

Before the Building Practitioners Board

	BPB Complaint No. C2-01207
Licensed Building Practitioner:	Jeffrey Bell (the Respondent)
Licence Number:	BP 123644
Licence(s) Held:	Carpentry and Site AOP 1

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Wellington
Hearing Type:	On the Papers
Hearing Date:	11 September 2018
Decision Date:	4 October 2018

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design AOP 2

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Board Decision:

The proceedings are stayed. No further action will be taken.

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Introduction

- [1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted].
- [2] The Board made a decision that the Respondent had failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act).
- [3] The Respondent appealed the Board’s decision to the District Court². The appeal was two-fold. Firstly that the Board’s investigation and hearing process was flawed. The second was that there was not a breach of section 87 of the Act. The District Court found that the Board’s procedures were not flawed but that it had erred in deciding that the Respondent had an obligation to issue a record of work and as such it overturned the Board’s decision.
- [4] The Ministry of Business Innovation and Employment (MBIE) appealed the District Court decision to the High Court³ on a point of law. The High Court allowed the appeal specifically finding that:
- [50] For the foregoing reasons, I respectfully disagree with the conclusions of the District Court in Ali v Kumar and in the decision under appeal insofar as they engage the issued I have discussed. In my view the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work.*
- [5] The High Court remitted the matter back to the Board:
- [53] As indicated, one of the issues raised on appeal to the District Court was not determined—namely whether the work fell within Schedule 1 to the Building Act, (which defines building work for which a building consent is not required). If it did, then Judge Gibson held that a record of work was itself not*

¹ The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

² *Bell v Lu* [2017] NZDC 23847

³ *Ministry of Business Innovation and Employment v Bell* CIV-2017-404-3031, [2018] NZHC 1662

required. Had it been necessary he would have remitted that matter to the Board. The question is whether I should do likewise.

[54] Given the fact that Mr Bell was exonerated of negligence, the very small penalty imposed by the Board for the breach of s 88 and the extent to which he has since been caught up in something of an arcane legal debate, I have given consideration to whether I should exercise my reserve powers under s 300(e) to “make any other order that the Court considers justice requires”, by staying the proceedings and remitting the penalty.

[54] Regrettably, I do not consider relevant Court of Appeal authority would support such a course. Although the power in s 300(e) does include a power to stay and has been invoked in circumstances where the relevant sentence has already been served and there would accordingly be no useful purpose in a retrial, the Court of Appeal has on another occasion noted that a stay will only be appropriate in “rare and exceptional circumstances”. These are not such circumstances. Rather the highest I can put it is that Mr Bell has had to endure the significant inconvenience of a protracted dispute and appeal process, at least part of which is not of his making.

[55] Somewhat reluctantly, therefore, I remit the issue, identified in [53] above, to the Building Practitioners’ Board.

[6] As noted above the specific matter remitted was that identified by Justice Muir in paragraph [53] of his decision namely:

... whether the work fell within Schedule 1 to the Building Act, (which defines building work for which a building consent is not required).

Hearing Procedure

[7] The Board decided that there was sufficient evidence in the materials already before the Board on which to make a decision on the matter which has been referred back to the Board. A Board Resolution to this effect was issued on 24 July 2018.

[8] On 2 August 2018 the Respondent’s Legal Representative wrote the Board questioning the decision to proceed to a hearing. The Representative submitted that the Board could resolve under regulation 9 of the Complaints Regulations not to proceed with a hearing.

[9] Regulation 9 of the Complaints Regulations must be read in conjunction with regulation 10 which states:

10 Board’s action after receiving Registrar’s report

(1) *When the Board receives the Registrar’s report, the Board must decide—*

(a) *to proceed no further with the complaint because regulation 9 applies; or*

- (b) *to proceed with the complaint.*
- (2) *If the Board decides to proceed with the complaint, it must hold a hearing.*

- [10] It is clear that regulation 9 applies when the Registrar's Report is being considered. In the present case that occurred prior to the Board making its decision that was subsequently appealed. The matter has been referred back to the Board for reconsideration of whether the work fell within Schedule 1 to the Building Act, not for reconsideration as to whether the matter should have proceeded to a hearing or not.
- [11] The Board does not, therefore, agree that it has a discretion not to proceed to a hearing under regulation 9 of the Complaints Regulations.
- [12] The Respondent's Representative also made other submissions which will be dealt with in due course.
- [13] Hearing submissions were received from both the Complainant and the Respondent's Representative and were considered as part of the hearing.

