

Under Pressure – Water Heater Lessors in Hot Water
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Hot water heater rentals are a fact of life for a vast number of Canadian homes. In 2011, Reliance Home Comfort Limited Partnership (“Reliance”) alone had 1.2 million hot water heater tanks rented out to home owners in Ontario. Many homeowners in Ontario default to the rental option and are blissfully unaware of the terms and conditions they are subject to in renting their hot water heater tank, aside from the \$15.00 to \$30.00 per month (a typical rental rate) which is withdrawn from their bank account each month. These agreements are restrictive: service is provided by the rental company, but the homeowner is restricted to using the rental company’s approved technicians to inspect, repair, and replace the rented hot water heater tank.

As with all things, hot water heater tanks have a finite lifespan. The tanks rented out by rental companies are typically stainless steel with a glass liner on the inside. Corrosion, sediment, wearing out of the glass liner, excessive temperature, high water pressure, and a multitude of other wear and tear issues may arise over the life cycle of a tank that will eventually result in the tank’s failure. Unfortunately, with the construction of the stainless steel and glass-lined tank, there is no way to properly investigate any issues of wear and tear without disassembling and destroying the tank. As a result, predicting when or if a tank will fail is a guessing game that cannot be verified until a leak, flood, or other failure occurs.

The situation for some home owners trapped by an agreement with their hot water heater rental company and limited in their options for replacement of an old hot water heater was addressed definitively by the Ontario Court of Appeal in late 2012 in the case of *Collett (appeal by Szilvasy) v. Reliance Home Comfort Limited Partnership*¹.

Small Claims Actions

This appeal decision was born of two successful small claims court actions by the Colletts and Szilvasys (subrogated actions brought by their home insurers) for flood damage caused by faulty and failing hot water heater tanks rented from Reliance. The Colletts’ tank was 19 years old while the Szilvasys’ tank was 9 years old. Both hot water heater tanks failed, leaked, and caused property damages within the Collett and Szilvasy homes. They both sued in the Small Claims Court and were successful. While the Deputy Judge found that warnings could absolve Reliance in negligence, the issue of breach of contract for goods remained. He found Reliance liable to the plaintiff lessees: that “only the timing is uncertain” of when a tank would fail and that the “warning confirms the high degree of risk the consumer is asked to bear”. Though the risk of flooding increased with the passage of time, the rental fee did not change month-to-month, treating the lease contract as though the tank was “just installed”. Without a program of replacement, Reliance retained ownership along with the risk of failure of the tank and the liability that follows. The Deputy Judge commented that: “If the defendant (Reliance) is charging as if the water heater were new, why should the warranty not be as effective as if the heater were new?”.

¹ [2012] O.J. No. 5555. Leave to appeal to the Supreme Court of Canada refused January 28, 2013.

Divisional Court Appeal

Reliance appealed to the Divisional Court². Justice Pardu summed up the Divisional Court's findings in the following introductory statement:

Reliance undertakes with its customers to provide them with working hot water tanks. Where a tank fails, Reliance replaces it and also services tanks which need maintenance. Reliance maintains ownership of the tanks unless a lessee chooses to purchase the tank from the company. The issue before the trial judge was whether there should be a warranty implied in the contract that Reliance was responsible for damage to property caused by water escaping from a corroded hot water tank. Contracts are of indefinite duration.³

Given the issue in dispute – “what it means to provide goods of a ‘reasonably acceptable quality’” – the Divisional Court had no difficulty in applying s.9 of the *Consumer Protection Act, 2002*⁴, to rentals of hot water heater tanks. Specifically, s. 9(1) “The supplier is deemed to warrant that the services supplied under a consumer agreement are of a reasonably acceptable quality” and s. 9(2) “The implied conditions and warranties applying to the sale of goods by virtue of the *Sale of Goods Act* are deemed to apply with necessary modifications to goods that are leased or traded or otherwise supplied under a consumer agreement”. The critical quotes from the Divisional Court is as follows:

All hot water tanks will corrode and eventually leak. The Appellant had no plan to replace water tanks before they leaked at any stage of their life span...Here the lessor promised to provide the lessee with a working hot water tank at all times. If the tank failed they undertook to replace it. If it required service, they provided it. The lessee retained ownership of the tank at all times. A tank provided by the lessor might be brand new or it might be 19 years old...Given the lessor's acknowledged contractual obligation to provide a working hot water tank at all times, it would be illogical to conclude that there was not a continuing warranty as to the proper functioning of the tank.⁵

Ultimately, the Divisional Court refused to alter the Deputy Judge's trial ruling.

