Civil Resolution Tribunal

Date Issued: June 28, 2019

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Jansz v. Clint Askin (dba Gary's Gas Company)*, 2019 BCCRT 783

B E T W E E N :

MICHAEL JANSZ

APPLICANT

A N D :

CLINT ASKIN (Doing Business As GARY'S GAS COMPANY)

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Trisha Apland

INTRODUCTION

1. This dispute is about the supply and installation of a tankless water heater.

2. On November 28, 2018, the respondent CLINT ASKIN (Doing Business As GARY'S GAS COMPANY), supplied and installed a low-output, non-condensing water heater (V65i) in the applicant, MICHAEL JANSZ's home.

3. The applicant claims the V65i did not function properly for his large, 4-bathroom home. He says the manufacturer, Rinnai America Corporation (Rinnai), rates the V65i for small to medium homes, with only two bathrooms.

4. Because the applicant found the V65i inadequate, he had the respondent remove the V65i and replace it with a high-output, condensing water heater. The respondent charged the applicant for the new water heater, plus an additional $194 for labour costs to replace it. The respondent refused to take back the V65i and issue a refund. The unused V65i remains in the applicant's possession.

5. The applicant claims reimbursement of $1,445 for the price he paid the respondent for the V65i. He also claims reimbursement of $194 for the labour to replace it.

6. The respondent denies that he owes the applicant any reimbursement. He says the applicant chose the V65i because it was the cheaper option and he is not responsible if the applicant later changed his mind. He says he does not permit refunds.

7. The parties are each self-represented.

JURISDICTION AND PROCEDURE

8. 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*. 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.

9. 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 "he 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.

10. 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.

11. 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.

12. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders:

    a. order a party to do or stop doing something;

    b. order a party to pay money;

    c. order any other terms or conditions the tribunal considers appropriate.

ISSUE

13. The issue in this dispute is whether the respondent owes the applicant reimbursement of $1,445 for the V65i and $194 in labour costs to replace it with a high-output model.

EVIDENCE AND ANALYSIS

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

15. The thrust of the applicant's claim is that he relied on the respondent to choose and supply a water heater that would perform well in his home. It is undisputed that the applicant has a large 4-bathroom home. He claims the respondent supplied a water heater that did not have the required output or rating for use in his home.

16. The applicant submitted an email from the manufacturer Rinnai that confirmed the V65i is rated for a maximum of 2 fixtures in Canada. He also submitted Rinnai's active website link showing the V65i is currently, meant for small to medium homes. The applicant says when he tested the V65i in his home, it would barely run two showers at the same time, the water would slow considerably, and the temperature seemed to drop if he concurrently turned on a sink faucet.

17. The respondent does not say that the V65i should have functioned well in the applicant's home or that it was rated for use in his large, 4-bathroom home. Instead, the respondent states generally that the V65i was at that time, his "most common," non-condensing model and would "perform well in most applications."

18. Based on the evidence before me, I find the V65i water heater was not rated for the number of fixtures that applicant had in his home. I also find it lacked the necessary output to function properly in the respondent's home. This is not particularly contested by the respondent.

Implied Warranty

19. The *Sale of Goods Act* (SGA) governs the sale of goods to consumers. I find the SGA applies here. The applicant purchased the V65i water heater directly from the respondent. I find that supplying the water heater was one of the main purposes of their verbal contract. Installation was the other main purpose.

20. Section 18 of the SGA implies warranties of quality and fitness for goods in certain situations. Section 18(a) says that when a buyer implies or expressly lets the seller know the goods are being purchased for a particular purpose there is an implied condition that the goods are reasonably fit for that purpose. Section 18(b) of the SGA says that if goods are bought by description, there is an implied condition that the goods are of merchantable quality. Section 18(c) says that there is an implied condition of durability. These implied warranties apply even where the seller is not the manufacturer, as is the case here.

21. While the applicant does not specifically rely on the SGA, I find in substance, he is arguing that the respondent breached section 18(a) of the SGA by selling a water heater that was not reasonably fit for the purpose of being used in his 4-bathroom home.

