



# Civil Resolution Tribunal

Date Issued: November 27, 2018

File: SC-2017-007472

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Super Save Disposal Inc. v. Magsen Realty Inc. et al*, 2018 BCCRT 763

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

Super Save Disposal Inc.

**APPLICANT**

**A N D :**

Magsen Realty Inc.

**RESPONDENT**

**A N D :**

The Owners, Strata Plan VR2684

**RESPONDENT BY THIRD PARTY CLAIM**

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## **REASONS FOR DECISION**

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Tribunal Member:

Shelley Lopez, Vice Chair

## INTRODUCTION

1. This is a somewhat complex contractual dispute involving 2 different contracts. The first is a contract for waste disposal services (waste contract). The applicant, Super Save Disposal Inc. (Super Save), says it contracted with the respondent property management firm, Magsen Realty Inc. (Magsen). This contract relates to waste disposal services for the third party respondent strata corporation, The Owners, Strata Plan VR2684 (strata)<sup>1</sup>. Super Save claims against Magsen for \$827.55 in debt and \$1,884.32 in liquidated damages, for a total of \$2,711.87, plus 24% annual contractual interest.
2. As referenced above, Magsen filed a third party claim against the strata. This third party claim is based on the second contract at issue, Magsen's and the strata's property management contract (management contract). Magsen says it signed the waste contract as the strata's agent, in accordance with the management contract in effect at the time, and that the strata therefore assumed liability for the waste contract.
3. Magsen wants the strata to pay for any award granted against Magsen under the waste contract, based on the agency terms in the management contract. The strata denies it can be held liable for Super Save's and Magsen's contract. The strata says the just and equitable result is that the liquidated damages claim be dismissed and that the strata be ordered to pay \$512.74 for waste services actually provided in September and October 2016.
4. Super Save is represented by an employee, Marli Giesel. Magsen is represented by Maurice Yu, an employee or principal. The strata is represented by Tynan Rollo, a strata council member.

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<sup>1</sup> I note the strata's legal name is "The Owners, Strata Plan VR 2685", and I have amended the style of cause above accordingly, as there is no dispute about this.

## **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. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note that in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the BC Supreme Court recognized the tribunal's process and found that oral hearings are not necessarily required, even where credibility is in issue.
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.
8. 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**

9. The issues in this dispute are a) whether the respondent Magsen is responsible to pay Super Save's debt and liquidated damages claims under the waste contract,

and b) whether under the management contract the third party respondent strata is responsible to pay for any award made against Magsen under the waste contract.

## **EVIDENCE AND ANALYSIS**

10. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. This means Super Save must prove its claims against Magsen, and Magsen must prove its claims against the strata. I have only referenced the evidence and submissions as necessary to give context to my decision.
11. Super Save delivered a waste bin to the location identified on the waste contract, which was the strata's address, in July 2006. It is unclear to me why the bin was delivered then, when the waste contract was effective April 2007. Nothing turns on when the bin was first delivered. Super Save continued to service the bin under the waste contract for 9 or 10 years, without issue, until around May 2016.
12. I will address the management contract first, between Magsen and the strata. It is undisputed that Magsen was the strata's property manager from February 1, 2006 to March 31, 2016. Another property manager, KP, became the strata's property manager on April 1, 2016. KP is not a party to this dispute.
13. It is undisputed that during its contract as the strata's property manager, Magsen had the authority to arrange routine servicing to the strata's property and to enter into service contracts on the strata's behalf. This is set out in clause 3(h) and (i) of the management contract. I find Magsen's authority included signing the waste contract, which is not disputed.
14. Clause 4(b) and (e) of the management contract states that the strata will save its agent Magsen harmless from all damage, claims, costs, and expenses the agent might incur as a result of bona-fide and non-negligent performance of its contractual duties. Another term is that the strata agrees to defend at its expense any litigation against its agent, Magsen, unless Magsen is proved negligent.

