

Before the Building Practitioners Board

At [REDACTED]

BPB Complaint No. C1119

Under the Building Act 2004 (the Act)

IN THE MATTER OF

A complaint to the Building Practitioners' Board under section 315

AGAINST

[REDACTED], Licensed Building Practitioner
No. [REDACTED]

DECISION OF THE BUILDING PRACTITIONERS' BOARD

1 Introduction

1.1 [REDACTED] (the Complainant) lodged a complaint with the Building Practitioners' Board (the Board) on 27 November 2013 in respect of [REDACTED], Licensed Building Practitioner (the Respondent).

1.2 The Complaint alleged the Respondent has, in relation to building work in respect of [REDACTED]:

- (a) carried out or supervised building work in a negligent or incompetent manner contrary to s 317(1)(b) of the Act;
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to 317(1)(d;) of the Act;
- (c) misrepresented his/her competence contrary to s 317(1)(h) and section 314B(a) of the Act;
- (d) carried out or supervised building work not within his competence contrary to s 317(1)(h) and section 314B(b) of the Act; and
- (e) conducted himself/herself in a manner that brings or is likely to bring, the regime under the Building Act for Licenced Building Practitioners into disrepute 317(1)(i) of the Act.

1.3 The Respondent is a Licensed Building Practitioner with a Design Area of Practice 1 issued 19 January 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
Brian Nightingale

Deputy Chairman, Presiding
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 [REDACTED] on 15 October 2014 and on 25 November 2014 in accordance with the Act and Regulations.
- 1.8 The following other persons were also present during the course of the hearing:
- | | |
|------------------|------------------------------|
| Greg Gimblett | Registrar's Representative |
| Sarah Jones | Board Secretary |
| [REDACTED] | Respondent by telephone |
| Keith Huntington | Special Adviser to the Board |

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 28 May 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 9 June 2014 the Board considered the Registrar's report and in accordance with Regulation 10 it resolved to proceed with the complaint that the Respondent carried out or supervised building work in a negligent or incompetent manner contrary to s 317(1)(b) of the Act.
- 2.4 The Board requested a Special Adviser be appointed to prepare a report. Keith Huntington report dated 16 September 2014 was received and circulated to the Respondent and Complainant.
- 2.5 On 29 September 2014 at 2 p.m. a pre-hearing teleconference was convened by Chris Preston, Deputy Board Chair. The Respondent and Registrar's Representative were both present. The hearing procedures were explained and the Respondent's attendance at the substantive hearing was confirmed.

3 The Hearing

- 3.1 The hearing commenced on 15 October 2014 at 2 p.m.
- 3.2 At the hearing the Board was assisted in the presentation of the case by the Registrar's Representative.
- 3.3 The Respondent attended the hearing by telephone conference. The Special Adviser attended in person.
- 3.4 The Respondent and the Special Adviser were sworn in, their evidence was presented and they answered questions from the Board.

- 3.5 During the hearing the Respondent raised concerns that a large file of evidence which he had submitted electronically to the Special Advisor might not have been included in the bundle of documents available to the Board.
- 3.6 The Board adjourned the hearing to allow the documents to be distributed to and considered by the Board.
- 3.7 The hearing was reconvened at 2.00pm on 25 November 2014 with the same persons in attendance and with the Respondent attending by telephone conference.

4 Substance of the Complaint

- 4.1 The complaint relates to the completeness of the documentation the Respondent was contracted to prepare for a four house development. The Respondent's services were provided electronically as the Respondent did not live in the region where the houses were to be consented and constructed. The central allegation was that the Respondent had been negligent or incompetent in the provision of his services.

5 Evidence

- 5.1 The Complainant says that the Respondent failed to accurately record and detail the materials and insulation that were to be used in the building works, the survey and town planning requirements and the plumbing schematic layout in a set of documents the Respondent provided on 28 July along with a payment claim for services provided. It was the view of the Complainant that had the documents provided to him on 28 July 2013 been submitted for a building consent then there would have been a request from the Building Consent Authority for further and better information to show how the building was to be constructed to code. The Complainant says the documents were missing fundamental items and could not be used for the project.
- 5.2 The Special Advisor gave evidence that the documents as at 28 July 2013 were not of sufficient detail and accuracy to be considered ready to support an application for a building consent.
- 5.3 The Respondent gave evidence that as at 28 July 2013 the documents were sufficiently complete to be made available to the truss designer and engineer for their professional input and for the Complainant to be able to get prices from subcontractors. The Respondent had generated an invoice for services rendered up to this stage of the preparation of the documents as expressly noted at item three of his service agreement. The Respondent expected to undertake further work on the documents prior to them being submitted for a building consent but the relationship with the complainant had broken down and the contracted work was not completed.
- 5.4 In response to questions from the Board and during submission of his evidence the Respondent described his processes for receiving instruction, managing interactions with the client about design requirements, preparation of preliminary drawings, completion of post design modifications to incorporate input from other professionals, preparation of documents and Certificate of Design for building consent application and revision to drawings, if any, following review and/or information requests by the building consent authority during the consent application process.
- 5.5 In response to questions from the Board the Respondent gave evidence that he kept up to date with changes to building legislation through information provided to the industry at trade outlets or BRANZ publications and changes in documentation requirements by reference to building consent authority checklists. He noted that he

