

Indexed as: BCSSAB 18 (1) 2010

IN THE MATTER OF THE *HOMEOWNER PROTECTION ACT*, S.B.C. 1998 C. 31

**AND IN THE MATTER OF an appeal to the
British Columbia Safety Standard Appeal Board**

BETWEEN: **An Owner Builder** **Appellant**

AND: **Homeowner Protection Office** **Respondent**

REASONS FOR DECISION

**Appeal of decision to deny an application pursuant to section 20.1(2) of the Act
to sell a new home within the prescribed 12 month period**

Vice Chair: Emily Drown

On behalf of the Appellant: the Appellant

Counsel for the Homeowner Protection Office: Kevin L. Boonstra
Kuhn & Company

REASONS FOR DECISION

[1] This is an appeal under the *Homeowner Protection Act*, S.B.C. 1998, c.31 (the “Act”) concerning a decision of the Registrar of the Homeowner Protection Office (“HPO”) dated February 15, 2010 (although the date of the decision has come into question in this appeal). The decision in question pertains to an application brought by the Appellant pursuant to section 20.1(2) of the Act to sell a new home within the prescribed 12 month period in which the sale of new homes built by owner builders are prohibited.

[2] The Appellant, an owner builder, applied to HPO for permission to sell his new home on January 7, 2010 after receiving a final occupancy permit for the property on December 17, 2009. In a letter dated January 26, 2010, the Deputy Registrar for the HPO responded to this application stating that HPO was relieving the Appellant of the requirement to become an HPO Licensed Residential Builder in order to sell his new home on the condition that the new home be enrolled in a policy of home warranty insurance prior to selling the home. This decision also stated that in order to finance the home warranty insurance, the Appellant was permitted to offer the home for sale on the condition that the warranty premium was held in trust and paid from the proceeds of any sale. To summarize, the Deputy Registrar’s decision granted the Appellant permission to sell his new home within the 12 month period in which the sale of new homes built by owner builders are prohibited pursuant to the Act, provided that he obtain a policy of home warranty insurance for the new home prior to the sale.

[3] Upon receipt of this decision, the Appellant requested, as he was entitled to do, a Registrar’s review of the decision pursuant to section 29.1 of the Act. This request resulted in the Registrar for the HPO providing a decision dated February 15, 2010 in which the Deputy Registrar’s earlier decision was upheld. It is this decision that is the subject of this Appeal.

Issues

[4] Issue One: Should the Appellant owner builder have been permitted to sell his new home within the prescribed 12 month period in which the sale of new homes built by owner builders are prohibited?

[5] Issue Two: If so, should the Appellant owner builder have been required to enroll

his new home in a policy of home warranty insurance prior to such a sale?

History of Appeal

[6] The Appellant and HPO have a lengthy history pertaining to the new home in question. The following chronology is set out to provide some background to the proceedings before the Board:

March 2006	The subject property was purchased as a vacant lot by a company in which the Appellant is the sole director, officer and shareholder.
February 2007	The Appellant hired a licensed residential builder to construct a new home on the property. The licensed residential builder enrolled the new home with National Home Warranty for a policy of home warranty insurance coverage.
February 27, 2007	A building permit from the City of Surrey was obtained
February 27, 2007 – January 2008	Construction of the new home took place; however, by January 2008 the new home was not complete
January 2008	The licensed residential builder withdrew from the project and de-enrolled the home from home warranty insurance coverage. At this time the construction of the new home was not complete.
July 2008	The Appellant decided to carry out the remainder of the construction himself.
December 2008	A compliance officer with HPO wrote to the Appellant explaining that pursuant to the Act a person must not carry on business as a residential builder unless licensed under the Act, and must not build a new home unless it is registered for warranty insurance.
February 25, 2009	The Appellant's company transferred a 1/100 interest in the subject property to the Appellant.
May 20, 2009	The Appellant obtained an Owner Builder Authorization from HPO.
December 17, 2009	Construction of the new home was completed and an occupancy permit was granted.
December 31, 2009	The Appellant moved into the new home with his family.
January 9, 2010	The Appellant applied to HPO for permission to sell his new home

January 26, 2010	The Deputy Registrar for HPO issued her decision as set out above
February 15, 2010	The Appellant applied to HPO for a Registrar's Review of the January 26, 2010 decision.
February 15, 2010 (the exact date is at issue)	The Registrar for HPO issued his decision as set out above.
March 16, 2010	The Appellant filed the his appeal of the Registrar's decision dated February 15, 2010

