



Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Gibbs v. Barclay*, 2021 BCCRT 1325

B E T W E E N :

LUANDA GIBBS and COLIN GIBBS

APPLICANTS

A N D :

DALE BARCLAY and DONNA BARCLAY

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Leah Volkers

INTRODUCTION

1. This dispute is about the sale of a house. The applicant buyers, Luanda Gibbs and Colin Gibbs, claim the respondent sellers, Dale Barclay and Donna Barclay, failed to disclose a material latent defect with the home's roof on the Property Disclosure Statement (PDS). The Gibbsses say the roof leaked six months after they purchased the home. They claim \$3,955.06 for repair costs.

2. The Barclays say they did not live in the home prior to selling it because it was a rental. The Barclays say they disclosed the 2014 roof leak in the PDS that was fixed with no further issues. The Barclays say they were not aware of any further roof leaks, and they are not responsible for the repair costs.
3. The parties are each self-represented.

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 "they said, they 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
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.

Parties to the dispute

8. Originally, the Gibbsses claimed \$4,430.59 for the roof leak repairs from both the Barclays and Lorne Rathgeber (doing business as Kootenay Inspect), arguing that the inspector was on the roof and should have seen the roof was done incorrectly. However, the Gibbsses settled and withdrew their claim against Lorne Rathgeber. The Gibbsses then filed an amended Dispute Notice, which named only the Barclays as respondents. The Barclays were provided an opportunity to file amended responses but declined to do so.

Late Evidence

9. The Gibbsses submitted late evidence in this dispute, which consisted of a one page typed document from the Gibbsses' realtor, CT. The Barclays did not object to this late evidence and had the opportunity to provide submissions on it. Consistent with the CRT's mandate that includes flexibility, I find there is no actual prejudice to the parties in allowing this late evidence. I allow the late evidence as I find it relevant.

ISSUES

10. The issues in this dispute are:
 - a. Are the Barclays liable for the roof leak after the home's sale?
 - b. If so, to what extent must the Barclays pay the claimed \$3,955.06 in repair costs?

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, as the applicants the Gibbsses must prove their claims on a balance of probabilities. I have read all the parties' submissions but refer only to the evidence and argument that I find relevant to provide context for my decision.
12. It is undisputed that the Gibbsses purchased the home from the Barclays on September 1, 2020 and took possession on September 16, 2020.
13. The Barclays undisputedly had the home, including the roof, inspected by Kootenay Inspect prior to purchase. A copy of the inspection report is not in evidence.
14. The Gibbsses say the roof started leaking in March 2021 when the snow began to melt in the spring. The Gibbsses say the roof leaked in two places in the principal bedroom in "the exact same place as it was leaking before as you can see the patch job when you get close to the area, cannot be seen at a distance" (reproduced as written). The Gibbsses also say the garage located directly below the leaking dormers also began to leak.
15. The parties' contract of purchase and sale is not in evidence, but the Gibbsses submitted a copy of the June 19, 2019 PDS signed by the Barclays. The PDS asks whether the sellers are aware of any roof leakage or unrepaired roof damage, and the Barclays put a checkmark in the "YES" column. However, the checkmark is crossed out and initialed, and the word "NO" is written with an explanation in the "Additional Comments" section. The Barclays wrote "When the roof was new there was a small leak in the [principal] bedroom dormer that bubbled the paint by the window. It was fixed 3 years ago and has been good since the fix". The roof undisputedly leaked in the same location after the Gibbsses purchased the home.
16. The principle of "buyer beware" generally applies to real estate transactions in BC. A buyer is required to make reasonable pre-purchase enquiries about the property. Exceptions include negligent or fraudulent misrepresentations and the seller's duty to disclose latent effects: see *Nixon v. MacIver*, 2016 BCCA 8 at paragraphs 32 to 33.

17. In completing a PDS, the sellers are required to honestly disclose their actual and current knowledge of the property: *Hamilton v. Callaway*, 2016 BCCA 189. A seller will breach the contract where the representation they made in the PDS was untrue and was inconsistent with the seller's true belief at the time.

Fraudulent or negligent misrepresentation?

