

Before the Building Practitioners Board
At [omitted]

BPB Complaint No. C2-01068

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315

AGAINST

[The Respondent], Licensed Building Practitioner No. [omitted]

DECISION OF THE BUILDING PRACTITIONERS' BOARD

1 Introduction

- 1.1 [Omitted] (the Complainant) lodged a complaint with the Building Practitioners' Board (the Board) on 10 March 2014 in respect of [omitted], Licensed Building Practitioner (the Respondent).
- 1.2 The complaint alleged the Respondent has, in relation to building work in respect of [omitted]:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (section 317(1)(b) of the Building Act 2004 ("the Act");
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (section 317(1)(d) of the Act);
 - (c) a licensed building practitioner has, for the purpose of [becoming licensed himself or herself, or for the purpose of any other person becoming licensed:
 - (i) either orally or in writing, made any declaration or representation, knowing it to be false or misleading in a material particular; or
 - (ii) produced to the Registrar or made use of any document, knowing it to contain a declaration or representation referred to in subparagraph (i); or
 - (iii) produced to the Registrar or made use of any document, knowing that it was not genuine.
- 1.3 The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 15 June 2012.
- 1.4 The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).

1.5 The following Board Members were present at the hearing:

David Clark	Chairman (Presiding)
Brian Nightingale	Board Member
Mel Orange	Board Member
Richard Merrifield	Board Member

1.6 The matter was considered by the Board in [omitted] on 16 July 2015 in accordance with the Act, the Regulations and the Board's Complaints Procedures.

1.7 The following other persons were also present during the course of the hearing:

Alistair Dumbleton	Registrar's Representative
Sarah Romanos	Board Secretary
[Omitted]	Respondent
[Omitted]	Legal Representative for the Respondent
[Omitted]	Legal Representative for the Respondent
[Omitted]	Complainant
[Omitted]	Complainant
[Omitted]	Witness

Members of the public were present.

1.8 No Board Members declared any conflicts of interest in relation to the matters under consideration.

2 Board Procedure

2.1 The "form of complaint" provided by the Complainant satisfied the requirements of the Regulations.

2.2 On 30 July 2014 the Registrar of the Board prepared a report in accordance with regulations 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint.

2.3 On 9 September 2014 the Board considered the Registrar's report and in accordance with Regulation 10 it resolved to proceed with the complaint that the Respondent:

- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act; and
- (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act.

2.4 The Board requested a Special Adviser be appointed to prepare a report. Stuart Wilson's report dated June 2014 was received and circulated to the Respondent and Complainant.

2.5 Prior to the hearing various pre-hearing applications were made and dealt with and two pre-hearing conferences were held. The result of the pre-hearing conferences meant that the issues for the hearing were refined and would focus on;

- (a) The Respondent accepted that he was liable under section 317(1)(d) of the Act for certain acts and/or omissions identified in Mr Wilson's report but not all of them; and

- (b) The Respondent was not liable under section 317(1)(b) of the Act and would argue that based on a strict interpretation of section 317(1)(b) building and/or supervising work without a building consent does not amount to negligence or incompetence under this provision.

3 The Hearing

- 3.1 The hearing proceeded on 16 July 2015. No Board Members raised any issues in relation to conflicts.
- 3.2 At the hearing the Board was assisted in the presentation of the case by the Registrar's Representative.
- 3.3 Those persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

4 Substance of the Complaint

- 4.1 The Special Adviser's report summarised the building work which was carried out and which would require a building consent as:
1. A fabricated plywood box beam
 2. Newly formed and altered exterior windows
 3. Installation of new external wall framing
 4. Installation of new plumbing
 5. Installation of roof struts
 6. Installation of cavity sliding door lintels, over spanned
 7. Installation of wall insulation
 8. Installation of timber piles

5 Evidence

- 5.1 As stated above, the hearing proceeded on the basis that the Respondent was accepting liability under section 317(1)(d) of the Act for some of the items listed in paragraph 4.1 above but not under section 317(1)(b).
- 5.2 The Board questioned the various witnesses regarding which of the items were undertaken by the Respondent and it was accepted that the Respondent carried out work on items 1 to 3, 5 and 6 and that these items required a building consent. Item 4 was carried out by a licensed plumber and item 7 was not the Respondent's work, it having occurred after his involvement had ceased. With respect to item 8, whilst the Respondent was involved in the work, it was the Respondent's contention that this work did not require a building consent under section 42A and Schedule 1 of the Act.

6 Board's Conclusion and Reasoning on section 317(1)(d) of the Act

- 6.1 Having found on the evidence that the Respondent undertook the work identified above, and accepting that he did not do the work listed under items 4 and 7 and, accepting that a consent was not required for item 8 the Board finds that the Respondent is liable under section 317(1)(d) of the Act and should be disciplined.

