



Civil Resolution Tribunal

Date Issued: July 21, 2022

File: SC-2022-000201

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Brunckhurst v. 1230635 B.C. Ltd.*, 2022 BCCRT 833

BETWEEN:

PAUL BRUNCKHURST and ANITA BRUNCKHURST

APPLICANTS

AND:

1230635 B.C. LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Sherelle Goodwin

INTRODUCTION

1. The applicants, Paul Brunckhurst and Anita Brunckhurst, hired the respondent, 1230635 BC Ltd. (123), to collect material samples from their basement and send the samples for asbestos testing. The applicants say 123 breached the parties' agreement by failing to provide a credible report assessing the possibility of asbestos. Specifically, the applicants allege 123 failed to correctly collect the samples and failed

to have them properly analyzed. The applicants claim reimbursement of the \$866.25 they paid to 123 for the asbestos testing.

2. 123 denies any wrongdoing. It says it followed the governing rules and regulations in carrying out the sampling.
3. Mr. Brunckhurst represents the applicants. An owner or employee represents 123.

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. 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.
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.

8. As a preliminary matter, Mr. Brunckhurst included in his evidence package copies of emails between the parties and CRT staff about settlement negotiations during the facilitation stage of this dispute, although the emails provided no detail. Under CRT rule 1.11 those emails cannot be disclosed unless all parties consent, which I find is not the case here. I have not considered those emails in my decision below.

ISSUE

9. The issue in this dispute is whether 123 failed to provide the agreed upon sample collection and asbestos testing and, if so, what is the appropriate remedy.

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 parties’ submissions and weighed the evidence, but only refer to that which is relevant to explain my decision.
11. The applicants wanted to do a small renovation in their basement, involving installing plumbing and electrical work for a stacking laundry set. Given the age of their house, the applicants contacted 123 to test the basement materials to be removed for asbestos.
12. On July 9, 2021, 123 collected 3 samples each of the applicants’ basement drywall, popcorn ceiling texture, and drywall joint compound. 123 also sent the applicants its invoice for \$866.25. Mr. Brunckhurst paid the invoice by e-transfer on July 10, 2021. In a July 13, 2021 email, 123 advised the applicants that lab testing confirmed their drywall and ceiling contained asbestos. None of this is disputed.
13. The applicants say that 123 did not provide adequate sample collection or testing, as agreed upon. It is undisputed that the parties have no written contract. Based on emails between the parties, their submissions, and 123’s July 9, 2021 invoice, I find the parties agreed that 123 would take material samples, send them for asbestos

testing, and provide a report to the applicants, and the applicants agreed to pay \$866.25 in return.

14. I do not find the parties agreed that 123 would collect the samples in any particular manner or would use any particular lab to test the samples.
15. The applicants allege that 123 did not adequately collect the material samples or have them properly tested. Essentially, they argue that 123's asbestos testing was deficient.
16. In general, where an allegation of deficient work is based on a claim that the work fell below the required professional standard, and the subject matter is outside ordinary knowledge, expert evidence is required to prove the deficiency. Other times, a breach of the standard may be so obvious that it does not require expert evidence (see *Bergen v. Guliker*, 2015 BCCA 283).
17. The applicants say that 123 failed to collect "representative samples" from the basement materials as required by Section 20.112(3)(a) of the *Workers Compensation Act's Occupational Health and Safety Regulation* (Regulation).
18. 123 submitted a May 9, 2022 report by Robert Dales. Mr. Dales is a senior consultant with Tsolum & Table Environmental Ltd., which I find is the laboratory that tested the samples taken by 123. Mr. Dales is a certified Asbestos Hazard Emergency Response Act (AHERA) building inspector and so I find he is qualified to provide expert evidence on asbestos testing methods.
19. In his report, Mr. Dales explains that WorkSafe BC (WSBC) guidelines require taking a minimum of 3 samples when 1,000 square feet or less of each type of homogenous surface material being removed. This is supported by the WSBC guideline chart Mr. Dales included in his report.
20. It is undisputed that the applicants' basement drywall, popcorn ceiling, and drywall joint compound are 3 different types of surface materials. It is undisputed, and the evidence shows, that approximately 500 square feet of drywall surface and 200

square feet of ceiling surface was to be removed during the renovation. So, I agree with 123 that it took the required number of samples of each material type. However, I find that does not end the matter.

