

**BPB Complaint No. C2-01240**

**IN THE MATTER OF**

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315 of the Act

**AGAINST**

[The Respondent], Licensed Building Practitioner No. [omitted]

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**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 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 a Roofing – Metal Tile Roof, Profiled Metal Roof and/or Wall Cladding Licence issued 5 August 2009.
- [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           |

C2-01240

[Omitted]	Respondent by telephone
[Omitted]	Complainant
[Omitted]	Support person for the Complainant
John Rennie	Special Adviser to the Board

Members of the public were not 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 28 April 2016 the Respondent was sent a prehearing information sheet having declined the opportunity to have a pre-hearing teleconference.

### **The Hearing**

- [15] The hearing commenced at 3 p.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.

### **Substance of the Complaint**

- [18] The allegation was that the Respondent had been negligent in his supervision of building work in relation to a new dwelling. The Complainant alleged the Respondent:
- (a) fabricated and or fitted a multi-piece capping to the top of the unsealed block wall in such a way as to leave a number of gaps, which have acted as scoops to funnel rain water onto the block wall and thence the house; and
  - (b) someone from [omitted] (the main contractor) came on site and applied screws and silicone to the flashing joints which did not remedy the (alleged) leak.

C2-01240

- [19] Of particular concern to the Board was a statement by the Respondent in response to the complaint that he had not attended the site he had been supervising.

### Evidence

- [20] 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.*

- [21] The Respondent provided a response to the complaint. In it he stated:
- (a) *he did not fit the roof himself. He supplied his LBP to [omitted] who was trained by the [omitted]. His LBP was supplied to him to cover the [omitted] roof as stated on the LBP forms he supplied;*
  - (b) *he was unaware of the parapet flashing until he received the complaint. The original plans show the [omitted] roof only, no parapet. He believes the block layer made the garage wall too high and the easiest solution would be to have an apron and parapet flashing; and*
  - (c) *[Omitted], the Operations Manager for [omitted], stated that the flashing may not look as good as it should but the flashing is fit for purpose. When it was removed there was no sign of water ingress under the cap itself. It was the lack of water proofing on the block wall that caused the problem.*
- [22] As part of the response the Respondent made reference to an adjudication under the Construction Contracts Act 2002 (the CCA). The Board notes that under s 68 of the CCA any proceedings and information in relation to those proceedings are confidential. The waiver of all parties involved in the adjudication is required for the information to be admissible. Accordingly the information was ruled by the Board to be inadmissible.

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

C2-01240

- [23] At the hearing the Board heard that the roof, a [omitted] pressed tile roof, was supplied direct by [omitted] to [omitted]. The installation of it was undertaken by [omitted]. There were no issues with the install of the roof.
- [24] The Respondent stated that the flashing in question was not installed by or under his supervision. It was installed by [omitted] a company that the Respondent has had an involvement in but was not a director or employee of at the time the work was undertaken.
- [25] The Respondent was questioned on his supervision processes. He stated he has about 25 persons in the employ of his company and that at least 10 are now licensed. The business does approximately 30 houses per month with most being in the Wellington region. About one per month is out of town and those are usually done by licensed persons. He goes to site on the jobs that he is supervising but did not do so in respect of the roof to which the complaint relates.
- [26] With regard to [omitted] the Respondent stated he is related to [omitted] whom he thought had at least 10 years' experience, has worked with him and is very confident in his competence in light weight metal roofing.
- [27] A search of the Licensed Building Practitioner Register shows that [omitted] was licensed in Roofing Area of Practice Metal Tile Roof and Profiled Metal Roof and/or Wall Cladding on 21 April 2016.

### Board's Conclusion and Reasoning

- [28] 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>2</sup>. 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.*

- [29] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>3</sup> 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.*

<sup>2</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>3</sup> [2001] NZAR 74

C2-01240

- [30] The Board accepts that the parapet flashing was not done by or under the supervision of the Respondent. Accordingly the Respondent has been neither negligent nor incompetent in respect of it.
- [31] Turning to the supervision of the person who installed the pressed tile roof the Board considers that whilst the Respondent's supervision may have been inadequate by not going to site it has not reached the threshold to be considered negligent or incompetent.
- [32] The Respondent's general supervision processes, as described, appear to be generally acceptable. With the job to which the complaint relates, however, the Respondent had limited involvement and instead relied on his knowledge of the installer's competence and capability. In this instance no issues arose but such a course of action does create risks and as such is not considered to be best practice.

### Board Decision

- [33] 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

- [34] The right to appeal Board decisions is provided for in s 330(2) of the Act<sup>i</sup>.

Signed and dated this 11<sup>th</sup> day of July 2016



**Richard Merrifield**  
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—  
(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.