



Civil Resolution Tribunal

Date Issued: July 14, 2020

File: SC-2020-000375

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Cromwell v. McKim*, 2020 BCCRT 788

BETWEEN:

BRAD CROMWELL

APPLICANT

AND:

DEBRA MCKIM and JAMES MCKIM

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. This dispute is about certain items and appliances included in the sale of a house. The applicant, Brad Cromwell, purchased the house from the respondents, Debra McKim and James McKim. Mr. Cromwell says the washing machine, hot water tank, wood stove, and outdoor hose bib are faulty. He says the respondents are liable

based on certain representations and the principle of “good faith”. He seeks \$4,046.04 as reimbursement for repairing and replacing these items.

2. The respondents deny that they are liable. They say that the doctrine of caveat emptor (“buyer beware”) applies. They also say that they met their disclosure obligations and did not misrepresent the appliances or items.
3. Mr. Cromwell represents himself. Ms. McKim represents both herself and Mr. McKim.

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, email, or a combination of these. Some of the evidence in this dispute amounts to a “he said, they 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 CRT proceedings 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. Further, bearing in mind the CRT’s mandate that includes proportionality and speedy resolution of disputes, I find that an oral hearing is not necessary. I also note that in *Yas v. Pope*, 2018 BCSC 282, the BC Supreme Court recognized the CRT’s process and found that oral hearings are not necessary.

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. 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.

ISSUES

8. The issues in this dispute are as follows:
 - a. Did the respondents breach any guarantee or fail to disclose a latent defect?
 - b. Did the respondents fraudulently or negligently misrepresent the condition of the washing machine, hot water tank, wood stove, or outdoor hose bib, and if so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

9. In a civil claim such as this, Mr. Cromwell bears the burden of proof on a balance of probabilities. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision.
10. For the reasons that follow, I find the respondents are not liable for the claimed amount. The principle of buyer beware applies. In the context of the sale, the respondents did not breach any obligations of good faith. They did not fail to disclose a latent defect. They also did not guarantee or misrepresent the condition of the washing machine, hot water tank, wood stove, and outdoor hose bib.
11. The background facts are undisputed. Mr. Cromwell purchased a house from the respondents. The parties signed an August 1, 2019 contract of purchase and sale

that included a property disclosure statement (“PDS”). The sale completed on November 21, 2019.

12. Prior to the sale, Mr. Cromwell relied on the respondents’ May 1, 2019 inspection report. I find that Mr. Cromwell was free to obtain his own report but chose not to do so.
13. After the sale completed, Mr. Cromwell encountered problems with the washing machine, hot water tank, and wood stove, and hose bib. I will refer to these in the decision as the “items” and discuss the items in further detail below.

Issue #1. Did the respondents breach any guarantee or fail to disclose a latent defect?

14. The principle of “buyer beware” generally applies to real estate transactions in BC. This means that a buyer is required to make reasonable enquiries about the property they wish to purchase.
15. Mr. Cromwell says the respondents were required to provide him with working appliances under section 7 of the contract. I disagree. Section 7 merely lists certain appliances and items included in the sale.
16. I note that the parties agreed under section 8 that the items included in the sale (which includes the items at issue) would be in substantially the same condition on the possession date and viewing date. These dates were November 21, 2019 and July 28, 2019, respectively. However, section 8 does not guarantee that the items will be free of defects. Mr. Cromwell did not allege that the respondents breached section 8.
17. Mr. Cromwell also says the respondents are liable for his claim under the common law principle of good faith. As noted in *Bhasin v. Hrynew*, 2014 SCC 71, good faith is an organizing principle in contract law. It provides that parties generally must perform their contractual duties honestly and reasonably and not capriciously or

arbitrarily (paragraph 63). However, what constitutes honesty and reasonableness is “highly context-specific” (paragraph 69).