[7] As part of the appeal process, both the Appellant and HPO have provided the Board with affidavit evidence and written submissions. In this regard, the Board is in receipt of and has considered the evidence set out in the following affidavits:

[8] From the Appellant:

1. Affidavit #1 of the Appellant, sworn May 14, 2010; and
2. Affidavit #2 of the Appellant, sworn June 14, 2010.

[9] From HPO:

3. Affidavit #1 of Mr. Robert Maling, sworn June 2, 2010; and
4. Affidavit #1 of Mr. Richard Rysen, sworn June 2, 2010.

Position of the Parties

Summary of Appellant's Position

[10] The Appellant's position is that HPO ought to have permitted the Appellant to sell his new home without the need for home warranty insurance, based on the considerations outlined in s.20.1(2) of the act. The Appellant states that if he is not permitted to sell his home without a policy of home warranty insurance that he will suffer undue hardship. In support of this position, the Appellant submits that the time restriction contemplated by section 20.1(1) of the Act was not enacted to prevent individuals in his position from selling their homes.

[11] In addition to the above, the Appellant also submits that the Registrar did not properly consider the evidence before him when making the decision under appeal. The evidence that the Appellant submits supports this contention is as follows:

- a) First, the Appellant states that the decision was mailed to the Appellant's old address despite the fact that the Appellant had updated his address on both his Permission to Sell Application and Registrar Review Request forms. The Appellant submits that this suggests that the Registrar did not have either application in front of him when he made his decision.
- b) Second, the Appellant points out that the decision states that the Appellant did not provide any documentation in evidence of his alleged financial difficulty or in support of any alternate reason to sell. The Appellant submits that had the Registrar reviewed all documentation that had been submitted with his initial Permission to Sell Application, he would have seen that documentation evidencing his alleged financial difficulty was submitted.
- c) Third, the Appellant states that the decision was dated the same day as his request for a Registrar's Review. The Appellant submits that it is questionable whether the Registrar would have had time to review the documentation in a meaningful way in such a short period of time.

Summary of Respondent's Position

[12] The Respondent's position is that the decision in question is entitled to deference, was reasonable and ought not to be varied or reversed on appeal.

[13] With respect to the Appellant's argument that the Registrar did not properly consider the evidence before him when making the decision on appeal, the Respondent relies on the Affidavit of Mr. Robert Maling, the Registrar, sworn June 2, 2010. In this Affidavit, the Registrar acknowledges that the decision letter was sent to the Appellant's old address. However, he states that this was not because he did not have the relevant information in front of him while considering his decision, but rather because the address is automatically entered into his decision by the computer system used by HPO when templates used for writing and rendering these types of decisions are opened. Further,

The Registrar clarifies that while the decision stated that there was no documentation provided that this pertained simply to the fact that there was no new documentation provided over and above that which had already been provided to HPO for the initial request for permission to sell the home. Finally, the Registrar states in his Affidavit that the decision was not made within hours of receipt of the Appellant's request, but rather made after a thorough review of the matter, which review took place over a number of days. In this regard, the Registrar states in his Affidavit that the date, like the Appellant's address, was likely inserted into the decision template when he first opened it upon receipt of the request for review and that he forgot to update the date to reflect the actual decision date.

Standard for Review: Appellant's Position

[14] There is dispute between the parties as to what is the applicable standard for review on this Appeal. The Appellant submits that pursuant to sections 29.4(7) of the Act and section 53 of the *Safety Standards Act*, S.B.C. 2003, c. 29 (the "Safety Standards Act") his appeal to the Board is a new hearing and consequently there is no requirement for him to show an error on the part of the earlier decision maker(s). He submits instead that the Board must rehear his request for review of the initial decision made January 26, 2010. Further, the Appellant states that the Board may consider any new evidence available to it.

[15] In the alternative, the Appellant suggests that regardless of whether the appeal is a new hearing, pursuant to the applicable legislation that he did not have to show an error on the part of the initial decision maker as section 29.1(5) of the Act indicates that a request for such a review "must be in writing, must identify the error the person believes was made or other grounds on which the review is requested." In this regard, the Appellant submits that as it was not until after receipt of the decision of the Deputy Registrar dated January 26, 2010 that he learned that he was not able to enroll his home with a policy of home warranty insurance and that this turn of events qualifies as "other grounds" pursuant to section 29.1(5) of the Act and ought to have been sufficient for the Registrar to review and alter the initial decision.

