Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Colford v. 2 Burley Men Moving Ltd.*, 2023 BCCRT 765

B E T W E E N :

PAULA COLFORD and REBECCA PHILLIPS

APPLICANTS

A N D :

2 BURLEY MEN MOVING LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Alison Wake

INTRODUCTION

1. This dispute is about alleged damage to furniture. The applicant, Paula Colford, hired the respondent, 2 Burley Men Moving Ltd. (Burley) to deliver an Italian leather sofa to the applicant Rebecca Phillips's home.

2. The applicants say Burley damaged the sofa, as well as Ms. Phillips's china cabinet and a couch that was already in her home. To distinguish between the two couches at issue in this decision, I will refer to the Italian leather sofa Burley delivered as the sofa, and Ms. Phillips's existing couch as the couch. The applicants collectively claim $3,800 for the alleged furniture damage.

3. Burley does not deny its movers damaged the sofa, but argues its liability for the damage is limited to $0.60 per pound based on the parties' contract. Burley denies liability for the alleged damage to the china cabinet and the couch.

4. The applicants are represented by Ms. Colford. Burley is represented by an employee.

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.

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. 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.

8. Burley submitted copies of emails it sent Ms. Colford after she had started the CRT dispute, which I find contain settlement discussions. CRT rule 1.11 says that parties

cannot disclose settlement discussions unless all parties agree. There is no evidence that the applicants agreed to the disclosure of these discussions, so I have not considered these emails in my decision.

ISSUES

9. The issues in this dispute are:
    a. Whether Burley's terms and conditions limit its liability for damage to the sofa and if not, what it must pay the applicants for the sofa damage, and
    b. Whether Burley damaged Ms. Phillips's china cabinet and couch and, if so, what remedy is appropriate.

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities (meaning "more likely than not"). While I have read all the parties' submitted evidence and arguments, I have only referred to those necessary to explain my decision.

11. Ms. Colford hired Burley to move the sofa from her home to Ms. Phillips's home, within the same city, on December 21, 2021. Ms. Colford paid Burley $325.68 for the move. The applicants say Burley damaged the sofa while moving it, and also damaged Ms. Phillips's china cabinet and couch when they delivered the sofa. The applicants claim $3,800 as compensation for the alleged damage.

Sofa damage

12. I begin with the sofa. Based on the applicants' photographs in evidence, I accept the sofa was damaged in several places. The photographs show obvious scratches and scuffs on the sofa's leather and feet, as well as ripped fabric on its underside, and two detached buttons. Ms. Colford says, and Burley does not dispute, that the sofa was in new condition prior to the move. Ms. Colford says she offered the movers

coverings for the sofa, as well as an alternative route to move it, but the movers refused both.

13. As noted, Burley does not specifically deny that its movers caused this damage and so I accept that they did. Instead, Burley argues the applicants are bound by the terms and conditions on its waybill, which it says limit its liability for damage to $0.60 per pound, per damaged item. Burley also argues Ms. Colford did not email it to report the damage to the sofa until 18 days after the move, when its terms and conditions require a damage claim to be submitted in writing within 14 days of the move. Finally, Burley argues Ms. Phillips signed an acknowledgment on the waybill that the services were performed satisfactorily and the shipment was received in good condition.

Limitation of liability

14. As noted, Burley says its terms and conditions limit its liability for damaged items to $0.60 per pound. It is unclear which section of Burley's waybill it relies on, as I find there are two sections that refer to a $0.60 per pound limit.

15. The first clause appears under the heading "Carrier Liability Coverage", and I will refer to it as the CLC clause. The CLC clause says, "All quotations include $0.60 per lb. per article and are provided by the carrier" (reproduced as written).

16. In *Wilson v. 2 Burley Men Moving Ltd.,* 2021 BCCRT 1133*,* a CRT member (now vice chair) considered an identically worded CLC clause, and cited *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.,* 1997 CanLII 307 (SCC) for the proposition that if a company intends to limit or exclude its liability in a contract, it must do so in clear and unambiguous terms. In *Wilson,* the member found the CLC clause did not limit Burley's liability because a reasonable person would read it as providing a guarantee of compensation for damaged items rather than a limitation of liability. While prior CRT decisions are not binding on me, I find this reasoning persuasive and apply it here. Because the CLC clause does not explicitly limit Burley's liability, I find Burley cannot rely on it to limit the amount it must pay the applicants for the sofa damage.

