Civil Resolution Tribunal

Date Issued: July 19, 2019

File: SC-2018-005797

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Cran v. Windley Contracting Ltd.*, 2019 BCCRT 880

B E T W E E N :

Brennan Cran

APPLICANT

A N D :

Windley Contracting Ltd.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Julie K. Gibson

INTRODUCTION

1. The applicant Brennan Cran says that dynamite explosions set off by the respondent Windley Contracting Ltd. caused damage to his window, irrigation system, and tea pot. The applicant claims $1,342.75 in damages.

2. The respondent admits that it was blasting in the applicant's area. It says all blasting was within residential limits. The respondent says it had an approved blasting plan, all permits and a seismograph. The respondent says no other residents reported any problems. The respondent denies that the damage was caused by the blasting. It says that the applicant has not proven causation or the amount of damages.

3. The applicant is self-represented. The respondent is represented by its principal, Dean Windley.

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. 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.

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 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.

8. I first issued a decision in this dispute on June 14, 2019, stating the applicant had not provided any evidence. The applicant then raised a concern that his evidence had not been considered in my June 14, 2019 decision. Upon reviewing the matter, I found that, through inadvertence, the applicant's evidence had been provided and was not considered by me in making my June 14, 2019 decision.

9. Because both sides did not have an equal opportunity to be heard, I found that it would be unfair to allow that decision to dispose of the issues between them. I made an order that my June 14, 2019 decision was a nullity (meaning 'of no effect').

10. I issued reasons to the parties via email on June 28, 2019, explaining that the June 14, 2019 decision was a nullity because through tribunal inadvertence the applicant's evidence was not reviewed prior to the decision being made and issued.

11. In reaching my conclusion, I relied on section 51(3) of the *Act* that permits reopening a dispute, on the request of a party, to "cure a jurisdictional defect. I also relied upon the decision in *Chandler* v*. Assn. of Architects (Alberta),* [1989] 2 SCR 848, where the Supreme Court of Canada held that a tribunal may reopen a dispute to discharge the function committed to it, if the tribunal has failed to dispose of an issue fairly before it, and where the legislation indicates that the dispute may be reopened. *Chandler* also says that where there is a denial of natural justice that takes away the legal force of the proceeding, the tribunal must start afresh. This determination is also consistent with the reasoning of the courts in *St. George's Lawn Tennis Club* v*. Halifax (Regional Municipality)* 2007 NSSC 26, and *Fraser Health Authority* v*. British Columbia (Workers' Compensation Appeal Tribunal)* 2014 BCCA 499, appeal upheld on other issues at 2016 SCC 25.

12. Below is the fresh decision in this dispute, which I made after reviewing the evidence from both applicant and respondent.

13. The applicant changed the scope of the remedy he was seeking prior to the first decision being issued. Below, I have addressed only the remedies he sought in his submissions, based on the evidence.

ISSUE

14. The issue in this dispute is whether the respondent was negligent in conducting its blasting, such that it must pay the applicant the claimed damages for his broken window, china, and the leak from his irrigation system.

EVIDENCE AND ANALYSIS

15. In this civil claim, the applicant bears the burden of proof on a balance of probabilities. I have reviewed all of the evidence and submissions but refer to them here only to the extent necessary to explain and give context for my decision.

16. The respondent conducted blasting near the applicant's home on December 15, 18 and 20, 2017. The applicant was away from his home for several months, including those dates in December.

17. Upon his return home, the applicant says there was damage to his window, irrigation system and a tea pot.

18. The respondent filed an expert report from DS, the president of an explosives company. In summary, DS wrote that

    a. all explosive charges were initiated to the industry standards,

    b. vibration levels from the blasting did not exceed the industry standard,

    c. the highest Peak Particle Velocity (PPV) level at the seismograph placed at the applicant's home was 38.5 mm per second. The industry standard is to remain below 50 mm per second.

d. The respondent followed regulated blasting protocol, conducting the blasting in a safe and professional manner,

e. PPV vibrations would not have turned the spigot on an irrigation system from closed to open, and

f. while the applicant was away from home, there were many earthquakes, including a 4.5 magnitude event on October 10, 2017 that caused PPV levels far exceeding that of the respondent's blast project.

19. The applicant says that, although he cannot prove it, the respondent's blasting must have damaged his irrigation system, broken his window and caused his tea pot to fall. This is, in effect, an argument that the thing speaks for itself, which is also referred to as the doctrine of *res ipsa loquitor*. *Res ipsa loquitor* is no longer the law in Canada (see *Fontaine* v*. British Columbia (Official Administrator)*, 1998 CanLII 814 (SCC).

