



# Civil Resolution Tribunal

Date Issued: November 21, 2018

File: SC-2018-002980

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Vigier v. HOSTPAPA INC*, 2018 BCCRT 751

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

Alistair Vigier

**APPLICANT**

**A N D :**

HOSTPAPA INC

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Michael F. Welsh, Q.C.

## **INTRODUCTION**

1. The applicant, Alistair Vigier, seeks damages of \$5,000 from the respondent, HOSTPAPA INC, a web-hosting service, because his company website domain that it hosted, [www.thewealthyfranchise.com](http://www.thewealthyfranchise.com), went “offline” for some time. The respondent takes issue with my jurisdiction as a tribunal member of the Civil

Resolution Tribunal (tribunal) to decide this matter and it also disputes liability for any damage that the applicant may have suffered.

2. The applicant acts for himself. The respondent is represented by a lawyer, Jamie Opalchuk.

## **JURISDICTION AND PROCEDURE**

3. These are the formal written reasons of the tribunal. The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act* (Act). The issues here are whether the tribunal's jurisdiction applies if the "event triggering" the dispute did not happen in British Columbia (BC), and whether there is jurisdiction when the parties have contracted to have disputes determined in another jurisdiction, in this case Ontario.
4. 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 will decide this dispute through written submissions, as I find that there are no significant issues of credibility or other reasons that might require an oral hearing, and as it largely involves a question of law.
6. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether the information would be admissible in a court of law or not. 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 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**

8. The issues in this dispute are:
  - a. Did the parties contract to have disputes between them heard by a court in Burlington, Ontario applying Ontario law?
  - b. Did any of the events triggering this dispute occur in BC, and if they did not, can and should the tribunal take jurisdiction over the dispute?
  - c. If the tribunal takes jurisdiction, is the respondent, as the hosting company, liable in damages to the applicant as a result of his company website domain going offline?
9. I must determine the jurisdictional issues before addressing the merits of the dispute.

## **EVIDENCE AND ANALYSIS**

10. I will review only the evidence necessary to determine this matter.
11. The applicant lists his personal address in Victoria, BC. On behalf of a company called Bound Again Marketing Inc., he set up a website domain named [www.thewealthyfranchise.com](http://www.thewealthyfranchise.com) through GoDaddy Inc., an online domain name registrar. On behalf of the company, he then entered a web-hosting agreement with the respondent in November 2017.
12. The respondent is a corporation based in Oakville Ontario, with no offices in BC. It is in the business of hosting websites. All its servers are physically in Ontario. It is undisputed that the respondent's staff with whom the applicant dealt are in Ontario.

13. The applicant says that he is from BC and made the web-hosting agreement from BC. However, it is undisputed and the respondent's invoicing shows that the web-hosting account for www.thewealthyfranchise.com was between the respondent and Bound Again Marketing Inc., which is noted as having an address in Las Vegas, Nevada. The applicant's personal name appears on the invoice as "Attn.: Alistair Vigier" at that Las Vegas address. Bound Again Marketing Inc. is not a party to this dispute.
14. The applicant says that Bound Again Marketing Inc. was incorporated in BC. He provides no documentary proof of this and does not explain why it was using the Las Vegas address. Some later documents in evidence do show a BC address for the company.
15. In early February 2018, when the domain name expired due to the applicant not renewing it with GoDaddy Inc., the website went "offline." The applicant noticed this in early March 2018 and contacted the respondent. He was advised that Bound Again Marketing Inc.'s domain had expired and to renew it or get a new one. He obtained a new domain and asked the respondent to transfer the contents of the expired website to the new website. He submits that the respondent made errors in doing this that increased the time before the new website was online.
16. He claims damages loss of business as he alleges his Google search engine optimization rankings went down during the time the old and new websites were not online. He has not provided any documentary evidence of what those damages are, but says they exceed \$20,000. He also says he spent \$15,000 on Facebook advertising for the website but again provides no documentation. He claims the maximum monetary amount the tribunal can order, namely \$5,000.
17. The web-hosting agreement terms of service (TOS) contain the following paragraph:

***Section 17.1 Governing Law.***

This Agreement will be governed by the laws of the Province of Ontario and the laws of Canada applicable therein, without reference to the conflict of laws provisions. The parties consent to the jurisdiction of the courts of Ontario, Municipality of Halton and City of Burlington.

