

Before the Building Practitioners Board

IN THE MATTER OF

The Building Act 2004

AND

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 ("the Complainant") lodged a complaint with the Building Practitioners' Board ("the Board") on 15 May 2013 in respect of Licensed Building Practitioner ("the LBP").
- 1.2 The complaint alleged that the LBP has, in relation to building work undertaken on the Complainant's property:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Building Act 2004 ("the Act")), and
 - (b) carried out or supervised building work or building inspection work that does not comply with the building consent (s 317(1)(d)) of the Act).
- 1.3 The LBP is a Licensed Building Practitioner with a Carpentry licence issued on 27 September 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 complaint was considered by the Board on 6 May 2014 in accordance with the Act, the Regulations and Board's "Complaints Procedure" (17 December 2013).
- 1.6 The following Board Members were present during the course of the hearing:
- | | |
|--------------------|----------------------|
| David Clark | Chairman (Presiding) |
| Chris Preston | Deputy Chairman |
| Dianne Johnson | Board Member |
| Richard Merrifield | Board Member |
| Brian Nightingale | Board Member |
| Mel Orange | Board Member |
| Colin Orchiston | Board Member |
| Catherine Taylor | Board Member |
- 1.7 No Board Members declared any conflicts of interest in relation to the matters under consideration.

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

Kata Rangataua-Rameka	Board Secretary
	Complainant
	LBP
	LBP's wife
Paul Chisnall	Registrar's representative
Simon Paykel	Special Adviser

No members of the general public were in attendance.

2. Complaint and decision 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 5 December 2013 the Registrar provided the Board with 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 In accordance with regulation 10, the Board then resolved to proceed with the complaint on the following disciplinary grounds:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).
- 2.4 Simon Paykel of Maynard Marks Limited was appointed as a Special Adviser "Special Adviser" to prepare a further report in this matter. His report dated March 2014 was received and circulated to the LBP and the Complainant, as was the Registrar's report and copies of submissions to the Board made by each of them.
- 2.5 A hearing commenced at 10:00 a.m. on Tuesday 6 May 2014 in accordance with notices given.
- 2.6 The Complainant, LBP, and Special Adviser were sworn in. They presented their evidence in relation to the complaint and answered questions from the Board.

3. The issues, and grounds for complaint.

- 3.1 The Complainant contracted the LBP to construct new decking with a roof over it to match an existing deck and roofing (the deck extension).
- 3.2 The LBP had previously been engaged by the Complainant to undertake some modifications to an existing deck which involved installing new translucent roofing

sheets and infilling the existing handrail with vertical balusters. The vertical balusters replaced a horizontal rail that the Complainant considered unsafe.

- 3.3 In March 2013 a local building inspector, who happened to be on site to inspect other building work at the address, inspected the deck extension undertaken by the LBP.
- 3.4 The Inspector advised that the building work required a building consent and he also advised the Complainant of concerns with the construction of the deck. The Inspector advised the Complainant that in order for the deck to remain in place the Complainant would either need to apply for a Certificate of Acceptance or building consent.
- 3.5 After a meeting on site, the LBP undertook to engage a designer (at his cost) to draw up plans and documentation support an application for a Certificate of Acceptance. The LBP also agreed to remedy the deficiencies at his cost.
- 3.6 Further changes were made to the remedial plans to meet the Complainant's requirements and a Certificate of Acceptance application was submitted to the local Building Consent Authority.
- 3.7 Further time elapsed before the Building Consent Authority advised the LBP that the Complainant had decided not to proceed with the application for a Certificate of Acceptance.
- 3.8 The complaint has been laid on two grounds:
 - that the LBP carried out or supervised building work that does not comply with the building consent, and
 - that the LBP carried out or supervised building work in a negligent or incompetent manner.

4. The evidence, and the matters to be considered.

- 4.1 The Special Adviser inspected the site on 13 February 2014, and given that there had been no remedial repairs undertaken since the complaint was lodged he was able to review the deck extension construction that forms the basis of this complaint.
- 4.2 A measurement taken at the corner of the deck extension showed that the height is 1860mm above the adjacent ground level, and at the junction with the existing deck 1570mm above the adjacent ground level. Given that the deck extension is more than 1500mm above ground level a building consent should have been applied for.
- 4.3 The LBP admitted that the deck extension was above 1500mm, noting that at the time construction commenced he did not think it would have been over this height. He admitted, however, that he did not check the height and in hindsight he should have had plans drawn and applied for a building consent.
- 4.4 The Board's view was that the LBP was in breach of s 40(1) of the Building Act 2004 in that the building work was undertaken without the required building consent requiring the owner to either remove the construction or lodge an application for a Certificate of Acceptance. The Board has found that grounds for discipline under section 317(b) are proven.

