



DECISION OF THE DIRECTOR

In the Matter of: *Business Practices and Consumer Protection Act, S.B.C. 2004, c.2*

Respondent: Adam McNaughton aka Decks4Life.com

Case Number: 30328

Adjudicator: Shahid Noorani

Date of Decision: April 12, 2021

A. INTRODUCTION

1. Adam McNaughton (the “respondent”) operates a sole proprietorship business registered as OA09713741.
2. The respondent often uses the name Decks4life.com as a pseudonym for the sole proprietorship when representing and documenting consumer transactions of OA09713741. Deks4life.com is not officially registered as a (d.b.a) name for OA09713741 and is not found within BC Corporate Registry records.
3. On October 29, 2019 Consumer Protection BC received a complaint against the respondent lodged by K.E. (the “consumer”). The consumer alleged the respondent failed to refund money received under a future performance contract after having received effective notice from the consumer that the contract was cancelled. The consumer asserts that to date, no refund has not been given by the Respondent.
4. On December 14, 2020 an inspector for Consumer Protection BC delivered a Report to Director (“the Report”) via registered mail and by email to the respondent. The mailing address was one obtained from banking records. The email address for delivery was one that had been used by the respondent in exchanging other communications with the inspector.

5. The Report alleged the respondent breached multiple provisions of the Business Practices and Consumer Protection Act (“BPCPA”). The Report also advanced a recommendation that the Director issue a Compliance Order requiring the respondent return the money paid by the consumer, and to reimburse inspection costs to Consumer Protection BC.

B. OPPORTUNITY TO BE HEARD

6. Prior to an action being taken under the BPCPA, the respondent must be provided with an opportunity to be heard. A notice of hearing (hearing notice) was sent to the respondent on March 1, 2020. It provided the respondent with the opportunity to submit a written reply to the Report by March 19, 2021. The hearing notice indicated that after the opportunity to respond was completed, a decision maker for Consumer Protection BC would determine whether the alleged violation occurred and may take an enforcement action if warranted. The hearing notice further stated that if the decision maker confirms a violation and imposes an administrative monetary penalty, they would apply the factors in section 164 (2) of the Act before determining the monetary amount, and that they would also be guided in calculating monetary penalties by Consumer Protection BC policy.
7. The hearing notice advised the Respondent that should a response to the Report not be given, a decision maker would proceed with making a decision in the absence of a response.
8. The respondent did not submit a response to the hearing notice.
9. I conclude the requirement for providing an opportunity to respond has been completed.

C. ALLEGED CONTRAVENTIONS

10. The Report makes three allegations against the Respondent:
 - i. The respondent contravened section 23(3) of the BPCPA when the supplier failed to provide the consumer with a copy of the future performance within 15 days of when the Contract was entered into with the consumer.
 - ii. The respondent contravened section 19 of the BPCPA when it failed to include in the future performance contract with the consumer: (a) the supplier's name and, if different, the name under which the supplier carries on business; (b) the supplier's business address and, if different, the supplier's mailing address; (n) any other restrictions, limitations or other terms or conditions that may apply to the supply of the goods or services;
 - iii. The respondent contravened section 27 of the BPCPA when it failed to refund money received in respect of the future performance contract entered into with the consumer within 15 days of receiving proper notice from the consumer cancelling the future performance contract.

D. LEGISLATION

11. The legislation relevant to this determination includes portions of the BPCPA as follows:

Section 1 - Definitions

In this Act:

"consumer transaction means (a) supply of good or services....to a consumer for purposes that are primarily personal, family or household (b) a solicitation, offer, advertisement or promotion by supplier with respect to a transaction referred to in paragraph (a)

"goods" means personal property, fixtures, credit and prepaid purchase cards, but does not include a security as defined in the *Securities Act* or contracts of insurance under the *Insurance Act*;

"goods or services" means goods or services or both;

services" means services, whether or not the services are together with or separate from goods, and includes a membership in a club or organization;

"supplier" means person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by (a) soliciting goods of services...(b) soliciting, offering, advertising or promoting with respect to a consumer transaction referred to in paragraph (a) of consumer transaction

Section 17 - Definitions

In this part

"future performance contract" means a contract between a supplier and a consumer for the supply of goods or services for which the supply or payment in full of the total price payable is not made at the time the contract is made or partly executed, but does not include any of the following:

(a)[...] (d)

