



# Civil Resolution Tribunal

Date Issued: June 3, 2020

Date of Amended Decision: June 4, 2020

File: SC-2019-009559

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Butterman v. Kilburn*, 2020 BCCRT 613

B E T W E E N :

WARREN BUTTERMAN

**APPLICANT**

A N D :

ERIK KILBURN

**RESPONDENT**

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## **AMENDED REASONS FOR DECISION**

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Tribunal Member:

Shelley Lopez, Vice Chair

## **INTRODUCTION**

1. This dispute is about a July 2019 contract for the purchase and sale of a residential townhome. The applicant purchaser, Warren Butterman, says the respondent seller,

Erik Kilburn, breached the contract by removing certain shelving and wall pegs and hooks. The applicant claims a total of \$2,895, for the claimed items' replacement and for repairs to walls.

2. The respondent denies the claimed items were included items in the sale. The respondent also says he reasonably repaired the walls behind the removed items.
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* (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. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me.
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, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

## **ISSUE**

8. The issue in this dispute is whether the respondent breached the parties' residential contract of purchase and sale by removing certain shelves and wall pegs or hooks, and if so, what is the appropriate remedy.

## **EVIDENCE AND ANALYSIS**

9. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only referenced the evidence and submissions as necessary to give context to my decision.
10. After taking possession of the townhome on September 11, 2019, the applicant noticed various missing shelves and wall pegs and contacted the respondent's realtor.
11. The parties' July 14, 2019 contract said that the purchase price included "fixtures", with no exclusions. The contract did not define fixtures and did not specifically address wall repairs by the respondent seller. However, the standard form contract said the property and all included items would be in "substantially the same condition" on the possession date as when viewed on July 14, 2019.
12. The parties signed a July 22, 2019 addendum, which stated it was not intended to be a repudiation of the original contract. The addendum said that the respondent seller would leave behind at no cost to the applicant buyer, "all the existing shelvings in the garage and all the existing shelvings, including the associated brackets in the dining room, kitchen, living room and all 3 bedrooms and den" (quote reproduced as written). The addendum also said in a separate paragraph the respondent seller would remove the TV mounts/brackets from the living room and master bedroom and patch, prime, and repair the holes left and repaint with matching colour. However, the addendum did not otherwise address wall repair.

## ***The law on fixtures***

13. As referenced above, a central issue in this dispute is whether the removed items were fixtures to be included with the sale of the home.
14. First, a fixture is legally defined as something permanently attached to real property. Put another way, as cited in Merriam-Webster's law dictionary, a fixture is defined as "an item of movable property so incorporated into a real property that it may be regarded as legally part of it." The definition of fixture matters because a fixture is part of the land or building sold, whereas a "chattel" or item of personal property is not. In this case, the fact that fixtures were to be included in the sale was specifically set out in the July 14, 2019 contract, which I find is binding on the parties.
15. In *Zellstoff Celgar Limited v. British Columbia*, 2014 BCCA 279 and *Scott v. Filipovic*, 2015 BCCA 409, the court cited *Stack v. T. Eaton Co.*, 1902 CarswellOnt 399 (Div. Ct.), which set out what is now commonly referred to as the "Stack" test for determining whether an item is a fixture or a chattel. Whether an item is a fixture or a chattel will usually depend on the particular facts of the case.
16. For the purpose of this dispute, the relevant portion of the *Stack* test can be summarized as follows, as clarified in *Zellstoff*, *Scott*, *North West Trust Co. v. Rezyn Developments Inc.* (1991), 81 D.L.R. (4<sup>th</sup>) 751 (BCCA), and in *Royal Bank of Canada v. Maple Ridge Farmers Market Ltd.*, 1995 CanLii 896:
  - a. Unattached items hung by their own weight are presumed to be personal property, not fixtures.
  - b. Items attached to the land "even slightly" are presumed to be fixtures.
  - c. In considering whether the presumptions above should be rebutted, there is an objective examination of the "degree of affixation" and, in some exceptional cases, the "purpose of affixation".

17. In other words, the more portable and less permanently attached the item is, the more likely the item is not<sup>i</sup> a fixture. And, if the item's attachment is for the purpose of making the item function better, the more likely it remains personal property. Conversely, if the purpose of the attachment is to improve the land, the more likely it is a fixture.
18. In *Royal Bank*, the court found that pictures hanging on a wall were chattels, because they hung by their own weight and could be removed without damage. The court said that while the nail that held the picture was a fixture, the picture itself was not.
19. In *Manarin v. Stelmaschuk Doucette Realty Ltd. and Leckie*, 2010 BCPC 81, the court applied *Royal Bank* and the *Stack* criteria to a number of objects in a residential sale dispute. There, the court found that items simply hanging on hooks or screws, and which could be removed without removing screws, were chattels or personal property items. Conversely, the court found that anything that required unscrewing to remove it was a fixture.
20. I turn now to the facts of the case before me. The main question in this dispute is to what extent, if any, the claimed items were a) fixtures, as defined in the case law, or b) shelves and brackets agreed to be left behind in the addendum.

