



# Civil Resolution Tribunal

Date Issued: March 30, 2021

File: SC-2021-002501

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Leung v. Ray*, 2021 BCCRT 348

BETWEEN:

NICHOLAS LEUNG

**APPLICANT**

AND:

ALEXANDER RAY

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Julie K. Gibson

## INTRODUCTION

1. This small claims dispute is about an agreement to build a fence between two strata lots.

2. The applicant, Nicholas Leung, says the respondent, Alexander Ray, agreed to replace an existing hedge between their strata lots with a wooden fence, at Mr. Ray's cost. Mr. Leung says Mr. Ray stopped work before the fence was complete. Mr. Leung seeks an order requiring Mr. Ray to complete the fence or pay him \$1,500.
3. Mr. Ray says he installed the fence at his own cost. Mr. Ray says the fence is a good quality replacement for the hedge that previously separated their yards. Mr. Ray asks me to dismiss the dispute.
4. Mr. Leung and Mr. Ray each represent themselves.

## **JURISDICTION AND PROCEDURE**

5. 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.
6. Some of the evidence in this dispute amounts to a "he said, he said" scenario. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour 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. Further, 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. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38, the British Columbia Supreme Court recognized the CRT's process and found that oral hearings are not necessarily required where credibility is an issue.

7. Under section 61 of the CRTA, the CRT may make any order or give any direction in relation to a CRT proceeding it thinks necessary to achieve the objects of the CRT in accordance with its mandate. In particular, the CRT may make such an order on its own initiative, on request by a party, or on recommendation by a CRT case manager (also known as a CRT facilitator).
8. 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.
9. 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.

### ***Preliminary Issues – Related Strata Dispute and Remedy Sought***

10. Originally Mr. Leung filed a single dispute against both Mr. Ray and the strata corporation, The Owners, Strata Plan BCS 1596 (strata), as a strata dispute under section 121 of the CRTA.
11. CRTA section 121 gives the CRT jurisdiction over a claim “in respect of the *Strata Property Act*”. Because Mr. Leung’s claim against Mr. Ray is a breach of contract claim between two owners, independent of his claim against the strata, I find that the breach of contract claim is not a claim “in respect of” the SPA. That is, liability between Mr. Leung and Mr. Ray would arise from the contract, not from the SPA.
12. By contrast, section 118 of the CRTA gives the CRT jurisdiction to resolve a claim for damages or specific performance of an agreement relating to personal property or services. I find that the breach of contract claim falls under the CRT’s section 118 jurisdiction.

13. The distinction between the two claims is also important because a CRT small claims decision is subject to a notice of objection process under CRTA section 56.1, but a CRT strata decision may be subject to judicial review before the BC Supreme Court. Although the claims are linked by their underlying facts, I find it practical to separate them by jurisdiction given these different review mechanisms.
14. Given this analysis, with the parties' consent I directed that Mr. Leung's breach of contract claim against Mr. Ray be moved into this small claims dispute and decided separately from his claim against the strata. I issued separate reasons in Mr. Leung's claim against the strata.
15. In his Dispute Notice, Mr. Leung sought only a \$1,500 payment from Mr. Ray. In submissions, Mr. Leung sought either \$1,500 or completion of the fence. I find that Mr. Ray had an opportunity to respond to both remedies.

## **ISSUE**

16. The issue in this small claims dispute is whether Mr. Ray breached his agreement with Mr. Leung about installing a fence between their yards.

## **EVIDENCE AND ANALYSIS**

17. In this civil claim the applicant Mr. Leung must prove his claims on a balance of probabilities. I have reviewed all the evidence and submissions provided, but only refer to that necessary to explain my decision.
18. Mr. Leung owns strata lot 1 (SL1) in a strata where Mr. Ray jointly owns strata lot 2 (SL2).
19. The strata plan shows that SL1 and SL2 are beside each other, with SL1 to the north of SL2. On the ground floor, SL1 and SL2 each have adjacent LCP yards.
20. The applicable bylaws provide that an owner must obtain the strata's written approval before altering common property.

21. On May 30, 2020, Mr. Ray wrote to the strata proposing to replace the hedges between SL1 and SL2, and SL2 and SL3, with a fence. Mr. Ray attached a photograph of a fence. The photograph shows a fence with horizontal paneling (proposed fence photograph). Based on this email, I find Mr. Ray proposed a fence with horizontal paneling entirely covering the 4x4 posts.
22. In his May 30, 2020 email, Mr. Ray requested contact details for his “neighbor to the north”, who is Mr. Leung. Mr. Ray told the strata that he would seek approval from Mr. Leung, and strata approval, before installing the fence. At the same time, Mr. Ray sought approval for a similar fence installation between SL2 and SL3.
23. On May 31, 2020, Mr. Ray forwarded his email proposal, including the proposed fence photograph, to Mr. Leung. Mr. Ray asked if Mr. Leung would pay 50% of the cost of the new fence.
24. Later on May 31, 2020, Mr. Leung replied by email, refusing to share the cost of the fence. However, Mr. Leung wrote that he agreed to Mr. Ray installing the fence to replace the hedge.
25. On June 1, 2020, Mr. Ray emailed Mr. Leung attaching photographs of the hedge and explaining his proposal to remove the existing hedge and replace it with a fence. Mr. Ray again explained that he felt the cost should be shared between them. I find that Mr. Leung did not agree to share the fence cost at any time.
26. After June 1, 2020, the parties exchanged emails about the fence’s location. However, as there is no disagreement about the fence location, I have not summarized those emails. I find that the fence was installed in the place of the existing hedge, on the line dividing the two LCP yards.
27. Based on the parties’ emails, I find that Mr. Leung and Mr. Ray agreed that, if Mr. Ray covered 100% of the cost, Mr. Ray could remove the existing hedge between SL1 and SL2 and replace it with a fence like the one in the proposed fence photograph, except without a gate or door. The proposed fence photograph shows a fence with horizontal panels. I find that it was a term of the agreement that the new fence would

have horizontal panels covering the 4x4 posts, matching the proposed fence photograph.

