

CANADA / JUDGMENT

Davidson v. Merrick

2021 BCSC 1847

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1847 Davidson v. Merrick

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Davidson v. Merrick,

2021 BCSC 1847

Date: 20211001

Docket: S56714

Registry: Vernon

Between:

Robert Davidson and Bonnie Davidson

Plaintiffs

And

Alan Charles Merrick and Charlotte Ann Merrick

Defendants

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Plaintiffs:

A.A.D. Powell

The Defendants on their own behalf:

A.C. Merrick

C.A. Merrick

Place and Date of Trial/Hearing:

Vernon, B.C.

September 8 - 10, 2021

Place and Date of Judgment:

Vernon, B.C.

October 1, 2021

- [1] This case involves the consideration of conditions precedent, or "subject to" clauses, in the context of a real estate transaction.

Background

The Property Deal

- [2] Alan Merrick and Charlotte Merrick ("the defendants") own a property at 5382 Eagle Bay Road in Eagle Bay, BC close to Shuswap Lake (the "Property"). The Property consists of an older cabin-style home and is described as "semi-lakeshore", a term used to describe property that is across the road from the water as opposed to being actually on it.
- [3] The facts are largely undisputed.
- [4] Robert Davidson and Bonnie Davidson ("the plaintiffs") were looking for a cabin property and engaged the services of a realtor, Lloyd Taverner, to assist them. Mr. Taverner identified a couple of options, including the Property. The plaintiffs, along with some family members, attended the Property with Mr. Taverner and concluded that it was perfect for their needs. Indeed, it was so perfect for them that they cancelled their other scheduled viewing.
- [5] Mr. Taverner prepared an offer for a price of \$540,000. The offer included a number of subject clauses, such as various inspections. The defendants made a counter-offer through their listing realtor, Aaron Priebe, in the amount of \$580,000. They also included a subject clause which is the subject of this litigation, and relates to their purchase of a replacement property. The clause reads as follows:

This offer is subject to the seller entering into an unconditional agreement to purchase a suitable waterfront or semi-waterfront home on or before August 14, 2020. This Subject is for the sole benefit [sic] of the seller (the "Suitable Purchase clause").

- [6] Bonnie Davidson was concerned about the Suitable Purchase clause. She saw it as vague and subjective, and she asked Mr. Taverner for his advice. Mr. Taverner advised the plaintiffs that there were lots of available properties for sale, the defendants would have no difficulty in finding one to purchase, and the plaintiffs had no need to worry. The plaintiffs, therefore, accepted the defendants' counter-offer at the higher price and the Suitable Purchase clause.
- [7] The plaintiffs arranged for the various inspections that were contemplated in their subject clauses, including a home inspection and an inspection of the fireplace. The home inspection revealed numerous deficiencies, but these were largely anticipated by the plaintiffs.
- [8] The plaintiffs were somewhat surprised by the results of the fireplace inspection and attempted to re-negotiate the price, but the defendants would not be moved. As Bonnie Davidson described, the plaintiffs were not to be dissuaded. The various subject clauses that were for the plaintiffs' benefit were all removed within the time stipulated.
- [9] The plaintiffs felt confident about their offer after they waived their subject clauses. However, as the August 14, 2020 deadline approached, the plaintiffs heard nothing from the defendants or their realtor. Just prior to the August 14, 2020 deadline, the defendants proposed a one-month extension of the Suitable Purchase clause to September 14, 2020, to afford them more time to find another property. Their search for a suitable replacement property had proven unsuccessful. The plaintiffs were not prepared to accept this proposal, and instead offered to extend the closing date for a further six months to February 2021, on the condition that the Suitable Purchase clause was waived. The defendants did not accept this counterproposal and the contract lapsed.
- [10] The plaintiffs remain ready, willing, and able to complete the sale, as they were on September 8, 2020.

