



Civil Resolution Tribunal

Date Issued: February 26, 2021

File: SC-2020-007642

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Barker v. Kabo Properties Ltd.*, 2021 BCCRT 228

B E T W E E N :

WESLEY BARKER and AMANDA BARKER

APPLICANTS

A N D :

KABO PROPERTIES LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Lynn Scrivener

INTRODUCTION

1. This dispute is about alleged deficiencies in a newly constructed home. The applicants, Wesley Barker and Amanda Barker, purchased a home from the respondent, Kabo Properties Ltd. (Kabo). The parties' agreement included a

provision that \$5,000 would be held back from the purchase price and returned to the Barkers if Kabo did not address certain deficiencies. The Barkers say that there is an issue with a roof cap that Kabo has not fixed, and ask for an order that the \$5,000 holdback be released to them. Kabo denies that there is a deficiency with the roof cap, and says that the Barkers are not entitled to the \$5,000.

2. The Barkers are self-represented. Kabo is represented by its principal.

JURISDICTION AND PROCEDURE

3. 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.
4. The CRT 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.
5. 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.
6. 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.
7. The parties' agreement stated that any dispute about rectifying deficiencies and the release of the holdback would be settled by arbitration. The CRT is not arbitration,

and there is no indication that either party has commenced the arbitration process. However, neither party objected to the CRT deciding this dispute. I find that the parties have waived the arbitration requirement, and that the CRT has jurisdiction over this dispute under its small claims jurisdiction over debt and damages.

ISSUES

8. The issues in this dispute are:
 - a. Whether Kabo breached the parties' agreement, and
 - b. Whether the Barkers are entitled to the \$5,000 holdback.

EVIDENCE AND ANALYSIS

9. In a civil dispute like this, an applicant bears the burden of proof on a balance of probabilities. The parties provided evidence and submissions in support of their positions. While I have considered all of this information, I will refer to only what is relevant and necessary to provide context to my decision.
10. The Barkers purchased a newly constructed home from Kabo in March of 2020. During a walk-through inspection, the Barkers produced a list of 23 deficiencies they wanted Kabo to address before the sale completed. Number 20 on that list was "[c]orrect roof cap sag".
11. As noted, the parties' agreement stated that the Barkers (through their conveyancer) could hold back \$5,000 from the sale proceeds until Kabo corrected the deficiencies. If the deficiencies were not addressed within 12 days, the balance of the holdback could be released to the Barkers so they could correct the deficiencies themselves.
12. The Barkers say that, as Kabo did not adequately address the roof cap, they are entitled to the \$5,000 holdback. Kabo says that there is no deficiency in the roof cap to correct, and noted that the Barkers signed a Pre-Delivery Inspection Form on

March 25, 2020 that identified no deficiencies. The Barkers say they did not notice that the sag had not been fixed until after they signed this form.

13. The Barkers provided photos showing a “sag” near the peak of the roof and video footage of what they say is “abnormal” movement of the ridge cap supports. The photos of the sag are taken from above, while the video is taken from below and shows a different portion of the structure.
14. The evidence before me also contains information from the insurer for the home warranty program. A July 9, 2020 inspection report described a “[r]oof structure/gable end sagging. 4 inch drop”. The inspector stated that “[n]o defect has been presented” in this area and that it “[m]eets industry standards”. According to the inspector, no action was required on this area.
15. Based on information the Barkers submitted to the insurer in November of 2020 (which may have been the video footage discussed above), the home warranty insurer considered what was described as “structural weakness of the framing of the gable end/soffit/ridge cap area. The gable end/facia board roof area has excessive movement when you lightly apply pressure by hand”. The insurer determined that the “condition of this item is considered not normal”, and correspondence in evidence indicates that the insurer has directed Kabo to repair this issue under its warranty coverage.
16. I accept that there is a structural problem with one of the framing elements in the Barkers’ roof. However, based on the angles of the images and the insurer’s descriptions, I am unable to conclude that this problem involves the same area as the sag. It is also not clear whether the movement shown in the video footage is related to the sag.
17. I find that the questions of whether the sag and structural problem are connected and whether the sag amounts to a deficiency are outside the knowledge and experience of an ordinary person, and therefore require an expert opinion to answer (see *Bergen v. Guliker*, 2015 BCCA 283). Here, there is no expert evidence to comment on these

matters. I find this lack of evidence to be particularly significant given the results of the initial inspection that the sag was not a defect. Based on the evidence before me, I cannot conclude that the roof sag amounts to a defect that Kabo should have corrected under the parties' agreement, or that Kabo breached the agreement by failing to address it.

18. Even if I had come to different conclusions about the defect and the breach, I would not grant the orders the Barkers seek. The holdback funds are held by the conveyancer, who is not a party to this dispute, and I cannot make orders against non-parties. Further, a declaratory order that the Barkers are entitled to the funds and an injunctive order that the conveyancer pay out the funds would be outside the CRT's small claims jurisdiction in section 118 of the CRTA.
19. Although I dismiss the Barkers' claim, I would point out that nothing in my decision impacts Kabo's responsibilities under the home warranty program or the decisions made by the insurer in that regard.
20. 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. As the Barkers were not successful, I dismiss their claim for reimbursement of CRT fees. Kabo was the successful party, but did not make a claim for fees or expenses.

ORDER

21. I dismiss the Barkers' claims and this dispute.

Lynn Scrivener, Tribunal Member