

Before the Building Practitioners Board  
At [omitted]

**BPB Complaint No. C2-01196**

**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 [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 15 May 2015 in respect of [the Respondent], Licensed Building Practitioner (the Respondent).
- 1.2 The complaint alleged the Respondent has, in relation to building work at [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); 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).
- 1.3 The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 1 October 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:
- |                    |                          |
|--------------------|--------------------------|
| Richard Merrifield | Deputy Chair (Presiding) |
| Mel Orange         | Board Member             |
| Dianne Johnson     | Board Member             |
| Catherine Taylor   | Board Member             |
- 1.6 The matter was considered by the Board in [omitted] on 1 December 2015 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- 1.7 The following other persons were also present during the course of the hearing:
- |                |                           |
|----------------|---------------------------|
| Terri Thompson | Counsel for the Registrar |
| Sarah Romanos  | Board Secretary           |
| [Omitted]      | Respondent                |
| [Omitted]      | For the Complainant       |

[Omitted]	For the Complainant
[Omitted]	Witness, [omitted] Council
[Omitted]	Witness
[Omitted]	Witness
Simon Cunliffe	Special Adviser to the Board
John Rennie	Special Adviser to the Board

Members of the public were present.

- 1.8 Mr Merrifield declared that he knows [omitted] but did not consider that a conflict existed. No other 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 10 September 2015 the Registrar of the Board prepared a report in accordance with reg 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 24 September 2015 the Board considered the Registrar’s report and in accordance with reg 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); 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 The Board requested a Special Adviser be appointed to prepare a report. Simon Cunliffe’s report dated 6 November 2015 was received and circulated to the Respondent and Complainant.
- 2.5 On 2 November 2015 at 10.30 a.m. a pre-hearing teleconference was convened by Richard Merrifield. 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. The Respondent requested an interpreter be made available for the hearing.

## **3 The Hearing**

- 3.1 The hearing commenced at 2:15 p.m.
- 3.2 At the hearing the Board was assisted in the presentation of the case by the Registrar’s Representative.
- 3.3 An interpreter was provided for the Respondent.
- 3.4 Persons giving evidence were sworn in, their evidence was presented, and they answered questions from the Board.

- 3.5 [Omitted] advised the Board that Simon Cunliffe's wife was an employee of the [omitted], who had at one time supervised [omitted], but did not have any involvement in the matter before the Board. The Board did not consider there was any conflict.

#### **4 Substance of the Complaint**

- 4.1 On 3 March 1998 a building consent was issued for the construction of a house in [omitted]. An inspection of the council file in December 2014 (after the estate of the deceased owner wanted to sell the house), identified that no Code Compliance Certificate had been issued for the house completed in the late 1990s.
- 4.2 When the [omitted] Council undertook a 'Durability Final Inspection' relating to the original consent in early December 2014, the inspection failed due to the following concerns, detailed in a s95A notice issued on 8 December 2014:
- Ground clearance to dwelling
  - Elevated moisture readings to lounge/dining and bathroom
  - Cladding to deck membrane clearance
  - Weep holes to brick veneer
  - Barge clearance to cladding
  - Tile on deck
  - Flashing detail glass awning
- 4.3 A building surveyor was engaged by the deceased owner's estate to assess the extent of repairs required to ensure the house was compliant with the building code.
- 4.4 The house was subsequently sold while investigative work into the extent of the required repairs continued. Not only was the building surveyor involved, but also [omitted], the company the new owner contracted to undertake the repairs.
- 4.5 A site visit and inspection of the property by [omitted] resulted in the provision of a report for the new owner dated 12 March 2015. In this report [omitted] identified that there would be a need to:
- 'Prepare Architectural Drawings for the rebuild.....Take out new Building Consent with [omitted] City Council.....Liaise at all times with Council to verify plans, works, and to assess the extent of timber to be replaced.'*
- 4.6 There was extensive discussion/correspondence between the building surveyor, [omitted] Council and [omitted] (after their appointment as building contractor) from the time the problem was identified in December 2014 through to May 2015.
- 4.7 [Omitted] advised [omitted] Council on 11 May 2015
- 'we're starting works in line with (the building surveyor's) findings'.*
- 4.8 In reaching this decision [omitted] relied on an email dated 5 May 2015 from an [omitted] Council officer stating:
- that they (the [omitted] Council) "agree to carry on with the work".*
- 4.9 On 12 May 2015, [omitted] Council advised [omitted] that the work *'requires a building consent and no remedial works may continue'*.
- 4.10 A Site Instruction Notice was issued on 13 May 2015 stopping all work until a building consent was issued.

