Civil Resolution Tribunal

Date Issued: January 17, 2022

File: SC-2021-001050

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Barakso v. White*, 2022 BCCRT 58

B E T W E E N :

JOHN J BARAKSO

APPLICANT

A N D :

LANCE WHITE

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Trisha Apland

INTRODUCTION

1. This dispute is about a condominium sale.

2. The applicant buyer, John J Barakso, purchased a condominium unit from the respondent seller, Lance White. Mr. Barakso says in the Property Disclosure Statement (PDS), Mr. White misrepresented a known problem with the heating

system's condition and so Mr. White is responsible for its repair costs. Mr. Barakso seeks reimbursement of the $4,462.50 he paid to repair it.

3. Mr. White denies the claim. He says there was a problem with the unit overheating in 2017, but he fixed it by replacing the thermostat. He says the unit's heat was working "according to building design" when he sold the property to Mr. Barakso in 2019.

4. Mr. Barakso is represented by a family member and Mr. White is self-represented.

5. For the reasons that follow, I find Mr. White must reimburse Mr. Barakso the claimed $4,462.50.

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.

Late Evidence

10. After the CRT's deadline to submit evidence, Mr. Barakso submitted as late evidence a December 16, 2020 text from Mr. White about the heating. Mr. White responds, in part, that the text "shows exactly" what he has been saying about the heating system. I find Mr. White's text is relevant to this dispute and I find no prejudice to Mr. White in admitting it into evidence. Given the CRT's mandate of flexible dispute resolution, I allow the text as evidence in this dispute.

ISSUES

11. The issues in this dispute are:

    a. Did Mr. White provide his actual and current knowledge about the heating system in the PDS?

    b. If no, to what extent, if any, does Mr. White owe Mr. Barakso the claimed $4,462.50?

EVIDENCE AND ANALYSIS

12. In a civil proceeding like this one, as the applicant Mr. Barakso must prove his claims on a balance of probabilities (which means "more likely than not"). 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.

13. In March 2019, Mr. White accepted Mr. Barakso's offer to purchase his condominium unit subject to conditions that included an inspection. Mr. White also completed and signed a PDS on February 13, 2019 that was incorporated into the Contract of Purchase and Sale. In the PDS, Mr. White answered no to the question "Are you

aware of any problems with the heating and/or central air conditioning system?" This question says it applied to both the unit and common property.

14. The subjects were removed on July 3, 2019 and Mr. Barakso took possession of the unit. Mr. Barakso says it became evident that the unit's heat delivery system did not function properly when temperatures dropped in October 2019. Mr. Barakso alleges that Mr. White knew about a hidden pre-existing heating problem and misrepresented his knowledge of it in the PDS. He seeks reimbursement of $4,462.50 that he spent to repair the unit's heating system.

15. Mr. White says he completed the PDS in good faith and his answer was truthful. He says there had been problems with the master bedroom overheating but he followed the recommended solution by replacing the thermostat in July 2017. He says this fixed the heating issue and after November 2017 he was "completely satisfied with the heat delivery" in his unit.

16. I discuss the evidence on the heating issue in detail below but first, I turn to the law.

The Legal Framework

17. 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 to the buyer beware principle include the seller's duty to disclose latent defects and negligent or fraudulent misrepresentations: see *Nixon v. MacIver*, 2016 BCCA 8 at paragraphs 32 to 33.

18. A latent defect is one that a buyer cannot discover through reasonable inspection. Only known latent defects require disclosure. Patent defects are those that can be discovered by conducting a reasonable inspection or inquiry about the property. Generally, 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.

19. In completing a PDS, the seller is making representations about the property. They are required to honestly disclose their actual and current knowledge of the property

in the PDS: *Hamilton v. Callaway*, 2016 BCCA 189. However, the PDS does not warrant the seller's knowledge was actually correct.

20. When the PDS is incorporated into the contract, as it was here, a seller could be liable in breach of the contract where the representation in the PDS was untrue and did not accord with their true belief at the time: see *Hanslo v. Barry,* 2011 BCSC 164 (*Hanslo*) at paragraph 96.

21. I find no need to discuss the law about negligent or fraudulent misrepresentation because I have decided this dispute on the basis of a contractual breach.

Did Mr. White breach the parties' contract by misrepresenting the information in the PDS?

22. The unit is heated by electric baseboard heaters and hot water radiators. The radiators have a zone servicing the main living area and a zone servicing the bedrooms and bathrooms. The radiators are controlled by thermostats and somehow related to the strata corporation's main "HVAC" system. These facts are not disputed.

23. It is undisputed that Mr. White owned the unit since 2014 and had experienced some issues with the unit overheating. As they are relevant to his knowledge of the heating problem, I have summarized the relevant correspondence and invoices below.

24. In April 2017, the strata's mechanical contractor, Pacific West Mechanical Ltd. (Pacific), attended the unit after Mr. White complained that the master bedroom was overheating. Pacific's June 16, 2017 invoice shows it replaced a faulty or mismatched thermostat and confirmed it was "operating well". Mr. White reported to the strata that "the issue is now resolved".

25. However, Mr. White emailed the strata property manager on November 3, 2017 that the new thermostat was not properly controlling the heat. He also stated it is "more evidence that the VALVE in the wall is <u>wrong</u>" (emphasis original). Mr. White also wanted the strata corporation's assurance he would not be charged for work related to a heating issue that was part of the "collective system". I infer his position was that

the valve or heating system were part of the common property and the strata corporation's responsibility to maintain and repair.

26. In his submissions, Mr. White explains that after sending the November email he learned the thermostat had a cooling function that was apparently switched on. After a contractor instructed him how to operate the thermostat, he says the overheating issue stopped.

