



# Civil Resolution Tribunal

Date Issued: June 19, 2020

File: SC-2020-000298

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kervin v. Roux*, 2020 BCCRT 685

BETWEEN:

JONATHAN KERVIN

**APPLICANT**

AND:

REBECCA ROUX

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Richard McAndrew

## INTRODUCTION

1. This claim is about the sale of a used phone. The applicant, Jonathan Kervin, says he purchased a used phone from the respondent, Rebecca Roux, for \$171, including shipping costs. Mr. Kervin says he electronically paid Ms. Roux \$171 but she did not deliver the phone. Mr. Kervin asks Ms. Roux to pay \$177, consisting of a full refund of \$171 for the phone and reimbursement of a \$6 court registry fee.

2. Ms. Roux initially said that Mr. Kervin did not purchase the phone or send her payment. Ms. Roux now says that she did send the phone to Mr. Kervin.
3. Both parties are self-represented.

## **JURISDICTION AND PROCEDURE**

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution CRT Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT 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 CRT may decide the format of the hearing, including by writing, telephone, videoconferencing, or a combination of these. Some of the evidence in this dispute amounts to a "he said, she said" scenario about what likely happened. Credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or CRT proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. 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 CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized the CRT's process and that oral hearings are not necessarily required where credibility is in issue.
6. The CRT 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 CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

7. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.
8. I note that Ms. Roux sent her submissions late. I find that this did not prejudice Mr. Kervin because he had an opportunity to reply. So, I have allowed Ms. Roux's late submissions.

## **ISSUE**

9. The issue in this dispute is whether Ms. Roux owes Mr. Kervin \$171 for a phone he paid for but she did not deliver.

## **EVIDENCE AND ANALYSIS**

10. I only reference the evidence and submissions as necessary to explain my decision. I note that Ms. Roux did not provide any evidence despite having the opportunity to do so.
11. Mr. Kervin says he saw Ms. Roux's online advertisement for the sale of a used phone for \$150. Mr. Kervin says he contacted Ms. Roux and she agreed to send the phone by courier for a total price of \$171. Ms. Roux provided her email address for an electronic transfer. Mr. Kervin provided electronic messages exchanged between the parties confirming this agreement. I am satisfied that the parties formed a contract to sell the phone for \$171, including shipping, on June 18, 2019.
12. Mr. Kervin says he electronically paid Ms. Roux \$171 on June 18, 2019. Ms. Roux says he not did pay her.
13. Mr. Kervin provided a bank statement showing a transfer of \$171 from his bank account on June 18, 2019. Mr. Kervin also referenced a transfer receipt dated June 18, 2019 (receipt) that he says shows that Ms. Roux accepted the \$171 payment. Mr. Kervin said this receipt was provided as an exhibit. However, the exhibit Mr.

Kervin referred to in his submissions was not the receipt. Rather, this document was actually a duplicate of another exhibit provided by Mr. Kervin.

14. I gave both parties an opportunity to make further submissions about the receipt. In response, Mr. Kervin submitted a copy of the receipt as evidence. Ms. Roux did not make a further submission. I find that Mr. Kervin's late delivery of the receipt did not prejudice Ms. Roux because she had an opportunity to reply. Accordingly, I have allowed the receipt as evidence.
15. The receipt shows that Mr. Kervin paid Ms. Roux \$171 on June 18, 2019. Based Mr. Kervin's submissions, Mr. Kervin's bank statement and the receipt, I find that Mr. Kervin paid Ms. Roux \$171 for the phone on June 18, 2019.
16. Mr. Kervin says that he never received the phone. Ms. Roux says sent the phone to Mr. Kervin. However, Ms. Roux did not provide any proof of shipping. The CRT can make an adverse inference against a party where, without sufficient explanation, they fail to produce expected supporting evidence (see *Port Coquitlam Building Supplies Ltd. v. 494743 B.C. Ltd.*, 2018 BCSC 2146).
17. In this matter, I would expect Ms. Roux to provide shipping confirmation if she had sent the phone. The central issue in this dispute is whether Ms. Roux sent the phone to Mr. Kervin. In these circumstances, proof of shipping would be very helpful in determining whether Ms. Roux performed the contract as claimed.
18. Ms. Roux says that she no longer had the shipping receipt by the time Mr. Kervin told her that he did not receive the phone a month later. However, I do not find this explanation credible because Mr. Kervin provided an electronic message showing that he asked her for a shipping tracking number on June 27, 2019, just 9 days after he bought the phone. Further, even if Ms. Roux did not keep the shipping information, she did not explain why she could not obtain another copy. In the parties' electronic messages, Ms. Roux said she was going to send the phone through a courier business owned by her daughter. Why was Ms. Roux unable to

