



Civil Resolution Tribunal

Date Issued: January 11, 2021

File: SC-2020-006769

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Tower Fence Products Ltd. v. Fitzpatrick*, 2021 BCCRT 29

BETWEEN:

TOWER FENCE PRODUCTS LTD.

APPLICANT

AND:

DANIEL FITZPATRICK

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Trisha Apland

INTRODUCTION

1. This dispute is over a residential fence project.
2. In about December 2019, Tower Fence Products Ltd. (Tower), built new fences and repaired an existing fence at the respondent Daniel Fitzpatrick's property. Mr.

Fitzpatrick undisputedly paid \$5,000 of Tower's \$6,919.50 invoice for the fencing work. Tower seeks the \$1,919.50 invoice balance, plus 24% annual interest.

3. Mr. Fitzpatrick denies the claims. Mr. Fitzpatrick says he paid Tower "top price" for the fence and did not get a "top job". Mr. Fitzpatrick asserts that the parties agreed the new fence would be consistent with his original fence and it is not. He says the top of the fence does not match with the rest of the fencing and there is a gap under the fence where his dogs can escape. I infer he is asking that I dismiss Tower's claims.
4. Tower is represented by an employee. The respondent is self-represented.

JURISDICTION AND PROCEDURE

5. 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). Section 2 of the CRTA states that 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 the dispute's parties that will likely continue after the CRT process has ended.
6. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. 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 in the interests of justice.
7. Section 42 of the CRTA says 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.

8. 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.

ISSUES

9. The issues in this dispute are:
 - a. Must Mr. Fitzpatrick pay Tower the \$1,919.50 invoice balance?
 - b. If so, is Tower entitled to the claimed 24% annual interest?

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, as the applicant Tower must prove its claims on a balance of probabilities.
11. I have read the parties' submissions, but only comment on the argument and evidence that I find relevant to provide context for my decision. I note that Mr. Fitzpatrick provided no documentary evidence for this proceeding despite being provided with a reasonable opportunity to do so.

Background

12. On September 13, 2019, Tower quoted 3 different types of fencing work for Mr. Fitzpatrick's property. The quote included: (a) installing 45 feet of wire deer fencing (\$2,450), (b) installing 30 feet of fencing at the front of the house (\$2,980), and (c) repairing the bottoms of 15 existing wood fence panels and 2 gates (\$3,430). The total quote was \$8,860, exclusive of GST. Mr. Fitzpatrick accepted the quote and the project was scheduled for December 3, 2019. These facts are undisputed and supported by the parties' emails.
13. On December 3, 2019, Mr. Fitzpatrick told Tower that he no longer needed it to do the front fencing (b) portion of the job. Mr. Fitzpatrick requested several other changes

to the job, which Tower agreed to do. These included changing the deer fencing material to wood, adding a section of wire fencing by the ocean boundary, and replacing a wood fence panel and some posts. Tower did not provide a new quote for the changes. None of this is disputed.

14. After installing the fences, Tower sent Mr. Fitzpatrick a January 4, 2020 invoice for \$6,919.50. Tower charged Mr. Fitzpatrick as originally quoted for installing the deer fencing (\$2,450) and the fence repair (\$3,430), plus an additional \$710 for the additional wood fence and posts. Tower did not charge for the wire fencing by the ocean boundary.
15. In May 2020 Mr. Fitzpatrick paid \$5,000 towards the January invoice. Tower says Mr. Fitzpatrick agreed to pay the balance if Tower returned to close-off a gap under a fence panel where his dogs could get out. I find this is supported by the parties' emails.
16. Mr. Fitzpatrick says he had been out of the country until early July 2020. The parties agreed Tower would return on July 28, 2020 to close-off the gap by adding a wood board. At Tower's request, Mr. Fitzpatrick emailed Tower a photograph of the gap. The photograph in evidence shows a gap under a corner of 1 fence panel.
17. A Tower employee undisputedly attended Mr. Fitzpatrick's property on July 28, 2020 to fix the gap. Tower says its employee came prepared with several boards in case there were extra gaps. Tower says instead, Mr. Fitzpatrick demanded the employee do other work and move a fence or "get off his property". The employee left without fixing the gap.
18. Mr. Fitzpatrick disputes that he demanded Tower's employee to leave his property for the above reason. Mr. Fitzpatrick says Tower's employee did not have "enough stuff" when they came to do the work and he told them to come back with it. By "stuff", I infer Mr. Fitzpatrick is referring to material to close the gap under the fence, though he does not specify.

