

Before the Building Practitioners Board
At [omitted]

BPB Complaint No. C2 - 01065

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315

AGAINST

[The Respondent], Licensed Building Practitioner No. [omitted]

DECISION OF THE BUILDING PRACTITIONERS' BOARD

1 Introduction

- 1.1 [Omitted] (the Complainant) lodged a complaint with the Building Practitioners' Board (the Board) on 3 April 2014 in respect of [the Respondent], Licensed Building Practitioner (the Respondent).
- 1.2 The complaint alleged the Respondent has, in relation to building work in respect of [omitted]:
- (a) carried out or supervised building work in a negligent or incompetent manner (section 317(1)(b) of the Building Act 2004 ("the Act"); and
 - (b) carried out or supervised building work that does not comply with a building consent (section 317(1)(d) of the Act).
- 1.3 The Respondent is a Licensed Building Practitioner with an External Plastering license AOP 2 issued 23 September 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:
- | | |
|-------------------|-----------------------------|
| Chris Preston | Chairman (Presiding member) |
| Brian Nightingale | Board Member |
| Colin Orchiston | 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 Wellington on 11 December 2014 in accordance with the Act, the Regulations and the Board's "Complaints Procedure".
- 1.8 The following other persons were also present during the course of the hearing:

Ella Tait	Registrar's Representative.
Vanessa Taumainamoe	Board Secretary.
[Omitted]	Respondent (Via telephone).
[Omitted]	Complainant (Via telephone).
Peter Rodgers	Special Adviser to the Board (By telephone).
[Omitted]	Witness for the Respondent (Via Telephone).
[Omitted]	Witness for the Complainant (Via Telephone).
[Omitted]	Witness summonsed by the Board (Via Telephone).

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 30 July 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 September 2014 the Board considered the Registrar's report and in accordance with Regulation 10 it resolved to proceed with the complaint that the Respondent:
 - (a) carried out or supervised building 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 The Board requested a Special Adviser be appointed to prepare a report. Peter Rodgers report dated 16 July 2014 was received and circulated to the Respondent and Complainant.
- 2.5 On 18 November 2014 at 10.30 am a pre-hearing teleconference was convened by Mr Chris Preston. The Respondent and Registrar's Representative were both present. The hearing procedures were explained and the Respondent's attendance at the substantive hearing, via telephone, was confirmed.

3 The Hearing

- 3.1 The hearing commenced at 9.00 am on 11 December 2014 in [omitted]. 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 Respondent, Special Adviser, Complainant and witnesses were sworn in, their evidence was presented and they answered questions from the Board.
- 3.4 The hearing was adjourned at 12.03 p.m. to allow the Respondent to provide further documents relating to the Respondents communications with the BCA on the requirements for a Building Consent.
- 3.5 On or about 15 December 2015 the Respondent emailed to the Board Secretary a one page document which included dialogue between the parties by text.
- 3.6 A further email was received from the Respondent on 17 December 2014 regarding the respondents meeting with the BCA.

3.7 The document was sent to the Complainant for comment. Her response was received on 17 December 2014.

3.8 Both documents were provided to the Board by the Secretariat.

4 Substance of the Complaint

4.1 The complaint is that the Respondent carried out or supervised the work in a negligent and/or competent manner and without a building consent.

4.2 The work relates to a residential two storey property built prior to the introduction of the NZ Building Act in 1991. The work was to replace cladding at the lower storey which required extensive maintenance or repair.

4.3 The work relates to the removing of the existing monolithic plaster cladding, supplying new building paper, proprietary flashings to windows and installing a new Graphex cladding system over a cavity.

4.4 The complaint alleges:

4.4.1 The Respondent advised that the work did not require a building consent.

4.4.2 A number of poor and substandard workmanship issues including:

4.4.2.1 Cladding that was not installed in accordance with the Building Code in that the distance between the bottom of the cladding and ground level was insufficient and that the building paper did not lap the required length past the bottom plate.

4.4.2.2 Flashings that were not correctly installed around the external joinery.

4.4.3 The Respondent did not register the complainant's contract with the local Rockcote representative as required for warranty purposes.

