Civil Resolution Tribunal

Date Issued: April 13, 2021

File: SC-2020-007913

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Irshman Enterprises Inc. v. 0989761 B.C. Ltd.*, 2021 BCCRT 385

B E T W E E N :

IRSHMAN ENTERPRISES INC.

APPLICANT

A N D :

0989761 B.C. LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Sarah Orr

INTRODUCTION

1. The applicant, Irshman Enterprises Inc. (Irshman), and respondent, 0989761 B.C. Ltd. (098), own 2 adjacent buildings. Irshman rents part of its building and parking

lot to a daycare. Irshman says 098's subcontractors pressure washed a concrete on 098's property which left lead paint chips in the daycare's parking lot and playground area. Irshman claims $808.50 for the cost of environmental testing, $1,441.65 for the cost of the site cleanup, and $1,575 for the cost of disruptions to the daycare's regular operations, for a total of $3,825.15.

2. 098 says it is it is not the proper party to this dispute because it is not liable for the acts or omissions of its independent contractor or subcontractors. It also says Irshman unreasonably refused to allow its contractor and subcontractors access to the concrete wall to complete their work and clean up the site. It says it does not owe Irshman anything.

3. Each party is represented by an employee or principal.

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. Some of the evidence in this dispute amounts to a "they said, they said" scenario. Credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanor in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. 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. I also note the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized the tribunal's process and that oral hearings are not necessarily required where credibility is in issue.

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.

8. Both parties submitted some late evidence. However, I find each party had the opportunity to respond to the other's late evidence in their submissions, so neither party would be prejudiced by admitting the late evidence. So, I have admitted and reviewed the late evidence and considered it in my decision.

ISSUES

9. The issues in this dispute are:

    a. Did the paint chips on Irshman's property constitute a nuisance?

    b. If so, is 098 liable for a nuisance caused by its contractor or subcontractors?

    c. Is Irshman entitled to $3,825.15 or another amount in damages?

EVIDENCE AND ANALYSIS

10. In a civil claim like this one, the applicant Irshman must prove its claims on a balance of probabilities. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision.

11. The basic facts are largely undisputed. In July 2020, 098 hired Macbeth Roofing (Macbeth) as its general contractor to perform work on its property. Macbeth is not a party to this dispute. On July 30, 2020, one of Macbeth's subcontractors pressure washed a concrete wall on the west side of 098's building along the property line with Irshman's property, leaving a significant amount of paint chips on the daycare's playground and parking lot. On July 31, 2020, the subcontractor returned to clean up the site but Irshman prevented them from entering its property to do any work because it was concerned that disturbing the paint chips could release toxic dust. On August 4, 2020, Irshman notified Macbeth that it would not allow it or its subcontractors to resume working on its property until they sent it insurance documents, site safety plans, and other specific safety information.

12. Macbeth had the paint chips tested and on August 7, 2020, it received a lab report through DG Environmental & Testing Ltd. (DG Environmental) stating that the paint chips contained lead and that a qualified person should be consulted for proper removal and disposal of the paint chips (first report). For unexplained reasons Macbeth did not disclose the first report to Irshman until 12 days later, on August 19, 2020. Immediately after receiving the first report, Irshman hired DG Environmental to visit the site, complete a full report about the risk of the paint chips, and recommend a safe cleanup and restoration procedure.

13. On August 28, 2020, Irshman received a report from DG Environmental (second report). The second report states that after a site inspection and lab testing, the paint chips were determined not to be leachable, meaning their lead content would not absorb into the soil or groundwater. The second report recommended that all paint chips should be removed from the daycare's parking lot and playground area. It also recommended a thorough cleaning of any surfaces that may have been in

the playground area since the July 30, 2020 work because lead paint dust had settled there. Irshman hired a contractor who cleaned the site on September 6, 2020.

Did the paint chips on Irshman's property constitute a nuisance?

14. Irshman says Macbeth and its subcontractors entered its property without permission on July 30, 2020 to work on the concrete wall, while 098 says Macbeth and its subcontractors had permission from one of the daycare's co-owners. However, I find it is unnecessary for me to resolve this point, because I find Irshman's claims are in nuisance rather than trespass. Trespass to land occurs when someone enters the land of another without lawful justification and **directly** interferes with that land. If a person's use of their own land **indirectly** affects another's land, that is a nuisance as opposed to a trespass (emphasis mine) (see *Lahti v. Chateauvert*, 2019 BCSC 1081).

15. Irshman does not claim that 098, Macbeth, or its subcontractors directly interfered with or damaged its land. Rather, Irshman's claim for damages flows from 098's subcontractor's use of 098's land (pressure washing its wall), which indirectly affected Irshman's land by leaving paint chips on its property. So, I find Irshman's claim is in nuisance rather than trespass, even though it did not specifically frame it that way. As such, I find nothing turns on whether or not Macbeth and its subcontractors had permission to enter Irshman's property on July 30, 2020.