17. The second clause appears on the waybill under the heading “Payment and Protection Plan”, so I will refer to it as the PPP clause. It reads, “I understand that any damage to my belongings or any surrounding structures resulting from this move are the sole responsibility of the undersigned customer. If I do not choose a plan, the carriers liability is $0.60 cents per lb/item or a $60.00 maximum repair per 100 lbs.” (reproduced as written).

18. The BC Provincial Court (BCPC) considered a similar clause in *Belanger v. 2 Burley Men Moving Ltd.,* 2021 BCPC 270. In *Belanger,* the contract offered three options for the customer to choose from, with different amounts per pound of coverage. The terms and conditions at issue here do not include those options, but the wording of the PPP clause is otherwise identical to that in *Belanger.*

19. BCPC decisions are not binding on me, but I adopt the court’s overall assessment in *Belanger* that Burley’s terms and conditions represent “poor legal drafting” and are “anything but clear”. Specifically, I agree with the court’s finding that it “would take a sophisticated reader some time” to discern that the PPP clause was intended to limit the compensation that a customer could recover for damage. I note that the waybill terms specifically include a section elsewhere labelled “Exception From Liability”, which only applies to a shipment delivered to a storage facility. I find a reasonable customer would expect all clauses limiting Burley’s liability to be found in this section, rather than under the misleading title “Payment and Protection Plan”.

20. The PPP clause is also internally contradictory and inconsistent. It says any damage is the “sole responsibility” of the undersigned customer, but then contemplates the carrier (Burley) bearing partial responsibility for damage to a maximum of $0.60 per pound per damaged item. Finally, it says this maximum applies if the customer does not “choose a plan”, but as noted the terms contain no other plan options for the customer to choose from. Overall, I find the PPP clause does not clearly and unambiguously limit Burley’s liability for damaged items.

21. Additionally, a limitation of liability clause is not effective or enforceable unless it is brought to the attention of the party whose rights it purports to limit at the time that

the contract is made: *Apps v. Grouse Mountain Resorts Ltd.,* 2020 BCCA 78. As the party seeking to rely on the waybill's terms as the basis of its contract, I find Burley has the burden to prove the applicants were aware of, and agreed to, the PPP clause before the move. While the applicants do not dispute that they signed the waybill, there is no evidence before me that they did so or were otherwise made aware of the PPP clause before Burley had already moved the sofa. So, I find Burley has not met its burden of proving that it brought the PPP clause to the applicants' attention at the time the contract was made.

22. Burley also provided a copy of its "Moving Appointment Reminder" email, which I accept it sent to Ms. Colford the day before the move. While the terms and conditions outlined in this email also include a section titled "Protection Plan Coverage and Payment", the terms in that section do not include any express limitation of Burley's liability for damage. So, I find the terms and conditions in the appointment reminder email do not assist Burley either.

23. Finally, although Burley did not specifically argue it, I considered whether Burley's liability is limited by section 37.39(2) of the *Motor Vehicle Act Regulations* (MVAR) which sets out the maximum liability for a carrier of household goods. However, I find Burley is not entitled to rely on the MVAR's maximum liability provisions, as its terms and conditions do not meet the MVAR's requirements for the information it is required to set out in a bill of lading: see *Lawlor v. Galaxy Mobile Storage Inc.,* 2018 BCPC 330. In any event, the conditions of carriage in the MVAR specifically do not relieve the carrier from liability for loss resulting from a negligent act or omission of the carrier or its employees.

24. In summary, I find Burley cannot rely on the CLC clause, the PPP clause or its emailed terms and conditions to limit its liability for damage to the sofa, because they do not clearly and unambiguously limit Burley's liability and because Burley has not proven it brought these clauses to either applicants' attention at the time the contract was made. I also find Burley cannot rely on the MVAR to limit its liability.

Other terms and conditions

25. As noted, Burley relies on two additional terms and conditions to defend against the applicants' claim. First, Burley argues Ms. Colford did not email it to report the damage to the sofa within the required time limit. Burley also argues that Ms. Phillips signed an acknowledgment on the waybill that the services were performed satisfactorily and the shipment was received in good condition.

