

Before the Building Practitioners Board

At [REDACTED]

Tuesday 8 July 2014, 10am

**BPB Complaint No. C1053**

**IN THE MATTER OF**

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315

**AGAINST**

[REDACTED] Licensed Building Practitioner [REDACTED]

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**DECISION OF THE BUILDING PRACTITIONERS' BOARD**

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**1 Introduction**

1.1 [REDACTED] (the Complainant) lodged a complaint with the Building Practitioners' Board (the Board) on 17 December 2012 in respect of [REDACTED] Licensed Building Practitioner (the LBP).

1.2 The complaint alleged the LBP has, in relation to building work in respect of [REDACTED]

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to s 317(1)(b) of the Act; and
- (b) carried out or supervised building work that does not comply with a building consent contrary to s 317(1)(d) of the Act)

1.3 The LBP is a Licensed Building Practitioner with a Carpentry issued 27 March 2012.

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 at the hearing:

Chris Preston	Presiding
Brian Nightingale	Board Member
Colin Orchiston	Board Member
Richard Merrifield	Board Member

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

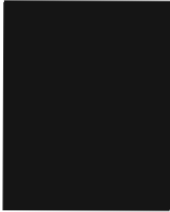
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1.7 The matter was considered by the Board in [REDACTED] on 8 July 2014 in accordance with the Act, the Regulations and the Board's "Complaints Procedure" (17 December 2013).

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

Simon Thomas

Joanna Owen



Registrar's Representative

Board Secretary

Respondent's Legal representative

Representative for the Complainant

Complainant's Legal representative

Witness

Witness (by telephone)

Witness

One member of the public was present.

## **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 7 March 2014 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 14 April 2014 the Board considered the Registrar's report and in accordance with Regulation 10 it resolved to proceed with the complaint that the LBP:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to s 317(1)(b) of the Act; and
- (b) carried out or supervised building work that does not comply with a building consent contrary to s 317(1)(d) of the Act.

2.4 On 13 June 2014 at 10am a pre-hearing teleconference was convened by David Clark. The LBP and Registrar's Representative were both present. The hearing procedures were explained and the LBP's attendance at the substantive hearing was confirmed.

## **3 The Hearing**

3.1 The hearing commenced at 10am on 8 July 2014 in [REDACTED] No person raised any issues in relation to conflicts.

3.2 At the hearing the Board was assisted in the presentation of the case by the Registrar's Representative.

3.3 The LBP attended the hearing.

3.4 The LBP and the witnesses were sworn in, their evidence was presented and they answered questions from the Board.

## **4 Substance of the Complaint**

4.1 On the 3 January 2013 the Board received a written complaint regarding the LBP from the [REDACTED] dated 17 December 2012.

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- 4.2 The complaint relates to building work undertaken at [REDACTED] The building work included alterations to an existing dwelling and erection of a kitset garage.
- 4.3 On 31 October 2012 the Complainant carried out an inspection at the property and on 1 November 2012 the Complainant sent an e mail to the LBP setting out six items of work that the Complainant alleged had been undertaken by the LBP without a building consent.
- 4.4 On 13 December the Complainant issued a notice to fix to the homeowner and the LBP.
- 4.5 On 29 July 2013 the Complainant set out for the Registrar further work that the complainant said did not comply with the building code: the garage concrete slab had incorrect reinforcing, the garage concrete slab had possibly been constructed over the Council sewer main, and the openings of windows in the dwelling had been enlarged without increasing the lintel length.

## **5 Evidence**

- 5.1 Both the Complainant and the LBP agreed that no Building Consent was issued for this work.
- 5.2 The LBP agreed and two witnesses confirmed there were no approved consent documents on site.
- 5.3 The LBP confirmed that he was present and helped install the windows into the renovated dwelling.
- 5.4 Evidence showed (photos) that the lintels for the windows that had been increased in width were too short and did not span the full width of the opening.
- 5.5 The LBP confirmed that he arranged and was present for the pouring of the concrete slab for the kit set garage, and that he had not arranged a pre pour inspection nor checked to see if one had been done.
- 5.6 Evidence was presented that the LBP did visit the site on a number of occasions and was in regular contact with his employees on the site by e mail and phone.
- 5.7 While the carpenter on the site was an LBP he was relatively inexperienced and reliant on the LBP to provide guidance and oversight of the building work.

## **6 Board's Conclusion and Reasoning**

- 6.1 The grounds for this complaint are that the LBP has carried out or supervised building work or building inspection work in a negligent or incompetent manner and has carried out or supervised building work that does not comply with a building consent.
- 6.2 In considering whether the LBP has carried out or supervised building work or building inspection work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*<sup>1</sup>. 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*

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<sup>1</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

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*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."*

6.3 Judge McElrea continues:

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

6.4 Furthermore Judge McElrea stated:

*"...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..."*

6.5 The Board has formed the view that the LBP has been both negligent and incompetent by carrying out work to the windows and garage floor without a building consent.

6.6 Section 40(1) of the Act states "a person must not carry out building work except in accordance with a building consent". Section 40(2) makes it an offence not to comply with s 40(1). Section 40 is fundamental to the operation of the Act and enforcement of the 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.

6.7 The fundamental nature of the s 40 is also borne out by it being a strict liability offence to carry out work without a building consent, and the severity of the penalties available to a court on conviction of a person under it.

6.8 The Board has found the LBP 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 building consent.

6.9 As the Board has found, on the evidence presented, consent had not been issued and the disciplinary offence is one of strict liability, the LBP is found to have contravened it.

6.10 The Board found that the LBP in installing new wider windows without increasing the length of the lintel to span the full width of the new window, has carried out work in both a negligent and incompetent manner.

## **7 Board Decision**

7.1 The Board has decided that LBP has carried out or supervised or building inspection work building work which is the subject of the complaint as a Licensed Building Practitioner:

- (a) in a negligent or incompetent manner contrary to s 317(1)(b) of the Act ; and
- (b) that does not comply with a building consent contrary to s 317(1)(d) and should be disciplined.

## **8 Disciplinary Penalties**

8.1 The grounds upon which a Licenced Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Act.

8.2 The Board invites the LBP to make written submissions on the matter of possible disciplinary penalties, up until close of business on 24 September 2014. Such submissions may include information on his personal and financial circumstances.

## **9 Costs**

9.1 Under s 318(4) of the Act, the Board has the power to order the LBP to pay the reasonable costs and expenses of, and incidental to, the Board's the inquiry.

9.2 The Board, therefore, is prepared to receive written submissions from the LBP on the matter of payment of costs up until close of business on 24 September 2014. Such submissions may include information on his personal and financial circumstances.

## **10 Publication of Name**

10.1 Pursuant to s 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.

10.2 The Board invites the LBP to make written submissions on the matter of publication by 4 p.m. on 24 September 2014.

## **11 Right of Appeal**

11.1 The right to appeal Board decisions is provided for in s 330(2) of the Act.

Signed and dated this 9<sup>th</sup> September day of 2014

  
Chris Preston  
Presiding Member