18. I find that the principle of good faith applies to the parties’ contract. However, I also find the duties of honesty and reasonableness regarding the items are limited in the context of a real estate transaction. This is because the principle of “buyer beware” applies and the terms of the parties’ contract lays out the parties’ obligations in detail.
19. The principle of “buyer beware” is subject to some exceptions. The only ones that may apply in this dispute are fraudulent or negligent misrepresentation and a duty to disclose latent defects. See *Nixon v. MacIver*, 2016 BCCA 8 at paragraphs 32 to 33.
20. A latent defect is one which cannot be discovered by a buyer through reasonable inspection. A seller has an obligation to disclose a latent defect if it renders the property dangerous or unfit for habitation: *Nixon* at paragraph 33.
21. I find the items did not have any latent defects that required disclosure. The hot water tank and hose bib both leaked and the washing machine did not work. Mr. Cromwell did not say or provide any evidence that they were dangerous or made his house unfit for habitation. The wood stove required new replacement parts and a new WETT (Wood Energy Technology Transfer) certificate. However, Mr. Cromwell did not argue the wood stove was a hazard. A December 21, 2019 invoice for stove repairs similarly does not describe any danger. The respondents also provided a January 24, 2019 service report for the fireplace and wood stove. The inspector noted that wood stove needed a new baffle but did not say it was dangerous to operate.
22. In summary, I find the respondents did not breach any guarantees or fail to disclose any latent defects of the items. I will discuss fraudulent or negligent misrepresentation below.

Issue #2. Did the respondents fraudulently or negligently misrepresent the condition of the washing machine, hot water tank, wood stove, or outdoor hose bib?

23. Mr. Cromwell says the respondents made certain representations about the items that were untrue. The test for fraudulent misrepresentation is summarized in *Ban v. Keleher*, 2017 BCSC 1132 at paragraph 16. In order to show fraudulent misrepresentation in the purchase and sale of a residential property, Mr. Cromwell must show the following:

- a. the respondents made a representation of fact to Mr. Cromwell,
- b. the representation was false,
- c. the respondents knew that the representation was false when it was made, or made the false representation recklessly,
- d. the respondents intended for Mr. Cromwell act on the representation, and
- e. Mr. Cromwell was induced to enter into the contract in reliance upon the false representation and suffered a detriment.

24. As summarized in *Hanslo v. Barry*, 2011 BCSC 1624, to show negligent misrepresentation, Mr. Cromwell must establish the 5 following elements:

- a. there must be a duty of care,
- b. the representation in question must be untrue, inaccurate, or misleading;
- c. the respondents must have acted negligently in making the misrepresentation;
- d. Mr. Cromwell must have relied, in a reasonable manner, on the negligent misrepresentation; and
- e. the reliance must have resulted in damages.

25. I note that the parties made submissions about an icemaker, but I find they have little relevance to the issues under consideration. I will focus on discussing the items and the representations about them below.

The Washing Machine

26. Mr. Cromwell says he asked the respondents if they had a problem with the washing machine. He says they advised, “No, we just replaced the drain hose.” The respondents say they replaced the drain hose but deny stating the washing machine had no problems.

27. I am not persuaded that the respondents represented that the washing machine had no problems. As noted in section 18 of the contract, the parties agreed that there were no representations made outside of those set out in the contract. The contract, including the attached PDS, contains no representations about the washing machine.

28. Given the respondents’ denial and the terms of the contract, I conclude that the respondents did not fraudulently or negligently misrepresent the washing machine.

The Hot Water Tank

29. In the May 1, 2019 inspection report, the inspector did not describe any hot water tank leaks. Mr. Cromwell says at some point after the report was written, the tank began leaking. Mr. Cromwell says the respondents must have known about the leak because it was leaking for “sometime”. He says the respondents therefore wrongly represented in the PDS that they were unaware of any plumbing system problems.

30. The respondents say that the May 1, 2019 inspection report warned Mr. Cromwell about the possibility of a leak. They note that the inspector wrote that the piping and water heater connector used dissimilar metals. The inspector added that this creates a small electric charge that corrodes the joint and results in a water leak over time. The inspector recommended using a dielectric union to prevent this. The

inspector also wrote that the tank was 7 years old, which was close to the noted life expectancy of 8 to 12 years.

