

Before the Building Practitioners Board

Appeal No. A1370

Between: Matthew Biddle (the Appellant)

And: The Registrar

In the matter of: An appeal against a decision of the Registrar of Licensed Building Practitioners to decline a Design Area of Practice 2 (AoP 2) Licence.

Decision of the Board under section 330(1)(a) of the Building Act 2004

Hearing Location [Omitted]

Hearing Type: In Person

Hearing and Oral Decision Date: 4 August 2022

Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)

Mr C Preston, Chair

Mr D Fabish, LBP, Carpentry and Site AoP 2

Mrs F Pearson-Green, LBP, Design AoP 2

Ms J Clark, Barrister and Solicitor, Legal Member

Appearances:

Mr M Denyer, Counsel for the Registrar

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Licensed Building Practitioners Rules 2007 (the Rules) and the Board's Procedures for the Management of Appeals (the Appeal Procedures).

Decision:

The Board has decided, under section 337 of the Act, to refer the matter back to the Registrar.

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Summary of the Board’s Appeal Decision

[1] The Board has decided that it will refer the matter back to the Registrar for reconsideration and that it will issue directions as to how the reconsideration is to be carried out.

The Board

[2] The Board is a statutory body established under the Building Act.¹ Its functions include hearing appeals against certain decisions of the Registrar in accordance with subpart 2 of Part 4 of the Act.

Procedure on Appeal

[3] Under section 335 of the Act, an appeal proceeds by way of rehearing. On hearing an appeal, the Board may confirm, reverse, or modify the decision or action appealed against. The Board may also make any other decision or take any other action that the decision maker (the Registrar) could have made. The Board cannot review any part of a decision or action not appealed against.

The Registrar’s Decision

[4] To become licensed, an applicant person must satisfy the Registrar that they meet the applicable minimum standard for the class or classes of licence applied for. ²The minimum standard is prescribed by rule 4 of the Rules. It states:

¹ Section 341 of the Act.

² Refer rule 9(1)(a) of the Rules

4 MINIMUM STANDARD OF COMPETENCE FOR EACH CLASS OF LICENCE

- (1) *The minimum standard of competence for a class of licence is meeting all of the competencies set out for that class of licence in Schedule 1.*
- (2) *In determining whether a person meets a competency, regard must be had to the extent to which the person meets the performance indicators set out for that competency in Schedule 1.*

[5] Under rule 12 of the Rules, the Registrar must make a decision on the application. The Registrar's decision to grant or decline a licence must be informed by an assessor's recommendation.³

[6] On 7 April 2022, the Registrar informed the Appellant that his application had been declined. The Appellant was informed of his right to appeal the decision.

The Appeal

[7] On 12 April 2022, the Appellant filed an appeal with the Board against the Registrar's decision. The Respondent noted, as part of his appeal application, that he would accept a Design AoP 1 Licence if the Board considered that he met the requirements for a Design AoP 1 Licence but not those for a Design AoP 2 Licence.

[8] The Board's Appeals Procedures stipulate that the Registrar is to provide a report that includes all evidence used to reach the decision, including the assessors' recommendation (the Registrar's Report). The Report noted the Appellant had failed to demonstrate the following competencies for the class of license applied for:

- (a) Competency 2: Manage the building design process.
- (b) Competency 3: Establish design briefs and scope of work and prepare preliminary design.
- (c) Competency 4: Develop design and produce construction drawings and documentation

[9] Under section 335(4) of the Act, the Board must not review any part of a decision or action not appealed against. On that basis, and on the basis of the Registrar's Report, the matters under appeal were those noted above.

[10] The burden of proof lies with the Appellant. It is for the Appellant to provide sufficient evidence to establish, on the balance of probabilities, that he meets sufficient of the performance indicators for those competencies that are being appealed to be granted a licence. If the Registrar appears at an appeal hearing,⁴ the matter proceeds using an adversarial process.

