Before the Building Practitioners Board
At Tauranga

BPB Complaint No. C2-01238

Under the Building Act 2004 (the Act)

IN THE MATTER OF	A complaint to the Building Practitioners' Board under section 315 of the Act
AGAINST	[The Respondent], Licensed Building Practitioner No. BP [omitted]

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

[1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 17 August 2015 in respect of [the Respondent], Licensed Building Practitioner.

[2] The complaint alleged the Respondent had, in relation to building work at [omitted] carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).

[3] Complaints were also made in respect of two other licensed building practitioners in relation to the same matters.

[4] The Respondent is a Licensed Building Practitioner with Carpentry and Site Area of Practice One Licences issued 25 November 2011.

[5] 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).

[6] The following Board Members were present at the hearing:

Richard Merrifield	Deputy Chair (Presiding)
Brian Nightingale	Board Member
Mel Orange	Board Member
Bob Monteith	Board Member

[7] The matter was considered by the Board in Tauranga on 17 May 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.

[8] 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]	Witness for the Respondent and industry representative
[Omitted]	Witness for the Respondent, business partner, Design 2 licensed
[Omitted]	Complainant
[Omitted]	Support Person for the Complainant
John Rennie	Special Adviser to the Board

Members of the public were present.

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

Board Procedure

[10] The "form of complaint" provided by the Complainant satisfied the requirements of the Regulations.

[11] On 13 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.

[12] On 10 December 2015 the Board considered the Registrar's report and resolved that a Special Adviser be appointed and provide a report prior to the Board making a decision under reg 10 of the Regulations.

[13] On 22 February 2015 an Addendum to the Registrar's Report was provided together with a report from John Rennie as a Special Adviser. On 10 March 2016 the Board considered the Addendum 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).

[14] On 22 April 2016 a pre-hearing teleconference was convened by Richard Merrifield. The Respondent, his representative, and Counsel for the Registrar were all present. The hearing procedures were explained and the Respondent's attendance at the substantive hearing with his representative was confirmed.

The Hearing

[15] The hearing commenced at 10.20 a.m.

[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. The Respondent was assisted in the presentation of his case by his industry representative.

Substance of the Complaint

[18] The Complainant, the owner of the property, alleged the Respondent had been negligent in designing the home in that there was no specification on the plans for a block fire wall to be sealed.

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 Respondent provided a written response to the complaint on 25 August 2015. In it he made statements relevant to the allegation as follows:

(a) on 19 February 2015 the site supervisor advised him there was (another) problem on the block fire wall. The existing block wall was approximately 2.5m and there was a 50 mm gap between the two therefore the new block wall could not sealed. He and [omitted] advised him (the site supervisor) to install a flashing over the existing block wall chased into the new wall and to close off the cavity at the sides with a similar flashing. They were unaware the block wall had not been sealed. [Omitted] had a feeling this would not be done so he contacted the manager of [omitted] (the main contractors) and relayed his concerns. This was followed up with an email. He understood a Council inspector visited the site on 1 April and gave the same advice;

(b) on 28 July 2015 he was told there was a significant leak. This was the first indication the instructions had not been carried out. The original site supervisor was no longer with [omitted] therefore [omitted] advised the new site supervisor of the requirements to complete the wall; and

(c) he agreed there could have been a note on the plan stating the block wall should have been sealed. However, sealing the block wall should have been done as a matter of course.

[21] At the hearing the Special Adviser confirmed his report dated 18 February 2016 which included the following summary:

[1] [2009] 1 NZLR 1

(a) *the house as designed had a new concrete block gable wall to be constructed 135 mm from the cross-lease boundary, and extend up to the underside of the roofing material;*

(b) *the plans did not specifically state the requirement for a waterproof surface coating to be applied to the external face of the new concrete block gable wall, however it was noted within the specification that the wall was to be constructed in accordance with NZS 4229:1999 which does include this requirement; and*

(c) *an existing inter-tenancy concrete block wall existed on the cross-lease boundary, however this was not shown on the plans beside a note on the site plan. It is assumed that this existing block wall is constructed across the boundary and therefore projects into the site by approximately 95mm. The new concrete block gable wall was therefore designed to be constructed approximately 40-50mm away from the face of this existing wall however no details were provided on the drawings to demonstrate how the new wall was to be waterproofed within this 50mm gap, or if any flashings were required. A surveyors certificate was contained within the Council file confirming that the wall had been set out in accordance with the plans.*

[22] The Special Adviser concluded:

(a) *the consented plans failed to specifically state the requirement for a waterproof surface coating to be applied to the external face of the new block wall, however, the specification did cover this requirement and it is expected that a licensed building practitioner would at least question the need to waterproof a bare concrete wall face; and*

(b) *we note that the consented plans failed to identify clearly the presence of the existing concrete block wall that existed on the cross-lease boundary, and that this may have contributed to Council not questioning how the new wall was to be constructed in a watertight manner at consent stage. As designed it was not possible to waterproof the exterior face of the new block wall where it was constructed alongside the existing wall and therefore an appropriate cap flashing was necessary.*

[23] The Respondent provided a response to the Special Advisor's report. In it he rejected the conclusion that the plans did not specifically state the requirement for waterproofing and he referred to a notation on the plans which stated "As per 4229:1999", submitted that the specifications form part of the consented plans and that as such waterproofing had been dealt with by way of the reference, the existing wall was shown on the site plan and that the waterproofing does not have to be applied to the external face. More specifically he stated:

> *The Special Advisor suggests that waterproofing layer should be applied to the external face. NZS 4229 does not specify whether the waterproofing coating is applied to the internal or external face. How it is applied, is a function of the site. In this situation, clearly an external application was not possible, but an internal surface coating should have been applied.*

[24] The Respondent submitted that *"the work was not undertaken in accordance with the plans and specifications, since no waterproofing, as required by NZS 4229, was applied".*

[25] At the hearing the representative for the Respondent provided written submissions and spoke to them. These included an overview of the processes used by the Respondent's business (including that they are now Building Codemark certified) and a reiteration of the submissions made prior to the hearings.

[26] The Respondent informed the Board that his business does all of the [omitted] designs for all of the franchises – completing plans for some 800 homes per year. The plans provided tend to place reliance on his knowledge of the skill and capability of [omitted] in that they do not provide a high level of detail.

[27] In questioning, the Respondent confirmed he had not been to site and generally does not for [omitted] projects, and, to a large extent, relies on instructions provided. He had not undertaken a council file search of the property. He was aware that it was a cross-lease title and that the wall of the other dwelling on the title could not be used as a party or intertenancy wall.

[28] The Respondent accepted that the reference on the plans was to a superseded version of NZS 4229 (the 1999 version). The Special Adviser gave evidence that, notwithstanding the old reference, the newest version would be deemed to apply.

[29] As regards the internal sealing of the wall, the Respondent submitted that the framing had been erected when he was informed that the wall had not been sealed. As such, sealing the wall on the internal face was no longer a viable and he provided the alternative detail.

Board's Conclusion and Reasoning

[30] 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.*

[31] 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*

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

[3] [2001] NZAR 74

which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

[32] The approach taken by the Respondent was one that placed a large degree of reliance on those carrying out the building work. A simple reference to NZS 4229 in the notes on the plan, as opposed to providing specific detail, as was done for other aspects of the build is, to say the least, a very minimalistic approach to compliance.

[33] One view of matters was that the block wall was known to be only 50mm from another wall and that care would have to be taken in its construction. The converse is that NZS 4229 includes a requirement to seal and how it should be done is up to those on site including the licensed carpenter or block layer using the various alternatives in the standard of internal or external sealing. In this respect it is noted that s 14D of the Act which covers the responsibilities of a designer, states:

14D Responsibilities of designer

(1) In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code.

(2) A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly completed in accordance with those plans and specifications or that advice

[34] On a basic view of the matter the plans met the requirements of the building code by referring to NZS 4229 and as such the requirements of s 14D of the Act (noting that under s 14A the provisions in s 14D are not definitive and are for guidance purposes).

[35] A question for the Board, though, is whether the Respondent had a duty to do more, given the proximity of the wall to the other dwelling. In this respect, it is also noted that the original specification did not include instructions to seal off the sides of the wall whereas the revised detail did. This was required in the revised detail as part of the weatherproofing solution but would not have been required had the block wall been sealed on the inside. It would nevertheless have been advisable to have included this in the original specification as it would have prevented debris and vermin from getting into the area. This in itself shows a degree of a lack of care but it is noted that it was not a compliance issue.

[36] The Board is, however, mindful of the comments as regards seriousness outlined above. Seriousness has been the subject of much judicial comment albeit mostly in the medial disciplinary jurisdiction. Some cases lean toward it being a matter for consideration in penalty, others toward it being a factor in determining liability in the first place. The more recent judicial statements tend toward the latter. For example in *Pillai v Messiter (No 2)*[4] the Court of Appeal stated:

"… the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse."

[4] (1989) 16 NSWLR 197 (CA) at 200

[37] The Board has to take into account that the different schemes have different provisions as regards discipline. The above case was one of professional misconduct where the threshold is considered to be higher than that for negligence or incompetence but it is nevertheless instructive when considering what might be termed minor departures from the norm.

[38] In this case, the Board considers the Respondent should have done more. There was a known area of the build that required care and attention to ensure it was done correctly. More thought and consideration could have been given to how that could be achieved than merely referencing a standard. The Board therefore considers that the Respondent has been negligent in that he has displayed a lack of care judged by the standards reasonably expected of such practitioners. The Board does not, however, consider the departure is of sufficient seriousness to warrant a disciplinary outcome.

[39] The Board would note, in coming to this conclusion, that it was by a very narrow margin and that the Respondent's approach to design, in this instance, is not promoting the purposes of a licensing regime being brought into being which, in part, was to improve overall standards and compliance.

[40] The Board also notes that there were various entities that contributed to the failure to waterproof the block wall. The licensed brick and block layer who built the wall and the licensed carpenter carrying out the restricted building work on site should have also turned their mind to the issue of waterproofing and had the notation as regards 4229 been followed then the issue would not have arisen. Overall, though the Board considers the single largest contributor was [omitted] and the processes and systems used by them in the construction of the home. In this respect, it is also noted that the Board heard evidence that [omitted] refused to redress the matter when it was brought to its attention, notwithstanding that it was a clear non-compliance issue.

Board Decision

[41] 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

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

Signed and dated this 6th day of July 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.