

Indexed as: BCSSAB 22 (1) 2013

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 STANDARDS APPEAL BOARD**

BETWEEN: **CONSTRUCTION COMPANY/OWNER** APPELLANTS

AND: **HOMEOWNER PROTECTION OFFICE** RESPONDENT

REASONS FOR DECISION

INTRODUCTION

[1] This is an appeal under the *Homeowner Protection Act*, SBC 1998, c.31 (the “Act”) regarding a review decision of the Registrar of the Homeowner Protection Office (the “HPO”) dated September 30, 2013 (the “Review Decision”), which upheld Compliance Order 13-007 dated May 22, 2013 and re-issued to the Appellant on June 20, 2013 (the “Compliance Order”). The Compliance Order ordered the Appellants to obtain new home warranty insurance for the home on River Road, Delta, British Columbia (the “Home”) pursuant to section 2(1) of the Act. The Appellants request the following:

- a) That the Compliance Order be set aside; and
- b) That (the “Homeowner”), the registered owner of the Home, be ordered to enroll the Home in a policy of home warranty insurance.

[2] Not surprisingly, the Respondent opposes the Appellants request and states that the Compliance Order should be upheld. With respect to the Appellants request that the Homeowner be ordered to enroll the Home in a policy of home warranty insurance, the Respondent states that such a request is outside of the scope of the Appellants’ rights of appeal to this Board.

ISSUES

[3] The first issue to be determined in this appeal is whether the Review Decision and thus the Compliance Order, should be upheld, set aside or varied. In the event that the Review Decision is set aside or varied, the question of whether the Homeowner can be ordered to enroll the Home in a policy of home warranty insurance will have to be dealt with.

EVIDENCE SUBMITTED

[4] In support of his appeal, the Appellants have provided the Board with the sworn statutory declaration of the Appellant, (the "Declaration"). In support of its position, the Respondent has provided the Board with written submissions and the following affidavits:

- a) Affidavit of the Compliance Officer, sworn June 19, 2014;
- b) Affidavit of the Senior Manager, sworn June 19, 2014; and
- c) The Registrar, sworn June 19, 2014.

[5] In addition to the material submitted by the parties, the Board has also received and reviewed the contents of the Appeal Record, which includes hundreds of pages of emails and contractual documents between the Appellants and the Homeowner.

POSTION OF THE PARTIES

The Appellant

[6] The Appellant states that he was never a residential builder or general contractor with respect to the construction of the Home and asks that the Compliance Order be set aside. He declares that he was only ever assisting the Homeowner with the construction of the Home. In this regard, he states that he knew the Homeowner since childhood and was willing to assist her with the construction of the Home as she had a strong background in construction and project management and would be easily able to be an owner builder with only minimal guidance from himself.

[7] The Appellant further states that the contract entered into between the parties dated November 1, 2010 identifies him only as a contractor and sets out that the Homeowner is to be the manager of the project. He states that he was only ever to be her assistant with respect to being a go-between between the Homeowner and the trades. In particular, he states that the

Homeowner used language and terms common to project managers and he would help to convey the Homeowner's information in a vernacular that was more easily understood by the tradespeople.

[8] The Appellant states that the November 1, 2010 was renegotiated between the parties and that a new contract was entered into on May 15, 2011. He states that this contract does not set out the actual responsibilities of the parties and that the wording is simply his standard form contract. The Appellant declares that he did not bother to re-write it as he was confident that the Homeowner and he both understood their respective duties. In any event, the Appellant states that the Homeowner submitted an Owner Builder Authorization to the Homeowner Protection Office on or about April 15, 2011 in which she identified herself as the owner builder.

[9] With respect to the tradespeople, the Appellant declares that initially the Homeowner arranged for the majority of the trades, but that after the construction schedule changed many tradespeople were unavailable and new trades had to be arranged. The Appellant states that he provided the Homeowner with various names and she determined which individuals she would like to meet with.

[10] The Appellant states that he attended the job site approximately every other day while the Homeowner or her father attended the job site daily for at least 2 – 3 hours per day. The Appellant also states that the Homeowner did some of the construction work herself and was responsible for and supervised the following work without any assistance from him: exterior painting, paving of driveway and placing of driveway stones, installing septic tank, compacting of foundation, digging of trench in front yard, survey and engineering plans, architect, trusses, flooring, roofing, concrete supplier, retaining wall block supplier, dump trucks, gravel supply, dirt removal, electrician, granite countertops, insulation installation, window supplier, tiling, door installation and handyman. The Appellant states that most of these suppliers were unknown to him.

[11] The Appellant states that he introduced the Homeowner to the following trades and then the Homeowner largely dealt with those trades herself: excavator, drywaller, plumber, framer, concrete placer, gas heating installer, finisher and supplier and installer of cabinets.

[12] The Appellant states that when the Home was approximately 95% complete, his services were terminated and that he has not yet been paid in full for the work he performed.

The Respondent

[13] The Respondent submits that the evidence filed with the Board shows that the Appellants engaged in, arranged for or managed all or substantially all of the construction of the New Home and that accordingly, the Compliance Order was correctly issued to the Appellants. In the alternative, the Respondent submits that the Registrar's Decision is entitled to deference, was reasonable and should not be overturned.