Section 19 – Required Contents

A direct sales contract, future performance contract or time share contract must contain the following information:

(a)the supplier's name and, if different, the name under which the supplier carries on business;

(b)the supplier's business address and, if different, the supplier's mailing address;

(c)the supplier's telephone number and, if available, facsimile number;

- (d) the date on which the contract is entered into;
- (e) a detailed description of the goods or services to be supplied under the contract;
- (f) an itemized purchase price for the goods or services to be supplied under the contract;
- (g) other costs payable by the consumer, including taxes and shipping charges;
- (h) if any customs duties, brokerage fees or other additional charges that may apply to the contract cannot reasonably be determined by the supplier, a description of those charges;
- (i) a detailed statement of the terms of payment;
- (j) the total price under the contract, including the total cost of credit;
- (k) if applicable, a description and dollar value of any trade-in;
- (l) if credit is extended or arranged by the supplier, a description of the subject matter of any security interest in accordance with Part 5 [*Disclosure of the Cost of Consumer Credit*];
- (m) a notice of the consumer's rights of cancellation, in the prescribed form and manner, if any;
- (n) any other restrictions, limitations or other terms or conditions that may apply to the supply of the goods or services;
- (o) any other prescribed information.

Section 23 - Future Performance Contract

(1) [...]

(2) In addition to the information required under section 19 [*required contents of contract*], a future performance contract must contain the following information:

(a) the supply date;

(b) the date on which the supply of the goods or services will be complete;

(c) if there are periodic payments under the contract, the amount of each of the periodic payments.

(3) A supplier must give a copy of the future performance contract to the consumer within 15 days after the contract is entered into.

(4) [...]

(5)A consumer may cancel a future performance contract by giving notice of cancellation to the supplier not later than one year after the date that the consumer receives a copy of the contract if the contract does not contain the information required under subsection (2) and section 19 [*required contents of contract*].

E. EVIDENCE

12. As the respondent did not provide a response to the Report, I take the evidence in the Report to be undisputed. I have reviewed all of this evidence but will limit my comments to only the parts of the evidence necessary to give context to my decision.
13. On September 6, 2019, the consumer and respondent contracted verbally for the respondent to supply and install hand railings and an enclosed deck at the consumer's residence. The cost for the goods and services to be supplied by the respondent was \$5,500. The consumer paid a deposit in the amount of \$2,750.00 by cheque on the same day.
14. Email communications between the consumer and respondent show the goods and services under the agreed to verbal contract were to be supplied at an undetermined date in the future.
15. On September 9th, 2019, the respondent noted a change in materials would be needed to meet the projected timeline for the work to be completed. This change in material was not part of the verbally agreed to contract.
16. On September 13, 2019, the consumer and respondent exchanged a series of e-mails in which the Consumer gave the respondent notice cancelling their verbal contract. In these e-mails, the consumer details the cancellation of the contract due to the respondent's unwillingness to formalize the contract's terms in writing; the change of goods to be supplied under the agreement and; that the services under the agreement had yet to be performed.
17. The respondent acknowledged receipt and acceptance of the consumer's cancellation notice; however, the respondent maintained the deposit paid was non-refundable.

F. ANALYSIS

Did the respondent contravene section 23(3) of the BPCPA by failing to provide a copy of the future performance contract to the consumer within 15 days of the contract being entered into?

18. Section 1 describes a supplier as a person who, in the course of business, participates in a consumer transaction by supplying goods or services or real property to a consumer. A consumer transaction means a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household. I find that the respondent meets the definition of a supplier, and that it engages in consumer transactions as contemplated by the BPCPA.

19. Email communication between the respondent and the consumer confirm a verbal agreement took place on September 6, 2019. I find the work to be performed by the respondent under the verbal agreement to be goods and services, as defined under the BPCPA.
20. A future performance contract is a contract for the supply of goods or services between a supplier and consumer for which the supply or payment in full of the total price payable is not made at the time the contract is made. The evidence is clear the consumer did not pay the *full amount* for the verbally contracted goods and services. As such, I find the agreement entered into by the consumer and respondent was a future performance contract.
21. I have examined closely the email exchanges that took place between the consumer and the respondent to see if they can form the basis of a future performance contract. These emails only confirm a verbal agreement. I do not consider there to be enough substance to these communications for them to be construed as a copy of the future performance contract.
22. As a supplier in a future performance contract, the respondent was required to provide a copy of the future performance contract to consumer within 15 days of being entered into. This was not done. Therefore, I find the respondent contravened section 23(3) of the BPCPA.

