

Indexed as: BCSSAB 6 (1) 2019

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:

A Residential Builder and Construction Inc.

Appellants

AND:

**British Columbia Housing Management Commission
Licensing and Consumer Services
("BC Housing")**

Respondent

Board Member:

Maureen E. Baird, QC

On Behalf of the Appellants:

Arondeep S. Mand

Counsel for the Respondent:

Kevin L. Boonstra

REASONS FOR DECISION

[1] This is an appeal of the decision of the Registrar of the Homeowner Protection Office ("HPO") dated January 29, 2019, which upheld a Compliance Order dated October 30, 2018 requiring the Appellants to register a new home located in Burnaby, BC ("the New Home") for coverage by home warranty insurance pursuant to section 22(1) of the *Homeowner Protection Act, SBC 1998, c.31* (the "Act").

ISSUES

1. Did the Appellants manage substantially all of the construction work at the New Home pursuant to section 1 of the *Act*?
2. Was there a procedural error by BC Housing that prejudiced the Appellants and, if so, what is the appropriate remedy?

FACTS

[2] The Appellant, a residential builder of a Construction Inc. was at all material times a licensed residential builder under the provisions of the *Act*. The Appellant, is the sole director and principal of the Construction Inc..

[3] The owners of the New Home (the "Homeowners") and the Construction Inc. entered into a written contract dated February 16, 2016 for construction of the New Home by the Construction Inc. Under the contract, the Construction Inc. agreed to build and complete the New Home and to be responsible for hiring and managing all tradespersons. In addition, the contract provided that the Construction Inc. would provide "2/5/10 warranty, proof of HPO", the cost of which would be paid by the Homeowners. The contract permitted the Homeowners to provide their own materials or use their own tradespersons on the basis that the owner would pay for those materials or tradespersons and that the material and/or labour so provided was to be excluded from the warranty coverage. The construction contract provided for completion of the Home within one year from issuance of the building permit.

[4] On or about May 24, 2016, the New Home was enrolled in a policy of home warranty insurance.

[5] Construction of the New Home commenced under a building permit issued on August 25, 2016.

[6] From the outset of construction, the Homeowners engaged their own tradespersons and were actively engaged in management of the construction of the Home. On October 4, 2016, the Homeowners and the Construction Inc. signed a letter agreement stating the the Construction Inc. had been advised to de-enroll the New Home but that the Construction Inc. wanted to continue to work with the Homeowners toward completion of the New Home. The

letter agreement of October 4, 2016 established and delineated terms and conditions for the Homeowners to hire their own trades. In particular the Homeowners were not permitted to provide the roofer, drywall, insulation or decking contractors. The Construction Inc. would continue as contractor for the New Home.

[7] By further letter agreement dated January 24, 2017, the Construction Inc. and the Homeowners agreed that the Homeowners could provide tradespersons for certain finishing work on the New Home and that the home warranty insurance provided by the Construction Inc. would not cover this work. The Construction Inc. would continue to be responsible for all aspects of the construction covered by the 5 and 10 year coverage of the home warranty including structural, water penetration, mechanical and electrical work.

[8] The ongoing active involvement of the owners in the construction project continued. On April 6, 2017 the Homeowners and the Construction Inc. signed a construction checklist on a National Home Warranty form. The Construction Inc. acknowledged that it constructed or supervised the foundation, framing/lockup, mechanical, electrical (with the exception of finishing and fixtures), exterior finishing (deck membrane, flashing siding gutters and downpipes) and the insulation.

[9] Email correspondence between the Construction Inc. and the Homeowners on May 23 and 24, 2017 discuss the Construction Inc. completing the exterior finishing to ensure that it is done correctly.

[10] A June 20, 2017 text from the Construction Inc. to the Homeowners confirms that the exterior is the Construction Inc. responsibility as contractor and warranty provider.