16. A nuisance is a substantial and unreasonable interference with the use and enjoyment of property which is intolerable to an ordinary person. Factors to consider in determining whether an interference is intolerable include the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the applicant's use, and the utility of the activity. The focus is on the harm suffered rather than on the prohibited conduct (see *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64 at para. 77).

17. It is undisputed that the paint chips contained lead and that they were strewn across a playground and parking lot used for a daycare. It is also undisputed that the daycare took its children to alternate outdoor areas between July 30 and September 4, 2020 to avoid potential lead exposure to any of its staff or children. The parties dispute who was responsible for the delay in removing the paint chips, and I address this in more detail below. However, given the inherent danger in the daycare children's potential lead exposure, I find the paint chips were an intolerable interference with Irshman's property regardless of how long they were there. On balance, I am satisfied that the paint chips were a nuisance.

Is 098 liable for a nuisance caused by its contractor or subcontractors?

18. Irshman says that because it has no contractual relationship with Macbeth or its subcontractors, its claims are against 098 as the property owner. On the other hand, 098 says that it is not responsible for the acts or omissions of Macbeth or its subcontractors.

19. A property owner is not an insurer, and so they are not automatically liable for a nuisance emanating from their land. In circumstances like this dispute where the property owner did not actively create the nuisance, they will not be found liable in nuisance unless they knew or should reasonably have known about a potential nuisance and failed to take reasonable steps to remedy the situation (see *Lee v. Shalom Branch #178*, 2001 BCSC 1760). So, I must determine when 098 knew or reasonably should have known about the lead paint chips on Irshman's property, and whether it failed to take reasonable steps to remove them.

20. Irshman says both Macbeth and 098's property manager advised it that 098 was receiving almost daily updates on the paint chip situation, but it does not specify when 098 first learned of the situation. 098 says it contacted its property manager in August 2020 about the issues related to this dispute, so I find it knew about the nuisance at some point in August 2020. 098 says its property manager advised it that the matter should be handled by Macbeth. However, I find that as the property

owner, once 098 learned of the nuisance it had an obligation to remedy it, despite any contradictory advice it may have received from its property manager.

21. On balance, I find it more likely than not that 098 learned of the nuisance by August 4, 2020. That is when Irshman notified Macbeth that it would not be allowed on Irshman's property until it sent certain safety documents, including a copy of 098's insurance policy. At that point Macbeth's work had been delayed since July 31, 2020, and the August 4, 2020 email caused a further delay as it required Macbeth to gather a significant amount of information. As the property owner, I find 098 would have been made aware of the reason for the continued delay.

22. On the evidence before me, I find that once 098 learned of the nuisance on August 4, 2020, it failed to take reasonable steps to remedy it. 098 says Macbeth and its subcontractors were ready and willing to clean up the paint chips on July 31, 2020, but that Irshman unreasonably refused to allow them to work. However, at that point it was unknown whether the paint chips contained lead, and Irshman was concerned that disturbing the paint chips could release toxic dust into the air. In the circumstances I find this was a reasonable concern, and I find it was not unreasonable for Irshman to prevent the work on July 31, 2020.

23. There is no evidence that 098, Macbeth or any of its subcontractors responded to Irshman's August 4, 2020 request for documents until September 3, 2020, almost a month later. While Macbeth did have the paint chips tested for lead in the first week of August 2020, I find it was unreasonable to delay sending the first report to Irshman for 12 days. There is also no evidence that 098, Macbeth, or its subcontractors consulted or intended to consult a qualified person about a safe cleanup protocol as recommended in the first report, or that any of them were qualified to conduct such a cleanup.

24. 098 says Irshman expressed no urgency to have the paint chips removed until its September 1, 2020 email. While I agree that Irshman specifically asked 098 to expedite the issue on September 1, 2020, I find Irshman's actions and communications throughout August 2020 consistently demonstrated that it deemed the matter to be urgent. I also note that on August 28, 2020 when it received the second report it immediately forwarded it to Macbeth and asked if it still wished to cleanup the site. Macbeth failed to respond until Irshman sent further emails on September 1, 2020.

25. 098 says Irshman was negligent for leaving lead paint out in the open for so long, but it did not file a counterclaim, so I decline to address this allegation. 098 also says Irshman's delay in allowing the site to be cleaned led to water damage in 098's building wall which caused 098 to incur additional costs. It submitted a statement from CM of Summit Steel Cladding who said 098's tenants were suffering from moisture problems caused by problems with the wall. However, 098 provided no other details or evidence about these claims or the alleged costs incurred, so I decline to address them in this decision.

26. 098 also says it was unreasonable for Irshman to hire someone to clean up the paint chips when Macbeth and its subcontractors were ready and willing to do so. However, I have already found it was reasonable for Irshman to prevent Macbeth or its subcontractors from immediately cleaning up the paint chips without first determining a safety protocol for dealing with potential lead contamination. After what I have already found was an unreasonable delay in sending Irshman the first report, 098's failure to take the recommended steps in that report, and some miscommunications with Macbeth in September 2020, I find Irshman reasonably lost trust in Macbeth and its subcontractors. I find that in the circumstances, it was reasonable for Irshman to hire someone else to clean up the paint chips.

