applicant provided a delivery receipt addressed to the respondent for 2 waste containers dated February 14, 2017. The receipt says that delivery was refused. The receipt is signed, but the signature is not legible. I accept that the respondent refused the applicant's delivery of waste containers on this date.
  15. The applicant sent a February 20, 2017 letter to the respondent by registered mail. The letter said that the applicant elects to terminate the agreement and demanded the respondent pay liquidated damages of \$3,366.26 broken down as follows:

- (a) 60 months x \$40.52 per month for waste removal - \$2,431.20;
- (b) 60 months x \$10.00 per month for cardboard service - \$600.00;
- (c) 2 x \$135.00 per bin for removal - \$270.00; and
- (d) GST - \$165.06.

**Did the parties have a binding agreement?**

- 16. The applicant says that the parties had a valid and binding agreement.
- 17. The respondent says that the agreement is not valid and was in fact terminated in July 2014 by a telephone call with an employee of the applicant. The respondent also says that they were not told that the agreement would commence once their pre-existing waste removal contract ended.
- 18. I do not accept that the agreement was terminated in July 2014. I find that the agreement was validly executed and constitutes a binding contract between the parties.

**Did the respondent breach the agreement?**

- 19. The agreement required the respondent to accept delivery of the waste containers at the start of the term. The respondent refused delivery of the waste containers on February 14, 2017, in breach of the agreement. I find that the refusal of delivery constituted a material breach and termination of the agreement. The respondent is only permitted to terminate the agreement as set out in clause 2. Clause 2 did not apply on February 14, 2017.
- 20. I find that the respondent's refusal of delivery of the containers constituted a breach and termination of the agreement.

## Is the applicant entitled to liquidated damages?

21. The agreement provides where the respondent terminates the agreement unlawfully, the applicant may elect to accept that termination. I find that the applicant did accept the respondent's termination of the agreement. I rely on the February 20, 2017 letter in making this finding.
22. Clause 11 states that if the agreement is improperly terminated by the respondent, the applicant is entitled to liquidated damages. The liquidated damages are the amount of the remaining monthly payments owing under the agreement, plus taxes.
23. Liquidated damages are a contractual pre-estimate of the damages suffered by a party in the event of a breach of contract. Liquidated damages must not be a penalty, but rather a genuine pre-estimate of damages incurred. Simply because a contract says damages are liquidated damages and not a penalty does not make them liquidated damages. The damages will be a penalty if the amount is extravagant and unconscionable when compared to the greatest loss that could possibly come from the breach. The courts have said their duty is to assess whether the clause is a genuine pre-estimate of the anticipated losses or a clause intended to compel performance of the contract. This issue was decided in the case of *Tristar Cap & Garment Ltd. v. Super Save Disposal Inc.* 2014 BCSC 690 (CanLII). Madam Justice Fenlon (at paragraph 46) found that the income stream loss over the remaining term of the contract amounts to a genuine pre-estimate of damages and is not a penalty.
24. In *Super Save Disposal Inc. v. Paul's Metal Service Inc.*, 2018 BCCRT 191, my colleague agreed with the comments of his Worship B. G. Baynham in *Super Save Disposal Inc. v. Lee* 2015 BCPC 0157. In particular, my colleague expressed her agreement with the court's comments regarding the onerous nature of the terms of disposal service contracts, and the need for consumer protection regarding those contracts. While I am not bound by her decision, I concur with my colleague.

25. However, I find that I am bound by the *Tristar Cap & Garment Ltd. v. Super Save Disposal Inc.* The remaining term of the agreement from the date of termination was 60 months. I find that the applicant is entitled to liquidated damages in the amount claimed, being \$3,366.26.
26. Under section 49 of the Act, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find the applicant is entitled to reimbursement of \$175.00 in tribunal fees.

## **ORDERS**

27. Within 30 days of the date of this order, I order the respondent to pay the applicant a total of \$3,573.47, broken down as follows:
  - a. \$3,366.26 as damages;
  - b. \$32.21 in pre-judgment interest under the *Court Order Interest Act*; and
  - c. \$175.00 in tribunal fees.
28. The applicant is entitled to post-judgment interest, as applicable.
29. 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.
30. 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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Graeme Nunn, Tribunal Member