

BPB Complaint No. C1012

IN THE MATTER of The Building Act 2004

A N D

IN THE MATTER of a complaint to the Building Practitioners' Board
under section 315 by _____ against
_____, Licensed Building Practitioner

DECISION OF THE BUILDING PRACTITIONERS BOARD

1. **Introduction**
 - 1.1 _____ lodged a complaint with the Building Practitioners' Board ("the Board") on 7 September 2012 in respect of _____, Licensed Building Practitioner.
 - 1.2 The complaint alleged that _____ has;
 - (a) carried out or supervised work in a negligent or incompetent manner; and
 - (b) carried out or supervised building work that does not comply with a building consent.
 - 1.3 The work complained of is in respect of building work carried out and supervised by _____ at _____.
 - 1.4 Mr Bosanac is a Licensed Building Practitioner (No. _____) in the following licence classes;
 - (a) Carpentry;
 - (b) Site (Area of Practice 1), both licences being granted on 4 October 2010.
 - 1.5 The Board has considered the complaint under the provisions of Part 4 of the Building Act 2004 ("the Act") and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 ("the Regulations").

District Council¹. That decision dealt with issues concerning the definition of “negligence” and “incompetence” in the context of the Licensed Building Practitioner Scheme and the Board determined that this complaint as well as a number of other complaints, should be delayed pending the decision in the appeal.

2.4 The decision in the District Court was delivered on 14 November 2012 and Notices of this hearing were circulated on 18 January 2013.

3. The Hearing

3.1 The hearing was scheduled to commence at 10.00 a.m. on Monday 25 March 2013. [redacted] was not present at 10 o'clock and subsequent enquiries revealed that [redacted] had incorrectly recorded the date of the hearing for 25 April 2013 rather than 25 March 2013. He also advised that two witnesses he intended calling, Mr [redacted] and Mr [redacted], had been advised by him that the hearing date had been scheduled for 25 April.

3.2 After a series of discussions between [redacted] Mr Guidera and the Presiding Member, it was decided that [redacted] would attend the hearing by way telephone conference call and reserve the right to call his witnesses, [redacted] and [redacted], if he required following the conclusion of the day's hearing². [redacted] was subsequently supplied with the various papers concerning the complaint and confirmed that at the point the hearing commenced, he was in a position to respond to the matters arising in respect of the complaint.

3.3 The hearing then commenced and it was noted that Mr Mullins and Mr Hyde-Hills were present at the hearing in response to the Board's summons issued at the request of [redacted].

3.4 No Board members declared any conflicts of interest in relation to the matter under consideration and no person present raised any issues in relation to conflicts.

4. Substance of the Complaint

4.1 The “form of complaint” filed by [redacted] was the standard form supplied by the (then) Department of Building and Housing. Accordingly, it satisfied the requirements of Regulations 5(a) to (d) of the Regulations.

4.2 The complaint by [redacted] can be summarised as follows:

- (a) [redacted] contracted [redacted]'s company, [redacted] E [redacted] (“the company”), to convert and renovate the existing building at [redacted], [redacted] into a [redacted].

¹ Beattie v FNDC [2012] 14 November 2012

² [redacted] subsequently confirmed that he did not wish to call these witnesses.

childcare centre. [redacted] was provided with what he believed to be a set of the resource consent and building consent plans to quote on and this was used to provide pricing and ultimately the contract between the company and [redacted]. The work was carried out in and around June 2011.

- (b) [redacted] claimed that the amount owing in accordance with the contract had been paid in full following an invoice being issued by the company in September 2011.
- (c) Following final inspection of the work by Auckland City Council on 15 September 2011, the Council issued [redacted] with a Notice to Fix on 11 October 2011. The Notice to Fix detailed a number of contravention or non-compliance items relating to fire egress issues and facilities for people with disabilities.
- (d) [redacted] stated that he had on a number of occasions (evidenced by copies of telephone records and emails he submitted as evidence) attempted to contact [redacted] to request that he rectify the Notice to Fix items of work but [redacted] failed and/or refused to respond to his request.
- (e) In order for the rectification of the Notice to Fix items to occur and for the Code Compliance Certificate to issue, [redacted] was required to engage another builder.
- (f) [redacted] was seeking full reimbursement of the sum of \$5,000.00 being the claimed expenses to rectify the Notice to Fix items together with compensation of \$10,000.00 for "the wasted time and costs while the facility was not operational and waiting for the compliance certificate".