Is Irshman entitled to $3,825.15 or another amount in damages?

27. Irshman claims $808.50 for the second report and submitted DG Environmental's August 28, 2020 invoice for that amount. I have already found it was unreasonable for Macbeth to wait 12 days between receiving the first report and sending it to Irshman, and that during that 12-day period neither 098, Macbeth, nor any of its subcontractors followed the first report's recommendation to consult a qualified person about proper cleanup protocols. Irshman received the report on August 19, 2020 and hired DG Environmental for the second report that day. In the circumstances, and particularly given the potential risk of lead exposure to the daycare children, I find it was reasonable for Irshman to hire DG Environmental on August 19 for the second report. So, I find 098 must reimburse Irshman $808.50 for the second report.

28. Irshman claims $1,441.65 for the cost of site cleanup. It submitted Jadco Consultants Inc.'s September 7, 2020 invoice for $1,469.11 which shows it took 4 hours to clean the site. Irshman did not explain the discrepancy between the amount claimed and the amount of the invoice, so I find at most it is entitled to the $1,441.65 claimed. I have already found that it was reasonable for Irshman to incur this expense. However, 098 disputes the amount of the invoice, and says the cleanup took only 2 hours. 098 submitted a statement from DS, a representative of Macbeth, who said he went to the building at 10:00 a.m. on September 6, 2020 at which time the cleanup was finished. DS said that while on site that day they spoke with one of Irshman's tenants, CR, who told him the cleanup took approximately 2 hours. 098 submitted a statement from CR which is consistent with DS's statement.

29. Irshman submitted 2 photos from the cleanup on September 6, 2020, one taken at 9:37 a.m., and one taken at 11:28 a.m. 098 says that since the photos were taken only 2 hours and 11 minutes apart, they do not support Irshman's position. However, Irshman says that if DS went to the building at 10:00 a.m. on September 6, 2020 they would have seen the cleanup happening. Irshman says the cleanup costs were not embellished or overpriced.

30. On balance, I prefer Irshman's evidence on this point. I find the photographs are the best evidence of the timing of the cleanup, and DS's and CR's statements are inconsistent with that timing. I find 098 must reimburse Irshman the $1,441.65 claimed for the Jadco invoice.

31. Irshman also claims $1,575 for daycare expenses. It submitted a September 7, 2020 invoice from the daycare for $1,500. Irshman did not explain the discrepancy between the two amounts, though I infer that it added 5 percent as taxes. However, I find there is no evidence Irshman paid the daycare more than $1,500, so I find at most it is entitled to $1,500.

32. The daycare invoice charged $1,000 for its inability to use the parking lot or playground. They say staff and clients had to find alternate parking for 4 weeks and they had to coordinate additional staff for field trips and walks for up to 24 children daily for over 5 weeks to comply with childcare licensing requirements. The daycare also charged $500 for administrative time for coordinating health and safety plans related to the paint chips; arranging alternate parking, field trips, and walks; and communicating with licensing authorities, staff, and clients about the issue.

33. 098 does not specifically dispute the amount of the daycare invoice. However, in response to the daycare's claim that 6 parking stalls were inaccessible until the site was properly cleaned, 098 says, "people park all over that [parking] lot." It is unclear exactly what this means. On balance, I find the amount of the daycare invoice is reasonably connected to the nuisance. However, although the daycare's operations were affected by the paint chips starting July 31, 2020, I have found that 098 did not learn about the nuisance until August 4, 2020. I find that 098 was unaware of the nuisance for 2 of the 25 weekdays on which the daycare's operations were affected by the paint chips, so I reduce the reimbursable amount of the daycare invoice by 8 percent to account for those 2 days. I find 098 must reimburse Irshman $1,380 for the daycare invoice. In total, I find 098 must reimburse Irshman $3,630.15 for the second report, the cleanup costs, and the daycare invoice.

34. The *Court Order Interest Act* applies to the CRT. Irshman is entitled to pre-judgment interest on the $3,630.15 owing, calculated from September 14, 2020, which is the date of its consolidated invoice, to the date of this decision. This equals $9.46.

35. 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. Since Irshman was mostly successful I find it is entitled to reimbursement of its CRT fees in the amount of $175. It did not claim any dispute-related expenses.

ORDERS

36. Within 30 days of the date of this order, I order 098 to pay Irshman a total of $3,814.61, broken down as follows:

    a. $3,630.15 as reimbursement for the invoices,

    b. $9.46 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $175 CRT fees.

37. Irshman is entitled to post-judgment interest, as applicable.

38. 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.

39. 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.

Sarah Orr, Tribunal Member