³ Rules 10 and 11 of the Rules

⁴ The Registrar may seek leave to appear and be heard under clause 2.9.16(a) of the appeal procedures either in person or by legal counsel.

[11] On 21 June 2022, the Registrar sought leave to appear and be heard through counsel. Leave was granted.

The Appellant's Licensing History

[12] The Appellant was first licensed as a Design AoP 2 on 22 May 2012.

[13] On 15 March 2017, the Board heard a complaint about the Appellant who did not engage in the investigation and hearing process.⁵ The Appellant was found to have carried out building work (design work) in a negligent manner and to have brought the licensing regime into disrepute. The Board initially decided that it would suspend the Appellant's licence for six months and order him to pay costs of \$2,000. Following submissions from the Appellant, the Board decided to amend the penalty to a fine of \$3,500 and costs of \$2,000. The Appellant did not pay the fine or costs and, as a result, and pursuant to section 319 of the Act, his licence was suspended. He then entered into a payment plan, and his licence was reinstated.

[14] On 31 October 2018, the Board heard a further complaint about the conduct of the Appellant.⁶ The Board found that he had carried out building work (design work) in an incompetent manner and to have brought the licensing regime into disrepute. On 22 November 2018, his licence was cancelled for a period of 18 months. He was ordered to pay costs of \$3,000. The Board, in its decision, noted:

[31] The Board, which included a Design AOP 2 Licensed Building Practitioner, reviewed the design which was submitted by the Respondent as being ready for lodgement for a building consent. It did not consider that they were competently developed or that it would have obtained a building consent. The design and specifications lacked site specific detail which would have been available to the Respondent had he carried out a competent site investigation. There were aspects that would not have met compliance requirements and/or were not buildable. The number and type of requests for information from the BCA highlighted this.

[32] On this basis the Board found that the Respondent had been incompetent.

[15] The Board, in imposing a penalty, noted:

[52] The Board also notes that the Respondent has been found to have been incompetent. Having made this finding it is appropriate that the Respondent's competence be assessed prior to his continuing to practice. There are two ways in which this can occur. The first is by way of training. The second is for his licence to be cancelled so that he has to prove his competence should he apply to be relicensed.

⁵ Complaint matter C2-01478

⁶ *Biddle* [2018] BPB 1932

- [16] It was as a result of the Board directed cancellation that the Respondent sought a new Design AoP 2 Licence.
- [17] Counsel for the Registrar also brought criminal convictions, which related to design work that the Appellant had carried out whilst he was not licensed to the Board's attention. One conviction was for carrying out restricted building work when not licensed. The other was for forgery. The Appellant produced a forged Certificate of Design Work for the purposes of obtaining a building consent.

The Hearing

- [18] Prior to the hearing, the Appellant provided further evidence to support the appeal. This consisted of two sets of plans: one a proposed residence for [Omitted] at [Omitted], and the second a proposed residence for [Omitted] and [Omitted] at [Omitted]. The Appellant gave evidence that the two residences were designed by the Appellant when he was a Licensed Building Practitioner (LBP). The plans provided were printouts that the Appellant produced for the hearing. They were not the consented drawings. They did not include engineering details or building specifications. The Appellant noted that both residences had been built. The plans were the same as those that were submitted by the Appellant with the licensing application that is being appealed.
- [19] The owner of the [Omitted] residence was put forward as a referee when the Respondent first applied for a licence. The referee was not favourable. The Registrar's Report, which set out the reasons why the licence was not granted, included that only one of the three referees put forward supported him being licensed. Two were strongly opposed to the Appellant being licensed.
- [20] The Appellant spoke to the plans that he had provided. He stated that there were limited requests for information (RFI) issued, notwithstanding that they were complex designs and that most related to other professionals who had contributed to the building consent application. The Appellant described his design process for the [Omitted] project as "seamless". The Appellant also made a note of his engagement with other professionals during both builds and of his ability to save the owner's costs and to improve on the work of other professionals.
- [21] The Appellant submitted that the plans provided clearly showed his ability as a designer. He further submitted that the only reason he had not been licensed when he applied was that the application was not supported by two referees and that he now had the support of referees. As such, he considered that a licence should be granted.
- [22] The Appellant called [Omitted], a Carpentry LBP, as a witness to support his appeal. He also produced a partial set of plans that related to redesign work he had carried out for the witness under supervision. Again, they were not the consented version. The witness for the Appellant gave evidence that the Appellant had carried out design work for him in 2004 and that he had asked the Appellant to modify the

