



Civil Resolution Tribunal

Date Issued: June 23, 2022

File: SC-2021-006542

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Costello v. Jensen Law Corporation*, 2022 BCCRT 730

BETWEEN:

SHAUN COSTELLO

APPLICANT

AND:

JENSEN LAW CORPORATION

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Trisha Apland

INTRODUCTION

1. This small claims dispute is about a lost cellphone.
2. The respondent, Jensen Law Corporation (JLC), represented the applicant, Shaun Costello, in a court proceeding and had possession of his cellphone. After the

proceeding, Mr. Costello was not able to collect his cellphone and asked JLC to send it to his new lawyer's address in Alberta. JLC sent the cellphone to the law firm by registered mail, but the package arrived open without the cellphone inside. Mr. Costello says it was JLC's fault that the cellphone went missing and seeks \$503.99 as reimbursement for his cellphone's purchase price, plus \$1,000 for the alleged loss of personal data, such as photographs and music, stored on the cellphone.

3. JLC denies Mr. Costello's claim. It says Mr. Costello gave it a cracked old cellphone as potential evidence for a court proceeding that was "borderline worthless". JLC says it mailed the cellphone to Alberta without any charge to Mr. Costello and its staff took "due care" in packaging it. JLC says it is not responsible for the lost cellphone or data.
4. Mr. Costello is self-represented. JLC is represented by an employee, Daniel McNamee, who is a lawyer.
5. For the reasons that follow, I dismiss Mr. Costello's claims.

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. In some respects, both parties of this dispute call into question the credibility, or truthfulness, of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and arguments before me. I note the decision *Yas v. Pope*, 2018 BCSC 282, in which the court recognized that oral

hearings are not necessarily required where credibility is in issue. Bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I decided to hear this dispute through written submissions.

8. 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.
9. 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.

Preliminary Matter

10. Mr. Costello disputes the admissibility of 2 affidavits submitted by JLC. He says the affidavits were not properly sworn because they have no official stamp and the witnesses merely signed beside the lawyer, Mr. McNamee's name. Mr. McNamee says he signed the affidavits as commissioner for oaths and there was no need for a stamp. I agree with Mr. McNamee. The CRT's rules do not require that witness statements are stamped by a commissioner of oaths, or that the statements are given under oath.
11. Mr. Costello says the affidavits are suspicious because they were signed with the same blue pen. Even if the witnesses used the same pen, I would not find it suspicious. The affidavits are from JLC's staff who likely had access to the same pen supply. I find no issue with the admissibility of the affidavits and I accept them. I discuss the weight I place on the affidavit evidence below.

ISSUES

12. The issues in this dispute are:
 - a. Was JLC negligent in handling the cellphone or its delivery?
 - b. If so, to what extent, if any is Mr. Costello entitled to the claimed damages?

EVIDENCE AND ANALYSIS

13. In a civil proceeding like this one, Mr. Costello as the applicant must prove his claims on a balance of probabilities. I have read all the parties' argument and evidence but refer only to what I find relevant to provide context for my decision. I note Mr. Costello did not provide any reply submissions, despite being given the opportunity to do so.
14. There is no dispute that JLC had possession of Mr. Costello's cellphone following a court proceeding. On October 15, 2020, Merchant Law Group LLP (Merchant Law) contacted JLC to ask it to send Mr. Costello's cellphone to its offices in Alberta. JLC sent the cellphone through registered mail with Canada Post on October 15, 2020. As noted, the cellphone package arrived at Merchant Law's offices on October 27, 2020 open with no cellphone inside. It is undisputed that the cellphone was never recovered.
15. Mr. Costello alleges that JLC failed to do its "due diligence" to seal the envelope, insure the package, and complete a service ticket through Canada Post once it learned about the missing cellphone. He says JLC is responsible to compensate him for the lost cellphone and personal data, such as photographs and music.
16. Although Mr. Costello does not use the legal terminology, I find his claim is in bailment. The law of bailment is about the obligations on one party to safeguard the possessions of another party. The bailor is the person who gives the goods or possessions and the bailee is the person who holds or stores them. Here Mr. Costello was the bailor who gave his cellphone to JLC, the bailee to hold and then deliver on his behalf.

