

Before the Building Practitioners Board
At [Omitted]

BPB Complaint No. C1045

Under the Building Act 2004

IN THE MATTER OF

A complaint to the Building Practitioners' Board under Section 315

AGAINST

[Omitted], Licensed Building Practitioner No. BP [Omitted]

DECISION OF THE BUILDING PRACTITIONERS' BOARD

1. Introduction

1.1 [Omitted] of [Omitted] ("the Complainant") lodged a complaint with the Building Practitioners' Board ("the Board") on 29 November 2012 in respect of [omitted], Licensed Building Practitioner.

1.2 The complaint alleged [omitted] has, in relation to building work in respect of [omitted], [omitted]:

1.2.1 carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Building Act 2004 (the Act)); and

1.2.2 carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act)).

1.3 [Omitted] is a Licensed Building Practitioner (number [omitted]) with a Carpentry licence issued 7 February 2011.

1.4 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").

1.5 The following Board Members were present during the course of the hearing:

David Clark	Chairman (Presiding)
Chris Preston	Deputy Chairman
Brian Nightingale	Board Member
Colin Orchiston	Board Member
Dianne Johnson	Board Member
Richard Merrifield	Board Member
Mel Orange	Board Member

1.6 No Board Members declared any conflicts of interest in relation to the matters under consideration.

- 1.7 The following other persons were also present during the course of the hearing:

Kata Rangataua-Rameka Board Secretary

[Omitted] Witness for the Complainant

[Omitted] Witness for the Complainant

[Omitted] Special Advisor to the Board

[Omitted] of the general public was in attendance.

2. Board Procedure

- 2.1 The “form of complaint” provided by the Complainant satisfied the requirements of Regulations 5(a) to (d) of the Regulations.

- 2.2 On 23 April 2013 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 13 May 2013 the Board considered the Registrar’s report and in accordance with Regulation 10:

- (a) It resolved to proceed with the complaint that the Respondent:

“carried out or supervised building work in a negligent or incompetent manner contrary to Section 317(1)(b) of the Act))”

and

“carried out or supervised building work that does not comply with a building consent contrary to Section 317(1)(d) of the Act))”.

- 2.4 The Board requested a special adviser be appointed to prepare a further report in regard to this matter. [Omitted] report dated 9 September 2013 was received and circulated to the Respondent and Complainant. The Respondent provided a written response to the report dated 7 October 2013.

3. The Hearing

- 3.1 The hearing commenced at 10:00 a.m. on Monday 2 December 2013 in [omitted]. No person raised any issues in relation to conflicts.

- 3.2 [Omitted] did not attend the hearing. The Board Secretary contacted [omitted] by phone prior to the hearing commencing to confirm he had elected not to attend.

- 3.3 [Omitted] and [omitted] were sworn in and presented their evidence in support of the complaint and answered questions from the Board. [Omitted] is the [omitted] building inspector in whose area the works were being undertaken. [Omitted] is the Team Leader, Building Services Delivery at the Council and is [omitted] manager.

3.4 The Special Adviser was available to respond to questions.

4. Substance of the Complaint and Complainant's Evidence

4.1 The Complaint allegation was that [omitted] commenced building work without a building consent. The following is a summary of the events leading to the complaint:

- 4.1.1 on 16 October 2012 [omitted] made a site visit to [omitted] where [omitted] was preparing foundations for a new residence. [Omitted] requested an inspection to enable the concrete to be poured;
- 4.1.2 building consent documentation could not be produced and an inspection was not undertaken. [Omitted] advised [omitted] that a consent was imminent with the only outstanding matter being payment;
- 4.1.3 on 25 October 2012 [omitted] checked the Council file and ascertained the building consent was not due to issue as a request for further information had been made (dated 15 October 2012);
- 4.1.4 further on 25 October 2012 [omitted] carried out an impromptu site visit at [omitted]. On arrival concrete placers were completing a concrete pour;
- 4.1.5 [Omitted] issued a stop work notice whilst on site as a result of the work having been undertaken without a consent; and
- 4.1.6 a notice to fix was issued on 26 October 2012.
- 4.1.7 At the hearing [omitted] produced diary records detailing attendances at the site and these were admitted into the record.
- 4.1.8 [Omitted] confirmed at the hearing that no inspections had been carried out at the site. His evidence was that:
- 4.1.9 normally a site inspection would be the first inspection carried out, followed by drainage and under-slab and then an inspection for the pour. None of these had been requested or completed;
- 4.1.10 no inspections would be undertaken without a building consent and consented plans being available to the inspector; and
- 4.1.11 an engineer's inspection would be in addition to, not in replacement of, a council inspection.
- 4.1.12 [Omitted] was questioned in relation to the council's processes in respect of Section 41(1)(b)(i) of the Building Act and in particular where weather conditions require urgency. He said the council takes a reasonable approach where weather conditions may impact a site. In this instance he did not consider either the foundation cut nor the positioning of the foundation posed any threat to life or health or any serious property damage. He confirmed the council had not received any communications from [omitted] in relation to proceeding with the foundation pour without a building consent due to weather conditions.

4.1.13 [Omitted] and [omitted] confirmed the actual foundations completed and inspected by an engineer differed from those which were consented. They also confirmed that a Certificate of Acceptance ("COA") has been issued for the foundations. The COA included the variation to the foundation design submitted following engineering verification of those changes.

5. Respondent's Evidence

5.1 [Omitted] made his submissions by way of a letter to the Registrar dated 6 February 2013 which was supported by various documents and statements and a response to the Special Adviser's report dated 7 October 2013.

