



Civil Resolution Tribunal

Date Issued: June 12, 2024

Files: SC-2023-002020
and SC-TPC-2023-012582

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Currie v. Jacob Bros. Construction Inc.*, 2024 BCCRT 535

B E T W E E N :

GERALD BRADLEY CURRIE and ELANN MICHELE CURRIE

APPLICANTS

A N D :

JACOB BROS. CONSTRUCTION INC. and SURREY, CITY OF

RESPONDENTS

A N D :

JACOB BROS. CONSTRUCTION INC.

RESPONDENT BY THIRD PARTY CLAIM

REASONS FOR DECISION

Tribunal Member:

Nav Shukla

INTRODUCTION

1. This decision is about two linked disputes that I find are a main claim and a third party claim about alleged damage caused by construction work.
2. In the main claim, which is dispute SC-2023-002020, Gerald Bradley Currie and Elann Michele Currie say that the City of Surrey (Surrey) contracted with Jacob Bros. Construction Inc. (Jacob Bros.) to widen a street near their home. The Curries say that excessive vibrations from the construction work damaged their fireplace and patio pavers. They allege Surrey and Jacob Bros. are liable for the damage in nuisance and claim \$1,212.23 for repair costs. I infer Mr. Currie represents himself and Ms. Currie.
3. Surrey and Jacob Bros. both deny that the vibrations from the construction work caused any damage. In the third party claim, which is dispute SC-TPC-2023-012582, Surrey says that if it is found liable for the alleged damage, its contract with Jacob Bros. requires Jacob Bros. to indemnify it for any amounts it is ordered to pay the Curries in the main claim. Surrey is represented by an in-house lawyer, Wassan Aujla. Jacob Bros. is represented by an employee.

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). 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.
5. 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. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me and that I can decide these disputes without an oral hearing.

6. 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 court.

ISSUES

7. The issues in these disputes are:
 - a. Are Surrey and Jacob Bros., or either of them, liable in nuisance for the alleged damage to the Curries' property?
 - b. If so, what damages are the Curries entitled to?
 - c. If Surrey is liable for the alleged damage, must Jacob Bros. indemnify Surrey?

EVIDENCE AND ANALYSIS

8. In a civil proceeding like this one, the Curries must prove their claims on a balance of probabilities, meaning more likely than not. Surrey must prove its third party claim to the same standard. I have considered all the parties' submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision.
9. In January 2021, Surrey hired Jacob Bros. to carry out construction work to expand a portion of 32nd Avenue. In July 2021, Jacob Bros. started the expansion work on a portion of 32nd Avenue that is near the strata complex where the Curries' home is located. The Curries say the construction work caused constant vibrations in their home, resulting in damage to their fireplace and patio pavers. The Curries argue Jacob Bros. is liable for the damage because it is the party that did the construction work. They argue Surrey is also liable as the party that hired Jacob Bros.
10. Surrey and Jacob Bros. do not dispute that the construction work may have caused vibrations, and I find videos in evidence that I Infer were taken during the construction activity show some vibrations inside the Curries' home. However, Surrey and Jacob

Bros. say that the Curries have failed to show that these vibrations caused any damage.

11. In its Dispute Response to the main claim, Surrey also relies on section 744 of the *Local Government Act*. This section says, in part, that a municipality is not liable in nuisance if damages arise out of a breakdown or malfunction of a dike or a road. Here, the Curries allege the damage was caused by the vibrations from the road widening construction activity. There is no suggestion that damage resulted from the road breaking down or malfunctioning. So, I find section 744 does not apply and I consider the Curries' nuisance claim against both Jacob Bros. and Surrey below.

Nuisance

12. A nuisance is the substantial (non-trivial) and unreasonable interference with the use and enjoyment of property (see *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, at paragraph 19). If the interference causes physical damage, a court or tribunal will generally find it unreasonable (see *Royal Anne Hotel Co. v. Ashcroft*, 1979 CanLII 2776, at page 760 and *Murray v. Langley (Township)*, 2010 BCSC 102 at paragraphs 35 to 37). Here, the Curries argue that the vibrations caused physical damage in the form of structural changes to the fireplace and separation between the patio pavers.
13. Surrey and Jacob Bros. argue that the Curries' nuisance claim must fail because they have not proven that the vibrations from the construction activity caused this physical damage. I agree that the question of causation is determinative.
14. As stated by the court in *Murray* at paragraph 36, before a finding of nuisance can be made, causation must be proven. The applicable test is the "but for" test (see *Sadowick v. British Columbia*, 2019 BCSC 1249 at paragraph 95). So, the Curries must prove causation by showing that but for the vibrations from the construction activity, the alleged damage to their fireplace and patio pavers would not have occurred. If the Curries cannot prove the vibrations caused the physical damage, then their claim in nuisance cannot succeed.

