IN THE DISTRICT COURT
AT WHANGAREI **CIV-2011-088-313**

IN THE MATTER OF	the Building Act 2004
and	
IN THE MATTER OF	an appeal under s 330(2)(b) of that Act against a decision of the Building Practitioners Board
BETWEEN	IAN BEATTIE, Building Practitioner Appellant
AND	FAR NORTH DISTRICT COUNCIL Respondent

Hearing: 11 May 2012

Further submissions: 5 September 2012 (appellant)
6 September 2012 (respondent)

Appearances: The appellant in person
JA McKay for the respondent
BA Corkill QC for the Building Practitioners Board

Judgment: 14 November 2012

RESERVED JUDGMENT OF JUDGE FWM McELREA

Result: The appeal by Mr Beattie is allowed in part.
The cross-appeal by Far North District Council is allowed in part.
Both matters are referred back to the Board for reconsideration.
Costs are reserved.

Introduction

[1] There are in fact two appeals here. The main appeal is by a licensed building practitioner (**LBP**), Mr Ian Beattie (**Mr Beattie**) who was the subject of adverse findings by the Building Practitioners Board (**the Board**) acting on a complaint by the Far North District Council (**the Council**). (The Council is a territorial authority under the Local Government Act and a registered Building Consent Authority under the Building Act 2004 (**the Act**).) The Board was assisted in its tasks by Mr Mark Scully as Registrar of Licensed Building Practitioners (**the Registrar**) under the Act.[1]

[2] Section 317 of the Act provides as one of the "grounds of discipline" of an LBP that he or she:

> has carried out or supervised building work or building inspection work in a negligent or incompetent manner; or ...

The Board made findings of incompetence against Mr Beattie and, in a later but interim decision dealing with penalty, ordered that his "work as a licensed building practitioner design be restricted to Area of Practice 2" and that he contribute $5000 towards the Board's costs.[2] These actions were taken in reliance on ss 316 to 318 of the Act and are the subject of Mr Beattie's appeal.

[3] There was also a cross-appeal by the Council against the finding by the Board that Mr Beattie had not been negligent (as well as incompetent). The Board had reached that view based on a legal interpretation of the word "negligent" in s 317 of the Act which required proof of loss, because loss caused by breach of a duty of care is a component in the tort of negligence. The Council argues that to apply the tortious concept to the Act is misconceived.

[4] The Court was told that this is the first appeal of a decision of the Board, and so there are no direct precedents to be applied. It is in some respects a test case. This decision has been made more difficult by the fact that Mr Beattie, presumably for financial reasons, was without legal representation either before the Board or in this Court.[3] However I have had

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[1] The Registrar is appointed under s 310 of the Act and has other functions apart from assisting the Board.
[2] The penalty decision was stated not to take effect until Mr Beattie's appeal against the finding of incompetence was dealt with, and for that reason it was "interim". Thus the restriction on Mr Beattie's design work has not yet taken effect.
[3] Indeed Mr Beattie told the Court that he had been bankrupted by the Council shortly before the appeal hearing.

very full submissions from Mr McKay as counsel for the Council, and Mr Corkill QC has also made helpful submissions, although limited by the fact that his client, the Board, is quite properly abiding the decision of this Court.

[5] The Board's role started with a complaint by the Council to the Board about Mr Beattie's handling of an application to the Council for a building consent for the repair of a leaking residential building at 7 Kane Street, Opua, Northland. The Council complained that Mr Beattie had carried out building work "in a negligent or incompetent manner", using the words of s 317(1)(b) of the Act. The term "building work" includes design work for the construction or alteration of a building.[4]

[6] The Council was not satisfied that Mr Beattie's design solution was appropriate. It had various features, central among which was the fact that new cladding would be applied directly over the old cladding without first removing all cladding to establish the extent of damage by water.

