



# Civil Resolution Tribunal

Date Issued: April 20, 2020

File: SC-2019-009714

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Bogdanova v. Pour*, 2020 BCCRT 421

BETWEEN:

ANASTASIA BOGDANOVA

**APPLICANT**

AND:

HADI HESHMAT POUR and MASUMEH NASSERI

**RESPONDENTS**

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## REASONS FOR DECISION

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Tribunal Member:

David Jiang

## INTRODUCTION

1. This dispute is about a gas fireplace. The applicant, Anastasia Bogdanova, purchased a strata lot from the respondents, Hadi Heshmat Pour and Masumeh Nasser. Ms. Bogdanovac says the respondents failed to disclose that her fireplace was damaged by a water leak before the sale completed. She seeks \$3,465 to replace the fireplace and \$525 for a new chase cap to prevent another water leak.

2. The respondents deny they breached any obligation to disclose defects about the fireplace or water leak. They say they relied on the comments of a strata building inspector, DM, to conclude that the fireplace had no issues. They express some willingness to pay for repairs but only if another gas fitter inspects the fireplace and verifies that replacing it is necessary. The respondents disagree with installing a new chase cap.
3. The applicant is self-represented. The respondents are represented by Hadi Heshmat Pour.

## **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* (CRTA). 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. Where permitted by section 118 of the CRTA, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

## **ISSUES**

8. The issues in this dispute are as follows:
  - a. Did the respondents breach their ongoing disclosure obligations?
  - b. Did the respondents fail to disclose a latent defect?
  - c. Did the respondents breach the parties' contract of purchase and sale by failing to provide a fireplace that worked?
  - d. If the answer is yes to any of the above, what is the appropriate remedy?

## **BACKGROUND AND EVIDENCE**

9. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only addressed the evidence and arguments to the extent necessary to explain my decision.
10. The applicant entered into a May 20, 2019 contract of purchase and sale to buy the respondents' strata lot. The contract incorporated a property disclosure statement (PDS) that was signed by all parties.
11. The applicant hired a home inspector. In his May 26, 2019 report, the inspector noted the gas fireplace worked. He recommended that the fireplace be serviced every 2 to 3 years to ensure proper operation.
12. The applicant asked the respondents to service the fireplace before she moved in. The respondents agreed to this request and on July 8, 2019, a fireplace service company, BCF, sent a technician to service and inspect the fireplace.
13. As documented in BCF's July 8, 2019 report, its technician found water ingress from a flue or storm collar had irreparably damaged the fireplace. BCF noted replacement parts were no longer being manufactured. It concluded that the fireplace had to remain shut down and be replaced. BCF also attached a red tag to

the fireplace dated July 8, 2019, warning against using it. The tag said the fireplace was “disabled due to unsafe operating conditions”.

14. On July 9, 2019, BCF sent a copy of its report to Hadi Heshmat Pour and the strata’s property manager. I find it likely that the other respondent, Masumeh Nasserri, became aware of the report at this time. Masumeh Nasserri does not deny having access to the report.
15. Neither the respondents nor the strata’s property manager provided the BCF report to the applicant or advised of its contents. In a July 10, 2019 email, Hadi Heshmat Pour asked the property manager to investigate the issue and “take...action accordingly”. The property manager replied that he would.
16. The respondents say they thought the strata or its property manager repaired the fireplace. The evidence shows they did not. In an October 18, 2019 email the property manager advised the applicant that the strata did not send a contractor or otherwise ensure the fireplace was in working order. Consistent with this, Hadi Heshmat Pour submits that when they spoke to the property manager at some point after December 2019, the property manager denied working on the fireplace. He said he only looked at the chimney to make sure water did not enter into the strata lot anymore.
17. In October 2019 the applicant first noticed BCF’s red warning tag when she tried to turn on the fireplace. By then the sale of the strata lot had completed months earlier. She emailed BCF and BCF forwarded its report to her. I find the evidence supports this was the first time the applicant became aware that the fireplace was defective.