design and complete building consent documentation for a dwelling that he intended to build on [Omitted]. [Omitted] engaged consultants, such as planners, engineers and a supervising LBP. Both the Appellant and [Omitted] noted that the Appellant had picked up technical and structural issues and that the Appellant's redesign would save time and money. [Omitted] considered that the Appellant was a competent designer.

- [23] The Appellant did not call an engineer that had originally supported his licence application as a witness.
- [24] Counsel for the Registrar questioned the Appellant. He asked how he had addressed the matters that led to his licence being cancelled by the Board. The Appellant did not refer to any specific training he had undertaken but stated he had been continuously learning and upskilling whilst working for a design business that uses outsourced LBP designers to supervise the restricted building work (design work) undertaken. The Appellant referred to changes to H1 of the Building Code as an example of how he had kept himself up to date. The Appellant noted that it was difficult to access courses during Covid-19.
- [25] The Appellant gave evidence about the system and process changes that he had made whilst with his new employer. He stated he had found various issues and had improved them. He also referred to extraneous matters that impacted his work when the Board made its disciplinary findings and that he had now addressed those matters.
- [26] Counsel for the Registrar also called a witness, Mr Roger Charnock, a Chartered Building Surveyor Design AoP 3 LBP who carried out the licensing assessment that is being appealed (the Assessor under the Rules). The Board was also provided with a copy of the Appellant's design LBP application and a 21-minute recording of an interview Mr Charnock conducted with the Appellant as part of Mr Charnock's assessment. The Board reviewed the recording prior to the hearing. The Board was also provided with a signed witness statement from Mr Charnock. The statement set out:

6. *Having considered all of the information provided to me I found that Mr Biddle did not meet Competencies 2, 3 and 4 but did meet Competencies 1 and 5.*
7. *The reason Mr Biddle did not meet Competencies 2, 3 and 4 was because he was unable to provide sufficient positive references about his work in these areas. In my view it is a fundamental requirement that an applicant be able to provide positive references to verify that he is competent. In the absence of positive references, I was not satisfied that Mr Biddle had demonstrated the relevant competencies. The application was too reliant on Mr Biddle's own assertions as to his competence.*

8. *It is a requirement that an applicant provide two referees. Of the two referees whose contact details were provided by Mr Biddle, [Omitted] commented positively on his abilities while [Omitted] refused to comment. I gave Mr Biddle a second chance to provide another referee. This third referee, [Omitted], stated that he did not believe Mr Biddle was a suitable candidate to hold LBP registration. Mr Biddle did not provide any written references and I am not aware of him providing any further referees since.*

[27] At the hearing, Mr Charnock reiterated that only one of the three referees put forward supported the Appellant being licensed and that the two that did not support licensing held strongly negative views. He stated that, in his experience, it was very unusual for referees put forward by an applicant to not support an application. Mr Charnock also noted that he considered the Appellant had met Competencies 1 and 5 as they were knowledge-based, whereas Competencies 2, 3 and 4 related to doing design work and that there was insufficient evidence to establish that the Appellant was competent in carrying out design work.

Submissions

[28] The Appellant submitted that he had learnt a lot since his licence was cancelled and that he has accepted the consequences of his licence being cancelled and of the criminal convictions. He believed that he had learned and developed and was ready to once again be an LPB.

