

CANADA / JUDGMENT

Whiffen v. Whistler Rainbow Properties Ltd.

2022 BCSC 1241

COURT

Supreme Court of British Columbia

DECIDED

20 July 2022

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

2022 BCSC 1241 Whiffen v. Whistler Rainbow Properties Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Whiffen v. Whistler Rainbow Properties Ltd.,

2022 BCSC 1241

Date: 20220720

Docket: S1914068

Registry: Vancouver

Between:

Valerie Elisabeth Whiffen and

Arthur Julian Craddock

Plaintiffs

And

Whistler Rainbow Properties Ltd.,

Big Bang Construction Ltd. and

Luis Eduardo Garcia

Defendants

Before: The Honourable Mr. Justice Caldwell

Reasons for Judgment

In Chambers

Counsel for the Plaintiffs, appearing via videoconference:

J.P. Parker

Counsel for the Defendants, appearing via videoconference:

B.J. Hicks

Place and Dates of Trial/Hearing:

Abbotsford, B.C.

February 1 & 2, 2022

Place and Date of Judgment:

Vancouver, B.C.

July 20, 2022

- [1] The plaintiffs apply by way of summary trial for judgment in the amount of \$319,361.65 or such other amount as the court may determine, for breach of contract, breach of promise, or negligent misrepresentation. The defendants oppose all such relief.
- [2] All parties, through their counsel, agree that this matter is suitable for summary trial disposition.
- [3] The plaintiffs bought a strata unit home in a high-density development just north of Whistler, British Columbia, in September 2017. Their complaint is that the home built on the adjacent lot is different than was represented to them, interferes with their views and privacy, and has reduced the market value of their home. The damages claimed represent the plaintiffs' estimate of the reduction in market value, costs of a variance application they made, and costs of installing a privacy screen to mitigate the damages associated with the loss of privacy.

THE PURCHASE

- [4] In the spring or summer of 2017, the plaintiffs decided to sell their townhouse in the Whistler area and purchase a larger home, also in that general area. Their evidence indicates that in addition to wanting a larger home, they "were committed to finding one with views and privacy."
- [5] As a result of their search, they identified a string of five lots being developed by Whistler Rainbow Properties Ltd. ("Rainbow") and built, or intended to be built, by Big Bang Construction Ltd. ("Big Bang"). They dealt with Mr. Garcia ("Garcia") who was associated with both Rainbow and Big Bang, and who appears to have communicated on behalf of both at various times in discussions and e-mails with the plaintiffs.

[6] In particular, they identified the house on the property at 8472 Bear Paw Trail (the "Property") and viewed it several times between April and August 2017. The house on the lot immediately to the north of the Property was at a similar stage of completion as the Property. The lot immediately to the south of the Property (the "Adjacent Property") was simply a vacant, graded lot.

[7] By April 2017, the plaintiffs became aware, at least in general terms, of plans for the construction of a house on the Adjacent Property. In his affidavit, Mr. Craddock says that:

My main concern about the Property was about what would be built on the Adjacent Property, and in particular how high the roofline of the constructed house would be because this could affect the view and privacy from the upper floor of the Property.

[8] The plaintiffs contacted the listing agent, Mr. David Wiebe and negotiated what they felt to be a beneficial arrangement: He would act as a dual agent on the purchase of the Property and as the plaintiffs' listing agent for their townhouse, but he would take a reduced commission. The Limited Dual Agency Agreement was signed on August 5, 2017.

[9] On August 5, 2017, the plaintiffs also made, through Mr. Wiebe, an offer to purchase the Property from Rainbow. After negotiations, a price of \$2.8 million was agreed. Rainbow was the seller and the plaintiffs were the purchasers. The contract contained a list of five subjects to be removed by August 23, 2017 and one subject (the sale of the townhouse) to be removed by September 9, 2017. The contract of purchase and sale was in the standard form and contained at para. 18 the following:

REPRESENTATIONS AND WARRANTIES: There are no representations, warranties, guarantees, promises or agreements other than those set out in this Contract and the representations contained in the Property Disclosure Statement if incorporated into and forming part of this Contract, all of which will survive the completion of the sale.

[10] None of the subjects, nor the terms and conditions, mentioned anything about the intended construction of a house on the Adjacent Property. Mr. Craddock says in his evidence that:

The Contract did not include a term or condition relating to the height of the house to be built on the Adjacent Property. We did not know it was possible to include that type of term in the Contract, and Mr. Wiebe did not suggest that we include such a term.

[11] Mr. Wiebe is not named as a party in this action.

[12] Various communications appear to have taken place among the parties, with Mr. Wiebe as the conduit. The plaintiffs say that they were constantly pushing for "comfort" as to what was going to be built on the Adjacent Property and that such "comfort" was of "critical importance to us before proceeding towards completion."

