Civil Resolution Tribunal

Date Issued: February 21, 2018

File: SC-2017-003470

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Hickson v. Wand*, 2018 BCCRT 48

B E T W E E N :

Timothy Hickson

APPLICANT

A N D :

Pat Wand

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. In 2014, the applicant Timothy Hickson bought a residential property (Property) from the respondent Pat Wand. Two years later, Mr. Hickson sold a garden shed that was in the back yard and discovered an underground storage tank (UST) containing a “petroleum product”.

2. This dispute is about whether Mr. Wand knew about the UST on the Property and failed to properly disclose it as required in the Residential Property Disclosure Statement (Disclosure Statement). The applicant claims reimbursement of $3,937.50 that he spent removing the UST and remediating the area, plus tribunal fees and dispute-related expenses. Both parties are self-represented.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

4. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing. Neither party requested an oral hearing.

5. The tribunal 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 tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

6. Under tribunal rule 121, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUES

7. The issues in this dispute are a) whether the respondent was aware there was a UST on the Property, b) whether the respondent failed to disclose an oil UST as required, and c) if the respondent did fail to properly disclose, what remedies are appropriate?

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only addressed the evidence and arguments to the extent necessary to explain my decision.

9. The respondent Mr. Ward bought the Property in around 1993. He submits he did not know about the UST. He says the house was heated by electricity and so there was no reason to suspect an oil tank. Mr. Ward submits the back deck stairs were steep and so they removed them in 1998, leaving a cement slab. Mr. Ward submits that it made sense to put a shed on top of that slab as they needed something to store car tires, lawn mower, and a wheel barrow. Mr. Ward states there was a cap sticking out of the ground in the slab, but he never opened it and levelled the slab and installed the shed. Mr. Ward submits “we never gave any thought to the cap after that”.

10. While I expect Mr. Ward likely wondered about the reason for the cap when he discovered it in around 1998, in the circumstances I accept it was at most a passing concern given that he installed the shed and had no reason to think about it again.

11. Sixteen years later, in 2014 Mr. Ward sold the Property to Mr. Hickson. Mr. Ward submits he filled out the Disclosure Statement to the best of his ability without any deception on his part. Mr. Ward denies falsifying the Disclosure Statement as alleged by Mr. Hickson.

12. The August 14, 2014 Disclosure Statement asks if the seller is "aware of any past or present underground **oil** storage tank(s)" on the Property (my bold emphasis added), and Mr. Wand initialed "No". The Disclosure Statement states that the statement is made based on the person's "current actual knowledge".

13. Mr. Hickson submits the BC Fire Code requires that out-of-service USTs must be removed and contaminated soil must be replaced. At the time of purchasing the Property, during the inspection Mr. Hickson raised the pipe jutting out of the back lawn and asked about its origin, with a UST being a particular concern. Mr. Hickson says Mr. Ward said he did not know what it was and neither did septic professionals. Mr. Ward's realtor gave Mr. Hickson a geotechnical report stating the pipe was an inclinometer to test for slope instability, which satisfied Mr. Hickson that there was no UST. I do not have the geotechnical report before me in evidence.

14. When Mr. Hickson sold the shed, he removed the cap and "detected petroleum product". There is no evidence before me to confirm that the UST contained oil as opposed to gasoline.

15. Mr. Hickson asked Mr. Ward to remove the UST, but Mr. Ward refused although around the same time he told Mr. Hickson's realtor that he knew it was there. In his tribunal submission, provided through his son, Mr. Ward states,

> When the realtor called about the tank I responded "I knew it was there". This is because I was reminded it was there. The falsifying a legal document is just not true.

16. Mr. Ward submits that he believes the UST was most likely a gasoline storage tank the prior owner installed, as given the electrical heating in the house this is the only thing that makes sense to him. Mr. Ward notes that the Disclosure Statement asks only about an "oil" tank. As Mr. Hickson's detection of a "petroleum product" was likely gasoline, Mr. Ward says his answer on the Disclosure Statement was in fact likely true.

17. Initially, Mr. Hickson alleged that a neighbour to the south saw Mr. Ward "pouring a pad above it and building a garden shed hiding it from view". Mr. Hickson did not mention this allegation in his tribunal submissions and there is no witness statement before me about Mr. Ward pouring a pad. I reject the suggestion that Mr. Ward poured the pad, and instead I accept Mr. Ward's evidence that he built the shed on top of the existing pad. I make this finding because it is consistent with the fact that once the shed was removed, the existing slab underneath had the cap in place. Thus, I cannot find that Mr. Ward actively tried to hide the UST, as perhaps suggested by Mr. Hickson.

18. I accept Mr. Ward's explanation that his statement "I knew it was there" referred to his being reminded by the realtor of the cap's existence, rather than that he knew of the UST. This is the only logical reading of his comment, given the overall context of his submissions. That Mr. Ward had a third party expert report stating the pipe was an inclinometer, rather than relating to a UST, also supports the conclusion that Mr. Ward did not believe there was a UST.

19. On balance, I find that Mr. Ward never had actual knowledge of an oil UST, until the issue was raised by Mr. Hickson. I accept that at the time of sale Mr. Ward had forgotten about the cap. Based on the language of the Disclosure Statement, I find Mr. Ward was not required to disclose anything short of "current actual knowledge". A seller's representations in a property disclosure statement must be honest, but they do not necessarily need to be correct. A seller cannot knowingly or recklessly make false representations of fact (see *Hamilton v. Callaway*, 2016 BCCA 189).

20. In *Coglon v. Ergas*, 2009 BCSC 1170, the court held that a property disclosure statement is not a warranty about a home's condition. Rather, it is just a statement of the seller's present knowledge in answer to the questions posed. The court also found that evidence of willful blindness might allow for room to argue that the seller was negligent in filling out the property disclosure statement.

21. The court in Hamilton left it for another case to consider whether willful blindness on the seller's part was relevant. I do not need to resolve the question of whether willful blindness could lead to a negligence finding, as given the circumstances above and the passage of time over 16 years, I find Mr. Ward was not willfully blind at the time he sold the Property.

22. At the same time, I accept Mr. Ward's explanation that he did not consider there was an oil storage tank, because the house was heated by electricity. The applicant's remediation invoices refer to removal of a "fuel" tank, rather than to an "oil" tank. The Disclosure Statement asked expressly about an oil storage tank, not about USTs generally. This also supports a conclusion that Mr. Ward did not falsify the Disclosure Statement.

23. In summary, I find that the applicant has not proven that Mr. Ward falsely declared that he was not aware of any oil USTs. Based on the evidence before me, I therefore find Mr. Hickson has not proven Mr. Ward was required to disclose the existence of a fuel or gasoline tank.

ORDER

24. I order that the applicant's dispute is dismissed.

Shelley Lopez, Vice Chair