[7] The Board at para 5.2 expressly refrained from deciding whether Mr Beattie's proposed design solution was an acceptable solution, focussing instead on whether he had performed "the building work" in a negligent or incompetent manner. It found that he had not been negligent, as already noted. However it found that he had carried out his work in an incompetent manner, judged against the four competencies described for level 3 design work in the Licensed Building Practitioners' Rules 2007.

[8] This raises a matter not the subject of submissions but which should be considered by the Board in respect of future complaints, namely whether the Board has jurisdiction to consider any complaint not about building or design work but about a building practitioner's dealings with a Council on behalf of an owner when attempting to obtain a building consent for a design already completed.[5] (It is arguable that dealings with a Building Consent Authority about whether or not a consent should issue are neither building work nor design

[4] See cl 3 of the Building (Design Work Declared to be Building Work) Order 2007

[5] A considerable part of the hearing before the Board and of the Board's decision related to matters such as Mr Beattie's refusal to supply a copy of a WHS report when requested by the Council. The Board's decision as stated at para 6.2 gives as particular reasons the fact that Mr Beattie's "actions or inactions did not provide a sufficient basis for the FNDC to … be satisfied that the provisions of the Building Code could be met". Mr Beattie's conduct in attempting to obtain a building consent for his client may not be part of his design work, and the Board will need to consider whether this is in fact a disciplinary matter under the Act.

work; however, because of the view I have reached on other matters it is not necessary for me to decide this issue.)

Decision of Whangarei District Court on 26 November 2010

[9] Because there was this earlier appeal to this Court it is helpful to mention it at this point. This decision was given by Judge de Ridder[6] on an appeal by Mr Beattie under s 208 of the Act against a decision of the Department of Building and Housing (**DBH**) confirming the decision of the Council not to issue a building consent for the same work as is in issue in this appeal. However in that proceeding Mr Beattie's competence was not at issue. The only issue was whether the Council should have issued a building consent on the basis of the application presented by Mr Beattie as agent for the owners.[7] The District Court confirmed the decision of the DBH confirming that of the Council in declining to issue a building consent.

[10] That issue is now settled. I apply the doctrine of *issue estoppel*, the point having been argued between the same parties (indeed, in respect of the same application for a building consent) in previous legal proceedings. Consequently I am bound by that earlier determination. Although the point in issue before Judge de Ridder was much narrower than that before the Board and this Court, it formed part of the reasoning of the Board - viz. that Mr Beattie was seeking a building consent without having provided adequate supporting information.

Grounds of this appeal

[11] Perhaps because Mr Beattie did not have a lawyer to assist him, his formal notice of appeal is not well drafted but the nature of his concerns was set out in his affidavit filed and served many months before this Court's hearing.[8] Two particular grounds of appeal have merit and are considered first – lack of time to respond, and lack of time to prepare for the hearing.

Lack of sufficient time to respond to the Registrar's expert

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[6] ***Beattie v Far North District Council*** (Whangarei District Court, CIV-2010-088-000109, 26 November 2010)
[7] The Chairman noted this distinction in a question to Dr Gatley at page 61 of the transcript (Vol 1 p 94).
[8] No objection was taken to its contents on the grounds that they went beyond the Notice of Appeal, and nor did Mr Beattie object to the late filing of an affidavit on behalf of the Board which put various documents before the Board that were not part of the Board's file as previously provided. (Neither witness was cross-examined on his/her affidavit.)

[12] The Registrar engaged an independent expert to assist him to prepare the report, a Dr Gatley.[9] Dr Gatley in fact provided a lengthy report which the Registrar attached to his own report, as part and parcel of his own report. The Registrar quite properly wanted Mr Beattie to have the opportunity to have input into Dr Gatley's report and told Mr Beattie that Dr Gatley would be in touch with him for this purpose.

[13] The process of compiling that report was commenced in mid-2010 but halted after Mr Beattie appealed to the District Court against the decision of the DBH already mentioned.[10] Once that decision was obtained the Registrar resumed the report process. On both occasions there was considerable delay by Dr Gatley in contacting Mr Beattie, so that Mr Beattie had little time to respond. Further details of this problem appear below.

