

Before the Building Practitioners Board
At [omitted]

BPB Complaint No. C2-01111

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 26 August 2014 in respect of [omitted], Licensed Building Practitioner (the Respondent).

1.1 The complaint alleged the Respondent 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).

1.2 The Respondent is a Licensed Building Practitioner with Carpentry and Site Area of Practice 2 licences issued 1 March 2012.

1.3 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).

1.4 The following Board Members were present at the hearing:

David Clark	Chairman (Presiding)
Chris Preston	Deputy Chairman
Mel Orange	Board Member
Richard Merrifield	Board Member
Catherine Taylor	Board Member

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

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

Ella Tait	Registrar's Representative
Gemma Lawson	Board Secretary
[Omitted]	Respondent

[Omitted]	Legal Counsel for the Respondent
Geoff Hardy	Special Adviser to the Board
[Omitted]	Witness

Members of the public were not present.

- 1.7 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 regulations 5(a) to (d) of the Regulations.
- 2.2 On 16 December 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 5 February 2015 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 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); and
 - (c) 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).
- 2.4 The Board requested a Special Adviser be appointed to prepare a report. Geoff Hardy’s report was received and circulated to the Respondent and Complainant.
- 2.5 On 28 May 2015 at 10.30 a.m. a pre-hearing teleconference was convened by David Clark. The Respondent, his legal counsel and the Registrar’s Representative were present. The hearing procedures were explained and the Respondent’s attendance at the substantive hearing was confirmed.

3 The Hearing

- 3.1 The hearing commenced at 10.30 a.m.
- 3.2 At the hearing the Board was assisted in the presentation of the case by the Registrar’s Representative.
- 3.3 The Respondent, Special Adviser and witness were sworn in, their evidence was presented and they answered questions from the Board.

4 Substance of the Complaint

- 4.1 The allegations of disciplinary offending arose from the Respondent being convicted of offences in the [omitted] for adding an additional bedroom to residential dwelling units post their completion. These actions raised questions as to whether the work

was consented, whether the Respondent had been negligent and or incompetent, and whether he had brought the regime into disrepute.

5 Evidence

- 5.1 The Board was assisted in its inquiry by the sentencing notes of [omitted] in the prosecution of the Respondent in the [omitted]¹.
- 5.2 The Board was also provided with a summary of events by the Special Adviser and detailed submissions from the Respondent's Counsel.
- 5.3 During 2012 and 2013 the Respondent carried out work at three properties at [omitted], [omitted] and [omitted]. The Respondent is a joint owner of two of the properties: [omitted]. The property at [omitted] is owned by another person.
- 5.4 The consented plans for each of the properties were for two semi-detached units on each; one unit with three bedrooms, the other with two making a total of five habitable rooms per property. The [omitted] District Plan allows for no more five habitable rooms per property as a permitted activity in the zone where the units were built.
- 5.5 Approximately one week after code compliance certificates were issued the Respondent converted a living space into a bedroom in one unit on each of the three properties by adding a door into a passageway to create a private space which could be used as a bedroom. Under the [omitted] District Plan this made the room a habitable room. Each of the three properties then had six habitable rooms.
- 5.6 No resource or building consents were obtained to add a sixth habitable room to the properties.
- 5.7 In January 2014 the [omitted] investigated a complaint regarding a breach of the District Plan and charges were laid against the Respondent in the [omitted]. On 18 August 2014 the Respondent pleaded guilty to two charges of use of land without obtaining resource consent in contravention of ss 9(3) and 338(1)(a) of the Resource Management Act 1991, and rule 8.9.1(i) of the [omitted] District Plan. He was convicted of both. The charges related to the properties in which he had joint ownership.
- 5.8 Additional rent from the sixth bedroom for the 2014 financial year was: [omitted] \$8580, [omitted] \$7800 and [omitted] \$7260.
- 5.9 The Respondent was fined \$7500 in the Environment Court for each of the properties at [omitted] and [omitted]. He was also to pay solicitor costs of \$113 and Court costs of \$130.
- 5.10 The Respondent through Counsel, accepted the evidence as set out above. The focus of his submissions was on whether the evidence was a breach of sections 317(1)(b), 317(d) and in particular, 317(1)(i) of the Act.

6 Board's Conclusion and Reasoning

Legal Principles

- 6.1 The Board was assisted by the report provided by the Special Adviser and the submissions received from the Respondent's Legal Counsel.

¹ *DCC v Kennedy & MacMillan* DC CRI-2014-012-001706

Negligence/Incompetence

- 6.2 In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board must have regard to the case of *Beattie v Far North Council*². Judge McElrea has provided useful guidance on the interpretation of these terms:

“...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.”