[11] On June 21, 2017, the New Home was de-enrolled by National Home Warranty at the request of the Construction Inc. An email of June 21, 2017 from the National Home Warranty office to BC Housing, Licensing and Consumer Services, described the construction as being "... close to substantial completion" and near lock-up with cladding not yet completed. This email was the first notice to BC Housing that there were issues in respect of the New Home.

[12] On June 21, 2017, a BC Housing Compliance Investigator made a site visit to the Home and formed the conclusion that the New Home "... requires further work to bring it to substantial completion". The Compliance Investigator took photographs of the New Home.

[13] Following de-enrollment, the Homeowners sought owner builder authorization from BC Housing including exemption from the mandatory owner builder examination because the New Home was near completion. They did not qualify as owner builders and withdrew their application.

[14] On October 30, 2018, Compliance Order 18-0070 was issued to the Appellants requiring them to register the New Home for coverage by home warranty insurance pursuant to section 22(1) of the *Act*.

POSITION OF THE PARTIES

The Appellants

[15] In support of their appeal, the Appellants provided the Board with an affidavit of the Appellant and written submissions.

[16] The Appellants set out the difficulties they experienced from the active participation of the Homeowners in hiring their own trades during construction. It is their position that based on the level of participation by the Homeowners that it was the Homeowners, not them, who had primary responsibility for managing the construction work.

[17] They say that on May 8, 2017, they were directed by the Homeowners to leave and not return to the construction site. The Appellant says that as of this date, at the latest, the Construction Inc. ceased managing construction of the New Home and the Homeowners had control and management. The Appellants estimate that the New Home was approximately 45% completed at this time. Further, they say that they were unable to complete the 5 and 10 year home warranty obligations because the Homeowners declined or refused to give them instructions or exterior finishing details. Therefore the Appellants say that they did not manage all or substantially all of the construction of the New Home.

[18] The Appellants also say that BC Housing committed a procedural error because a Compliance Investigator did not attend at the site of the New Home until June 21, 2017 which they say is over a month after the Construction Inc. had ceased to manage construction of the New Home and that this error has prejudiced them because it results in a level of completion beyond what it was when they left the site of the New Home. Therefore should not be required to provide home warranty insurance.

The Respondent

[19] The Respondent says that the Compliance Order should be confirmed because the evidence discloses that the Appellants were responsible for managing and construction of the New Home. The proper focus is not on who did what work but rather on who was responsible for the overall construction.

[20] It is the position of the Respondent that no procedural error was committed because, on the facts, the Compliance Investigator went to the site of the New Home as soon as notice was given to BC Housing by the home warranty provider that an issue had arisen in request of coverage for the New Home.

DECISION

Did the Appellants Manage Substantially all of the Construction Work at the New Home?

[21] 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.

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

[23] 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.”

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

[25] Section 22(1) of the *Act* states that “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.

[26] 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.

[27] The Appellants acknowledge and admit that they meet the definition of “general contractor” and “residential builder” as set out in section 1 of the *Act*.

[28] There is no dispute that the Appellants initially intended to manage all of the construction of the New Home, as they secured warranty coverage at the outset of construction.

[29] The position of the Appellants is that that the New Home was not substantially complete on or about May 8, 2017 when they say they were directed by the Homeowners to leave and not return to site.

[30] Board *Decision 17(2) – 2014* provides a helpful analysis on the meaning of the words “substantial completion” in the context of the *Act*. The following excerpt from that case is relevant here:

The Act does not speak of substantial completion but rather it refers to the party who manages substantially all of the construction. It is not

necessary, in the Board's view, that the Home be substantially complete before the builder can be said to have managed substantially all of the construction.

