

BPB Complaint No. C2-01217

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]

COMPLAINT DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 20 June 2015 in respect of [the Respondent], Licensed Building Practitioner.
- [2] The complaint alleged the Respondent has, in relation to building work at [omitted]:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);
 - (c) has breached s 314B of the Act (s 317(1)(h) of the Act); and
 - (d) has conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 28 June 2011.
- [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).
- [5] The following Board Members were present at the hearing:
- | | |
|--------------------|--------------------------|
| Richard Merrifield | Deputy Chair (Presiding) |
| Brian Nightingale | Board Member |
| Mel Orange | Board Member |
| Catherine Taylor | Board Member |
- [6] The matter was considered by the Board in Wellington on 2 February 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- [7] The following other persons were also present during the course of the hearing:
- | | |
|---------------|---------------------------|
| Aaron McIlroy | Counsel for the Registrar |
|---------------|---------------------------|

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Gemma Lawson	Board Secretary
[Omitted]	Respondent
[Omitted]	Complainant
William Hursthouse	Special Adviser to the Board
[Omitted]	Designer, Witness

Members of the public were not present.

- [8] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Board Procedure

- [9] The “form of complaint” provided by the Complainant satisfied the requirements of the Regulations.
- [10] On 20 October 2015 the Registrar of the Board prepared a report in accordance with reg 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. It included a report from William Hursthouse, Special Adviser.
- [11] On 12 November 2015 the Board considered the Registrar’s report and in accordance with reg 10 it resolved to proceed with the complaint that the Respondent has breached s 314B(a) of the Act (s 317(1)(h) of the Act) in that he had misrepresented his competence.
- [12] On 18 December 2015 at 11 a.m. a pre-hearing teleconference was convened by Richard Merrifield. The Respondent and Counsel for the Registrar were both present. The hearing procedures were explained and the Respondent’s attendance at the substantive hearing was confirmed.

The Hearing

- [13] The hearing commenced at 1.05 p.m.
- [14] At the hearing the Board was assisted in the presentation of the case by the Counsel for the Registrar.
- [15] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.
- [16] The Board notes that summonsed witness, [omitted] from the building consent authority where the work was undertaken, failed to appear. The Board considered whether or not the failure to appear would prejudice the Respondent and it determined that it would not. As such the hearing proceeded.

Substance of the Complaint

- [17] The Complainant alleged the Respondent misrepresented his competence as a licensed building practitioner and in particular had misrepresented his understanding of the building consent. The complaint and the information provided with it also raised

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a question of whether the Respondent had misrepresented his competence when he specified SuperCoat, an alternative product to Traffigard the consented product. Specifying a product requires design competencies and a design licence which the Respondent did have or not hold.

Evidence

- [18] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*¹ where Justice McGrath in the Supreme Court of New Zealand stated:

[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

- [19] The Respondent was the project manager for the build during the period to which the complaint relates. The building work was undertaken by contracted licensed building practitioners. The build encountered a number of issues and the relationship between the main contractor and the Complainant deteriorated.
- [20] The Complainant gave evidence and produced documents as to the history around the substituted product and more generally in relation to what he perceived to be a lack of understanding of the building consent by the Respondent.
- [21] In respect of the deck membrane the evidence before the Board clearly showed that the membrane applied was Supercoat and that the consent stipulated Traffigard. There was disagreement between the Complainant and the Respondent as to when the Supercoat was actually applied. At the hearing the Complainant produced hand dated photographs indicating that the work commenced on or about 21 November 2014 and was complete by 26 November 2014.
- [22] The Supercoat product was not, at the time it was applied, Code Mark approved and was initially rejected by the Council. In March 2015 it was Code Mark Approved and the Council accepted it as an alternative product.