4.5 The Board then considered evidence in relation to the construction of the deck. This evidence related to deviations from recognised standards and compliance documents, in particular the Building Code.

4.6 S 17 of the Act states:

"All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work."

Given that the building code is performance based rather than prescriptive, compliance with the building code can be achieved by following "Acceptable Solutions" or adopting an Alternative solution.

4.7 The following deficiencies were brought to the attention of the Board and detailed in the Special Adviser's report:

- The height of the handrail on the deck was 900mm. The minimum height in order to comply with the Acceptable Solutions is 1000mm.
- The spacing of the balusters exceeded the maximum gap allowed (100mm) within the Acceptable Solutions. They are 105mm apart.
- The handrail baluster posts were spaced at 2200mm apart. The maximum recommended span in NZ3604 is 1000mm.
- The stair constructed to access the deck had non-compliant risers, landings and handrails.
- Undersized plies were used on the deck extension being 90x90mm instead of 125x125mm.
- No subfloor bracing existed to any of the subfloor structure.
- The methods of fixing the deck extension in various places did not meet standards.

4.8 The LBP advised that the height of the handrail was not changed when the vertical balusters were built on the existing deck. His advice was that the Complainant did not want to incur the extra cost of replacing the existing handrail. When the deck extension was built the height of the handrail was continued for aesthetic purposes.

4.9 The LBP also noted that Clause 4 F4/AS1 allows a 900mm high barrier on stairs, ramps and landings.

4.10 In relation to the other deficiencies that LBP acknowledged the complaint and was very willing to do everything to rectify the problems to the mutual satisfaction of both parties and at the LBP's expense. The Complainant denied the LBP that opportunity. Further, the Complainant has not paid the LBP for the building work undertaken on the deck extension.

4.11 The Board considered whether or not the LBP has carried out or supervised building work in a negligent or incompetent manner and has regard to the case of *Beattie v Far North District Council*. Judge McElrea has provided useful guidance on the interpretation of these terms:

"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."

4.12 Judge McElrea continues

"...However, in a case brought to my attention by Mr Corkill,¹ Gendall J stressed that not all negligence or malpractice amounts to professional misconduct but only "behavior that falls seriously short of what is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness".² 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.)..."

4.13 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..."

- 4.14 Each deficiency identified by the Building Consent Authority and the Special Adviser was considered to be only moderately difficult to access or replace and able to be rectified to meet the building code. The LBP had offered to rectify the deficiencies at his own expense but is no longer able to be involved. The Board also considered the number of deficiencies that were identified.
- 4.15 The Board consider that knowledge of the Act, the building 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 the LBP has not displayed these competencies. The Board recognised that the LBP worked on his own account, and suggest that from time to time he needs to refresh his knowledge and understanding of building requirements.
- 4.16 On balance the Board took the view that the number of deficiencies leads to a finding that the LBP was incompetent and that he had shown a serious lack of care. Consequently the Board has found that grounds for discipline under s 317(b) are proven.
- 4.17 Both findings require the Board to consider penalty, recovery of costs, and publication of name.

¹ *Collie v Nursing Council of New Zealand* [2000] NZAR 74

² 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)

5. Penalty, costs, and publication of name; and the matters to be considered

- 5.1 The grounds upon which a Licensed 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.⁽³⁾

6. Board's Decision

- 6.1 The Board finds the grounds for discipline under s 317(1)(b) and s 317(1)(d) proven, and that the LBP should be disciplined.

7. Disciplinary penalties

- 7.1 S 318(1) of the Act provides for a range of disciplinary penalties which the Board may apply in these circumstances.
- 7.2 The Board invites the LBP to make written submissions on the matter of possible disciplinary penalties, up until close of business on **5 p.m. Monday 23 June 2014**. Such submissions may include information on his financial circumstances.

8. Costs

- 8.1 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 inquiry.
- 8.2 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 **5 p.m. Monday 23 June 2014**. Such submissions may include information on his financial circumstances.

³ 318 Disciplinary penalties

(1) In any case to which section 317 applies, the Board may—

(a) do both of the following things:

(i) cancel the person's licensing and direct the Registrar to remove the person's name from the register; and

(ii) order that the person may not apply to be relicensed before the expiry of a specified period:

(b) suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register;

(c) restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register;

(d) order that the person be censured;

(e) order that the person undertake training specified in the order;

(f) order that the person pay a fine not exceeding \$10,000.

(2) The Board may take only 1 type of action in subsection (1)(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).

(3) No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.

(4) In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.

(5) In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.

9. Publication of Name

- 9.1 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.
- 9.2 The Board invites the LBP to make written submissions on the matter of publication of disciplinary penalties, up until close of business on **5 p.m. Monday 23 June 2014**.

10. Right of Appeal

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

Signed and dated this 25th day of May 2014



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Chairman
David Clark