Civil Resolution Tribunal

Date Issued: July 30, 2021

File: SC-2020-009266

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *BPM Indoor Cycling Inc. v. Larrington*, 2021 BCCRT 834

B E T W E E N :

BPM INDOOR CYCLING INC.

APPLICANT

A N D :

SALLY LARRINGTON

RESPONDENT

A N D :

BPM INDOOR CYCLING INC.

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: David Jiang

INTRODUCTION

1. This dispute is about the division of a business. The respondent and applicant by counterclaim, Sally Larrington, previously owned half the shares of the applicant and respondent by counterclaim, BPM Indoor Cycling Inc. (BPM). Under the terms of a written agreement, Ms. Larrington sold her interest in BPM to its current sole owner, Keelan Clemens. In exchange she received a split of BPM's assets and liabilities.

2. BPM says Ms. Larrington breached the terms of the agreement by failing to return 135 BPM-branded heartrate monitors. It claims $2,894.40 as compensation. Ms. Larrington disagrees and says she is entitled to the monitors. She also disputes how many monitors she has.

3. Ms. Larrington counterclaims for breach of contract. She says Mr. Clemens wrongfully deleted an app and seeks $134 as damages to replace it. She also says Mr. Clemens wrongfully removed schedule data and seeks $321.30 as reimbursement to pay a worker reconstruct the data. Finally, she says Mr. Clemens wrongfully restricted her access to a company bank account and seeks $300 for time wasted. Mr. Clemens is not a party, so I infer Ms. Larrington is referring to Mr. Clemens as BPM's agent. BPM disagrees it is liable.

4. Mr. Clemens represents BPM. Ms. Larrington represents herself.

5. For the reasons that follow, I find only BPM has proven its claims. I order Ms. Larrington to pay the amounts set out below.

JURISDICTION AND PROCEDURE

6. 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.

7. 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 "he said, he 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.

8. 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.

9. 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.

10. 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.

Late Evidence

11. BPM provided a witness statement from MB as late evidence. MB is a BPM employee. I find it relevant to this dispute. Ms. Larrington had the opportunity to review the statement and provided evidence and submissions in response. She chose to provide submissions. Consistent with the CRT's mandate that includes flexibility, I find there is no actual prejudice to Ms. Larrington in allowing the late evidence and I do so.

ISSUES

12. The issues in this dispute are as follows:

    a. Did Ms. Larrington breach the parties' agreement by failing to return 135 branded heartrate monitors, and if so, what are the appropriate remedies?

    b. Did BPM breach the parties' agreement, and if so, what are the appropriate remedies?

EVIDENCE AND ANALYSIS

13. In a civil proceeding like this one, BPM and Ms. Larrington must prove their respective claims and counterclaims on a balance of probabilities. I have read all the parties' submissions but refer only to the evidence and arguments that I find relevant to provide context for my decision.

14. I begin with the undisputed background facts. Previously BPM operated a fitness studio and a spin bike studio at different locations. Ms. Larrington and Mr. Clemens each held half the shares of BPM at the time.

15. On November 5, 2020, Ms. Larrington entered into a written agreement with Mr. Clemens and BPM. In general terms, Ms. Larrington agreed to sell her BPM shares to Mr. Clemens in return for BPM's interests in the spin bike studio. These interests included BPM's existing lease agreement, the spin bikes, and other equipment.

Issue #1. Did Ms. Larrington breach the parties' agreement, and if so, what are the appropriate remedies?

16. The parties dispute who is entitled to certain heartrate sensors under their agreement's terms. Ms. Larrington agrees she has the monitors but disagrees about how many. I consider the parties' contract below.

17. The basic principles of the formation and interpretation of contracts are laid out in *Shaw Production Way Holdings Inc. v. Sunvault Energy, Inc.,* 2018 BCSC 926 at paragraphs 138 to 152. That case says that the individual understandings or beliefs of the parties about the terms of a contract are irrelevant. Instead, what matters is whether a reasonable person in any of the parties' situation would have believed and understood that the other party was consenting to identical terms.