27. As reported in its November 6, 2017 internal email, Pacific wrote that it checked the thermostat, concluded it was operating properly, and there was no observed issue with the heat. So, I find there was no problem with the thermostat itself. However, Pacific's email also said the "zone valve" needs inspection. It noted a potential issue with a valve hidden behind the unit's spare bedroom wall that needed more investigation. It wrote the owner did not want him to cut the wall without "blueprint confirmation first" and a quote and that the owner did not want to pay for it.

28. According to Pacific's December 15, 2017 invoice sent to the strata property manager, Pacific submitted a quote and then attended Mr. White's unit to open his walls and investigate the valve issue. It discovered 2 zone valves buried in the wall behind a closet. It wrote that the unit's valve lay-out is a problem because the valves share a return line which means if the bathroom heat is on but the bedroom heat is off, the return water from the bathroom would still flow through the bedroom piping causing the room to heat up. Pacific wrote:

> We advised the owners of our findings, and informed them that they will have to keep the heat off in their bathroom if they want the bedroom thermostat to control the heat until the issue can be reviewed by the original contractor.

29. On December 15, 2017 Pacific sent an internal email stating that the piping flaw is from the original construction and "the owner is just going to keep their heat in their bathroom off so that the thermostat in the bedroom will finally be controlling the heat to the spare bedroom and master bedroom".

30. Pacific's invoices are not expert opinion reports as defined by the CRT rules. However, there is no dispute that Pacific had the expertise to diagnose the heating system issue. Pacific's invoices include summaries of the reported issues, its investigations, and its conclusions and there is no independent evidence contradicting them. I find Pacific's invoices reliable and accept Pacific's conclusions. I accept Pacific's conclusions. I find there was an underlying issue with the valve's configuration that impacted the thermostat's ability to control the heating system in both bedrooms unless the bathroom heat was turned off. During the time Mr. White owned the unit, it is undisputed the valves were never reconfigured. So, I find the heating system problem remained.

31. Mr. White says he was not privy to Pacific's December invoice or internal email because they were never sent to him and says no one ever told him to stop using the bathroom thermostat. Mr. White also says after the thermostat was replaced, he was able to manage the heat to his satisfaction and he never had an issue with lack of heat in the spare room as experienced by Mr. Barakso.

32. I accept Mr. White was not invoiced for the December work nor knew of Pacific's internal emails. I also accept Mr. White was satisfied enough with the unit's heating that he did not fix it or follow up with the strata to have it fixed if it was a common property issue. However, I find it unlikely that he did not know about the heating system's valve issue at all. It was Mr. White's unit, he pointed out the potential valve issue, disputed responsibility to pay for it, and Pacific had to open his wall to inspect the valves. Also, while he lived there, the valve issue was unresolved. So, I find his thermostat would have only controlled the bedroom heat when the bathroom heat was off or his bedroom would have overheated. For these reasons, I find it more likely than not that Mr. White had discussed Pacific's inspection results, knew about the improper valve configuration, and knew it negatively impacted the unit's heat distribution.

33. On Balance, I find Mr. White knew there was a problem with the heating system when he completed the PDS. I find he should have answered the PDS question about it in the affirmative.

34. Based on the year of troubleshooting for Pacific to source the valve issue and its location behind the wall, I find it was not detectible on normal inspection. I find the improper valve configuration was a latent defect with the heating system. So, I find nothing turns on Mr. Barakso's inspector not discovering it during their inspection. Since I find Mr. White knew about this latent defect when he sold the unit to Mr. Barakso, I find he was obligated to disclose it and he did not: see *Karner* at paragraphs 19 and 20.

35. In summary, I find Mr. White's PDS statement that he was not currently aware of any heating problems was inaccurate and he reasonably knew it was inaccurate when he made it. I find he was also required to disclose his current knowledge of the latent heating system problem in the PDS. As the PDS was part of the contract, I find Mr. White breached the parties' contract because he failed to do so.

To what extent, if any, does Mr. White owe Mr. Barakso the claimed $4,462.50?

36. In similar breach of contract cases, the courts have concluded that repair costs can be an appropriate measure of damages provided there is well-defined evidence: see *Brunning v. Cummings* at paragraph 124, *Karner v. Kuhnke,* 2021 BCSC 1942 at paragraph 43, and *Hanslo* at paragraphs 99 and 132. In this dispute, I find there is well-defined evidence about the repair costs and they are the appropriate measure of damages.

37. A November 4, 2020 invoice for $2,782.50 from Pacific to Mr. Barakso indicates that Pacific replaced and relocated the heating zone valves from underneath the bathroom cabinet to the closet behind the bathroom cabinet. A November 11, 2020 invoice from Factory Edge Construction Ltd. shows it did carpenter work behind the vanity, baseboard and closet for $1,680. I find these repairs are consistent with

resolving heating system's problem as identified in Pacific's December invoice and the work to restore the unit. I am satisfied Mr. Baraskso suffered this loss from the breach of contract. I find Mr. White must pay Mr. Baraskso $4,462.50 in damages.

38. The *Court Order Interest Act* applies to the CRT. Mr. Barakso is entitled to pre-judgment interest on the $4,462,50 in damages award from the invoice dates to the the date of this decision. The interest equals $24.06

39. 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. I find Mr. Barakso is entitled to reimbursement of $175 in CRT fees. Mr. Barakso did not claim any specific dispute-related expenses.

ORDERS

40. Within 30 days of the date of this order, I order Mr. White to pay Mr. Barakso a total of $4,661.56, broken down as follows:

    a. $4,462.50 in damages,

    b. $24.06 in pre-judgment interest under the *Court Order Interest Act,* and

    c. $175 in CRT fees.

41. Mr. Barakso is entitled to post-judgment interest, as applicable.

42. 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.

43. 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.

Trisha Apland, Tribunal Member