obtain proof of shipping from her daughter? In the absence of an explanation of why she could not obtain another copy, I find Ms. Roux's explanation insufficient.

19. Ms. Roux says there was an unrelated incident that impacted her memory in the week after she sent the phone to Mr. Kervin. However, she provided no supporting documentation about the incident. In the absence of evidence, I do not find these submissions to be sufficient explanations for her failure to provide shipping proof.
20. For the reasons stated above, I find it appropriate to draw an adverse inference against Ms. Roux for her failure to provide such important evidence. Based on this adverse inference, I find that Ms. Roux did not send the phone to Mr. Kervin.
21. Further, even I did not draw an adverse inference against Ms. Roux for her failure to provide proof of shipping, I would still find that Mr. Kervin's version of events is more credible than Ms. Roux's.
22. I find that Ms. Roux's version of events about what happened does not have the ring of truth. Ms. Roux initially said that she did not send the phone because Mr. Kervin did not pay for it. Then Ms. Roux submits that she sent the phone but she discarded the shipping information. Ms. Roux does not explain this change in her position or why she shipped the phone to Mr. Kervin if he did not pay for it. I find Ms. Roux's version of events to be inconsistent and, as such, unlikely to be true. I find that Ms. Roux's version of events is not credible and I do not give it any weight.
23. For the reasons stated above, I am satisfied that Ms. Roux breached the contract by failing to deliver the phone to Mr. Kervin. I find that Mr. Kervin is entitled to damages equal to the amount he paid, being \$171.
24. The *Court Order Interest Act* applies to the CRT. Mr. Kervin is entitled to pre-judgement interest on the damages from June 18, 2019, the date he paid Ms. Roux, to the date of this decision. This equals \$3.36.
25. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable

dispute-related expenses. I see no reason in this case not to follow that general rule. I find Mr. Kervin is entitled to reimbursement of \$125 in CRT fees.

26. Mr. Kervin claims \$6 in dispute-related expenses. Mr. Kervin says he paid a \$6 court registry fee to locate Ms. Roux to commence this dispute. However, in the absence of a receipt or proof of payment, I find that Mr. Kervin has not proved this expense. Accordingly, I dismiss Mr. Kervin's request for reimbursement of dispute-related expenses.

## **ORDERS**

27. Within 30 days of the date of this order, I order Ms. Roux to pay Mr. Kervin a total of \$299.36, broken down as follows:
- a. \$171 as damages for non-delivery of the phone,
  - b. \$3.36 in pre-judgment interest under the *Court Order Interest Act*, and
  - c. \$125 for CRT fees.
28. Mr. Kervin is entitled to post-judgment interest, as applicable.
29. Under section 48 of the CRTA, the CRT 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 CRT's final decision. The Minister of Public Safety and Solicitor General has issued a Ministerial Order under the *Emergency Program Act*, which says that CRTs may waive, extend or suspend a mandatory time period. The CRT can only waive, suspend or extend mandatory time periods during the declaration of a state of emergency. After the state of emergency ends, the CRT will not have this ability. A party should contact the CRT as soon as possible if they want to ask the CRT to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

30. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT 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 CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

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Richard McAndrew, Tribunal Member