4.4.4 That the Respondent engaged [omitted] to replace some decayed timber and that [omitted]

4.4.4.1 Cut a load bearing lintel above a ranch slider, compromising the strength and integrity of the wall, and

4.4.4.2 Installed studs and framing timber floor / floor anchors in a poor manner.

5 Evidence

5.1 The complainant submitted evidence including:

5.1.1 Photographs of the alleged poor workmanship.

5.1.2 A copy of the Respondents quotation for the work.

5.1.3 A copy of promotional material relating to the Respondent's company and also that of [omitted].

5.1.4 A copy of email correspondence between the Complainant and the Respondent, including written advice that the work did not need a permit (building consent);

5.1.5 A copy of email correspondence between the Complainant and her solicitor, attaching a copy of the Pre Purchase Property Report.

- 5.1.6 That the Respondent gave advice to the Complainant before the house was purchased and based on this advice was engaged to carry out work after the house was purchased.
- 5.2 The witness for the Complainant submitted that he had visited the site and observed:
 - 5.2.1 Graphex sheets not nailed off properly.
 - 5.2.2 Graphex sheets fixed over the wrap that had been cut off at the incorrect height.
 - 5.2.3 Beading fixed over the some of the Graphex sheeting suggesting that these sheets were unlikely to have been fixed temporarily.
- 5.3 The Special Advisor in his report confirmed that he had visited site and observed the building work. He advised that:
 - 5.3.1 In his opinion the work required a building consent.
 - 5.3.2 The Graphex sheets were not fully installed and a long way off being ready to receive any plaster.
 - 5.3.3 He considered that the Respondent had done his best to leave the works in a state that prevented water getting into the building.
 - 5.3.4 He was unable to determine whether or not the ground levels, gulley trap and wrap overhang etc were an issue as construction had been stopped before this relevant work was completed.
 - 5.3.5 In his opinion the cut in the lintel would not prevent the lintel from carrying the load currently supported by the lintel.
- 5.4 The Respondent submitted that:
 - 5.4.1 He was not on site carrying out the work and did not fix any of the building wrap, Graphex panels or beads himself.
 - 5.4.2 As soon as he came on site and saw the issues with ground clearances, detailing around the deck and the extent of timber replacement required he stopped work, temporarily made good and advised the Complainant of the need to engage a suitability qualified person and the possibility of requiring a building consent.
 - 5.4.3 The work carried out by [omitted] was carried out directly for the Complainant and nothing to do with him.
 - 5.4.4 The lintel was cut by [omitted].
 - 5.4.5 The Complainant was advised of the need to remedy ground levels. This was stated in the quote.
 - 5.4.6 The window flashings were installed correctly. The system has edge seal flashings which adhere to the fin of the window, meaning there is no need for the windows to be removed to install the flashings.
 - 5.4.7 The only work carried out was the removal of the existing cladding, installation of the building wrap and some Graphex sheets temporarily fixed to provide weather protection whilst the ground levels and details were resolved.
 - 5.4.8 That no Graphex had been installed in a final and complete position.
 - 5.4.9 With respect to the building consent, the Respondent accepts that he gave advice that he did not believe a building consent was required, and submits that he did not try to mislead the Complainant but at the time of starting the building

work, believed that the work was a simple replacement of comparable components and therefore exempt under Schedule 1 of the Building Act.

5.4.10 He does not usually register a job with Rockcote until after the job starts.

5.5 The witness for the Respondent submitted that:

5.5.1 He is an employee of the Respondent and carried out the said building work.

5.5.2 He has been plastering for 27 years.

5.5.3 The wrap and Graphex sheets were fixed temporarily to provide some weather protection until the issues with the replacement timber and ground levels were resolved and under no circumstances could it have been considered ready for plastering.

6 Board's Conclusion and Reasoning

6.1 The grounds for this complaint are that the Respondent 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.

Did the Respondent carry out or supervise the building work in a negligent or incompetent manner?

6.2 In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has to decide what work the Respondent carried out or supervised.

