



# Civil Resolution Tribunal

Date Issued: March 22, 2021

File: SC-2020-004724

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Svenson v. Powell*, 2021 BCCRT 318

BETWEEN:

SHERRY SVENSON and CHRIS SVENSON

**APPLICANTS**

AND:

GRANT POWELL

**RESPONDENT**

AND:

SHERRY SVENSON and CHRIS SVENSON

**RESPONDENTS BY COUNTERCLAIM**

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**REASONS FOR DECISION**

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Tribunal Member:

Eric Regehr

## **INTRODUCTION**

1. The respondent and applicant by counterclaim, Grant Powell, owns a house that he rents out as a vacation rental. The applicants and respondents by counterclaim, Sherry Svenson and Chris Svenson, agreed to rent the house for 1 month. The Svensons paid a \$1,000 deposit to secure the reservation. They say that the house was not as Mr. Powell had advertised and was dirty. They refused to stay. In this dispute, the Svensons ask for a return of the \$1,000 deposit.
2. Mr. Powell denies that he misrepresented the house and says that it was clean. In his counterclaim, he asks for \$2,601.66, which he says is the profit he lost because the Svensons cancelled at the last minute.
3. Ms. Svenson represents the Svensons. Mr. Powell is 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 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.
5. 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. In some respects, both parties of this dispute call into question the credibility, or truthfulness, of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. I note the decision *Yas v. Pope*, 2018 BCSC 282, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. Bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I decided to hear this dispute through written submissions.

6. 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.
7. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to pay money or to do or stop doing something. The tribunal's order may include any terms or conditions the CRT considers appropriate.

### ***Jurisdiction***

8. Under section 10 of the CRTA, the CRT must refuse to resolve a claim that it considers to be outside the CRT's jurisdiction. The RTB has exclusive jurisdiction over disputes about "tenancy agreements" under the *Residential Tenancy Act* (RTA). On its face, the parties' written contract appears to be a tenancy agreement because it uses the RTB's standard form contract.
9. Before the Svensons started this dispute, Mr. Powell had filed a dispute against the Svensons with the Residential Tenancy Branch (RTB). On September 18, 2020, the RTB dismissed Mr. Powell's case with leave to reapply because none of the parties showed up for a scheduled hearing. At my request, Mr. Powell confirmed that nothing has happened with the RTB case since then. The RTB did not rule on its jurisdiction to hear Mr. Powell's case.
10. Section 4(e) of the RTA says that the RTA does not apply to "living accommodation occupied as a vacation or travel accommodation". I asked the parties for submissions about the Svensons' intended use of the house, which they both provided. The Svensons say that they needed a short-term "vacation" property because their company had a job nearby. Mr. Powell says that this means that they were not using it for a vacation. The Svensons want this CRT dispute to proceed. Mr. Powell wants to reapply with the RTB.

11. The RTB's policy manual, which I provided to the parties, says that when deciding whether accommodations are used for "vacation or travel", the RTB will consider, among other things, how long the person is staying at the accommodation and whether it is their primary or permanent residence.
12. The parties' contract was for a fixed term of 1 month. It required the Svensons to vacate the house at the end of the month rather than automatically renewing. The Svensons were only going to use it while they and their employees were in Mr. Powell's community for a specific job. So, I find that it was not their primary residence during that time. I find that the Svensons intended to use the house for a travel purpose, even though they were not on vacation. Therefore, I find that the RTA does not apply and the CRT has jurisdiction to decide this dispute.

## **ISSUES**

13. The issues in this dispute are:
  - a. Did Mr. Powell fundamentally breach the parties' contract?
  - b. Are the Svensons entitled to a return of the deposit?
  - c. If the Svensons breached the contract, what are Mr. Powell's damages?

## **EVIDENCE AND ANALYSIS**

14. In a civil claim such as this, the Svensons as the applicants must prove their claims on a balance of probabilities. Mr. Powell must prove his counterclaims to the same standard. While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.
15. Mr. Powell advertised his house as a vacation rental on Airbnb. It is undisputed that he only rented out the house's upper portion while he lived in the lower portion with his family. I infer that both suites are self-contained.