7. The Respondent's argument under section 317(1)(b) of the Act

7.1 [Omitted] made detailed submissions to the Board in respect of whether;

"In the circumstances of (the) complaint, the words "negligent or incompetent" in section 317(1)(b) extend to carrying out building work without a building consent; and (whether) it is fair and in accordance with natural justice for the Board to collaterally charge and penalise [omitted] for an alleged breach of section 317(1)(b) based solely on the fact that work was done without a permit when he has admitted an allegation under section 317(1)(d) founded on entirely the same facts".

7.2 The Board has previously held that a licenced person who commences or undertakes building work without a building consent can be negligent in doing so¹.

7.3 Whether the words "negligent or incompetent" in section 317(1)(b) can extend to carrying out building work without a building consent, the Board notes the comments of his Honour, Judge McElrea in *Beattie v Far North Council*² in relation to the Board's jurisdiction on matters peripheral to "building work". At paragraphs 7 and 8 of the judgement his Honour commented:

The Board at para 5.2 expressly refrained from deciding whether Mr Beattie's proposed design solution was an acceptable solution, focussing instead on whether he had performed "the building work" in a negligent or incompetent manner. It found that he had not been negligent, as already noted. However it found that he had carried out his work in an incompetent manner, judged against the four competencies described for level 3 design work in the Licensed Building Practitioners' Rules 2007.

This raises a matter not the subject of submissions but which should be considered by the Board in respect of future complaints, namely whether the Board has jurisdiction to consider any complaint not about building or design work but about a building practitioner's dealings with a Council on behalf of an owner when attempting to obtain a building consent for a design already completed. (It is arguable that dealings with a Building Consent Authority about whether or not a consent should issue are neither building work nor design work; however, because of the view I have reached on other matters it is not necessary for me to decide this issue).

7.4 The *obiter* comments made by his Honour expressly left open whether the Board has the jurisdiction to determine matters which may not be strictly "building work", but peripheral to the same. What the Respondent is contending is that because a consent has not issued, if a licensed building practitioner ("the LBP") carries out the (unconsented) building work nevertheless, on a strict interpretation of section 317(1)(b) of the Act, he/she cannot be liable because to be liable, that building work must have already had a consent issued in respect of it. To extend the definition of "building work" to included unconsented building work is wrong.

7.5 [Omitted] makes the further point that a remedy does exist against the LBP under section 40 of the Act where a Territory Authority can prosecute any person building without a consent but not as a disciplinary matter under section 317(1)(b).

¹ Refer Licensed Building Practitioners Board decisions C1045 dated 19 March 2014 and C1030 dated 31 July 2014.

² Judge McElrea, DC Whangarei, CIV-2011-088-313

8. Board's Conclusion and Reasoning on section 317(1)(b) of the Act

8.1 The term “building work” is defined term in section 7 of the Act as follows:

building work —

(a) means work—

(i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and

(ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and

(b) includes sitework; and

(c) includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act; and

(d) in Part 4, and the definition in this section of “supervise”, also includes design work (relating to building work) of a kind declared by the Governor-General by Order in Council to be building work for the purposes of Part 4.

8.2 The phrase “for, or in connection with” used in the definition connotes in the Board’s view a wide range of matters that could be brought into play including the processes and systems used to manage the construction, alteration, demolition or removal of a building.

8.3 We accept [omitted] submission that the Board is required to interpret terms in the Act from the text and in accordance with its purpose but ultimately it should be done to ensure that it gives effect to the purpose of Parliament³. The Board may, if necessary in ascertaining the meaning of the enactment, consider other indications provided in it. In this respect the provisions in section 3 “Purposes of the Act”⁴, section 14E “Responsibilities of the Builder”⁵ and section 282A “Purposes of Licensing Building Practitioners”⁶ have been taken into consideration.

³ Refer s 5 of the Interpretation Act 1999

⁴ Section 3 Purpose

This Act has the following purposes:

- (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
 - (i) people who use buildings can do so safely and without endangering their health; and
 - (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
 - (iii) people who use a building can escape from the building if it is on fire; and
 - (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:
- (b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

⁵ S 14E Responsibilities of builder

- (1) In subsection (2), builder means any person who carries out building work, whether in trade or not.
- (2) A builder is responsible for—
 - (a) ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates;
 - (b) ensuring that building work not covered by a building consent complies with the building code.
- (3) A licensed building practitioner who carries out or supervises restricted building work is responsible for—
 - (a) ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act; and