Ontario Court of Appeal

Reliance appealed to the Court of Appeal⁶. Simply stated by Justice Gillese, the purpose of the appeal was to determine “who should bear the cost of the property damage” for the failed hot water heaters?⁷

The Court reviewed the Terms and Conditions of the hot water heater rental from Reliance, including the following:

² *Collett v. Reliance Home Comfort Limited Partnership* [2011] O.J. No. 6318 (Ont. Div. Ct.)

³ *Ibid.* at para. 1.

⁴ S.O. 2002, c. 30, Schedule A.

⁵ *Collett* (Ont. Div. Ct.), *Supra*, at para. 13.

⁶ *Collett (appeal by Szilvassy) v. Reliance Home Comfort Limited Partnership*, [2012] O.J. No. 5555 (Ont. C.A.).

⁷ *Ibid.* at para. 1.

[11] *The Terms & Conditions state that, among other things, the customer is to:*

(a) pay rental charges when due; and

(b) ensure that the water heater is located in an area with sufficient drainage and that the drainage is open and unrestricted.

[12] *The Terms & Conditions state that Reliance will:*

(a) repair and/or replace the water heater; and

(b) provide access to a customer service centre 7 days a week, 24 hours a day.

[13] *The Terms & Conditions also provide that Reliance:*

will not be liable for any loss, damage or injury of any type (including as a result of any water leakage) ... caused or contributed to in any way by the use and operation of the water heater or any indirect, incidental, special or consequential damages, even if reasonably foreseeable.⁸

Despite a warning sent to homeowners in August 2006 concerning possible leaks and preserving valuables, Reliance continued its procedure of only replacing those tanks that had failed. The Court reviewed the statutory authority relied upon by the homeowners, and disputed by Reliance, in the above decisions against Reliance, namely s. 9 of the *Consumer Protection Act*, and s. 15 of the *Sale of Goods Act*; the latter being referenced in the former.

After determining that the *CPA* applied retrospectively to the homeowners' rental of the hot water heater tanks, given that the Szilvasys began renting the tank in question in April 2004 before the *CPA* came into effect in 2005, the Court went on to find that s. 15 of the *SOGA* also applied. In particular, the Court quoted the following section:

15. Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

2. Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not),

⁸ *Ibid.* at paras. 11-13.

there is an implied condition that the goods will be of merchantable quality...⁹

The Court found the plaintiffs to be ordinary homeowners renting hot water heater tanks from Reliance, a company in the business of supplying and servicing such tanks. Reliance knew the purpose for which the homeowners were renting the tanks and the homeowners relied upon Reliance's expertise to provide a functioning hot water heater tank. As the tank leaked, it was not "fit for the purpose". The condition and age of the tank did not matter; so long as it did not leak, it would be fit for the purpose. The Court dismissed Reliance's appeal.

Conclusion

The above court decisions were significant victories for insurers looking to commence subrogation actions for hot water heater tank leaks. Leased hot water heaters, particularly those provided by Reliance (approximately 1.2 million in Ontario), were found to be subject to the provisions of the *Sale of Goods Act* and the *Consumer Protection Act*. By finding that these Acts applied to hot water heater tank lease agreements, companies that lease hot water heater tanks are bound to provide a hot water heater tank that is fit for the purpose and does not leak. By failing to put in place a system of regular and reasonable replacement, Reliance exposed itself to liability for any damages suffered by its lessors from failed hot water tanks.

Insurers should take note of the following particular pieces of information when paying out hot water claims:

- If the hot water heater tank is leased and, if so, from which company;
- The date the tank lease commenced and the terms and conditions that accompanied the tank;
- The location of the hot water heater and whether it is located near an unobstructed drain;
- The method of failure (temperature and pressure valve, rusting, corrosion, improper welding, etc.);
- Consideration of any betterment to an insured property following the remedial work completed, including the age and value of the replaced goods and items; and,
- The water heater tank should be retained for inspection, both by the leasing company and the insurer's own engineers if necessary. An argument of spoliation could jeopardize a subrogation claim against a water heater tank lessor.

The economic approach to hot water heater tank failures taken by leasing companies, rather than a responsible approach of regular replacement, will not be tolerated by the courts. Consumers, and their insurers, will not be asked to shoulder the burden of tank failures owned by the leasing company. By treating the hot water heater tanks as untouchable objects by the homeowner at an indefinite price and duration, tank leasing companies cannot maintain ownership without any liability attaching to the failure of the hot water heater tanks.

⁹ *Sale of Goods Act*, R.S.O. 1990, c. S.1 at s. 15.

The homeowner, and homeowner's insurer, will continue to have recourse against these leasing companies until there is a change in the approach to hot water heater tank leasing. The damages that flow from indefinite tank leasing agreements will continue to be attributed to the leasing companies as owners and caretakers of the tank. The leasing company's own terms and conditions created this legal hot water and will, in all likelihood, result in a flood of subrogated claims.