18. A contract's wording must be read in the context of the circumstances that existed at the time the contract was made. If an objective view of the contract's wording can bear 2 or more reasonable interpretations, the CRT may then consider other matters such as the parties' post-contracting conduct. See *Shaw Production Way Holdings Inc.* at paragraph 149 and *Gilchrist v. Western Star Trucks Inc. (2000),* 2000 BCCA 70 at paragraphs 17 to 18.

19. I will now consider the relevant contract terms. Sections 5(a) and 5(b) of the agreement says the following:

> 5. [Ms. Larrington] acknowledges that as of the Closing Date, the following property shall be owned by BPM and shall be subject to the control and removal by [Mr. Clemens]:
>
> (a) The…Lease and all equipment, tenant's fixtures and leasehold improvements located at the Fitness Studio;
>
> (b) all BPM branded products, content, inventory and/or equipment…

20. Section 2(c) says the following:

> 2. On the Closing Date, BPM shall sell, assign and transfer to [Ms. Larrington] the following: … (c) all equipment, furnishings, inventory and tenant's fixtures located at the Spin Studio as of the Agreement Date…

21. August 2019 and February 2020 invoices show BPM ordered 200 heartrate monitors. It is undisputed the monitors had BPM logos. Screenshots show that BPM sold them through an online store. I find from this that the heartrate monitors were BPM-branded products, inventory, or equipment under section 5(c) of the contract.

22. Ms. Larrington says she was entitled to the monitors under section 2(c) of the contract. This is because as of the date of the agreement, the heartrate monitors at issue were at the spin studio and some had been used there previously. However, section 5 expressly states BPM-branded products, which I find includes the heartrate monitors, were "subject to the control and removal" by Mr. Clemens. I find from this wording that, viewed objectively, the parties intended for Mr. Clemens to remove the monitors and other BPM products, inventory, or equipment from the spin studio. Put another way, I find the specific wording of section 5 overrides the more general wording of section 2(c). This is because section 5's wording shows the narrower intention of the parties. This intention includes the removal of BPM-branded products from the spin studio.

23. While not necessary for my decision, I find the parties' post-contracting conduct is consistent with my conclusion. In a November 7, 2020 email, Mr. Clemens said he would come by to retrieve all BPM-branded products, including the heartrate sensors. Ms. Larrington did not disagree at the time. It is undisputed that she placed BPM's property in garbage bags outside the spin studio for Mr. Clemens to pick up on November 13, 2020, but did not include any heartrate monitors. I find a reasonable person in the parties' position would conclude that Mr. Clemens was entitled to the monitors as they were, like the other items left for pickup, BPM-branded products, inventory, or equipment.

24. Ms. Larrington says she removed the logo from some of the monitors. I do not find this made them Ms. Larrington's. Rather, I find she damaged BPM's property. I find Ms. Larrington breached the contract by not returning the monitors.

25. The next question is what remedy is appropriate. BPM says Ms. Larrington has 135 monitors, of which 50 are used and 85 are new. Ms. Larrington says she has 122 monitors, of which 60 are used, 6 are broken, and 56 are new and in original boxes. I prefer BPM's total as it was supported by the invoices dated August 2019 and February 2020 and an inventory count document dated April 20, 2020.

26. Ms. Larrington says the difference of 13 monitors between her total and BPM's total is due to employee theft. She also suggests the inventory count document was fabricated and points out some past inconsistencies in Mr. Clemens' evidence. One of these was Mr. Clemens' denial that he brought his dog to the spin studio in August 2020. A dated video screenshot shows he was wrong. While I acknowledge this, I do not find it means he fabricated the inventory count document. BPM's total is close to Ms. Larrington's total, which I find adds credibility to BPM's claims. I also find the allegations of employee theft speculative.

27. BPM requests $21.44 for each of the 135 heartrate monitors, for $2,894.40 in total. BPM's invoices show it originally purchased each monitor at a wholesale price of $16 USD each. Ms. Larrington did not provide a different currency conversion rate. Given this, I find $2,894.40 is appropriate and order Ms. Larrington to pay it.

28. I decline to reduce the amount payable for any used or broken monitors. There is no evidence it would be cheaper to obtain used monitors at a non-wholesale price and there is no evidence that BPM or Mr. Clemens broke the monitors. Ms. Larrington suggested returning the new monitors instead of paying for them, but I decline to order this given the parties' history of conflict.

