

BPB Complaint No. C1059

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315

AGAINST

Mark Ensom, Licensed Building Practitioner
No. BP 106597

DECISION OF THE BUILDING PRACTITIONERS' BOARD

1 Introduction

- 1.1 The Auckland Council (the Complainant) lodged a complaint with the Building Practitioners' Board (the Board) on 18 January 2013 in respect of Mark Ensom, Licensed Building Practitioner (the LBP).
- 1.2 The complaint alleged the LBP has, in relation to building work in respect of 9 Wallingford Road, Grey Lynn and 48 Summer Street, Ponsonby, Auckland carried out or supervised building work that does not comply with a building consent. In accordance with s 317(1)(d) of the Building Act 2004 ("the Act") an offence that may be grounds for discipline of the LBP.
- 1.3 The LBP is a Licensed Building Practitioner with a Carpentry licence issued 2 May 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 at the hearing:
- | | |
|-------------------|----------------------|
| David Clark | Chairman (Presiding) |
| Brian Nightingale | Board Member |
| Mel Orange | Board Member |
| Dianne Johnson | Board Member |
- 1.6 No Board Members declared any conflicts of interest in relation to the matters under consideration.
- 1.7 The matter was considered by the Board in Auckland on 16 September 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:

Paul Chisnall	Registrar's Representative
Joanna Owen	Board Secretary
Mark Ensom	Respondent LBP
Stuart Wilson	Special Adviser to the Board
William Reimers	Witness for the Council
Selwyn Pankhurst	Witness for the Council

A Ministry observer was present.

Members of the public were not 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 11 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 carried out or supervised building work that does not comply with a building consent.
- 2.4 The Board requested a Special Adviser be appointed to prepare a report. Stuart Wilson's report dated June 2014 was received and circulated to the LBP and Complainant.
- 2.5 The matter was set down for a hearing on 22 July 2014 in Auckland, but was adjourned at the request of the LBP.
- 2.6 On 8 September 2014 at 1.30 p.m. a pre-hearing teleconference was convened by Chris Preston, Deputy Board Chair. 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 10.30 a.m. on 16 September 2014 in Auckland. 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, the Special Adviser, and witnesses were sworn in, their evidence was presented and they answered questions from the Board.

4 Substance of the Complaint

- 4.1 The complaint related to an allegation by the Auckland Council that the LBP had carried out building work at 9 Wallingford Road and 48 Summer Street without a building consent.

5 Evidence

5.1 The Board notes from the Registrar's report that the LBP's licence was suspended during the following periods for what the Board understands was a failure by the LBP to pay his annual licensing fees:

- 18 June 2012 to 1 February 2013
- 26 June 2013 to 25 November 2013

5.2 The Board further notes that the work the LBP carried out or supervised at Summer Street prior to the issue of a Building Consent and resource Consent, took place during the first period of suspension outlined above. The Board notes that under s 297(1) the suspension of an LBP (for whatever reason) means the LBP is treated as if he is no longer licensed during the period that he is suspended. What that means in respect of disciplinary matters is that the Board does not have jurisdiction when an LBP is suspended for work done during the suspension. Accordingly the Board is not able to deal any further with this aspect of the complaint. The Board does note however that restricted work is unable to be undertaken by non-licensed persons and persons who do so are liable to be prosecuted under the provisions of the Building Act.

5.3 On the basis of the evidence, it is clear that at least some of the work which the Council alleges required a consent on 9 Wallingford Street took place prior to 18 June 2012, when the LBP was licensed.

5.4 The LBP's evidence was that whilst he did not do any physical work on 9 Wallingford Street he accepted that he had supervised the work undertaken by others on the home which was his personal residence.

5.5 The work on 9 Wallingford Street, which the complainant alleged required a consent was:

- Repair of an existing deck to remedy moisture damage;
- Extension of the deck by 800mm which was subsequently removed;
- Removal of a sliding door to remedy moisture issues and replacement of the same door and the replacement of adjacent cladding;
- Replacement of internal stairs; and
- Removal and replacement of exterior cladding.

5.6 The LBP's submission was that the work at 9 Wallingford Street did not require a consent as it fell within the exemptions in Schedule 1 of the Building Act. The house had been built in or about 1999 and he was merely replacing like for like to remedy weather-tight issues.

5.7 The evidence of the Council witness was that the building work undertaken required a consent as whilst it was repair or replacement work it was work to repair or replace items which had failed the durability provisions of the building code (Clause B2).

5.8 The Special advisor provided his opinion in respect of whether or not a building consent was required. His view was that Exemption a(iii) of Schedule 1 applied to the work on the deck, sliding door, and weather boards, as the need for the work was triggered by a failure of external moisture management and therefore a building consent was required. This provision stated, at the time the work was carried out or supervised:

“A building consent is not required for the following building work:

- (a) any lawful repair and maintenance using comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with a building, including all lawful repair and maintenance of that nature that is carried out in accordance with the Plumbers, Gasfitters, and Drainlayers Act 2006, except:*
 - (iii) repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code.”*

6 Board’s Conclusion and Reasoning

- 6.1 The grounds for this complaint are that the LBP has carried out or supervised building work that does not comply with a building consent. The Board only has jurisdiction in respect of 9 Wallingford Street.
- 6.2 The Board must first decide whether a building consent was required for the work that was completed and, if it was, whether the LBP carried out or supervised that work.
- 6.3 In respect of the second element the LBP was licenced during the period when at least some of the work was carried out at 9 Wallingford Street and he has accepted that he supervised the work.
- 6.4 As regards whether a consent was required the Board accepts the evidence of the Special Advisor and the Council witness that the exemption under Schedule 1 does not apply due to a failure of an external moisture management component and a consent was required.
- 6.5 The Board notes the disciplinary offence relates to work which does not comply with a building consent. In this instance there was no consent but the Board has previously held that this provision is to be given a liberal interpretation so as to give effect to the purpose of the Act – to ensure unconsented work is not carried out. As such the Board’s interpretation of the disciplinary provision is that work which does not comply with a building consent includes work undertaken without a consent. This interpretation is also consistent with s 40 of the Act which states:
“a person must not carry out building work except in accordance with a building consent”.
- 6.6 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.

7 Board Decision

- 7.1 The Board has decided that LBP has supervised building work which is the subject of the complaint as a Licensed Building Practitioner 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 3 November 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 3 November 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 3 November 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 day of 8 October 2014



David Clark
Chairman