



# Civil Resolution Tribunal

Date Issued: March 19, 2021

File: SC-2020-007144

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Coomber v. Funk*, 2021 BCCRT 303

**B E T W E E N :**

AMY COOMBER

**APPLICANT**

**A N D :**

DAMIEN FUNK and BEATRICE FEHSL

**RESPONDENTS**

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## **REASONS FOR DECISION**

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Tribunal Member:

Sarah Orr

### **INTRODUCTION**

1. This is a dispute about a fence. The applicant, Amy Coomber, bought a strata lot from the respondents, Damien Funk and Beatrice Fehsl, through a contract of purchase and sale. Miss Coomber says the respondents failed to build an adequate fence on her strata lot as required by the contract. She wants the respondents to pay her \$2,100 in damages for breaching the contract.

2. The respondents say they built the fence on Miss Coomber's strata lot as required by the contract, and they do not owe Miss Coomber anything.
3. Miss Coomber and Mrs. Fehsl represent themselves. As discussed below, Mr. Funk did not formally participate in this dispute.

## **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). Section 2 of the CRTA states that 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 the dispute's parties that will likely continue after the CRT process has ended.
5. Section 39 of the CRTA says 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 "she said, he said" scenario. Credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanor in a courtroom or tribunal proceeding 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. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice. I also note the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized the tribunal's process and that oral hearings are not necessarily required where credibility is in issue.

6. Section 42 of the CRTA says 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.

## **ISSUE**

8. The issue in this dispute is whether the respondents built the fence as required by the contract, and if not, what remedy is appropriate.

## **EVIDENCE AND ANALYSIS**

9. In a civil claim like this one, the applicant Miss Coomber must prove her claim on a balance of probabilities. This means I must find it is more likely than not that her position is correct.
10. Mr. Funk did not submit a Dispute Response or formally participate in this dispute, so technically he could be in default. However, as part of her evidence Mrs. Fehsl submitted a signed statement from Mr. Funk in which he explains his position and denies the claims against him. In the circumstances, and given the CRT's mandate to be flexible, I have decided to exercise my discretion not to assume liability against Mr. Funk. So, I find Mr. Funk is not in default.
11. I have read all the parties' evidence and submissions, but I refer only to what is necessary to explain my decision.
12. For the following reasons, I dismiss Miss Coomber's claims.

13. It is undisputed that Miss Coomber entered into the contract to purchase a strata lot with a July 3, 2020 possession date. It is also undisputed that Mrs. Fehsl and Mr. Funk were both sellers in the contract.
14. Evidently the strata is comprised of 5 strata lots in a row in one building, each with a backyard. Miss Coomber's strata lot is on one end (unit 1). The respondents live in the strata lot directly adjacent to Miss Coomber's (unit 2). Unit 5 on the opposite side of the building to Miss Coomber is also an end unit. There is a retaining wall running parallel to the building through all of the strata lots' backyards. This retaining wall separates each of the strata lots' backyards into a lower yard and an upper yard.
15. The relevant part of the contract states, "Seller agrees to complete the fence in the backyard. The fence should be the same as the neighbor's fence to match with everyone's backyards. To be completed by possession (July 3, 2020)."
16. There is no dispute that the respondents built a 6-foot high fence around Miss Coomber's lower backyard by July 3, 2020. It is also undisputed that the respondents left an opening between the fence and the building's corner, meaning the fence did not completely enclose the yard. The parties disagree about whether the fence was completed as required by the contract. Miss Coomber says the fence was incomplete because it did not completely enclose her yard so she could not let her dog roam freely. She expected the respondents to build a gate across the opening, which they did not do. In contrast, the respondents say Miss Coomber requested a fence opening so that she could exit her yard through it, and they say they never agreed to build a gate.
17. On its face, I find the contract's wording is unclear. It states, "the fence should be the same as the neighbor's fence" but does not specify which of the 4 neighbours it refers to. However, I find the sentence's second part which says the fence should "match with everyone's backyards" implies that all of the backyards have the same fencing. To give proper meaning to these contractual words, I find I must first

determine the state of all 5 strata lots' fencing as of April 30, 2020, which is when the parties entered into the contract.

18. Miss Coomber did not explicitly describe the fencing condition in the other strata lots at the time she entered into the contract, though she did submit some "before" photos, which I infer were taken on or before July 3, 2020. One of these "before" photos shows a fence dividing 2 yards. I infer from the remainder of the evidence that this is the 5-foot fence on the respondents' property separating their lower backyard from Miss Coomber's lower backyard. Miss Coomber's evidence is that Mr. Funk was in the process of building this fence at the time she viewed the property. In the photo there appears to be a gap between the fence and the building, meaning someone could walk freely between the lower backyards of units 1 and 2. This is consistent with Miss Coomber's submissions, as she says that on July 3, 2020 the respondents' 5-foot fence separating units 1 and 2 was not completed, and that she could walk into the respondents' yard from hers. Miss Coomber did not submit "before" photos of the other strata lots' lower backyards, but she submitted a statement from her realtor, TH, who said that every other yard in the strata was enclosed with a fence.
19. Mrs. Fehsl says that before July 3, 2020 all of the other 4 lower backyards aside from Miss Coomber's were fenced apart, and each fence goes from the building back to the retaining wall. I find this is not entirely accurate, as other evidence described above shows the fence between units 1 and 2 did not connect with the building. However, I find this discrepancy does not detract from the overall credibility of Mrs. Fehsl's evidence. Rather, I find she made this comment in the context of explaining the direction and location of each fence. Mrs. Fehsl says that none of the fences in the lower backyards of the middle strata lots have gates, and this is supported by her realtor, CW's, statement. Mrs. Fehsl did not specify whether unit 5 had a gate or an opening in its fence, and I find I cannot determine this from the photos in evidence. Mrs. Fehsl says that all fences separating the lower backyards were 6 feet tall except for the 5-foot fence separating the lower backyards of units 2 and 1. She submitted an undated photo that is consistent with this description.

