

CANADA / JUDGMENT

Shafzand v. Whitestone Management Ltd.

2014 BCSC 21

COURT

Supreme Court of British Columbia

DECIDED

9 January 2014

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2014 BCSC 21 Shafazand v. Whitestone Management Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Shafazand v. Whitestone Management Ltd., 2014 BCSC 21 Date: 20140109 Docket: S115840 Registry: Vancouver Between: Arman Shafazand, carrying on business as Competitive Quality Contractors Plaintiff And Whitestone Management Ltd. and Jia Guo Defendants And Arman Shafazand, carrying on business as Competitive Quality Contractors Defendant by Counterclaim Before: The Honourable Mr. Justice Goepel Reasons for Judgment Counsel for the Plaintiff and Defendant by Counterclaim: A. Shafazand, appearing in person on his own behalf Counsel for the Defendants: D.K. Plunkett Place and Dates of Trial: Vancouver, B.C. December 10-14, 2012 February 4-6, 2013 May 1-3, 2013 Place and Date of Judgment: Vancouver, B.C. January 9, 2014

INTRODUCTION

- [1] This case raises for determination whether, as a matter of public policy, either party to a residential construction contract can seek relief in Supreme Court in circumstances in which the plans submitted to obtain a municipal building permit were deliberately altered to conceal a planned illegal suite in the residence.
- [2] The plaintiff, Arman Shafazand, who carries on business as Competitive Quality Contractors, entered into a written contract (the "Contract") with the defendant Whitestone Management Ltd. ("Whitestone") pursuant to which the plaintiff agreed to construct a single family dwelling residence (the "Residence") at 1360 West 62nd Avenue, Vancouver, B.C. Pursuant to the terms of the Contract, the plaintiff was to be paid the fixed price of \$571,200, inclusive of taxes.
- [3] Whitestone is a residential developer. Its principal is Ms. Eileen Fu. The Residence was Whitestone's first project. Whitestone was retained by the defendant Jia Guo (the "Owner") to build the Residence. Whitestone, in turn, contracted with the plaintiff to carry out the construction.

- [4] The plaintiff alleges that during the course of construction Whitestone made additions, deletions and amendments to the scope of work. The plaintiff alleges the extra costs totalled, inclusive of taxes, \$137,405.17 and seeks judgment for that amount.
- [5] With some limited exceptions, Whitestone denies that the plaintiff is owed any further payment for extras pursuant to the terms of the Contract. It claims that it incurred additional expenses of \$65,862.62 to complete the work that the plaintiff refused or neglected to complete. It counterclaims for that sum.
- [6] The complicating factor in this matter is that the Contract called for the construction of an illegal suite in the basement of the Residence. When Whitestone applied to the City of Vancouver for the building permit, the plans submitted to the City were deliberately altered to conceal this fact. In these circumstances, the question arises whether, as a matter of public policy, the court should grant relief to either party.

BACKGROUND

A. Overview

- [7] Before turning to the public policy issue, it is first necessary to review and determine, as between the plaintiff and Whitestone, the merits of the claim and counterclaim. This will require a review of the events leading up to the execution of the Contract and during the course of construction.
- [8] The plaintiff and Ms. Fu have sharply divergent recollections of many of these events. Many of the difficulties that have arisen have their root in these differing recollections. It will be necessary to make credibility findings in order to resolve many of the conflicts. B. Pre-Contract Events
- [9] Whitestone was engaged by the Owner to build the Residence. The project included the removal of the existing home and construction of a new two-storey plus basement single family home and garage. In June 2010, Ms. Fu contacted the plaintiff as a possible builder after seeing an advertisement the plaintiff had put on Craigslist.
- [10] The plaintiff had previously built four or five other residential houses. After he received a telephone call from Ms. Fu to inquire as to whether or not he would be interested in building the Residence he met Ms. Fu at the job site. At that time the original home was still on the property.
- [11] The plaintiff says that Ms. Fu told him at this meeting that the plan was to build a square box home. The home was not to be fancy. The plaintiff testified that he told Ms. Fu at this initial meeting that he was prepared to build the Residence for \$120 a square foot and the parties agreed at that initial meeting to proceed on that basis.

