



# Civil Resolution Tribunal

Date Issued: May 11, 2021

File: SC-2020-008051

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kim v. Superbug Pest Control Ltd.*, 2021 BCCRT 497

**B E T W E E N :**

KATE KIM

**APPLICANT**

**A N D :**

SUPERBUG PEST CONTROL LTD.

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

David Jiang

## **INTRODUCTION**

1. This dispute is about who should pay for veterinary bills. The applicant, Kate Kim, says the respondent, Superbug Pest Control Ltd. (Superbug), negligently applied ant poison at her residence, causing her cat to fall ill. Ms. Kim alleges that Superbug used

a pesticide containing pyrethrins, which she says is toxic to cats. She seeks reimbursement of \$2,049.89 for 2 veterinary bills incurred on August 14 and 15, 2020.

2. Superbug denies the claim. It says it used a pet-safe insecticide without any pyrethrins in it. It also says it placed the insecticide in areas that would have been inaccessible to the cat.
3. Ms. Kim represents herself. Superbug's employee or principal, MA, represents Superbug.
4. For the reasons that follow, I dismiss Ms. Kim's claims.

## **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. Some of the evidence in this dispute amounts to a "they said, she said" scenario. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour 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. 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. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38,

the British Columbia Supreme Court recognized the CRT's process and found that oral hearings are not necessarily required where credibility is an issue.

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.

## **ISSUE**

9. The issue in this dispute is whether Superbug negligently applied insecticide and if so, what remedy is appropriate.

## **BACKGROUND, EVIDENCE AND ANALYSIS**

10. In a civil proceeding like this one, Ms. Kim as the applicant must prove her claims on a balance of probabilities. I have reviewed all the parties' submissions and evidence, but only comment on them as necessary to explain my decision.
11. I begin with the undisputed background facts. Ms. Kim's landlord hired Superbug to inspect and potentially treat Ms. Kim's rental unit for ants. MA visited Ms. Kim on Superbug's behalf on August 11, 2020. He detected an ant infestation and applied insecticide.
12. Ms. Kim asked MA at the time if the insecticide used would be safe for her cat, and MA said yes. As noted above, MA also submits that he placed insecticide in areas that the cat could not reach.
13. Ms. Kim says, and I accept, that her cat began to show signs of illness on August 12, 2020. Ms. Kim took her cat to the veterinarian the next day. The veterinarian ran tests

and treated the cat. The parties agree that the veterinarian said the cat suffered from “toxic poisoning”. Ms. Kim subsequently exchanged messages with MA via WhatsApp, about what insecticide he used. The insecticide used is a significant point of disagreement between the parties, so I discuss it in detail below.

### ***The Insecticide Used***

14. Ms. Kim says MA used an insecticide named Scorpio Ant Granule (Scorpio). Ms. Kim places significance on this because it is undisputed that Scorpio contains pyrethrins. As stated earlier, Ms. Kim says this substance is toxic to cats. MA disagrees he used Scorpio. He says Scorpio is “for outdoor use only and not pet-friendly” but disagrees it caused the cat’s illness.
15. For the following reasons, I find it likely that MA did use Scorpio.
16. After her cat became ill, Ms. Kim asked MA what products he used via WhatsApp. MA replied by sending 2 pictures. One was for a labelled container of Scorpio and another was for a container of another insecticide, Niban. I find the most reasonable inference is that Superbug used both Scorpio and Niban. MA says he sent the picture of the Scorpio container by accident. I do not find MA’s explanation persuasive. He did not correct himself in the WhatsApp messages in evidence. MA says there are other messages that support his version of events. However, he says he deleted them, so I am unable to rely on them. I also have some difficulty accepting MA’s explanation that he deleted them to “increase my phone’s space”.
17. Other evidence supports my conclusion. Ms. Kim took pictures of a pink powdery substance and grainy yellow substance that I find MA applied to various areas of her residence. In some pictures the 2 substances are shown next to each other. Ms. Kim provided the pictures to TT, a business manager for the manufacturer of Scorpio. TT wrote in an undated email that the “pink-red product does look like Scorpio Ant Granule”. He wrote that the “yellow product is not our product”.
18. MA relies on an August 11, 2020 service report he filled out, which says he applied “Niban Boric Acid” under the cabinet and “domestic grade disinfectant” in the kitchen.

