



# Civil Resolution Tribunal

Date Issued: September 13, 2018

File: SC-2017-006484

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Brind'Amour v. Unger*, 2018 BCCRT 519

**B E T W E E N :**

Alain Brind'Amour

**APPLICANT**

**A N D :**

Robert Unger

**RESPONDENT**

**A N D :**

Alain Brind'Amour

**RESPONDENT BY COUNTERCLAIM**

---

## **REASONS FOR DECISION**

---

Tribunal Member:

Shelley Lopez, Vice Chair

## **INTRODUCTION**

1. The applicant, Alain Brind'Amour, made an offer to buy a house from the respondent, Robert Unger. Mr. Brind'Amour paid Mr. Unger a \$5,000 deposit, and the offer was subject to inspection. On inspection, Mr. Brind'Amour says mouse feces and several dead mice were found. Further, Mr. Brind'Amour and his spouse concluded the laneway would be too difficult to navigate in the winter, and the cost to re-mediate the laneway was excessive. Mr. Brind'Amour says he decided, based on the inspection, not to purchase the property. He seeks the return of the \$5,000 deposit, which Mr. Unger has refused to do.
2. In his counterclaim, Mr. Unger seeks to keep the \$5,000 Mr. Brind'Amour paid. Mr. Unger says Mr. Brind'Amour's offer was not made in good faith. Mr. Unger says the house inspector was not a qualified professional home inspector. Mr. Unger essentially submits that the driveway was there to be seen at the time the offer was made and the inspection of it could not have changed anything. Mr. Unger says there was no rodent problem, although he acknowledges one mouse. Given the above, Mr. Unger says there were no valid reasons to back out of the sale and he says he is therefore entitled to keep the \$5,000 deposit. The 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.
5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Some of the evidence in this dispute amounts to a “she said, she said” scenario. Credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the tribunal’s mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the recent decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized the tribunal’s process and that oral hearings are not necessarily required where credibility is in issue.
6. 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.
7. Under tribunal rule 126, 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

8. The issue in these disputes is to what extent, if any, the applicant Mr. Brind'Amour is entitled to the return of his \$5,000 deposit, or, whether Mr. Unger is entitled to keep it.

## EVIDENCE AND ANALYSIS

9. In a civil dispute such as this, the applicant bears the burden of proof on a balance of probabilities. I have only commented upon the evidence and submissions to the extent necessary to give context to these reasons.
10. It is undisputed that Mr. Brind'Amour's July 17, 2017 offer had a "subject to inspection" clause, which included the buyer Mr. Brind'Amour having the right to obtain and approve an inspection report of the property on or before August 11, 2017. The \$5,000 deposit became part of the purchase price, within 48 hours of the contract becoming unconditional. In other words, once the "subject" was lifted, the \$5,000 was non-refundable. However, the inspection clause was for the sole benefit of Mr. Brind'Amour, the buyer. Further, the agreement provided that if the sale does not complete, the deposit should be returned or "paid into Court". It is undisputed the sale did not complete.
11. On August 11, 2017, the day after a July 31, 2017 inspection, Mr. Brind'Amour or his realtor sent Mr. Unger (or his realtor) a "General Release & Authorization re: deposit monies", stating that the July 17, 2017 contractual offer was void, because:

After Inspection of the Property the Buyers, in particular Farrah Brind'Amour decided the driveway was too severe and dangerous to navigate at any time let alone winter and also she was disgusted with dead/live mice in the home.
12. I find the July 31, 2017 inspection was arranged through the seller's realtor, Cathy Burke, which was not particularly disputed. Mr. Brind'Amour attended with a Pat Davis, who is a "local developer and project manager". Mr. Brind'Amour submits

Mr. Unger's daughter asked Mr. Brind'Amour if he would remove some large mice that her cat had caught and left strewn about the property, as it made her uncomfortable. Mr. Brind'Amour also says he removed a ceiling panel as it had a water ring on it, and upon removal he found it was covered in mouse feces. Later, Mr. Brind'Amour removed the ceiling panel that led to the attic to inspect it, and again found mouse feces on the panel. Mr. Brind'Amour says that "later on", his wife noticed how steep the laneway was and the inability to turnaround at the bottom, and that she did not feel confident about using it in the winter. Mr. Brind'Amour further submits that his wife was repulsed at the idea of living in a house full of mice.

