

Before the Building Practitioners Board  
At [omitted]

**BPB Complaint No. C2-01158**

**IN THE MATTER OF**

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315

**AGAINST**

[Omitted], Licensed Building Practitioner No. [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 25 February 2015 in respect of [omitted], Licensed Building Practitioner (the Respondent).

1.1 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 (s 317(1)(b) of the Act); and
- (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).

1.2 The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 4 March 2011.

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:

Chris Preston	Deputy Chairman (Presiding)
Brian Nightingale	Board Member
Mel Orange	Board Member
Dianne Johnson	Board Member

1.5 The matter was considered by the Board in [omitted] on 2 September 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
Graeme Calvert	Special Adviser to the Board
[Omitted]	Witness for the Respondent
[Omitted]	Witness, Stonewood Project Manager

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 the Regulations.
- 2.2 On 15 May 2015 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 28 May 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); and
  - (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).
- 2.4 The Board requested a Special Adviser be appointed to prepare a report. Graeme Calvert’s report dated 29 July 2015 was received and circulated to the Respondent and Complainant.
- 2.5 On 5 August 2015 at 11.30 a.m. a pre-hearing teleconference was convened by Chris Preston, Deputy Chair. The Respondent and Registrar’s Representative were both 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 11.30 a.m.
- 3.2 At the hearing the Board was assisted in the presentation of the case by the Registrar’s Representative.
- 3.3 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 substance of the complaint was that the Respondent failed to identify the correct boundary pegs when setting out the dwelling which resulted in it being built in an incorrect position and partially over a neighbouring boundary.

## 5 Evidence

- 5.1 A building contract was entered into between the Complainant and [omitted]. The Respondent was a subcontractor to [omitted]. Work commenced in August 2014.
- 5.2 On about the 4 or 5 September 2014 a site meeting took place between the Respondent and a Stonewood project manager. The meeting was to discuss the site set out. Boundaries were ascertained and walked. Both the Respondent and the project manager were adamant they could only find one boundary peg in the area where the boundary issue arose.
- 5.3 When setting out string lines and taking diagonals the Respondent queried the boundaries with the project manager and again following the set-out when the Respondent noticed a measurement discrepancy he alerted the project manager. A site meeting took place and the Respondent held off doing further work awaiting instructions from the project manager. This occurred on a Friday and on the following Monday the project manager advised the Respondent to continue. The project manager, when questioned, considered the set out was within the allowed tolerances which is why he issued the instruction. He stated he did not make any further enquiries in the intervening period.
- 5.4 Following construction a fencing contractor, whilst measuring the boundaries noticed an issue with them and, following a site survey from a local cadastral Surveying company, an incorrect set out was confirmed.
- 5.5 The error arose from the Respondent and project manager using a wrong boundary peg as a reference point. When identifying the boundary pegs they had not confirmed the numbering on each to ascertain which lot they related to. The Special Adviser noted in this respect that:

*“The correct survey peg should have been easily identified, as it would have had a lot number etched into the site side face of the peg, similar to other survey pegs identified in the area. Upon finding the incorrect peg that would not have had this specific marking, the respondent/project manager were ‘on notice’ to ensure further inquiry was made of a Registered Surveyor as to the accuracy of the boundary set out.”*

- 5.6 The project manager stated he had received an electronic copy of the building consent file. This included a copy of the title. Neither the Respondent nor the project manager said they had seen a copy of the deposited plan associated with the title. The deposited plan shows a three metre strip of land between that lot and the neighbouring [omitted]. The incorrect peg used was that between [omitted] (as indicated by the annotated blue arrow below). The peg between [omitted] should have been used.