The Defendant's Property Search

- [11] In 2019, in addition to the Property, the defendants had a principal residence on Gaspardone Road in Kelowna. They decided that they would prefer to combine those homes so that they would have a principal residence that was either waterfront or semi-waterfront. Their geographical area of interest was Okanagan Centre because one of their four adult children resides in Okanagan Centre, and two of their other three children live in the North Glenmore area of Kelowna, which is close by. Okanagan Centre is a small community on the east side of Okanagan Lake between Kelowna and Vernon.
- [12] The defendants started their property search in late 2019 through their realtor, Mr. Keith Watts. They told Mr. Watts what they were looking for and advised him their budget was \$2 million. Mr. Watts sent them copies of listings as they came up. On other occasions, when the defendants noticed a property for sale, they inquired with Mr. Watts.

- [13] The defendants found a property they wanted in the Okanagan Centre in late 2019 and made an offer, but because they had not sold their Kelowna home, their offer was made subject to sale. They were unable to sell their home, and their offer to purchase lapsed.
- [14] The defendants then decided to list their Kelowna property for sale so that they would not find themselves in the same position again should they subsequently find a property they wished to purchase. The defendants contracted to sell their Kelowna property in April 2020, and the sale closed on August 12, 2020.
- [15] The defendants initially listed the Property for sale in 2019, but they received no offers. They re-listed in 2020 at the same price, but again there was little action. The defendants were just about to take the Property off the market when the plaintiffs arranged to view it.
- [16] The defendants included the Suitable Purchase clause in their counter-offer because they were only willing to sell their semi-lakeshore cabin if they found an acceptable replacement.
- [17] The defendants viewed nine properties in the Okanagan Centre area, all but one of which was seen prior to the contract with the plaintiffs. However, none of the prospective properties were viewed during the six-week period between July and August 14, which was the deadline for the defendants to waive the Suitable Purchase clause.

Positions of the parties

- [18] The plaintiffs argue that the defendants had an obligation to make their best efforts to satisfy the Suitable Purchase clause, and that they failed to do so because:
- a) they limited their search to the Okanagan Centre area, and their definition of "suitable" was unreasonably narrow; and
 - b) even if their search criteria were reasonable, they failed to expend their best efforts in order to satisfy their obligation to seek out a reasonably suitable property.
- [19] The defendants do not deny that they had an obligation to try to find a suitable property. Rather, they argue that they did all they could to identify possible properties, but no suitable property became available during the six-week window. They were, therefore, unwilling to waive the Suitable Purchase clause that they had included for their benefit. They were willing to extend the Suitable Purchase clause for a further month in hopes that a suitable property came available, but the plaintiffs were unwilling to accept that offer. As such, the contract lapsed.
- [20] Although the defendants did not take the position that the contract was not enforceable because the Suitable Purchase clause was too vague, I raised the possibility with the parties during closing arguments.
- [21] For the reasons that follow, the plaintiffs' claim is dismissed.

Legal framework

[22] Subject clauses are ubiquitous in real estate contracts in British Columbia. The interpretation of these clauses is often at issue when a party is disappointed that the transaction did not complete. In *Wiebe v. Bobsien*, (1995) 64 B.C.L.R. 295 at 298, 20 D.L.R. (4th) 475 (B.C.C.A.) [Wiebe], Justice Lambert, although in dissent, identified three distinct classes of "subject to" clauses:

- a) entirely subjective;
- b) clear, precise, and objective; and
- c) partly subjective and partly objective.

[23] In *Jung v. GNR Property Management Inc.*, 2006 BCSC 1692 at para. 28 [Jung], Justice Josephson described the three classes of "subject to" clauses as identified by Lambert J.A. and their contractual implications as follows:

1. Entirely subjective. An entirely subjective clause, depending entirely on the subjective state of mind of the purchaser. For example "subject to the whim of the purchaser," does not create a binding agreement but rather constitutes a standing offer. Since there is no contract in such a case, there is no obligation to act in good faith to remove the clause and either party can walk away from the agreement. The offer can be appropriately revoked as the contract does not exist until the condition precedent has been removed or waived and acceptance has been communicated.
2. Clear, precise and objective. In such a case the contract is completed; neither party can withdraw and the obligations are held in suspense until the objective condition precedent is fulfilled. Lambert J.A.'s example is "subject to John Smith being elected as Mayor in the municipal election on 15 October of this year." Both parties have the duty to act in good faith to bring the contract to fruition.
3. Partly subjective and partly objective. This type of condition has been dealt with by implying a term that the parties will take all reasonable steps to cause the conditions precedent to be fulfilled. For example, in *Griffins v. Martens* (1988), 24 B.C.L.R. (2d) 152 (B.C.C.A.), the clause "subject to satisfactory financing" was included for the sole benefit of the purchaser. The court held that "satisfactory" in the context of the agreement meant "satisfactory to a reasonable person with all the subjective but reasonable standards of the particular purchaser." The court held that the purchaser had a "good faith" implied obligation to use its best efforts to apply for financing.

