

**BPB Complaint No. C1027**

**IN THE MATTER** of The Building Act 2004

**A N D**

**IN THE MATTER** of a complaint to the Building Practitioners' Board under section 315 by [omitted] against [omitted], Licensed Building Practitioner [omitted]

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**DECISION OF THE BUILDING PRACTITIONERS BOARD**

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**1. Introduction**

1.1 [omitted] (“the Complainant”) lodged a complaint with the Building Practitioners’ Board (“the Board”) on 30 July 2012 in respect of [omitted] (“the LBP”).

1.2 The complaint alleged that the LBP has;

(a) carried out or supervised building work or building inspection work in a negligent or incompetent manner; (s 317(1)(b) of the Building Act 2004 (“the Act”)); and

(b) Misrepresented her competence (s317(1)(h) & s314B(a)); and

(c) Conducted herself in a manner which brings, or is likely to bring, the Licenced Building Practitioners’ regime into disrepute (s317(1)(i)).

1.3 The building work complained of is design work carried out by the LBP for proposed alterations and additions at [omitted].

1.4 The LBP is a Licensed Building Practitioner [omitted] in the following licence class;

(a) Design (Area of Practice 2) granted 22 March 2011.

1.5 The Board has considered the complaint under the provisions of Part 4 of the Building Act 2004 (“the Act”) and the Building Practitioners

(Complaints and Disciplinary Procedures) Regulations 2008 (“the Regulations”).

1.6 The complaint was considered by the Board in a hearing in Auckland on 10 September 2013 in accordance with the Act, the Regulations, and the Board’s “Complaints Procedure” (12 September 2011).

1.7 The following Board Members were present for the hearing;

David Clark – Board Deputy Chair (Presiding)  
Dianne Johnson – Board Member  
Richard Merrifield – Board Member  
Brian Nightingale – Board Member  
Colin Orchiston – Board Member

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

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

Kata Rangataua-Rameka – Board Secretary  
Simon Thomas - Board Appeals and Complaints Adviser  
[omitted]– Complainant  
[omitted]– Licensed Building Practitioner  
[omitted]– Representing [omitted]  
[omitted]– Witness and work colleague of [omitted]  
Stuart Wilson – Special Adviser to the Board

No members of the general public were in attendance. The Board’s deliberations were conducted in private with no other persons present.

## 2. **Board Procedure**

2.1 The “form of complaint” satisfied the requirements of Regulations 5(a) to (d) of the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008.

2.2 Dated 29 November 2012 the Registrar 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 10 December 2012 the Board considered the Registrar’s report and in accordance with Regulation 10 it elected to proceed with the complaint. The Board also requested that a Special Adviser’s report should be commissioned. The Special Adviser’s report was completed in June 2013 and circulated to the parties. The Complainant responded to various matters raised in the report by email to the Board’s Appeals

and Complaints Adviser 8 July 2013. The Respondent provided a written response dated 09 July 2013.

**3. The Hearing**

- 3.1 The hearing commenced at 10.00 a.m. on Tuesday 10 September 2013. No person present raised any issues in relation to conflicts.
- 3.2 The LBP's representative appeared on behalf of the LBP, and her work colleague attended as a witness. The Complainant presented his own submissions and responded to questions from the Board and from the LBP's representative. The LBP's representative then presented the LBP's submission, and the LBP answered questions from the Board. The Special Adviser responded to questions and statements put to him by the Complainant and the LBP's representative, and responded to questions from the Board.
- 3.3 At the conclusion of the hearing, the Board adjourned to consider the matters, and arrived at a decision "in principle" which was subsequently confirmed in detail by review and consensus.

**4. Substance of the Complaint**

- 4.1 The complaint can be summarised as follows:
- (a) On the basis of representations made in a "TradeMe" advertisement, and subsequent discussions, the Complainant contracted the LBP's company, and/or the LBP, for architectural design work for alterations to a house at [ommitted]. This engagement followed the resolution of site planning issues in respect of site carparking requirements.
  - (b) The design was for the conversion of a double carport so that half of it became a garage and laundry, and the other half a "sleep-out" comprising a living space and bathroom.
  - (c) The LBP duly considered the information available to her, and prepared the necessary documentation for a building consent application. The consent was issued by the Auckland Council, and arrangements were made for the construction work.
  - (d) The construction work was to be undertaken under the guidance of a project manager. It then became apparent that there were differences between the drawings and the work required to be done on site: firstly in respect of the construction of the floor slab in relation to the existing slab levels and ground levels; and secondly the absence of suitable support for the existing roof after the relocation of the wall beneath.

- (e) In the ensuing communications, the services of the LBP and the project manager were terminated. The Complainant sought the computer files of the LBP's documentation, but the LBP withheld them. The work has since been redesigned and built by others to a revised plan.
- (f) In essence, the Complainant's view is that he has been put to unnecessary effort and expense as a result of the LBP's incompetence and/or misrepresentations as to that competence.

