



# Civil Resolution Tribunal

Date of Original Decision: September 1, 2020

Date of Amended Decision: September 4, 2020

File: SC-2020-003146

Type: Small Claims

Civil Resolution Tribunal

Indexed as: Vela Ortez v. Azga Service Canada Inc. dba Allianz Global Assistance,  
2020 BCCRT 968

B E T W E E N :

SAMUEL VELA ORTEZ

**APPLICANT**

A N D :

AZGA SERVICE CANADA INC. dba ALLIANZ GLOBAL ASSISTANCE

**RESPONDENT**

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## **AMENDED REASONS FOR DECISION**

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Tribunal Member:

Rama Sood

### **INTRODUCTION**

1. This dispute is about an insurance claim. The applicant, Samuel Vela Ortez, says the respondent, Azga Service Canada Inc. dba Allianz Global Assistance (Allianz), refused to pay his insurance claim for his stolen iPhone. He seeks \$1,544.55 in damages for the value of the cell phone.

2. Allianz says it denied the claim because Mr. Vela Ortez<sup>i</sup> did not comply with the insurance policy's terms and conditions. It also says he made contradictory statements about how his iPhone was stolen.
3. Mr. Vela Ortez is self-represented. Allianz is represented by an articling student, Charlotte Chamberlain.

## **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 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.
5. The CRT 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.
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.

## **ISSUE**

8. The issue in this dispute is whether Allianz must pay for Mr. Vela Ortez's iPhone.

## EVIDENCE AND ANALYSIS

9. I have read all of the evidence provided but refer only to evidence I find relevant to provide context for my decision. In a civil proceeding such as this, the applicant must prove his claim on a balance of probabilities.
10. Mr. Vela Ortez says he was visiting Spain on August 16, 2019 at 1:00 AM when his iPhone was stolen. He says he was at a nightclub and had placed his “sackpack” containing his iPhone XS (iPhone) and wallet on a counter beside him so he could pay his bill. He says as he was paying, his sackpack was stolen, including his iPhone.
11. Mr. Vela Ortez also says on Aug 17, 2019, at 2:35 AM, he reported the theft to the police in Spain and completed a police report. The parties agree that on August 20, 2019, upon his return from Spain, Mr. Vela Ortez contacted Allianz by phone to report the theft. On August 21, 2019 Mr. Vela Ortez submitted a TD Insurance Purchase Security Claim Form (claim form) to Allianz for the iPhone. On September 25, 2019, Allianz denied Mr. Vela Ortez’s claim, stating that Mr. Vela Ortez did not practice due diligence and left his sackpack unsecured or unattended.

### ***Did Mr. Vela Ortez breach the policy’s terms and conditions?***

12. Allianz says it denied Mr. Vela Ortez’s claim for the stolen iPhone because Mr. Vela Ortez did not comply with several of the terms and conditions of the TD Credit Card Purchase Security and Extended Warranty Protection Group Policy (policy).
13. First, Allianz says Mr. Vela Ortez breached section 7 of the policy by waiting 26 hours to report the theft to the police in Spain. According to section 7, Mr. Vela Ortez must “immediately” notify the police or other authorities in cases of theft or burglary.
14. Did Mr. Vela Ortez fail to report the theft immediately? Based on the court’s decision in *McAnerin v. BC SPCA et al.*, 2004 BCSC 1430 at paragraph 25, I find “immediately” means “as soon as reasonably practicable in all the circumstances”.

15. Mr. Vela Ortez says he was unable to report the theft immediately after it occurred because he was with a friend who did not want to leave the nightclub. He also says he was unable to call an Uber to go to the police station since his iPhone was stolen. He also says he was unwilling to go the police station by himself because he was in a foreign country and it was very late at night.
16. I accept that it was reasonable for Mr. Vela Ortez to not go directly to the police station considering the time of night, that he was in a foreign country, and that he did not have the means to arrange transportation. While this may explain Mr. Vela Ortez's delay until noon or early afternoon, Mr. Vela Ortez did not explain why he waited until 2:35 AM the next day to report the theft. I find Mr. Vela Ortez failed to prove that he immediately reported the theft as required under section 7.
17. However, the concern with any delay in reporting is the potential prejudice to the insurer (see *Ball v. Insurance Corp. of British Columbia*, 1996 CanLII 1776 (BC SC)). I find Allianz has not shown any prejudice arising from the delay. For this reason, I find the delay was not an adequate reason to deny Mr. Vela Ortez's insurance claim.
18. Second, Allianz says the details in the police report, the claim form, and Mr. Vela Ortez's discussion with Allianz's agent on Aug 20, 2019 were "substantially inconsistent". Allianz says due to these inconsistencies, they considered the loss of the iPhone as a "mysterious disappearance" under section 4(b)(v) of the policy and it was therefore excluded from coverage. Allianz noted the following inconsistencies which I will review in further detail:
  - a. Allianz says Mr. Vela Ortez's statement in the claim form that he placed his backpack containing the iPhone on the counter while paying is inconsistent with the 5 page police report where he allegedly stated that "he had the phone, then he didn't". The police report is mainly a fill-in-the-blank form. I reviewed it carefully and I did not see any place where Mr. Vela Ortez described what happened to the iPhone. For this reason, I find there is no inconsistency and give no weight to this allegation.

