



Civil Resolution Tribunal

Date Issued: May 24, 2019

File: SC-2018-006074

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Le Houillier v. Noble*, 2019 BCCRT 626

B E T W E E N :

Darrell Le Houillier

APPLICANT

A N D :

Darren Noble

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Sarah Orr

INTRODUCTION

1. This is a dispute about a dishwasher. The applicant, Darrell Le Houillier, bought a house from the respondent, Darren Noble. The respondent warranted that all appliances, including the dishwasher, would be in proper working order when the applicant took possession of the house. The applicant says when he moved into the house he learned the dishwasher was defective and he had to replace it. He wants

the respondent to pay him \$937.49 for the cost of removing the defective dishwasher and purchasing and installing the new dishwasher.

2. The respondent says he noticed a minor issue with the dishwasher when he owned the house, but that it was in proper working order when he sold the house. He says the applicant decided to buy the house after a home inspection, and that the applicant never mentioned any issues with the dishwasher before buying the house.
3. The applicant is a part-time member with the Civil Resolution Tribunal (tribunal), and the respondent objects to me deciding this dispute based on a reasonable apprehension of bias. The applicant says the circumstances do not give rise to a reasonable apprehension of bias, and that I am able to decide this dispute.
4. Both parties are self-represented.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the tribunal. The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal 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.
6. 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.
7. 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.

8. 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

9. The issues in this dispute are:
 - a. Should I refuse to resolve this dispute based on a reasonable apprehension of bias?
 - b. If not, is the respondent required to pay the applicant \$937.49 for the cost of removing his dishwasher from his house and purchasing and installing a new dishwasher?

EVIDENCE AND ANALYSIS

10. In a civil claim like this one, the applicant must prove their claim on a balance of probabilities. This means I must find it is more likely than not that the applicant's position is correct.
11. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision. The respondent filed a Dispute Response and made submissions but did not submit any evidence, as he says he has none.
12. The respondent previously owned a house in Vancouver (house). On May 2, 2017 the parties entered into a purchase of contract and sale of the house (contract). In the contract the respondent warranted that all appliances would be in "proper working order on possession."
13. On June 1, 2017 the applicant took possession of the house, but he carried out some repairs and renovations and did not move in until July 23, 2017. Between June 1, 2017 and July 23, 2017 no one used the dishwasher, and no work was conducted in the kitchen. Within a few days of moving into the house, the applicant

noticed that the dishwasher did not work properly. He says the lower tray did not roll smoothly on its tracks when loaded with dishes and it had to be lifted over a spot where the tracks were damaged. The applicant submitted a statement from his wife who said the defect was not apparent unless the lower dishwasher tray was more than half full of dishes.

14. Between July 27, 2017 and late September 2017, the applicant and his wife made numerous attempts to contact the respondent directly and through their realtor to find out when the respondent bought the dishwasher and whether it was still under warranty. They received no response from the respondent.

Should I refuse to resolve this dispute based on a reasonable apprehension of bias?

15. Under section 11 (1) (a) (ii) of the Act, the tribunal may refuse to resolve a dispute within its jurisdiction if it considers the dispute would be more appropriate for another legally binding process or dispute resolution process.
16. The applicant is a part-time member of the tribunal, appointed on December 11, 2017. He disclosed this information to the tribunal when he started this dispute, but the respondent was not aware that the applicant is a tribunal member when this dispute came before me. I decided that the applicant's membership on the tribunal raised the issue of whether having a tribunal member adjudicate a dispute involving another tribunal member creates a reasonable apprehension of bias. I advised the respondent that the applicant is a tribunal member and gave both parties an opportunity to provide submissions on this issue. I also informed the parties that I have never met or communicated with the applicant in his role as a tribunal member or otherwise.
17. To assist the parties in making responsive submissions, I informed them that a reasonable apprehension of bias is a reasonable concern or suspicion that an adjudicator might not act in an entirely impartial manner, even if such impartiality is unintended. I informed the parties that the courts have said the test for determining

a reasonable apprehension of bias is whether a reasonable and informed person with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the adjudicator's conduct gives rise to a reasonable apprehension of bias (see *Committee for Justice and Liberty et al. v. National Energy Board et al.*, 1976 CanLII 2 (SCC)). I informed the parties the courts have also said that because there is a strong presumption of a decision-maker's impartiality that is not easily displaced, the test for a reasonable apprehension of bias requires a "real likelihood or probability of bias," and there is a high burden of proving a claim of bias (see *Trans Mountain Pipeline ULC v. Mivasair*, 2018 BCSC 2141 (CanLII) (*Trans Mountain*)).

