



Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kerr v. Michalkow*, 2023 BCCRT 595

B E T W E E N :

DANIEL THOMAS KERR and AMANDA KERR

APPLICANTS

A N D :

TREVOR MICHALKOW

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Micah Carmody

INTRODUCTION

1. The applicants, Daniel Thomas Kerr and Amanda Kerr, purchased a home from the respondent, Trevor Michalkow. The applicants say the respondent failed to meet his contractual obligations to leave certain things in good working order. Those things

included a toilet and bathroom, landscaping, an irrigation system, an air conditioner and an ensuite bathroom light fixture. The applicants claim \$4,897.31 to fix or replace those things.

2. The respondent generally denies the applicants claims. He says he met his obligations and any damage or breakdown happened after the applicants took possession of the home.
3. Mr. Kerr represents the applicants. The respondent is 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. In some respects, the parties in this dispute call into question each other's credibility. Credibility of 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. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not necessarily required where credibility is in issue. In the circumstances of this dispute, I find that I am able to assess and weigh the evidence and submissions before me. Bearing in mind the CRT's mandate that includes proportionality and prompt resolution of disputes, I decided to hear this dispute through written submissions.

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.

ISSUES

8. The issues in this dispute are:
 - a. Did the respondent breach any contractual obligations?
 - b. If so, what remedies are appropriate?

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities, meaning more likely than not. While I have considered all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.
10. The applicants viewed the property on March 12, 2022. The next day, the parties signed the contract of purchase and sale. The contract said the purchase price included, among other things, the building and all fixtures and appliances as viewed by the applicants on March 12, 2022.
11. One of the contract's conditions was that the applicants could obtain a property inspection. That inspection occurred on March 28, 2022. Among other things, the inspection report said the main floor bathroom toilet was leaking and had damaged the surrounding flooring and the ceiling below. It said concealed damage was expected.

12. On March 30, the parties agreed to a contract amendment. The possession date was changed to July 2, 2022. The amendment also said that the respondent agreed to complete certain repairs, including to the main floor bathroom toilet, and provide proof with receipts or photos.
13. The applicants say the respondent breached numerous contractual obligations, but they have limited their claim to the ones for which they say they incurred expenses to address. I discuss these obligations below.

Main floor bathroom toilet leak

14. On June 28, 2022, the applicants did a “final walkthrough” with their real estate agent and noticed the basement ceiling under the main floor toilet was still wet. The respondent agreed to cut a hole in the ceiling to determine whether the toilet was leaking. The applicants and their agent returned and the toilet visibly leaked when flushed. This is confirmed by a video, the applicants’ submissions, and the applicants’ real estate agent’s written statement.
15. The respondent says if the toilet leaked, it is because the applicants or their real estate agent tampered with the toilet during the walkthrough. I find this explanation unlikely as the ceiling was already wet. Further, I accept the agent’s evidence that all they did was flush the toilet one time and water flowed through the hole in the ceiling below.
16. The only evidence the respondent provided in this dispute is an inspection invoice from Joe Harman of Stutters Restorations. Joe Harman said they inspected the respondent’s main floor bathroom and the basement ceiling below. They found a 1-by-1 foot section of wet ceiling. They said there was no visible microbial growth and minimal likelihood of such growth. I put little weight on the former conclusion because it is not clear on what date Joe Harman attended and whether they were able to see into the space between the toilet and the ceiling below. I put little weight on the latter conclusion because it is entirely unexplained. Neither Joe Harman nor the respondent supported their evidence with photos.

17. In contrast, the applicants rely on a letter from ARG Contracting's Adam Galbraith, who repaired the bathroom on July 15, 2022. Adam Galbraith said they, along with a licensed plumber, inspected and determined that an improperly installed toilet flange and a cracked spacer caused the leak. They said the leak had been active for "an extended period of time" as evidenced by the significant mould growth beneath the toilet, which is confirmed by photos. So, I find the damage did not occur on or after June 28, 2022 as the respondent suggests.
18. The ARG invoice totalled \$2,734. It included subfloor removal and reinstallation, plumbing repairs, and drywall repairs. Is the respondent responsible for all these costs under his obligation in the amendment to "ensure that the main floor toilet is not leaking and repair and monitor to ensure no further leak"? I find it is ambiguous whether this meant to simply repair the toilet in the sense of stopping the leak, or to repair the leak in the sense of remediating the resulting damage.
19. The modern approach to contract interpretation involves reading the contract as a whole and giving the words their normal and ordinary meaning in line with the surrounding circumstances of the parties when they made the contract: see *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53. While the amendment was not perfectly drafted, I find its meaning can be determined from the ordinary meaning of the words. I find the most reasonable interpretation is that the respondent was obligated to repair the subfloor and drywall below the leaking toilet because the parties included "repair" in addition to the obligation to ensure that the toilet was not leaking. There were no toilet repairs to be made, other than ensuring that it was not leaking. So, I find "repair" must be taken to mean repairing damage caused by the leak. This is consistent with the home inspection report, which noted damage to the surrounding floor and the ceiling below, and likely concealed subfloor damage. The amendment specifically said the respondents' new obligations arose as a result of the professional home inspection. For these reasons, I find the respondent was obligated to repair the toilet plumbing, subfloor and drywall below. I find the respondent must reimburse the applicants \$2,734 for the full ARG invoice.

