

Indexed as: BCSSAB 17 (2) 2014

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 Builders Inc. **Appellant**

AND: Homeowner Protection Office **Respondent**

REASONS FOR DECISION

INTRODUCTION

[1] This is an appeal of the decision of the Registrar of the Homeowner Protection Office ("HPO") dated November 3, 2014 concerning a Compliance Order dated September 2, 2014 which required the Appellant to secure warranty coverage on a new home located in Blind Bay, British Columbia, (the "Home"). By agreement of both parties, the appeal proceeded by way of written submissions. Following the receipt of written submissions, Builders Inc. was given the opportunity to file a reply. Counsel for HPO objected to certain portions of that reply and in some cases, if the additional submissions were to be received, HPO requested the opportunity to file additional submissions in response. In light of the findings set out below, it has not been necessary to rely upon the reply submissions nor was there any need to allow HPO to file further submissions.

ISSUES

1. Did the Appellant manage substantially all of the construction work at the Home pursuant to section 1 of the *Homeowner Protection Act*, (the "Act")?
2. Should the Appellant be relieved of the requirement to place warranty coverage on the Home owing to financial hardship?

3. Should the Compliance Order be overturned, affirmed, or stayed?

FACTS

[2] Builders Inc. has been a licensed residential builder under the provisions of the *Act* since October 22, 2007. The Appellant is the directing mind of Builders Inc.

[3] On November 5, 2007, Builders Inc. purchased the property on which the Home was constructed.

[4] On January 14, 2009, Builders Inc. obtained a commitment from a home warranty insurance provider to provide home warranty insurance on the Home and construction commenced shortly thereafter.

[5] Builders Inc. ran into financial difficulty in approximately 2012 and did not finish the Home. Their lender, a Credit Union, commenced foreclosure proceedings and was granted conduct of sale by the Supreme Court of British Columbia on March 27, 2013.

[6] The Credit Union took control of the property and hired a Holdings Ltd. to complete construction of the Home. The work done by the Holding Ltd. was completed in or about July 2014.

[7] The Credit Union incurred costs of at least \$170,000, and perhaps as much as \$235,000 in having in the Holding Ltd. correct deficiencies in the construction of the Home and to complete work that Builders Inc. had not yet performed.

[8] On August 14, 2014, Builders Inc. de-enrolled the Home from warranty coverage.

[9] On September 2, 2014, the HPO issued a Compliance Order requiring Builders Inc. to enroll the Home under warranty coverage.

[10] Sometime in April 2015, the Credit Union secured its own warranty coverage on the Home from National Home Warranty.

DECISION

Did the Appellant Manage Substantially all of the Construction Work at the Home?

[11] The *Act* requires all builders of residential homes to firstly, register as a builder under the *Act* and secondly to obtain warranty coverage. The only exception to this requirement is for home owner builders but that is not applicable in this case.

[12] The *Act* defines a 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. [my emphasis added]

[13] There is no controversy that Builders Inc. initially intended to manage all of the construction of the home, since they secured warranty coverage at the outset. However, Builders Inc. submits that they did not complete the Home and that significant sums were expended by the Credit Union in having another contractor complete the construction and correct deficiencies and so it cannot be said that Builders Inc. managed nearly all of the construction. HPO submits that the Home was nearly completed at the time Builders Inc. ceased work on the Home in 2013.

[14] Both parties rely to some extent on a series of appraisal reports in support of their respective positions. Both parties centre their argument around the term "substantial completion", a term which is more often used in the context of builder's lien legislation and intended to be a reference to when the home is either complete or nearly complete. 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.

[15] The appraisal reports the parties rely on, which speak of percentage completion, are not particularly helpful in determining this issue. They are essentially real estate valuation reports rather than assessments of the state of the construction. The first appraisal, dated January 23, 2012 says that the property is 100% complete.

[16] The second report in April, 2013 suggests that the property was 95% complete.

[17] The third appraisal, dated September 5, 2013 says that the property is not 100% complete and notes a number of significant areas that needed further work:

- exterior of the home;
- landscaping;
- domestic water connection;
- septic system;
- driveway;
- missing front stairway;
- incomplete HVAC system.

[18] The third appraiser notes:

"We are not qualified to assess the state of completion and/or quality of construction relative to provincially accepted codes and standards."

[19] In terms of percentage completion, the appraiser notes:

"The actual percentage complete of the home is speculative."