- 6.3 Judge McElrea continues:

“...However, in a case brought to my attention by Mr Corkill, Gendall J stressed that not all negligence or malpractice amounts to professional misconduct but only “behaviour that falls seriously short of what is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness”. While the legislation I am considering does not require a finding of “professional misconduct”, this is a timely reminder that disciplinary sanctions should not be applied unless there is a serious issue being addressed. (The fact that no loss or damage has occurred can be very relevant in that context but is not determinative of the matter.)...”

- 6.4 Furthermore Judge McElrea stated:

“...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...”

Contrary to a Building Consent

- 6.5 In Board decision C1030 the Board found that a licenced person who commences or undertakes building work without a building consent would, in such circumstances, be considered to be both negligent and incompetent.
- 6.6 Section 40(1) of the Act states “a person must not carry out building work except in accordance with a building consent”. Section 40(2) makes it an offence not to comply with s 40(1). Section 40 is fundamental to the operation of the Act and enforcement of the Code. The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large.

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

- 6.7 The fundamental nature of the s 40 is also borne out by it being a strict liability offence to carry works without a building consent and the severity of the penalties available to a court on conviction of a person under it.
- 6.8 It is to be noted that whilst s 317(1)(d) of the Act refers to work that does not comply with a building consent the Board has applied a liberal interpretation to the section so as to give effect to the purpose of the Act. The Board's interpretation of the section is that work that does not comply with a building consent includes work undertaken without a consent.

Bringing the Regime into Disrepute

- 6.9 The disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board was provided with references to findings made in those occupations by the Special Advisor.
- 6.10 The Board has also noted the Regulatory Impact Statement issued by the Department of Building and Housing. It considered the provision was needed to catch "poor behaviour" rather than incompetence. It included the example the "Fair-Go" type complaints where a builder had a pattern of taking deposits [from] the elderly for building work but never turns up to complete the job.
- 6.11 The Board considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed builder. The Board notes that in the professions listed above there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example in the High Court held in *Davidson v Auckland Standards Committee No 3*³ a company director, who, in the course of his duties as a director was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time, however, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.
- 6.12 Similarly in a determination of the *Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants*⁴, convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.
- 6.13 Counsel for the Respondent submitted that the regime under the Act was principally aligned with the enforcement of the building code. Reference was made to section 14E of the Act which outlines the responsibilities of a builder including that of "ensuring ... restricted building work is carried out in accordance with the requirements of the Act". The submission was that as the work in question was not "restricted" the Respondent was not under an obligation, as a licensed person, to comply with the Act.
- 6.14 The Board notes that s 14E must be read in conjunction with section 14A of the Act. It states that ss 14B to 14G:

³ [2013] NZAR 1519

⁴ 24 September 2014

- (a) *are not a definitive and exhaustive statement of the responsibilities of the parties but are an outline only:*
- (b) *are for guidance only, and in the event of any conflict between any of those sections and any other provision of this Act, the latter prevails:*
- (c) *do not reflect the responsibilities of the parties under any other law or enactment or any contract that may be entered into between them [[and are not intended to add to the existing responsibilities of the parties]].*

6.15 On the basis of section 14A, the authorities cited and the Regulatory Impact Statement the Board does not consider the narrow interpretation advanced by the Respondent can be sustained. The Board determines that the conduct complained of in s 317(1)(i) does not have to be conduct of a licensed building practitioner in the course of carrying out restricted building work and that conduct outside of the practitioner's licensed occupation can amount to conduct which brings or is likely to bring the regime into disrepute.

6.16 Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is "disrepute". The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"⁵ and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*⁶ the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*⁷

6.17 Counsel for the Respondent submitted that the standards to be expected of a licensed builder are less than those of other professions where disrepute provisions are enacted as those other professions have character or fit and proper person criteria for licensing which are not included in the provisions for building practitioners. He further submitted that to judge a licensed builder on general standards of poor behaviour would be to open the flood gates for complaints.

6.18 The Board does not accept that submission. It is noted that various licensing schemes contain varying combinations of entry criteria and or disciplinary provisions to set and maintain standards. Those with entry criteria tend to have well defined and set entry paths to admission and are what could be described as mature schemes. The licensing environment for building, however, is new, is still developing, and is working toward a unified qualifications based system of entry. Imposing entry criteria beyond competency based criteria in a new licensing system looking to licence upward of 20,000 persons in a short span of time would have been impracticable. Rather Parliament has chosen to enact disciplinary offences and to include a disciplinary provision of bringing or likely to bring the regime into disrepute to ensure standards can be set and maintained post licensing. As such the Board does not see

⁵ Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

⁶ [2012] NZCA 401

⁷ [2012] NZAR 1071 page 1072

a lack of entry criteria as making the standards expected of licensed builders as distinguishable from those of other licensed occupations.

