



# Civil Resolution Tribunal

Date Issued: May 21, 2021

File: SC-2020-008685

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Cohen v. Rendezvous Dive Adventures Ltd.*, 2021 BCCRT 552

B E T W E E N :

HAROLD COHEN

**APPLICANT**

A N D :

RENDEZVOUS DIVE ADVENTURES LTD.

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

David Jiang

## INTRODUCTION

1. This dispute is about a cancelled scuba diving trip. The applicant, Harold Cohen, booked the trip with the respondent, Rendezvous Dive Adventures Ltd. (RDA). The scuba diving trip did not occur as planned due to the global pandemic caused by

COVID-19. Mr. Cohen says he is entitled to a refund for 3 reasons: 1) the parties' contract provides for it, 2) both parties cancelled the contract, and 3) the parties' contract was frustrated. I also asked the parties to comment on whether Mr. Cohen is entitled to a refund under the *Business Practices and Consumer Protection Act* (BPCPA). Mr. Cohen says he is. He seeks an order for \$1,655.40.

2. RDA disagrees. It says the sum paid was not refundable. RDA denies it ever cancelled the contract or that the doctrine of frustration applies. RDA also disagrees that Mr. Cohen should get a refund under the BPCPA.
3. Mr. Cohen represents himself. RDA is represented by its director.
4. For the reasons that follow, I find that the parties entered into a future performance contract under the BPCPA. I find that the contract did not comply with the BPCPA, so Mr. Cohen was entitled to cancel the contract. I order RDA to pay Mr. Cohen the sums set out below.

## **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.

### ***The CRT's Jurisdiction and the BPCPA***

9. Section 171 of the BPCPA states that the Provincial Court has jurisdiction over proceedings to recover damage or loss for failure to comply with the BPCPA. The CRT does not have jurisdiction to award remedies for a breach of the BPCPA. However, the CRT may consider the BPCPA in deciding whether the parties' contract should be cancelled and if Mr. Cohen is entitled to a refund.

### **ISSUE**

10. The issue in this dispute is whether Mr. Cohen is entitled to a refund of the \$1,655.40 deposit, either under the BPCPA, the contract's terms, or because of the doctrine of frustration.

### **EVIDENCE AND ANALYSIS**

11. In a civil proceeding like this one, the applicant Mr. Cohen must prove his claims on a balance of probabilities. I have read all the parties' evidence and submissions but only refer to them as necessary to explain my decision.
12. I begin with the undisputed facts. On February 6, 2020 Mr. Cohen booked a diving trip with RDA, for himself and a family member. A receipt shows Mr. Cohen paid \$1,655.40, which was the full price of the trip including tax. Mr. Cohen booked the trip for March 24 to 26, 2020 in BC. Mr. Cohen and the family member reside in the USA.

13. On March 13, 2020, Mr. Cohen emailed RDA to advise that the family member was sick with symptoms consistent with COVID-19. He also advised that “we are not going to be able to make it”. He asked for “as much of a refund as you’re able to do”. RDA’s representative replied on March 16, 2020 for Mr. Cohen to check with his health or travel insurance for a refund. RDA also offered to reschedule “for later in the season if possible”.
14. Mr. Cohen replied on March 17, 2020. He suggested the parties wait to see if a mid-June 2020 visit would be possible. He suggested a refund if not. RDA replied the next day that a refund would normally not be possible given that Mr. Cohen’s cancellation was so close to the arrival date. She reiterated that he check with his insurance.
15. I find from the above that the parties did not come to any agreement on amending the terms of their agreement. RDA’s offer to reschedule was vague and conditional and Mr. Cohen did not accept it in any event.
16. On August 2, 2020 Mr. Cohen emailed RDA and said it was clear that rescheduling would not be possible. He asked for a refund. RDA replied the same day that the cancellation policy applies, and RDA would not provide a refund, though it still offered to reschedule the trip “at some time through the 2021 season”.