6.3 The Respondent gave evidence that he was on site for an hour when work first started to direct his employee in what was required and then left site. He returned later, after his employee had identified and advised him of the issues.

6.4 The Board notes that as soon as the Respondent became aware of the condition of the exposed original structure, he stopped the cladding reinstatement work and advised the complainant that the project was no longer a simple replacement of the cladding and now required specialist design to specific areas, including how to deal with the deck.

6.5 The Board considers that stopping the work and taking expert advice was appropriate.

6.6 The Board considers that in doing so the Respondent did not carry out or supervise the building work in a negligent or incompetent manner.

Did the Respondent carry out work that does not comply with a building consent?

6.7 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. Commencing building work on site without a building consent is a strict liability offence. 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.

- 6.8 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 building consent.
- 6.9 In this case the Respondent has submitted that he considered that the building work he was carrying out was in accordance with the exemptions listed in Schedule 1 (1)(a) of the Act.
- 6.10 The Board notes that:
- 6.10.1 He was replacing the existing plaster with a comparable component or assembly, both being monolithic plaster wall cladding systems.
- 6.10.2 The Graphex was being fixed to the same substrate with proprietary cavity battens and flashings which was in similar but not exactly the same position as the components that had been removed.
- 6.11 In considering whether the Respondent has carried out or supervised building work that does not comply with a building consent, or as in this case, whether the work required a building consent, the Board has regard to the case of *Fairley v North Shore City Council*. Judge Venning has provide useful guidance on the interpretation of Schedule 1 of the Act:¹

“...the exemption provided for in s 41 and Schedule 1 contemplates two alternative situations:

- First, repairs and maintenance to a component or assembly of a building using comparable materials to those previously used: and*
- Secondly, replacement of a component or assembly with a comparable component or assembly in the same position as the component or assembly of the building being replaced.*

The definition of comparable relied on by Mr Fairley is similar to the definition in the Oxford English Dictionary, namely that of “able to be compared, capable of comparison” or “worthy of comparison”.

- 6.12 The Judge Venning continues²:

“... There is an argument that the replacement of a tin roof with a butyl roof is the replacement of a component or assembly (a roof) with a comparable component or assembly.”

- 6.13 Furthermore Judge Venning stated³:

“...While the repair and maintenance must be carried out using comparable materials, there is no requirement that comparable materials be used when the work involves replacement of the component or assembly. The second part of the exemption does not refer to the phrase “comparable materials” whereas it is expressly referred to in the first part. The reference to “comparable” in the second part of the exemptions is directed at the nature of the component or assembly and not the materials used. The replacement

¹ Para 12

² Para 14

³ Para 16

component or assembly must be comparable and in the same position. The focus is properly on this to ensure that the replacement component or assembly does not alter the size, shape, layout, structure or footprint of the building. If it did it would require a building consent."

- 6.14 The Board notes that the Respondent stopped work, once he realised that the scope of building work was changing and that more details were required to deal with the deck connections, increased extent of the decayed timber and that a building consent may then have been required.
- 6.15 The Board considers that at the time the work stopped, no recladding work had been completed that required a building consent.
- 6.16 The Board acknowledges that interpretation of Schedule 1 is complex and in this project required consideration of a number of matters including the time of the original construction as well as the components to be used in the replacement work.
- 6.17 The Board considers that giving advice on building consent matters is not something that is contemplated within the competency of a Plastering licence and that the respondent would have been better advised to advise the Complainant to seek advice from their lawyer, the BCA or from a suitably qualified designer or building surveyor.

7 Board Decision

- 7.1 The Board has decided that **the Respondent has not carried out or supervised building work which is the subject of the complaint as a Licensed Building Practitioner a negligent or incompetent manner contrary to s 317(1)(b) of the Act.**
- 7.2 The Board has decided that **the Respondent has not carried out or supervised building work which is subject of the complaint as a Licensed Building Practitioner that does not comply with a building consent contrary to s 317(1)(d) of the Act.**

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 16 April 2015



Chris Preston
Presiding Member