Standard for Review: Respondent's Position

[16] The Respondent agrees with the Appellant that the appeal is a new hearing. However, counsel for the Respondent submits that as the appeal is an appeal of the Registrar's decision the appeal is a new hearing of the application for a Registrar's Review not a new hearing of the original decision by the Deputy Registrar. As such, the Respondent submits that the issue is whether there was an error or other grounds on which the Registrar should reconsider whether he was "satisfied" that the Appellant should be able to avoid his statutory obligations.

[17] The Respondent submits that the Registrar's decision is entitled to deference from the Board as the Registrar's decision is a discretionary decision, left by the Act in the hands and opinion of the Registrar. In support of this position, the Respondent relies on *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 ("*Khosa*") and *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 ("*Dunsmuir*"). The Respondent also relies on *Decision BCSSAB 3 (5) 2005*, a decision of this Board pertaining to a review of a decision of a provincial safety manager in which the Board applied the reasonableness standard from *Dunsmuir* despite it also being a new hearing.

Analysis

The Law: Standard for Review

[18] The first issue that must be determined is the correct standard of review to be applied to this appeal. The Appellant is correct that section 53 of the *Safety Standards Act* applies to this appeal and it is therefore a new hearing. However, as set out in the case law referenced above, even in a new hearing the Registrar's decision is entitled to deference based on the application of the standard of reasonableness. That being said, if there is new evidence that was not presented to the Registrar when he made the decision under appeal, the Board may and in fact ought to consider such evidence.

[19] Accordingly, the Board must determine whether the Registrar's decision was reasonable. As set out in *Dunsmuir* the reasonableness standard is defined as follows:

[20] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend

themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions ...in judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The Law: Applicable Legislation

[21] The Appellant's appeal is brought pursuant to section 20.1 of the Act. This section of the Act states:

- 20.1 (1) Subject to subsection (2), an owner builder must not sell or offer to sell a new home
- (a) while the new home is being constructed, or
 - (b) within the prescribed period of time after the new home has been built, unless the registrar permits the sale or offer under subsection (2).
- (2) On application to the registrar, an owner builder may be permitted to sell or offer for sale a new home despite the requirements of subsection (1) if
- (a) the registrar is satisfied that the person would suffer undue hardship if the permission is not granted, and
 - (b) the person pays the prescribed fee.
- (3) The registrar may impose conditions on a permission granted under subsection (2).

[22] Accordingly, an owner builder is prohibited from selling or offering for sale a new home for the time prescribed unless the Registrar otherwise permits when presented with an application for permission to offer the home for sale. For this purpose the *Homeowner Protection Act Regulation* states that the prescribed length of prohibition on the sale of a new home is 12 months. This means that unless otherwise permitted by the Registrar the Appellant is prohibited from selling his new home for a period of 12 months after the granting of the final occupancy permit.

[23] As can be seen from the wording of the applicable legislation, the prohibition against the sale of a new home is not without some relief: an owner builder may apply to the Registrar for permission to sell the home within the 12 month period and the Registrar may grant such permission if he or she would suffer undue hardship if the permission was not granted. In the event that the Registrar grants such permission, the legislation clearly states that the Registrar may impose conditions on any permitted sale or offer for sale.

[24] In my review of the wording of section 20.1 of the Act it is clear that the power of the Registrar to grant such permission is discretionary. The Act states that “an owner builder may be permitted to sell or offer for sale a new home despite the requirements of subsection (1) if the Registrar is satisfied that the person would suffer undue hardship if the permission is not granted [emphasis added]”.

[25] As set out above, the standard for review of this appeal is reasonableness, which means that the Board must give deference to the discretion the legislation grants to the Registrar in coming to decisions regarding applications to sell or offer a new home for sale.

[26] In addition to granting deference to the discretion of the Registrar, pursuant to section 29.4(1) of the Act, when considering an appeal, the Board must also consider the purposes of the Act. The purposes of the Act are set out in section 2(1) and (2) of the Act as follows:

- a) to strengthen consumer protection for buyers of new homes;
- b) to improve the quality of residential construction,
- c) to support research and education respecting residential construction in British Columbia; and
- d) to administer the reconstruction loan portfolio, as defined in section 24.1, in accordance with Part 9.

[27] Clearly, items c) and d) from this list of purposes do not apply to situations such as the one before the Board as whether or not the Appellant’s appeal is successful will have no impact on either research and education respecting residential construction or the administration of the reconstruction loan portfolio. However, items a) and b) do apply and accordingly, in making my decision, I must consider them.