5.2 [Omitted] responses can be summarised as follows:

- (a) [Omitted] was not the principal contractor, he was undertaking the foundations as a sub-contractor for another builder who was dealing with the owner and the building consent;
- (b) he thought the issue of building consent was imminent with payment being the only outstanding matter. [Omitted] believed it would be issued on 17 October 2012;
- (c) [Omitted] was not aware of a letter from the Thames Coromandel District Council dated 15 October 2012 requesting further information in relation to the building consent;
- (d) his account of [omitted] instructions on 16 October 2012 was that [omitted] advised he could carry on but was to leave the plumber's pipes uncovered. He states the plumber was instructed not to proceed any further but no such instruction was given to him. Two statements supporting his position were produced. These contentions were put to [omitted] at the hearing who denied them and produced his diary records as supporting evidence for his position;
- (e) when enquiring with the owner as to when the consent would be available he was advised it could not be uplifted due to a processing delay;
- (f) the weather was deteriorating. He was concerned about the safety and integrity of the site so [omitted] had the works inspected by an engineer on 24 October 2012. The engineer signed off the structural foundations and floor as being in accordance with the design. (It should be noted that the Board found this was a revised design, not the design that was submitted to the council for a building consent);
- (g) prior to the concrete being poured [omitted] again enquired of the owner where the consent was and was advised it had not issued; and
- (h) [Omitted] belief was that the work had to be "assured by the engineer, not the council" and accordingly he decided to proceed with the pour.

5.3 As [omitted] did not appear at the hearing his evidence was not confirmed on oath or by an affirmation.

6. Special Advisers Report

- 6.1 The Special Adviser confirmed his report as tabled. He did not wish to add anything to the report.

7. Board's Conclusions and Reasoning

- 7.1 The grounds for this complaint are that the LBP has carried out or supervised building work in a "negligent or incompetent manner" and has "carried out or supervised building work that does not comply with a building consent". Note that with regard to the building consent the Board is concerned with in this complaint, the issue is whether or not works were undertaken without a building consent, not whether changes in the foundations design did not comply.

- 7.2 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 District Council*¹. 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."

- 7.3 Judge McElrea continues²:

"...However, in a case brought to my attention by Mr Corkill,³ 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".⁴ 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 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.)..."

¹ Building Act 2004 s317(1)(b)

² Supra at paras 42

³ *Collie v Nursing Council of New Zealand* [2000] NZAR 74

⁴ at para 21, following similar reasoning by Elias J in *B v Medical Council of New Zealand* (High Court, Auckland, HC11/96, 8 July 1996)

7.4 Furthermore Judge McElrea stated⁵:

“...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...”

- 7.5 The Board has formed the view that [omitted] has been both negligent and incompetent by commencing works without a building consent.
- 7.6 Section 40 of the Act is fundamental to the operation of the Act and enforcement of the Building Code. 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.
- 7.7 The fundamental nature of the Section 40 is borne out by it being a strict liability offence to commence works without a building consent and the severity of the penalties available to a court on conviction of a person under it.
- 7.8 In this instance [omitted] proceeded with the works with full knowledge that a consent had not issued. Even on the basis of his evidence he was fully aware a consent had not actually been issued.
- 7.9 Given the above the Board has decided, on the basis of the evidence received, that [omitted] has shown a serious lack of care when judged by the standards reasonably expected of a practitioner.
- 7.10 Furthermore the Board has decided [omitted] exhibited a serious lack of competence. Knowledge of the Act, the Code and the building consent process are essential competencies for a person with a Carpentry Licence and on the basis of the evidence heard it was clear to the Board that [omitted] has not displayed these competencies.
- 7.11 The Board has also decided [omitted] has carried out or supervised building work that does not comply with a building consent. Whilst Section 317(1)(d) of the Act refers to work that does not comply with a building consent the Board has applied a liberal interpretation to the Section so as to give effect to the purpose of the Act. The Board’s interpretation of the Section is that work that does not comply with a building consent includes work undertaken without a consent.
- 7.12 As the Board has found, on the evidence presented, a consent had not issued and the disciplinary offence is one of strict liability. [omitted] is found to have contravened it.

⁵ Supra at paras 44 and 46

- 7.13 The Board notes that whilst changes to a foundation design would normally be covered under the Section those changes can only become a disciplinary offence once a consent has issued.

8. Board's Decision

- 8.1 The Board has decided that [omitted] has carried out or supervised building work which is the subject of the complaint as a Licensed Building Practitioner, licensed in Carpentry:

8.1.1 in a negligent or incompetent manner contrary to Section 317(1)(b) of the Act)); and

8.1.2 that does not comply with a building consent contrary to Section 317(1)(d) of the Act)).

and should be disciplined.

9. Publication of Name

- 9.1 Pursuant to Section 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.

- 9.2 The Board invites [omitted] to make written submissions on the matter of publication by **4 p.m. on 7 April 2014**.

10. Disciplinary Penalties

- 10.1 Section 318(1) of the Act provides for a range of disciplinary penalties which the Board may apply in these circumstances.

- 10.2 The Board invites [omitted] to make written submissions on the matter of possible disciplinary penalties by **4 p.m. on 7 April 2014**. Such submissions may include information on his financial circumstances.

11. Costs

- 11.1 Under Section 318(4) of the Act, the Board has the power to order a LBP to pay the reasonable costs and expenses of, and incidental to, the Board's inquiry. The Ministry of Business Innovation and Employment has prepared a statement of the relevant costs and expenses of the Board's inquiry which is attached to this decision.

- 11.2 The Board requests that they receive written submissions from [omitted] on the matter of payment of costs by **4 p.m. on 7 April 2014**. Such submissions may include information on his financial circumstances.

12. Right of Appeal

- 12.1 The right to appeal Board decisions is provided for in Section 330(2) of the Building Act 2004.

Signed and dated this 19th day of March 2014.



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Chairman
David Clark