16. Ms. Svenson contacted Mr. Powell through Airbnb in May 2020, asking about a potential 3-month rental. She said that she needed it for “the guys” to sleep instead of hotels, which I infer referred to Mr. Svenson and his employees. Ms. Svenson and Mr. Powell exchanged phone numbers and continued their discussion by text message.
17. Ms. Svenson and Mr. Powell agreed to a 1-month rental from June 8 to July 8, 2020, for \$3,100. The Svensons paid a \$1,000 deposit and, as mentioned above, signed a standard form residential tenancy agreement.
18. On June 8, 2020, Mr. Svenson arrived with at least 1 employee. Ms. Svenson was not there. Mr. Powell gave Mr. Svenson the keys.
19. There is no direct evidence from Mr. Svenson, but shortly after he checked in, Ms. Svenson texted Mr. Powell that the house was “not at all what he was expecting” because it was “super tiny”. She also said that they could hear people downstairs and that the house was “very dirty”. Mr. Svenson refused to stay in the house and left. Mr. Powell refused to return the \$1,000 deposit.

***Did Mr. Powell fundamentally breach the parties’ contract?***

20. While they do not use this language, the Svensons allege that Mr. Powell fundamentally breached the parties’ contract by misrepresenting the house in the Airbnb posting and by failing to provide a reasonably clean house.
21. Not every breach of a contract is a fundamental breach. The distinction matters because there are different remedies available to the wronged party. For most breaches of contract, the wronged party can claim monetary damages against the other party but the contract remains in force. For a fundamental breach, the wronged party can terminate the contract immediately and is relieved from further performance. See *Poole v. Tomenson Saunders Whitehead Ltd.*, 1987 CanLII 2647 (BC CA). So, if Mr. Powell fundamentally breached the contract, the Svensons were

entitled to terminate the contract, refuse to pay the remaining rent, and demand a refund of the deposit.

22. A fundamental breach occurs when a party fails to fulfill a primary obligation of a contract in a way that deprives the other party of substantially the whole benefit of the contract. See *Hunter Engineering Co. v. Syncrude Canada Ltd.*, 1989 CanLII 129 (SCC). Put another way, a fundamental breach is a breach that destroys the whole purpose of the contract and makes further performance impossible. See *Bhullar v. Dhanani*, 2008 BCSC 1202.
23. The Svensons main argument is that Mr. Powell's Airbnb posting was so misleading that they were entitled to terminate the contract. They say that the posting was for an entire house, but Mr. Powell resided in the lower suite, and that the house was small. They also say that the house was so dirty, including the smell of marijuana, that they could not stay.
24. There is no evidence that Mr. Powell made any representations about the house other than what was on the Airbnb posting. Neither party provided the entire Airbnb posting. Mr. Powell provided the "Introduction" of his Airbnb posting, which says in part, "my daughters and I enjoy calling this place our home as we occupy the separate suite on the bottom level throughout the summer". The Svensons say that this statement was not in the posting when they reviewed it. The Svensons rely on a different part of the posting, which categorizes the rental as an "entire house".
25. I find that I do not need to resolve the parties' contradictory evidence on this point. This is because I find that even if the posting did mislead the Svensons by implying that the rental was for a standalone building with no other suites, this is not serious enough to be a fundamental breach. Even if it was not what the Svensons were expecting, I find that the existence of a lower suite did not make it impossible for the Svensons to have stayed there or deprive them of the whole benefit of the contract.
26. As for the house's size, there is no evidence that the posting said anything about house's size other than that it had 3 bedrooms and 1 bathroom. The Svensons do

not say that this was inaccurate. So, I infer that the Svensons were unhappy with the size of the rooms, not the number of rooms. There are no photos of the house in evidence. So, I find that there is no evidence that Mr. Powell misrepresented the house's size.