- b. Allianz also says Mr. Vela Ortez stated on the claim form that the iPhone was in his sackpack and it was stolen while travelling in Spain. Allianz says this is inconsistent with his statement in the police report that he was at a nightclub. Again, I have carefully reviewed the claim form and I find Mr. Vela Ortez did not state that the sackpack was stolen while travelling in Spain. What Mr. Vela Ortez stated was that his phone was inside a sackpack, he placed the bag on the counter while completing a purchase, and the bag was snatched by an unknown person. He did not mention in the claim form that he was travelling in Spain at the time. However, since Allianz did not raise that omission as an issue, I will not consider it in my decision. I find Allianz has failed to show an inconsistency.
- c. Allianz also says Mr. Vela Ortez's statement that the iPhone was in his sackpack was inconsistent with his conversation with Allianz' agent when he confirmed that he had the phone on his person when it was stolen and was carrying the phone with him at all times. Section 17(1) of the *Insurance Act* states that an insurance contract is not rendered void or voidable unless an insured's misrepresentation or failure to disclose is material to the contract. The question of materiality is one of fact. I find whether the iPhone was physically on Mr. Vela Ortez or in a sackpack next to him on a counter is not a material misrepresentation. I find the distinction is irrelevant because, in either case, the iPhone was still in Mr. Vela Ortez's care and control.
19. Based on my reasons above, I find Allianz has not proved inconsistencies in Mr. Vela Ortez's various statements and so I find the loss of the iPhone was not an excluded "mysterious disappearance" under section 4 of the policy.
20. Allianz's third reason for denying Mr. Vela Ortez's claim is that it says Mr. Vela Ortez left the iPhone unattended and so was not duly diligent as required under section 7 of the policy. Section 7 states that the insured must use due diligence and do all things reasonable to diminish any loss of property. Mr. Vela Ortez denies he left the sackpack containing his iPhone unattended. He says he placed it beside him

on the counter while he paid for an item. The standard of due diligence requires that serious efforts be made, but the standard is not one of perfection and requires a person to take all reasonable steps (see *MacEachern v. Rennie*, 2009 BCSC 1858 at paragraph 12). I find that Mr. Vela Ortez acted reasonably by placing his backpack beside him on the counter. I find Mr. Vela Ortez was required to do so in order to access his wallet to pay for his purchase. There is no evidence that Mr. Vela Ortez left his backpack unattended or that he was not duly diligent.

21. I find Allianz did not prove Mr. Vela Ortez breached the policy and I find he is therefore entitled to coverage for his stolen iPhone. Mr. Vela Ortez provided a receipt which showed he paid \$1,544.55 for his iPhone and so I find Allianz must reimburse him this amount.
22. The *Court Order Interest Act* applies to the CRT. Mr. Vela Ortez is entitled to pre-judgement interest on the iPhone purchase from August 21, 2019, the date Mr. Vela Ortez submitted the claim loss form to Allianz, to the date of this decision. This equals \$27.19.
23. 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. Vela Ortez is entitled to reimbursement of \$125 in CRT fees. He did not claim any dispute-related expenses.

## **ORDERS**

24. Within 14 days of the date of this order, I order Azga Service Canada Inc. dba Allianz Global Assistance to pay Mr. Vela Ortez a total of \$1,696.74, broken down as follows:
  - a. \$1,544.55 as reimbursement for the iPhone,
  - b. \$27.19 in pre-judgment interest under the *Court Order Interest Act*, and

c. \$125 in CRT fees.

25. Mr. Vela Ortez is entitled to post-judgment interest, as applicable.
26. 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.
27. The Province of British Columbia has enacted a provision under the *COVID-19 Related Measures Act* which says that statutory decision makers, like the CRT, may waive, extend or suspend mandatory time periods. This provision is expected to be in effect until 90 days after the state of emergency declared on March 18, 2020 ends, but the Province may shorten or extend the 90-day timeline at any time. 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.
28. 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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Rama Sood, Tribunal Member

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<sup>i</sup> Amendment Notes – Amendments made to correctly identify the applicant's last name and to add the respondent's name in paragraph 24. These corrections are made under section 64 of the CRTA.