[31] While the evidence and submissions of the Appellants attempt to diminish the extent of the work they completed, the totality of the evidence demonstrates that they agreed to manage the construction of the New Home. In particular, on February 16, 2016 they entered into a contract with the Homeowners to manage all of the construction of the New Home. The National Home Warranty Checklist completed on April 6, 2017 together with the photographs provided to the Board demonstrates that the Appellants were responsible for and built all of the structural components of the New Home including footings, foundations, framing, installation of windows and doors to lock-up stage. As a result, they are responsible for the 10 year structural component of home warranty insurance, which is mandatory under s. 22(1) and (2)(c) of the *Act*.

[32] The evidence demonstrates that the Appellants took responsibility for the building envelope components of the New Home. The January 24, 2017 letter agreement states that the Construction Inc. agreed that "all aspects of the structural, water penetration, mechanical, electrical and any other items covered by the 5 and 10 year portion of the warranty ...will continue to be covered by the Construction Inc. The April 6, 2017 checklist confirmed that the Construction Inc. continue to be responsible for all exterior finishing. The Appellant confirms this in his affidavit which states that the exterior of the New home was commenced as at or about May 2, 2017, by which time the Construction Inc. had completed the interior electrical and drywall. Email correspondence between the Homeowners and the Appellant on May 23 and 24, 2017 discuss how the Construction Inc. would complete the exterior finishing work to ensure that it was done properly. As late as June 20, 2017, the Appellant confirmed in a text message to the Homeowners that "Exterior is the Construction Inc. responsibility as your contractor and Warranty provider". Photographs taken by the BC Housing Compliance Investigator on June 21, 2017 show that the structure of the New Home was complete with roofing, gutters, soffits, windows doors, deck membrane and second coat of stucco cladding completed. Based on the totality of the evidence, the Appellants are responsible for the 5 year building envelope component of home warranty insurance, which is mandatory under s.22(1) and (2)(b) of the *Act*.

[33] The evidence also demonstrates that the Construction Inc. agreed to and did provide plumbing and electrical components, insulation, windows and doors, heating and ventilation components and drywall as well as labour to the New Home. Therefore the Appellants are responsible for the 2 year materials and labour component of home warranty insurance.

[34] The Homeowners were actively involved in the construction of the New Home. This was anticipated both in the original construction contract and in the letter agreements of October 4, 2016 and January 24, 2017. The *Act* and Regulations allow the policy of home warranty insurance to exclude work and materials provided by the Homeowners. The participation of the Homeowners is not a legitimate basis for cancellation of the policy of home warranty insurance.

[35] Applying the analysis set out above in Decision 17(2) – 2014, the Appellants in this case managed substantially all of the construction.

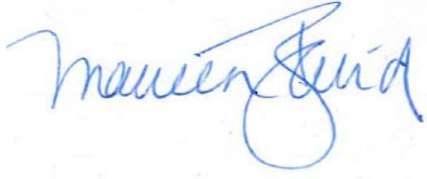
[36] The Registrar, correctly in my view, found in her review decision that the initial assessment of the BC Housing Compliance Investigator that further work was required to bring the New Home to substantial completion was not accurate in light the totality of the evidence.

[37] Based on a review of all of the evidence, I find that the Appellants were engaged as residential builders with respect to the construction of the New Home and that they managed substantially all of the construction. Therefore the Review Decision and the Compliance Order should be upheld.

[38] Lastly, there remains the issue of the procedural error suggested by the Appellants that the timing of the site visit by the BC Housing Compliance Investigator. They say that they were disadvantaged because he did not attend until several weeks after the date that they say they stopped work on the New Home. However, the uncontested evidence is that there was no notice to BC Housing until June 20 or 21, 2017 when it became aware through the home warranty provider of the cancellation of the coverage by the Appellants. Therefore, there is no factual basis to support the claim by the Appellants of being disadvantaged.

[39] Based on the above, the Board dismisses the appeal.

Sign:

A handwritten signature in blue ink that reads "Maureen Baird". The signature is fluid and cursive, with the first name "Maureen" and the last name "Baird" clearly distinguishable.

Maureen E. Baird, QC
Vice Chair, Safety Standards Appeal Board