- [12] Ms. Fu denies that any agreements were made at the initial meeting. She says that at the meeting they walked around the existing house and lot. They discussed that the house would be between 3,800 and 4,500 square feet depending upon its final design. She says she told the plaintiff that she expected the house to be constructed to a medium finish with a high end look. She says she made clear to him that this was a "West side house" and denies that she indicated the house was to be built as a simple box without design features. Ms. Fu says there was no discussion of price at this initial meeting.
- [13] Subsequent to the meeting Ms. Fu requested references from the plaintiff so she could see the quality of his work. On June 21, 2010, he sent Ms. Fu an email containing pictures of a home that he had constructed in Kitsilano. Ms. Fu then attended that home and took various pictures. She testified the Kitsilano home had the medium finish, high end look that she was hoping to replicate in the Residence.
- [14] The plaintiff acknowledges sending Ms. Fu pictures of the Kitsilano home and arranging for her to view the house. He acknowledges that the Kitsilano house has a medium finish, high end look. He says, however, that it was never discussed that the Residence would be finished to the same standard as the Kitsilano house.
- [15] On June 22, 2010, the plaintiff and Ms. Fu met with Mr. Eric Lee, a principal of Victor Eric Design Group, who had been retained to design the Residence. Ms. Fu testified that she brought to the meeting the home finish schedule which contained guidelines for the Residence's finishing. In the course of the meeting Mr. Lee provided photographs of the interior finishes of other homes he had designed. Ms. Fu and Mr. Lee both testified that the photos showed a level of finishing similar to that incorporated into the plans of the Residence. They say that the plaintiff did not express any concerns at the meeting concerning the proposed level of finishing.
- [16] The plaintiff recalls that Mr. Fu and Ms. Lee looked at some photographs at the meeting. He denies that he was shown any photographs of other designs done by Mr. Lee. He says there was no discussion that the photographs depicted the level of finishing that was planned for the Residence.
- [17] Ms. Fu says that the day after the meeting with Mr. Lee she had a telephone conversation with the plaintiff. The plaintiff told her that he was comfortable with the project and could do the work for \$120 a square foot. He indicated his total price would be \$480,000. She says he told her that he needed a \$15,000 deposit to secure his time.
- [18] The plaintiff denies this conversation took place. He says the parties had agreed to the price at their initial meeting which took place prior to Ms. Fu attending at the Kitsilano house and before the meeting with Mr. Lee.

- [19] On June 28, 2010, Ms. Fu sent an email to the plaintiff containing a draft letter of intent together with a scanned copy of the draft floor plan and elevation. The draft letter of intent described the job as an approximate 4,000 square foot new home plus a two-car detached garage, all of which would be constructed for \$480,000 plus taxes. As part of the letter of intent Whitestone agreed to pay the plaintiff a retainer of \$15,000 which would be credited against the first advance.
- [20] Ms. Fu subsequently called the plaintiff concerning the draft letter of intent. Ms. Fu testified that the plaintiff advised her that his price did not include the garage and the letter of intent was modified to add \$30,000 to the price for the garage.
- [21] The parties executed the letter of intent on June 29, 2010. Ms. Fu gave the plaintiff a retainer in the sum of \$15,000 as per the provisions of the letter of intent. It was a term of the letter of intent that the formal Contract agreement would take precedence over the letter of intent.
- [22] On July 8, 2010, Ms. Fu sent to the plaintiff the space plan, site plans and hand-sketched elevations for the Residence.
- [23] On July 13, 2010, Ms. Fu sent the plaintiff a draft Contract, which she had prepared. She indicated she had chosen to use the Canadian Construction Documents Committee document as it is widely accepted in the construction industry. She further indicated that since it was their first project together she had no objection to spending more time to craft a suitable Contract which they could use as a template for future projects. She asked the plaintiff to review the draft Contract and let her know if he had any comments.
- [24] The draft Contract was 31 pages in length. The Contract price was \$510,000 plus \$61,200 in taxes for a total price of \$571,200. The general conditions included some 12 separate sections. There were 18 defined terms. The Contract designated the Victor Eric Design Group as consultant. Attached to, and forming part of the Contract, were the designer's floor plans, roof plans, site plans, elevation and the home finish level specifications.
- [25] On or about July 18, 2010, the parties reviewed together the proposed Contract and attachments. The plaintiff says that after he reviewed the finishing specifications he told Mr. Fu that the house would cost more than the Contract price. He says that Ms. Fu assured him that they were behind him and would take care of him.
- [26] Ms. Fu says the parties went through the Contract before it was signed. She denies that the plaintiff told her before the Contract was signed that the house could not be built for the Contract price.
- [27] The parties initialed each page and executed the Contract. The work was to commence on the date that the city issued the development and building permit, with substantial performance of the work to be achieved within seven months of the commencement date.
- [28] Pursuant to Article A-3, Section 3.1 of the Contract, the following documents comprised the contents and terms of the Contract:

- (a) agreement between owner and contractor;
 - (b) definitions;
 - (c) the general conditions of the stipulated price contract;
 - (d) drawings from the designer, including floor plans, roof plans, site plans and elevations;
 - (e) Home Finish Level Specification Outline from the owner; and
 - (f) all other drawings including but not limited to, updated Design package, structural drawings and interior design package.
- [29] Part 6 of the General Conditions dealt with changes in the work. Those provisions included the following: GC 6.1 CHANGES 6.1.1 The Owner through the Consultant, without invalidating the Contract may make changes in the Work consisting of additions, deletions, or other revisions to the work by Change Order or Change Directive. 6.1.2 The Contractor shall not perform a change in the work without a Change Order or a Change Directive. GC 6.2 CHANGE ORDER 6.2.1 When a change in the Work is proposed or required, the Consultant shall provide a notice describing the proposed change in the Work to the Contractor. The Contractor shall present, in a form acceptable to the Consultant a method of adjustment or an amount of adjustment for the Contract Price, if any, and the adjustment in the Contract time if any, for the proposed change in the Work. 6.2.2 When the Owner and Contractor agree to the adjustments in the Contract Price and Contract Time or to the method to be used to determine the adjustments, such agreement shall be effective immediately and shall be recorded in a Change Order, signed by the Owner and Contractor. The value of the work performed as a result of a Change Order shall be included in applications for progress payments. GC 6.3 CHANGE DIRECTIVE 6.3.1 If the Owner requires the Contractor to proceed with a change in the Work prior to the Owner and the Contractor agreeing upon the adjustment in Contract Price and Contract Time, the Owner through the Consultant, shall issue a Change Directive. C. The Building Permit Application
- [30] The basement floor plan was one of the drawings attached to the Contract. The floor plan indicated that the basement would contain a two bedroom suite and include a kitchen, living room and dining area.
- [31] In August 2010, Whitestone made application for the building permit. The basement plans attached to the building permit application showed a different layout for the basement than the plans attached to the Contract. Whereas the drawings attached to the Contract showed two bedrooms, a kitchen and a living area, the plans submitted in support of the building permit showed a sewing room, games room and crafts room.