5. Evidence

5.1 [redacted]'s evidence can be summarised as follows;

- (a) He received a set of plans from [redacted] which he used as the basis for his pricing. The plans were not the building consent plans but were a mixture of initial design plans and plans which he later realised were used for the resource consent.
- (b) The price submitted to [redacted] was accepted and a contract was signed dated 12 June 2011 between [redacted] and the company.
- (c) Upon commencing the work [redacted] stated the property was tenanted (which was not expected) and that the resource consent had been issued with conditions which he was not

aware of. He was not reimbursed for working around the tenants, liaising with disgruntled neighbours and the extra costs incurred to comply with resource consent conditions.

- (d) Notwithstanding the above the work was completed and was in accordance with the plans that he had received, all inspections including a "final" inspection from the Auckland Council had been passed and if there was any further work which was required then such work would only be completed as an "extra" or variation to the contract.
- (e) The Notice to Fix was for work not covered by the terms of the contract.

5.2 relied upon the two witnesses who he had requested appear through summons issued by the Board namely Mr Mullins and Mr Hyde-Hills. The Board heard from both and accepted their evidence which can be summarised as follows;

- (a) All building work was inspected and was passed by Mr Mullins up until the final inspections;
- (b) Three final inspections were required on 24 August 2011, 5 September 2011 and 15 September 2011.
- (c) The inspections of 24 August and 5 September failed because of various items identified by Mr Mullins. On 15 September, Mr Mullins noted from his records that all outstanding items had been completed and the final inspection was passed. Importantly none of the items noted in the Notice to Fix were identified before or during the course of the final inspections.
- (d) Mr Hyde-Hills' role was to ensure that the resource consent was complied with. He was able to provide a number of photographs of the extra ramps, decks and fencing referred to in the Notice to Fix but was not involved in the issue of the Notice to Fix.

6. **Special Adviser's Report**

6.1 It is worth mentioning at this juncture the Special Adviser's Report received from by the Board.

6.2 The purpose of the Special Adviser's Report is to assist the Board in its inquisitory function to identify the issues relating to whether work was carried out or supervised in a negligent or incompetent manner. In doing so the Special Adviser will interview the relevant parties, and any persons who may be potential witnesses, for the purpose of examining what the Board will need to consider as part of its determination process. It should be further noted that the Special

Adviser is not an expert witness in the hearing and that his report and the comments he makes are not evidence as such. His or her role is to advise on the issues arising from the complaint but with the opportunity given (through the Chair) for him to be questioned by the parties on the contents and subject matter of his report.

- 6.3 It was noted by the Board that the Special Adviser correctly identified that the main issue here was whether the items in the Notice to Fix were items which had been involved in (in terms of supervision or performance) and whether in doing so he had been negligent and/or incompetent.

7. **The Notice to Fix**

- 7.1 Why did the Notice to Fix issue? The Notice to Fix issued on 11 October 2011. This was notwithstanding, as stated, the work passing a final inspection on 15 September 2011 and Council writing to Mr Ghuman on 22 September 2011 advising the Code Compliance Certificate would issue subject to the payment of some outstanding fees.

- 7.2 The Special Adviser in his report noted that he received from Council on 12 June 2012 an email which stated:

"Following the final inspection of 15/9/11, it was decided that an audit of the final inspection be carried out as part of council's quality assurance program, (a requirement under the Building Accreditation of Building Consent Authorities Regulations 2006).

During the audit, it became clear that several non-compliances had not been identified during the final inspection. Although the items were not deemed serious enough to classify the building as dangerous, it was decided to issue a NTF in order to ensure the work was carried out to make the building compliant before CCC could be issued. Following this issue, council reviewed the inspector's performance and his competency level.

I also note that council is required by the NZ Building Act 2004, to issue the CCC only after it was satisfied on reasonable grounds that the building work complies with the building consent.

In this instance the NTF issues were specified in the building consent (including the fire report) and therefore council was obligated to withhold CCC until these matters were addressed.

Please except my sincere apology for the inconvenience this has caused but having the work completed has also ensured the owners/occupiers have greater peace of mind knowing that they have a compliant building which will safeguard the children and staff for the future."

- 7.3 It was clear then that the Council inspection regime had failed to pick up the items which were subsequently included within the Notice to Fix. Rather, they were picked up in a subsequent audit.

7.4 It does not necessarily follow that the issuing of the Notice to Fix automatically means _____ is either negligent or incompetent in respect of these items. The actions of _____ must be assessed against the grounds of the complaint, namely:

- (a) _____ was he negligent or incompetent in carrying out the work that he did and/or;
- (b) _____ did he carry out or supervise work that did not comply with a building consent?

7.5 To examine the above the Board must look at each of the items in the Notice to Fix and then assess _____'s actions against these items.