## **ANALYSIS**

18. Real estate transactions in BC are generally subject to the doctrine of *caveat emptor* or “buyer beware”. This means that the buyer is required to make reasonable enquiries about the property they wish to purchase. This principle is subject to several exceptions. The most relevant in this dispute is a duty to disclose

dangerous latent defects. See *Nixon v. MacIver*, 2016 BCCA 8 at paragraphs 32 to 33.

19. A buyer may also sue for a breach of any terms of the contract. As discussed below, in this dispute the respondents had ongoing disclosure obligations under the parties' contract of purchase. Another key term in the parties' contract is that under section 3, the seller warranted that the appliances would be in working order as of the possession date of July 25, 2019.
20. Based on the submissions and evidence before me, I find the applicant's legal claims are that:
  - a. the respondents breached their ongoing disclosure obligations,
  - b. the respondents failed to properly disclose the latent defects of the water leak and the damage it caused to the fireplace, and
  - c. the respondents breached the parties' contract by failing to provide a fireplace that worked.
21. I will consider them each in turn.

***Issue #1. Did the respondents breach their ongoing disclosure obligations?***

22. The PDS says that any important changes to the PDS information made known to the respondents would be disclosed by the respondents to the applicant prior to closing. As noted above, the parties' contract of purchase and sale explicitly incorporated the PDS as part of their agreement. The PDS therefore provides ongoing disclosure obligations that are part of the parties' contract. See *Brunning v. Cummings*, 2020 BCSC 31 at paragraph 113.
23. For the reasons that follow, I find the respondents breached their ongoing disclosure obligations under the parties' contract of purchase and sale.

24. In the PDS both respondents indicated under item 3(H) that they were not aware of any water damage to the strata lot or common property. Under item 3(J) they also indicated they were not aware of any leakage or unrepaired damage.
25. I am satisfied that the respondents were being truthful when they made the above representations in the PDS on May 15, 2019. The evidence supports the conclusion that the respondents only learned about water damage to the strata lot and fireplace after BCF provided its report on July 9, 2019.
26. However, I find that once the respondents became aware of the information in the BCF report, they had an obligation to disclose it before the parties' closing date of July 22, 2019. The leak and resulting fireplace water damage were "important changes" to the PDS information and hence required disclosure. They contradicted the respondents' representations under items 3(H) and 3(J). They also meant the fireplace was unsafe to operate.
27. The respondents say they believed the strata fixed the fireplace. I disagree that this provides a defence as the respondents had an obligation to provide ongoing disclosure. This includes disclosure of the fireplace water damage as they learned of it.
28. In summary, I find the respondents breached their ongoing disclosure obligations to advise the applicant of the water damage to the strata. I will discuss the appropriate remedy below.

***Issue #2. Did the respondents fail to disclose a latent defect?***

29. Even if I am wrong about issue #1, I find the respondents breached their obligation to disclose the fireplace damage because it was a dangerous latent defect.
30. A latent defect is one which cannot be discoverable by a buyer through reasonable inspection. A seller has an obligation to disclose a known latent defect if it renders the property dangerous or unfit for habitation. As noted above, this is an exception to the principle of "buyer beware". See *Nixon* at paragraphs 32 to 33. A seller must

disclose such a latent defect that they either know of or are reckless about whether or not it exists. See *Nixon* at paragraph 36 citing *McCluskie v. Reynolds (1998)*, 1998 CanLII 5384 (B.C.S.C.).

31. I find the fireplace damage was a latent defect as it was not discoverable through a reasonable inspection. In May 2019 the applicant's inspector looked at the fireplace and turned it on without noticing any problems. There is no indication the inspector acted unreasonably. Although the inspector did not identify any water damage, I find this is because BCF serviced the fireplace in July 2019, and this servicing went beyond what would be expected for a reasonable inspection.
32. The respondents say they did not disclose the fireplace damage because they believed it was fixed. I disagree that the respondents reasonably held this belief. BCF advised that the fireplace could not be fixed and had to be replaced. There is no evidence before me that shows the strata advised the respondents that it had completed these repairs.
33. In summary, I find the respondents breached their obligation to disclose the fireplace water damage because it was a dangerous latent defect.