- [32] Ms. Fu testified that the basement suite was not shown on the plans submitted to the City for the building permit because the basement suite was not authorized under the City bylaws and if the plans had shown the basement suite the building permit would not have been issued. The plaintiff was fully aware that the plans submitted to the City were misleading. It was the parties' common intention to construct the basement suite after the City had done its final inspection and issued its occupancy permit. D. Construction
- [33] The building permit was issued on September 17, 2010. Construction commenced almost immediately thereafter with the demolition of the existing house on the premises.
- [34] The demolition and excavation work was completed by October 5, 2010, by which time the foundation and framing work was underway. On October 12, 2010, Whitestone provided the plaintiff with the detailed Reflected Ceiling Plan and Lighting Legends (ID 2), and the detailed Furniture Plan, Electrical Plan and Electrical Legend (ID 3). These plans showed the number of pot lights that were ultimately used in the project and the substantial amount of dropped ceilings.
- [35] On October 20, 2010, further interior design package drawings were issued for construction and provided to the plaintiff.
- [36] On January 24, 2011, Whitestone provided the plaintiff with the finalized interior design package.
- [37] As of April 2011, the project was significantly behind schedule. Pursuant to the terms of the Contract, the work was to have been finished by April 17, 2011.
- [38] After construction was commenced, the plaintiff and Whitestone entered into contracts to build two additional houses. In the result, the plaintiff was attempting to build and complete three houses at once.
- [39] Pursuant to the terms of the Contract, the plaintiff was to be paid in four instalments:
- (a) \$150,000 upon obtaining the building permits from the City, less the 10% booking fee that was paid to the plaintiff upon signing the letter of intent;
 - (b) \$120,000 upon completion of foundation;
 - (c) \$120,000 upon locking up;
 - (d) \$120,000 upon completion of drywall.
- [40] Under the terms of the Contract, Whitestone was entitled to hold back 10% of the amounts owed pending completion of the project.
- [41] The installments were paid pursuant to the provisions of the Contract. The installments were not increased to reflect any changes in the work. The fourth installment was paid on or about April 6, 2011.

- [42] In June 2011, the plaintiff told Whitestone that he had insufficient funds to complete. In order to assist the plaintiff and in an effort to get the Residence completed, Whitestone, on June 6, 2011, released to the plaintiff the holdback funds (\$51,000 plus HST).
- [43] The plaintiff did not ultimately complete the Residence. In order to complete, Whitestone ordered certain supplies and engaged subcontractors to complete the Contract work that the plaintiff did not get done. The costs that Whitestone incurred in finishing the Residence form the basis of its counterclaim.
- [44] On June 23, 2011, the National Home Warranty conducted an inspection and approved the Residence for substantial completion. On June 24, 2011, the City conducted its final inspection. The Residence did not pass the inspection due to a number of minor deficiencies. Whitestone took the necessary steps to have the deficiencies corrected and on July 7, 2011 the City re-inspected the house and approved it for occupancy.
- [45] After the Residence had passed its final inspection the plaintiff had a discussion with the Owner's daughter. She thanked him for all his work. In their conversation, the daughter told him that the Owner had paid Whitestone \$1,040,000.
- [46] On July 7, 2011, the plaintiff gave Whitestone an invoice dated July 4, 2011 for the alleged extras incurred in excess of the Contract price. The plaintiff claimed extras of \$127,494.36. The plaintiff says that throughout the project there were numerous changes made in the plans and designs. He says he was assured on numerous occasions by Ms. Fu that he would be paid for the various extras that were carried out.
- [47] When the plaintiff gave Ms. Fu the invoice she told him that Whitestone would not make any additional payments. She denied giving him any assurances during construction that she would make additional payments. She drew his attention to the change order process spelled out in the Contract that requires extra work to be authorized in writing before it can proceed. THE CLAIM FOR EXTRAS A. Overview
- [48] The plaintiff submits that, from the outset, Ms. Fu requested changes in the work and continually advised him that he would be paid and he should not worry about the extra cost. The plaintiff testified that throughout the course of the project there were numerous changes made and that Ms. Fu, on several occasions, confirmed that Whitestone would pay for the changes.
- [49] Ms. Fu emphatically denies that evidence. While acknowledging there were some minor changes for which she is prepared to pay, she says that she never gave the plaintiff the blanket assurances he alleges with regard to changes in the project. Indeed, she says there were few, if any, changes once construction commenced.
- [50] The Contract contained detailed language concerning changes in the work. It required that all changes be in writing and that the contractor not perform any changes without a written change order. The evidence indicates that Ms. Fu did not demand strict compliance with the contractual terms, but she did request the plaintiff on several occasions to advise her of the

costs that would be involved in changes and would approve or not approve the proposed change depending upon the amount. In circumstances in which the change resulted in a change of price, it was usually documented. Whitestone now agrees and is responsible for additional costs in regard to:

- (a) skylights
- (b) plumbing fixture materials;
- (c) addition of the basement wet bar; and
- (d) carpet materials.