[24] The proper interpretation of a clause, and, therefore, the question of which class of "subject to" clauses a particular clause may fall, will depend on the wording of the clause when viewed in the context of the contract. When interpreting a contract or clause, the court should have regard to all of the surrounding circumstances, often referred to as the factual matrix: *Creston Moly v. Sattva Capital*, 2014 SCC 53 at paras. 46-48 [Creston].

- [25] The general nature of the clause will not necessarily be determinative. For example, in *Jung*, the Court at para. 44 held that a clause that said "subject to lawyer's approval" was too broad to be enforceable. However, in *Zhang v. Amaral-Gurgel*, 2017 BCSC 1561 at para. 56 Justice Smith concluded that the vendor was purporting to rely on legal advice to avoid the contract solely for the purpose of justifying acceptance of a subsequently received better offer, and not for any legitimate basis that was founded on legal advice.
- [26] In *Murray McDermid Holdings Ltd. v. Thater*, (1982) 42 B.C.L.R. 119 at 125, 17 A.C.W.S. (2d) 341 (B.C.S.C), the contract was subject to approval by the purchaser company's president of the terms and the price. In that case, the clause was considered to be too vague to be capable of enforcement.
- [27] The difficulty with a contract term that leaves its performance to the whim of one of the parties is that it becomes impossible for the court to evaluate whether a party has satisfied its obligations or not. In the trial decision in *Wiebe* (reported at 59 B.C.L.R. 183, 14 D.L.R. (4th) 754 (B.C.S.C.)), Justice Bouck said the following at 190:

While a purchaser must use his best efforts in doing such things as obtaining financing, getting subdivision approval or selling his own home, there is no way the law can test whether he used his best efforts in deciding if he really likes a particular piece of property or not. Therefore, there can be no contract in the first instance.

- [28] Generally speaking, courts will try to find a contract because it should be assumed that the parties intended to be bound when affixing their signatures to the document. Notwithstanding those intentions, the fact that the parties intended to be bound does not necessarily lead to the conclusion that the wording of the contract was sufficient to be binding.
- [29] For the reasons that follow, I conclude that the Suitable Purchase clause is entirely subjective and falls into the first category of "subject to" clauses identified by Lambert J.A., and as such, no enforceable contract was created.

Discussion

- [30] The majority of subject clauses in British Columbia real estate transactions fall into the third category as identified by Lambert J.A., which are conditions that are partly subjective and partly objective. Common examples include subject to financing, or subject to a property inspection satisfactory to the buyer. While there may be disagreement as to what might constitute a reasonable basis to refuse to waive a particular clause, there can be no question that there is an obligation to at least contact the bank, or retain a building inspector, as the case may be.