[29] Counsel filed written submissions. He submitted:

- 5 *It is submitted that while the failure to provide positive referees was a sufficient basis for declining Mr Biddle's application, this does not mean that him simply providing an additional referee or referees willing to attest to his competence would necessarily be sufficient to establish that his application should be approved. As Mr Charnock explains in his statement, from an assessor's point of view he would need to consider the content of any reference in light of all information supplied by Mr Biddle and the requirements of Competencies 2, 3, and 4.*
- 6 *It is noted that as per rule 7(1)(k) of the Licensed Building Practitioner Rules 2007, it is mandatory for an applicant to provide "the contact details of 2 or more referees". It is submitted that it is clear from this requirement that applicants are expected to be able to provide at least two positive referees who will be able to comment on how the applicant meets the relevant competencies. While it is not explicitly mandatory that the referees provide any particular information, the requirement to provide their details would be redundant if there was no expectation that they provided relevant and supportive information.*

- 7 *Notwithstanding the requirement to provide referee details, it is common sense that an assessor should be able to verify an applicant's competence by means beyond the assertions and evidence provided by the applicant. In the absence of sufficient referees, it is a logical conclusion that an applicant has failed to sufficiently establish or verify the competencies that they are asserting they meet. The assessor and Registrar will simply not be able to be satisfied that the information and documentation supplied by an applicant is reflective of their work without some sort of external verification.*
- 8 *In short, it was Mr Biddle's failure to supply positive references which informed the decision to decline his application. There were no other specific issues raised with his application; the lack of referees led to an inability to verify it.*

[30] At the hearing, Counsel submitted that the Appellant had not addressed the matters that resulted in his licence being cancelled and that there was insufficient evidence for the Board to determine that the Appellant should be licensed. Counsel further submitted that, if the Board considered there may be sufficient evidence, that it would be appropriate for the matter to be referred back to the Registrar for reconsideration. The Appellant did not oppose that course of action.

The Purposes of the Licensing Regime

[31] The Building (Definition of Restricted Building Work) Order 2011 stipulates that design work and building work on the primary structure and external moisture-management system of a house or a small-to-medium apartment building is restricted building work. Restricted building work applies to work that is carried out or supervised under a building consent⁷.

[32] Under section 84 of the Act:

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

[33] Given the above provisions, a person who wishes to carry out or supervise restricted building work, other than as an owner builder, must be licensed.

[34] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention of the enabling legislation⁸:

The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes pride in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a

⁷ Refer section 401B of the Act.

⁸ Hansard volume 669: Page 16053

prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.

[35] And, as was noted by the responsible Minister during the first reading of the legislative provisions that established it:⁹

A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.

[36] Within that context, it is important that the competence of those who seek to be licensed is thoroughly assessed so as to ensure that the legislative purposes of licensing are advanced, consumers are protected, and buildings are designed and constructed in a manner that makes them safe and healthy.

Board's Decision and Order

[37] On the basis of the evidence and submissions received, and having taken into consideration the purposes of the licensing regime, the Board has decided that it will, under section 337(1) of the Act, refer the application back to the Registrar¹⁰ for reconsideration. Further, the Board has decided that it will, under section 337(2) of the Act, issue directions.

[38] Firstly, the Board notes that whilst under section 335(4) of the Act, the Board must not review any part of a decision or action not appealed against, section 337(1) allows for the whole of the decision to be referred back:

337 Appeal authority may refer matter back for reconsideration

(1) *Instead of determining an appeal under this subpart, the appeal authority may direct the decision-maker to reconsider, either generally or in respect of any specified aspect, the whole or any part of the decision or action.*

[39] On that basis, the Board has decided that the Registrar is to review the entire application afresh. Competencies 1 to 5 for a design license are to be reassessed.

