



# Civil Resolution Tribunal

Date Issued: June 5, 2024

File: SC-2023-002768

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Howe v. JVDEV Real Estate Group Ltd.*, 2024 BCCRT 510

B E T W E E N :

JANICE HOWE

**APPLICANT**

A N D :

JVDEV REAL ESTATE GROUP LTD., JASON D. PENDER, and  
1301123 B.C. LTD.

**RESPONDENTS**

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## REASONS FOR DECISION

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Tribunal Member:

Alison Wake

## INTRODUCTION

1. Janice Howe lives next to a property owned by the respondent, 1301123 B.C. Ltd. (130). She says 130, Jason D. Pender, and JVDEV Real Estate Group Ltd. (JVDEV) negligently excavated 130's property, which caused trees to fall onto her property.

2. Ms. Howe initially claimed \$5,000 for the cost to remove the trees and debris and to replace a damaged tree. In her submissions, Ms. Howe reduces the amount claimed to \$4,880.45.
3. JVDEV and Jason Pender say that they are not proper respondents to this dispute, as they do not own the property in question. 130 acknowledges that trees fell onto Ms. Howe's property, but denies that it was negligent. It asks me to dismiss Ms. Howe's claims.
4. Ms. Howe represents herself. Jason Pender represents all three respondents.

## **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). CRTA section 2 says that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly.
6. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, none of the parties requested an oral hearing. While in some respects, the parties in this dispute call into question each other's credibility, or truthfulness, these allegations mostly relate to matters that are not at issue in this dispute, such as alleged altercations between Ms. Howe and others, that do not affect my conclusions below. Considering the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find the benefit of an oral hearing does not outweigh the efficiency of a hearing by written submissions, so I have decided this dispute on the written materials before me.
7. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court.

8. 130 provided additional evidence after the CRT's deadline to do so. This evidence consists of an updated version of 130's submissions, which includes minor changes to its earlier submissions. Ms. Howe had an opportunity to respond to these updated submissions, so I find there is no procedural unfairness in considering them. Consistent with the CRT's mandate for flexibility and accessibility, I have considered 130's late submissions in this decision.

***Preliminary issue – named respondents***

9. As noted, Jason Pender and JVDEV say that they should not be named as respondents to this dispute, because they do not own the property where the excavation occurred. Ms. Howe says that she believes both Jason Pender and JVDEV should be "held accountable" in this dispute, but she does not specifically address why she believes they are liable for the alleged damage to her property. Ms. Howe says that JVDEV is managed by Jason Pender, and that it undertook logging on the property next to hers. She says she believes 130 was created to deflect liability from Jason Pender, but it has not been involved in the management and development of the property next to hers.
10. Ms. Howe raised this argument in her final reply submissions, so the respondents did not have an opportunity to respond to it. In any event, Ms. Howe did not provide documentary evidence to support her assertion that 130 is not involved in the property's development, nor did she provide documentary evidence that either JVDEV or Jason Pender is responsible for the excavation. While Jason Pender is one of 130's directors, directors are not personally liable unless they committed a wrongful act independent of the corporation.<sup>1</sup> Here, I find Ms. Howe has not provided any evidence that would support a finding that Jason Pender personally committed a wrongful act.
11. The respondents say that 130 is the property's registered owner, and I accept this as it is supported by a title search in evidence. On the evidence before me, I find Ms.

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<sup>1</sup> See *Merit Consultants International Ltd. v. Chandler*, 2014 BCCA 121).

Howe has not established that Jason Pender or JVDEV is responsible for any damage caused by excavating 130's land. So, I dismiss Ms. Howe's claims against Jason Pender and JVDEV. I have considered her claims against 130 below.

## **ISSUES**

12. The issues in this dispute are:

- a. Is 130 responsible for the alleged excavation damage?
- b. If so, must 130 pay Ms. Howe \$4,880.45 for her claimed damages?