18. Although the Gibbsses do not use these words, I find they allege the Barclays misrepresented the roof's condition in the PDS. As noted above, fraudulent or negligent misrepresentation are exceptions to the principle of "buyer beware". The key representation in this dispute comes from the PDS where Barclays indicated that they were not currently aware of any leaks or unrepaired roof damage.
19. 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, the applicant must show the following:
- a. The respondent made a representation of fact to the applicant,
 - b. The representation was false,
 - c. The respondent knew that the representation was false when it was made, or made the false representation recklessly,
 - d. The respondent intended for the applicant to act on the representation, and
 - e. The applicant was induced to enter into the contract in reliance upon the false representation and suffered a detriment.
20. To prove negligent misrepresentation, the applicant must establish 5 elements (see: *Hanslo v. Barry*, 2011 BCSC 1624 at paragraph 108):
- a. There must be 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 misrepresentation,

- d. The applicant must have reasonably relied on the negligent misrepresentation, and
 - e. The reliance must have resulted in damages.
21. In real estate transactions the law presumes a special relationship between buyer and seller, and the seller owes the buyer a duty of care: *Hanslo* at paragraphs 117 to 118. The applicable standard of care is that of the reasonable person: *McCluskie v. Reynolds* (1998), 1998 CanLII 5384 (B.C.S.C.) at paragraph 67.
22. As I will discuss further below in the context of latent defects, I find the available evidence does not prove that the Barclays' representation was false or misleading. However, even if the Barclays were aware of further leaks or unrepaired damage, and misrepresented that to the Gibbsses, I find the Gibbsses have not proven they reasonably relied on the Barclays' representation in any event.
23. As noted, the Gibbsses had the roof inspected. I find this shows that the Gibbsses did not rely on the Barclays' representation that the roof leak was repaired. Instead, I find it shows that when the Barclays became aware that there was a previous roof leak, they chose to have the roof inspected. As noted above, the Gibbsses say their home inspector should have seen that the roof was incorrectly done. However, the Gibbsses pre-purchase inspection report is not in evidence and so I do not know what information the Gibbsses had when they purchased the home. The CRT can make an adverse inference against a party where, without sufficient explanation, they fail to produce expected supporting evidence (see *Port Coquitlam Building Supplies Ltd. v. 494743 B.C. Ltd.*, 2018 BCSC 2146). I find that the inspection report is directly relevant to the issues in this dispute. I find it appropriate to draw an adverse inference against the Gibbsses for failing to provide such important evidence. Based on this adverse inference, I find that the inspection report contained information that the Gibbsses relied on when they purchased the home, and they did not rely on the Barclays' representation. So, I find Gibbsses' misrepresentation claim must fail.

Latent or patent defect?

24. The Gibbsses say there was a material latent defect in a portion of the roof that caused the roof to leak. Inconsistently, the Gibbsses also say that their home inspector was on the roof and should have seen the roof “was incorrectly done including no flashing at dormers, and flashing on top of shingles. Tar was also used.” I find the Gibbsses inconsistently claim the roof’s condition was a latent defect and a patent defect. The Gibbsses say they would not have purchased the home if they had known about the roof issues. The Barclays say that they were not hiding anything, and they disclosed the previous roof leak and repair.
25. A latent defect is one that a buyer cannot discover through reasonable inspection: *Nixon* at paragraph 33. Only known latent defects require disclosure. Patent defects are those that can be discovered by conducting a reasonable inspection or inquiry about the property. A seller does not have to disclose patent defects to a buyer, but they must not actively conceal them: *Cardwell v. Perthen*, 2007 BCCA 313. Here, I find the roof’s condition at the time of sale was not a latent defect because the Gibbsses themselves say that their home inspector should have “seen” that the roof was incorrectly done. However, even if the roof’s condition was a latent defect, for the following reasons, I find the Gibbsses have failed to prove that the Barclays were aware of the latent defect at the time the sold the home to the Gibbsses.
26. The Gibbsses say the Barclays concealed leaks on the wall before new renters moved in. They say previous sanding marks are visible on the interior dormer wall where the paint was bubbling after the roof leaked. Photos and videos in evidence show bubbled paint after the roof leaked. However, I cannot tell from the photos and videos whether there was a previous repair in the same location. Without more, I find this does not show that that Barclays concealed any leaks.
27. The Gibbsses also provided text messages from a former renter, TF to Mrs. Gibbs. TF said that the roof leaked “all the time” when they lived there “from August 30 2017 to April 2017” (reproduced as written) and the Barclays said they would fix it. I infer that TF meant to say the lived in the home from August 2017 to April 2018, and mistakenly

wrote April 2017 in the text message. TF also said the Barclays fixed water damage on the wall before renters moved in so they would not know. The Barclays dispute this.