18. The respondent submits that the applicant explicitly agreed to be bound by their TOS when he completed their online services form. That online order form, which is in evidence, has a section at the bottom where, to complete and submit it, a customer must check off “I have read and agree to HostPapa’s Terms of Service, Privacy Policy and Cancellation Policy.”
19. The respondent also points to the tribunal’s website and a BC government website that both state that the tribunal “cannot resolve a dispute if the event triggering it did not happen in BC.”<sup>1</sup>
20. Unfortunately, that information is not completely accurate. As noted earlier, the tribunal draws its small claims jurisdiction from the Act and the *Small Claims Act*. (SCA.) Under section 10 of the Act, the tribunal must refuse to resolve a claim that it considers is not within its jurisdiction. Nothing in the Act or the SCA specifically addresses the tribunal’s jurisdiction in cases where the event triggering the dispute is arguably outside BC.
21. In *Smith v. Sunwing Vacations Inc. et. al.*, 2018 BCCRT 122 at paragraph 16, the tribunal found that it could determine disputes that are arguably outside BC if the parties agree and do not raise an issue of its jurisdiction (what is known as “attorning to jurisdiction.”)
22. The *Smith* case relies in part on *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, where the Supreme Court of Canada set out the principles for assuming jurisdiction over a dispute. The court said that the party who requests a court to do so must identify a presumptive connecting factor that links the subject-matter of the dispute to the forum (in this case, BC.) The other party must dispute that jurisdiction (not attorn). This is commonly done by showing that it is not convenient to have the court

assume jurisdiction (in Latin, that it is a *forum non conveniens*), as a court of another jurisdiction is more appropriate for a fair and efficient resolution of the matter.

23. Consequently, I find that the tribunal has a discretion in appropriate cases, such as when the parties agree to have it determine a dispute that has some connection to BC, to assume jurisdiction even though the matter occurred outside BC.
24. In this case, there is no such agreement. Instead, the respondent relies on its TOS under which the applicant, or more precisely his company, contracted with the respondent that any disputes will be heard in the court in Burlington Ontario, using Ontario law.
25. I find that, in the circumstances of this case, where the applicant specifically agreed to another forum and set of laws for his disputes with the respondent, he is bound to that agreement. He says he did not receive the TOS, or that they were changed by the respondent. But I find on the balance of probabilities that they were linked to the online order form that he completed and submitted after checking off that he had reviewed them.
26. I therefore exercise my discretion to refuse on jurisdictional grounds to hear this matter.
27. While not necessary for this decision, I make the following comments for the assistance of the parties, as they made submissions on them.
28. Had I determined I should assume jurisdiction I would have dismissed this claim.
29. Firstly, as the respondent notes in its submissions and the invoicing documents establish, the web-hosting agreement was not with the applicant, but with Bound Again Marketing Inc. This would preclude any claim by the applicant personally. Secondly, as the respondent also notes, the problem that led to the domain going off-line was not that the web-hosting services failed. The applicant's domain name with GoDaddy Inc. expired as the applicant, on behalf of Bound Again Marketing

Inc., failed to renew it. There was then nothing to host. I would have found the website going offline was therefore the applicant's fault. Thirdly, the applicant has not provided any proof of what his damages entail. On those bases I would have found that the applicant has failed to prove his claim on the merits.

30. Of course, nothing in these comments on the merits binds any other tribunal or court. They are not part of my order. The applicant has the right to pursue his claim in Ontario if he chooses to do so.

## **ORDER**

31. Under section 10 of the Act, I refuse to resolve the applicant's claim on the basis that I decline to exercise jurisdiction over it.

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Michael F. Welsh, Q.C., Tribunal Member

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<sup>1</sup> The links to the websites are: <https://civilresolutionbc.ca/resources/crt-jurisdiction/#what-types-of-disputes-cant-be-taken-to-the-crt>, and <https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribunal#small>