



Civil Resolution Tribunal

Date of Original Decision: April 23, 2020

Date of Amended Decision: April 24, 2020

File: SC-2019-009191

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Davy v. Kidwai*, 2020 BCCRT 442

B E T W E E N :

MICHAEL DAVY

APPLICANT

A N D :

AKHTAR KIDWAI

RESPONDENT

AMENDEDⁱ REASONS FOR DECISION

Tribunal Member:

Julie K. Gibson

INTRODUCTION

1. This dispute is about the purchase and sale of a parrot.
2. The applicant Michael Davy bought a male Eclectus parrot named Tiberius from the respondent Akhtar Kiwai for \$2,100. Unfortunately, less than 1 month later, Tiberius

tested positive for a virus called Psittacine Beak and Feather Disease (PBFD), which causes parrots serious health problems and early death.

3. The applicant says the respondent misrepresented Tiberius' health by telling him Tiberius was molting and had clipped wings but was otherwise healthy. The applicant says the respondent knew that Tiberius had PBFD but failed to disclose it. Based on the alleged misrepresentation, the applicant says he expected a healthy parrot. The applicant claims \$2,641.00, for a refund and veterinary bills.
4. The respondent says Tiberius did not look sick when he sold him to the applicant. He says the applicant had a thorough pre-purchase inspection and requested that Tiberius' wings be clipped. The respondent says \$2,100 was a fair market price for Tiberius. He says that live birds can catch airborne diseases during transportation or in a new location. The respondent asks me to dismiss the dispute.
5. The parties are each self-represented.

JURISDICTION AND PROCEDURE

6. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). 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.
7. 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.
8. 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.

9. Where permitted by section 118 of the CRTA, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

ISSUES

10. The issue in this dispute is whether the respondent misrepresented Tiberius' health or otherwise breached the parties' contract such that he must pay the applicant the claimed \$2,641.00.

EVIDENCE AND ANALYSIS

11. In this civil claim, the applicant must prove his claim on a balance of probabilities.
12. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision. For the following reasons, I allow the applicant's claim for damages arising from his purchase of Tiberius.
13. On about July 13, 2019, Tiberius was born.
14. It is undisputed, and I find, that Eclectus parrots typically live for 30 to 40 years.
15. The parties agree that, in July 2019, the respondent advertised Tiberius for sale on Kijiji. Neither party filed a copy of the Kijiji advertisement in evidence.
16. At the end of July or early August, the applicant paid the respondent a \$1,000 deposit toward the purchase of Tiberius.
17. On August 29, 2019, the respondent emailed the applicant to say that Tiberius was "healthy and happy" but had dropped some tail feathers due to molting.

18. The applicant inspected Tiberius. He noticed that Tiberius was missing some tail feathers, but thought this was due to Tiberius' diet, which had been seed only but would ideally include lots of fruits and vegetables.
19. The respondent agrees that Tiberius was missing some tailfeathers and says he thought this was due to molting. Molting is a healthy parrot's natural shedding process, during which parrots lose old feathers and grow new ones. The respondent denies knowing that Tiberius had PBFD. The respondent says his facility is clean and his other birds are not infected.
20. Based on the August 29, 2019 email, I find that Tiberius appeared well except for some missing tailfeathers at the end of August 2019. However, I find that the applicant has not proven that the respondent knew that Tiberius had PBFD. My reasons follow.
21. On September 5, 2019, the applicant bought Tiberius from the respondent. The applicant paid the respondent a \$1,100 balance to complete the purchase.
22. On September 15, 2019, the applicant emailed the respondent to say Tiberius was "doing great" and had "settled in well." Based on this email, I find that the applicant himself did not have concerns about Tiberius' health as of mid-September. This finding is consistent with the pre-purchase photograph of Tiberius sitting in a planter. The photograph shows intact wing and body feathers but does not show his tail.
23. On September 27, 2019, the applicant took Tiberius to see veterinarian Noëlle Webb. I find that the applicant took this step because, as the applicant put it "I was prompted by someone to get a vet review" after Tiberius lost tail and wing feathers.
24. Dr. Webb noted that Tiberius had tattered feathers and feather dust, meaning Tiberius was dropping a white powder produced by the feathers closest to his skin.
25. Because these feather and feather dust losses are common in PBFD, Dr. Webb tested Tiberius for the virus. Testing confirmed that Tiberius had PBFD. Dr. Webb

wrote that birds “usually contract this virus from a contaminated environment or directly from an infected bird.” I find that this opinion does not prove that the respondent knew that Tiberius had PBF, because the initial signs of disease looked, to the non-veterinary observers, like molting or dietary variations.

26. In an undated email to the applicant, Dr. Webb commented that Tiberius’ test for PBF was still pending, but initial laboratory test results lead her to believe that Tiberius was “...already experiencing some systemic side effects of the virus, especially considering the marked change in his physical appearance from our initial visit.” Based on this email, I find that while Tiberius looked healthy in late August, by late September he appeared obviously unwell.
27. On October 4, 2019, Dr. Webb issued a Certificate of Health confirming that Tiberius had tested positive for PBF. Dr. Webb reported that Tiberius had poor feather quality, with almost all tail feathers missing. Dr. Webb recommended that Tiberius be kept in quarantine and retested in 90 days to confirm persistent infection. Dr. Webb wrote “PBF is an extremely contagious and lethal virus; no contact with other birds, particularly parrots, should be allowed.”
28. By December 27, 2019, Dr. Webb noted that Tiberius’ condition had declined. His feather quality was then “quite poor”. By this time, Dr. Webb reported that Tiberius’ “clinical appearance” was much more pronounced and “typical of a bird with PBF.”
29. The applicant submits that the respondent made a fraudulent misrepresentation about Tiberius’ health. Specifically, the applicant says the respondent knew that Tiberius had PBF but led him to believe Tiberius’ tail feather loss was due to molting instead. The respondent says he did not know Tiberius was sick and genuinely believed his tail feather loss was due to molting.
30. A fraudulent misrepresentation is a false statement of fact that causes someone to enter into a contract.