[51] There are specific documents reflecting the change to the price of the carpet and the plumbing fixtures. With respect to the skylights, Ms. Fu specifically requested a price and rejected it when she found it was too high. She was then told that under an alternative method the costs would be minimal.

[52] Ms. Fu denies issuing any change directives or instructing the plaintiff to proceed with extra work without first reviewing the expected costs, obtaining the Owner's approval and/or reaching an agreement with the plaintiff in relation to the total extra costs. Ms. Fu specifically denies ever representing to the plaintiff that he should proceed with extra work and they would deal or work out a price after the fact.

[53] The plaintiff retained sub-trades to do most of the work. He called as his witnesses various individuals who acted as sub-trades. Many of these witnesses indicated that during the course of construction they found the Residence to be more complex than they had been initially advised. This led to them increasing their charges to the plaintiff. Much of the plaintiff's claim concerns his attempt to pass on these additional charges to the defendant.

[54] While I will deal with the specific allegations in more detail below one example will suffice. The electrical contractor, Mr. Amani, testified that he gave the plaintiff a cost estimate of \$22,000. He estimated there would be 10 to 15 pot lights installed. Ultimately, the Residence required 101 pot lights and Mr. Amani charged the plaintiff an additional \$6,020 on account of the pot lights. B. Legal Framework

[55] The governing legal principles are not in issue. *Sargent Douglas & Co. Ltd. v. Kozic Holdings Ltd.* (1985), 17 C.L.R. 13 (B.C.S.C.) concerned a contract for construction of new motel units which required changes to be ordered in writing with payment for extras contingent upon this requirement being met. The wording was similar to that in the contract in issue here. Perry L.J.S.C. set out some guiding principles regarding extras, at p. 21: The general principles of law applicable to extras and to be applied in the present case, may be briefly stated. Firstly, it must clearly appear that the work for which extra compensation is demanded was not embraced by the original contract. Work cannot be recovered for as an extra which must have been contemplated by both parties when the contract was entered into. Though where, as here, the contract gives the owner right [sic] to order extras, the

contractor's right to payment for any changes or extras so ordered will depend upon his establishing that an express or implied agreement was in fact made covering each order as a result of the owner's instructions under his power to order extras. An implied contract may be inferred from the conduct of the parties, but in all such cases an essential element is that the owner at least knew that the work was going on and acquiesced in the contractor doing it. In some cases it may be presumed that the owner consented to such extra work if so great that it must have been done with his knowledge, or was necessary and not foreseen. Finally, the contractor must prove conclusively that the work done was not a part of the main contract: see *Demenico v. Earls*, [1945] O.W.N. 375 at 376 (Ont. H.C.).

- [56] In *Kei-Ron Holdings Ltd. v. Coquihalla Motor Inn Ltd.* (1996), 29 C.L.R. (2d) 9 (B.C.S.C) [Kei-Ron], Levine J. (as she then was), reviewed several of these types of cases and at para. 41 set out a framework to be applied in determining liability for extra work: 41 The cases employ different wording and approach the problem of extras from different angles, but share common underlying principles. In determining liability for the cost of extra work, the first question to be answered is whether the work performed was, in fact, extra work; that is, it did not fall within the scope of work originally contemplated by the contract. If so, did the owner give instructions, either express or implied, that the work be done or was the work otherwise authorized by the owner? Next, was the owner informed or necessarily aware that the extra work would increase the cost? Finally, did the owner waive the provision requiring changes to be made in writing or acquiesce in ignoring these provisions? If the plaintiff can establish these elements, the defendant is liable to pay a reasonable amount for the extra work. These elements must be proved with respect to each extra claimed. C. Findings of Fact
- [57] There are serious and significant credibility issues in this litigation. As set out in the section concerning the pre-Contract events, the plaintiff says that he was led to believe that the plan was to build a simple square box home without any fancy finishing touches. It was on this basis that he agreed to build the Residence for \$120 a square foot. Ms. Fu's evidence is to the contrary. She says she made it clear to the plaintiff that this was to be a "West side house" that would be constructed to a medium finish with a high end look.
- [58] The question as to what was understood by the parties at the time they entered into the Contract is fundamental to the overriding issues in this litigation. The plaintiff's complaints in regard to changes in the design are premised on the Residence being the square box house that he envisioned at the time he entered into the Contract. Many of the matters he now claims as extras arise from his understanding as to the nature of the premises. Whitestone, in turn, says that most of the amounts claimed as extras are not extras at all, but form part of the scope of work contemplated in the Contract.
- [59] The plaintiff's evidence is not internally consistent. He testified that at the first meeting with Ms. Fu he was told that the plan was to build a square box home and based upon that representation, he agreed to build the Residence for \$120 a square foot. He denies that he was ever told that the finishing of the Residence would be consistent with the Kitsilano home that he had previously built and Ms. Fu had inspected. He denies that there were

discussions at the meeting with Mr. Eric Lee on June 22, 2010 that the finishing would be similar to those of other homes that Mr. Lee had designed, of which photographs were examined during the course of that meeting. He alleges that his claim for extras arises from changes that Ms. Fu demanded throughout the course of construction.