21. The applicants submitted an April 19, 2022 report by Scott Conrad, general manager of AREC Environmental Group Ltd. (AREC). Mr. Conrad is also a certified AHERA building inspector with 5 years' consulting experience. I find Mr. Conrad is also qualified to provide expert opinion evidence on asbestos testing methods.
22. In his report, Mr. Conrad agrees that 123 took the correct number of samples. However, he says 123's samples did not adequately represent the testing areas, as required by the Regulation. Specifically, he says 123 took each of the 3 drywall and ceiling samples from only one area on each surface.
23. The applicants submitted photos taken by another AREC employee (AH), while she was taking surface samples from the applicants' basement on September 3, 2021. They also submitted photos they took. Based on all the photos, I find 123 took 3 samples of the drywall within 1-2 inches of each other. I find the photos show the same for 123's ceiling samples. Based on 123's sample location, I find the samples only represent a few square inches of each of the drywall and ceiling surfaces to be tested for asbestos. I find 123's samples did not adequately represent the surfaces to be tested for asbestos.
24. In his May 9, 2022 report, Mr. Dales says that all 3 samples from the same area must be considered to contain asbestos, even if only 1 of them tests positive for asbestos. He explains this is because asbestos was added to building materials such as drywall, mud, or ceiling texture on site and so might not be evenly distributed throughout the same surface area. Given this explanation, I find 3 samples from within a few square inches of a 200 or 500 square foot surface area does not adequately represent the possibility of asbestos in the entirety of that surface area. So, I find 123's samples were not "representative samples" as required under the Regulation. I also find that such a sampling technique falls below the expected industry standard, given Mr.

Conrad's expert evidence on how sampling should occur. I find 123's sample collection deficient in this way.

25. The applicants also say that 123 failed to clean their tools before taking samples, as they saw AH from AREC do when she took the later set of samples. The applicants submitted a photo of a very dirty and black boxcutter they say 123 left at their house. 123 did not address this allegation in its submissions or provide any evidence that it cleaned its tools before arriving at the applicant's house. Given that the set of samples is taken to test for hazardous materials, I find it reasonable to expect the sampler to clean their tools to remove potential hazardous materials from former samples before taking new samples.
26. It is undisputed that Mr. Brunckhurst collected his own ceiling and drywall joint compound sample and submitted it to Island EHS for analysis. Based on the applicants' photos, I find the drywall sample was taken within 2 inches of 123's samples. Island EHS' August 27, 2021 report shows the sample contained no asbestos. I find these results alone are not determinative of whether 123's sampling method was deficient, given that Mr. Brunckhurst took only 1 sample of each area and is not trained in this area. However, I have also considered AREC's samples.
27. AREC's September 10, 2021 report shows that none of the 3 drywall or 3 ceiling samples it took contained any asbestos. Based on AH's photos, I find she took samples from various locations of each surface area to be removed, including 1 within an inch of 123's samples. In other words, I find AH took representative samples of the basement drywall and ceiling. So, on retesting using representative samples and clean tools, no asbestos was detected by AREC. Given that AREC also took samples at the same location as 123, I find it likely that the ceiling and drywall contained no asbestos.
28. In a September 2, 2021 email, Mr. Conrad explained to Mr. Brunckhurst that false positives for asbestos are most often the result of cross contamination from another material or if the sample tool is not properly decontaminated between collections.

29. Given Mr. Brunckhurst and AREC's negative lab results, the boxcutter photo, Mr. Brunckhurst's observations about 123's testing and the lack of any contradictory evidence from 123, I find it more likely than not that 123 did not clean its tools before taking samples from the applicants' basement. I find 123's sampling deficient in this way.
30. Contrary to the applicants' arguments, I find 123's history of Regulation contravention complaints with WSBC is not relevant to whether 123's work for the applicants was deficient or not. I make the same finding about the lab 123 sent its collected samples to for analysis.
31. The applicants also argue that 123 failed to properly identify the location of each sample on its report, contrary to Regulation 20.112(3)(e). While I agree that such a contravention would fall below the expected industry standard, the applicants have not shown that any such deficiency would require the applicants to have the testing or report redone. So, I find the applicants have not proven any damage from this alleged deficiency.
32. On balance, I find 123's lack of representative samples, and likely failure to decontaminate its tools before collecting samples was deficient. I find the deficiencies resulted in unreliable and inaccurate testing results, which meant the applicants had to hire someone else (AREC) to retest their basement materials. In other words, I find the applicants received no benefit from 123's testing. So, I find the applicants are entitled to reimbursement of the \$866.25 they paid 123 for the sample collection and asbestos testing.
33. The *Court Order Interest Act* applies to the CRT. The applicants are entitled to pre-judgment interest on the \$866.25 from the date it was paid (July 10, 2021) to the date of this decision. This equals \$4.65.
34. 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 the successful party, I find the applicants are entitled to reimbursement of \$125 in CRT fees and \$24.21 in dispute-related expenses.

35. As the unsuccessful party, 123 is not entitled to reimbursement of any of its claimed dispute-related expenses. Even if it had been successful, I would not have allowed 123's claimed expenses because it provided no supporting evidence of any expert report fee. Further, the CRT generally does not order reimbursement of time spent on a CRT dispute, under CRT rule 9.5.

ORDERS

36. Within 14 days of the date of this order, I order 123 to pay the applicants a total of \$995.11, broken down as follows:
- a. \$886.25 as reimbursement for asbestos testing,
 - b. \$4.65 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$149.21, for \$125 in CRT fees and \$24.21 in dispute-related expenses.
37. The applicants are entitled to post-judgment interest, as applicable.
38. 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. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Sherelle Goodwin, Tribunal Member