[14] In this regard, the Respondent submits that the Appellants meet the definition of "general contractor" and "residential builder" as set out in the Act and accordingly must register the Home in a policy of home warranty insurance pursuant to section 22(1) of the Act. In support of this assertion, the Respondent states that the contract entered into between the Appellants and the Homeowner clearly shows that the Appellants were to provide project development and construction management services to and for the benefit of the Homeowner. Further, the Respondent states that although a review of the evidence shows that both the Homeowner and the Appellants were involved in some aspects of the construction of the Home that the Appellant had primary responsibility for managing the construction work. In this regard, the Respondent submits that:

- a) The Appellant is clearly shown as the owner's "Representative" on documents filed with the municipality;
- b) The Appellant coached the Homeowner on the content and nature of the documents to be filed with the municipality;
- c) The Appellant made arrangements for a number of trades to work on the construction of the Home;
- d) The Appellant was involved in obtaining quotes and pricing for sub-trade work.
- e) The Appellant complained that the Homeowner was interfering when she dealt directly with the trades;
- f) Trades and other third parties believed that the Appellant was the general contractor for the Home; and
- g) The Appellant was involved in scheduling most of the construction activities at the Home and was involved from initial excavation through to the finishing work.

[15] The Respondent acknowledges that the Homeowner may have identified some of the trades and paid them directly; however, the Respondent states that this does not diminish the fact that the Appellant was engaged to arrange and manage the work.

[16] With respect to the material set out by the Appellant in the Declaration, the Respondent states that it omits to include most of the correspondence exchanged between the Homeowner and the Appellant, which documents the Respondent states clearly show that the Appellants fall under the ambit of section 22 of the Act.

[17] The Respondent states that although the Homeowner was originally issued an Owner Builder Authorization (the "OBA") pursuant to section 20 of the Act that the OBA was cancelled when the Respondent learned that the Homeowner was not arranging and managing all or substantially all of the construction of the Home. The evidence submitted by the Respondent includes a number of witness statements from various professionals associated with the construction of the Home, all of which indicate that the Appellant was the builder or general contractor for the construction of the Home.

[18] The Respondent states that the evidence is conclusive and that as the Home was not an owner built home pursuant to section 20 of the Act that it is a requirement of the Act that the Home be covered by a policy of home warranty insurance. In support of this submission, the Respondent further states that pursuant to section 29.4(1) of the Act, the Board must consider the purposes of the Act, which include strengthening consumer protection for buyers of new homes. In this regard, the Respondent submits that both the Homeowner and subsequent purchasers of the home are entitled to the protection of home warranty insurance.

ANALYSIS

[19] An appeal before the Board is a new hearing pursuant to section 53 of the *Safety Standards Act*, which applies to appeals under the *Homeowner Protection Act*. In this regard, it is appropriate for both parties to provide the Board with evidence and submissions that they wish the Board to consider in the Appeal. Both parties to this appeal have done so. The Board must then review this evidence along with the appeal record to determine what in fact occurred and must then make a determination of fact.

[20] With respect to whether the Compliance Order ought to be set aside as requested by the Appellant the relevant law is set out in the Act and its associated regulations.

[21] Section 1 of the Act defines “residential builder” as a “person who engages in, arranges for or manages all or substantially all of the construction of a new home or agrees to do any of those things, and includes a developer and a general contractor.” A “general contractor” is further defined to be a person that is “engaged under contract by an owner...to perform or cause to be performed all or substantially all of the construction of a new home, and includes a construction manager and project manager.”

[22] Section 14(1) of the Act prohibits a person from carrying on the business of a residential builder unless licensed under the Act.

[23] Section 22(1) of the Act states that a “person must not build a new home unless the new home was registered for coverage by home warranty insurance provided by a warranty provider.” Section 22(1) does not apply to an owner builder.

[24] Section 29.4(1) of the Act requires that the Board must consider the purposes of the Act, which are:

- 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) the administration of the reconstruction loan portfolio.

[25] While the evidence submitted by the Appellants attempts to paint the Appellants as mere assistants to an owner-builder, a thorough review of the contracts and email correspondence between the Appellants and Homeowner shows that the Appellants were much more involved in the construction of the Home. This finding is further supported by the numerous witness statements provided by the Respondent.

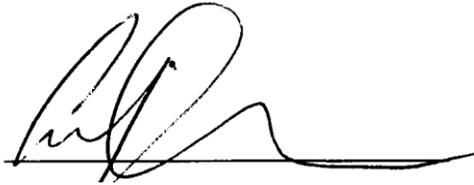
[26] Upon review of all of the evidence, I cannot help but find that the Appellants were engaged as residential builders with respect to the construction of the Home. Accordingly, the Appellants’ appeal is dismissed and they must enroll the home in a policy of home warranty

insurance as set out in the both the Compliance Order and Registrar's Decision. To hold otherwise would not only violate the Act, but would also weaken consumer protection within the province.

CONCLUSION

This Appeal is dismissed.

Signed:

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a horizontal line extending to the right.