

BPB Appeal No. A1018

IN THE MATTER OF

The Building Act 2004

AND

IN THE MATTER OF

An Appeal to the Building Practitioners' Board under Section 330(1)(a) by **Hamish Illsley** against a decision of the Registrar

DECISION OF THE BUILDING PRACTITIONERS' BOARD

1. Introduction

- 1.1. On 23 December 2010, Hamish Illsley ("the Appellant") of Dannevirke applied for a Carpentry Licence and a Site (Area of Practice 1) Licence under S.288(2) of Building Act 2004 ("the Act") and the Licensed Building Practitioners' Rules 2007¹ ("the Rules").
- 1.2. On 25 July 2011 the Appellant appealed to the Board against the Registrar's decision under S.330(1)(a) of the Act, seeking that, on the basis of information provided, the Board grant a Carpentry Licence.
- 1.3. The Board held an Appeal hearing in Palmerston North on 10 October 2011. The Appeal was considered in accordance with the Board's "Appeals Procedure".
- 1.4. The Procedure provides that appeals are considered by way of a "re-hearing"², and that the burden of proof lies with the Appellant (Clauses 3.10.17 and 3.10.18 of the Board's Appeals Procedure).
- 1.5. The following were present for the hearing of the appeal:

Board Members and support staff:

Colin Orchiston	Presiding Member
Jane Cuming	Board Member
Brian Nightingale	Board Member
William Smith	Board Member
Dianne Johnson	Board Member
Tracy Goddard	Board Secretary

¹ Incorporating amendments for 2008, 2009 and 2010.

² Refer S.335(2) of the Act.

Appellant:

Hamish Illsley, with support from Mrs. Illsley and two sons, and witnesses Peter Philipson^a, Peter Lea, and Klaus Van der Oord.

Registrar:

Mark Scully

1.6. The Board received the Registrar's report of 1 August 2011.

2. The Registrar's Report & Submissions

2.1. In order to become licensed, the Appellant was required to satisfy the Registrar that he met the applicable minimum standards for licensing (under section 286 of the Act). These minimum standards are set out in Schedule 1 to the Rules, in the form of "competencies" which must all be satisfied.

2.2. For the Carpentry Licence these competencies are in relation to category 1, 2 and 3 buildings as follows:

- Competency 1: Demonstrate knowledge of the regulatory environment of the building construction industry
- Competency 2: Demonstrate knowledge of current building and trade practice
- Competency 3: Carry out planning and scheduling of carpentry work
- Competency 4: Carry out carpentry work

2.3. In order to be licensed an applicant must demonstrate that he/she meets all the required competencies of the licence class.

2.4. These competencies may be demonstrated by meeting some or all of the performance indicators of the Rules. In carrying out an assessment, the Assessor must use the "Assessor Guidelines" prescribed by the Registrar (see Rule 11(1)).

2.5. The competencies address a broad range of skills and knowledge that a competent practitioner should be able to demonstrate.

2.6. The Registrar must take into consideration the Assessor's recommendation before making a decision (under Rule 12(2)).

2.7. Reliance on the Assessor's recommendation does not mean that the Registrar cannot reach a different view about an applicant from the view reached by the Assessor. The Registrar is required to maintain an independent view. In the normal course of events, however, the Registrar will

^a This online document differs from the Board's initial decision as a typographical error has been fixed in the spelling of the witness' name.

accept a recommendation of an Assessor, unless there are strong reasons for not doing so.

- 2.8. In making the recommendation to decline the application, the Assessor noted that the appellant's original skills and trade experience were primarily in joinery, and subsequently his role had been as a project manager and business owner of a building company. Whilst that was appropriate to the Site licence as granted, the assessor considered that the appellant's direct involvement in carrying out carpentry work was limited to the extent that competency 4 was not met.
- 2.9. The Registrar's decision considered the distinction between the supervision of carpentry work, and the carrying out of it, and noted that competency 4 is "Carry out carpentry work". His report states:
- "A qualified applicant who spends time on a building site, personally checking carpentry work and being directly involved with it (eg discussing, organising, and dealing with designers) would generally satisfy this requirement
 - Some qualified carpentry applicants may not be proximate to the carpentry work; for example because there are one or more layers of staff reporting to them who are employed to do this work"
- 2.10. During the hearing, the Registrar explained that in order to demonstrate "current competency" the assessor's guidelines use a 5-year horizon. This means that assessors do not generally accept evidence related to work done beyond that period.