15. Surrey says that photographs in evidence of the alleged damage do not adequately establish causation. The photographs in evidence show the backing of the Curries' fireplace separated from the wall, areas where the fireplace's pieces are not aligned (the Curries say these are areas where the fireplace has "dropped"), some gaps or separation at joints in the fireplace hearth, separation between the fireplace hearth and the wall, and gaps in between the patio pavers.
16. Surrey says that the gaps and spaces shown in the photographs are minor, measuring in millimeters or at most centimeters. It says that if this is a deviation from the original construction, it could be attributed to any number of causes or factors, including the settlement of the building or the specific construction, soil shrinkage, compaction, or any other construction related causes.
17. Jacob Bros. similarly alleges that any damage shown in the photographs is likely due to deficient installation, not the construction vibrations. It relies on vibration monitoring reports that it had done during the road widening work after Surrey received complaints about the vibrations from residents. The vibration monitoring was done by exp Services Inc. on July 26, September 21, September 22 and November 23 and each report noted that the risk of damage to structures from the measured vibrations was low.
18. Surrey argues that in order for the Curries to prove causation, expert evidence is required. I agree that the photographs in evidence provide little assistance in establishing what caused the alleged damage and that expert evidence is required here. The Curries say that they have presented expert evidence from RJR Construction Management Ltd. (RJR), the company that initially installed the fireplace hearth and did the repair work in September and October 2021. The only documents in evidence from RJR are its August 11, 2021 quote for the repair work and its October 21, 2021 invoice for the repair work it actually completed. Neither of these documents provide an expert opinion about what caused the damage. So, I find there is no expert evidence before me that establishes that the road widening construction activity caused the alleged damage.

19. The Curries say that on the evidence before me, a reasonable person would nonetheless conclude that the fireplace and patio paver damage was a result of the construction activity. They say that the vibration monitoring reports Jacob Bros. relies on confirm the risk of structural damage was low, and that low risk does not equal no risk. They further say that other residents at their strata complex also complained about the vibrations and damage, which confirms that the damage the Curries complain about here must have been caused by the construction activity vibrations. Emails in evidence show that at least 1 other resident at the Curries' strata complex complained about damage to their basement bathroom as a result of the construction activity. Minutes from the Curries' strata council's July 22, 2021 meeting also note that the strata council had received reports about disturbance and damage within strata lots. While I accept that at least 1 other resident complained about damage allegedly caused by the nearby construction work, I do not find this, or other residents' complaints about vibrations from the construction, establish on a balance of probabilities that the specific damage the Curries complain about was caused by vibrations from the road widening construction. Without expert evidence establishing that the type of damage the Curries allege was likely caused by vibrations from Jacob Bros. construction work, I find the Curries nuisance claim must fail. So, I dismiss the main claim.
20. Since Surrey is not liable under the main claim, it follows that I dismiss Surrey's third party claim against Jacob Bros.
21. Under CRTA section 49 and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. Since the Curries were unsuccessful in the main claim, I dismiss their claim for reimbursement of their paid CRT fees. Both Surrey and Jacob Bros. were successful in the main claim. So, I order the Curries to reimburse Surrey \$75 for the CRT fees it paid for its third party claim against Jacob Bros. Jacob Bros. did not pay any fees and none of the parties claim any dispute-related expenses, so I award none.

ORDERS

22. Within 14 days of the date of this decision, I order the Curries to pay Surrey \$75 in CRT fees.
23. Surrey is entitled to post-judgment interest, as applicable.
24. I dismiss the Curries' claims in dispute SC-2023-002020 and Surrey's third party claim against Jacob Bros. in dispute SC-TPC-2023-012582.
25. This is a validated decision and order. 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.

Nav Shukla, Tribunal Member