



Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Panayotof Schaan v. Beachcomber Marina Ltd.*, 2021 BCCRT 352

B E T W E E N :

ERIC PANAYOTOF SCHAAN and SANDRA BORTON

APPLICANTS

A N D :

BEACHCOMBER MARINA LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Leah Volkers

INTRODUCTION

1. This dispute is about boat moorage. The applicants, Eric Panayotof Schaan and Sandra Borton, rented a moorage slip from the respondent, Beachcomber Marina Ltd. (Beachcomber) to moor their boat for 4.5 months over the winter. The applicants say that during a storm, they discovered the moorage slip was not adequately

protected from winter weather, and they had to move their boat to another marina. The applicants are seeking a \$1,518.51 refund of the balance of their moorage fees.

2. Beachcomber says the applicants are not entitled to a refund under the parties' moorage rental contract. Beachcomber says the moorage slip was adequately protected from winter weather and was available for the applicants' use for the contract's duration.
3. The applicants are self-represented. Beachcomber is represented by its owner, Ian Barnes.

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. 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.
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. 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.
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 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 the applicants are entitled to a refund of 3.5 months moorage fees totaling \$1,518. 51.

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities. I have read all the parties' submissions but refer only to the evidence and argument that I find relevant to provide context for my decision.

Background and Parties' Positions

10. It is undisputed that the applicants agreed to pay Beachcomber \$1,855.22 in moorage fees to moor their boat at Beachcomber's marina for a fixed term of 4.5 months between October 15, 2020 and February 28, 2021. The parties' signed contract in evidence includes 2 pages of standard terms and conditions.
11. The applicants allege that the moorage slip did not adequately protect their boat from winter weather. The applicants say that on November 7 and 8, 2020, a storm caused them to become concerned that their boat was not safe in its current moorage location. They say the storm itself was not severe, but "produced a violent result for our vessel". They say they had to overnight on their boat to protect it from damage during the storm. They say several bumpers used to protect their boat were broken during the storm and some of their lines were chaffed and unusable, including a brand-new dock line. The applicants also say that parts of Beachcomber's main dock and their moorage slip were broken and there were "at least six structural issues in the area immediately around our boat". The applicants say that as a result, they had to move their boat to a different marina, where it would be better protected. It is

undisputed that the applicants moved their boat out of Beachcomber's marina on November 11, 2020. The applicants say they should be entitled to a refund because Beachcomber's moorage slip was not adequate.

12. Beachcomber says that the applicants are not entitled to a refund under the contract. Beachcomber does not dispute that the applicants were concerned about their boat but says that the moorage slip was adequate to protect the boat from winter weather. Beachcomber denies that the docks or mooring slip was damaged. Beachcomber also says that the applicants were offered a more protected moorage slip after the storm, but instead chose to move their boat to another marina.
13. The applicants provided extensive submissions and documentary evidence about the alleged effect of the storm on the moorage slip and their concerns. However, none of the parties submitted expert evidence to support their submissions on the adequacy of the moorage slip to protect the boat from winter weather. While the parties disagree as to whether Beachcomber's moorage slip was adequate, I find I do not need to resolve this discrepancy in the evidence. Here, the issue is whether the applicants are entitled to a refund of the balance of the moorage fees after they moved their boat to another marina. In deciding this dispute, I find that nothing turns on either the mooring slip's condition or the alleged reason the applicants moved their boat elsewhere.

Are the applicants entitled to a refund of the balance of moorage fees?

14. I find that the applicants are entitled to a refund of the balance of the moorage fees. My reasons follow.
15. On November 10, 2020, the applicants emailed Mr. Barnes to advise they were moving their boat to a different marina after observing "the amount of movement and damage the docks sustained last weekend". They requested Beachcomber refund the balance of their moorage fees.
16. On November 11, 2020, Mr. Barnes confirmed Beachcomber had offered them an alternative slip that "is far more protected". Mr. Barnes also admitted that there was

movement in the docks and slight damage to one of “the fingers” but denied that the docks were significantly damaged during the storm. Mr. Barnes said the applicants were shown the moorage slip before they accepted it. As for the applicants’ request for a refund, Mr. Barnes referred the applicants to “clause 18 in the Contract conditions...which would only be effected if and when the slip is relet”. Clause 18 is titled “moorage assignment/sublet/early contract withdrawal”. Clause 18 deals with the parties’ obligations when assigning or subletting moorage slips, which is not at issue in this dispute.

17. On November 12, 2020, the applicants wrote Mr. Barnes a second time, requesting a refund and reiterated their concerns that parts of Beachcomber’s marina were “not suitable to provide safe moorage during common winter weather”.
18. On November 13, 2020, Mr. Barnes responded to the applicants and advised they were only entitled to a refund if the moorage slip was sublet. Notably, Mr. Barnes also wrote:

“As I said before it is very unfortunate that we are all in this situation – but your choices are responsible. Both of the slips allocated to you are still vacant at this point in time so to minimize any monetary loss that you would suffer I will keep them open for you to bring your boat back until the end of this week-end (15th October), when they will then be returned to the “available” pool and we will move on from there without further contact” (my emphasis).