- [60] The inconsistency in the plaintiff's testimony is, however, that he acknowledges that he knew prior to signing the Contract, after he had reviewed the finishing specifications, that that house would cost more than the Contract price. He says he raised this matter with Ms. Fu before the Contract was signed and she gave him assurances that he would be taken care of.
- [61] I do not accept the plaintiff's evidence with regard to the matters that took place in advance of the signing of the Contract and to the extent that that evidence is in conflict with that of Ms. Fu's, I prefer Ms. Fu's evidence. In particular, I do not accept the plaintiff's evidence that he advised Ms. Fu at their initial meeting that he would build the house for \$120 a square foot based on Ms. Fu's representations the plan was to build a square box home. I accept Ms. Fu's evidence that the price was not discussed at the initial meeting. I further accept her evidence that she told the plaintiff at the initial meeting that the house was to be constructed to a medium finish with a high end look and with design features. It is for that reason that the plaintiff sent Ms. Fu pictures of the Kitsilano home he had previously constructed and arranged for Ms. Fu to view that home. The plaintiff acknowledges that the Kitsilano home had a medium finish high end look.
- [62] I accept the evidence of Ms. Fu and Mr. Lee that at the meeting on June 22 they discussed the manner in which they contemplated the house would be finished and showed pictures of the proposed finishing to the plaintiff. I do not accept the plaintiff's evidence that such discussions did not take place. It is not credible that the parties did not discuss at the June 22 meeting how the house would be finished. That information was of critical importance to the plaintiff, because without it he could not realistically determine the amount to charge for construction of the Residence.
- [63] I find that it was only after the meeting had taken place on June 22 and that the plaintiff was fully aware of the proposed finishing for the Residence that the plaintiff offered to build the Residence for \$120 a square foot.
- [64] I do not accept the plaintiff's evidence that he told Ms. Fu prior to signing the Contract that the house could not be built for \$120 a square foot or that Ms. Fu at that time gave him any assurances that Whitestone would be prepared to pay any amounts over and above the Contract price. I do not accept that Ms. Fu made any such representation. Such representations would be completely contrary to the parties entering into a complex stipulated price agreement, which was to govern their relationship.
- [65] The plaintiff's testimony, however, that he knew the house could not be built for the Contract price prior to signing the Contract is of some considerable import. It suggests that he committed himself to this project knowing that it was likely to be unprofitable. Possibly

he thought that it was in his interests to do so because of the opportunity of building other houses for Whitestone. I note that the contracts for the other houses that he ultimately built for Whitestone were on a cost plus basis. Whatever his motivation, the plaintiff committed to build the Residence for a fixed price, and subject to approved changes and extras, he was contractually committed to finish the Residence for the Contract price.

- [66] The plaintiff's evidence that he knew the house could not be built for the Contract price undermines his evidence that the additional costs incurred in the course of construction arose because of changes to the Contract. While I will review below in some detail the specific extra claims, many cannot succeed because they do not overcome the initial hurdle of establishing that the claims did not fall within the scope of work contained in the Contract. D. Individual Extra Claims
- [67] In the notice of civil claim it is alleged that Whitestone made changes to the terms of the Contract, and made additions, deletions and amendments to the scope of work, all of which were provided by the plaintiff as requested. The statement of claim particularizes 24 items totalling \$137,405.17. In the course of submissions the plaintiff conceded that, in regard to several of the items, no evidence was called. With regard to certain of the items, Whitestone concedes that additional work was done for which it is liable.
- [68] As set out in Kei-Ron, the onus is on the plaintiff to establish that the alleged extra did not fall within the scope of work originally contemplated by the Contract. He must also establish that the work was authorized and that Whitestone knew it would increase the price.
- [69] In the section that follows I will review each of the individual claims as set out in the pleading.
- a. Excavation, Gravel Backfill - \$900
- [70] The plaintiff led no evidence to support this claim. This claim is dismissed.
- b. Framing - \$17,885
- [71] Considerable evidence was led at trial concerning the framing extras. Testimony was led from the framer, Mr. Sourisseah. He testified that he initially suggested to the plaintiff a framing cost of \$26,000. Once he had the opportunity of reviewing the plans, he increased his estimate to \$30,000. Following completion of the project he sent an account for extras totalling \$15,551.20 (HST included). In regard to that account, he particularized 23 items of extra work that he carried out. He says, in regard to several of those items, he had discussions with Ms. Fu and only carried out the changes after she had given her consent.
- [72] Whitestone acknowledges that certain extra framing was required. In particular, they accept the following items on Exhibit 15B:
1. Item 3 - framing extra gate to rear of house - 5 hours
 2. Item 6 - remove playroom door from west side of house - 1 hour

3. Item 20 - reframe 2-piece landing from second floor - 10 hours
4. Item 21 - frame 2 skylights - 16 hours

[73] In regard to the balance of the extra items claimed in relation to framing, Whitestone submits that the work was either included in the plaintiff's scope of work, authorized on the basis that it would not require an adjustment in the base Contract price, was a direct result of the plaintiff's failure to properly coordinate trades on site, or was done without the consent or approval of Whitestone.