- [31] In the case of a subject to financing clause, the court can evaluate a party's efforts, and can also assess whether the party was reasonable in refusing to accept an offer of financing with regard to prevailing rates and practices. While perhaps the task may be more difficult in the context of a property inspection report that identifies defects in a property, a court can, nonetheless, undertake a similar evaluative process to determine whether a party acted reasonably in failing to waive a property inspection clause.
- [32] But how does the court assess whether these defendants were able to find a "suitable waterfront or semi-waterfront home"? What constitutes a suitable home for one family may be wholly unsuited for another. The problem for the court when faced with contractual terms that are wholly subjective is that it is impossible to evaluate whether or not a party fulfilled its obligations.
- [33] The Canadian Oxford Dictionary, Second Edition, defines "suitable" as "well fitted for the purpose; appropriate." What constitutes a suitable home will inevitably mean different things to different people, and it invokes subjective consideration of a home's many aspects and features.
- [34] The plaintiffs argue that the Suitable Purchase clause is partly subjective and partly objective, and that the defendants' geographical restriction of Okanagan Centre is not objectively reasonable. They invite the Court to conclude that the defendants' geographical search criterion of Okanagan Centre was unreasonably restrictive.
- [35] I find that the defendants had always intended to restrict their property search to the Okanagan Centre area. I accept the defendants' evidence that they had been searching in Okanagan Centre since at least late 2019, and had instructed their realtor, Mr. Watts, to advise them of any listings of waterfront or semi-waterfront properties in that area that were listed for under \$2 million. Unfortunately, there were no new listings of any waterfront or semi-waterfront homes in Okanagan Centre during the six-week window leading up to August 14, 2020. I note that every property viewed by the defendants prior to entering into the contract with the plaintiffs was in Okanagan Centre, including the property they lost because their Kelowna home did not sell.
- [36] As the Supreme Court of Canada said in *Creston*, the court may look to the surrounding circumstances to interpret the words of a contract, but they must never, in the words of Justice Rothstein, "overwhelm the words of that agreement": at para. 57. The Supreme Court of Canada went on to say that the court cannot use the surrounding circumstances to create a new agreement.
- [37] The purpose of the court's review of all of the surrounding circumstances is to assist in determining the mutual intentions of the parties at the time of the contract: *Creston*, at paras. 57-58. By suggesting that the defendants were obligated to search outside of the Okanagan Centre area, the plaintiffs are asking the court to create an agreement that the defendants never agreed to.

- [38] I accept that both parties were of the view that they had obligations to work towards a closing. In this regard, I note that the defendants made the Property available for inspection by the plaintiffs, and they also emptied the septic tank and provided a copy of the receipt to the plaintiffs in accordance with the terms of the contract. Further evidence consistent with the defendants' belief that they intended to be bound in some manner by the contract is found in their offer to extend the Suitable Purchase clause for a further month in the hopes that a suitable property would come up.
- [39] When Bonnie Davidson expressed concern about the Suitable Purchase clause to Mr. Taverner when she saw the defendants' counteroffer, she was right to be concerned. Mr. Taverner's comment that the defendants would have no difficulty finding a suitable property provided hollow assurance as he had no idea what the defendants were looking to buy.
- [40] Can the Court conclude that these defendants should have purchased a home in a community adjacent to Okanagan Centre, in a community an hour's drive away, or indeed elsewhere, whether inside or outside of British Columbia? The answer is no.
- [41] It may well be that the defendants could have found a waterfront or semi-waterfront home to their liking in another community, or indeed another very nice home nowhere near a lake. However, the Court is concerned only with what the defendants had contractually obligated themselves to do, as opposed to what they could have done had they so chosen.
- [42] I conclude that the Suitable Purchase clause is entirely subjective, and subject to the whims of the defendants. Although the defendants have subsequently broadened their search given the scarcity of available options in Okanagan Centre, it is not for the Court to conclude that the defendants ought to have been prepared to make do with a home in another location solely for the purpose of selling the Property to the plaintiffs.
- [43] It is not possible for the Court to determine what might be a suitable residence for the defendants because suitability is wholly subjective. It follows that there was no binding contract of purchase and sale.
- [44] Because the Suitable Purchase clause is entirely subjective, by accepting the defendants' counter-offer, the plaintiffs were offering to buy the Property for the agreed upon price if the defendants were willing to sell it. If the defendants waived the Suitable Purchase clause, a binding contract of purchase and sale would have come into existence. But until then, there was no contract and as such either party, including the plaintiffs, were entitled to revoke the offer.
- [45] In the alternative, if the Suitable Purchase clause was found to be sufficiently precise so as to be enforceable, I would conclude that the defendants were entitled to restrict their geographical search to Okanagan Centre, consistent with their earlier search. The contract would not come into existence until the Suitable Purchase clause was met.

[46] There was no evidence to contradict Alan Merrick's testimony that there were no new listings that satisfied their criteria during the six weeks prior to August 14, 2020, nor any evidence to contradict his evidence that they were constantly looking for new listings and were provided new listings by their realtor, Mr. Watts.

Disposition

[47] The plaintiffs' claim is dismissed with costs to the defendants.

"Wilson J."

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