Issue #2. Did BPM breach the parties' agreement, and if so, what are the appropriate remedies?

29. Ms. Larrington says BPM breached the parties' contract and I outline each allegation below. I note in some submissions Ms. Larrington refers to Mr. Clemens breaching the contract, but he is not a party to this dispute. As stated above, I infer Ms. Larrington is referring to Mr. Clemens as BPM's representative or agent.

Deletion of App - $134

30. Ms. Larrington says BPM breached section 2(c) of the contract by deleting a one-time purchase app called "djay2" from her iPad. Ms. Larrington says the old version had no monthly charge and the current version costs $9.49 per month. She seeks damages equal to a one-year subscription, plus tax.

31. BPM says that the app was tied to Mr. Clemens' personal account on the iPad. BPM says Ms. Larrington connected to Mr. Clemens' personal account without permission, and the app was automatically deleted when Mr. Clemens disconnected his personal account with the iPad.

32. BPM provided receipts that I find show Mr. Clemens purchased the app using his personal account. Given these facts, I find the app was not equipment, furnishing, inventory, or tenant's fixtures under section 2(c) of the agreement. Instead, I find BPM only had to provide the iPad to Ms. Larrington and the parties' submissions indicate it did so. I dismiss this claim. I also note that an email receipt shows Ms. Larrington started using the new version of djay2 in June 2020, before Ms. Larrington sold her shares in BPM. So, I find it unproven that Ms. Larrington would have only continued to use the old version of the app. I would dismiss the claim for this reason as well.

Blocking Access to RBC's Online Banking System - $300

33. Ms. Larrington says that in August 2020 Mr. Clemens wrongfully blocked her access to BPM's bank account. She claims $300 for time spent resolving the situation. Mr. Clemens says he had to change the passwords to prevent misuse of BPM's funds.

34. These events occurred several months before the parties entered into the November 2020 agreement. It follows that BPM did not breach the agreement with these actions. I do not find there to be any proof that BPM acted inappropriately in the circumstances. Ms. Larrington also did not provide any evidence to show why $300 would be an appropriate measure of damages. For these reasons, I dismiss this claim. I make no findings about whether Mr. Clemens breached any obligation to Ms. Larrington about the online banking system.

Removal of Spin Classes from the BPM Schedule - $321.30

35. Ms. Larrington says Mr. Clemens removed spin classes from the BPM schedule, causing inconvenience. She says BPM breached section 12(a) of the contract by doing so. That term says the following:

> 12. During Interim Period, the Parties agree that:
>
> (a) [Ms. Larrington] shall continue to have full access rights and privileges to all BPM information management systems including QuickBooks, Mind/Body POS, RBC etc. and [Mr. Clemens] agrees not to block or restrict such access.

36. I find from this wording that Mr. Clemens was obligated to refrain from blocking or restricting access to BPM information management system. I find BPM itself did not owe this obligation to Ms. Larrington. As noted above, both Mr. Clemens and BPM were parties to the November 13, 2020 agreement. I find that if the parties meant for BPM to be liable, the contract would have said so.

37. Mr. Clemens is not a party to this dispute, and as Ms. Larrington's counterclaim is against BPM and not Mr. Clemens, I dismiss this counterclaim and all her counterclaims entirely. I make no findings about whether Mr. Clemens breached any obligation under section 12(a) of the contract.

38. The *Court Order Interest Act* applies to the CRT. BPM is entitled to pre-judgment interest on the damages award of $2,894.40 from November 13, 2020, the closing date of the contract, to the date of this decision. This equals $9.25.

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 see no reason in this case not to follow that general rule. BPM is entitled to reimbursement of $175 in CRT fees. The parties did not claim for dispute-related expenses, so I order none.

ORDERS

40. Within 14 days of the date of this order, I order Ms. Larrington to pay BPM a total of $3,078.65, broken down as follows:

    a. $2,894.40 as damages,

    b. $9.25 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $175 in CRT fees.

41. BPM is entitled to post-judgment interest, as applicable.

42. I dismiss all of Ms. Larrington's counterclaims.

43. 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 in effect until 90 days after June 30, 2021, which is the date of the end of the state of emergency declared on March 18, 2020, 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.

44. 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.

David Jiang, Tribunal Member