



Civil Resolution Tribunal

Date Issued: May 24, 2022

File: SC-2021-007631

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Sutherland v. The Brick Warehouse LP*, 2022 BCCRT 608

BETWEEN:

TARA SUTHERLAND and FRANCES SMOLDERS

APPLICANTS

AND:

THE BRICK WAREHOUSE LP and MC COMMERCIAL INC.

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about a leaking washing machine (washer). The applicants, Tara Sutherland and Frances Smolders, say the washer leaked 3 days after installation,

causing water damage. While the washer was undisputedly repaired under warranty, the respondent seller and installer, The Brick Warehouse LP (The Brick), and the respondent manufacturer, MC Commercial Inc. (MC), refused to pay for the damage. The applicants claim \$5,000.

2. Ms. Sutherland is the washer's owner. Ms. Smolders is a claims adjuster with Ms. Sutherland's insurance company, The Wawanesa Mutual Insurance Company (Wawanesa). It is not clear why Ms. Smolders is a named applicant in her personal capacity. The submitted evidence shows Wawanesa is pursuing a subrogated claim, not Ms. Smolders. More on this below.
3. The Brick says it only delivered and "hooked up" the washer, and that none of its actions affected the washer's defective internal hose. MC argues that it is unknown whether The Brick removed rods/bolts in order to fit the washer into a closet, arguing that such removal could have led to the leak.
4. The applicants are represented by Ms. Sutherland, although her submissions appear to have been written by a representative of her insurer, which I infer was Ms. Smolders. The Brick is represented by an employee and MC is represented by its insurer.

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). CRTA section 2 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. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these.

In some respects, both parties of this dispute call into question the credibility, or truthfulness, of the other. 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.

7. CRTA section 42 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.
8. 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

9. The issue in this dispute is whether the respondents are responsible for the washer's leak and if so, whether they are responsible for the claimed property damage.

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, the applicants must prove their claim on a balance of probabilities (meaning "more likely than not"). I have read all the submitted evidence and arguments but refer only to what I find relevant to provide context for my decision.
11. Ms. Sutherland bought the GE brand washer from The Brick on October 15, 2020, for \$1,862.74. On October 20, 2020, The Brick installed it for her. On October 23, 2020, 3 days later, Ms. Sutherland had a water leak from under the washer. Ms. Sutherland made a claim with her insurer, Wawanesa. None of this is disputed.

12. Ms. Sutherland submitted a FirstOnSite Restoration (FOS) document showing it was contacted on October 23, 2020 and inspected Ms. Sutherland's property. FOS wrote that at the time of its October 23, 2020 inspection, it determined the water from the washer had "poured down into the ceiling below, pouring out a light fixture and running along the ceiling tape joints". There was no damage to the main floor flooring as Ms. Sutherland had managed to catch the water immediately with bowls. FOS also identified damage, which it repaired, to the laundry closet and drywall. The undisputed repairs cost over \$8,000, but the applicants have limited their claim to \$5,000, which is the CRT's monetary limit in small claims matters.
13. The issue in this dispute is causation, which is in turn essentially a dispute between the 2 respondents. There is no suggestion or any evidence that Ms. Sutherland did anything to cause her newly installed washer to leak.
14. On Ms. Sutherland's behalf, Wawanesa hired a forensic engineer, Ashley Beckman, P.Eng., CFEI, to inspect the washer. I find Ms. Beckman is qualified under the CRT's rules to provide expert evidence on the washer leak's likely cause.
15. On October 26, 2020, Ms. Beckman emailed Ms. Smolders and Wawanesa that she had examined all the washer's connections and that it "appears to be hooked up properly." Ms. Beckman said because the washer was stacked with a dryer it was difficult to maneuver and she did not retest it, as she did not want to cause another flood. Ms. Beckman recommended an appliance repair person examine the washer and then send her any part to determine if that part was responsible for the leak.
16. On November 6, 2020, MC's technician examined the washer and repaired the leak under warranty. The technician's report says, "Re and re stacked unit from closet to refit the tub to pump hose at the tub test ok" (quote reproduced as written).
17. On December 7, 2020, Ms. Smolders emailed Ms. Beckman to say that the insurance adjuster for GE blamed the loss on installation. Ms. Smolders noted, "the tech had to refit the tub to pump hose at the tub." Ms. Beckman responded that a

“pump to tub hose” sounded like an internal component that The Brick’s technician would not be expected to touch during installation.

18. MC’s insurer took the position that it “sounds like an install error”. Ms. Smolders explained to MC’s insurer that her engineer expert (Ms. Beckman) had indicated the failed part was likely internal. Ms. Smolders asked MC’s insurer for the part number for the “pump to tub hose” but received no response. Ms. Smolders asked MC directly and received no response.
19. MC submitted a copy of an August 26, 2021 email from its insurance adjuster to Ms. Smolders, in which it wrote:

All washer tubs are bolted for shipment and are removed by whoever installs same. They are bolted to prevent movement of the washer tub during transport.