15. Clause 5.01 of the management contract provides that when the management contract ends, the agent Magsen's obligations end and the strata assumes obligations under "all commitments made and contracts entered into" by Magsen on the strata's behalf. It is undisputed that Magsen entered into the waste contract on the strata's behalf.
16. I find there is insufficient evidence before me to conclude Magsen was negligent with respect to the waste contract, and the strata has not argued that Magsen was negligent. At most, the strata submits that the litigation could have been avoided if Magsen had put the strata's name as the "customer" on the waste contract. I cannot find that this failure is sufficient to establish negligence, or that any negligence has caused the strata a loss in this dispute. It is undisputed that the strata never instructed Magsen to terminate the waste contract.
17. Here, I note Magsen's submission that it "placed its trust" in Super Save to write the content of the waste contract the same way it did for another strata corporation that Magsen acted for as property manager. This relates to the absence of the strata as the named customer in the waste contract. I accept that while the strata was not formally a party to the 2007 contract, it was intended by all parties that it would be. However, the reality is that Magsen is the only party to the waste contract with Super Save, on its face. I cannot find that Super Save did anything dishonest with respect to leaving out the strata as a named party. Nothing prevented Magsen from ensuring the strata was properly named. Based on the evidence before me, I find that this omission went unnoticed until after April 1, 2016, when KP took over the strata's property management account. As discussed further below, I find nothing ultimately turns on this omission, given the indemnity terms in the management contract.
18. At this point, I note the strata's lengthy argument about the law of agency, stating that Super Save cannot collect from both the strata's agent Magsen and from the strata, and instead that it must choose one or the other. The strata says that Super Save clearly chose Magsen, because Super Save expressly did not name the strata

as a respondent in this dispute. As such, the strata says Super Save cannot now collect its claimed damages from the strata.

19. However, the difficulty for the strata is that Super Save is not looking to collect its debt and liquidated damages from the strata. The strata's involvement in this dispute is only because Magsen made a third party claim against it, based on the management contract. Contrary to the strata's submission, Super Save is not attempting to enforce the waste contract against the strata by "chaining" its claim against Magsen with Magsen's third party claim. Magsen alone brought the third party claim.
20. The relevant aspects of the law of agency are as follows. When an agent (Magsen) acts with actual (or presumed) authority on behalf of an undisclosed principal (the strata), the contractor (Super Save) can sue the agent on the contract. When the contractor learns of the principal, it can choose whether to proceed against the agent or the principal. When Super Save learned about the strata being the principal, it made an election to proceed against the agent, Magsen. In doing so, Super Save gave up any right to claim against the principal, the strata.
21. I do not agree with the strata that Super Save and Magsen are trying to "have it both ways". The law of agency cited by the strata refers to scenarios where the contractor, here Super Save, seeks to directly claim against both the end customer (the strata) and the agent (Magsen). However, as discussed above, that is not the scenario before me.
22. Contrary to the strata's central submission, the fundamental point is that Super Save is not pursuing the strata under the waste contract. The strata's liability for the waste contract, if any, is only because of its liability to Magsen under the management contract. The management contract's provisions are the basis of Magsen's third party claim against the strata. The law of agency is not offended by this.

23. In summary, given the management contract's terms, I find the strata must indemnify (or "save harmless") Magsen for Magsen's liability, if any, to Super Save under the waste contract. I also find that under the management contract's terms, the strata assumed liability for the waste contract, even though Super Save would not agree to simply transfer it into the strata's name.
24. I turn then to the waste contract, which as noted above, is between Super Save and Magsen. The relevant terms of the waste contract are as follows (my bold emphasis added):
- a. The "monthly charge" is for a weekly service of a 4-yard waste bin, for \$113.
  - b. The applicable effective date is shown as April 1, 2007.
  - c. As noted above, the stated effective date of the contract is April 1, 2007. Clause 3 had a pre-printed 5-year term, but the copy provided by Super Save has the term changed to 1 year, which is initialed and consistent with another notation on the waste contract that it was for "1 year terms". As noted above, **I find the waste contract was for renewable 1-year terms.**
  - d. As the customer, **Magsen could terminate the waste contract in writing, by registered mail, "not less than" 60 days before the end of the current 1-year term.** This is often referred to as the 'cancellation window'. The contract renews automatically for successive 1-year terms, without further action by the parties. (Clause 3). Given the April 1 effective date, so long as Magsen cancelled the contract before January 31 (depending on a leap year), the contract would end on March 31.
  - e. Interest on overdue accounts is payable at the rate of 2% per month, with payments due 30 days from the date of invoice (Clause 5). This equals 24% annual interest.
  - f. If the customer, Magsen, tries to terminate the agreement before the term's expiry, Super Save may, at its option accept the respondent's repudiation,

and in that case the respondent agrees to immediately pay liquidated damages calculated as the greater of 2 methods: i) sum of the customer's monthly billing for the most recent 9 months (9 x \$113), or ii) the sum of the amount owing to the balance of the (1-year) term. The customer acknowledges this represents reasonable liquidated damages to compensate Super Save for the loss of revenue, rather than a penalty. (Clause 11).

g. As the customer, **Magsen must get Super Save's written consent to assign the waste contract, which Super Save must not unreasonably withhold.**

h. Above Mr. Chung's signature on behalf of Magsen, the form states that the customer, Magsen, acknowledges that the person signing has express authority to do so on its behalf.

