



Civil Resolution Tribunal

Date Issued: July 3, 2020

Files: SC-2019-008601 and
SC-2019-010083

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Berger v. Higham*, 2020 BCCRT 743

B E T W E E N :

DEVIN BERGER

APPLICANT

A N D :

PETER HIGHAM and CAROLYN HIGHAM

RESPONDENTS

A N D :

JONATHAN STEVE LEGINUS (Doing Business As DR. JOHN'S
PERFORMANCE)

RESPONDENT BY THIRD PARTY CLAIM

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about the sale of a Polaris Range RZR, an all-terrain vehicle (ATV), that ultimately was discovered to be stolen property. As set out in dispute SC-2019-008601, the applicant Devin Berger bought the unregistered ATV from the respondents Peter Higham and Carolyn Higham. Mr. Berger says that when he went to register the ATV on October 17, 2019, 3 days after he bought it, the ATV's VIN number showed up as stolen. It is undisputed Mr. Berger had to surrender the stolen ATV to the police. Mr. Berger paid \$5,500 for the ATV but as the Highams have since refunded him \$3,000 he has reduced his claim against them to \$2,500.
2. The Highams say they are a victim of fraud along with Mr. Berger, and it is undisputed they did not know the ATV was stolen property, until Mr. Berger told him it was.
3. Dispute SC-2019-010083 is Mr. Higham's third party claim against Jonathan Steve Leginus (doing business as Dr. John's Performance). On July 2, 2019, Mr. Higham bought the ATV from Mr. Leginus, about 3 months before the Highams sold it to Mr. Berger. Mr. Higham claims \$4,331.84, the amount Mr. Higham paid for the ATV plus amounts he spent repairing the vehicle. Mr. Higham says as Mr. Leginus operates a "storefront" he ought to have been more careful to not sell a stolen ATV.
4. Mr. Leginus denies knowing the ATV was stolen when he paid cash for it in June 2019 "as is where is". He says he sold the ATV to Mr. Higham "as is where is", less than a month after he bought it, because he decided it would be too much money and work to get it running.
5. The parties are each self-represented.

JURISDICTION AND PROCEDURE

6. 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 Tribunal 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.
7. The CRT 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.
8. 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.
9. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT 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.
10. As referenced above, Mr. Berger expressly reduced his claim to \$2,500, as the Highams refunded him \$3,000 after the CRT dispute began. Generally speaking, Mr. Leginus' liability to Mr. Higham in a third party claim is limited to whatever the Highams' liability is to Mr. Berger. Here, this is also because the Highams no longer have an interest in the ATV, having sold it to Mr. Berger for \$5,500. I find I can consider whether Mr. Higham is entitled to \$4,331.84 from Mr. Leginus even if the Highams are only ordered to pay \$2,500 in this decision, given the \$3,000 refund they have paid in the course of the CRT proceeding.

ISSUES

11. The issues in this dispute are:

- a. Are the Highams legally responsible for selling Mr. Berger a stolen ATV, such that they must refund its purchase price?
- b. If the answer above is yes, is Mr. Leginus legally responsible for selling Mr. Higham the stolen ATV, and if so must Mr. Leginus reimburse Mr. Higham if the Highams are ordered to refund Mr. Berger?

EVIDENCE AND ANALYSIS

12. In a civil claim such as this, the applicant Mr. Berger bears the burden of proof, on a balance of probabilities. Mr. Higham bears this same burden in his third party claim against Mr. Leginus. I have only referenced the evidence and submissions as necessary to give context to my decision. I note Mr. Leginus did not submit any evidence, despite being given the opportunity to do so.

13. I will deal with the sales of the ATV in chronological order. As referenced above, the ATV was transferred between the parties during a relatively short period of time in 2019. Mr. Leginus bought it in June 2019 and sold it to Mr. Higham in July 2019. Mr. Higham says he paid \$2,500 in cash, but Mr. Leginus says it was \$2,300. I have no evidence before me to assist in determining which version is correct, such as a contemporaneous text message, receipt, or a witness statement from anyone who addressed the purchase price. I am left with an evidentiary tie on this point, and since Mr. Higham bears the burden of proof in his claim against Mr. Leginus, I find Mr. Higham has only proved he paid \$2,300 for the ATV.