3. The Appellant's Submissions

- 3.1. The Appellant said that he had completed his joinery apprenticeship with advanced trade certificate and then worked as a carpenter for some years.
- 3.2. He is now the owner and operator of a joinery and building company involved in residential-scale construction in and near Dannevirke. His 7 waged staff undertook the building work, and his role was the day to day management of all facets of the projects undertaken by the company. This included sourcing work; liaising with clients, designers, subcontractors and suppliers; instructing staff in tasks, resourcing and technical issues; guiding, controlling and approving work done on site; and dealing with contractual requirements.
- 3.3. He said that generally he was not "on the tools" but if necessary – for specific tasks or to instruct staff – he was available. In past years he had been actually carrying out work on site, and was still competent in carpentry skills.
- 3.4. He recognised that in order to direct and supervise staff, he had to demonstrate to them that he had current competency in all the tasks he required of them. In order to maintain skills and to adapt to changes in building technology, he actively pursued upskilling and continuing education opportunities.

- 3.5. He outlined his extensive involvement in support and mentoring within the local industry, including successful entries in awards programmes for housing.
- 3.6. He said that 5 or 6 years ago he had personally undertaken carpentry work when building their new family home.

4. The Board's Considerations In Relation to Competencies 1, 2 and 3

- 4.1. The Board notes the Registrar's statement that assessors operate to guidelines which limit consideration of past experience to a "horizon" of 5 years. The Board considers that it is not constrained to that period, and would consider past skills as relevant if the evidence establishes they are applicable to the current circumstances.
- 4.2. The Appellant, in a reference given by his boss in relation to his carpentry work early in his career, had been described as a "natural" on site.
- 4.3. Despite an apprenticeship in Joinery rather than Carpentry, the Appellant had then worked for some years as a carpenter. The Board was satisfied that their questioning and the references supplied by the Appellant established his competency in carpentry at that time.
- 4.4. However, the Board was required to establish that that prior competency was relevant to current building technology.
- 4.5. All three of the witnesses were very supportive of the appellant's work ethic, standard of management, and outcomes achieved by his company on building projects.
- 4.6. The first witness, Mr. Philipsen, spoke in a private capacity but held a position in the Registered Master Builders Federation such that he could compare the Appellant to his peers. He read a statement about the Appellant's performance and reputation as a carpenter, but had not recently actually observed him working in that capacity.
- 4.7. The second witness Mr. Lea (a builder from Pahiatua) presented his view of the Appellant's competence and advised that he used him as a mentor and viewed him as "one of the best contractors in the business". He confirmed to the Board that the Appellant carries out carpentry work as well as site work.
- 4.8. The third witness Mr. van der Oord said the Appellant's company had done building work on his homestead. When it began about 16 years ago the Appellant was personally working on the site as a carpenter, but since then it had been done by staff under his direction. Mr. van der Oor praised the Appellant's building skills and ability.
- 4.9. On the basis of the Appellant's submissions, the witness statements, and the enquiries made by the Board at the hearing, the Board is satisfied that:
 - a. The competencies exhibited by the Appellant in past years are directly applicable to his involvement in the industry now.

- b. The Appellant has relevant knowledge and experience in current building technology and the supervision of others undertaking carpentry work.

4.10. Accordingly the Board is satisfied that competencies 1, 2 and 3 have been sufficiently demonstrated.

5. The Board's Considerations in Respect of Competency 4

5.1. The Board is mindful of the exact wording in the Rules, and that the Appellant's original application was declined on the basis of the assessor's understanding of that wording, as follows:

"Competency 4: Carry out carpentry work"

Where, as in this case, the applicant is wholly in a supervisory and/or management role and may not have been active as a carpenter for some time, there may be some doubt about how the literal interpretation of Competency 4 is applied.

5.2. The Board notes the Registrar's consideration of "proximity" in determining whether the Appellant was "carrying out" carpentry work. The Appellant's appeal was on the basis that his management and supervisory roles meant that he had a direct involvement in carrying out carpentry work despite not physically undertaking it.

5.3. Section 84 of the Act states

"All restricted building work must be carried out or supervised by a licensed building practitioner who is licensed to carry out or supervise the work."

5.4. Section 282A(b) of the Act states that the purposes of the LBP scheme include

"to license building practitioners so that, in regard to restricted building work, licensed building practitioners can carry it out or supervise it."

