



# Civil Resolution Tribunal

Date Issued: June 15, 2021

File: SC-2021-001312

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Jensen v. O'Connor*, 2021 BCCRT 661

BETWEEN:

LORILL JENSEN

**APPLICANT**

AND:

JUSTIN O'CONNOR

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Sherelle Goodwin

## INTRODUCTION

1. This dispute is about an allegedly misrepresentative house listing.
2. The applicant, Lorill Jensen, purchased a house from BAJ. The respondent, Justin O'Connor was BAJ's real estate agent. BAJ is not a party to this dispute.

3. Ms. Jensen says that Mr. O'Connor misrepresented the house as having a built-in vacuum system in the Multiple Listing System (MLS) listing when it does not. Ms. Jensen claims \$1,651.98, part of the amount she says she paid for installing a built-in vacuum system.
4. Mr. O'Connor denies any wrongdoing and says Ms. Jensen has failed to prove the listing was incorrect. He further says he is not a party to the sales agreement and did not act as Ms. Jensen's agent. Mr. O'Connor also says the MLS listing contained an explicit disclaimer against reliance and so Ms. Jensen should not have relied on it. Mr. O'Connor asks that the claim be dismissed.
5. Both parties are self-represented.

## **JURISDICTION AND PROCEDURE**

6. 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.
7. 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. 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 in the interests of justice.
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.

## **ISSUES**

10. The issues in this dispute are:
  - a. Does Mr. O'Connor owe Ms. Jensen a duty of care?
  - b. If so, did he breach that duty by negligently misrepresenting the built-in vacuum system in the MLS listing?
  - c. If so, must Mr. O'Connor reimburse Ms. Jensen any of her vacuum costs?

## **EVIDENCE AND ANALYSIS**

11. In a civil case such as this one the applicant, Ms. Jensen, must prove her claim on a balance of probabilities. I have reviewed the submissions and weighed the evidence submitted but only refer to that necessary to explain and provide context to my decision.
12. It is undisputed that Ms. Jensen purchased a house from BAJ in February 2020 and took possession on March 28, 2020.
13. In BC, the "buyer beware" principle applies to the sale of real property. This means that the buyer is required to make reasonable enquiries about the property they wish to purchase. The principle is subject to several exceptions, including fraudulent or negligent misrepresentation (see *Nixon v. MacIver*, 2016 BCCA 8).
14. As noted above, Ms. Jensen says Mr. O'Connor misrepresented the vacuum system in the MLS listing. The November 12, 2019 listing identifies "vacuum roughed in" as

an interior feature of the house. Ms. Jensen says she relied on the MLS listing in agreeing to purchase the house from BAJ for the agreed upon price.

15. Mr. O'Connor says he created the listing from information provided to him by the seller BAJ. Since Ms. Jensen does not dispute this, I accept it as true.
16. Ms. Jensen says she discovered the house did not have a roughed in vacuum system when she hired a vacuum sales company to install a vacuum canister in the house. There is some dispute as to whether the house had at least a partial system roughed in or not. I will return to that issue later.
17. To prove negligent misrepresentation, Ms. Jensen must establish the following 5 factors (see *Hanslo v. Barry*, 2011 BCSC 1624):
  - a. There is a duty of care,
  - b. The representation in question must be untrue, inaccurate, or misleading,
  - c. The respondent must have acted negligently in making the representation,
  - d. The applicant must have reasonably relied on the negligent misrepresentation, and
  - e. The reliance must have resulted in damages.

### ***Duty of Care***

18. Ms. Jensen relies on *Cosway v. Boorman's Investment Co. Ltd.*, 2008 BCSC 1482 in arguing that Mr. O'Connor owes Ms. Jensen a duty of care even though he was not acting as her real estate agent in the transaction. In that case, the court referred to *Shaak v. McIntyre*, [1991] B.C.J. No. 2607 (S.C.) in finding that a seller's real estate agent owed the purchaser a duty of care to check the completeness and accuracy of information of which the agent is in doubt, or ought to have been in doubt, before passing that information on to the purchaser (at paragraph 27). In that case the agent had been advised that his information about property boundaries was likely incorrect, yet he continued to tell the purchaser that the property extended fully to the road,

when it did not. I find the facts in this dispute quite different. There is no indication here that Mr. O'Connor knew, or ought to have known, the state of the house's vacuum system.

19. I find the more recent case of *Gordon v. Krieg*, 2013 BCSC 482 more instructive in this dispute. In that case, the court considered whether a seller's agent owed the purchaser a duty of care at law to independently inform themselves of property defects and inform the seller. The court found that such a duty could not exist because it would conflict with agent's duty to their own client, the seller. Further, requiring a seller's agent to independently verify information and inform the purchaser would have the effect of imposing a dual agency on all parties, who had specifically contracted for sole agency with their own agents (see *Brown v. RE/MAX Select Realty*, 2020 BCPC 250). I find Mr. O'Connor did not owe Ms. Jensen a duty of care to verify whether the house had a roughed in vacuum system, or the extent of any such system.

### ***Negligent Misrepresentation***

20. Even if I had found that Mr. O'Connor owed Ms. Jensen a duty of care to verify the vacuum information, I would have found that Ms. Jensen has failed to show that Mr. O'Connor's representation was untrue, inaccurate, or misleading. My further reasons follow.
21. Based on the March 24, 2020 invoice from the vacuum store, I find Ms. Jensen paid to have 2 vacuum canisters and 4 central vacuum inlets installed. I infer the inlet is the plug for the vacuum hose and nozzle, which connect the hose to tubing inside the house which eventually connects to the vacuum canister. There is no indication that vacuum tubes were supplied or installed inside the walls of the house so, I infer, the vacuum tubes were already inside the walls. In other words, I find it likely that the house had some component of the vacuum system "roughed in". Ms. Jensen has provided no evidence or expert opinion to the contrary. So, I find she has not proven that Mr. O'Connor's "vacuum roughed in" statement was untrue. Further, I find Ms.

Jensen cannot reasonably have relied on the MLS listing statement because the statement says “Information deemed reliable but cannot be guaranteed”.

22. For the above reasons, I find Ms. Jensen’s claim for negligent misrepresentation must fail. So, I find Mr. O’Connor is not required to reimburse Ms. Jensen any of her vacuum costs.
23. 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 Ms. Jensen was unsuccessful, I find she is not entitled to reimbursement of any CRT fees or dispute-related expenses. Mr. O’Connor, as the successful party, did not claim dispute-related expenses.

## **ORDER**

24. I dismiss Ms. Jensen’s claim and this dispute.

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Sherelle Goodwin, Tribunal Member