14. Mr. Higham claims he paid Mr. Leginus \$450 in labour charges to repair the ATV's transmission, which is undisputed and supported by their text messages in evidence. Mr. Higham also claims \$994.62 for his own labour in repairing the ATV, but there is no evidence before me to support this figure. In particular, there is no record of hours spent, or even what rate Mr. Higham used. Given the lack of

evidence, I find Mr. Higham is not entitled to \$994.62. However, it is undisputed he did some work on the ATV before selling it to Mr. Berger. Mr. Leginus' own evidence is that the work required to get the ATV running was going to be significant, as that is why he said he decided to sell it. So, on a judgment basis I find Mr. Higham's labour is worth \$600.

15. Mr. Higham also claims \$387.22 in Canadian dollars for parts he bought for the ATV, which I accept as it is supported by receipts in evidence. In total, I find Mr. Higham has proved he spent \$3,737.22 on the ATV.
16. In October 2019, through a Facebook advertisement the Highams sold the ATV to Mr. Berger, for \$5,500 on an "as is" basis. As noted above, a few days after purchase Mr. Berger discovered the ATV was stolen property.
17. I turn then to the parties' respective positions. As also noted above, it is undisputed that none of the parties had actual title or ownership of the ATV at any time, and that the ATV has been seized by the police.
18. Mr. Berger does not allege the Highams knew or ought to have known the ATV was stolen when they sold it to him, and based on the evidence before me I find they did not. In other words, Mr. Berger's claim is not based on misrepresentation. Rather, he essentially argues the Highams breached their contract as they sold him a stolen ATV.
19. Mr. Higham also does not allege Mr. Leginus misrepresented the ATV when he sold it. However, Mr. Higham says because Mr. Leginus works with vehicles and operates a "storefront", Mr. Leginus should have done due diligence to be sure he did not sell a stolen vehicle. I note there is no evidence Mr. Leginus is in the business of selling vehicles, but rather it appears his business relates to the repair of vehicles.
20. I turn now to the applicable law. In short, because each of the sellers in this dispute never had title to the ATV, they are bound to refund the respective innocent purchasers of the ATV. Contrary to Mr. Leginus' submission, the fact that Mr.

Higham could have done a pre-purchase search to determine if the ATV was stolen does not mean Mr. Higham is not an innocent purchaser. As noted, he did not know the ATV was stolen property, just as Mr. Leginus says he did not know.

21. Section 16 of the *Sale of Goods Act* (SGA) says, with limited exceptions that do not apply here, that there is an implied condition by the seller in a contract of sale that the seller has a right to sell the goods and that the buyer is to have “quiet possession” of the goods. There is also an implied warranty that the goods are free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before the contract is made. See *Ed Learn Ford Sales Ltd. v. Giovannone*, 1990 CarswellOnt 943, where the court found the defendant who sold a stolen car breached the statutory condition (a substantially similar provision to BC’s section 16) to deliver clear title. The court found the breach of that condition gave the plaintiff the right to either repudiate the contract or claim damages. See also *Ko v. Gill*, 2010 ABQB 247, where an innocent purchaser bought a stolen car that was later seized, and the plaintiff was entitled to recover the purchase price.
22. Section 26 of the SGA codifies the legal principle known as “*nemo dat quod non habet*”. Put plainly, this means that if goods are sold by someone other than the owner and without the owner’s consent (or conduct implying consent), the buyer acquires no better title to the goods than the seller had.
23. Professor G.H.L. Fridman in his text *Sale of Goods in Canada* states:

It is undoubtedly correct, however, that, where the buyer does not get title to the goods, by reason of the failure of the seller to fulfil the implied condition as to his right to sell the goods ... the buyer can assert a total failure of consideration, and reclaim the purchase price if it has been paid to the seller. ... This will be so even if the buyer has enjoyed possession and use of the goods for a period of time.

24. The purpose of section 26 of the SGA is the protection of property, so that the true owner’s interests are protected. The ATV’s true owner is not a party to this dispute.