17. I find JLC was what is known in law as a gratuitous bailee. This is because it is undisputed that JLC received no money or benefit from storing and delivering the cellphone. Gratuitous bailees have traditionally only been liable if they were “grossly negligent” in handling a person’s possessions. However, the courts are moving towards a preference to determine liability based on the lower standard of whether or not the bailee exercised reasonable care in all of the circumstances: *Harris v. Maltman and KBM Autoworks*, 2017 BCPC 273.
18. Mr. Costello carries the burden to prove on a balance of probabilities that JLC failed to exercise reasonable care in handling his cellphone for delivery. I find he has not met that burden here. My reasons follow.
19. On its end, JLC submitted signed affidavits from 2 employees involved with handling the cellphone. AS stated that they packaged the cellphone in a bubble wrap envelope, secured the flap with the adhesive seal, and then reinforced the seal with packing tape. AS stated that they took “particular care” in the packaging because it was an electronic device. They stated that they have prepared and delivered many sensitive packages in the same way and this is the first time the contents did not arrive.
20. JLC’s legal assistant, LP, stated that they witnessed AS package Mr. Costello’s cellphone with additional packing tape and that they both made sure the cellphone was “secure in the envelope”.
21. In contrast, Mr. Costello submitted a signed affidavit from LR, who works as a paralegal with Merchant Law and received the package that should have contained the cellphone. LR stated that it seemed “the package was not sealed correctly”. LR did not give specific details about what they believed was incorrect about the seal apart from the fact that it arrived open.
22. However, LR had made a Canada Post claim for the lost cellphone on October 28, 2020. In the claim form it states that the envelope arrived with nothing in it, that there was no sign of tampering, it was taped shut, but looked like the “tape didn’t hold”.

23. Since all witnesses say the envelope had been taped shut, I find it more likely than not that AS taped the envelope flap shut with the cellphone inside before mailing it through Canada Post.
24. Mr. Costello did not pay for JLC to deliver the cellphone nor ask it to prepare the package in any specific way. This is undisputed. In the circumstances, I find its staff were not required to do more to prepare the cellphone for delivery other than sealing it shut with tape in the bubble wrap envelope.
25. Mr. Costello argues that JLC is liable because, as the sender, it should have made a claim through Canada Post for the lost cellphone. However, the emails show LR from Merchant Law had already initiated a claim through Canada Post and Canada Post agreed to investigate it. There is no correspondence from Canada Post about the outcome of its investigation. JLC's employee, AS, stated that they contacted a Canada Post representative who told them there was essentially nothing it could do to locate the contents of a package that were lost in transit. I find the evidence does not establish that the outcome would have been any different had it been JLC who initiated the formal claim. So, I find nothing turns on JLC not making the claim itself.
26. I note Mr. Costello stated in the Dispute Notice that JLC "never bothered to insure the parcel for whatever reason". However, I find no evidence that Mr. Costello asked JLC to insure the parcel containing the cellphone. Mr. Costello also did not establish the cellphone's value and Mr. Costello did not pay JLC anything to insure the cellphone. In these circumstances, I find it was reasonable that JLC sent with the cellphone by registered mail without also insuring it.
27. For the reasons above, I find Mr. Costello has not established that JLC or its employees did anything wrong or caused his cellphone to go missing. I find JLC acted reasonably in packaging and sending the cellphone to Alberta through Canada Post and JLC is not liable for the lost cellphone or its data. I dismiss Mr. Costello's claims.
28. Neither party paid CRT fees nor claimed dispute-related expenses.

ORDER

29. I dismiss Mr. Costello's claim and this dispute.

Trisha Apland, Tribunal Member