

BPB Complaint No. C2-01211

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. BP [omitted]

COMPLAINT DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [Omitted] (Complainant A) lodged a complaint with the Building Practitioners' Board (the Board) on 18 June 2015 in respect of [omitted], Licensed Building Practitioner (LBP) (the Respondent).
- [2] [Omitted] (Complainant B) lodged a complaint with the Building Practitioners' Board (the Board) on 20 July 2015 in respect of [omitted], LBP (the Respondent).
- [3] On 10 September 2015, The Board resolved to consolidate both complaints.
- [4] The complaints alleged the Respondent has, in relation to building work at [omitted]:
- (a) over excavated which has undermined the existing house;
 - (b) hand mixed structural concrete for the header block in the foundations which was subsequently rejected by the Territorial Authority;
 - (c) erected wall and floor framing that is not in accordance with the building consent;
 - (d) constructed a deck with a fall less than that specified in the building consent;
 - (e) erected exterior wall cladding prior to receiving a pass with the "Cavity Wrap" inspection;
 - (f) erected exterior wall cladding in a negligent and incompetent manner;
 - (g) exhibited workmanship below the standard expected of a LBP.
- [5] The Respondent is a Licensed Building Practitioner with a Carpentry and Site 1 Licence issued 1 December 2009.
- [6] 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).
- [7] The following Board Members were present at the hearing:
- | | |
|--------------------|---------------------------------|
| Richard Merrifield | Deputy Chair (Presiding member) |
| Brian Nightingale | Board Member |

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Mel Orange	Board Member
Catherine Taylor	Board Member

[8] The matter was considered by the Board in Auckland on 3 February 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.

[9] The following other persons were also present during the course of the hearing:

Terri Thompson	Counsel for the Registrar
Gemma Lawson	Board Secretary
[Omitted]	Respondent
[Omitted]	Complainant A
[Omitted]	Complainant B
William Hursthouse	Special Adviser to the Board
[Omitted]	Witness
[Omitted]	Witness

Members of the public were not present.

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

Board Procedure

[11] The "form of complaint" provided by the Complainants satisfied the requirements of the Regulations.

[12] On 8 October 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. This report include a report dated 12 September 2015 from Mr William Hursthouse as a Special Adviser.

[13] On 26 November 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);
- (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).

[14] On 21 December 2015 at 1.00 pm a pre-hearing teleconference was convened by Richard Merrifield. The Respondent and Counsel for the Registrar were both present. The hearing procedures were explained and the Respondent's attendance at the substantive hearing was confirmed.

The Hearing

[15] The hearing commenced at 1.23 pm.

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- [16] At the hearing the Board was assisted in the presentation of the case by the Counsel for the Registrar.
- [17] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

Substance of the Complaint

- [18] In relation to building work at [omitted], the documentation provided to the Board alleged that the Respondent has:
- (h) over excavated which has undermined the existing house;
 - (i) hand mixed structural concrete for the header block in the foundations which was subsequently rejected by the Territorial Authority;
 - (j) erected wall and floor framing that is not in accordance with the building consent;
 - (k) constructed a deck with a fall less than that specified in the building consent;
 - (l) erected exterior wall cladding prior to receiving a pass with the "Cavity Wrap" inspection;
 - (m) erected exterior wall cladding in a negligent and incompetent manner;
 - (n) exhibited workmanship below the standard expected of a LBP.