7.6 The defects identified in the Notice to Fix then are as follows;

(a) *the installation of a safety fencing panels with gates opening opposite to the direction of the travel for fire egress compliance.*

(b) *the installation of lockable latching devices to the above mentioned gates.*

(c) *the installation of an aluminium casement fire egress door opening opposite to the direction of travel for fire egress compliance.*

(d) *the fitting of a lock to the above-mentioned door which is key operated on the inside of the door.*

(e) *the failure to install edge rails to the bottom of the disabled persons access ramp barriers.*

(f) *the failure to radius the end of the handrail extensions fitted to the disabled persons ramps.*

(g) *the failure to install lever type handles to the locks fitted to the disabled persons facilities.*

(h) *the failure to install safety glass to the full height exterior window located in the northern wall of the building.*

(i) *the installation of an aluminium ranch slider type door into the fire egress safe path located in the north eastern side of the building.*

(j) *Install toilet paper holder, a mirror and grab rails.*

8. **Board's Conclusions and Reasoning**

8.1 It was clear that what the complainant wanted was a builder who would come back and fix the Notice to Fix items. _____ refused to do this because he claimed these were extras to the contract which

required payment over and above the contract price. When
refused to pay him refused to return.

- 8.2 Perhaps what wanted from the Board was a determination that had had been negligent and/or incompetent because he had breached the terms of his contract by failing to come back and fix the items.
- 8.3 It should be noted that whilst the Board will not rule out a finding of negligence or incompetency in terms of the performance of a contract as between a licensed building practitioner and a client, in this case, that is only one consideration. What the Board examines is whether or not was negligent and/or incompetent in respect of the building work that he had carried out or supervised, or by failing to apply sufficient knowledge of the regulatory environment and thereby causing the Notice to Fix to be issued, or by failing to follow the building consent.
- 8.4 With respect to the issue of the performance of the contract and the relevance of what plans had at the time that he quoted for the work and set out the scope of work in the contract, there was a conflict on the evidence as to what plans had. The Board finds that had the resource consent plans but was unaware of the conditions. He also had some other building plans drawn up by another unrelated contractor. He did not have however the final building consent plans when he quoted for the work and therefore the Board has found that some of the work shown on the building consent plans later provided to (and subsequently used for construction) was additional to that quoted for. That does not however remove any responsibility he may have to follow the building consent plans especially where he has contracted to undertake the scope of that work.
- 8.5 Turning now to the case of *Beattie v Far North District Council*³. Judge McElroy made the following findings with respect to negligence and incompetence;

"...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."

- 8.6 Furthermore Judge McElroy stated⁴:

³ Supra at para 41

⁴ Supra at paras 44 and 46

"...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..."

8.7 Examining each of the items listed as non-compliant in the Notice to Fix;

(a) *The installation of a safety fencing panels with gates opening opposite to the direction of travel for the fire egress compliance.*

(i) stated that he did not install the fence and gates but that a subcontractor engaged by his company installed it. This evidence was uncontested and was accepted by the Board. In the circumstances therefore, if he is negligent or incompetent then it will be in relation to his Site (Area of Practice 1) licence;

(ii) accepted that the gates were installed incorrectly (ie in the opposite direction for travel in respect of fire egress). The opening direction was shown on the plans that he had when he quoted for the work and when the work was undertaken. They were incorrectly installed by the subcontractor and Mr Bosanac failed to pick this up. offered to fix this item independently of the other items but this offer was not accepted by

(iii) The Board finds that has made an error in his supervision of this item, however, the Board does not find that the error exhibits a *"serious lack of care judged against the standard reasonably expected of such practitioners."* It is at best 'de minimis' and does not breach the standard outlined.

(b) *The installation of lockable latch devices to the abovementioned gates.*

(i) Again, the locking devices were installed by subcontractor. Again it is an issue that will affect his Site (Area of Practice 1) licence.

(ii) stated in his evidence that the type of latch which was installed was a latch unable to be opened by

children. He says that he questioned Council who confirmed that the latch installed was correct. He further says that the plans were silent on the type and position of the latch.

- (iii) The issue then is whether he has failed to follow the New Zealand Building Code ('NZBC') requirements, and whether he ought to have known what was required.
 - (iv) The consented plans required an "810 gate with child proof lock". The Board accepts that there is a conflict between that requirement and fire egress requirements, and access for disabled persons and notes that Mr Bosanac raised that issue with the Council Officer. In following the consented plans, we cannot find him negligent or incompetent on this issue.
 - (v) We also do not find him negligent or incompetent on whether he knew or ought to have known the NZBC requirements given the conflict that was apparent, that he took steps to enquire and ultimately, the consented plans were followed on this item.
- (c) *The installation of an aluminium encasement fire egress door.*
- (i) None of the plans required anything to be done with this door and therefore stated that this work was not part of the contract and he did nothing to it.
 - (ii) The Board understands that the door was existing and in the circumstances without there being any evidence that he was to do anything on this matter, we cannot find he was either negligent or incompetent.
- (d) *The fitting of a lock to the abovementioned door.*
- (i) The same finding applies in respect of this item as in (c) above.
- (e) *The failure to install edge rails to bottom of disabled persons access ramps.*
- (i) This detail was not shown on the building consent plans and was shown on the contract. Without the detail being shown on the building consent plans then we cannot find that he was either negligent or incompetent on this issue.
- (f) *The failure to radius the end of the handrails.*