28. It is uncontested that, upon being notified that both Mr. Leung and Mr. Ray agreed to the proposed fence installation, the strata approved Mr. Ray's request to install the fence on LCP separating the SL1 and SL2 yards. No one filed strata minutes of the approval or formal correspondence.
29. On June 7, 2020, having reviewed some further fence photographs from Mr. Ray, Mr. Leung wrote, in part, "Nice. What a great job." Mr. Ray provided further photographs, and Mr. Leung confirmed that he was "ok" with the fence location.
30. Based on photographs of the fence from Mr. Leung and Mr. Ray's respective sides, I find that Mr. Ray completed the fence with horizontal paneling on the side facing SL2. However, I find that Mr. Ray left the side facing SL1 without horizontal wood panels, leaving exposed 4 x 4 posts.
31. On June 10, 2020, Mr. Leung wrote to Mr. Ray asking that Mr. Ray finish the fence to match the proposed fence photograph.
32. Mr. Ray refused to change Mr. Leung's side of the fence. He emailed Mr. Leung writing, in part, "If you'd like me to finish your side same as mine, it will cost \$1,500." Mr. Leung replied to say that the fence was not the one shown in proposed fence photograph. Mr. Ray and Mr. Leung disagree about whether Mr. Ray was obliged to finish the fence to match the proposed fence photograph.
33. Mr. Leung submits that the agreement was for Mr. Ray to remove the existing hedge and build a fence like the one in the proposed fence photograph, at Mr. Ray's expense. Because Mr. Ray failed to complete the fence to match the proposed fence photograph, Mr. Leung argues he is entitled have the fence finished or be paid \$1,500.
34. I have found that the parties agreed that Mr. Ray would replace the existing cedar hedge with a fence matching proposed fence photograph.

35. I find that Mr. Ray did not complete the side of the fence facing Mr. Leung's yard with horizontal wood paneling. I find that Mr. Ray breached his agreement with Mr. Leung by failing to finish the fence as shown in the proposed fence photograph.
36. Turning to remedy, I find the monetary remedy claimed by Mr. Leung is more practical. I say that because ordering Mr. Ray to complete the fence under the agreement may be difficult to enforce, if the parties cannot agree on what is required.
37. Mr. Ray raises the issue of betterment by submitting that Mr. Leung should consider the fence a considerable improvement on the hedge that was removed. Mr. Ray submits that the hedge was dying. Betterment arises where ordering the full cost of repairing the fence might provide Mr. Leung with a fence of greater value than what existed before the breach: see *Hu v. Kerchum*, [2018] B.C.J. No. 3120 at paragraph 52. In this dispute, before the breach Mr. Leung had the promise of a complete fence.
38. In assessing damages for breach of contract, I seek to restore Mr. Leung to the position he would have been in had Mr. Ray completed the fence. For the reasons below, I find that betterment is not a factor in assessing Mr. Leung's damages.
39. Close up photographs of the hedge show that some portions of it were brown, while other parts remained green. Mr. Leung provided a photograph of the hedge taken from above which appears to show a green and healthy hedge. Aside from Mr. Ray's assertion, no one provided expert evidence, such as from an arborist or landscaper, proving that the hedge needed replacement. Based on the evidence, I find that the hedge provided a reasonable privacy barrier between SL1 and SL2 before it was replaced.
40. I also find that the contract between the parties was to have the hedge replaced by a specific fence, with horizontal panels. Had Mr. Leung known that Mr. Ray would not install the horizontal panels, he may not have agreed to the removal of the hedge at all. Therefore, I find an appropriate measure of damages is the cost to furnish and install the horizontal panels. This is sometimes called the "cost of performance" of the contract: see *Macdonald v. Sorenson*, [2021] B.C.J. No. 474, BCPC, paragraph 157.

41. Mr. Ray valued completing the fence at \$1,500 in his correspondence with Mr. Leung. As this is the only evidence of value for the installed horizontal paneling, I accept it and order that Mr. Ray pay Mr. Leung \$1,500.
42. The *Court Order Interest Act* applies to the CRT. Mr. Leung is entitled to pre-judgment interest on the \$1,500 from June 10, 2020, which I find is the date the fence should have been completed, to the date of this decision. This equals \$6.73.
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. Because Mr. Leung did not pay CRT fees for this small claims dispute or claim dispute-related expenses, I make no order for them.

## **ORDERS**

44. Within 30 days of the date of this order, I order Mr. Ray to pay Mr. Leung a total of \$1,506.73, broken down as follows:
  - a. \$1,500 which is the value to complete the fence, and
  - b. \$6.73 in pre-judgment interest under the *Court Order Interest Act*.
45. Mr. Leung is entitled to post-judgment interest, as applicable.
46. 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 Province of British Columbia has enacted a provision under the *COVID-19 Related Measures Act* which says that statutory decision makers, like the CRT, may waive, extend or suspend mandatory time periods. This provision is expected to be in effect until 90 days after the state of emergency declared on March 18, 2020 ends, but the Province may shorten or extend the 90-day timeline at any time. 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.

47. 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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Julie K. Gibson, Tribunal Member