- 8.4 All of these provisions use similar references to the process to achieve the resulting object of building work and of its compliance with a building consent and the building code. On this basis the Board has formed the view, that the process of obtaining a building consent is an integral part of the building process and ensuring that a building consent has been obtained naturally fits within the definition of “building work”. The words “*work, for and in connection with...*” (the construction process) is sufficiently wide to include acts (or omissions) of obtaining or ensuring a consent is present before work commences. This interpretation in no way places an artificial or a strained interpretation on this provision. In the Board’s view the interpretation fulfils what Parliament’s overall intention was, namely no person, LBP or otherwise should commence work (which requires a building consent), without first obtaining the building consent or ensuring one has been obtained.
- 8.5 Accordingly the Board finds no reason for it to depart from its previously held position that for an LBP to commence building work where a building consent is required amounts to negligence.
- 8.6 [Omitted] second submission, based on principles of fairness and natural justice, to “*find proved or convict and then penalise an individual for two separate offences based on the same facts*” would be wrong in principle and, in the criminal context, such charges will be held to be bad for duplicity. This submission was further supported by a submission that under section 26(2) of the Bill of Rights Act which states:
- “No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.”*
- and therefore the Respondent should not face two charges essentially arising from the same set of facts.
- 8.7 While the Board accepts, that in the criminal context, the Rule against Duplicity may apply, in the disciplinary context, the Board is unaware why, for public policy considerations an LBP should not face potential liability across a range of offences even though the factual basis for the offences are the same..
- 8.8 The Board notes that in a general sense, with regard to licensed persons it is within the very nature of disciplinary provisions that a licensed person may face more than one consequence as a result of their actions. The provisions in section 317(1)(a) of the Act, for example, expressly provide for a disciplinary action where a person has been convicted of certain types of offence. The reason for this is that outside of the licensing regime the Courts do not have the ability to deal with the practitioner’s ability to carry on in their trade whereas, within the trade, the Board does. It does so to ensure that the Board is able to protect the public from an LBP who has failed to meet certain standards expected of him or her. To ameliorate this, as regards LBP’s the Act restricts the Board from imposing a pecuniary penalty where they have been fined by a court for the same act or omission under section 318(3) of the Act.

(b) ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.

⁶ S 282A Purposes of licensing building practitioners

The purposes of licensing building practitioners under this Act are—

- (a) to assess and record building practitioners as having certain skills and knowledge relevant to building work; and
- (b) to license building practitioners so that, in regard to restricted building work, licensed building practitioners can carry it out or supervise it.

- 8.8 Furthermore one of the purposes of the licensing provisions in the Act is to ensure the public are informed when engaging with LBP's including whether they have been subjected to any disciplinary matters⁷. For the public to be fully informed it is appropriate that all matters pertaining to the LBP's conduct, from a disciplinary perspective, be recorded.
- 8.9 [Omitted] submitted that the disciplinary provisions in the Act are, in essence, criminal sanctions and as such should be construed strictly in line with the age old presumption that penal statutes should be interpreted narrowly in favour of the subject. However, the purposes of disciplinary proceedings is to uphold the integrity of a profession and to protect the public. Those purposes were reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales* as follows:
- “The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain the public confidence in the integrity of the profession and to uphold proper standards of behaviour.”*⁸
- 8.10 As such whilst the disciplinary provisions of the Act contain sanctions it is not accepted that they are purely penal in nature and as such a narrow or strict interpretation in favour of the LBP is not warranted.

9 Board Decision

- 9.1 Given the above the Board has determined that the Respondent has carried out or supervised building work which is the subject of the complaint as a Licensed Building Practitioner:
- (a) in a negligent or incompetent manner contrary to s 317(1)(b) of the Act ; and
 - (b) that does not comply with a building consent contrary to s 317(1)(d) of the Act and should be disciplined.

10 Disciplinary Penalties

- 10.1 The grounds upon which a Licenced Building Practitioner may be disciplined are set out in section 317 of the Act. If one or more of the grounds in section 317 applies, then the Board may apply disciplinary penalties as set out in section 318 of the Act.
- 10.2 The Board invites the Respondent to make written submissions on the matter of possible disciplinary penalties, up until close of business on 14 September 2015. Such submissions may include information on his personal and financial circumstances.

11 Costs

- 11.1 Under section 318(4) of the Act, the Board has the power to order the Respondent to pay the reasonable costs and expenses of, and incidental to, the Board's the inquiry.
- 11.2 The Board, therefore, is prepared to receive written submissions from the Respondent on the matter of payment of costs up until close of business on 14 September 2015. Such submissions may include information on his personal and financial circumstances.

⁷ S 299 of the Act – Purpose of the register and s301 of the Act – Matters to be contained in the register

⁸ [2011] UKSC 1, 19 January 2011.

12 Publication of Name

- 12.1 Pursuant to s 318(5) of the Act, the Board may publicly notify any disciplinary action taken against a Licensed Building Practitioner in any way it thinks fit.
- 12.2 The Board invites the Respondent to make written submissions on the matter of publication by 4 p.m. on 14 September 2015.

13 Right of Appeal

- 13.1 The right to appeal Board decisions is provided for in s 330(2) of the Act.

Signed and dated this 31st day of August 2015



David Clark
Presiding Member