18. The respondent objects to the tribunal resolving this dispute because he says the applicant and I are co-workers. He says the fact that I am aware the applicant is my co-worker creates a bias that could affect my decision. He says that although I claim not to know the applicant, it is more likely that we do in fact know each other since we work together. He says there is no evidence that I have no relationship with the applicant other than our statements, which are insufficient. The respondent would prefer that this matter be resolved by a judge in the Provincial Small Claims Court, where he says there would be a "more even playing field."
19. The applicant says the threshold to establish a reasonable apprehension of bias is high, and mere suspicion is insufficient (*R. v. Novak*, 1995 CanLII 2024 (BC CA)). He says that after his appointment to the tribunal on December 11, 2017 he attended 2 days of training at the tribunal's office in February 2018, and he has not returned to the tribunal's office since that date. He says all his files are assigned to him directly by the tribunal's Chair, he completes them electronically, and he communicates only with the Vice Chairs of Small Claims and Strata about his decisions. The applicant notes that I was appointed to the tribunal on November 20, 2018, and that he has never met me or spoken to me. He says the only connection between us is the fact that we both work for the tribunal.

20. The applicant says courts have repeatedly concluded that employment in an organization alone does not give rise to a reasonable apprehension of bias with respect to that organization, and he cites *Re Marques et al. v. Dylex Ltd.*, 1977 CanLII 1157 (ON SC). In that case the Vice-Chair of the Labour Relations Board (LRB) was on a panel at a certification hearing. One year prior to his appointment to the LRB he had been an employee at a law firm which had acted for the union involved in the hearing. While the Vice-Chair worked at that law firm he acted for the union on unrelated matters, but he had nothing to do with any aspect of the LRB certification proceeding that was before him while he was an employee of the law firm. The court found there was no reasonable apprehension of bias.
21. The applicant says a reasonable person would not reasonably infer that I would be biased towards him simply because we do the same type of work and report to the same people. The applicant notes the tribunal's mandate to provide accessible, speedy, informal, and flexible decision-making. He says this is a small dispute with claimed damages between \$1000 and \$1100, and that this is the type of dispute that is better addressed by the tribunal's accessible, informal and flexible process than by the more procedurally burdensome requirements of the court.
22. In *Eckervogt v. British Columbia*, 2004 BCCA 398, a 3-member panel of the Expropriation Compensation Board conducted a hearing between an individual and the provincial government. One member of the panel took a crown counsel position with the Legal Services Branch of the Ministry of Attorney General while the decision was reserved. The court found there was no reasonable apprehension of bias. The court said it is the Legal Services Branch, not the Criminal Justice Branch, that advises the government with respect to expropriation litigation, and the 2 branches have little to do with each other. The court said that while in the private sector an adjudicator's employment with one of the parties is grounds for automatic disqualification, it is not necessarily so in the public sector.
23. In *British Columbia (Forests, Lands and Natural Resource Operations) v. British Columbia (Forest Appeals Commission)*, 2014 BCSC 2192 (CanLII) (affirmed 2016

BCCA 80), a member of the Forest Appeals Commission (Commission) decided a case between a forestry company and the government in which they rescinded 2 stumpage rate determinations by the Regional Appraisal Coordinator. The member was actively involved in an organization at the time that lobbied the government to reduce stumpage rates.

24. The court said that because the Commission had a strictly adjudicative role, its members were expected to comply with the same standard of neutrality that applies to the judiciary. They also said the court should apply more scrutiny when an adjudicator has an ongoing association or employment with one of the parties. However, the court also recognized that the test for reasonable apprehension of bias is highly contextual, depending upon the facts and circumstances of the case. Given the regulatory nature of the forest industry, the fact the member was appointed specifically for his expertise in stumpage appraisal, the limited number of people in the industry with that expertise, and the fact the member had not lobbied the government for amendments to the sections of legislation relevant to the dispute he decided, the court found there was no reasonable apprehension of bias.
25. This applicant in this case is participating in the tribunal process not in his capacity as a tribunal member, but as a private individual. The tribunal is structured such that all full-time and part-time members work remotely, and there are very few occasions on which members attend the tribunal's office. The applicant says the only time he attended the tribunal's office was for 2 days of training in February 2018, which was 9 months before my appointment to the tribunal. I have attended the tribunal's office several times since November 2018, however the applicant was not present at the office on any of those occasions.
26. As the applicant says, tribunal members' files are assigned by the Chair, and tribunal members communicate with the Vice Chairs about their decisions. In this way each tribunal member works independently from other tribunal members on their assigned files. The full-time tribunal members attend bi-weekly study sessions

and intermittent training sessions held by teleconference, however the part-time members do not participate in these sessions.

27. I appreciate the respondent's concerns about the applicant and I being "co-workers." If the tribunal were a more traditional office environment the applicant's suspicions may have more weight. However, given the unique remote working structure of the tribunal, and the fact that tribunal members work on files independently, I find the respondent's mere suspicion that I know the applicant is insufficient to establish a reasonable apprehension of bias, particularly given the high threshold discussed in *Trans Mountain*. It is the applicant's responsibility to prove a reasonable apprehension of bias and he has submitted no evidence to establish that the applicant and I have ever met or been in contact. I find that a reasonable person properly informed of these circumstances would not apprehend bias.
28. I also find that if there was a reasonable apprehension that every tribunal member was biased regardless of their relationship with the applicant, this would effectively prevent the applicant from accessing the tribunal's services by virtue of his part-time employment with it.
29. In all of the circumstances I find the respondent has not established a reasonable apprehension of bias, and I decline to refuse to resolve this dispute. Therefore, I must decide the dispute on its merits.

