

Before the Building Practitioners Board  
At [omitted]

**BPB Complaint No. C2-01229**

**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]

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**COMPLAINT DECISION OF THE BUILDING PRACTITIONERS' BOARD**

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**Introduction**

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 28 July 2015 in respect of [the Respondent], Licensed Building Practitioner.
- [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).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 19 December 2012.
- [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).
- [5] The following Board Members were present at the hearing:
- |                   |                          |
|-------------------|--------------------------|
| Brian Nightingale | Board Member (Presiding) |
| Mel Orange        | Board Member             |
| Bob Monteith      | Board Member             |
- [6] The matter was considered by the Board in [omitted] on 17 February 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- [7] The following other persons were also present during the course of the hearing:
- |               |                            |
|---------------|----------------------------|
| Greg La Hood  | Counsel for the Registrar  |
| Sarah Romanos | Board Secretary            |
| [Omitted]     | Respondent                 |
| [Omitted]     | Counsel for the Respondent |

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[Omitted]

Support person for the Respondent

Simon Cunliffe

Special Adviser to the Board

Members of the public were not present.

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

### **Board Procedure**

- [9] The “form of complaint” provided by the Complainant satisfied the requirements of the Regulations.
- [10] On 24 November 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. It included a report from Simon Cunliffe as a Special Adviser to the Board.
- [11] On 21 December 2015 the Board considered the Registrar’s report and in accordance with reg 10 it resolved to proceed with the complaint that the Respondent carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- [12] On 21 January 2016 at 11.30 a.m. a pre-hearing teleconference was convened by Chris Preston, Boar Chair. 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**

- [13] The hearing commenced at 2 p.m.
- [14] At the hearing the Board was assisted in the presentation of the case by the Counsel for the Registrar.
- [15] The Board Secretary attempted to contact the Complainant by phone. The Complainant could not be reached at the commencement of the hearing. The Board resolved to contact the Complainant if and when required, and requested that the Board Secretary notify the Complainant of this. The Board then resolved to proceed with the hearing.
- [16] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.
- [17] The Board, once it heard the evidence of those present, decided that [omitted], a witness who was to be called by way of telephone conference, was not required.

### **Substance of the Complaint**

- [18] The Respondent carried out repairs on exterior cladding, exterior joinery, fascia, soffits, decking, a pergola, windows and handrails. The Complainant alleged a building consent should have been obtained prior to the building work being undertaken.

## 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*<sup>1</sup> 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 house in question was constructed at a time when the Building Act 1991 was in force. A consent was obtained for its construction but a code compliance certificate had not been obtained. No code of compliance had been issued and the consent was still live.
- [21] The Respondent carried out two lots of work on the property. The first involved maintenance and repairs at the request of the Complainant, the other, repairs under an insurance policy following a flood. The property had been subjected to a number of flooding events.
- [22] The scope of work undertaken for the first lot of repairs was outlined in inspection reports completed by [omitted]. There were indicators in the reports, the design of the house, the materials and the type of construction that the house may have been a leaky home.
- [23] The Respondent gave evidence that:
- (a) as regards the first lot of repairs he checked framing and waterproofing prior to commencing the repairs and he outlined the methods he used. He stated he found no evidence to indicate the property had weather tightness issues; and
  - (b) with respect to the post flood repairs there was nothing to suggest that plasterboard removed and replaced was in any way structural or that exterior cladding or timber framing had failed due to weather tightness issues.

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<sup>1</sup> [2009] 1 NZLR 1

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- [24] Following a conditional sale of the house a property report was completed which stated a building consent should have been obtained prior to the works being undertaken.
- [25] The territorial authority issued a notice to fix which stipulated failure to comply with the Building Act 2004 and that a building consent was required for the works as a result of the failure of the durability of the external cladding and the compromising of the building in terms of B1, B2, and E2.
- [26] A determination<sup>2</sup> was sought with regard to the notice to fix (the Determination). It found, in part, that:
- (a) the house did not comply with clauses B2 and E2 of the Building Code at the time the remedial works was carried out; and
  - (b) building consent was required for the remedial work.
- [27] The Special Adviser considered there were indicators that should have put the Respondent on notice that the home was a “leaky home” and that the durability requirements on the Building Code may not have been met. He considered that the Respondent should have followed a consenting process in determining whether or not the repairs could be carried out under Schedule 1 of the Act.

### Boards Conclusion and Reasoning

- [28] The Board has found in previous decisions<sup>3</sup> that a licenced person 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. Full reasoning was provided by the Board in decision C2-01068<sup>4</sup>.
- [29] More recently the High Court in *Tan v Auckland Council*<sup>5</sup> the Justice Brewer in the High Court stated, in relation to a prosecution under s 40 of the Act, that:
- [35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.*
- [37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.*
- [38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.*
- [30] The Board considers the Court was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent is obtained (if required). It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.
- [31] The question for the Board to consider is whether, at the time the building work was undertaken by the Respondent a building consent was required.

<sup>2</sup> Determination 2014/002 dated 22 January 2014

<sup>3</sup> Refer for example to Board Decision C1030 dated 21 July 2014

<sup>4</sup> Board Decision C2-01068 dated 31 August 2015

<sup>5</sup> [2015] NZHC 3299 [18 December 2015]

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- [32] In this respect the Board notes the findings of the Determination. It was made after the building work was undertaken with the benefit of additional evidence, detailed submissions and considered deliberations. A determination post the fact and a decision made at the time of the building work being undertaken need to be distinguished. Also relevant to the Board's considerations (and which were not considered by the Determination) was whether the building work would have had to comply with the 1991 Act or the 2004 Act.
- [33] The Board does not consider that, at the time of the building work was undertaken, there was any evidence to prove a failure of the external cladding other than the signs of water staining caused by floods. Moreover the replacement of the plasterboard flood damage repair which was exempt work under Schedule 1 of the Act. Other building work would, at the time, would also have been considered to be repairs and maintenance using comparable materials and also considered to be exempt under Schedule 1.
- [34] Therefore, notwithstanding the leaky home indicators, the Board considers, on the basis of the information available to the Respondent at the time, the investigations he undertook and the type of work undertaken, that it would have been reasonable for a licensed building practitioner with a carpentry licence to consider the building work could be undertaken under Schedule 1 of the Act.
- [35] The Board does note that it would have been prudent for the Respondent to have made enquiries of the building consent authority prior to undertaking the repairs. A failure to do so in itself may amount to negligence. Again the state of knowledge of the Respondent is determinative and in this instance, invasive investigations having been carried out, it does not consider the actions of the Respondent have fallen below the expected standard.

### Board Decision

- [36] The Board has decided that Respondent has not carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act) and should not be disciplined.

### Right of Appeal

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

Signed and dated this 7<sup>th</sup> day of March 2016




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**Brian Nightingale**  
Presiding Member

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<sup>i</sup> **Section 330 Right of appeal**

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

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- (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.*