20. After reviewing and weighing the evidence, I find that as of the date of the contract, the lower backyards of units 3, 4, and 5 were enclosed with 6-foot fences. I find that units 3 and 4 did not have a gate. I find there is insufficient evidence to determine whether unit 5 had a gate. I find that the respondents' lower backyard was separated from Miss Coomber's lower backyard by a 5-foot fence that was under construction at the time of the contract, and which left a gap between the fence and the building such that anyone could walk freely between the two lower yards.
21. With respect to the state of the fencing in the upper backyards of the strata lots at the time of the contract, the uncontested evidence is that there were no fences on units 1, 2, 3, or 4, though there were some posts installed, and there may have been some construction on the upper backyard of unit 5.
22. I return to the contract's wording. Having found that the strata lots did not have uniform fencing in their backyards at the time of the contract, I find the requirement that the fence on Miss Coomber's property be the "same as the neighbor's" and that it "match with everyone's backyards" to be ambiguous in that it could have more than one meaning.
23. The courts, and in this case, the CRT, should try to give effect to what the parties intended when they made the contract. The starting point is the contract's language, which should be given its plain and literal meaning. If the language reveals more than one possible interpretation, consideration may be given to the facts surrounding the contract's creation. If this does not resolve the ambiguity, it is to be resolved against the party who drafted the contract, which in law is known by a Latin phrase '*contra proferentum*' (see *Miller v. Convergys CMG Canada Limited Partnership*, 2014 BCCA 311).
24. To attempt to resolve the contractual ambiguity in this case, I find I must review the evidence surrounding the parties' agreement. I first address the evidence about Miss Coomber's upper backyard. She seems to allege in her submissions that the contract required the respondents to build fencing in her upper backyard by July 3, 2020. The respondents dispute this. I find the balance of the evidence does not

support this aspect of Miss Coomber's claim. In a July 19, 2020 handwritten letter to the respondents Miss Coomber states, "The bottom half that was in our contract that we both signed off on upon possession was not completed." The respondents submitted a statement from CW who said the parties agreed the lower backyard was the only area of Miss Coomber's property that was to be fenced. It is also undisputed that the only complaint Miss Coomber raised on July 3, 2020 when she took possession of her property was about the fence gap and the absence of a gate. I have also found that at the time the parties entered into the contract there was no fencing on the upper backyards of any of the strata lots, aside from unit 5 which may have had some construction in the upper part of its yard. For these reasons, I find Miss Coomber has not established that the contract required the respondents to build any fencing in her upper backyard, and I dismiss this aspect of her claim.

25. I turn next to the evidence about Miss Coomber's lower backyard. In their statement, TH said that when they viewed the property Mr. Funk was building a fence and deck in his lower backyard. TH said Miss Coomber asked Mr. Funk if he could build a fence around unit 1's yard because she had a dog and wanted to keep the dog in the yard. TH said Mr. Funk agreed to this request. The respondents do not specifically dispute this.
26. However, Mrs. Fehsl says that after the parties signed the contract Miss Coomber had concerns about the yard being completely fenced in with no exit. She says that based on Miss Coomber's concerns, the respondents left an opening in Miss Coomber's fence for a gate. This is supported by Mr. Funk's statement, in which he said he received many phone calls asking how Miss Coomber would get out of her backyard if the fence completely enclosed it. He did not specify who phoned him. However, Miss Coomber does not specifically dispute the respondents' evidence on this point.

27. Mrs. Fehsl and Mr. Funk both say that TH saw the fence on Miss Coomber's property and approved it on or before the July 3, 2020 possession date. Mrs. Fehsl says TH's statement is inaccurate because it fails to mention this detail. Miss Coomber does not address this allegation in her submissions or dispute that TH approved the fence before July 3, 2020. She did submit a July 2, 2020 text message from TH to CW asking CW to make sure her clients put a gate on the fence on Miss Coomber's property. However, I find this does not prove the respondents ever agreed to build a gate.
28. On balance, I find the circumstances surrounding the formation of the relevant contract clause do not resolve the ambiguity described above. So, I find I must attempt to resolve the ambiguity against the party who drafted the contract. In this case the relevant clause is an addition to a standard form contract, and it is unclear which party drafted the additional clause. However, the clause was for Miss Coomber's benefit, and she does not deny that she or her agent drafted it. So, I find I must resolve the ambiguity against Miss Coomber's position.
29. Miss Coomber is responsible for proving her claim. This includes proving the manner in which the respondents were required to build the fence on her property under the contract. I find she has not done so, and therefore I find she has not established that the respondents breached the contract. Given this conclusion, I do not need to review her evidence related to damages. I dismiss Miss Coomber's claim.
30. In their submissions and evidence, the respondents raised many concerns with Miss Coomber's behaviour that is unrelated to this fence dispute. However, the respondents have not filed a counterclaim, so I decline to address any of these concerns in this decision.
31. 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. Since Miss Coomber was unsuccessful, I find the she is not entitled to reimbursement of CRT fees or dispute-related expenses.

## **ORDER**

32. I dismiss Miss Coomber's claims and this dispute.

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Sarah Orr, Tribunal Member