22. To establish a claim under s 18(a) of the SGA, the applicant must prove the following three factors on a balance of probabilities (*Nikka Traders v Gizella Pastry*, 2012 BCSC 1412, para 65):

    a. the buyer has made known to the seller the purpose for which he requires the goods,

    b. the dissemination of that purpose shows that the buyer relies on the seller's skill or judgment, and

    c. the goods are of a description that is in the course of the seller's business to supply.

23. I find on a balance of probabilities that the applicant satisfied all three required factors and has proven the respondent breached section 18(a) of the SGA by supplying a water heater that was not fit for its purpose. My reasons follow.

a. The Purpose

24. The evidence is undisputed that the respondent viewed the applicant's 4-bathroom home prior to purchasing and installing the water heater and the parties discussed the requirements of the applicant's home. I find the applicant had let the respondent know the purpose for which he required the water heater, satisfying the first factor of the test in *Nikka Traders*.

b. Reliance on the Respondent's Skill or Judgment

25. The applicant submits that he had relied on the respondent's expertise and judgment to choose an appropriate tankless model consistent with the size of his home and preference for a condensing water heater. The respondent submits that the applicant chose the V65i based on its price.

26. The respondent visited the applicant's home in about June 2018 to discuss water heater options. The respondent emailed the applicant the options, which included traditional tank, tankless condensing and tankless non-condensing water heaters.

27. On July 4, 2018. the applicant emailed the respondent that he wanted a tankless system and thought a condensing model would be "worthwhile". He said that even though it was more expensive, it had a rebate. The respondent explained that most of his customers go with the non-condensing model but if the applicant can make "the extra investment it will pay off in the long run." This is the only documented evidence of the parties' discussion about water heater options prior to purchase. The parties' emails contains no mention of specific water heater models.

28. It is undisputed that on November 28, 2018, the respondent arrived at the applicant's home and asked the applicant's wife to call the applicant, who was not home, to ask him which water heater he wanted installed.

29. The parties dispute the content of the discussion between the applicant's wife and the respondent. The content of this discussion is the key feature of the respondent's submissions in response to this dispute. The respondent submits that he had asked the applicant's wife to "confirm the model" and whether the applicant wanted the "less expensive, non-condensing model or the more expensive larger unit." The respondent says she told him the applicant had chosen the less expensive unit. He said based on this choice he left the home, purchased the V65i from his supplier, and returned and installed it in the applicant's home.

30. In support his account, the respondent submitted a witness statement from his brother. I find the brother's statement is not sufficiently independent to be reliable and I put no weight on it. The brother's statement is written in the first person by the respondent and is an exact copy of the content of the respondent's Dispute Response. The brother added one line at the end of the statement to say that the applicant's statement is a truthful account of what occurred.

31. The applicant says he was busy at work when his wife called to ask him about the water heater. The applicant specifically denies that he told his wife he wanted a less expensive unit or the non-condensing V65i. Instead, he says he told his wife to accept whatever the respondent recommended, which he thought would be consistent with the parties' earlier discussions and manufacturer specifications.

32. I have no statement from the applicant's wife with her account of the conversation. Presumably such a statement would have been easy for the applicant to provide, so I draw an adverse inference. I find whatever was specifically communicated in that conversation, the respondent had understood that the applicant wanted the less expensive unit. However, communicating the choice, "less expensive" does not necessarily refer to a certain model, size or type (condensing or non-condensing).

33. Regardless of what the applicant's wife might have told the respondent, I accept the applicant's submission that he did not ask his wife to request the cheaper, non-condensing, V65i model. I find such a choice would have been inconsistent with the

applicant's July 4 email where he told the respondent he preferred the *condensing* water heater for his home and did not mind that it was more expensive.

34. Nothing in evidence suggests the applicant changed his mind. The applicant submits that on seeing the installed V65i, he immediately researched it on the internet and found it was not right for his house. The night of the installation, the applicant emailed the respondent expressing surprise at the V65i because it seemed a "mismatch" for his house due to Rinnai rating the unit for small to medium houses. The respondent replied that the V65i is his "go to unit for non-condensing units" and that other models provide only "marginally" better output.

35. I find based on the parties' email exchanges that it is more likely than not that it was the respondent and not the applicant, who ultimately chose the V65i.

36. I find the applicant had relied on the respondent's skill and judgment to choose the appropriate water heater for his home. Based on *Nikka Trader,* I would find the applicant had relied on the respondent, even if applicant's wife had told him her husband wanted the "less expensive" unit, which again, does not mean the type, size, or model he got.