Stay of Proceedings

- [14] The Board is mindful of the comments made by the High Court as regards the matter proceeding to a further hearing. The Board also notes that whilst the Respondent has been caught in a legal debate, he was the original appellant.
- [15] The High Court considered a stay of proceedings and noted that a stay is only exercised in rare and exceptional circumstances. Notwithstanding the Board has decided to consider whether circumstances exist, within its jurisdiction, for it to be able to consider a stay and whether it has the jurisdiction to impose one.
- [16] Looking first at the question of jurisdiction clause 27 of Schedule 3 of the Act provides that the Board may regulate its own procedures. . In *Castles v Standards Committee No.3*⁴ the High Court held that the disciplinary jurisdiction under the Lawyers and Conveyance Act 2006 which contains the same provision was a summary jurisdiction. It therefore follows that the Board has the power to determine preliminary applications and challenges in advance of the substantive hearing. In *Orlov v National Standards Committee 1*⁵ the High Court put it as:

[29] Parliament has provided that the Tribunal is free to set its own procedure. Obviously it must do so in a way that is consistent with the discharge of its statutory functions and does not cut across any express statutory or regulatory provisions. Subject to those constraints, the Tribunal has been given a high degree of procedural flexibility in the exercise of its important statutory functions.

⁴ [2013] NZHC 2289

⁵ [2013] NZHC 1955

- [17] The Board's functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners⁶. The Complaints Regulations set out the procedures to be used. They stipulate that a hearing must be held if regulation 9 does not apply. In terms of procedure regulation

14 Nature of hearing

- (1) *The Board, when exercising the power under section 284 of the Act to regulate its own procedure for making decisions, must be guided by the principle that it should avoid unnecessary formality.*
- (2) *Subclause (1) does not limit section 283 of the Act, which includes requirements for the Board to comply with the rules of natural justice and give written notices of, and reasons for, its decisions.*
- [18] Given the above the Board considers that it does have the jurisdiction to consider whether a stay of proceedings should be issued and that to do so would not cut across any statutory or regulatory provisions.
- [19] Turing to consideration of a stay, one can be granted to prevent an abuse of process, in that it would offend the Court's sense of justice and propriety to try the accused in the particular circumstances of the case⁷. In *Beckham v R* the Court of Appeal emphasised that a high threshold applies⁸.
- [20] In *Moevao v Department of Labour*⁹ the Court of Appeal, held that relevant factors included whether the proceedings were vexatious and oppressive¹⁰; the principle of fair treatment¹¹; and public confidence in the due administration of justice¹².
- [21] The current proceedings could be described as oppressive. The original complaint was received on 12 June 2015. What followed was a protracted path to a hearing during which the Respondent's then advisor and representative challenged the Board's procedures at every step. A hearing was held finally on 29 September 2016.
- [22] The appeal to the District Court was also driven by the Respondent's representative. The Respondent consented to those proceedings but appeared to take little part in them.
- [23] Given the District Court's findings as regards section 88 of the Act and its interrelationship with section 87 of the Act, and the impacts such a decision would have on the record of work regime, MBIE decided to appeal that decision.

⁶ Section 343(1)(b) of the Act

⁷ Refer *Fox v Attorney-General* [2002] 3 NZLR 62(CA) and *Beckham v R* [2012] NZCA 603

⁸ Page 47

⁹ [1980] 1 NZLR 464

¹⁰ Richmond P. at page 470

¹¹ Woodhouse J. at page 476

¹² Richardson J. page 478

- [24] A hearing was held 14 June 2018. The Respondent was not represented. A decision was delivered on 6 July 2018. The present considerations are now taking place on 11 September 2018 some three years and three months after the original complaint was made.
- [25] As can be noted from the above the path to the present hearing has been a protracted one and the Respondent could be considered a passenger on it. Taking this into consideration, along with the comments of the High Court noted in paragraph [5] above, the Board has decided that it will stay the proceedings.
- [26] It should be noted that a stay means that the Board will not be taking any further steps with regard to the present matter. It does not mean that the Board has made any findings as to whether the building work carried out was or was not restricted building work or whether or not a record of work was due.

Signed and dated this 4th day of October 2018

A handwritten signature in black ink that reads "Chris Preston". The signature is written in a cursive, flowing style.

Chris Preston
Presiding Member