31. The 4 elements of civil fraud, also known as fraudulent misrepresentation, are set out by the Supreme Court of Canada in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, at paragraph 21, as follows:
- a. A false representation made by the respondent;
 - b. Some level of knowledge of the falsehood of the representation on the part of the respondent (whether through knowledge or recklessness);
 - c. The false representation caused the applicant to act; and
 - d. The applicant's actions resulted in a loss.
32. If Tiberius had Pbfd at the time of the sale, then the respondent's representation that Tiberius was "healthy" was false. Given my analysis below, it is not necessary for me to determine whether Tiberius in fact had Pbfd at that time. I find that the representation induced the applicant to buy Tiberius.
33. However, I find that the applicant has not met the burden of proving that the respondent probably either knew that Tiberius had Pbfd or was reckless in not knowing. Even the applicant did not take Tiberius for a veterinary examination until a few weeks later, and only after a third party suggested he do so. There is also no evidence proving that the respondent knew of Tiberius' illness, or a Pbfd outbreak in British Columbia, at his own facility or in any of his other birds.
34. I also find that the applicant did not prove a fraudulent misrepresentation regarding Tiberius' clipped wings.
35. The *Sale of Goods Act* applies to "all chattels personal". A chattel is a thing that a person can possess in physical form. Based on this definition, I find that the *Sale of Goods Act* applies to Tiberius. My finding also accords with *Robertson v. Leyzac*, 2003 CanLII 24234 (ON SC) where the Ontario Superior Court applied the Ontario *Sale of Goods Act* to the sale of a barrel racing horse found unfit for barrel racing.

36. Section 18(c) of the *Sale of Goods Act* (SGA) says there is an implied warranty that a good will be durable for a reasonable period having regard to the use to which it would normally be put and to all the surrounding circumstances.
37. Had Tiberius been healthy, he would have lived for 30 to 40 years. Dr. Webb reports that Tiberius now has incurable Pbfd, requiring regular care and medications, limiting his lifespan to between weeks and several years.
38. In *Ta v. Vernon*, 2019 BCCRT 675, the tribunal considered the purchase of a puppy that suffered fatal seizures after only 10 months. At paragraph 22, the tribunal found that the puppy should have lived or been “durable” for at least 6 months, even given the unpredictability of health issues. While this decision is not binding on me, I find the analysis of durability for a young apparently healthy animal applicable here.
39. I find that there was an implied warranty in the parties’ contract that Tiberius would be healthy for at least 6 months, given the durability warranty under section 18(c). Instead, Tiberius became very ill within weeks of the applicant’s purchase. I find that the respondent breached the implied warranty under section 18(c).
40. The applicant seeks damages, noting that to return Tiberius would risk infecting other birds. I find that the applicant had some benefit from owning Tiberius. However, on a judgement basis, I find that the applicant has only received about 25% of the value he was entitled to under the contract. Therefore, I order a refund of 75% price paid which is \$1,575.
41. The applicant claimed \$541 in veterinary expenses as damages and \$427.67 in veterinary expenses as dispute-related expenses. Based on the receipts, I find that he proved \$928.61 in veterinary expenses relating to Pbfd diagnosis and treatment. Therefore, I find the respondent must also pay the applicant \$928.61 for veterinary costs as damages for breach of the implied warranty.
42. The *Court Order Interest Act* applies to the tribunal. The applicant is entitled to pre-judgement interest on the \$2,503.61 from February 4, 2020 the date of full payment for the veterinary costs, to the date of this decision. This equals \$10.83.

43. Under section 49 of the CRTA and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. The applicant was the successful party but did not pay tribunal fees so I make no order in this regard. I found that his claimed veterinary care dispute-related expenses were damages, addressed above.
44. I dismiss the respondent's \$200 claim for an "expert report on bird disease", because he was unsuccessful and did not file an expert report nor any receipt proving the expense.

ORDERS

45. Within 60 days of the date of this order, I order the respondent to pay the applicant a total of \$2,514.44, broken down as follows:
- a. \$1,575 in damages, as a refund of 75% of the price paid for Tiberius,
 - b. \$928.61 in damages, for veterinary care expenses, and
 - c. \$10.83 in pre-judgment interest under the *Court Order Interest Act*.
46. The applicant is entitled to post-judgment interest, as applicable.
47. Under section 48 of the CRTA, 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. The Minister of Public Safety and Solicitor General has issued Ministerial Order No. M086 under the *Emergency Program Act*, which says that tribunals may waive, extend or suspend a mandatory time period. The tribunal can only waive, suspend or extend mandatory time periods during the declaration of a state of emergency. After the state of emergency ends, the tribunal will not have this ability. A party should contact the tribunal as soon as possible if

they want to ask the tribunal to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

48. Under section 58.1 of the CRTA, 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.

Julie K. Gibson, Tribunal Member

ⁱ Under section 64 of the CRTA, I have made amendments to correct inadvertent typographical and calculation errors.