5.5. Section 7 of the Act (Interpretation) provides as follows:

"supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—
(a) is performed competently; and
(b) complies with the building consent under which it is carried out"

5.6. It follows that it is not necessary to physically carry out the work: the alternative is the supervision of it. Since a license is for the carrying out or supervision of carpentry work, then the competency standards must apply to both the carrying out and supervising roles.

5.7. The Appellant's evidence was that whilst he was not always on site to direct and control work, he was nevertheless involved on a day to day first-hand

basis. He described that a typical day would start with briefing staff on the work to be done, discussing particular construction issues, and allocating resources. A typical project would involve a daily visit to inspect and review performance, progress, and resourcing requirements. If necessary he would “pick up a hammer” and physically show how the work was to be done. He took responsibility for managing staff, subcontractors and materials; his staff were dependent on his direction and approval of work done.

- 5.8. Typical of many small business owners in this industry, the Appellant’s role extends beyond inspection and approval, and beyond management functions. He was involved in the carpentry work to the extent that he had direct control direction and oversight of it, and was responsible for performance and compliance in accordance with Sections 7 and 84 of the Act.
- 5.9. In this appeal, the Appellant has demonstrated to the Board’s satisfaction that he meets the competency standards to both physically undertake carpentry work and to supervise it as defined in the Act. Therefore by either of the criteria he meets the requirements for a Carpentry licence.
- 5.10. Having considered the matters above, the Board notes the following principles applicable to this and similar appeals:
 - a. “Carry out carpentry work” (as required by competency 4) could include either physically doing the work, or supervising it.
 - b. In both cases the competency standards will need to be met, but a licence issued on the basis of supervision is dependent on meeting the requirements for supervision as defined in Section 7 of the Act.
- 5.11. On the basis of the appellant’s submissions, the witness statements, and the enquiries made by the Board at the hearing, the Board is satisfied that:
 - a. The appellant has current skills and capabilities to undertake carpentry work as described in the competencies
 - b. In the absence of physically undertaking carpentry work, the appellant’s supervision role is as defined in the Act
- 5.12. On that basis, the Board considers that competency 4 is met.

6. The Board’s Decision

- 6.1. **Pursuant to S.335(3) of the Act and Clause 3.11.3 of the Board’s Appeals Procedure, the Board has resolved to reverse the Registrar’s decision not to issue Hamish Illsley with a Carpentry Licence.**
- 6.2. **Pursuant to Clause 3.11.6 of the Board’s Appeals Procedure, the Board directs the Registrar to issue a Carpentry Licence to Hamish Illsley as soon as practicable.**
- 6.3. The Board’s reasons are that Hamish Illsley has demonstrated, to the Board’s satisfaction, that he meets sufficient of the competency requirements under the Licensed Building Practitioners’ Rules for the Carpentry Licence.

7. Costs

- 7.1. Pursuant to S.338 of the Act, the Board may order any party to the appeal to pay any other party any or all of the costs incurred by the other party in respect of the appeal.³
- 7.2. Submissions on costs were sought from the Appellant and the Registrar.
- 7.3. Neither the Appellant nor the Registrar sought costs.
- 7.4. The Board, having considered the circumstances of this appeal, directs that costs shall lie where they fall.

8. Publication of Name

- 8.1. Pursuant to S.339 of the Act, the Board may prohibit the publication of the Appellant's name and/or particulars.
- 8.2. The Board invited submissions from the Appellant on this matter.
- 8.3. The Appellant indicated that he would want his name to be published.
- 8.4. The Board recognises that the Appellant has an interest in the publication of his name, and notes that a licence is a personal attribute which does not attach to the Appellant's business.
- 8.5. The Board, having considered the circumstances of this appeal, advises the Registrar that there is no requirement to withhold the publication of the Appellant's name and/or particulars.

Signed and dated this 14th day of November 2011

Colin R Orchiston (Presiding Member)

³ The "parties" are the Appellant and the Registrar. The Board is not a party.

Advice Note (not part of Board's Decision)

Extracts from the Building Act 2004:

330 Right of Appeal

- (1) *A person may appeal to the Board against any decision of the Registrar to—*
 - (a) *decline to licence the person as a building practitioner; or*
 - (b) *suspend or cancel his or her licensing.*

- (2) *A person may appeal to a District Court against any decision of the Board—*
 - (a) *made by it on an appeal brought under subsection (1); or*

...

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.*