***Issue #3. Did the respondents breach the parties' contract of purchase and sale by failing to provide a fireplace that worked?***

34. Finally, even if I am wrong about issues #1 and #2, I find the respondents breached sections 3 of the parties' contract of purchase and sale.
35. Section 3 stated that the respondents warranted that appliances included in the purchase of the property would be in proper working order as of the possession date of July 25, 2019.
36. I find that a fireplace is an appliance and the respondents warranted that it would be in proper working order. The *Merriam-Webster.com Dictionary* defines an appliance to include an instrument or device designed for a particular use or function,

specifically a household or office device (such as a stove, fan, or refrigerator) operated by gas or electric current. I find a gas fireplace fits under such a definition.

37. The July 2019 BCF report shows the fireplace was not in proper working order. The respondents are therefore liable for breach of contract.

***Issue #4. What is the appropriate remedy?***

38. I have found the respondents breached the parties' contract of purchase and sale. The applicant is entitled to damages.

39. The applicant claims \$3,465 for a replacement fireplace. She provided an October 18, 2019 quote from BCF for this amount. As noted earlier, BCF's evidence is that the fireplace cannot be fixed and must be replaced entirely. In their July 9, 2019 letter, BCF wrote that the \$3,465 replacement fireplace was their "least expensive" model.

40. The respondents say they are willing to "take care of the expenses" but desire another opinion from a gas fitter. They rely in part on comments from DM, a strata project manager. The parties agree that on December 2, 2019, DM checked the applicant's fireplace. DM said at the time that he thought the fireplace could be repaired, rather than replaced. However, there is no evidence from DM in this dispute.

41. Based on the evidence before me, I find that the applicant is entitled to \$3,465 in damages. While I acknowledge that DM may have disagreed that replacing the fireplace was necessary, there is no evidence from DM. The respondents could have also provided evidence from another gas fitter to comment on BCF's evidence but did not do so. The best evidence before me comes from BCF.

42. The applicant also claims \$551.25 for a new chase cap. She says BCF advises that the new chase cap is necessary to prevent future damage to the replacement fireplace. I decline to award this amount as this is not supported by any evidence



from BCF. There is also no estimate or quote in evidence about the cost of a new chase cap.

43. The *Court Order Interest Act* applies to the tribunal. The applicant is entitled to pre-judgment interest on the \$3,465 damages award from July 25, 2019, being the possession date in the parties' contract of purchase and sale. I find this date appropriate as the applicant should have had a working fireplace from that date onwards under the parties' agreement. This equals \$50.17.
44. Under section 49 of the CRTA 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. I find the applicant has been largely successful and is entitled to reimbursement of \$175 in tribunal fees. The applicant did not claim for dispute-related expenses.

## **ORDERS**

45. Within 14 days of the date of this order, I order the respondents to pay the applicant a total of \$3,690.17, broken down as follows:
  - a. \$3,465.00 in damages,
  - b. \$50.17 in pre-judgment interest under the *Court Order Interest Act*, and
  - c. \$175.00 in tribunal fees.
46. The applicant is entitled to post-judgment interest, as applicable.
47. The applicant's remaining claims are dismissed.
48. Under section 48 of the CRTA, 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. The Minister of Public Safety and Solicitor General has issued Ministerial Order No. M086 under the *Emergency Program Act*, which says that tribunals may waive, extend or suspend a mandatory time period. The tribunal can only waive, suspend or extend mandatory time periods during the declaration of a state of emergency. After the state of emergency ends, the tribunal will not have this ability. A party should contact the tribunal as soon as possible if they want to ask the tribunal to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

49. Under section 58.1 of the CRTA, 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.

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David Jiang, Tribunal Member