The report does not mention Scorpio. He also says he only purchased 1 container of Scorpio and provided a picture of it with its seal still on. MA says the pink substance could be rodenticide someone else applied or rodent droppings.

19. Ultimately, I place the greatest weight on the WhatsApp messages on this issue. They are consistent with the photos and TT's email. I place less weight on the service report. I find the most likely explanation for the evidence is that Superbug, through MA, used both Scorpio and Niban in Ms. Kim's residence.

***Did Superbug negligently apply insecticide?***

20. Ms. Kim says that Superbug was negligent. The test for negligence is set out by the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paragraph 3. In order to succeed in a negligence claim, Ms. Kim must prove 1) Superbug owed Ms. Kim a duty of care, 2) Superbug breached the standard of care, 3) Ms. Kim sustained a loss, and 4) the loss was caused in fact and in law by Superbug's negligence. The fourth factor considers whether the loss is too remote to warrant recovery
21. I am not persuaded that Superbug breached the standard of care. In claims of professional negligence, an applicant generally must prove a breach of the standard of care through expert opinion evidence. This is because the applicable standard is generally outside the knowledge or experience of an ordinary person. See, for example, *Bergen v. Guliker*, 2015 BCCA 283 at paragraph 119.
22. I find Ms. Kim's claims are for professional negligence as this dispute is about the proper selection and use of insecticide. Ms. Kim did not provide any expert opinion evidence. I acknowledge that Scorpio's container label and data sheets say Scorpio is for outdoor use only. However, TT also wrote in his email to Ms. Kim that Scorpio was "not a highly toxic product" and that it could be legally used indoors in the USA, though not Canada. MA also says he applied the insecticide in areas that the cat could not reach. In these circumstances, I do not find it clear that Superbug breached

the standard of care by not following the label or data sheets for Scorpio and using it indoors.

23. I note that TT's email is not expert opinion evidence because his qualifications are not stated as required by CRT rule 8.3(2). TT also did not provide any opinion on the applicable standard of care.
24. More significantly, I do not find Ms. Kim has proven that Superbug caused any loss by using Scorpio. Ms. Kim says Scorpio contains pyrethrins and is "well known to be potentially fatally toxic to cats". The Scorpio label shows it contains "Pyrethrins 0.175%". However, I do not find it to be a generally known fact that pyrethrins would be harmful to cats, or that Scorpio contains enough pyrethrins to harm cats. While CRT members have previously taken judicial notice of health hazards, this has been limited to notoriously dangerous substances such as secondhand smoke. See, for example, *Bahmutsky v. Petkau*, 2020 BCCRT 244 at paragraph 38.
25. I find the submitted evidence falls short of proving that pyrethrins or Scorpio caused the cat's illness. I have carefully reviewed the veterinary records in evidence. They provide no diagnosis or explanation for the cat's symptoms. The parties agree the veterinarian said to Ms. Kim that her cat had "toxic poisoning", but there is nothing in the records that says this or explains the verbal comment. There are reports of test results but these lack any interpretative comments. The veterinarian records do not say whether the cat's illness was likely caused by pyrethrins or Scorpio.
26. As noted earlier, TT also wrote in his email that Scorpio was not highly toxic. Ms. Kim did not ask TT if Scorpio would cause illness in cats. The Scorpio data sheets and label say Scorpio should be used outdoors and not applied around people or pets. However, they do not note any particular toxicity regarding cats and there is no hazard pictogram shown. There is no "skull and crossbones" iconography on the data sheets or label.

27. While I acknowledge there is a close relationship in time between the use of Scorpio and the onset of her cat's illness, on balance, I do not find this enough to prove Ms. Kim's claim.
28. As for the other substance, Ms. Kim did not allege that Niban or its active ingredient, boric acid, could harm her cat, and there is no evidence before me on the matter.
29. For those reasons, I dismiss Ms. Kim's claims.
30. 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.
31. Superbug is the successful party. It paid no CRT fees and claims no dispute-related expenses. As such, I do not order any reimbursement for the parties.

## **ORDER**

32. I dismiss Ms. Kim's claims and this dispute.

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David Jiang, Tribunal Member