37. The court in *Nikka Trader* held that reliance does not need to be specifically expressed and can arise by implication from the circumstances. In *Nikka Trader,* the plaintiff bought cookies from the defendant manufacturer for sale in Japan. The cookies did not meet Japan's import specifications because they contained margarine. The plaintiff had agreed that the defendant would make the cookies with margarine because it was a cheaper option to butter. The court found that even though the plaintiff had specifically approved the use of margarine, the plaintiff continued to rely on the defendant to ensure the margarine would not inhibit the importation of the cookies into Japan. Here in relatively analogous circumstances, I find that even if the applicant conveyed though his wife that he wanted the cheaper option, he continued to rely on the respondent to choose a model that would meet the specifications of his home.

38. I find the applicant has satisfied the second factor of the test in *Nikka Trader.*

c. The Water Heater Business

39. In the respondent's June 2018 email to the applicant, the respondent claims he is the "largest installer of Rinnai on-demand water heaters in the valley". I find the respondent was clearly in the business of selling and supplying water heaters and the applicant satisfied the third factor of the test.

Damages

40. Since I found that the respondent breached the implied warranty under section 18(a), I find the applicant is entitled to the remedy as set out in section 56 of the SGA. Section 56(2) says the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

41. According to the parties' email evidence, the applicant paid the respondent $1,445 for the V65i water heater. The applicant was not able to return the V65i for a refund. The respondent would not accept it on any condition. The respondent's supplier would not accept it because the extended warranty was already registered. Rinnai would not accept it primarily because it had not sold it directly.

42. I find the applicant is entitled to reimbursement of the price he paid for the V65i, subject to a reduction for its market value. However, apart from the cost of a new V65i and the parties' emails I have little evidence to assess its market value.

43. According to the parties' emails, the applicant asked the respondent in November 2018 to offer the V65i to his customers for about $1,145. The respondent agreed to try but was not sure it would sell because the registered warranty was non-transferable, and the rebate no longer applied. The V65i did not sell.

44. On March 6, 2019, the applicant asked the respondent to try to sell the V65i for $1,100. The next day, the applicant decided it would be impossible to sell it at that price. He proposed a somewhat complicated arrangement where the parties would predict the value. I infer from his email that the applicant predicted he would be able

to sell the V65i in the range of $600 and $700. The respondent provided no estimated value and did not agree to this arrangement. The V65i remains unsold. The applicant did not say whether he made any additional efforts to sell the V65i apart from trying to sell it back to the respondent.

45. Neither party provided independent evidence of the market value of a used V65i. The applicant provided an active Rinnai website link that shows the list price of a new V65i is $1,387.26. He says a new V65i sold through Amazon.ca or Build.ca is $1,094.39. I find the V65i is not worth $1,445 when the respondent was unable to sell it after two months at a $300 discount and it can be bought new for less.

46. Since the applicant's V65i has no warranty or rebate and the applicant is not in the business of selling water heaters, I find $650 is an appropriate market value for the used V65i. This price is in the middle of the applicant's projected selling range.

47. The applicant claims $194 in labour costs he paid the respondent to replace the V65i with a more appropriate model. I allow these costs as I find they are supported by the evidence and flow directly and naturally from the respondent's breach.

48. I find the total measure of the applicant's loss is the price of the V65i, less its current market value, plus the labour costs. Accordingly, I find the respondent must pay the applicant a total of $989, calculated as: $1,445 - $650 = $795 + $194 = $989.

49. Under the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find the applicant is entitled to reimbursement of $125.00 in tribunal fees. The applicant did not claim dispute-related expenses.

ORDERS

50. Within 30 days of the date of this decision, I order the respondent to pay the applicant a total of $1,124.70, broken down as follows:

a. $989.00 as reimbursement for the breach of warranty,

b. $10.70 in pre-judgment interest under the *Court Order Interest Act* calculated from the date of the invoice, November 28, 2018, and

c. $125.00 in tribunal fees.

51. The applicant is entitled to post-judgment interest, as applicable under the *Court Order Interest Act*.

52. 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.

53. 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.

Trisha Apland, Tribunal Member