



Civil Resolution Tribunal

Date Issued: January 31, 2023

File: SC-2022-003856

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Gordon v. Milltown Yacht Sales Ltd.*, 2023 BCCRT 89

BETWEEN:

MICHAEL GORDON

APPLICANT

AND:

MILLTOWN YACHT SALES LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. This dispute is about responsibility for an insurance deductible.
2. The applicant, Michael Gordon, who asked to be referred to as Dr. Gordon, entered into a contract with the respondent, Milltown Yacht Sales Ltd. (Milltown), for Milltown to sell his boat for him. Dr. Gordon says that Milltown's broker damaged his boat while

showing it to a potential buyer, and that Milltown refused to pay for the required repairs. Dr. Gordon claims \$1,500 for reimbursement of his insurance deductible.

3. Milltown says the parties' contract required Dr. Gordon to maintain insurance on the boat while it was in Milltown's possession, for Milltown's benefit. Milltown says this contractual clause transferred the risk of boat damage to Dr. Gordon. Milltown asks that this dispute be dismissed.
4. Dr. Gordon is self-represented. Milltown is represented by its director, Greg Hughes.

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.
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.

ISSUE

9. The issue in this dispute is whether Milltown is responsible for reimbursing Mr. Gordon's \$1,500 insurance deductible.

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, as the applicant, Dr. Gordon must prove his claims on a balance of probabilities (meaning "more likely than not"). I have read all the parties' submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision. I note that Dr. Gordon did not provide any final reply submissions, despite having the opportunity to do so.
11. The background facts are not in dispute. The parties entered into a January 25, 2022 Yacht Marketing Agreement (contract), for Milltown to market and find a purchaser for Dr. Gordon's boat. The parties' contract permitted Milltown to test drive the boat with potential purchasers (referred to as a sea trial). On March 13, 2022, Milltown's yacht broker, MB, was operating the boat during a sea trial when the boat struck a submerged object, causing damage to the boat's hull.
12. Dr. Gordon says Milltown is responsible for the \$1,500 insurance deductible he paid for the boat repairs under the law of bailment. A bailment is a temporary transfer of property, where the personal property of one person, a "bailor", is handed over to someone else, a "bailee". The bailee is obligated to take reasonable care of the bailor's property and may be responsible if the property is damaged while in their possession.
13. A bailment can exist independently of a contract, but I find in this dispute, both a bailment and contractual relationship existed between the parties. Milltown argues that the parties' contract is determinative of the issues in this dispute. For the following reasons, I agree.
14. Under clause 9 of the parties' contract, Dr. Gordon agreed to have both marine Hull and Machinery insurance and indemnity insurance in place during the contract's term.

The insurance had to be in a form acceptable to Milltown and allow the boat to be in Milltown's possession for demonstration purposes. Clause 9 also required Dr. Gordon to use his best efforts to have Milltown named as an insured under the insurance policy.

15. Milltown says that clause 9 gave it the benefit of the insurance policy while it operated the boat during the sea trial. Further, Milltown says that because Dr. Gordon agreed to maintain the insurance for Milltown's benefit, he accepted the risk of a loss occurring, and so he is responsible for paying the deductible.
16. Milltown relies on the recent BC Supreme Court decision in *Lehigh Hanson Materials Limited v. Sea Imp Xi (Ship)*, 2022 BCSC 1556, involving damage to a barge while it was being towed by a tug boat. The parties in *Lehigh* had entered into a contract with a term very similar to clause 9, requiring the barge owner to have certain insurance coverage in a form acceptable to the tugboat operator during the contract's term. The court reviewed leading cases on contracts containing a promise to insure and noted they consistently take the approach that it is reasonable to infer contracting parties allocated the risk to the party promising to insure against it unless the contract indicates otherwise.
17. In *Lehigh*, the court concluded that the barge owner was responsible for the insurance deductible because it had expressly agreed to obtain insurance in a form acceptable to the tugboat operator. The court found there was no reason for that requirement unless the parties had intended that the tugboat operator would have the benefit of the insurance.
18. I reach the same conclusion here. Given the requirement under clause 9 for Dr. Gordon to obtain Hull and Machinery insurance in a form acceptable to Milltown, I find the parties allocated the risk of any hull damage that might occur while Milltown operated the boat to Dr. Gordon. That means Dr. Gordon is responsible for the insurance deductible.

19. I note that Dr. Gordon says the parties modified clause 9 during a March 11, 2022 telephone conversation between Dr. Gordon and MB about the upcoming sea trial. Dr. Gordon alleges that MB told him that if damage occurred due to a problem with the boat, it would fall under Dr. Gordon's insurance, but if the damage occurred due to Milltown's operation, it would fall under Milltown's insurance. Milltown provided a signed affidavit from MB, in which MB expressly denied telling Dr. Gordon that the written contract's terms would not be in effect during the sea trial.
20. There is a strong common law presumption that signed written contracts reflect the parties' true agreement. The parole evidence rule says that where there is a written agreement, outside evidence cannot be admitted to vary, modify, add, or contradict the written agreement's terms, unless the written agreement is unclear or ambiguous: see *Athwal v. BlackTop Cabs Ltd.*, 2012 BCCA 107, at paragraphs 42 to 44. I find clause 9 of the parties' agreement is not ambiguous, and so Dr. Gordon's evidence about the parties' March 11 conversation cannot be used to modify their written agreement.
21. Further, while parties may mutually agree to modify a written contract, I am left with an evidentiary tie on this point, as Dr. Gordon says they did so and Milltown says they did not. Dr. Gordon has the burden to prove each element of his claim, and I find there is no supporting evidence to tip the balance in his favour and conclude that Milltown agreed to pay for boat damage caused by its operation. For these reasons, I find Dr. Gordon has not established the parties agreed to modify clause 9, and so I find he remains responsible for the insurance deductible.
22. Given the parties' contract expressly contemplated responsibility for damage that might occur while the boat was in Milltown's possession, I find the law of bailment does not apply to this dispute. I dismiss Dr. Gordon's claim.
23. 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. As the successful party, Milltown did not pay any CRT fees, and neither party claims dispute-related expenses, so I make no order.

ORDER

24. I dismiss Dr. Gordon's claims and this dispute.

Kristin Gardner, Tribunal Member