- (i) Again, this detail was not stipulated in the building consent plans nor was it in the contract. said he did ask the inspector what he wanted, (which Mr Mullins confirmed), which was to have the handrail rounded off. followed the instructions he received from the inspector, and as Mr Dalton has stated this does comply with the NZBC requirements.
- (ii) Accordingly we cannot find he was negligent or incompetent on this issue.
- (g) *The failure to install lever type handles and locks for disabled persons.*
 - (i) Again none of the plans showed what type of handles were to be installed and no details were provided. said this was not part of the contract as it wasn't on the plans he had originally seen.
 - (ii) What the plans do say is that the "locking devices...shall be designed to be easily operated..." which the Board finds was complied with. We further note as per Mr Dalton's report that this was an issue that Council prior to the audit appeared to accept as compliant as well.
 - (iii) Accordingly we cannot find he was negligent or incompetent on this issue.
- (h) *The failure to provide safety glass to the full height exterior window.*
 - (i) stated that every window which was marked on the plans to be installed with safety glass was completed. The window complained off was not marked as being required to have safety glass although it would appear from both Mr Bosanac's evidence and the building inspector's that markings denoting safety glass were visible on the full height exterior window.
 - (ii) Accordingly the Board cannot find negligent or incompetent on this item.
- (i) *The installation of aluminium ranch slider door.*
 - (i) This detail was not shown on any of the plans and was not included in the contract. Accordingly we cannot find him negligent or incompetent on this item.
- (j) *Install toilet paper holder, a mirror and grab rails.*

- (i) These items were not present in the documents quoted by [redacted] and were therefore additional to the scope of work in the contract. The building consent drawings supplied at a later date do not describe or detail a toilet paper holder nor a mirror, and the grab rails are inadequately dimensioned.
 - (ii) [redacted] indicated that all of this work was carried out by his plumber but under his supervision.
 - (iii) Without there being sufficient detail as to what [redacted] was required to do, we cannot find that he was incompetent or negligent on this item.
- 8.8 With respect to the items disclosed in the Notice to Fix the Board has found that [redacted] was neither negligent nor incompetent either in the work that he performed or the supervision that he carried out.
- 8.9 It is further noted that [redacted] has stated as part of the contract, and as a matter which forms part of the complaint, that [redacted] agreed to pay for "AKO matting" to be affixed to the wheelchair access ramp to comply with a request which was made by Council.
- 8.10 [redacted] accepted that this was part of the contract but it was also his evidence that once there was failure in communication and a breakdown in the relationship he no longer wished to install it.
- 8.11 The Board does not consider that this is an issue of incompetency or negligence. Rather this is an issue of contract enforcement which, under the circumstances of this case, is a matter which [redacted] may wish to seek a remedy for in another jurisdiction.

9. Conclusion

- 9.1 The Board finds therefore that [redacted] is neither incompetent nor negligent in respect of the complaint which has been laid by [redacted]. The Board would however point out that notwithstanding its findings as set out above, [redacted] has not helped himself in respect of the complaint. In particular the Board would point out;
- (a) When a Licenced Building Practitioner enters into a construction contract, such a contract should establish clear guidelines and performance criteria such as an agreed scope of works, arrangements to deal with additional or unforeseen issues, contract administration and the maintenance of on-going communications (this list is not intended to be exhaustive);
 - (b) The contract that was drafted between [redacted] and [redacted] company was unclear, imprecise and led to a lot of

the communication and relationship breakdown as between the parties. It is trite that a properly worded, clear and articulated contract would have better served the parties in these circumstances.

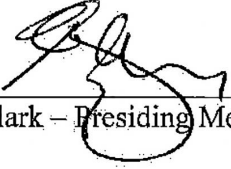
10. **Penalty**

10.1 As a result of there being no finding as to incompetency or negligence, no penalty is imposed.

11. **Costs**

11.1 As a result of there being no finding as to incompetency or negligence, the Board does not award costs in this matter.

Signed:


D J Clark – Presiding Member

Dated:

28/05/2013