## 5 Evidence

- 5.1 A number of parties were involved in determining how best to respond to the repairs required for a Code Compliance Certificate to be issued for the property. [omitted] Council, the building surveyor, and later [omitted], were in regular dialogue as to the work required. [Omitted] Council's requirement that a building consent would need to be applied for before work could commence was clearly stated in the evidence before the Board.
- 5.2 Evidence was also presented that the Respondent, a contractor to [omitted] was not involved in this dialogue. The Respondent stated:
- I am employed by [omitted] of [omitted]. [Omitted] is responsible for liaising with the Council and the owners. [Omitted] is also responsible for any contractual and Council consent matters. I am instructed by [omitted] to carry out the building work.*
- 5.3 [Omitted] appeared as a witness and was questioned by the Board on his understanding of the requirements of [omitted] Council for a building consent to be issued. The Board did not accept his assertion that he could rely on the 5 May email as the trigger to commence building work, when in fact he knew in March 2015 that a building consent would be required.

## 6 Board's Conclusion and Reasoning

- 6.1 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. 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. The fundamental nature of the s 40 is also borne out by it being a strict liability offence to carry works contrary to or without a building consent and the severity of the penalties available to a court on conviction of a person under it.
- 6.2 The disciplinary provisions for licensed persons in Part 4 of the Act include the ground for discipline of having 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). The disciplinary provision, on a literal interpretation, does not include the situation where work is undertaken without first obtaining a consent. The Board, has however, found in previous decisions<sup>1</sup> that a licensed building practitioner who commences or undertakes building work without a building consent could, in such circumstances, be considered to be both negligent and incompetent and as such that the conduct can come within the provisions of s 317(1)(b) of the Act.
- 6.3 The Board's reasoning is based on its interpretation that obtaining a building consent falls within the definition of "building work" in the Act. The term is defined term in section 7 of the Act as follows:

*building work —*

*(a) means work—*

- (i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and*
- (ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and*

<sup>1</sup> Refer for example to Board Decision C1030 dated 21 July 2014

*(b) includes sitework; and ...*

- 6.4 The phrase “for, or in connection with” used in the definition connotes, in the Board’s view, a wide range of matters that could be brought into play including the requirement to obtain a building consent prior to undertaking any building work. The Board considers this interpretation is consistent with the requirement to interpret terms in the Act from the text and in accordance with its purpose so as to give effect to the purpose of Parliament<sup>2</sup>. The Board may (if necessary), in ascertaining the meaning, consider other indications provided in the Act. In this respect the provisions in s 3 “Purposes of the Act”<sup>3</sup>, s 14E “Responsibilities of the Builder”<sup>4</sup> and s 282A “Purposes of Licensing Building Practitioners”<sup>5</sup> have been taken into consideration.
- 6.5 All of these provisions use similar references to the process used to achieve the resulting object of building work and of its compliance with a building consent and the building code. On this basis, the Board has formed the view that the process of obtaining a building consent is an integral part of the building process and ensuring that a building consent has been obtained naturally fits within the definition of “building work”. The words “work, for and in connection with...” (the construction process) is sufficiently wide to include acts (or omissions) of obtaining or ensuring a consent is present before work commences. In the Board’s view the interpretation fulfils what Parliament’s overall intention was, namely no person, licensed or otherwise should commence work (which requires a building consent), without first obtaining the building consent or ensuring one has been obtained.