Is the respondent required to pay the applicant \$937.49 for the cost of removing his dishwasher from his house and purchasing and installing a new dishwasher?

30. The applicant submitted photographs of the inside of the dishwasher which show a significant dent in one of the bottom tracks. He also submitted photographs of the outside of the dishwasher after it had been removed from the cabinetry which show a visible external dent on the same side. He also submitted a video of him trying to pull out the bottom dishwasher rack when it was full of dishes, and he was unable to

do so without reaching into the back of the dishwasher and lifting the bottom rack out manually. The statement from the applicant's wife says that by October 2017 she was eight months pregnant and unable to lift the lower rack of the dishwasher when it was more than half full of dishes.

31. The respondent says the dishwasher was purchased as a final sale approximately 1 year before he sold the house. He says he used the dishwasher during that time, and that although the bottom tray did occasionally stick when pulling it in and out, it was in "proper working order."
32. On the evidence before me I am not satisfied the dishwasher was in proper working order when the applicant took possession of the house. The respondent does not deny that there was an issue with the bottom tray before he sold the house. The applicant provided detailed evidence of the dishwasher's alleged defect, which he noticed within days of moving into the house. The respondent does not allege, nor is there any evidence to suggest, that the dishwasher was damaged after the June 1, 2017 possession date. I find it is not reasonable to expect someone using a dishwasher to bend down and lift a rack full of dishes out of the dishwasher. I find the dishwasher was not in proper working order when the applicant took possession of the house and that the respondent breached his warranty in that regard.
33. The respondent says that regardless of his warranty, the applicant had the opportunity to inspect the entire house, including the dishwasher, before buying it, and that the applicant bought the house without raising any issues with the dishwasher. The applicant says that when he and his wife inspected the house they noticed there was a minor bumping noise when they opened or closed the bottom tray of the dishwasher without dishes. However, the applicant says he did not learn of the dishwasher's defect until the bottom tray was full of dishes, and that it is not standard practice to bring dishes to a home inspection. I agree.
34. The applicant says that even if it was reasonable to bring dishes to a home inspection, the respondent's warranty was not contingent on an inspection. The applicant relies on the tribunal's decision in *Tong v. Paramis Home Inc.*, 2018

BCCRT 239, in which the tribunal found a seller's warranty in a contract of purchase and sale for a house was effective regardless of whether the purchaser did an inspection prior to purchase. While that decision is not binding on me, I find the facts of that case are similar, and I rely on it. I find the fact that the applicant inspected the house before purchasing it does not relieve the respondent of his responsibility to fulfill the terms of the contract, which includes the warranty that all appliances would be in proper working order on possession. As I have found the respondent breached the warranty, I find he is responsible for the applicant's costs to remedy the defective dishwasher. Next, I must determine the amount of those costs.

35. The applicant says the dishwasher was not repairable and that he had to replace it. While there is no evidence the applicant attempted to repair the dishwasher, based on the nature of the defect, and the fact that it was dented both externally and internally, I am satisfied that it was not repairable.
36. The applicant went shopping for a new dishwasher at 4 different appliance vendors and says he found the best prices at Home Depot. He bought a new dishwasher for \$798, however he says he bought a superior model to the dishwasher in the house. He says he confirmed with Home Depot staff that the closest equivalent model to the dishwasher in the house cost \$598. His evidence also shows the haul-away fee for the original dishwasher was \$25, and the delivery fee for the new dishwasher was \$49.98, and that these amounts were all subject to GST and PST for a total of \$753.74. The applicant's evidence shows the installation fee for the new dishwasher was \$175 plus GST for a total of \$183.75, making his total claim \$937.49.
37. The respondent did not submit evidence about the value of the dishwasher at the time he sold the house, nor did he dispute any of the applicant's evidence about the costs associated with replacing the dishwasher. Therefore, I accept the applicant's evidence, and I find the respondent must pay the applicant \$937.49. The applicant is entitled to \$20.81 in pre-judgment interest under the *Court Order Interest Act*

calculated from October 28, 2017, which is the date he purchased the new dishwasher.

38. Under section 49 of the Act, and tribunal rules, as the applicant was successful I find he is entitled to reimbursement of \$125 in tribunal fees. He also claims \$10.70 in dispute-related expenses for the cost of registered mail to serve the Dispute Notice on the respondent. I find this expense is reasonable and the applicant is entitled to \$10.70 in dispute-related expenses.

ORDERS

39. Within 14 days of the date of this order, I order the respondent to pay the applicant a total of \$1,094.00, broken down as follows:
- a. \$937.49 for the cost of removing the defective dishwasher and purchasing and installing the new dishwasher
 - b. \$20.81 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$135.70 for \$125 in tribunal fees and \$10.70 for dispute-related expenses.
40. The applicant is entitled to post-judgment interest, as applicable.
41. 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.

42. 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.

Sarah Orr, Tribunal Member