



# Civil Resolution Tribunal

Date Issued: June 30, 2020

File: SC-2019-010920

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Sander v. Smit*, 2020 BCCRT 729

BETWEEN:

HEATHER SANDER

**APPLICANT**

AND:

JOHAN SMIT and ANNEMARIE SMIT

**RESPONDENTS**

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## REASONS FOR DECISION

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Tribunal Member:

Richard McAndrew

## INTRODUCTION

1. This dispute is about damage to a beach road. The applicant, Heather Sander, says the respondents, Johan Smit and Annemarie Smit, damaged her beach road while excavating retaining wall footings on their neighbouring property. Ms. Sander claims damages of \$2,953.72 to repair the beach road.

2. The Smits admit their contractors damaged Ms. Sander's beach road. They say they tried to repair the road but Ms. Sander's now deceased husband, Dr. Sander, was not satisfied with the repairs. The Smits say that Dr. Sander intended to repair the beach road himself which the Smits say relieved them of further responsibility for the repairs.
3. All parties are self-represented.

## **JURISDICTION AND PROCEDURE**

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT 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 CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, or a combination of these. Though I found that some aspects of the parties' submissions called each other's credibility into question, I find I am properly able to assess and weigh the documentary evidence and submissions before me without an oral hearing. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always necessary when credibility is in issue. Further, bearing in mind the CRT's mandate of proportional and speedy dispute resolution, I decided I can fairly hear this dispute through written submissions.
6. The CRT 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 CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

7. I note that the CRT dispute records show that Dr. Smit filed a Dispute Response but Ms. Smit did not, putting her in default. However, I find that Dr. Smit's Dispute Response was jointly filed with Ms. Smit. So, I find that Ms. Smit has filed a Dispute Response and she is not default.
8. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

## **ISSUE**

9. Do the Smits owe Ms. Sander compensation for damaging her beach road, and if so, how much?

## **EVIDENCE AND ANALYSIS**

10. In a civil claim such as this, Ms. Sander must prove her case on the balance of probabilities. While I have read all of the parties' evidence and submissions, I only refer to what is necessary to explain and give context to my decision.
11. The following is not disputed. The parties own neighbouring properties. The Smits wanted to build a retaining wall near Ms. Sander's property boundary in 2018. Dr. Sander gave the Smits permission to access his property so they could perform footing excavations for the retaining wall. The Smits' contractors damaged Ms. Sander's beach road while excavating. Their contractors tried to repair the beach road in September 2018 but Dr. Sander was not satisfied with the repair. Dr. Sander asked the Smits to remove the surface materials from the beach road.
12. The BC Supreme Court has considered similar issues in the decision of *Kramer v. Blair*, 2015 BCSC 1194 (CanLII). In *Kramer*, the parties owned adjacent property lots. The plaintiff gave the defendant permission to remove several large boulders along the property line. However, during the defendant's excavation, the defendant also removed soil from the plaintiff's property. The court found that the removal of

soil exceeded the scope of the plaintiff's permission to remove the boulders. The court ruled that the removal of the plaintiff's soil without permission was a trespass.

13. Similarly, in this matter it is undisputed that Dr. Sander gave the Smits permission to access Ms. Sander's property to excavate footings for the retaining wall. However, I find that Dr. Sander did not authorize the excavation of his beach road. Dr. Smit acknowledges that the excavation work was more invasive than expected.
14. Based on the reasoning in *Kramer*, I find that the Smits exceeded Dr. Sander's permission by excavating the beach road. In doing so, I find that Dr. and Ms. Smit trespassed on Ms. Sander's property and they are responsible for the damage caused to the beach road.
15. The Smits say they were willing to repair the beach road. However, they say that Dr. Sander told them in September 2018 that he wanted to repair the beach road himself. This is confirmed in a statement from JM, an excavation contractor employee. The Smits argue that this resolved the matter in September 2018.
16. I am satisfied that Dr. Sander said that he intended to repair the beach road himself. However, I find that this did not end the Smits' responsibility for the damage. I find that there is insufficient evidence that Dr. Sander intended to settle this dispute with the Smits. Although Dr. Sander told the Smits that he would repair the beach road, I find that Dr. Sander did not say that he was assuming the repair costs. It is undisputed that Dr. Sander was not satisfied with the Smits' contractor's attempted beach road repair. In these circumstances, it appears likely that Dr. Sander planned to repair the beach road himself so that the repairs would be performed to his satisfaction. However, just because Dr. Sander planned to perform the repair work himself does not prove that he also intended to release the Smits from the cost of these repairs.
17. Based on the evidence provided, I am not satisfied that the Sanders relinquished their claim against the Smits. So, Ms. Sander had the right to seek compensation