***Claimed items – fixtures or chattels?***

21. Below are the applicant's specific claims, which total \$2,895. I have itemized them and included the respondent's position for each:
  - a. **Two garage coat hanger shelves** - \$65 (the respondent provided evidence that these cost \$20 each from IKEA). The respondent says these were not permanently affixed to the wall and were not listed in the addendum, and so he was not required to leave them behind. The applicant's photos show these were coat hooks affixed to a board attached to the wall.

- b. **Six solid oak wall pegs (coat hangers) in front entrance** - \$75 (the respondent provided evidence that an IKEA 6-pack of these pegs cost around \$23). The respondent says these were not listed in the addendum. There is no evidence about how these were attached to the wall, and the photos do not show exposed nails or screws.
  - c. **White wood floating shelf in entrance hallway** - \$30. The respondent says this is not a shelf and was not permanently attached to the wall, as it hung off two nails and was not screwed into the wall. The respondent says this \$10 IKEA ledge was not listed in the addendum.
  - d. **Two dark 3-foot floating wood shelves in living room** - \$160. The respondent submitted evidence that each “ledge” cost \$15 from IKEA. He says these were picture ledges hung by 2 nails, and so were not fixtures and were not included in the addendum.
  - e. **One 4-foot floating wood shelf in dining room** - \$75. This is a white version of item 11(d) above.
  - f. **Three floating wood shelves in baby room** - \$130. The respondent submitted evidence that each “ledge” cost \$10 from IKEA, was hung from the wall with nails, and was not included in the addendum.
  - g. **One chrome clothes bar in master bedroom** - \$60. The respondent says this was a series of hooks, and cost \$15 for a 3-pack from IKEA. The respondent says this was hung with nails and was not included in the addendum.
22. I find the shelves, ledges, wall hooks and pegs that hung by their own weight off a nail are not fixtures as legally defined in the case law. It is undisputed that most of the claimed shelves were hung by nails, and there is no evidence any were screwed into the wall. So, I find the claimed shelves are not fixtures within the legal meaning. Here, I note that the garage coat hangers were nailed to the wall, rather than being hung by their own weight off a nail. However, on balance, given the nature of the

items and each only being loosely affixed with a nail, I find they are not fixtures as legally defined.

23. As for the entrance hallway wall pegs, which based on the respondent's photo appear to each be 2 inches in diameter, I find there is insufficient evidence that they were anything more than loosely attached to the wall.
24. Further, I find the purpose of attaching the claimed shelves, wall pegs and hooks was to improve their use as a shelf, peg, or hook, and not to improve the land itself. Shelves are better used when hung up, as are wall pegs and hooks.
25. In short, I find all of the claimed items are not fixtures as legally defined.
26. What about the addendum? First, I disagree with the respondent that there is any meaningful distinction here between "shelving" and a "ledge". Based on the submitted photos, I find the items the respondent say are ledges are still a type of shelf, though shallow ones. Second, I find round wall pegs and mounted clothes hooks are not "shelving". Third, I also find the garage coat hangers are not shelves, but in fact clothing hooks attached to a board, which the respondent then attached to the wall with nails.
27. I find all of the claimed hooks, wall pegs, and entrance hallway shelving were not included in the addendum, which only expressly included "shelving" in certain rooms. Here, I acknowledge the respondent left behind a significant number of shelves in various rooms, as shown in the submitted photos. However, the issue in this dispute is largely about smaller items the respondent decided were ledges not shelves, and I have explained above I find no meaningful distinction.
28. So, I find the floating ledges in the living room, dining room, and baby's room were all shelving expressly included in the addendum and therefore the respondent was required to leave them behind. In coming to this conclusion, I place weight on the fact that "shelving" was the word used in the addendum and not just "fixture". I have addressed the legal meaning of fixture above, which I find here is narrower than

“shelving” which is a word I find includes ledges and other shelves hung by their own weight off a nail.

29. The applicant did not provide any proof of his claimed amounts for the shelves and did not dispute the respondent’s valuations based on IKEA pricing. So, I allow a total of \$75, based on:
- a. \$30 for the 2 floating living room shelves,
  - b. \$15 for the floating dining room wood shelf, and
  - c. \$30 for 3 floating baby room shelves.