## 5. **The LBP's Evidence**

### 5.1 The LBP's submissions can be summarised as follows:

- (a) She received a set of plans from the Complainant which he indicated would be adequate for her documentation. Lacking vital information, she was strongly dissuaded from attending on site and instead was reliant upon measurements provided by the Complainant. There was an inconsistency in the information available to her, and under the circumstances she made an assumption about the accuracy of it.
- (b) Upon receipt of building consent and the appointment of the project manager, the LBP became aware that the floor slab of the garage was sloping approximately 300mm from the rear down to the front (over about 5 metres), and was more or less level with the adjacent ground level.
- (c) She acknowledged that her documentation did not reflect the existing slope in the floor, nor the measurements provided by the Complainant. However, she considered that his reluctance to allow her onto the site to confirm information compelled her to make an assumption, which was subsequently proven wrong. Under the circumstances, she had been neither negligent nor incompetent.
- (d) She had annotated the drawings with a caution to check all dimensions before commencing work. She had also noted on the drawings the required vertical clearance between the slab level and the existing ground level. She submitted that because a building consent had been issued on that basis, she had met the necessary requirements in relation to slab levels.

### 5.2 The LBP's evidence and submissions in respect of the structural support of the roof can be summarised as follows:

- (a) She acknowledged that her drawings did not show the necessary support, but described this as an oversight arising out of the pressure brought to bear upon her by the Complainant.

- (b) When the error became known to her, she consulted with a structural engineer.
- 5.3 In respect of both the floor slab and roof support errors, she was – at the time - happy to correct the documentation and to meet the costs (if any) arising out of an application for an amendment to the building consent. However, at the same or similar time the Complainant instructed changes to the cladding and layout elsewhere in the house, and required that she undertake that separate and additional work at no fee. The LBP had sought a fee of \$200 for that work.
- 5.4 In the opinion of the LBP, the Complainant’s quest to minimise costs was the reason for both his reluctance to allow her on site to undertake the necessary information gathering, and for the later changes by other designers.
- 5.5 The LBP’s evidence and submissions in respect of the allegation of misrepresentation can be summarised as follows:
  - (a) She worked for – or with – a company which (at the relevant time) advertised on “TradeMe” to the effect that they were able to undertake the full range of architectural and engineering work associated with domestic scale work. That advertisement described her as the contact person.
  - (b) She had made it clear to the Complainant that she was an architectural designer, but if any engineering work was required, she was able to arrange for it. At no time did she communicate that she would personally undertake such work.

## 6. **Special Adviser’s Report**

- 6.1 The role of the Special Adviser generally is to assist the Board to identify the issues. In doing so the Special Adviser may interview the relevant parties, and any persons who may be potential witnesses. The Special Adviser is not an expert witness in the hearing, and any resulting report or comments are not evidence as such. The opportunity is given (through the Chair) for the Special Adviser and the report to be questioned by the parties and the Board.
- 6.2 The Board received the Special Adviser’s report. It was thorough, considered the performance of the LBP both in relation to the building code and the performance indicators of her licence, and provided a useful context for the Board to reconcile the conflicts in evidence.

## 7. Board's Conclusions and Reasoning

7.1 In the Board's view this complaint appears to have been brought on the basis that the Complainant has been motivated by the perceived losses arising out of the performance of the contract of service with the LBP, rather than the actual competency of that performance.

7.2 Whilst the Board may consider issues of the performance of a contract between a licensed building practitioner and a client, it must do so in the context of whether or not the LBP was negligent and/or incompetent in respect of the building work (in this case, design work) carried out or supervised.

7.3 The Board, in considering the issues of negligence and incompetence, is guided and assisted by the case of *Beattie v Far North District Council*<sup>1</sup> in which Judge McElroy made the following findings:

*"...the term negligence...focuses on a practitioner's breach of their duty in a professional setting. The test as to what constitutes negligence... requires as a first step in the analysis, a determination of whether or not, in the Tribunal's judgment, the practitioner acts or omissions fall below the standards reasonably expected of a... practitioner in the circumstances of the person appearing before the Tribunal. Whether or not there has been a breach of the appropriate standards is measured against standards of a responsible body of the practitioner's peers."*

7.4 Furthermore, Judge McElroy stated<sup>2</sup>:

*"...a "negligent manner" of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence (or deficient in the required skills)..."*

*"...negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a difference focus – negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of reasonably expected ability or skill level..."*

7.5 There are four issues that the Board considers to be at the heart of this complaint:

- (a) Was the LBP acting competently when making decisions about the slab design levels?
- (b) Did the assumptions thus made amount to negligence?
- (c) Was the LBP negligent in not documenting the re-support of the roof?