***Is Mr. Cohen entitled to cancel the contract under the BPCPA?***

17. Section 17 of the BPCPA says a future performance contract means a contract between a supplier and a consumer for the supply of goods or services for which the supply or payment in full of the total price payable is not made at the time the contract is made or partly executed. Section 17 lists certain exclusions but these do not apply.
18. It is undisputed that RDA is a supplier and Mr. Cohen is a consumer under the BPCPA, and that they were involved in a consumer transaction. I note that the BPCPA defines a consumer to include individuals outside of BC, such as Mr. Cohen.

19. Mr. Cohen paid in full at the time was contract was made. RDA says this means the parties did not enter into a future performance contract. However, I disagree as BPCPA section 17 says a future performance contract is one where the supply or full payment is not made at the time the contract is made or partly executed (my emphasis added). As RDA's services were to be supplied a month after the contract was made, I find that the parties entered into a future performance contract.
20. RDA says that the parties entered into a distance sales contract. BPCPA section 17 says such contracts include a contract for the supply of services between a supplier and a consumer that is not entered into in person. I do not find there is anything in the BPCPA which prevents the parties' contract from being both a future performance contract and distance sales contract. I find nothing turns on this.
21. I next consider whether Mr. Cohen could cancel the contract under the BPCPA. Section 23(3) requires a supplier to give a copy of the future performance contract to the consumer within 15 days after the contract is entered into. Sections 19 and 23(2) require such contracts to contain certain information. Section 23(5) says that a consumer may cancel a future performance contract by giving notice of cancellation to the supplier not later than 1 year after the date the consumer receives a copy of the contract, if the contract does not contain the information required in sections 19 and 23(2).
22. Mr. Cohen says that RDA never sent him a copy of the contract. RDA says Mr. Cohen should have known the contract terms given the parties' phone calls, the information on their website, and a February 6, 2020 "statement of payment" it sent to Mr. Cohen. I find the statement of payment likely refers to the February 6, 2020 receipt, as it is titled "Statement".
23. In the circumstances, I conclude that the February 6, 2020 receipt is the parties' contract. I find that it contains most of the information required under BPCPA sections 19 and 23(2) save for what is required under section 19(n). That provision specifies that the contract must contain any other restrictions, limitations or other terms or conditions that may apply to the supply of the goods or services.

24. I find that the cancellation policy consists of terms or conditions that apply to the supply of RDA's vacation services. The policy is particularly relevant to this dispute because RDA relies on it to refuse a refund. The contract does not refer to the cancellation policy or state its terms. As such, I find that RDA breached BPCPA section 19(n).
25. I next consider whether Mr. Cohen gave notice of cancellation within 1 year of receiving a copy of the contract, on February 6, 2020. Section 54 of the BPCPA requires a consumer who wishes to cancel a future performance contract to give notice by any method that creates evidence of their intention to cancel the contract on a specific date. I find that Mr. Cohen cancelled the contract through his March 13, 2020 email and reiterated this request in his August 2, 2020 email. I find that both cancellation requests were in time under BPCPA section 23(5).
26. Section 27 of the BPCPA says that if a consumer cancels a contract, the supplier must refund to the consumer all money received, without deduction, within 15 days after the notice of cancellation has been given. Section 55 says the consumer may recover the refund from the supplier as a debt due. Given this, I find that RDA must pay Mr. Cohen \$1,655.40.
27. Given my findings, I do not find it necessary to determine whether Mr. Cohen was entitled to a refund under the terms of the contract or because of the doctrine of frustration.
28. The *Court Order Interest Act* applies to the CRT. Mr. Cohen is entitled to pre-judgment interest on the \$1,655.40 debt from February 6, 2020, the date of the receipt, to the date of this decision. This equals \$19.49.
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 Mr. Cohen is entitled to reimbursement of \$125 in CRT fees. He did not claim any dispute-related expenses. I therefore order none for the parties.

## ORDERS

30. Within 14 days of the date of this order, I order RDA to pay Mr. Cohen a total of \$1,799.89, broken down as follows:
  - a. \$1,655.40 in debt,
  - b. \$19.49 in pre-judgment interest under the *Court Order Interest Act*, and
  - c. \$125 in CRT fees.
31. Mr. Cohen is entitled to post-judgment interest, as applicable.
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.

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David Jiang, Tribunal Member