

Before the Building Practitioners Board  
At [omitted]

**BPB Complaint No. C2-01105**

**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]

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**DECISION OF THE BUILDING PRACTITIONERS' BOARD**

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**1 Introduction**

- 1.1 [Omitted] (the Complainant) lodged a complaint with the Building Practitioners' Board (the Board) on 08 August 2014 in respect of [omitted], 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 or building inspection work in a negligent or incompetent manner (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 (s 317(1)(d) of the Act); and
  - (c) has conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- 1.3 The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 5 September 2012 and a Site Area of Practice One Licence issued 7 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 matter was initially considered by the Board in Auckland on 27 May 2015 and was adjourned and reconvened on 15 July 2015. Both hearings were held in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- 1.6 The following Board Members were present at the initial hearing:
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|--------------------|-------------------|
| David Clark        | Chair (Presiding) |
| Chris Preston      | Deputy Chairman   |
| Robin Dunlop       | Board Member      |
| Richard Merrifield | Board Member      |

1.7 At the reconvened hearing the Chair was not available. Mel Orange, Board Member, attended in his place. Due to the change in the composition of the Board the evidence was heard afresh.

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

Marija Ulrich	Registrar's Representative
Sarah Romanos	Board Secretary
[Omitted]	Respondent
[Omitted]	Complainant
[Omitted]	Complainant
William Hursthouse	Special Adviser to the Board

Members of the public were present.

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

## **2 Board Procedure**

2.1 The "form of complaint" provided by the Complainant satisfied the requirements of the Regulations.

2.2 On 2 December 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 5 February 2015 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 or building inspection work in a negligent or incompetent manner (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 (s 317(1)(d) of the Act); and
- (c) has conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).

2.4 The Board requested a Special Adviser be appointed to prepare a report. William Hursthouse's first report dated 14 May 2015 was received and circulated to the Respondent and Complainant. Following the adjournment of the initial hearing the Special Adviser was asked to provide an updated report. This was provided to all parties.

2.5 Prior to the initial hearing, on 14 May 2015 at 10.30 am a pre-hearing teleconference was convened by the Board Chair, David Clark. The Respondent and Registrar's Representative were both present. The hearing procedures were explained and the Respondent's attendance at the initial hearing was confirmed.

### **3 The Initial Hearing**

- 3.1 The initial hearing commenced at 10.00 am on 27<sup>th</sup> May 2015.
- 3.2 At the hearing the Board was assisted in the presentation of the case by the Registrar's Representative.
- 3.3 All witnesses were sworn in, their evidence was presented and they answered questions from the Board.
- 3.4 At the initial hearing the disciplinary charge under s 317(1)(i) was withdrawn by the Board prior to the matter being adjourned.
- 3.5 The Complainant gave evidence that the initial contract for the house alteration was with another unlicensed builder, who engaged the Respondent to use the Respondent's licence to supervise and sign off the restricted building work. As written in the inspection report sheet of Professional Building Consultants, a [omitted] and [omitted] were present for inspections from 24/7/13 till 25/10/13. The Respondent stated in this time that he visited the site three times for supervision purposes.
- 3.6 At the hearing of 27 May 2015 evidence was heard that the two parties were still in the process of continuing with the house alteration and the Respondent stated he had a pre-code compliance inspection booked for the next day (28/5/15), and that he intended to have the project complete within two weeks. On this basis the Presiding Member of the Board adjourned the hearing and instructed the Special Advisor to liaise with the Building Consent Authority, to re-inspect the property and prepare an updated report for the Board prior to a new date being set to resume the hearing.

### **4 The Reconvened Hearing**

- 4.1 The reconvened hearing commenced at 1.35 pm on 15 July 2015. The two remaining grounds for discipline under s 317(1)(b) and (d) of the Act.
- 4.2 The Registrar's Representative reaffirmed her opening.
- 4.3 All witnesses were sworn in again.