from the Smits at any time after the damage was caused, subject only to the limitation period.

18. The Smits also say the beach road was in poor condition before they entered the property. SG, a building contractor, provided a statement saying the beach road was already heavily eroded. In contrast, Ms. Sander says the road was in good condition before the excavation. She provided photographs taken before and after the excavation. I find the beach road appears to be in significantly worse condition after the excavation. Based on the photographs, I am satisfied that the Smits' excavation damaged the beach road.
19. For the above reasons, I find that the Smits are responsible for damaging Ms. Sander's beach road.
20. So, how much compensation do the Smits owe?
21. Ms. Sander provided an August 28, 2019 quote of \$3,320.49 to repair the beach road and she had the road repaired in October 2019. Ms. Sander provided an October 10, 2019 invoice of \$3,115.42 for the repairs.
22. The Smits argue that they should not be responsible for replacing the beach road. The Smits also argue that their contractors had already attempted to repair the road. JM's statement says that Dr. Sander was dissatisfied with the beach road repairs because mud and dirt was mixed into the road surface material. JM says that Dr. Sander asked the contractor to remove all debris to bare rock which they did.
23. Based on JM's statement, I am satisfied that the Smits' beach road repair was not completed. After their attempted repair in 2018, I find that the road was left in a bare condition requiring substantial work to be restored. The Smits have not provided any evidence showing that the \$3,115.42 repair invoice was excessive for such substantial repair work.

24. The Smits also argue that they are not responsible for rainwater drainage on Ms. Sander's property. I note that there are charges \$293.95 for PVC pipes and connections in the repair invoice. However, based on the description of the proposed services in the repair quote, I am satisfied that the PVC pipes are related to the beach road repair.
25. I find that the entire repair cost of \$3,115.42 was a reasonable repair of the excavation damage. Since the repair invoice exceeds Ms. Sander's claim of \$2,953.72, I find only \$2,953.72 is owing.
26. All parties have also provided extensive evidence and submissions about the condition and legal status of the Smits' retaining wall. I find that Ms. Sander's claim is limited to her request for compensation for damage to her beach road. I find that the condition and status of the retaining wall is not relevant to this dispute. As such, I am not making any findings about the retaining wall in my decision. However, nothing in this decision prevents any of the parties from bringing a further dispute at the CRT or an applicable court if they wish to have claims about the retaining wall adjudicated.
27. The *Court Order Interest Act* applies to the CRT. Ms. Sander is entitled to pre-judgement interest on the damages of \$2,953.72, from October 10, 2019, the date of the repair invoice, to the date of this decision. This equals \$41.82.
28. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find that Ms. Sander is entitled to reimbursement of \$150 in CRT fees. Since Dr. and Ms. Smit were unsuccessful, I dismiss their request for reimbursement of their CRT fees.

## ORDERS

29. Within 30 days of the date of this order, I order Dr. and Ms. Smit to pay Ms. Sander a total of \$3,145.54, broken down as follows:
- a. \$2,953.72 in damages for reimbursement of repair costs,
  - b. \$41.82 in pre-judgment interest under the *Court Order Interest Act*, and
  - c. \$150 in CRT fees.
30. Ms. Sander is entitled to post-judgment interest, as applicable.
31. Under section 48 of the CRTA, the CRT 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 CRT'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 CRT can only waive, suspend or extend mandatory time periods during the declaration of a state of emergency. After the state of emergency ends, the CRT will not have this ability. A party should contact the CRT as soon as possible if they want to ask the CRT to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.
32. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT 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 CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

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Richard McAndrew, Tribunal Member