19. I find Tower's version is somewhat supported by an email it sent Mr. Fitzpatrick the day after the interaction. I also find Mr. Fitzpatrick's version of events lacks plausibility. I find it unlikely that Tower would request a photograph of what needed to be done, schedule the work, have its employee go there, and either not send enough material or fail to return with the material to finish the task. If it did, it would have risked not getting paid the significant holdback. For these reasons, I prefer Tower's version of events. I find it more likely than not that Mr. Fitzpatrick required Tower's employee to leave the jobsite if they were unwilling to perform extra work.

Must Mr. Fitzpatrick pay Tower the \$1,919.50 invoice balance?

20. There is nothing in writing specifying the manner in which Tower would perform the fencing work. Nevertheless, there is an implied warranty in all contracts that the contractor will perform the work in a reasonably professional and competent manner (see *A.A.A. Aluminum Products Ltd. v. Grafos*, 2015 BCSC 2128).

21. Where a party asserts a deficiency in a contractor's work as Mr. Fitzpatrick does here, the burden of proof is on the party asserting the deficiency (see *Lund v. Appleford Building Company Ltd. et al*, 2017 BCPC 91 at para 124). So, to the extent Mr. Fitzpatrick seeks to avoid paying the invoice balance based on a deficiency, he carries the burden of proof.

22. There is no dispute that the gap was a deficiency. Within the context of this contract, I find it was negligible and not a fundamental breach of the contract. Normally, a contractor has the right to return to a worksite and repair deficiencies (*Meszarics et al v. Hart Modular Homes et al*, 2020 BCPC 234). As mentioned, I find Tower attempted to fix it and Mr. Fitzpatrick told its employee to leave. In the circumstances, I find Mr. Fitzpatrick was not entitled to withhold payment as he did not allow Tower to fix the gap. In any event, I find any potential cost to Mr. Fitzpatrick to fix the gap is likely offset by Tower adding the requested new wire fencing (at the ocean boundary) at no charge.

23. Apart from the gap issue, I cannot determine from reviewing the submitted photographs that there were other deficiencies in the fencing job. It is not clear from the photographs which portions of the fence were original and which were added by Tower. Also, the fence panels look like they are all the same pre-fabricated style. I note there is a portion of the fence that is different where the fence drops down in grade. This portion has extra boards along the top. Since it was deer fencing, I infer the boards were intentionally added for height, to compensate for the grade and keep deer out. Mr. Fitzpatrick does not say these particular boards were the alleged consistency issue, so I find they were not.
24. In the absence of an obvious defect, I find an assessment of the quality of this fencing job is technical and would require evidence from someone with expertise in the trade (see *Bergen v. Guliker*, 2015 BCCA 283). Mr. Fitzpatrick has submitted no objective expert evidence critical of Tower's fencing work. Without an expert opinion, I find that Mr. Fitzpatrick has not proven that the fencing job was of poor quality or inadequate for the price.
25. Overall, I find the fencing job was reasonably completed and Tower is entitled to full payment.
26. I find that Mr. Fitzpatrick must pay Tower the claimed \$1,919.50 invoice balance.

Is Tower entitled to the claimed 24% in annual interest

27. Tower claims contractual interest on the \$1,919.50 debt at a rate of 24% per year, starting February 4, 2020. There is no evidence that the parties had agreed to this interest rate. It is only set out in Tower's invoice.
28. The BC Court of Appeal stated in *N.B.C. Mechanical Inc. v. A.H. Lundberg Equipment Ltd.*, 1999 BCCA 775: "a right to charge interest cannot be based simply on a unilateral assertion in an invoice". I find Tower is not entitled to the claimed 24% annual interest rate, because Mr. Fitzpatrick never agreed to that rate. Instead, I find Tower is entitled to pre-judgment interest under the *Court Order Interest Act* on the

\$1,919.50 debt from February 14, 2020 to the date of this decision. This equals \$19.79.

FEES AND EXPENSES

29. 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 Tower is entitled to reimbursement of \$125 in CRT fees. Neither party claimed dispute-related expenses.

ORDERS

30. Within 30 days of the date of this order, I order Mr. Fitzpatrick to pay Tower a total of \$2,064.29, broken down as follows:

- a. \$1,919.50 in debt for the invoice balance,
- b. \$19.79 in pre-judgment interest under the *Court Order Interest Act*, and
- c. \$125 in CRT fees.

31. Tower is entitled to post-judgment interest, as applicable under the *Court Order Interest Act*.

32. 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 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.

33. 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.

Trisha Apland, Tribunal Member