[74] I find Mr. Sourisseah to be a credible and reliable witness. He distinguished between work he carried out on the instructions of the plaintiff and that in which he had received approval from the defendant to do. I accept his evidence that in addition to the items which the defendant has conceded are payable, the defendant must also pay for the work carried out in relation to the following items:

1. Item 10 - install 3 additional beams on main floor - 21 hours
2. Item 15 - relocated centre bedroom window - 3 hours
3. Item 16 - moved wall between east and centre bedroom - 5 hours
4. Item 17 - framed second wall in west corner bedroom - 3 hours
5. Item 18 - altered the box out window - 3 hours
6. Item 22 - altered entire skirt roof system - 6 hours

[75] In total, in regard to framing, I find that there was an additional 73 hours of work done which are properly considered extras. Mr. Sourisseah's rate was \$60 an hour and therefore the amount allowed under this heading is \$60 x 73 plus \$525.60 HST for a total of \$4,905.60.

[76] I find that in regard to the balance of the framing items, they either were included in the scope of work, arose from plaintiff's failure to properly coordinate trades or were not approved by Whitestone.

c. Plumbing - \$14,000

[77] The plumbing contractor, Mr. Kontaginannis, provided an initial budget of \$30,000 for all plumbing work. He acknowledged that this was a rough estimate and was not based on his review of the building permit drawings. The plaintiff claims for total extras of \$14,000.

[78] The original rough plumbing estimate of \$30,000 was based on a gravity connection to the sewer system. Once Mr. Kontaginannis realized that a pump would be necessary to connect to the sewer, he adjusted his price to \$38,000. He gave that estimate to the plaintiff on September 26, 2010.

- [79] The remaining alleged extras, as set out in Exhibit 8, are for the basement bar sink, the basement kitchen sink, future solar pipes, sump pump installation, hose bibs for the garage, jetted tubs, moving second floor bathroom plumbing and emergency call to fix faulty shower valve.
- [80] The defendant accepts that the basement bar sink was a Contract change approved during construction. It was installed at a cost of \$800. With regard to the balance of the items, the defendant says that they were all mechanical designed components which are included in the Contract documents and, on some occasions, specifically highlighted on the building permit drawings. The fact that extra work was required to remedy construction defects is a matter for which the plaintiff has no responsibility.
- [81] I find that the only extra that the plaintiff is entitled to recover in relation to the plumbing is the sum of \$800 for the basement bar sink.
- d. Electrical - \$7,836
- [82] Pursuant to the terms of the Contract, the plaintiff was required to supply and install an all new electrical system. From the initial design conception stages, the parties discussed and reviewed similar projects that had medium to high end quality in the modern, partly traditional style which included pendants, wall sconce, chandeliers, pot light fixtures and finishes.
- [83] Mr. Amani, the electrical contractor, gave an initial estimate of \$22,000. This was based on 10 to 15 pot lights.
- [84] The ceiling pot lights were included in the original design concept for the Residence and specifically included in the Contract documents. For example, the home finish level specifications detail "certain ceiling spotlights throughout". The photographs reviewed at the June 22, 2010 meeting and the Kitsilano house that the plaintiff had earlier constructed both contained spotlights throughout. I find the various items set out for electrical extras at Exhibit 10 all form part of the scope of work set out in the Contract. The claim for electrical extras is dismissed.
- e. Electrical Post - \$700
- [85] An electrical post was constructed for the completion of the buried underground electrical connection to the City utilities. Underground electrical utility connection was specified in the Contract documents. The defendants did not issue any change orders or change directive or make any requests to the plaintiff or its contractors to construct the electrical post. Any costs related to the plaintiff's unilateral and unauthorized design changes do not constitute a valid extra. There is no evidence to substantiate this claim.
- f. Windows and Skylights - \$4,769

[86] The plaintiff was required to supply and install custom-made windows throughout the Residence. The plaintiff has produced no evidence to support its claim for alleged extra window costs. The claim for windows and skylights is dismissed.

g. Millwork - \$17,000

[87] At all material times, pursuant to the terms of the Contract, the plaintiff was required to install all new millwork for the Residence including, but not limited to, custom-made shaker cabinets, a kitchen island, bedroom closets and bedroom vanities. Based on the initial design concept and sample photographs reviewed at the June 22, 2010 meeting, the plaintiff was aware of the level and quality of finish and design the defendants required in this regard.

[88] The millwork claim consists of the following items:

1. Custom built fireplace mantle - \$2,500
2. Removal of fireplace mantle to resize and reinstall - \$500
3. Main kitchen hood cover removed to resize - \$500
4. Wall unit for family room as per new design \$3,500
5. Soft-closing kitchen cabinet doors, installation of six vanities - \$3,000
6. Basement wet bar - \$1,500.