Did the respondent contravene section 19 of the BPCPA by failing to include required information in the future performance contract?

23. It is conceivable for a supplier to meet all of the required disclosure items under sections 19 and 23 of the BPCPA in a verbal contract. The requirement though that a copy of the contract be given to the consumer within 15 days ensures that such verbal terms of a future performance are eventually codified. Having already concluded the respondent violated section 23(3) of the BPCPA by not providing a copy of the future performance agreement, I do not believe it necessary to undertake a deeper analysis to decide if the respondent satisfied the disclosure requirements under section 19 of the BPCPA when the future performance contract was entered into verbally. In electing not to make a finding, the allegation is dismissed.

Did the respondent contravene respondent contravened section 27 of the BPCPA when it failed to refund money received in respect of the Contract within 15 days of receiving proper notice cancelling the Contract?

24. A critical element to this contravention is the need for the consumer to *receive* a copy of a contract that fails to meet the requirements under sections 19 and 23 of the BPCPA. It is only when armed with a non-complaint contract can a consumer then exercise rights of cancellation under section 23(5) of the BPCPA and become entitled to the refund provisions under section 27 of the BPCPA. As already discussed, the consumer was not given a copy of the contract.

Therefore, the rights to cancel under section 23(5) of the BPCPA did not exist, and flowing from this there was no consumer entitlement to a refund under section 27 of the BPCPA. The allegation is dismissed.

G. DUE DILIGENCE

25. The respondent is entitled to the complete defence of due diligence against the allegations if it shows that all reasonable steps were taken to prevent the contravention. The onus is on the respondent to establish this defence. The respondent has presented no evidence. I find the defence of due diligence has not been established by the respondent.

H. CONCLUSION

26. I conclude the respondent contravened section 23(3) of the BPCPA by failing to provide the consumer with a copy of the future performance contract within 15 days of the contract being entered into with the consumer.

I. ENFORCEMENT ACTION

27. The Report advances a recommendation that I issue a Compliance Order requiring the respondent to refund the deposit money paid by the consumer under the future performance contract. It is also recommended in the Report that the Compliance Order require the respondent reimburse Consumer Protection BC the costs of the inspection. I am not bound to these recommendations. I have complete discretion to decide what, if any, enforcement action to take for a contravention.

28. As an adjudicator determining that a contravention has occurred, I may take one or more of the following actions:

1. Issue a compliance order (under section 155 of the Act), directing the respondent to:
 - stop a specified act or practice and take actions to correct the issue;
 - pay Consumer Protection BC the costs of the relevant inspection, including creation of the Report.
2. Impose a penalty of up to \$5,000 on an individual, or up to \$50,000 on a corporation, pursuant to section 164 of the Act. A contravention to section 189(5) is prescribed for the purpose of administrative penalty under the *Business Practices and Consumer Protection Regulation*.
3. Enter into an Undertaking with the respondent on terms that I consider appropriate.

29. I have considered these possible enforcement actions and determined that a compliance order for the contravention to section 23(5) of the BPCPA to be appropriate.

Compliance Order

30. Having found the respondent responsible for a contravention to section 23(3) of the BPCPA, I exercise my authority under section 155 (4)(a) of the BPCPA to require the respondent to reimburse money received from a consumer. The requirements of my order for the respondent to reimburse the consumer are set out in the Compliance Order issued with this decision. I also exercise my authority under section 155(4)(d) of the BPCPA to require the respondent to reimburse Consumer Protection BC the cost of the inspection. Both requirements of my order to the respondent are set out in more detail in the Compliance Order issued with this decision.

J. RECONSIDERATION

30. A compliance order or monetary penalty may be reconsidered in accordance with Division 1 of Part 12 of the Act, subject to the provisions outlined in sections 181 and 182 (2). A request for reconsideration must be submitted within 30 days of delivery of the order to the respondent. The request must be in writing, identify the error the person believes was made or other grounds for reconsideration, and be accompanied by a \$252 application fee. A request for reconsideration should be addressed to:

Consumer Protection BC
Attention: Shahid Noorani, Vice President
200 – 4946 Canada Way, Burnaby, BC V5G 4H7
shahid.noorani@consumerprotectionbc.ca

Decided on April 12, 2021 in Burnaby, BC.



Shahid Noorani, Vice President