[40] The following directions are issued:

- (a) The entire application is to be considered afresh and in accordance with the Rules;
- (b) As part of the reconsideration, the Registrar is to consider whether Mr Biddle meets sufficient of the performance indicators to be issued with a Design AoP 2 or, alternatively, a Design AoP 1 licence;

⁹ Hansard volume 669: Page 16053

¹⁰ The Registrar is the "decision maker" for the purposes of section 337 of the Act as defined in section 282 of the Act.

- (c) The Registrar is to appoint a new assessor who is to be an experienced assessor who holds no less than a Design AoP 3 Licence or who is a Registered Architect (the Assessor). The Registrar may seek leave to have this condition modified if it cannot reasonably be fulfilled;
- (d) The Registrar is to obtain the full BCA files for the two projects that Mr Biddle provided for his application and for the appeal, including all RFIs and correspondence leading up to the issue of the building consents. Those building consent files are to be provided to the Assessor and are to be used as part of the assessment process;
- (e) The Assessor is to interview the persons who instructed Mr Biddle to develop the building consents, the main contractor or principal LBP who carried out the construction and any engineers who provided design input as persons who can attest to Mr Biddle's competence;
- (f) Mr Biddle may put forward two further referees provided they are persons for whom he has carried out design work that has been consented or persons under whose supervision he has developed designs which have been consented; and
- (g) The Registrar is to obtain the full BCA files for any design work that relates to any referees that Mr Biddle puts forward for review by the Assessor.

[41] In making its decision to refer the application back to the Registrar, the Appellant and Registrar should note the Board took the view that the Appellant had not satisfied the Board that he met sufficient of the performance indicators to be granted with a Design AoP 1 or Design AoP 2 Licence. However, the Board has noted that if it were to decline the appeal, then it would be open to the Appellant to simply make a fresh application to be licensed. Given the Appellant's licensing history and the Board's previous findings of incompetence, the Board is of the view that a more robust and thorough assessment is required. It is on this basis that the Board has decided to impose the above conditions. Further, the Board considered, having listened to the interview completed and viewed the plans submitted, that the assessment of the Appellant's application under appeal was superficial.

Costs and Publication

Costs

- [42] Under section 338(4) of the Act the Board may order any party to the appeal to pay to any other party to the appeal any or all of the costs incurred by the other party in respect of the appeal.
- [43] The Board has adopted the approach taken by the District Court to costs on appeal.
- [44] Neither party made submissions as regards costs. Either party may file, within 10 working days of the issue of this decision, a memorandum as to costs. If either party

files, the other will be afforded an opportunity to reply prior to the Board making a decision.

Publication

[45] Section 339 of the Act provides:

339 Orders as to publication of names

- (1) *On an appeal under this subpart, the appeal authority may, if in its opinion it is proper to do so, prohibit the publication of the name or particulars of the affairs of a licensed building practitioner or any other person.*
- (2) *In deciding whether to make an order under subsection (1), the appeal authority must have regard to—*
 - (a) *the interests of any person (including, without limitation, the privacy of any complainant); and*
 - (b) *the public interest.*
- (3) *If the appeal authority prohibits the publication of the name or particulars of the affairs of a licensed building practitioner, the Registrar must remove the name or particulars of the affairs of that licensed building practitioner from the register in relation to the matter under appeal to the extent necessary to reflect the appeal authority's prohibition on publication.*

[46] There has been considerable public interest in the matter. Again, submissions on publication were not received. Both parties are directed to make submissions on publication within 10 working days of this decision being issued. The Board will then make a decision on publication.

Right of Appeal

[47] The right to appeal a Board decision of this type is provided for in section 330(2) of the Actⁱ.

Signed and dated this 16th day of August 2022.



Mr M Orange
Presiding Member

ⁱ Section 330 Right of appeal

- (2) *A person may appeal to a District Court against any decision of the Board—*
(a) *made by it on an appeal brought under subsection (1)*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
(b) *within any further time that the appeal authority allows on application made before or after the period expires.*