[89] The defendant accepts the claims for the fireplace mantle and acknowledges it was not included in the original design specifications. They also accept the claim for the basement wet bar. Those amounts total \$4,000 plus \$480 HST for a total of \$4,480.00.

[90] The defendants do not accept the remaining items. They say any costs involved in removal and replacing the fire mantle was as a result of poor workmanship. They say the plaintiff and/or the millwork contractor failed to construct the kitchen hood cover as per the design which required it to be removed and resized. The defendants note that the design details indicate that the self-closing kitchen cabinet doors and drawers were to have soft closing devices as per the design drawings and that the vanities were included within the scope of work. I accept the defendants' submissions on these points. I limit the millwork claim to \$4,480.00.

h. Sump pump - \$1,810

[91] No evidence was led in support of this item.

i. Tile placing - \$1,444

[92] Pursuant to the Contract, the plaintiff was required to supply and install various different tile materials. All of the detailed plans and specifications relating to tile finishes were set out in the Interior Design Package Drawings, dated October 11, 2010 and provided to the plaintiff well before any interior finishes were to be supplied or installed. The plaintiff failed to produce any evidence to support this claim as an additional cost.

j. Finishing carpentry - \$9,680

[93] The plaintiff failed to produce any evidence in support of any extra for finishing carpentry.

k. Concrete, concrete pump and placing

[94] The plaintiff failed to produce any evidence to substantiate an extra claim relating to these matters.

l. Interior painting - \$7,000

[95] In accordance with the Contract, the plaintiff was required to complete the interior painting at the Residence. The painting details and specifications were set out in the Interior Design Package Drawings, dated January 24, 2011 and provided to the plaintiff well before any interior painting work was scheduled to commence. Mr. Khodaei-Jopari was the interior painter on the project. Before he started the job he indicated to the plaintiff that the cost would be \$9,000 to \$10,000. He charges extra for crown moldings and drop ceilings. He does not give a final bill until the end of his work.

[96] I find that the interior painting costs were part of the scope of work set out in the Contract. That the painter ultimately charged the plaintiff more for his work than the plaintiff expected, does not turn those additional costs into extras that can be recovered from the defendant.

m. Carpet - \$4,526.75

[97] The defendant accepts this amount is a proper extra. It submits that it is an example that illustrates the defendants' position that where Whitestone was told there might be an adjustment in price Ms. Fu requested the information and made an informed decision as to whether or not to approve the cost.

n. Heating and air conditioning - \$4,780

[98] Pursuant to the terms of the Contract, the plaintiff was required to supply and install a quality heating, ventilation and air conditioning system. The plaintiff claims he incurred extras of \$4,780 for services necessary to change the air handler unit to a gas high efficiency furnace because of the lack of available height in the mechanical room, and to move the air conditioning unit from the house to a location near the garage. The defendant says that Ms. Fu allowed the plaintiff to install the air conditioning system where he wanted but on the basis that there would be no change to the overall costs. It says that the plaintiff's claim regarding the size of the mechanical room is unfounded. Mr. Navisvand, who was the party

involved in installing the air conditioner, testified the original unit would have fit had he installed it before other mechanical equipment was installed.

[99] I accept that it was necessary to move the air conditioning system to the garage area. The cost of that work was \$2,000 plus \$240 HST. The plaintiff is entitled in that regard to recover the sum of \$2,240. I do not accept the balance of the claim.

o. Stucco - \$2,000

[100] The design drawings called for a medium texture acrylic stucco, but the owner ultimately wanted a change and requested a rock-dash material. I accept the plaintiff's evidence that the change in material added \$2,000 to the costs and the defendant is responsible for that sum.

p. Landscape fence and railing - \$2,500

[101] No evidence was led in support of this claim.

q. Stonework, labour and material - \$8,720

[102] No evidence was led in support of this claim.

r. Siding, labour and material - \$3,750

[103] No evidence was led in support of this claim.

s. Motion lights - \$300

[104] No evidence was led in support of this claim.

t. Communication - \$4,229

[105] No evidence was led in support of this claim.

u. Window wells and material - \$1,900

[106] No evidence was led in support of this claim.

v. Firebusters - \$118.44

[107] No evidence was led in support of this claim.

w. Land surveying - \$2,170

[108] No evidence was led in support of this claim.

x. Stucco sample \$123.50

[109] No evidence was led in support of this claim.

[110] In summary, in regard to the claim for extras, I allow the following amounts: Framing \$4,905.60 Basement bar sink 800.00 Millwork 4,480.00 Carpet 4,526.75 Move air conditioning system 2,240.00 Stucco 2,000.00 TOTAL: \$18,952.35 COUNTERCLAIM