However, I find section 26 is relevant because it establishes that none of the parties ever had title to the ATV, given it is undisputed that at all material times the ATV was stolen property.

25. Sections 28, 30 and 59 of the SGA are exceptions to the “*nemo dat*” rule, with the purpose of protecting commercial transactions (see *Manning v. Algard*, 2008 BCSC 1129). However, none of these exceptions apply and none of the parties argued they did. Briefly, section 28 deals with “voidable title” and as noted none of the sellers had title at all, so there was no “voidable title”. Section 59 deals with a sale by a “mercantile agent” or someone who is in business of selling the item and as noted neither the Highams nor Mr. Leginus were mercantile agents in the business of selling ATVs. Section 30 of the SGA is somewhat complicated but I find it does not apply as none of the parties in this dispute were the ATV’s true owner claiming for it (see *Holat v. Wettlaufer*, 2014 BCSC 425). In *Holat*, the true owner sued both the rogue who effectively stole the vehicle and the innocent person to whom the rogue sold the vehicle. In that case, none of the exceptions in section 28, 30 or 59 applied and the innocent purchaser had to give up the car, which effectively left the innocent purchaser with the only option of suing the rogue they bought it from.
26. In *ICBC v. Scheelar*, 2003 BCSC 677, the court noted that Mr. Scheelar had unknowingly bought a stolen vehicle, and that the Provincial Court in the underlying decision had found the various purchasers preceding Mr. Scheelar could recover from the sellers.
27. So, how does the law apply to the facts in these disputes?
28. Given the case law cited above and section 16 of the SGA, I find Mr. Leginus breached the implied condition of sale that he was giving good title to the ATV. Mr. Leginus cannot contract out of section 16 of the SGA on the basis the ATV was sold “as is where is”. Similarly, the Highams also breached section 16 of the SGA when they sold the ATV to Mr. Berger. Given the statutory provisions, I find I do not need to address the parties’ arguments about whether more due diligence would have disclosed the ATV’s stolen status.

29. Since the ATV was seized, I find the appropriate remedy is a full refund from the Highams. As noted, the Highams have already refunded \$3,000 of the \$5,500 purchase price, and so I order the Highams to pay Mr. Berger the remaining \$2,500.
30. Similarly, I find Mr. Leginus must pay Mr. Higham the \$3,732.22 I have found above Mr. Higham spent for and on the ATV before selling it to Mr. Berger. Whether Mr. Leginus can recover from the person who sold him the stolen ATV is not an issue before me.
31. The *Court Order Interest Act* (COIA) applies to the CRT. Mr. Berger is entitled to \$34.28 in pre-judgment interest on the \$2,500 ordered, from October 14, 2019 to the date of this decision. Similarly, Mr. Higham is entitled to \$72.92 in pre-judgment interest on the \$3,732.22, from July 2, 2019 to the date of this decision.
32. Under section 49 of the CRTA and the CRT's rules, a successful party is generally entitled to the recovery of their CRT fees. I find the Highams must reimburse Mr. Berger the \$175 he paid in CRT fees. I find Mr. Leginus must reimburse Mr. Higham the \$125 Mr. Higham paid in CRT fees. As Mr. Leginus was unsuccessful, I dismiss his claim for reimbursement of \$25 in paid CRT fees. No dispute-related expenses were claimed.

ORDERS

33. Within 30 days of this decision I order the Highams to pay Mr. Berger a total of \$2,709.28, broken down as follows:
 - a. \$2,500 in damages, as the balance of the \$5,500 purchase price for the ATV,
 - b. \$34.28 in pre-judgment COIA interest, and
 - c. \$175 in CRT fees.
34. Within 30 days of this decision I order Mr. Leginus to pay Mr. Higham a total of \$3,930.14, broken down as follows:

- a. \$3,732.22 in damages, for the money Mr. Higham spent on the ATV,
 - b. \$72.92 in pre-judgment COIA interest, and
 - c. \$125 in CRT fees.
35. Mr. Berger and Mr. Higham are each entitled to post-judgment interest as applicable.
36. 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 tribunals 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.
37. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of BC. 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 BC.

Shelley Lopez, Vice Chair