[Picture omitted]

- 5.7 The result of the set-out error was the dwelling’s soffit and southeast roof corner was positioned over the neighbouring [omitted] and the dwellings position had rotated in a southerly direction by approximately 4.0 degrees.
- 5.8 The Special Adviser in his report noted:

*“Following the incorrect identification of the southeast corner survey peg, the east boundary would have measured 3m longer than the site plan depicts*

*(27.39m) and the south boundary would increase in length also. This should have been obvious if the correct measurement checks had been undertaken.”*

- 5.9 The building consent required that the building be set out in accordance with the consented documents. The set out error meant it had not. In this respect the Special Adviser noted:

*“The site plan, drawing sheet 2 clearly sets out all perimeter boundaries and the associated dimensional lengths. The specification clearly sets out the requirements for site position, building consent compliance, statutory obligations, building consent requirements and set out and set out and datum.”*

- 5.10 The Special Adviser also noted the Council records did not show whether the required siting and foundation inspection had been called for or carried out. At the hearing the Respondent gave evidence and produced his diary to show that the required siting and foundation inspection had been called for and had occurred. The Respondent also gave evidence that the council inspector did not check any of the measurements.
- 5.11 The dwelling failed its final inspection as a result of the siting issue.
- 5.12 When the Respondent was questioned on the set out, he stated that had it been one of his own jobs (as opposed to a sub-contract to [omitted]) he would have retained the services of a surveyor prior to proceeding any further with the job. In this instance he did as he was instructed and carried on notwithstanding the misgivings. The project manager also stated that [omitted] now routinely use surveyors for set out to ensure the set out is correct.

## **6 Board’s Conclusion and Reasoning**

### **Negligence and Incompetence**

- 6.1 In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*<sup>1</sup>. 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.”*

- 6.2 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*

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<sup>1</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

*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.)...*

6.3 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...”*

6.4 This is not a case where the competence of the Respondent was called into question. Rather it is a question of alleged negligence – the failure to correctly identify the correct boundary peg as, but for that failure, the set out would have proceeded correctly. The question for the Board is whether the conduct amounted to mere inadvertent error, oversight or carelessness or whether it went beyond that and constituted negligence. In this instance the consequences of the Respondent’s failing have been significant but what must be considered by the Board is what was the degree or seriousness of the Respondent’s negligence.

6.5 In this case the Respondent was operating as a subcontractor. The Board notes there was a degree of confusion over the roles and responsibilities of the Respondent and the project manager representing the main contractor. On two occasions the Respondent asked the project manager, who was also a Licensed Building Practitioner and was representing the head contractor, for verification of the boundaries. He stopped construction whilst waiting for verification and only proceeded on receipt of it. As such, in the Board’s view, the Respondent did take some steps to clarify the boundary issue and it was reasonable, in the circumstances of this case, for him to place some reliance on the assurances given. Accordingly, the Board finds that the degree of negligence does not meet the seriousness threshold in the *Beattie* case.

6.6 The Board does remind the Respondent though that as the licensed person he is the one who carries the responsibilities under the Act and who is liable for contraventions of it. He cannot abrogate to the head contractor.

### **Contrary to a Consent**

6.7 Section 40(1) of the Act states “a person must not carry out building work except in accordance with a building consent” and s 40(2) makes it an offence not to comply with s 40(1). The fundamental nature of s 40 is 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 Section 317(1)(d) of the Act, like s 40 is a strict liability offence albeit one that only applies to licenced persons. As with s 40 it is only necessary to show that there was “building work” as defined in the Act and it had not been carried out in accordance with the building consent.

6.9 In this case there is no question the Respondent was carrying out building work and there is clear evidence, in respect of set-out, that the building consent has not been complied with.

- 6.10 Given the above factors the Board finds the Respondent has contravened s 317(1)(d) of the Act.

## **7 Board Decision**

- 7.1 The Board has decided that the Respondent has not carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- 7.2 The Board has also decided that the Respondent has carried out building work that does not comply with a building consent (s 317(1)(d) of the Act) 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<sup>i</sup>.
- 8.2 The Board invites the Respondent to make written submissions on the matter of possible disciplinary penalties, up until close of business on 14 October 2015. Such submissions may include information on his personal and financial circumstances.

## **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 14 October 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 14 October 2015.

## **11 Right of Appeal**

- 11.1 The right to appeal Board decisions is provided for in s 330(2) of the Act<sup>ii</sup>.

Signed and dated this 23<sup>rd</sup> day of September 2015



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**Chris Preston**  
Presiding Member

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**<sup>i</sup> Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
    - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
  - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*
  - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

**<sup>ii</sup> 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.*