Irrigation system

20. In the contract, the respondent agreed that “the irrigation system is in good and proper working condition[.]” The applicants say 13 of 20 irrigation sprinkler heads were broken or not functioning properly upon possession. This is supported by photos of damaged sprinkler heads, and I accept it. There is no dispute that the sprinkler heads are part of the irrigation system, so I find the irrigation system was not in good and proper working condition.
21. The respondent was required to provide all fixtures, which I find included the irrigation system and sprinkler heads, in the same condition on the possession date as when the applicants viewed them. So, I find the respondent breached this contractual term.
22. I find the applicants are entitled to reimbursement for the irrigation parts they purchased, for which they provided receipts totaling \$503.49.

Landscaping

23. In the contract, the respondent agreed “to maintain the landscaping including lawn to the same or better standard as viewed by the buyer.” The applicants say that when they viewed the property on March 12, 2022, the yard and garden beds were barren and reasonably tidy. This is confirmed in the home inspection report photos. The applicants’ July 4, 2022 photos show garden beds overgrown with what the applicants say are weeds, up to waist high.
24. The respondent says the applicants viewed the home in early spring, before the natural grasses and vegetation were out of the ground. He says much of the yard is left in its natural state. He says the lawn, flower beds and vegetable garden were groomed and left in good condition.
25. I agree with the respondent that landscaping will look different in the summer compared to the early spring. However, I do not agree that the gardens were left groomed and in good condition. The applicants provided a statement from a landscaper, MacKenzie Ramsden, who said the gardens were “heavily overgrown”.

They said removing weeds from the property took a full day and filled a trailer. MacKenzie Ramsden invoiced the applicants \$1,000 for weed removal.

26. I find the \$1,000 weeding charge is high for 1 day. I also find that some of the “weeds” were probably pre-existing but dormant vegetation that would have been there to be seen had the applicants instead viewed the property in the summer. On a judgment basis, I find the applicants are entitled to \$300 for weed removal.

Air conditioner

27. The applicants say the air conditioner did not work on possession. They hired ComfortTech Heating and Cooling Ltd. to investigate. ComfortTech found that the air conditioner “contactor” was infested with ants, which had caused it to fail. ComfortTech replaced the contactor and the unit worked as it should. The cost was \$439.95.
28. The contract said the purchase price included air conditioning fixtures as viewed by the applicants on March 12, 2022.
29. The inspection report said the air conditioner could not be tested because of the cool outdoor temperature. It noted that the air conditioner was 21 years old with a life expectancy of 12 to 15 years. It said given the age, good performance was not expected, and the unit should be replaced. Given the air conditioner’s age and the ant infestation I find it more likely than not that the air conditioner was not working when the applicants viewed it. This means I find the respondent provided the air conditioner in the same condition as when the applicants viewed it, and did not breach the contract.
30. There is no property disclosure statement in evidence and the applicants do not allege that the respondent misrepresented the air conditioner’s condition. To the extent that the ant infestation was a latent defect (one that cannot be discovered through reasonable inspection), the respondent had no obligation to disclose it, only an obligation not to conceal it. There is no evidence that the respondent concealed the ant infestation.

31. For these reasons, I find the applicants are not entitled to reimbursement for the air conditioner repair.

Ensuite bathroom light fixture

32. The applicants say the light fixture in the ensuite bathroom was working at all previous inspections but did not work upon possession. They say they tried replacing the bulb but the bulb was not the issue.
33. The respondent says the light was working properly. He says he had a cleaning crew in the home the day before possession and “can only assume” it was working for them because they did not tell him otherwise. However, the respondent provided no supporting evidence to confirm that a cleaning crew attended.
34. On balance, I prefer the applicants’ evidence. I find it unlikely that they would fabricate a broken light fixture to be reimbursed for an inexpensive replacement. I find the light fixture stopped working at some point between the home inspection, which did not note any non-functional light fixtures, and the possession date.
35. I find the applicants are entitled to reimbursement of \$114.87 for the fixture as claimed. I find this amount reasonable and supported by a receipt.

Summary, interest and CRT fees

36. I have found that the applicants are entitled to reimbursement of \$2,734 for the plumbing repairs, \$503.49 for irrigation repairs, \$300 for weeding, and \$114.87 for the ensuite bathroom light fixture. This totals \$3,652.36.
37. The *Court Order Interest Act* applies to the CRT. The applicants are entitled to pre-judgment interest on the \$3,652.36 damages from June 30, 2022, the contract’s completion date, to the date of this decision. This equals \$120.36.
38. Under section 49 of the CRTA and CRT rules, a successful party is generally entitled to reimbursement of their CRT fees and reasonable dispute-related expenses. The

applicants were largely successful, so I find they are entitled to reimbursement of \$175 in paid CRT fees. Neither party claims dispute-related expenses.

ORDERS

39. Within 21 days of the date of this order, I order the respondent to pay the applicants a total of \$3,947.72, broken down as follows:

- a. \$3,652.36 in damages,
- b. \$120.36 in pre-judgment interest under the *Court Order Interest Act*, and
- c. \$175.00 in CRT fees.

40. The applicants are entitled to post-judgment interest, as applicable.

41. 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.

Micah Carmody, Tribunal Member