25. As noted above, it is undisputed that the strata is not a party on the face of the waste contract.

26. I note the monthly rate went up over time, although Super Save's evidence is only its collection letter. However, as the strata and Magsen did not dispute it, I accept that in 2016 the applicable monthly rate was \$256.37, plus tax.

27. It is undisputed that Super Save and Magsen signed the waste contract on June 14, 2007, with an effective date of April 1, 2007. It is not clear to me why the effective date pre-dated the date the waste contract was signed, but nothing turns on it.

28. On March 10, 2016, Magsen paid Super Save's February 29, 2016 invoice and then cancelled its trust accounts for the strata, as the management contract had ended.

29. As discussed further below, in May 2016 Super Save refused to assign the waste contract without a fresh credit application from KP or the strata. When KP provided a signed credit application on August 9, 2016, Super Save demanded a new contract. KP and the strata refused to sign a new contract, as the strata did not want to extend the term.



30. On July 10, 2016, KP paid Super Save's March to June 2016 invoices. In late August 2016, Super Save suspended service to the strata's waste bin, apparently on the basis that the account was in arrears. I infer this relates to the August 2016 invoice being unpaid, as on August 15, 2016 KP paid the July 2016 invoice. Shortly afterwards, KP offered to pay an adjusted August 2016 invoice, but Super Save refused. The service suspension prompted the strata to sign another waste disposal contract with a third party hauler. On August 16, 2016, KP sent Super Save a registered letter that the waste contract between Super Save and Magsen was terminated as of September 19, 2016. In its letter, KP also noted there was no agreement between Super Save and the strata.
31. Super Save wrote that the request for termination was contrary to the contract's terms, and that it would claim liquidated damages if "they persist" with cancellation of the waste contract. Based on Super Save's August 18, 2016 letter to Magsen "c/o" KP, I accept that it was understood by all parties that KP had "taken over" Magsen's role in acting for the strata. In its letter, Super Save set out its claim as 7 months at \$256.37 (the current rate), plus a \$135 bin removal charge and tax, for a total of \$2,026.07.
32. On October 26, 2016, KP again wrote Super Save and asked that it remove the waste bin from the strata's property, which Super Save did on November 4, 2016.
33. Super Save submits the waste contract was for a renewable 2-year term. However, this is not what the waste contract says. I find the waste contract was for a renewable 1-year term. Super Save makes other submissions about the waste contract that appear to be based on other standard contracts, but are not consistent with the terms of the waste contract in evidence before me, which Super Save provided.
34. I find that the timing of the cancellation was in accordance with the waste contract's terms, in that September 19, 2016 was more than 60 days before April 1, 2017. However, on the face of the waste contract, Magsen owes Super Save liquidated damages for 5 months (November 2016 through March 2017). Based on the

evidence before me, the monthly waste fee for September and October 2016 was also not paid. However, that is not the end of the matter, given correspondence between Super Save and Magsen in June 2016, as discussed below.

35. It is clear that Super Save accepted that the strata was the beneficial party to the waste contract, because on June 27, 2016, Super Save e-mailed Magsen to “disregard the statement sent” because it was waiting on KP to “transfer the invoices into their name”. As noted above, KP and the strata did not do so, in that they refused to sign a new contract that would require a new term. Magsen did not hear more from Super Save until October 2016, apart from receiving invoices that it continued to forward to KP.
36. In all of the circumstances, I find that before this tribunal proceeding began, Super Save abandoned its claim against Magsen, with Magsen relying upon that abandonment. This finding is based on the “disregard the statement sent” email and the fact that Super Save’s conduct shows that it accepted at the time in April 2016 that Magsen was no longer a party to the waste contract. The fact that Super Save pursued KP and the strata for 4 to 5 months, between April and August 2016, and not Magsen is support for this conclusion. I note Super Save did not provide a reply submission to Magsen’s argument in this respect, though it had the opportunity to do so.
37. The difficulty for Super Save is that it does not have an enforceable contract against the strata directly, which it apparently knows, given it did not name the strata as a respondent in this dispute. As set out above, having made its election to claim against Magsen, I find that Super Save also abandoned any claim against the strata.
38. Even if I am incorrect about Super Save having abandoned its claim against Magsen by June 2016, it was not Magsen who terminated the waste contract. Super Save chose to accept the termination based on KP’s letter, not Magsen’s. This fact supports the conclusion that Magsen is not liable for any liquidated damages under the waste contract.