- [13] August 23 was approaching. The plaintiffs had identified various issues of concern, including having not received all or part of the required disclosure and having not been able to obtain an inspection. They also say that they were not prepared to continue with the purchase until they got confirmation of what was to be built on the Adjacent Property. They requested an extension of the subject removal date for the first five subjects to August 28. That extension was agreed to and an addendum to that effect was signed.
- [14] Nothing in that addendum mentioned anything about the Adjacent Property.
- [15] On August 24, a meeting occurred at the Property. The attendees were:
- the plaintiffs;
 - Mr. Garcia;
 - Mr. Wiebe;
 - Mr. Derek Venter, architect for one or more of the defendants; and
 - Mr. Doug Bush, surveyor for one or more of the defendants.
- [16] Mr. Wiebe and Mr. Venter swore and provided affidavits on this application; Mr. Bush did not. Therefore, assertions about comments made by Mr. Bush are of no assistance; they are clearly hearsay and not admissible on an application for a final order.
- [17] However, it is clear that there were discussions about the Adjacent Property during the August 24 meeting.
- [18] Mr. Venter provided clear evidence of certain discussions about the Adjacent Property. At paras. 10 and 11 of his affidavit, he swears that:

I thought it was important for Mr. Craddock and Ms. Whiffen to understand that the plans Mr. Garcia was referring to had not yet been approved and were subject to change, and in any event, even if the plans were approved, the plans would not be binding upon Whistler Rainbow or any subsequent owner of the Adjacent Property.

I told Mr. Craddock and Ms. Whiffen more than once during the course of the Meeting that the plans for the Adjacent Property were subject to change either at the request of the Municipality, at the discretion of Whistler Rainbow, or at the discretion of any subsequent owner in the event that Whistler Rainbow decided to sell the Adjacent Property. I told them that Whistler Rainbow, and any other owner, would not be bound to abide by the current plans and they would be at liberty to construct any home on the Adjacent Property provided it complied with the Municipality's bylaws and the required approvals were obtained for any new or revised plans. I told Mr. Craddock and Ms. Whiffen they should not count on a future house at the Adjacent Property following the existing plans that Mr. Garcia had told them about.

- [19] Mr. Venter also recalled that it was the plaintiffs themselves who broached the subject of the sloped roofline on the Adjacent Property being replaced with a flat roofline to reduce the side profile of that house. That evidence is disputed by the plaintiffs.
- [20] Mr. Wiebe in his affidavit confirmed that there were two main issues to be addressed at the meeting: First, a long list of deficiencies; and second, the form of construction on the Adjacent Property. He basically confirmed Mr. Garcia's comments and assurances about designs and construction, as well as some of the comments made by Mr. Venter to the plaintiffs that such comments or assurances were not binding.
- [21] Mr. Craddock in his evidence also acknowledged, at least in general terms, that Mr. Venter told them "on more than one occasion" that "nothing was on title" and that "anything could be built on the Adjacent Property that was approved by the municipality". He said that he understood that if someone else bought the Adjacent Property, they could build whatever the municipality allowed; however, he believed that as long as Big Bang was doing the building, it would be done according to the plans that had been submitted but not yet approved.
- [22] Mr. Craddock swore further that he and Ms. Whiffen had some comfort about construction on the Adjacent Property following the meeting but that they still felt uncertain because there was nothing in writing making the actual terms clear.
- [23] On August 25, Mr. Garcia wrote an e-mail to Mr. Wiebe as follows:
- David, I just want to confirm via email that as long as Big Bang Construction builds the house that will be located on 8468 Bear Paw Trail, the house on that lot will be the one shown on the plans that I showed to Your [sic] client. We will try to move the house as much as we can to the road which will allow to have a bigger yard and will leave you with a little more view facing south.
- This, however, could change in case someone buys the land and decide [sic] to go a different way. Our plans are already submitted at the Municipality and should be getting Building Permit anytime.
- [24] The e-mail was signed "Luis E. Garcia-Contreras, Big Bang Construction Ltd., 604-902-6678". This is but one example of the imperfect or at least imprecise communications among the parties, as neither Mr. Garcia nor Big Bang were parties to the contract of purchase and sale.
- [25] Mr. Wiebe forwarded the e-mail to the plaintiffs.
- [26] There was no evidence of any discussions between the plaintiffs and Mr. Wiebe regarding the e-mail nor any indication that legal advice was recommended, sought, or obtained on the issue of the Adjacent Property or the comments, assurances, or e-mail.
- [27] On August 26, the plaintiffs decided to move ahead with the purchase. The parties signed two formal addenda to the contract of purchase and sale. The first identified with considerable specificity a variety of deficiencies, both as identified in the original contract and others as discovered and identified in the home inspection report; obliged Rainbow to

correct such deficiencies; and provided a \$10,000 holdback as security for the performance of those obligations. The second removed the first five subjects, leaving only the final one regarding the sale of their townhouse.

- [28] Neither of the addenda in any way mentioned or referred to any issues regarding the Adjacent Property or the house that was to be built on that property sometime in the future.
- [29] The plaintiffs' townhouse sold and the purchase of the Property completed as scheduled, on September 29, 2017.