20. Even if it can be assumed that the blasting caused the damage, the respondent can only be liable in negligence if the applicant can show that the respondent owed it a duty of care, the respondent breached the applicable standard of care, and that the breach caused the applicant's loss or damage. Liability in negligence does not follow from proof of damage alone, in the circumstances of this dispute.

21. I find that the respondent owed the applicant a duty of care. The standard of care is based on what would be expected of an ordinary, reasonable and prudent person in the same circumstances, which includes an examination of the likelihood of foreseeable harm and the gravity of the harm, the burden of the cost to prevent injury, and external factors such as custom and industry practice or regulatory standards (see *Ryan v. Victoria (City)*, [1999] 1 SCR 201 (SCC) at paragraph 28, a railway case; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41).

22. Based on the evidence before me, I find that the standard of care was to keep blasting levels at or below industry standards for a residential area. I find, based on the expert opinion of DS, that the respondent met this standard.

23. Since the respondent has established that it took reasonable measures to prevent damage, the applicant cannot establish negligence even if the damage occurred. *(Laursen v. Bemister*, 1999 CanLII 6059 (BCSC)).

24. Even if there had been a breach of the standard of care, the applicant would then have to show that "but for" the respondent's negligence, the loss would not have occurred. I will discuss each damages claim below to explain my finding that the applicant has also not proven causation. The law does not allow for strict liability in these circumstances.

Irrigation System Damage & Water Leak

25. The applicant says his irrigation system leaked from valves that moved due to vibrations from the explosions. He says a professional checked his irrigation system found that two taps on the valves had moved slightly due to the vibrations. The applicant did not file a statement from the professional. I find he has not proven that the irrigation system was damaged by the vibrations.

26. I find that the applicant's water usage was elevated from June to October 2017. However this alone does not prove that the blasting caused a water leak.

27. On November 14, 2017, the City of Nanaimo wrote to the applicant to alert him that there may be a water leak at his property. The letter notes that a leak on the property is the owner's responsibility. It goes on to say that no adjustments to the bill will be made for leaks from "faulty irrigation systems". Again, this is not evidence the irrigation system was damaged by the respondent.

28. I have found that there was no breach of the standard of care by the respondent in conducting its blasting. Even if there had been, the applicant has not proven that the breach caused the leak described by the applicant. I say this because the

respondent filed an email from an irrigation installer, KC, that the most common cause for leaks in an irrigation system is a failure to blow them out properly. He notes that valves can also fail. That is, there are other, more common, causes for irrigation system failure and leaks.

29. KC's evidence, combined with the opinion from DS, supports my finding that the blasting is not the probable cause of the damage to the irrigation system.

Tea Pot

30. The applicant also says that a tea pot was found on the kitchen floor broken, after the blasting. The applicant admits being away from the property at the time.

31. In December 2017, the applicant's property manager JT went to check on the applicant's home. JT then emailed the applicant informing him that a tea pot had fallen on the kitchen floor. She wrote "I am suspecting that the blasting they are doing below may have giggled [sic] some stuff in the kitchen area and it fell over…" In her email, JT also noted that that the windows were "fine" at that time.

32. I find that the applicant has not proven that a breach of the standard of care by the respondent caused his tea pot to break. While the blasting may have caused the tea pot to break, it is at least equally likely, based on the report from DS, that a more seismically significant earthquake caused the problem. As such, I find that the applicant has failed to prove causation.

Cracked Window

33. The applicant did not file a photograph of the cracked window that he says was damaged by blasting.

34. The respondent filed evidence from an industry manual, which I accept, listing many causes for cracked windows, more common than residential blasting, including weather, humidity and manufacturer's error.

35. I find the respondent did not prove causation with regard to the cracked window.

Summary

36. For the reasons given above, I find that the applicant has not proved the respondent breached the relevant standard of care. The applicant also did not prove that the respondent's actions caused damage to his irrigation system, tea pot and window, on a balance of probabilities. I find that the applicant has not proved negligence.

37. I dismiss the applicant's claims and this dispute.

38. Under section 49 of the Act, and 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. The successful respondent did not pay any tribunal fees and so I make no order in this regard. I dismiss the applicant's claims to tribunal fees and dispute-related expenses.

ORDER

39. I dismiss the applicant's claims and his dispute.

Julie K. Gibson, Tribunal Member