I infer from Mr. Barnes’ November 13, 2020 email that he intended to set a deadline of November 15, 2020, not October 15, for the applicants to return their boat to Beachcomber’s marina.

19. It is undisputed that the applicants did not return their boat to Beachcomber’s marina by November 15, 2020.
20. As stated in *Kuo v. Kuo*, 2017 BCCA 245, unless an agreement is terminated, parties must fulfill their obligations. Termination by repudiation occurs when a party shows

an intention not to be bound by the agreement and the other party accepts this repudiation.

21. Here, I find that the applicants had fulfilled their obligations under the contract. They had prepaid their moorage fees for the duration of the contract. As for the applicants' use of the moorage slip, the contract does not prohibit the applicants from removing their boat from Beachcomber's marina. To the contrary, the contract states that "this contract is for the provision of space only". So, I find the applicants were entitled to remove their boat from their moorage slip whenever they wished.
22. I do not find that the applicants' requests for a refund breached any of the terms or conditions of the contract. While the applicants may have hoped to be provided with a refund, I find that requesting one did not show an intention not to be bound to their contractual obligations. I say this because the applicants had already fulfilled their payment obligations under the contract and had no ability to withhold payment or breach any further payment obligations under the contract.
23. Beachcomber did not provide a refund and retained the benefit of the applicants' payment for the contract's duration. I find there was nothing preventing Beachcomber from refusing to give the applicants a refund and leaving the moorage slip empty and available for the applicants until the end of the term. Beachcomber chose to go a different route.
24. Here, I find it was Beachcomber that showed a clear intention not to be bound by the contract. Beachcomber repudiated the contract when Mr. Barnes advised the applicants that their moorage slip would be returned to the available pool if they did not return their boat to Beachcomber's marina by November 15, 2020. In doing so, Beachcomber showed an intention to withhold access to the applicants' prepaid moorage slip during the contract's term, in breach of the contract. I find the applicants accepted Beachcomber's repudiation of the contract when they did not return their boat to the moorage slip by November 15, 2020. This terminated the contract.

25. Beachcomber submits that the applicants' moorage slip was available for their use for the contract's duration. This is contrary to Mr. Barnes's email, above. I agree with the applicants that Mr. Barnes's email "effectively removed the availability of either slip to us, and severed the contract". The applicants say that in doing so, Beachcomber effectively blocked their ability to sublet the moorage slip to minimize their losses, which clause 18 of the contract would have permitted them to do. In light of the clear wording in Mr. Barnes's email that the moorage slip would be returned to the available pool if the applicants did not return their boat by November 15, I accept the applicants' submissions that they relied on Mr. Barnes's email to treat the contract as "severed".
26. While not specifically argued by Beachcomber, I note that clause 17 of the contract gave Beachcomber the right to terminate the contract at any time "in the event of a breach, non-performance or non-observance by the Owner of any of the terms and conditions herein contained". In that circumstance Beachcomber is entitled to keep the balance of the prepaid moorage fees. As discussed above, I find the applicants' removal of their boat from Beachcomber's marina and request for a refund did not breach any of the terms and conditions of the contract. Therefore, I find clause 17 is not applicable in this dispute.
27. The applicants' remedy for the breach and repudiation of the contract is damages. Damages for breach of contract are intended to place an innocent party in the position they would have been in if the contract had been carried out as agreed (see *Water's Edge Resort Ltd. v. Canada (Attorney General)*, 2015 BCCA 319 at paragraph 39). In this case, the applicants seek a refund of the balance of their prepaid moorage fees. I find this is reasonable.
28. Given my findings above that the contract was terminated, I find the applicants are entitled to a refund of their moorage fees from the date the contract was terminated, November 15, 2020, to February 28, 2021 (3.5 months).
29. The applicants claim the balance of moorage fees is \$1,518.51. I do not accept this is the accurate amount.

30. The contract sets out how the moorage fees are calculated. The moorage fees were charged at a monthly rate of \$10.28 per foot, or \$9.77 per foot if paid by October 4, 2020, plus GST. The applicants were also charged \$2.00 per month for dock lighting, plus GST. The applicants' boat is listed as 40 feet in length. It is undisputed that the applicants paid the reduced monthly rate of \$9.77 per foot. This results in a total monthly rate of \$390.80 plus dock lighting.
31. I find the applicants are entitled to a refund of \$1,443.60 for 3.5 months' moorage fees including GST (\$1,436.25 for moorage fees and \$7.35 for dock lighting).
32. The *Court Order Interest Act* applies to the CRT. The applicants are entitled to pre-judgment interest on the balance of the moorage fees from November 15, 2020, the date of the contract termination to the date of this decision. This equals \$2.41.
33. 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 the applicants are entitled to reimbursement of \$125 in CRT fees. The applicants did not claim any dispute-related expenses, and so I award none.

ORDERS

34. Within 30 days of the date of this order, I order Beachcomber to pay the applicants a total of \$1,571.03, broken down as follows:
 - a. \$1,443.60 as reimbursement for 3.5 months of moorage fees,
 - b. \$2.43 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$125 in CRT fees.
35. The applicants are 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 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.

37. 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.

Leah Volkers, Tribunal Member