13. Mr. Brind'Amour provided a statement from Mr. Davis, who says he has over 20 years' experience in property development. This background is not disputed and I accept it, although I acknowledge Mr. Unger's objection that Mr. Davis was not a professional home inspector and was Mr. Brind'Amour's friend. Mr. Davis stated that his first concern was the grade of the driveway, as it was so steep it would be problematic in winter, and any remediation would be difficult and expensive. He confirmed that the major concern in inspecting the house interior was the amount of mouse feces discovered, as described by Mr. Brind'Amour.
14. Mr. Lamoureux provided a statement that confirmed he notified Ms. Burke on August 1, 2017 that Mr. Brind'Amour would not complete the contract due to the issues with the steep driveway and the mice.
15. Mr. Brind'Amour provided a copy of an email thread Ms. Burke had with Mr. Lamoureux. In it, Ms. Burke referenced the "unconditional release" (which I infer refers to the deposit), and said that her head office told her to have no more contact with Mr. Unger.
16. As referenced above, Mr. Unger submits the offer was not made in good faith. Other than a copy of the parties' contract, he provided no documentary evidence. His submission is based on his argument that Mr. Davis was not a professional

inspector, his denial of the presence of mice, and that the driveway grade was unchanged from the date of the offer.

17. First, nothing in the contract says Mr. Brind'Amour must use a "professional" inspector. The contract is also clear that the inspection clause is for Mr. Brind'Amour's sole benefit.
18. Second, on balance I find there was some evidence of mice, given both Mr. Brind'Amour and Mr. Davis noted it and because Mr. Lamoureux confirmed the inspection failed only the day after the inspection, and he gave the reasons for that failure. Further, even setting aside the fact that Mr. Unger brought his own dispute to keep the \$5,000 deposit, Mr. Unger did not produce a statement from his daughter, which presumably could have refuted Mr. Brind'Amour's statement about mice and her cat, if it was indeed untrue. While Mr. Unger objects to the inspection having taken place when he was not home, it is undisputed that it was arranged through his own realtor, Ms. Burke. In any event, Mr. Unger acknowledges that his cat brought a mouse to the house at the time of inspection, although he denies any "rodent problem". Again, on balance, I find there was evidence of mice: some feces and, as admitted, at least one mouse.
19. I find the presence of mouse feces and at least one mouse was a valid reason for Mr. Brind'Amour to treat the inspection as having failed. Again, the "subject to inspection" clause was solely for Mr. Brind'Amour's benefit.
20. Third, while the driveway grade was always there to be seen, there is nothing inappropriate in Mr. Brind'Amour relying upon Mr. Davis' experience to identify the steep grade and that it was likely problematic in winter. The inspection was of the "property", which includes the house and the driveway. Inspections are not necessarily confined to a strict list or only to hidden defects, bearing in mind here there were no contractual limitations as to what the inspection could entail.
21. I find Mr. Unger has not proved his serious allegation that Mr. Brind'Amour and his spouse "just changed their minds" and that they made their offer in bad faith. They

made a timely report that they found the inspection had failed. I find Mr. Unger must refund the \$5,000, as provided in the parties' contract. I dismiss Mr. Unger's claims, and his dispute.

22. The applicant entitled to pre-judgment interest on the \$5,000 under the *Court Order Interest Act* (COIA), from August 1, 2017, as set out in my order below. In accordance with the Act and the tribunal's rules, as the applicant was successful I find he is entitled to reimbursement of the \$175 paid in tribunal fees.

## **ORDERS**

23. Within 30 days of the date of this decision, I order Mr. Unger to pay Mr. Brind'Amour a total of \$5,234.32, comprised of:
  - a. \$5,000 as a refund of the deposit,
  - b. \$59.32 in pre-judgment interest under the COIA, and
  - c. \$175 in tribunal fees.
24. Mr. Brind'Amour is entitled to post-judgment interest under the COIA, as applicable.
25. I dismiss Mr. Unger's claims, and therefore his dispute.
26. Under section 48 of the Act, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.
27. Under section 58.1 of the Act, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed,

a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

---

Shelley Lopez, Vice Chair