28. The Barclays say that there was never any discussions with any previous renters about a leak because there was no leak after 2014. The Barclays say TF is the daughter of a former renter, and say TF's allegation that the roof leaked all the time does not make sense and is inconsistent with the Gibbses' submission that the roof did not leak when it rained or snowed but only in the spring when the ice melted. TF has not lived in the home for a number of years. Overall, I find TF's text messages are vague and inconsistent with the Gibbses' other evidence about the roof leak. I find that TF's statement that the roof leaked all the time over the eight month period they lived in the home is inconsistent with the Gibbses' submission that the roof only leaked in the spring when the ice and snow began to melt, after the Gibbses had also lived in the home for approximately seven months. I find it more likely than not that, if the roof leaked as TF claimed, the Gibbses would not have been able to live in the home for seven months without discovering the allegedly concealed leaks. I also question how TF was able to continue living the home if the leaks went unrepaired for a period of approximately eight months, as TF alleged. So, I place little weight on TF's text messages.
29. The Barclays say their most recent renters from October 2018 to September 2020 (2020 renters) never complained about leaks. The Barclays say the 2020 renters were planning to buy the home, but could not get financing for it. I infer the Barclays argue that the 2020 renters would not have planned to buy the home had the roof been leaking. The Gibbses say they contacted the 2020 renters, who said they did not want to add anything to this matter. Neither party provided any statements from the 2020 renters. Given this, I place little weight on these hearsay statements.
30. The Gibbses also say Mr. Barclay told them not to go upstairs when they went to view the home on September 5, 2020, after the sale had completed but prior to the possession date. I infer the Gibbses argue that the Barclays were concealing a leak

in the principal bedroom. The Gibbses also provided a typed Word document that appears to be a statement from their realtor Crystal Tennant. The document states that Crystal Tennant attended with the Gibbses and “the seller” asked them not to go upstairs. The Barclays dispute this.

31. Mr. Barclay says he recalls advising the Gibbses that Donna Barclay was still up in the bedroom and she heard them come upstairs. He says it makes no sense that he would be doing a repair job after the house was sold. The Barclays also say the Gibbses viewed the home a few times and a home inspector did an inspection. The Barclays say that if there was water damage at that time, it would have been obvious. In reply submissions, the Gibbses say Mr. Barclay told them they could not go upstairs, and “no one went upstairs to the [principal] bedroom where the leaks were present”. I find each party’s version of the September 5, 2021 home visit equally likely. However, it is undisputed that Gibbses viewed the home before purchasing it, and had the home inspected. So, I find nothing turns on whether the Gibbses went upstairs on September 5, 2020, after the sale had completed.
32. The Gibbses also provided a statement from Chad Walker, the owner of SEVN Studs Renos. Chad Walker says they were hired by the Gibbses because of leaks. Chad Walker says they found caulking in the roof valley, which they say proves “someone knew a leak was there and tried to cover it up instead of fixing the problem” and that “the previous owner was aware of a leak and knowingly tried to cover it up”. I do not accept this evidence. Chad Walker did not address the previous roof leak in their statement. As the Barclays repaired a previous roof leak (which they disclosed to the Gibbses), I find it equally likely that the caulking was part of the initial repair and not to cover up a problem. I also find it is unlikely that the Barclays would disclose a past leak and repair in the same location, if the Barclays were actively concealing ongoing roof leaks, as the Gibbses allege.
33. It is undisputed that Chad Walker found evidence of water damage and the roof required repair in March 2021, seven months after the Gibbses purchased the home.

However, I find this does not prove that the Barclays knew about any further leaks or unrepaired damage.

34. As noted, the Gibbsses bear the burden of proving their claims. Here, I find that on balance, the evidence does not prove that the Barclays knew about any further leaks or unrepaired damage, beyond the disclosed 2014 repair. So, I find the Barclays did not misrepresent anything or fail to disclose a latent defect, and the Gibbsses' claim must fail.
35. Under CRTA section 49 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 Gibbsses were unsuccessful, I dismiss their claim for reimbursement of CRT fees. The Barclays did not pay any CRT fees or claim any dispute-related expenses.

ORDER

36. I dismiss the Gibbsses' claims and this dispute.

Leah Volkers, Tribunal Member