31. The respondents also cited *Ball v. Dalla Valle*, 2008 BCPC 385. In that case the sellers indicated on the PDS that there were no problems with the plumbing. However, the buyer's inspector noted evidence of water damage and potential leakage. The court held that it was not reasonable for the buyer to rely on the sellers' representation when the problem was reported on the inspection report before subject removal (paragraph 51).
32. I find that the respondents' representation that they were unaware of any plumbing system problems includes the hot water tank. However, I find this situation shares some similarities with the facts in *Ball*. Mr. Cromwell was warned about the possibility of a water leak. The inspector commented on the tank's ongoing corrosion and age. By the time subjects were removed in October 2019, the inspection report was also several months old. I find that it was not reasonable for Mr. Cromwell to rely on the PDS representation given the comments in the inspection report. As such, I find the respondents did not negligently misrepresent the hot water tank.
33. Mr. Cromwell also hired a company to replace the hot water tank in late November 2019. However, he did not provide any evidence from the company to show when the leak started or whether the leak was in a visible area or otherwise noticeable. I am therefore not persuaded that the respondents were aware of the leak prior to subject removal. I conclude the respondents did not fraudulently misrepresent the hot water tank.

The Wood Stove

34. Mr. Cromwell says the respondents only advised that the wood stove needed to be serviced and have its baffles replaced. He says that in reality several parts had to be replaced. He also says the respondents represented in the PDS that the stove

was WETT certified, when in fact it was no longer certified due to the age of the stove or the certificate.

35. I am not persuaded the respondents negligently or fraudulently misrepresented the stove's condition. In an August 14, 2019 email, Ms. McKim advised her realtor that the respondents did not use the wood stove in 2018 or 2019. She also wrote that the wood stove required a new baffle. The realtor replied she would forward this information to Mr. Cromwell's realtor. Mr. Cromwell did not deny receiving this information. This appears to be the main representation about the work needed on the stove. I do not find that this representation would be negligent or fraudulent, given that the January 24, 2019 service report provided the same comments.
36. As for the WETT certification, the PDS states the respondents are obligated to disclose any important changes to the information in the PDS. I find the respondents fulfilled this obligation. Ms. McKim provided an August 15, 2019 email from her home insurer. The insurer advised Ms. McKim that the new purchaser would be required to obtain a new WETT certificate as the existing WETT certificate was too old. Another email shows she provided this information to her realtor for disclosure to Mr. Cromwell. Mr. Cromwell did not deny receiving this information. I find this significant, as it was a key point in the submissions. I find it likely he received the information in August 2019. A signed contract addendum indicates that subjects were removed later, on October 15, 2019. Given this, I find that the respondents fulfilled their disclosure obligations.
37. In summary, I conclude that the respondents did not fraudulently or negligently misrepresent the wood stove or its WETT certification status.

The Hose Bib

38. Mr. Cromwell says the garden hose bib leaks and must be replaced. He says the respondents misrepresented the hose bib by stating that they were unaware of any plumbing system problems. He says Ms. McKim was aware of the leak because she advised after the sale completed that the hose bib "always leaked".

39. The respondents deny being aware of any issues with the hose bib or making any such statement. They explained that they normally did not use the hose bib.
40. I conclude that the respondents were unaware of the leak. In addition to their denials, Mr. Cromwell's own submission is that the leak was difficult to detect and only clearly visible at night, when the running water was reflected by ambient lighting. My conclusion is consistent with the inspection report, which reported no issues with the hose bib.
41. I conclude that the respondents did not fraudulently or negligently misrepresent the hose bib.

Conclusion

42. In summary, I find Mr. Cromwell has not proven his claims and they must be dismissed.
43. 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 the respondents are the successful party. They did not pay any tribunal fees or claim any dispute-related expenses. I therefore do not award them to any party.

ORDERS

44. I dismiss Mr. Cromwell's claims and this dispute.

David Jiang, Tribunal Member