## **EVIDENCE AND ANALYSIS**

13. As the applicant in this civil proceeding, Ms. Howe must prove her claims on a balance of probabilities, meaning more likely than not. While I have considered all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.
14. The background facts are undisputed. 130 purchased the property next to Ms. Howe's property in August 2021. It had trees, stumps, and debris excavated from the property, near the property line bordering Ms. Howe's property. In September 2021, multiple trees fell onto Ms. Howe's property, causing damage to her fence, hedge, and dogwood tree. More trees fell in January and December 2022. Ms. Howe claims \$4,880.45 to repair damage she says was caused by the falling trees.
15. The parties agree that the excavation at issue was carried out by an individual, PD. 130 says that it hired PD to excavate trees, stumps, and debris from 130's property near the property line with Ms. Howe's property. PD is not a party to this dispute, and the respondents' evidence is that he is now deceased. So, I infer Ms. Howe argues that 130 is vicariously liable for damage caused by PD's excavation.
16. First, I consider whether PD was 130's employee or an independent contractor. This matters because employers are generally liable for their employees' conduct.

However, with certain exceptions, an employer is generally not liable for negligence of independent contractors it hires.<sup>2</sup>

17. In determining whether a person is an employee or an independent contractor, relevant factors to consider include the level of control the employer has over the worker's activities, whether the worker provides their own equipment, whether the worker hires their own helpers, and the degree of financial risk taken by the worker.<sup>3</sup> These factors are not exhaustive, and the relative weight of each factor depends on the facts and circumstances of each case. The central question is whether the worker is performing services as a person in business on their own account. If so, the person is more likely an independent contractor.
18. Here, there is limited evidence before me about whether PD was 130's employee or an independent contractor. However, on the available evidence, I find it more likely than not that PD was an independent contractor that 130 hired to excavate its property.
19. I say this for several reasons. First, 130 refers to PD as a contractor in its submissions. While this is not determinative, I find it unlikely that 130 would refer to PD as a contractor if he were 130's employee. Second, correspondence between Ms. Howe and Jason Pender in evidence shows that Ms. Howe communicated directly with PD about some of the alleged damage, and they made an agreement for him to repair it. While 130 says that it ultimately paid PD for this additional work, I find this demonstrates that PD had a significant degree of control over his activities, and took on his own financial risk.
20. There is no evidence before me about who owned the excavator that PD used, so I find this factor does not assist in the determination. However, both parties' submissions describe PD working alone, or with his own employees. 130 says that it

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<sup>2</sup> See *Const. Scarmar Ltée v. Geddes Contr. Co.*, 1989 CanLII 2777 (BC CA), at paragraph 19.

<sup>3</sup> See *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, and *Kirby v. Amalgamated Income Limited Partnership*, 2009 BCSC 1044.

had to convince PD to continue working on the site following alleged altercations with Ms. Howe, which indicates that PD had control over where he chose to work.

21. On balance, I find the evidence supports a conclusion that PD was an independent contractor. As noted, this means that 130 generally cannot be held liable for PD's negligence.
22. An exception to this general rule arises where the activity for which the contractor is hired involves a non-delegable duty of care. This means that if a party is under a duty to do a particular thing, it cannot escape liability by delegating that duty to an independent contractor.<sup>4</sup> It remains responsible to ensure that the independent contractor carries out the work without negligence. This can arise where there is a strict statutory duty, or where the task is inherently dangerous or harmful, though these categories are not exhaustive or determinative. Whether a duty is non-delegable depends on whether it is appropriate, in the circumstances of the relationship between the parties, to hold the employer liable for its independent contractor's negligence.<sup>5</sup>
23. Here, there is no relevant statutory duty owed by 130. Previous CRT decisions have found that falling trees and excavating are not non-delegable duties.<sup>6</sup> While CRT decisions are not binding on me, I agree with their reasoning and apply it here. I find 130 was not under any special duty to take particular precautions to ensure that PD took reasonable care in his excavation activities.
24. In the circumstances, I find 130 is not vicariously liable for PD's alleged negligence, and so I find I do not need to further address Ms. Howe's claimed damages. I dismiss Ms. Howe's claims.

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<sup>4</sup> See *Lewis (Guardian ad litem of) v. British Columbia*, 1997 CanLII 304 (SCC).

<sup>5</sup> See *Lewis* at paragraph 53.

<sup>6</sup> See, for example, *McPherson v. Rutledge*, 2021 BCCRT 458, and *Caracciolo v. Potts*, 2023 BCCRT 102.

## **CRT FEES AND EXPENSES**

25. Under CRTA section 49 and the CRT Rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. As Ms. Howe was unsuccessful, I dismiss her claim for CRT fees. The respondents did not pay CRT fees and none of the parties claimed dispute-related expenses, so I make no order for them.

## **ORDER**

26. I dismiss Ms. Howe's claims and this dispute.

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Alison Wake, Tribunal Member