The appointment of Dr Gatley

[14] The matter is complicated by the fact that Dr Gatley was not, as one might have expected, appointed under s 322(1)(d) of the Act, whereby the Board:

> [may] appoint any persons as special advisers to assist the Board (for example, to advise on technical evidence).

Instead he was engaged by the Registrar for the purpose explained by the Registrar at paras 8 and 9 of his report:

> 8. To assist me to fulfil my requirement to report to the Board regarding regulations 8(1)(a) and 8(1)(b), I engaged a suitably qualified independent person, Dr David Gatley, to prepare a report which I have appended to my report.
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> 9. My intention is that Dr Gatley's report is to be read by the Board as forming part of my report.[11]

[15] Dr Gatley appears to have performed two different roles – assisting the Registrar with his report, and giving evidence to the Board. He could have been, but was not, appointed by the Board as an "expert adviser" under s 322(1)(d). Such a person would give advice, rather than evidence, to the Board. Here Dr Gatley was clearly a witness, sworn in to give evidence

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[9] Mr Scully explained to the Board that he did this in part because Mr Beattie was authorised to design the most complex type of structures (design 3) whereas he was a former builder and building inspector but was now more of a "bureaucrat"; and secondly because he (Mr Scully) had opposed Mr Beattie's registration as a Design 3 practitioner and been overruled on appeal, and he wished to avoid any perception of a "conflict of interests": transcript pp 18,19.

[10] That was a sensible step: if the District Court had held that a building consent should have issued, that would have largely disposed of this disciplinary proceeding.

[11] There is other evidence of this being the nature of Dr Gatley's appointment. (See e.g. para 28(c) below.)

(p 16 of the Board's transcript), and had earlier been asked to confirm that he had "complied with the High Court Rules as an expert [witness]" (p 14).

[16] Of course, had Dr Gatley been appointed by the Board as a special adviser, he could then have been used by the Registrar to assist with his report pursuant to reg 7(4), but he would then have been obliged to approach the matter within the statutory framework applicable to the Registrar.[12]

The first period of delay

[17] In relation to the general issue of insufficient time being given, Mr McKay reminded the Court that extensions of time were granted by the Registrar. His submission (para 38) that "Dr Gatley may have initially given Mr Beattie insufficient time to formally respond to the complaint" is a considerable understatement. In 2010 Mr Beattie was given less than a week, if one allows time for Dr Gatley's letter to be delivered.

[18] Mr McKay's submissions at (para 38) rely on the fact that the Registrar extended the response timeframe to comply with the complaints procedures of the BPB. He was in fact given more than a month.[13] I agree therefore with Mr McKay's submission that the surprisingly short period of time given by Dr Gatley was extended appropriately by the Registrar on this occasion – but only after Mr Beattie had complained about it.

The second period of delay

[19] However, after the statutory process was resumed, in December 2010, the position is somewhat different. The Registrar's letter of 24 December 2010 is to be found at Vol 2 p 263 of the Board's file. It gives Mr Beattie "20 working days" (said to mean until 8 February 2011) to comment or provide information on the facts and evidence provided by the Council and to provide any additional relevant information.[14] At p 19 of the Board's transcript the

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[12] I am not suggesting that the Registrar had no authority to engage the services of Dr Gatley – he presumably had the authority of the Board to so proceed, as the Board treats Dr Gatley's fees, or a portion of them (for the Board regarded them as excessive), as properly incurred in assisting the Registrar.: see para 4.4 of the Board's decision on penalty, costs and public notification dated 19 July 2011.

[13] (Refer to transcript page 28 and the letter from the Registrar to the appellant dated "28 May 2008" (*sic*: 2010) found at p 273 of Vol 2. That letter states that the Complaints Procedures of the BPB provide for a response period of 20 working days from receipt of the Registrar's letter, and so applying that formula Mr Beattie was required send his response to Dr Gatley by 23 June 2010, which I note was then just over a month away.