### ***Repairs and patching***

30. The applicant says the addendum required the respondent to repair walls. In contrast, the respondent says he was not required to “patch and paint” after removal of nail-hung items. I note the photos in evidence show the respondent patched certain holes left by nails, but admittedly did not sand and paint them. The respondent submits he only patched over removed nails as a “kind gesture”. I note that while the nails themselves are fixtures under the law, the applicant does not claim for the (presumably trivial) cost of them, and so I make no order about that.
31. As noted above, the original contract is silent about repairs or patching. It says the property must be left in the same condition as when viewed, which I find meant with nails in holes where removeable personal property, such as pictures or nail-hung shelves, had previously been hung. The addendum only required repair and patching of removed TV mounts and brackets in the living room and master bedroom, and to the extent the applicant alleges it I find he has not proved the TV mounts were improperly repaired.
32. The respondent submits that if the applicant wanted the claimed shelving and is awarded compensation for their replacement, there is arguably no repair to be done because the replacement items can just be hung up in the same spots. Here, I acknowledge the patching appears relatively small for each area. However, the



difficulty with the respondent's argument is that it does not acknowledge that his patching may have gone beyond the shelf's boundaries and may be visible after a replacement shelf is installed. Plus, the applicant claims for widespread repainting due to the respondent's patching of nail holes, including for removed personal items like a wall calendar and a clock where there is not necessarily anything being rehung in their place.

33. On balance, I find the applicant is entitled to reasonable compensation for repairs and repainting where the respondent patched walls, leaving the wall surface requiring further sanding and painting work. For clarity, had the respondent not done the patching, I would have ordered no compensation for wall repair in the circumstances here. I note my conclusion is consistent with the tribunal's decision in *Theilade v. Bell*, 2019 BCCRT 4, which is not binding on me but which I find persuasive here. Similarly, in the tribunal's non-binding decision in *Adams v. Lloyd*, 2019 BCCRT 913, a vice chair concluded that by leaving a property with a large number of poorly patched holes, the home was not in substantially the same condition as when viewed. Here, by only patching the nail holes, the respondent left the property in a condition that was not substantially the same as when the applicant viewed it, contrary to the July 2019 contract.
34. First, the applicant claims \$300 for installation, anchors, and wall fasteners for the claimed items. The applicant provided no evidence to support the \$300 claim and I find an award for simple nail-hung installation of 6 small floating ledges would be excessive and inappropriate. I dismiss this claim.
35. Next, the applicant claims \$400 for repainting and repair of the garage wall, which the applicant says the respondent failed to do after removing the shoe racks as they agreed. Since the addendum specifically required the respondent to remove the shoe racks but not to repair that wall, I find the respondent is not responsible for the wall repair. I also accept the respondent's undisputed evidence that the garage patch marks in the applicant's photos already existed at the time of the July 14, 2019 viewing. I dismiss this claim.

36. Finally, the applicant claims \$1,600 for repainting. The applicant submitted 2 painting quotes: a) \$1,627.20 to paint “all rooms” in the home, including 2 stairwell ceilings, from Blue Chip Painting and b) \$1,155 for painting areas noted to have been patched but not sanded or repainted, from Sherwood Painting & Decorating Ltd. An unspecified portion of these quotes is for the garage repainting, which I have found the respondent is not responsible for.
37. The respondent submitted a February 26, 2020 \$375 plus GST quote from Hayden Painting Solutions (Hayden), which included repair of minor wall deficiencies, painting walls 1 coat to match existing colour, plus the necessary paint. Hayden noted it had painted the entire unit in 2018.
38. The respondent says there are only 5 walls in the townhouse affected by the claimed shelving. As noted above, I find the respondent’s obligations for repairs and painting stem from his decision to patch nail holes, which is not limited to the claimed shelving. It is not clear on the face of Hayden’s quote whether it assumed the only walls at issue were the “shelving” ones, rather than all patched nail hole areas. However, I do not agree the applicant is entitled to have the entire home freshly repainted at the respondent’s expense.
39. On balance, on a judgment basis I award \$600 for repainting. I find the applicant’s quotes are excessive, given the extent of the required sanding and repainting. However, I also find Hayden’s quote does not clearly include all the nail holes the respondent patched. Together with the \$75 for the removed shelves, I award the applicant a total of \$675.
40. The evidence shows the applicant has not yet replaced any shelving or done the wall repairs, and so I make no order for pre-judgment interest under the *Court Order Interest Act*.
41. Under section 49 of the CRTA and the tribunal’s rules, a successful party is generally entitled to the recovery of their tribunal fees. Here, there was divided

success. I find the applicant is entitled to reimbursement of \$62.50, half the \$125 paid in tribunal fees. No dispute-related expenses were claimed.

## **ORDERS**

42. Within 21 days of this decision, I order the respondent to pay the applicant \$737.50, broken down as follows:
  - a. \$675 in damages, and
  - b. \$62.50 in tribunal fees.
43. The applicant is entitled to post-judgment interest as applicable.
44. 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 a Ministerial Order 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.
45. 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 BC Provincial Court.

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Shelley Lopez, Vice Chair

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<sup>i</sup> Amendment Notes: Amendment made to paragraph 17 under section 64 of the CRTA to correct a typographical error.