



# Civil Resolution Tribunal

Date Issued: May 30, 2019

File: SC-2019-000806

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Rioux v. Hibberd*, 2019 BCCRT 658

BETWEEN:

LUC RIOUX

**APPLICANT**

AND:

BILL HIBBERD

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Shelley Lopez, Vice Chair

## INTRODUCTION

1. This is a dispute about a July 2016 house sale. The applicant buyer, Luc Rioux, says the respondent, Bill Hibberd, failed to disclose an inoperative and unsafe 'homemade' gas fireplace that had inadequate venting.

2. The applicant says at the time of sale he believed the fireplace was safe and useable and the fact that it was not should have been disclosed. The applicant seeks \$3,500, which he says is the cost to repair the fireplace.
3. The parties are each self-represented.

## **JURISDICTION AND PROCEDURE**

4. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 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.
5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. 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 that in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the BC Supreme Court recognized the tribunal's process and found 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 9.3(2), 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.

## **ISSUE**

8. The issue is whether the respondent seller was required to disclose the fireplace's inoperative condition at the time of sale, and if so, what is the appropriate remedy.

## **EVIDENCE AND ANALYSIS**

9. In a civil claim such as this, the burden of proof is on the applicant to prove its claims on a balance of probabilities. I have only referenced the evidence and submissions as necessary to give context to my decision.
10. At the time of the respondent's sale of the home to the applicant, the house had three fireplaces. One, the subject of this dispute, was inoperative.
11. The applicant says in December 2017 he discovered the fireplace was unsafe when he had the fireplace connected by a gas contractor GPH Mechanical (GPH) and then started it: he says the room filled with carbon monoxide and 'aldehydes'. The applicant contacted the respondent who said not to use the fireplace.
12. The respondent says he initially installed the custom fireplace in 1994, but that after testing he decided it would require a lot more work to ensure it was safe to use. So, the respondent decided to make the fireplace inoperative, which he felt made it safe. He and his wife liked the fireplace's appearance (a log set) so they kept it as a decorative feature for 20 years.
13. While there is some dispute between the parties about whether the gas to the fireplace had been capped off, the applicant acknowledges that he hired GPH to re-connect electrical wiring to get the fireplace started. I find this shows the fireplace was inoperative at the time of sale.

14. I note the applicant submits that GPH said he “got the fireplace running but it was quite dangerous” and it was “not an approved appliance and I shouldn’t have touched it”. There is no statement from GPH in evidence and no explanation from the applicant why not. I find the absence of a statement from GPH leads me to prefer the respondent’s submission that he had capped the gas line to the fireplace. There is no explanation for why GPH did not tell the applicant that the fireplace was “quite dangerous” and instead just got it running.
15. There is no suggestion the respondent ever told the applicant the fireplace was safe or that it worked. On the property disclosure statement (PDS), the respondent initialed under the “NO” column in answer to the question ‘has the fireplace, fireplace insert, or wood stove installation been approved by local authorities’. I find this was one opportunity for the applicant to pursue appropriate investigations about the condition of the fireplace.
16. I acknowledge the respondent said “NO” to the PDS question of whether he was aware of any alterations made without a required permit. However, he had already indicated the fireplaces were not approved. Given the fireplace in question had been inoperative for 22 years and was used as a decorative feature only, I find the respondent reasonably answered this question based on his current knowledge at the time.
17. Except for matters that must be disclosed on a PDS, the principle of “buyer beware” generally applies to real estate purchases, and the onus is on the purchaser to determine the state and quality of the property. However, buyer beware does not apply when a vendor makes a fraudulent misrepresentation about the property (see *Cardwell v. Perthen* 2006 BCSC 333, affirmed 2007 BCCA 313). There is no suggestion here the respondent made a fraudulent misrepresentation. Rather, the applicant’s claim is that the respondent failed to disclose the fireplace would be unsafe if it were operated.

18. Thus, this case turns on whether the defect in the fireplace had to be disclosed by the respondent. In particular, whether the fireplace's condition was a latent (hidden) defect or a patent (obvious on reasonable inspection) defect.
19. A patent defect is one that can be discovered by conducting a reasonable inspection and making reasonable enquires about a property (see *Cardwell*). By contrast, a latent material defect is a material defect that cannot be discerned though a reasonable inspection of the property, including a defect that renders the property dangerous or potentially dangerous to the occupants or unfit for habitation. A seller must disclose a latent defect if they have knowledge of it.
20. There is no question here the respondent was aware of the defect, in that he knew the fireplace was inoperative and that it would be unsafe for it to be operated. So, if the fireplace's condition was a latent defect, the respondent is liable because it is uncontested he failed to disclose it. I note the evidence shows that the respondent did not purposely remain silent about the fireplace at the time of sale, but rather treated it as inoperative and de-commissioned as he had done for the 20 plus years prior. When the applicant contacted him in December 2017 about the fireplace, the respondent was immediately candid that it should not be used and that it had been an expensive experiment. The respondent then wrote that if the applicant did not want to leave it as a decorative piece, the applicant would need to install a direct vent fireplace.
21. Based on the applicant's own evidence, the problem with the fireplace arose as soon as he tried to operate it after it was connected by GPH. I find this shows it was a patent or obvious defect. Further, the applicant obtained an 84-page inspection report that identified all the deficiencies in the home. It identified that 2 of the 3 fireplaces were "operational", and the third (the 1 in question here) was shut off in the crawl space. The respondent notes "shut off" was incorrect because the gas line was disconnected and properly capped off, which the applicant denies. In any event, I find the fireplace's inoperative status was something the applicant knew before he bought the home. As further support for my conclusion the fireplace was a

patent defect, I note the respondent disclosed on the PDS that the fireplaces were not approved and the Multiple Listing Service (MLS) listing stated there were only 2 fireplaces. The parties' contract did not specifically address fireplaces at all.

22. Next, as noted above a material latent defect may include something that renders the property dangerous or potentially dangerous. However, the respondent says he had disconnected it and 5 things needed to be done to turn it on. As noted, the applicant admits he hired a gas contractor (GPH) re-connect wiring, quite apart from the disputed issue of the gas being capped. Given these circumstances, together with the home inspection report, I find the inoperative and de-commissioned fireplace was not dangerous such that its condition needed to be disclosed.
23. As the fireplace's condition was a patent defect, the respondent had no obligation to specifically point it out. As noted above, there is no evidence the respondent did anything to actively conceal it. There was no misrepresentation.
24. Even if I had found the respondent responsible for not disclosing the fireplace's condition, I would not have allowed the applicant's damages as claimed. He claims \$3,500, yet the estimate he provided was for \$2,500 to \$3,000 plus GST, with a 10% contingency built-in. While the applicant asserts \$500 is reasonable for the "extra taxes" and drywall repair costs, he has provided no estimate about drywall or any explanation for why drywall repair would be required for venting the fireplace that has a stone surround.
25. Given my conclusions above, I find the applicant's claims must be dismissed. In accordance with the Act and the tribunal's rules, as the applicant was unsuccessful I find he is not entitled to reimbursement of tribunal fees or dispute-related expenses.

**ORDER**

26. I order the applicant's claims and this dispute dismissed.

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Shelley Lopez, Vice Chair