POST-PURCHASE EVENTS

- [30] In April 2018, the plaintiffs discovered that the design of the house on the Adjacent Property, then in early stages of construction, had "changed" to include a rooftop deck with a covered outdoor kitchen, a hot tub, and a bathroom. Construction was completed in or about August 2018.
- [31] The plaintiffs claim that the house as built on the Adjacent Property reduces and interferes with their view, and they say it compromises their privacy. They say that they determined by late 2018 that they could not live in the home given the compromises to view and privacy.
- [32] They listed the Property for sale in May 2019 for \$3,179,000 but received no offers. They installed a privacy screen in August 2019 at a cost of \$14,546.45. The house remained on the market until August 2020, save for a three-week period in April/May 2020 due to COVID-19 concerns. They received three offers ranging from \$2.77 million to \$3.02 million during that listing but none of the offers firmed up to completion. They re-listed the Property in June 2021 for \$3,879,000 and received an offer in September 2021 for \$3.2 million, which they describe as well below asking price. They indicate an intention to re-list the Property in 2022.

THE CLAIMS

- [33] The plaintiffs say, first, that the comments of Mr. Garcia regarding the Adjacent Property and his e-mail of August 25 became part of the contract of purchase and sale and that Rainbow, Big Bang and/or Mr. Garcia breached the contract by ultimately building something different than had been indicated. In the alternative, they say that the e-mail constituted a promise as to the house to be built and that one or more of the defendants breached that promise. In the further alternative, they say that the statements made constitute negligent misrepresentations by one or more of the defendants. In any case, they seek damages.

DECISION

- [34] In my respectful view, this matter turns to be decided on what are essentially undisputed facts as follows:

1. the plaintiffs identified views and privacy as being very important in their search for a new home - possibly the most important issues;
2. the plaintiffs did not "rush into" any purchase but rather investigated the Whistler area market from at least the early spring of 2017;
3. the plaintiffs identified and actively investigated the Property and were aware that the Adjacent Property was a vacant lot intended for future construction from at least April 2017;
4. during the period from April to August 2017, the plaintiffs apparently did not seek legal advice regarding options available to them when contracting to purchase a home;
5. the plaintiffs knowingly, and in fact at their own request, entered into a Dual Agency arrangement with the listing agent in order to obtain financial benefit;
6. the contract of purchase and sale signed by the plaintiffs and by Mr. Garcia on behalf of Rainbow listed and specified a large number of terms, conditions and subjects as proposed and required by the plaintiffs, but none of those terms, conditions or subjects mentioned anything about the Adjacent Property;
7. the discussions, and even the written communications among the parties prior to completion, certainly included the Adjacent Property but appear to have left each of the parties with a different view of what was to happen and what was being committed to;
8. the on-site meeting of August 24 addressed a large number of deficiencies, as well as the Adjacent Property situation;
9. the plaintiffs were told during the August 24 on-site meeting, in very clear terms, that there were no limitations on the title of the Adjacent Property and that none of the discussed limits on construction on that property were binding on the defendants, who were in fact free to build anything approved by the municipality;
10. the plans for construction on the Adjacent Property had not been approved by the municipality as of August 24 or 25;
11. the e-mail of August 25 appears on its face to be from the construction company, Big Bang, who is not a party to the contract of purchase and sale or the then existing first addendum extending the subject removal date. The email is, in any event, somewhat equivocal and unclear in its terms;
12. the final addendum, prepared by Mr. Wiebe and signed by the plaintiffs on August 26, lists in extreme detail 67 deficiencies (up from the 14 deficiencies listed in the original contract) which the plaintiffs required the seller to correct as an express term of the addendum, and inserts a new term requiring a holdback of \$10,000 as security against those deficiencies being addressed by the seller; and

13. the final addendum mentions absolutely nothing regarding the Adjacent Property, the issue they say was the most important to them and one which they considered a "deal breaker".
- [35] On the evidence before me I am unable to find, on a balance of probabilities, that the various comments and communications about the Adjacent Property were more than discussions between the parties. I cannot find that these were to become part of the contract of purchase and sale, that they constituted promises as to future events, or that they were negligent misrepresentations. The discussions were far ranging and, in my respectful view, lack the certainty required to accord them the status sought by the plaintiffs. Had either party, particularly the plaintiffs, wished to make their expectations clear, they were well able to include a term or terms detailing those expectations in the final addendum. They did so with respect to the other changes relating to deficiencies. They failed, for reasons best known to themselves, to do so with respect to the Adjacent Property.
- [36] I dismiss the plaintiffs' action in its entirety; the defendants are entitled to their costs at Scale B.

"Caldwell J."

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/22/12/2022BCSC1241.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/whiffen-v-whistler-rainbow-properties-ltd-2022>

Prepared on 28 October 2026 · Esheria