39. I also note that on August 18, 2016, Super Save claimed a total of \$2,026.07, for debt and liquidated damages combined, in its “warning” letter. This was the maximum amount payable until the end of the term (7 months). Other than accruing contractual interest, I agree with the strata that Super Save cannot now seek the larger figure of \$2,711.87. Super Save has not provided any explanation of the different amounts. I also agree with the strata that there were only 5 months remaining in the term, not 7. At a monthly rate of \$256.37 for 5 months, this equals \$1,281.85. I agree with the strata that the waste contract does not allow for the ‘administration fees’ charged on Super Save’s invoices nor the \$135 bin removal fee.
40. Given my conclusions above, I find that Magsen is not liable under the waste contract for any liquidated damages. The strata is therefore not liable for them either, under the third party claim that rests on the management contract. This conclusion is consistent with decisions where the court has required a party claiming liquidated damages to strictly prove a breach of contract. I dismiss Super Save’s claim for liquidated damages.
41. I turn then to Super Save’s debt claim for \$827.55. I have found above that Super Save’s invoices were paid up to July 2016. Super Save removed the bin on November 4, 2016, after KP’s requests in August and October 2016. As noted above, the applicable monthly rate was \$256.37 (\$269.19 including GST). Thus, at most there are 3 months of bin service at issue. However, I am unable to determine how Super Save arrives at the claimed \$827.55 figure, as that sum is not evenly divided by either \$256.37 or \$269.19.
42. The strata says it should only pay \$512.74 on a *quantum meruit* basis (fair market value for services actually received), because it had the benefit of the bins for the 2 months of September and October 2016. I agree, with one caveat. I note the strata’s stated calculation was “\$269.19 x 2 = \$512.74”, yet the total is in fact \$538.38. The \$512.74 total is twice the pre-tax monthly rate of \$256.37. I find the correct total is \$538.38. I find this amount is reasonable.

43. I have found above that Super Save abandoned its claim against Magsen, by its June 2016 email and conduct in the months following.
44. I agree that the strata, which benefitted from the bin service, must pay Super Save a total of \$538.38, on a *quantum meruit* basis. Given the *quantum meruit* basis, I do not order the claimed 24% contractual interest.
45. The strata must pay pre-judgment interest under the *Court Order Interest Act* (COIA) on the \$538.38, from November 1, 2016, a date I consider reasonable in the circumstances.
46. The respondent Magsen was successful. In accordance with the Act and the tribunal's rules, I find Super Save must reimburse Magsen its claimed \$125 in tribunal fees and \$9.45 in dispute-related expenses. I have exercised my discretion in this way because Super Save was unsuccessful in its claim against Magsen, and Magsen's third party claim only arose because of Super Save's claim.
47. As for Super Save's claimed tribunal fees of \$125, I dismiss that claim. I say this because Super Save was only partially successful in terms of a compensation order, and because Super Save has not done significantly better in this decision than the strata's offer before the tribunal dispute began. I also dismiss Super Save's claim for \$78.75 in dispute-related expenses, for the same reason and because there was no explanation or receipts provided for it.

## **ORDERS**

48. Within 30 days of this decision, I order the third party respondent strata to pay the applicant Super Save a total of \$549.19, broken down as follows:
  - a. \$538.38 in compensation, and
  - b. \$10.81 in pre-judgment interest under the COIA.

49. Within 30 days of this decision, I order Super Save to pay Magsen a total of \$134.45: \$125 for tribunal fees and \$9.45 in dispute-related expenses.
50. Super Save and Magsen are entitled to post-judgment interest under the COIA, as applicable. Super Save's remaining claims are dismissed.
51. 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.
52. 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