Evidence

- [19] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*¹ where Justice McGrath in the Supreme Court of New Zealand stated:

[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to "the reasonable satisfaction of the Tribunal". A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal's reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

- [20] The Board received the following evidence in support and in response to the allegations:

¹ [2009] 1 NZLR 1

- a. Photos showing that the excavation had undermined piles supporting the house. The Complainants advised that one undermined pile in particular had to be replaced with a much larger senton pile. The Respondent explained that the excavations had to be taken back far enough to allow safe access behind the block wall to carry out the works. The Complainants both advised that they considered the space allowed was greater than necessary.
- b. Both the Complainants and the Respondent agreed that the Respondent had hand mixed structural concrete for the foundation wall header block that was subsequently rejected and had to be removed. The Respondent by way of explanation advised that the concrete was affected by bad weather.
- c. Photos of the wall and floor framing.
 - i. In respect to the wall framing the complainants allege that some walls were framed to an incorrect height. The subject wall frames were pre nailed frames supplied by a separate supplier.
 - ii. The Complainants both allege that the incorrectly sized frames caused problems with the first floor and deck framing resulting in an excessive amount of additional framing.
 - iii. In response the Respondent spoke of and demonstrated a number of ambiguities, conflicting information and inadequate detailing in the building consent documents. This was supported by the Special Adviser in his evidence.
 - iv. The Special Adviser tabled photos showing floor joists that appeared to have inadequate ground clearance. In response the Respondent said that if he had been permitted to complete his work he would have excavated the ground around these to ensure the appropriate clearances.
- d. Agreement from both the Complainants and the Respondent that the deck fall was below the 2 degrees shown on the building consent.
 - i. The Respondent by way of explanation said that he had requested additional help from the Architect on how to construct the deck falls and that the information provided was later shown to be incorrect.
 - ii. Evidence was provided to show that the falls as constructed have eventually been accepted by the Territorial Authority.
- e. The Claimants say that the Respondent should not have started the erection of the weatherboards because:
 - i. The Auckland Council "Cavity wrap inspection" failed and directed the Board to copies of Auckland Council inspection checklists and Site Instruction notices showing that the cavity wrap inspection carried out by the Building Inspector on 11 December 2014 failed.
 - ii. The claimants allege that the Respondent proceeded to begin erection of the weather boards before the failed inspection was remedied.
 - iii. Further examination of these documents and evidence from the Respondent suggested that the reason for the failed inspection was because some window and door flashings, support bars and sill tapes had failed.

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- iv. The Respondent claimed that these flashings, support bars and sill tapes had not been supplied to site so were unable to be installed.
- v. In respect to the erection of the weatherboards the Respondent claims that the weather boards had only been tacked into position and not finally fixed.

Board's Conclusion and Reasoning

Negligence

- [21] 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*². Judge McElrea provided guidance on the interpretation of those terms:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.

[44] In my view 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.

[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.

- [22] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*³ as regards the threshold for disciplinary matters:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

- [23] The Board notes that due to a contractual dispute the Respondent left site before the works were complete.
- [24] The Board notes the conflicting evidence and considers that it is unable to determine that the Respondents actions reached the threshold of "serious lack of care", contemplated by Judge McElrea when considering whether or not a Respondent is negligent.

Contrary to a Consent

- [25] 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

² Judge McElrea, DC Whangarei, CIV-2011-088-313

³ [2001] NZAR 74

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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.

- [26] In considering whether or not the Respondent has carried out or supervised building work or building inspection work that does not comply with a building consent:
- a. The Board notes that the fall to the deck has been accepted by the Territorial Authority.
 - b. The Board notes that the building consent documentation is ambiguous and lacks specific detail on the correct framing heights.
 - c. The Board considers that there is insufficient evidence to determine whether or not the deck sub floor framing varied sufficiently from the building consent documentation such that an amendment to the building consent may have been required.
 - d. The Board notes whilst the cavity wrap inspection was a “fail”, this was due to the lack of window flashings and support bars, that were to be supplied by the Complainant, and that the Respondent had only tacked the weather boards in place waiting the supply and installation of these.

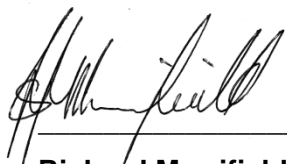
Board Decision

- [27] **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.**

Right of Appeal

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

Signed and dated this 3rd day of March 2016



Richard Merrifield
Presiding Member

ⁱ **Section 330 Right of appeal**

(2) *A person may appeal to a District Court against any decision of the Board—*

(b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*