20. MC’s adjuster sent further emails to Ms. Smolders on August 26, 2021, saying that washers are leak tested before leaving the factory, and then bolted and secured as per the quoted email above. The adjuster wrote that tilting the washer during installation (such as in a tight laundry closet) “can very well cause stress on the washer tub if not secured”. In other words, MC’s insurer speculates that The Brick’s installer removed the bolts to the washer tub and then tilted the washer to install it, thus stressing the tub and causing the leak. MC’s adjuster asked Ms. Smolders if the unit was tilted during its installation but says they received no response. Based on the evidence before me, Ms. Smolders did not know about any tilting, given the washer was installed by The Brick.
21. Ultimately, I am left with the respondent manufacturer MC and the respondent supplier The Brick saying the other is to blame for the washer’s leak and resulting damage. I find expert evidence is clearly required to establish the washer leak’s cause, and in particular whether it was due to an internal manufacturer defect or due to an installation error.

22. As noted, generally speaking the burden is on an applicant to prove their claim. That said, neither respondent submitted any expert evidence to support their position. I do not find emails from their insurance adjusters amounts to expert evidence. The only expert evidence I have before me is Ms. Beckman's. As noted above, Ms. Beckman found that the installation connections likely were sound and that the leak likely resulted from an internal error. I find Ms. Beckman's evidence is the best evidence about the likely cause and so I find it was likely an internal rather than an installation error.
23. As for the tilting MC mentions in their emails, I find this is speculative in the absence of any expert evidence to support the assertion that tilting was improper, that tilting was the leak's cause, or that The Brick's installer ought to have known not to tilt the washer, even if the installer did tilt it. I place no weight on MC's unsupported arguments about tilting.
24. I turn next to MC's liability as the washer's manufacturer. The law of manufacturers' liability is set out succinctly in *Racz v. Akzo Nobel Canada Inc.*, 2012 BCPC 0217, paragraphs 12 to 14, which I have summarized below:
- a. Unlike the consumer's relationship with the goods' seller, there is no contractual obligation (where the manufacturer is not the vendor) and no implied warranties under the *Sale of Goods Act* (SGA).
 - b. Rather, the manufacturer's liability arises where it commits a tort (a civil wrong). In *Rivtow Marine Ltd. v. Washington Iron Works*, 1973 CanLII 6 (SCC), the Supreme Court of Canada held that a product manufacturer owes the ultimate consumer a duty to take reasonable steps that its products will not result in injury to the consumer's life or property.
 - c. Under *Rivtow*, damages for pure economic loss (as opposed to damages resulting from physical injury to a person or property) are not recoverable.
25. Here, Ms. Sutherland's property was undisputedly damaged. I have found above this likely resulted from a defect within the washer, rather than an installation error.

So, I find MC was negligent in the washer's manufacture and is responsible in tort for the washer's leak and related damages, which as noted above are proven as \$5,000 as claimed. However, that is not the end of the matter.

26. The Brick sold the washer to Ms. Sutherland and so I find that under sections 18 and 56 of the SGA The Brick is jointly and severally liable with MC to pay the \$5,000 damages. Section 18 of the SGA sets out implied warranties of fitness for purpose, merchantable quality, and durability. Section 56 says a consumer can sue a supplier, even if it was not the manufacturer, for a breach of those warranties. In other words, I find The Brick breached its contract with Ms. Sutherland to sell her a functional and durable washer and so I find it is liable for its having sold her a washer that leaks 3 days later. Whatever claim there may be between The Brick and MC is not before me.
27. Finally, I turn to Ms. Smolders' status as an applicant. As noted above, it appears Wawanesa pursued a subrogated claim as Ms. Sutherland's insurer in filing this CRT dispute. This is consistent with section 36 of the *Insurance Act* that says "the insurer...is subrogated to all rights of recovery...and may bring an action **in the name of the insured** to enforce those rights" (my bold emphasis added). However, I find no legal basis to make any award to Ms. Smolders personally. So, I dismiss Ms. Smolders' claim and allow only Ms. Sutherland's claim.
28. The *Court Order Interest Act* applies to the CRT. I find Ms. Sutherland is entitled to pre-judgment interest on the \$5,000 under the COIA. Calculated from the last invoice repair date of December 8, 2020 to the date of this decision, this interest equals \$32.70. I note the CRT's small claims monetary limit is exclusive of COIA interest and CRT fees.
29. Under section 49 of the CRTA and the CRT's rules, a successful party is generally entitled to reimbursement of their CRT fees and reasonable dispute-related expenses. As Ms. Sutherland was successful, I find she is entitled to reimbursement of \$175 in paid CRT fees. No dispute-related expenses were claimed.

ORDERS

30. Within 21 days of this decision, I order MC and The Brick, jointly and severally, to pay Ms. Sutherland a total of \$5,207.77, broken down as follows:
- a. \$5,000 in damages,
 - b. \$32.77 in pre-judgment interest under the COIA, and
 - c. \$175 in CRT fees.
31. Ms. Sutherland is entitled to pre-judgment interest, as applicable. I dismiss Ms. Smolders' claims.
32. 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.
33. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of BC. 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 BC.

Shelley Lopez, Vice Chair