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<sup>2</sup> Refer s 5 of the Interpretation Act 1999

<sup>3</sup> Section 3 Purpose

This Act has the following purposes:

- (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
  - (i) people who use buildings can do so safely and without endangering their health; and
  - (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
  - (iii) people who use a building can escape from the building if it is on fire; and
  - (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development;
- (b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

<sup>4</sup> S 14E Responsibilities of builder

- (1) In subsection (2), builder means any person who carries out building work, whether in trade or not.
- (2) A builder is responsible for—
  - (a) ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates;
  - (b) ensuring that building work not covered by a building consent complies with the building code.
- (3) A licensed building practitioner who carries out or supervises restricted building work is responsible for—
  - (a) ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act; and
  - (b) ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.

<sup>5</sup> S 282A Purposes of licensing building practitioners

The purposes of licensing building practitioners under this Act are—

- (a) to assess and record building practitioners as having certain skills and knowledge relevant to building work; and
- (b) to license building practitioners so that, in regard to restricted building work, licensed building practitioners can carry it out or supervise it.

6.6 Such a finding is also consistent with the disciplinary provisions of the Act which ensure licensed persons are held to account and the public are protected from those who fail to meet the standards expected of them. If the only course of redress open was via s 40 of the Act then the licensing provisions which ensure the public are informed when engaging licensed persons including whether they have been subjected to any disciplinary matters<sup>6</sup> would not be achieved.

6.7 It is also noted that the Act protects against any risk of double jeopardy where a person has already been dealt with under s 40 the Act by restricting the Board from imposing a pecuniary penalty where they have already been fined by a court for the same act or omission<sup>7</sup>.

6.8 The Board's considers its findings are also consistent with the interpretation of "negligent or incompetent" in *Beattie v Far North District Council*<sup>8</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's 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."*

*"...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 Given that the Board has found that the process of obtaining a building consent is an integral part of the building process failing to obtain one is conduct which falls below the standards expected and show both a serious lack of care and competence.

6.10 The evidence presented was that the Respondent commenced repairs to the property without a building consent. The Respondent is a Licensed Building Practitioner licensed in Carpentry. Competency 1 of the Carpentry Licence Class requires the practitioner to demonstrate knowledge of the regulatory environment of the building construction industry which includes:

1.1 *explain the purpose of the Building Act and Building Code and their relationship with the construction process.*

1.4 *describe the process for work requiring a building consent – includes but not limited to – trigger points for consent, application, inspection, code compliance certificates, and consequences of non-compliance.*

6.11 The Respondent should not have commenced the building work without the consented plans on site. Notwithstanding the Respondent's evidence that he took instructions from the sole Director of [omitted], [omitted], commencing building work without a building consent has put the Respondent's licence at risk.

<sup>6</sup> S 299 of the Act – Purpose of the register and s301 of the Act – Matters to be contained in the register

<sup>7</sup> s 318(3) of the Act.

<sup>8</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

- 6.12 The Board notes that the Respondent only worked for [omitted] and whilst he described himself as a contractor he took his direction as to what had to be done and when from [omitted] of [omitted] and could be more accurately described as an employee.
- 6.13 The Respondent's evidence was that he stopped work immediately after receiving advice the work required a consent and did not return to the site until the building consent was in place. The question for the Board is whether or not it was reasonable for the Respondent to rely on the information provided to him by [omitted] that a building consent was not required. Put another way should he have made his own independent enquiries.
- 6.14 In the circumstances of this case, the Board finds that it was reasonable for the Respondent to rely on the advice and instructions received from [omitted] and that he took the appropriate steps in stopping work once he was appraised of the true situation. The Board notes, however, that it would have been wise for him to verify the consent requirements for himself and had it been a situation where the requirement for a consent was obvious then the Board would have found the Respondent to have committed a disciplinary offence.
- 6.15 Finally, the actions of [omitted], who has been involved in the building industry for a long time, in instructing the Respondent to commence work when he knew a building consent was required were unacceptable and disreputable. A master/servant relationship existed resulting in the instructions of the master potentially compromising the licence of the Respondent.

## 7 Board Decision

- 7.1 Taking into account the extenuating circumstances outlined above, the Board has decided that Respondent **has not**:
- (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 **should not** be disciplined.

Signed and dated this 22<sup>nd</sup> day of December 2015



**Richard Merrifield**  
Presiding Member