Considering consumer protection and the quality of residential construction, a number of facts become relevant to this appeal:

- a) The new home was not originally intended to be owner-built and occupied as it was originally owned entirely by the Appellant's company and was being constructed by a licensed residential builder;
- b) The Appellant knew or ought to have known about the one-year occupancy requirement when he chose to become an owner builder. In fact, having the intention to reside in the home for at least one year is required in order to qualify for an owner builder authorization from HPO.
- c) The Appellant's application for permission to sell was received only nine days after he moved into the new home with his family.
- d) The home was partly built by a licensed residential builder and partly by the Appellant or others hired by him, making it difficult for a future owner to sort out who might be responsible for defects.
- e) Deficiencies were pointed out by the original home warranty insurance provider and it is unclear from the evidence whether these deficiencies have been rectified.
- f) The Appellant plans to move to Ontario once he sells his new home, which could make it difficult for any purchaser to take advantage of the protection offered by the Act.

[28] In addition to the facts set out above, I find that the Appellant is in fact suffering from financial difficulties that would amount to undue hardship if he were not permitted to offer his new home for sale before the expiry of the twelve month prohibited period. That being said, while it is difficult to know what the home might sell for, I find that the debts in question are considerably less than the assessed value of the home.

[29] All of these facts suggest that the Registrar was reasonable to uphold the decision permitting the sale of the new home as well as ensuring that there was some mechanism in place in his decision to ensure that consideration was given to the strengthening consumer protection and improving the quality of residential construction. In this regard, I note that the decision in question does not prohibit the Appellant from selling or offering his new home for sale. In fact, the decision gives him permission to do

so on the condition that he registers the new home with a policy of home warranty insurance prior to doing so. Furthermore, the decision takes into account the Appellant's financial troubles and gives the Appellant the option of paying the home warranty premium out of the eventual sale proceeds.

[30] The Appellant's application for a Registrar's Review of the initial decision indicates that there were no warranty companies to enroll his home except National Home Warranty. The Appellant's affidavit evidence states that National Home Warranty would not enroll his home. However, the evidence of the Registrar is that National Home Warranty is prepared to consider enrolling the home for a policy of home warranty insurance. The Registrar also stated that in his experience home warranty insurance providers are quite accommodating in arranging for coverage even under difficult circumstances if the applicant is prepared to comply with their requirements for security. Unfortunately, neither party provided any evidence directly from the warranty providers as to what National Home Warranty (or any other warranty provider) is or is not prepared to do. However, on the evidence before me, I find it more likely than not that the Appellant will be able to enroll his home in a policy of home warranty insurance if certain deficiencies are remediated and the requisite security arrangements are made with the warranty provider.

[31] The Appellant has submitted that the purpose of the relevant sections of the Act is not to prohibit someone in his circumstances from selling a home within the prescribed prohibited time period. I disagree and find that given the facts of this case that this is the sort of situation the legislation is intended to cover. However, the legislation also has the built in mechanism of permitting a sale upon application to the Registrar if the Registrar is satisfied that the application will suffer undue hardship if a sale is denied. In this regard, I find that the Registrar was reasonable in his decision to uphold the initial decision; a decision which I find strikes a balance between providing relief to the Appellant and providing consumer protection to future purchasers of the home in question.

[32] While I have found the decision of the Registrar reasonable upon consideration of all of the evidence presented, I would be remiss if I did not discuss the Appellant's contention that the Registrar did not adequately consider the evidence before him at the time he made his decision. Given the discrepancies noted by the Appellant, the

Appellant's assertion that the Registrar did not adequately discharge his statutory responsibility appears to have merit. However, I am satisfied that each of the discrepancies has been adequately explained by the Respondent's evidence and accordingly, I find that the discrepancies noted are not grounds for a successful appeal, especially in light of the reasonableness of the Registrar's decision.

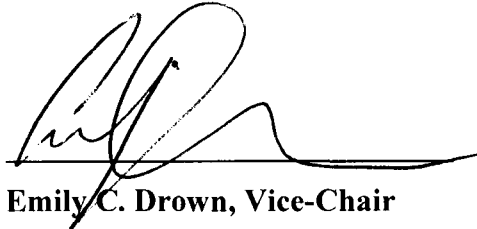
Conclusion

[33] Issue One: The Appellant owner builder should have been permitted to sell his new home within the prescribed 12 month period in which the sale of new homes built by owner builders are prohibited.

[34] Issue Two: The Appellant owner builder should have been required to enroll his new home in a policy of home warranty insurance prior to such a sale.

[35] Accordingly, the Registrar's decision under appeal is upheld. For the reasons set out above, the appeal is dismissed.

Signed:



Emily C. Drown, Vice-Chair