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<sup>1</sup> Supra at para 41

<sup>2</sup> Supra at paras 44 and 46

- (d) Did the LBP misrepresent her competence in the TradeMe advertisement or otherwise?
- 7.6 In respect of 7.5(a), under other circumstances, the Board would have expected the designer to be the person determining how to gather the necessary information, and the extent of the investigations necessary for that purpose. If the designer relies on information provided by others, it would normally be on the basis that they have some certainty about the source, and/or that the consequences of the information being wrong have been assessed and accepted.
- 7.7 In this case, balancing the conflicting evidence, the Board accepts that the Complainant did not allow the LBP the necessary freedom to carry out the tasks required by the contract for services between them. It follows that the Complainant is at least partly responsible for the decisions which followed. The Complainant did not then provide the LBP with a reasonable opportunity to rectify matters.
- 7.8 In respect of 7.5(b), another designer may have come to a different decision, but this designer chose to rely on the drawings prepared some years earlier by a competent draftsman, and provided to her by the Complainant for the purpose, in preference to the information provided “first hand” by the Complainant. As it turns out, although that assumption was wrong, it was based on a reasonable (or at least justifiable) consideration of the issues. Applying the tests proposed by Judge McElroy, those assumptions were not negligent.
- 7.9 In respect of 7.5(c), the LBP’s statements that she was under duress suggest that showing (or not showing) the beam on the drawings was a matter which only arose at a point in time, without the opportunity to review it later. In fact, a competent designer would be considering this issue at several stages of the documentation process: at least in the preparation of the demolition plan, in the repositioning of the wall, in sizing the lintels, in drawing the sections, and in detailing the eaves.
- 7.10 It seems that the LBP never considered this issue, despite drawing details of the eaves where it would immediately become apparent. Whilst there are other aspects of the drawings which may also cause concern, this particular aspect goes to the level of basic construction understanding and competence, and shows a lack of care in carrying out and checking the drawings. On this issue, the Board is of the view that the standard of performance of the LBP fell below that expected of an LBP holding a Design AOP 2 licence.
- 7.11 The Board notes that the LBP accepted that she had made errors in her documentation, and immediately they became apparent was prepared to make good at no inconvenience to the Complainant. However, as for the slab issues, the Complainant did not provide the reasonable opportunity for the LBP to rectify the matter. Although not having a direct bearing on the considerations of competence, it is reasonable to

note that the failures did not lead to additional costs: they were in the nature of work which was always required whether or not it had been shown on the drawings. There was no “loss” incurred by the Complainant, and the consequences were minor.

- 7.12 In respect of 7.5(d), the evidence before the Board does not establish that the LBP held herself out as an engineer. Whilst the TradeMe advertisement certainly left room for improvement, the Board is of the view that this was a matter of language and poor communication rather than deliberate misrepresentation. Accordingly the allegation of misrepresentation is not proven.

## 8. **Conclusion**

- 8.1 Having found that the LBP failed to meet the expected standards of due care in respect of a particular item, the Board is required to consider the seriousness of that failure before concluding that it meets the test of negligence set out in Judge McElroy’s judgement.
- 8.2 The Board has considered the body of work and the accumulated experience set out in the LBP’s submission and the references from clients and past employers therein. It has observed the conduct of the LBP during the hearing, and the depth of knowledge and experience thus demonstrated. Clearly there were mistakes made in the documentation of this project, and these were acknowledged by the LBP. The LBP’s subsequent offer to rectify the issues at no cost to the Complainant was not taken up.
- 8.3 The Board has formed the view that the failures exhibited in this complaint alone do not establish that the LBP is either generally incompetent, or generally negligent.
- 8.4 The Board thus concludes that the LBP is neither incompetent nor negligent in respect of the complaint which has been laid by the Complainant.
- 8.5 The Board also finds that the LBP did not misrepresent her skills or experience.
- 8.6 It follows that the Board does not consider that the LBP has brought the scheme into disrepute.
- 8.7 However, as in past complaints, the Board notes that some of the difficulties on this project arise because the contract between the parties has not been adequately defined. When entering into a contract, there should be clear guidelines and performance criteria including (at least) an agreed scope of works, arrangements to deal with additional or unforeseen issues, and the maintenance of on-going communications. An unclear, imprecise and inadequate contract is a recipe for future dispute.

9. **Penalty**

9.1 S.318(1) of the Act provides for a range of disciplinary penalties which the Board may apply in these circumstances.

9.2 As a result of the complaint not being made out, no penalty is imposed.

10. **Costs**

10.1 Under s. 318(4) of the Act, the Board has the power to order payment of the reasonable costs and expenses of, and incidental to, the Board's the inquiry.

10.2 As a result of the complaint not being made out, the Board does not award costs in this matter.

11. **Right of Appeal**

11.1 The right to appeal Board decisions is provided for in s 330(2) of the Building Act 2004.

A handwritten signature in blue ink, appearing to be 'D J Clark', written over a horizontal line.

Signed: \_\_\_\_\_  
D J Clark – Presiding Member

Dated: 4 October 2013