26. Ms. Colford undisputedly reported the damage to Burley in writing on January 8, 2022, 18 days after the move. Burley relies on a term in its waybill saying that "all claims must be submitted in writing within 14 days of move completion." However, I note the terms and conditions Burley emailed Ms. Colford the day before the move say that claims must be submitted within 30 days of the move completion. In any event, I find Burley waived the application of the time limit as well as Ms. Phillips's acknowledgment of satisfactory performance, for the following reasons.

27. A waiver occurs where one party to a contract gives up, or foregoes reliance on, a contractual term. Waiver may be expressed formally or informally or may be inferred from conduct (see *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co*., [1994] 2 S.C.R. 490).

28. Burley submitted in evidence its February 3, 2022 email to Ms. Colford, in which it calculated a "payout" based on the $0.60 per pound limit in its "protection plan" discussed above. Burley asked for Ms. Colford's credit card information so that it could process the refund. There is no email response from Ms. Colford in evidence.

29. I find by offering Ms. Colford $147 on February 3, 2022, Burley implicitly waived its right to rely on 1) the term requiring claims to be submitted in writing within 14 days of the move completion, and 2) the acknowledgment that the shipment was received in good condition unless noted on the waybill. I find if Burley intended to rely on those terms to deny liability for the damage, it would have said so in response to Ms. Colford's damage claim, rather than calculating the payout and asking for her credit card information. So, I find Burley cannot now rely on these terms to preclude the applicants from claiming damages.

Damages

30. So, what amount must Burley pay the applicants for the damaged sofa? The applicants claimed $3,800 in their Dispute Notice, but did not provide a breakdown or explain how this amount should be allocated between the damaged sofa and the allegedly damaged couch and china cabinet. The applicants also provided no evidence of the cost to repair or replace the sofa, such as a receipt, quote, or comparable listing. I note Ms. Colford says the new sofa had been delivered to her apartment "days earlier" by a local furniture company, so I find a receipt or invoice showing the sofa's value was likely available.

31. However, Burley does not dispute the sofa was in new condition before the move, and it does not provide its own evidence or arguments about the sofa's value. As noted, I accept that following the move the sofa's leather and feet were scratched and scuffed in at least two places, two buttons had been detached and the fabric underneath the sofa was ripped. While I find it likely the buttons, ripped fabric and scuffed feet can be repaired, I accept that due to the nature of leather some of the scuffs and scratches are unlikely to be repairable and so the sofa's value has likely decreased. However, I find the sofa is not rendered worthless, as the damage is cosmetic only and the sofa is still functional for its overall intended use. On a judgment basis, I find $500 is an appropriate amount to compensate the applicants for the damaged sofa.

32. I find the applicants are jointly entitled to this amount, as they filed this dispute together and did not provide any evidence or argument about how damages should be allocated between the two of them.

Other furniture

33. Turning to the other alleged damage, the applicants say Burley's movers damaged Ms. Phillips's china cabinet by scratching it and damaging its glass shelving. They also say Burley's movers dragged Ms. Phillips's couch through mud when they removed it to replace it with the sofa. Burley does not specifically address this alleged

damage in submissions, but says in its Dispute Response that it was "not privy to" these damaged items.

34. The difficulty for the applicants is they have provided no supporting evidence of this portion of their claim, such as photographs of the damage to the couch and cabinet. In the absence of any supporting evidence, I find this portion of the applicant's claim unproven, and dismiss it.

35. The *Court Order Interest Act* applies to the CRT. However, I find that because there is no evidence the applicants have paid anything to repair or replace the sofa, they are not entitled to interest.

36. 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. Ms. Colford paid $175 in CRT fees. As the applicants were partially successful, I find Ms. Colford is entitled to reimbursement of half of these fees, or $87.50.

ORDERS

37. Within 21 days of the date of this order, I order Burley to pay the following amounts:
    a. $500 in damages to Ms. Colford and Ms. Phillips jointly, and
    b. $87.50 in CRT fees to Ms. Colford.

38. The applicants are entitled to post-judgment interest, as applicable.

39. I dismiss the applicants' remaining claims.

40. 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. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Alison Wake, Tribunal Member