27. As for the house's condition when Mr. Svenson arrived, the Svensons do not say how the house was dirty other than saying that Mr. Svenson smelled marijuana smoke. Mr. Powell says that the house was clean and that he does not smoke marijuana. There are no photos of the house's condition when Mr. Svenson checked in. Notably, there is also no evidence from the Svensons' employee, who they say refused to stay in the house because of its condition. I also note that Ms. Svenson's initial complaint to Mr. Powell said nothing about marijuana smoke. I find that the Svensons have failed to prove that the house was dirty.
28. For these reasons, I find that the Svensons have not proven that Mr. Powell fundamentally breached the contract. This means that the Svensons were not entitled to terminate the contract. This also means that by failing to pay the remaining rent under the contract, the Svensons breached the contract. I will address the Svensons' entitlement to the deposit's return below.
29. I note that the Svensons say that Airbnb allows guests to cancel within 24 hours of the start of their stay. However, the Svensons did not book the rental through Airbnb, so I find that Airbnb's terms do not apply.

### ***What are Mr. Powell's damages?***

30. Mr. Powell claims \$2,376.66 in lost revenue. He says that he lost 23 nights of revenue because he had blocked off 30 nights on his Airbnb calendar to accommodate the Svensons' stay. After they cancelled, he says that he was only able to re-rent it for 7 nights. He calculated a \$103.33 nightly rate by dividing the Svensons \$3,100 rent by 30 days, and multiplied this rate by 23 vacant nights.

31. I find that this is not the correct way to calculate Mr. Powell's damages. When a party breaches a contract, they must pay the innocent party the amount that would put them in the position they would have been in if the contract had been performed. Applied to this dispute, if the Svensons had not breached the contract, Mr. Powell would have received \$3,100 in rent.
32. This does not mean that Mr. Powell is entitled to \$3,100 in damages. Mr. Powell had to mitigate his damages, which means that he had to take reasonable steps to try to recoup the amount he lost. In the context of a nightly rental, I find that Mr. Powell had to try to rent the house out to other guests. His damages will be reduced by the amount he received or would have received if he had made reasonable efforts. The burden is on the Svensons to prove that Mr. Powell failed to mitigate his damages.
33. Mr. Powell provided his Airbnb calendar, which shows that there was only 1 guest during the time the Svensons were supposed to occupy the house, who paid \$1,326.91 for 7 nights.
34. Mr. Powell provided a statement from a witness, AK, who says that they phoned Mr. Powell on June 3, 2020, to inquire about renting the house. AK says that Mr. Powell said that the house was already booked. AK says that Mr. Powell called them on June 9, 2020, to see if AK was still interested, but by then AK had found somewhere else to rent.
35. The Svensons do not say what more Mr. Powell should have done to try to rent out the house after they cancelled. I find that Mr. Powell took reasonable steps to mitigate his damages.
36. I therefore find that Mr. Powell's damages are \$1,773.09, which is \$3,100 minus the \$1,326.91 he received from his guest.
37. The Svensons make several arguments about why Mr. Powell must return the deposit under the parties' contract. Because Mr. Powell's damages exceed the amount of the deposit, I find that I do not need to address these arguments. Even if



Mr. Powell had to pay the deposit back under the contract, the Svensons would still have to compensate him for breaching the contract. With that, I find that the appropriate result is to apply the \$1,000 deposit to offset Mr. Powell's damages. I find that Mr. Powell's net damages are \$773.09. I order the Svensons to pay him this amount. I dismiss the Svensons' claim for the deposit's return, as I have taken it into account in calculating Mr. Powell's damages.

38. The *Court Order Interest Act* (COIA) applies to the CRT. Mr. Powell is entitled to pre-judgment interest on his damages from June 8, 2020, the date that the Svensons were supposed to begin their stay, to the date of this decision. This equals \$2.59.
39. 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 find that neither party was entirely successful, so I decline to award any CRT fees or dispute-related expenses.

## **ORDERS**

40. Within 30 days of the date of this order, I order the Svensons to pay Mr. Powell a total of \$735.68, broken down as follows:
  - a. \$733.09 in damages, and
  - b. \$2.59 in pre-judgment interest under the COIA.
41. I dismiss Mr. Powell's remaining claims.
42. I dismiss the Svensons' claims.
43. Mr. Powell is entitled to post-judgment interest, as applicable.
44. 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.

45. 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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Eric Regehr, Tribunal Member