had a peer review process which involved him quality checking his own work and that he considered it was the Building Consent Authority's role to check his work and pick up errors and deficiencies that he may have missed or was not aware of. He saw it as more efficacious for the Consent Authority to identify areas where changes in standards or acceptable solutions had occurred than for him keep abreast of all of the changes which might have an impact on his designs. He saw the interaction with the request for further information process with the Consent Authority as part of his learning and development.

6 Boards Conclusion and Reasoning

- 6.1 The grounds for the complaint were that the Respondent had carried out or supervised building work in a negligent or incompetent manner. The complaint was laid by the owner of the land on which the project, as designed, was to be constructed.
- 6.2 The Complainant's position was that the documents prepared by the Respondent would not be acceptable to the building consent authority if used to support an application for a building consent.
- 6.3 The Respondent position was that the documents were 95% complete and that he still needed to revise them to align with the truss and engineer specific designs, detail exactly what materials the owner had decided to use and other adjustments. At that time he would have removed the water mark to show that the drawings were complete.
- 6.4 In considering the service agreement and the faxed exchanges between the parties the Board was satisfied that the site specific drawings and specifications that are the subject of this complainant were incomplete at the time when the contractual relationship broke down because they were stage one of a two stage preparation agreement.
- 6.5 The Board however, through its enquiries at the hearing, found that the Respondent's description of his processes and methodology for quality assurance, keeping up to date with legislative changes and building consent authority minimum documentation requirements fell below those expected of a reasonable practitioner holding a design AOP1 licence. The Respondent relies on Building Consent Authority information request processes as a quality assurance mechanism rather than undertaking his own professional development and research of the currency of New Zealand Standards and/or Acceptable Solutions. The Respondent is professionally isolated and is unaware of where to get construction industry information which is publically available on the MBIE website. The Board is of the view that a reasonable practitioner with a Design AO1 licence would not operate their design practice in this manner and would be aware of the need to keep informed and up to date and not to rely on the Consent Authority in this respect.
- 6.6 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 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

¹ Judge McElrea, DC Whangarei, CIV-2011-088-313

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."

6.7 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.)..."

6.8 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..."

6.9 On the basis of the above the Board has decided the Respondent has carried out or supervised building work in a negligent or incompetent manner in that the Respondent has shown a lack of reasonably expected care in how he has gone about keeping himself up to date with regulatory and code changes, indicating a lack of ability and skill level.

7 Board Decision

7.1 The Board has decided that Respondent has carried out or supervised building work as a Licensed Building Practitioner in a negligent or incompetent manner contrary to s 317 (1)(b) of the Act and should be disciplined.

7.2 The Board's Complaints Procedures allow the Board to either set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make written submissions on those matters.

7.3 The Board considers that the offence is at the lower end of offending and considers a censure is the appropriate penalty. Furthermore as there was relevant material before the Board at the hearing and information presented by the Respondent on his personal and financial circumstances in relation to this claim the Board does not consider it necessary to seek further submissions.

7.4 With regard to costs the Board notes that the respondent has been cooperative in regard to the Board's inquiry and did not obstruct the Registrar in his investigation. The Board considers the sum of \$250 is an appropriate amount of costs for the Respondent to pay towards the costs of and incidental to the Boards inquiry.

- 7.5 The Board strongly recommends that the Respondent amends the way in which he undertakes his design practice and puts suitable quality assurance and professional development processes and systems in place.
- 7.6 On the matter of the publication, the Respondents name and the disciplinary outcome will be recorded in the public register maintained as part of the Licenced Building Practitioners' scheme as is required by the Act. Having taken into account the circumstances of the case, the Board does not find it necessary to further publish the Respondents name or to specifically identify him in other publications.
- 7.7 For the reasons set out above, the Board directs that:

Penalty

Pursuant to s318(1)(d) of the Act, the Respondent is to be censured

Costs

Pursuant to s 318(4) of the Act, the Respondent is ordered to pay \$250 (GST inclusive) towards the costs of, and incidental to, the inquiry of the Board.

Publication of Name

The registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with s301(1)(iii) of the Act.

In terms of s 318(5) of the Act, there will be no action taken to publicly notify the Board's action, except for the note in the register.

8 Right of Appeal

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

Signed and dated this day of 17 December 2014



Chris Preston
Presiding Member