### **5 Substance of the Complaint**

- 5.1 The complainant alleged the Respondent was negligent in his supervision of the building project and carried out building work that did not comply with the building consent.
- 5.2 Aspects of this are:
  - (a) waste pipes not installed before ground floor slab pour;
  - (b) beams not buried in ceiling;
  - (c) the membrane clad deck;
  - (d) the cantilevered deck;
  - (e) roofs at first floor level;
  - (f) buried gutter;
  - (g) cavity closures;
  - (h) meterbox to exterior of bricks;

- (i) window at south end of garage;
- (j) double glazing;
- (k) joinery in wooden weatherboards

## 6 Evidence

- 6.1 Evidence was presented by the Complainant, the Respondent and the Special Advisor.
- 6.2 The Registrar's Representative brought to the attention of the Board an inspection sheet from Professional Building Consultants to show the dates of the Respondent's involvement in the house alteration
- 6.3 The Special Advisor presented his revised report based on an inspection of the property on 5 June 2015. He provided photos from his previous report and had new photos of the house alteration taken on 5 June 2015. He noted some work had been undertaken, but stated some of this work did not follow the consented plans or meet either the Building Code or NZS 3604. He also stated the workmanship was not of a good quality.

## 7 Board's Conclusion and Reasoning

- 7.1 The allegation is that the Respondent has carried out or supervised building work in a negligent or incompetent manner and has carried out or supervised building inspection work that does not comply with a building consent.
- 7.2 The Respondent was involved in the house alteration project and allowed the original builder to use his LBP licence for the early part of the contract. For some reason the original builder vacated the contract and the Respondent took over to complete the alterations. The Board heard evidence alleging that the Respondent undertook work which did not comply with a building consent and that the work was done in a negligent or incompetent manner.
- 7.3 With regard to s 317(1)(d), carrying out or supervising work which does not comply with a building consent there was clear evidence of this. The disciplinary provision is one of strict liability and, as such, the Board upholds the s 317(1)(d) charge.
- 7.4 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*<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 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."*

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

7.5 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.)...”*

7.6 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...”*

7.7 The work the Respondent carried out himself displayed a lack of reasonably expected care and, on that basis, the Board has decided that the Respondent has carried out building work in a negligent or incompetent manner.

7.8 In this complaint the Respondent did not carry out building work in the early part of the alterations but he has accepted that he was supervising it. The question therefore, with regard to those aspects, is whether the Respondent was negligent or incompetent in his supervision.

7.9 The Act defines supervision in section 7:

*supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—*

- (a) is performed competently; and*
- (b) complies with the building consent under which it is carried out.*

7.10 Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992<sup>2</sup>. The definition of supervision in that Act is consistent with the definition in the Building Act and as such the comments of the court are instructive. Section 2 of the Electricity Act defines supervision as:

*Supervision, in relation to any work, means that the work is undertaken under such control and direction of a person authorised under this Act to do the work [or, in the case of section 76, a person authorised to supervise work under that section] as is sufficient to ensure—*

- (a) That the work is performed competently; and*
- (b) That while the work is being undertaken, appropriate safety measures are adopted; and*

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<sup>2</sup> *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

- (c) *That the completed work complies with the requirements of any regulations made under section 169 of this Act.*

7.11 In the case Judge Tompkins stated at paragraph 24:

*“As is made apparent by the definition of “supervision” in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least” supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”*

7.12 On the basis of the evidence presented, and taking into consideration the definition and interpretation of supervision, the Board has formed the view that the Respondent has also supervised building work in a negligent manner in that the work which he supervised was not performed competently and did not comply with the building consent.

## **8 Board Decision**

8.1 The Board decided that the Respondent has carried out and supervised building work which is the subject of the complaint as a Licensed Building Practitioner in a negligent or incompetent manner contrary to s 317(1)(b) of the Act and has carried out or supervised building work or building inspection work that does not comply with a building consent contrary to s 317(1)(d) of the Act and should be disciplined.

## **9 Disciplinary Penalties**

- 9.1 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.
- 9.2 The Board invites the Respondent to make written submissions on the matter of possible disciplinary penalties, up until close of business on 30 September 2015. Such submissions may include information on his personal and financial circumstances.

## **10 Costs**

- 10.1 Under s 318(4) of the Act, the Board has the power to order the Respondent to pay the reasonable costs and expenses of, and incidental to, the Board’s the inquiry.
- 10.2 The Board, therefore, is prepared to receive written submissions from the Respondent on the matter of payment of costs up until close of business on 30 September 2015. Such submissions may include information on his personal and financial circumstances.

## **11 Publication of Name**

- 11.1 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.

11.2 The Board invites the Respondent to make written submissions on the matter of publication by 4 pm on 30 September 2015.

## **12 Right of Appeal**

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

Signed and dated this 11<sup>th</sup> day of September 2015



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Chris Preston  
Presiding Member