[20] The Board finds that the more compelling evidence on the state of completion of the Home is found in the invoices for the work performed by Holdings Ltd. in completing the construction. While it is difficult to determine with precision the extent of work Holdings Ltd. performed on individual aspects of the Home, it seems relatively clear that a portion of their time was devoted to correcting deficiencies in work that had already been performed by Builders Inc., and in completing work that Builders Inc. never did. Their invoices confirm work in these general areas:

HVAC system

Electrical issues

Septic tank

Drilling of well

Completion of interior room above garage

Installing appliances

Repair to tile work, painting, and some drywall deficiencies

Replace some exterior cladding

Install some flashing

Construct front entrance stairs

Complete landscaping and driveway.

[21] The evidence is also somewhat unclear as to the precise amount that the Credit Union incurred in completing the construction but it is, on the evidence before me, no less than \$170,000, and perhaps as much as \$235,000. These are not insignificant sums but they must also be viewed in the context of the overall construction cost which the appraisal evidence estimates would be between \$941,250 and \$1,010,000. Based on this evidence, Holdings Ltd. work accounted for somewhere between 18% and 23% of the overall construction cost meaning that Builder Inc. performed the balance of the work, or roughly 80%.

[22] As noted above, the Board finds that the *Act* does not require the builder to take a home to substantial completion before they can be deemed a builder under the *Act* but rather the builder need only be responsible for managing substantially all of the construction. On the evidence before me it is clear that Builders Inc., while it did not finish the Home, managed substantially all of the aspects of the construction. They certainly managed the majority of it. It cannot be said that Holdings Ltd. managed substantially all of the construction and if it is not Holdings Ltd. then it must follow that Builders Inc., being the only other party in control of the project, that must be said to have managed substantially all the construction of the Home.

[23] As the residential builder of the Home, as that term is defined in the *Act*, Builders Inc. was responsible for securing warranty insurance on the Home as per Section 22(1) of the *Act*. Builders Inc. is not relieved of that obligation simply because another contractor finished, or in some cases corrected, Builders Inc. work if that completion contractor cannot be said to have assumed management for substantially all of the construction. The Board finds Builders Inc. managed substantially all of the construction.

Should the Appellants be Relieved of their Requirement to Place Warranty Coverage on the Home Owing to Financial Hardship?

[24] Builders Inc. submits that they should not be required to replace the warranty coverage that they withdrew in August, 2014, owing to the financial hardship it would cause to the company.

[25] The *Act* makes provision for financial hardship applications only in relation to owner builders who are seeking relief from the *Act's* provisions for selling a home without warranty coverage. Section 20.1(2) of the *Act* provides:

On application to the Registrar, an owner builder may be permitted to sell or offer for sell 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.

[26] There is no similar provision in the *Act* for relieving a registered builder of the requirement to maintain home warranty coverage on homes they construct. Builders Inc. is not an owner builder and Builders Inc. is not seeking relief from provisions of the *Act* that would prevent them from selling the Home. The hardship provision in Section 20.1(2) has no application to this appeal and therefore it cannot provide any relief to Builders Inc. in this instance.

Should the Compliance Order be Overturned, Affirmed, or Stayed?

[27] HPO concedes in its submissions that subsequent to this appeal being filed, the Credit Union, the lender who assumed control of the Home pursuant to foreclosure proceedings, actually obtained their own warranty coverage on the Home sometime in April, 2015. HPO nonetheless seeks to dismiss this appeal and asks the Board to give effect to the Registrar's decision requiring Builders Inc. to place insurance on the Home.

[28] Builders Inc. submits that since the Home now has warranty coverage, it is unnecessary for the Registrar's Order to be allowed to remain in force. HPO submits that the mere presence of current warranty coverage on the Home arranged by the Credit Union does not change the fact that Builders Inc. would have a continuing obligation to warrant the Home should circumstances arise in the future whereby the warranty coverage placed by the Credit Union for whatever reason, ceases to exist. But of course, that circumstance has not arisen and the Board is concerned about giving effect to an Order that Builders Inc. cannot currently perform.

[29] On the one hand, while the Board is satisfied that Builders Inc. was the builder substantially responsible for managing the construction of the Home and that they were accordingly required under the *Act* to ensure that there was home warranty insurance in place, were also faced with the unique circumstances that there is no way for Builders Inc. to comply with the Order now that the Credit Union has warranted the Home. There can be only one home warranty in place at a time.

[30] Accordingly, the Board dismisses the appeal. However, in addition, the Board directs that the Registrar's Order requiring Builders Inc. to place warranty insurance on the Home be stayed. HPO may re-apply to the Board to lift the stay should circumstances in the future result in loss of

warranty coverage, provided HPO can demonstrate that the circumstances at that time require that the Registrar's Order be given effect.

Signed;

A handwritten signature in black ink, appearing to be "J. M. P.", written in a cursive style.