¹ [2009] 1 NZLR 1

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- [23] At the hearing the Respondent produced email correspondence between administrative staff at [omitted] and the designer who submitted the building consent dated 28 November 2015 requesting a site amendment to the plans to allow for the substituted product.
- [24] He gave evidence that the decision was made approximately one month prior to the work commencing to substitute Supercoat as it was a superior product, they had problems with the specified product on other sites and it was being used by other [omitted] franchise operations. Once the Respondent was made aware of the Council rejecting Supercoat he stated he stopped any further work pending an outcome with the Council.
- [25] The Respondent provided extensive written submissions which he spoke to.

Board's Conclusion and Reasoning

- [26] Misrepresentation is not defined in the Act so it bears the meaning it has at common law. A misrepresentation is a representation which is false. A representation is a statement which relates to a matter of present or past fact, not one which relates to the future². It is not a statement of opinion³ or puffery⁴. A misrepresentation may be express or implied, and may be inferred from acts or conduct as much as from words.
- [27] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(a) a misrepresentation must be in relation to the licensed building practitioner's competence as that competence relates to the licensing regime under the Act. The Licensed Building Practitioners Rules 2007 (the Rules) set out the licence class competencies in schedule 1 and the Board must consider any representations in light of those defined competencies.
- [28] The Board is not, however, restricted by those the Rules when considering matters under s 314B(b) as competency under that provision can be read as also pertaining to the common dictionary definition of "the ability to do something successfully or efficiently"⁵. Accordingly a licensed building practitioner who holds a class of licence for the building work he or she is undertaking who is not able to successfully or efficiently complete the building work may be working outside of their competence. Such a situation could occur, for example, where a person holding a carpentry licence who has only ever built simple single level dwellings unsuccessfully undertakes a complex multi-level build.
- [29] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁶ as regards the threshold for disciplinary matters:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

² *Ware v Johnson* [1984] 2 NZLR 518 at 537

³ *David v TFAC Ltd* [2009] NZCA 44

⁴ *Dimmock v Hallett* (1866) 2 Ch App 21

⁵ Oxford Dictionary

⁶ [2001] NZAR 74

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- [30] There are potentially two matters before the Board. The first relates to representations as to the Respondent's competence as a project manager. The second to whether he misrepresented that he held design competencies.
- [31] The Respondent holds a carpentry licence. Competency 3 of the licence relates to carrying out, planning and scheduling carpentry work. Included in the performance indicators for that competency are:
- 3.1 Read and interpret working drawings, specifications, programme schedules and quantity lists.
 - 3.2 Order and coordinate material supply.
May include but not limited to - ability to measure, calculate and estimate quantities, order and coordinate material supply.
- [32] The performance indicators are synonymous with those expected of a project manager. As such a representation by the Respondent that he could project manage was not of itself a misleading statement of past or present fact and was therefore not a misrepresentation.
- [33] Turning to the second aspect of the complaint, whether he misrepresented that he held design competencies, the Board notes the email referred to at paragraph 23 herein and provided at the hearing was not available to it when a decision was made under reg 10 to proceed with the complaint. Had it been that it is quite possible that a decision not to proceed may have been made under reg 9.
- [34] The email made it clear that contemporaneous with the change in deck membranes being made instructions were given to the designer to prepare and submit the necessary documentation for the Council. Moreover the change was probably one that would be considered a "minor variation" under the Act and as such work would have been able to continue whilst the change was dealt with, i.e. prior approval by the building consent authority was not required.
- [35] Given these factors the Board finds that the Respondent did not make a misrepresentation as regards his ability to carry out design work.

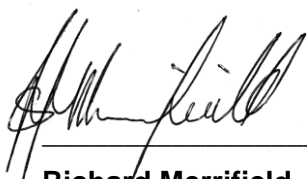
Board Decision

- [36] The Board has decided that Respondent has not breached s 314B(a) of the Act and should not be disciplined.

Right of Appeal

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

Signed and dated this 19th day of February 2016



Richard Merrifield
Presiding Member

ⁱ **Section 330 Right of appeal**

- (2) A person may appeal to a District Court against any decision of the Board—
(b) to take any action referred to in section 318.

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.