

**BPB Complaint No. C2-01316**

**IN THE MATTER OF**

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315 of the Act

**AGAINST**

[The Respondent], Licensed Building Practitioner No. BP [omitted]

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**DECISION OF THE BUILDING PRACTITIONERS' BOARD**

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**Introduction**

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 2 December 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); 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).
- [3] The Respondent is a Licensed Building Practitioner with a Foundations – Concrete or Timber Pile Foundation, Walls and Concrete Slab-on-ground – Licence issued 19 February 2014.
- [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:
- |                    |                  |
|--------------------|------------------|
| Chris Preston      | Chair(Presiding) |
| Richard Merrifield | Deputy Chair     |
| Brian Nightingale  | Board Member     |
| Bob Monteith       | Board Member     |
- [6] The matter was considered by the Board in Auckland on 21 April 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:
- |                |                           |
|----------------|---------------------------|
| Terri Thompson | Counsel for the Registrar |
| Sarah Romanos  | Board Secretary           |

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[Omitted]	Respondent
[Omitted]	Complainant
[Witness A]	Witness
[Witness B]	Witness

Members of the public were 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 4 February 2016 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.
- [11] On 25 February 2016 the Board considered the Registrar’s report and in accordance with reg 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).
- [12] On 4 April 2016 a pre-hearing teleconference was convened by Chris Preston. 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 10.00 a.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.

### **Substance of the Complaint**

- [16] The basis for the complaint was that the plans for the foundation needed to be amended and the Respondent did not ensure that the amended plans had been approved by the home owner and were not on site and as a result the Council failed the inspection.
- [17] That the Council also failed the pre pour inspection due to a number of issues including the absence of the sand binding, steel poorly installed, lack of protection for piping, steel too close to boxing and damage to the damp proof membrane.

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**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*<sup>1</sup> 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] [Witness A] of the Auckland Council (Building Control) confirmed that:
- a. the Council had failed the two inspections due to the work not being in accordance with the building consent;
  - b. any change to the plans that need the Council’s consent also needs consent from the home owner; and
  - c. the change to the foundation work on this occasion did need a consent amendment and could not be treated as a minor variation.
- [20] The Respondent agreed that he had not seen any consented drawings for the change in the design of the foundation, that there were no consented drawing on site as there should have been and that he agreed with the failed pre pour inspection and made the comment that his sub-contractor who did the work was “a little rusty on the prep work”.
- [21] The Respondent maintained that he was instructed to follow the new plans as provided by [omitted], that the plans had been approved by an Engineer and presumed the amended plans had been consented.
- [22] [Witness B] from [omitted] confirmed that he had given the Respondent the go head to proceed with the new plans and that he had done so without obtaining the consent for the change and that the plans have not been consented. This forms the basis of the commercial dispute between [omitted] and the Complainant.

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<sup>1</sup> [2009] 1 NZLR 1

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## Board's Conclusion and Reasoning

### Negligence

- [23] 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>2</sup>. Judge McElrea provided guidance on the interpretation of those terms:

*[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*

*[44] In my view 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.*

*[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.*

- [24] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>3</sup> 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.*

- [25] In this case the Respondent did not ensure that the work undertaken by his sub-contractor was to an acceptable standard and had not inspected the work prior to the inspection by the Council or even attended the inspection.
- [26] In this case the Board is of the view that the Respondents actions were careless and that he should have taken more care, but considers the behaviour does not fall seriously short of that which is considered acceptable.

### Contrary to a Consent

- [27] 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. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as a variation to the consent before any further work can be undertaken.
- [28] In *Tan v Auckland Council*<sup>4</sup> the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

<sup>2</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>3</sup> [2001] NZAR 74

<sup>4</sup> [2015] NZHC 3299 [18 December 2015]

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*[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.*

- [29] The same applies to the ongoing verification of building work. A failure to notify the Council of changes to the consented documents defeats the purpose of the process. Moreover, undertaking building works that vary from those that have been consented can potentially put person and property at risk of harm.
- [30] In this case the Respondent should have made sure that the new foundation design had in fact been consented by the Council and that those plans were on site but the Board accepts that he did make enquiry of the head contractor [omitted] and had been told to proceed using unconsented plans.
- [31] The Board accepts that there was a need to change the foundation design and that this was done by an engineer and new plans provided to the Respondent to work with.
- [32] The Board considers that a prudent Practitioner would ensure that where a Building Consent is required it is both sighted and on site and that the LBP builds to the consented drawings.
- [33] The Board found that the Respondent has been negligent in that he did not check for the amended consent documents but decided in this instance it has not reached the threshold for seriousness.
- [34] The Board does not consider the Respondent has carried out building work that does not comply with a building consent.

### **Board Decision**

- [35] The Board has decided that the Respondent has not:
- (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)
- and should **not be** disciplined.

### **Right of Appeal**

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

Signed and dated this 16<sup>th</sup> day of May 2016



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**Chris Preston**  
Presiding Member

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<sup>i</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.