- [111] Construction of the Residence was supposed to be complete by April 17, 2011. In order to complete the Residence, it was necessary for Whitestone to order supplies and engage subcontractors to complete certain work that was within the plaintiff's original scope of work which he did not complete.
- [112] Whitestone now claims additional expenses in the total of \$58,806.66 which it says it is entitled to set off against any monies owing to the plaintiff. The breakdown of Whitestone's claim is as follows: Expense Subtotal HST (12%) Total: Tiles \$8,307.46 \$996.90 \$9,304.36 Doors 3,312.64 397.52 3,710.16 Lighting 7,159.47 859.14 8,018.61 Brackets 424.00 50.88 474.88 Exterior Granite 6,198.63 743.84 6,942.47 Stain for Stairs 65.90 7.91 73.81 Landscape 17,694.00 2,123.28 19,817.28 Painting (labour) 3,562.50 427.50 3,990.00 Energy Report 400.00 48.00 448.00 Miscellaneous Materials 7,700.84 924.10 8,624.94 Blinds 3,750.00 450.00 4,200.00 Front Post 981.40 117.77 1,099.17 Plumbing 1,316.77 158.01 1,474.78 Fireplace 1,212.26 145.47 1,357.73 Sidewalk 1,683.05 201.97 1,885.02 TOTAL: \$63,768.92 \$7,652.29 \$71,421.21
- [113] The plaintiff does not seriously challenge that the expenses claimed by Whitestone for labour and materials required to complete the Residence were at all material times included in the scope of work and part of the Contract for which the plaintiff was responsible.
- [114] I find for the defendants on their counterclaim in the amount of \$71,421.21. PUBLIC POLICY
- [115] As set out, I have found that the plaintiff is entitled to recover extras in the sum of \$18,952.35. Whitestone, in turn, is entitled to recover on its counterclaim the sum of \$71,421.21 leaving a balance in Whitestone's favour of \$42,468.86.
- [116] In the normal course, Whitestone would be entitled to a judgment for that sum.
- [117] In this case, Whitestone set out to deliberately deceive the municipal authorities concerning the premises that were to be constructed. In order to obtain its building permit, it submitted plans to the City that it knew were false. It did so because it knew the City would not approve the construction of the proposed basement suite.
- [118] Whitestone's actions raise a serious question of public policy. Having set out to deceive the municipal authorities, should it be able to look to the courts to recover monies that it is owed under the terms of the Contract?
- [119] A somewhat similar situation arose in *Lotusland Estates Ltd. v. Ali and Ali*, 2002 BCSC 131. In *Ali*, as in this case, the parties entered into an agreement to construct a home with an unauthorized suite. The plans submitted to the City referred to the area as a hobby and media area. Taylor J. discussed the legal principles commencing at para. 40:
- [40] During the course of the trial, I raised the question of what effect this knowledge might have on the claims of the parties. Counsel addressed that question in submissions.

- [41] Counsel for the defendants suggested that because of the agreement to build what was to be an unlawful suite, neither party should be permitted to recover; whether or not such a conclusion would benefit the defendants to the prejudice of the plaintiff was beside the point.
- [42] Counsel for the plaintiff referred to the current approach to the "illegality" doctrine as enunciated in *Still v. M.N.R. (C.A.)*, [1998] 1 F.C. 549 at 575 (F.C.A.). That was a case involving the right to Employment Insurance benefits when during the period of contribution, the applicant had been working illegally in Canada.
- [43] Robertson J.A., writing for the Court at para. 42, held: First, I am of the view the classic model has long since lost its persuasive force and is no longer being applied consistently. In my view, decisions such as *Sidmay* and *Grobman* mark a new era in the illegal doctrine while retaining the quintessential feature underlying its existence. That feature is the jurisdiction of the courts to refuse relief to those in breach of a statutory prohibition the grounds of refusal being on a principled and not arbitrary basis.
- [44] In *Still* the Court observed that where an agreement is illegal due to the operation of a statute, the effect of the illegality may differ upon a consideration of:
- (1) the relative merits of the parties;
 - (2) the purpose of the statute and the policy upon which it is founded;
 - (3) whether the statute contains the consequences of the illegality; and,
 - (4) whether a voiding of the agreement results in a defacto penalty that is disproportionate to the breach itself.
- [120] Ultimately, Taylor J. decided, in the circumstances of the case before him, that it would be wrong to deny the plaintiff the recovery to which it may be entitled for the costs of construction, as that would effect a double benefit to the defendant being spared the additional costs of construction and benefitting from the use of the suite.
- [121] The facts in this case, however, are somewhat different. In this case, Whitestone has already sold the residence to the Owner. The Owner has paid Whitestone for the illegal suite. Whitestone, in turn, now seeks to recover its counterclaim against the plaintiff. I do not find that it would be in any way unfair to prohibit it from doing so.
- [122] In this case, Whitestone set out to construct for the benefit of the Owner an illegal suite without disclosing this information to the municipal authorities who provided the building permit. To obtain a building permit, Whitestone submitted false and misleading plans to conceal its intentions to build the basement suite. It should not, in my respectful opinion, be rewarded for such conduct.

[123] In the circumstances of this case it would not be fair to Whitestone to allow the plaintiff's claim without setting off for the amounts owing under the counterclaim. To deny Whitestone, however, the benefit of the balance of its counterclaim is not disproportionate to its conduct. I find that it would be against public policy to grant judgment in favour of Whitestone on their counterclaim.

[124] In the result, I would dismiss the claims of both the plaintiff and the defendant. Each side shall pay their own costs. "R.B.T. Goepel J."

The Honourable Mr. Justice R.B.T. Goepel

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/14/00/2014BCSC0021.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/shafzand-v-whitestone-management-ltd-2014>

Prepared on 28 October 2026 · Esheria