- 6.19 As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect the Special Adviser brought the Board's attention to various cases where disrepute was upheld which included:
- criminal convictions⁸;
 - honest mistakes without deliberate wrongdoing⁹;
 - provision of false undertakings¹⁰; and
 - conduct resulting in an unethical financial gain¹¹.
- 6.20 The Special Adviser also highlighted a number of cases where the conduct related to specific or important tasks a licensed person is required to complete within their occupations. Often such behaviour is measured within the context of a code of conduct or ethics. A code is yet to be established within the Building Act although provision for one is made. What is clear from the cases though is that unethical or unprofessional conduct can amount to disreputable conduct.

Board's Findings – Negligence/Incompetence and Building Consent

- 6.21 The Board finds, on the basis of the evidence received and its previous findings in C1030, that the Respondent's has been negligent in failing to obtain a building consent and has carried out or supervised building work that does not comply with a building consent.
- 6.22 Ordinarily the building work undertaken, the insertion of a door in a pre-formed opening, would not require a building consent as it would have fallen within the exemptions in Schedule 1 of the Act pursuant to s 42A. However, in this instance the condition that the work will not breach any other enactment in s 42A(2)(c) applies as the work was in breach of the Environment Act.
- 6.23 Counsel for the Respondent sought to distinguish C1030 on the basis that the work undertaken in that case was restricted building work and submitted the disciplinary provisions should only apply to such work. C1030 involved the construction of a deck which required a consent. It was not, however, restricted building work. Moreover the Board has, in numerous cases, found that the disciplinary provisions of the Act which relate to building work apply to licensed persons irrespective of whether the work is restricted work (which requires a licence) or not. There are also disciplinary provisions which apply solely to restricted building work such as s 317(1)(c) and as such had Parliament intended to restrict the application of s 317(1)(d) to restricted building work they would have explicitly done so.

Board's Findings – Bringing the Regime into Disrepute

- 6.24 The Board finds, on the basis of the evidence received and the authorities cited, that the Respondent has deliberately attempted to circumvent the district plan to obtain a

⁸ *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519

⁹ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

¹⁰ *Slack, Re* [2012] NZLCDT 40

¹¹ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

financial gain and that this is conduct which is likely to bring the regime into disrepute.

6.25 In this respect the Board notes the sentencing comments of Judge B P Dwyer that:

*There is a feature of this offending which is particularly significant in my view, and that is the element of culpability. I concur with Ms St John's submission that your culpability is in the medium to high range. Indeed, I go further and think it is in the high range.*¹²

6.26 His honour went on to state:

*It is impossible to reach any conclusion other than that your actions were deliberate and intended to deceive the Council that District Plan requirements were being complied with.*¹³

*Further, it is apparent that there was a direct financial benefit to you in avoiding application of the Rules in establishing a sixth habitable room in each property.*¹⁴

6.27 The Board considers the very direct connection between the conduct complained of and the building trade to be an aggravating feature. Viewed objectively the deliberate attempt to circumvent the District Plan would lower the reputation of the licensed building regime.

6.28 The Board is of the view that licensed persons should operate within the bounds of district plans. These are designed to set down frameworks for the management of natural and physical resources and to ensure development is undertaken in a manner which the infrastructure can support. For a licensed person to deliberately set out to circumvent them for personal gain has the potential to reflect poorly on the regime as a whole.

7 Board Decision

7.1 The Board has decided that Respondent has:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner;
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent; and
- (c) 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 and should be disciplined.

8 Disciplinary Penalties

8.1 The grounds upon which a Licenced Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Act.

8.2 The Board invites the Respondent to make written submissions on the matter of possible disciplinary penalties, up until close of business on 4 p.m. 23 July 2015. Such submissions may include information on his personal and financial circumstances.

¹² DCC v Kennedy & MacMillan DC CRI-2014-012-001706 para 15

¹³ Ibid para 16

¹⁴ Ibid para 17

8.3 The Board would also seek submissions on whether the s 318(3) of the Act applies as a result of the fines imposed by the Environment Court.

9 Costs

9.1 Under s 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.

9.2 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 4 p.m. 23 July 2015. Such submissions may include information on his personal and financial circumstances.

10 Publication of Name

10.1 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.

10.2 The Board invites the Respondent to make written submissions on the matter of publication by 4 p.m. on 23 July 2015.

11 Right of Appeal

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

Signed and dated this 2nd day of July 2015



David Clark
Presiding Member