[14] At page 20 of the transcript, the Registrar explained to the Board that the Building Act says that "the period over the Christmas January period is not counted as a working day", and there was also Auckland Anniversary

Registrar paraphrases this as "opening submissions", which is not actually what Mr Beattie was invited to supply; this may support the idea that the Registrar misunderstood the function of his report. More importantly however, the letter goes on in its final paragraph to remind Mr Beattie that Dr Gatley had been "engaged as an independent person" to assist the Registrar to prepare the report to the BPB, and to advise Mr Beattie that in the New Year [i.e. 2011] "Dr Gatley will contact you directly to seek from you any comment or information you wish to provide in response to the complaint. This information will then be used to inform the report I am required to provide to the [Board]."

[20] What subsequently happened is that Dr Gatley did not contact Mr Beattie until the second month of the "New Year", by his letter of 2 February 2011 (received on 4 February) inviting a response by 8 February 2011, which was the day the Registrar had given Mr Beattie in his letter of 24 December.

[21] It seems entirely reasonable that Mr Beattie, having been told by the Registrar that he had until 8 February to reply but in the same letter being told that Dr Gatley would be contacting him directly to seek information or comment, would wait until he had heard from Dr Gatley before supplying comment. For a second time Dr Gatley left that extremely late in the piece, so that Mr Beattie had only four actual days (indeed, two working days) in which to respond to the "independent report" that was to be provided to the Board.[15]

[22] It seems that the Registrar's letter of 24 December 2010 rather confusingly attempted to perform two different roles – satisfying the legal requirements of regs 7 and 8, and inviting cooperation with Dr Gatley. It may help to set here out the last three paragraphs of that letter:

> At its December meeting the Board was advised that the Whangarei District Court had now released its decision. Accordingly the Board has asked me to proceed with preparing a report for the Board about the complaint,
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> As per the Boards Complaints Procedures, you are invited to comment on the facts and evidence provided by [the Council], and to provide any additional relevant information. If you wish to comment or provide information you are required to so [*sic*, meaning "do so"?] within 20 working days of being notified. The Building Act provides that the days between 20 December and 10 January are not working days, and 31 January is a public holiday in Auckland. Accordingly, if you wish to comment

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Day which did not count. (The Registrar was here referring to the definition of 'working day' in s 7 of the Building Act 2004 which excludes the period 20 December to 10 January plus weekends and statutory holidays.)

[15] When he had not heard from Dr Gatley by the end of January Mr Beattie assumed that he was no longer involved, and sent in a summary of his position by letter dated 2 February received on 7 February 2011 (Vol 2 p 242). That however does not solve the problem, as will be seen.

or provide information you are required to so [*sic*, meaning "do so"?] by 8 February 2011.

I have previously advised you that I have retained an independent person, Dr David Gatley, to assist me to prepare the report to the Building Practitioners Board. In the New Year Dr Gatley will contact you directly to seek from you any comment or information you wish to provide in response to the complaint. The information will then be used to inform the report I required to provide to the Building Practitioners Board.

[23] The following observations about that letter are pertinent.

(a) The Registrar was acting on the authority of "the Boards Complaints Procedures" which were not provided in evidence but which one assumes are based on the regulations. (If not, it is the latter, rather than the former, that apply to this case.)

(b) The reference to Mr Beattie making any "comment" or providing "information" occurs three times - twice in the second paragraph quoted above (which is presumably based on the regulations) and once in the third paragraph (which relates to Dr Gatley). This strongly suggests that if Mr Beattie wished to make any comment or provide information (in terms of the regulations), he should do so *after* being contacted by Dr Gatley, because it is *that* information that will then be used "to inform" the report the Registrar is required to make to the Board. In this way, Mr Beattie's time to respond was effectively reduced to a few days, instead of the intended four full weeks.

(c) The letter only partly follows the regulations. Regulation 7(2) requires the Registrar to provide to the respondent (Mr Beattie) a copy of the complaint (which had already been done) and to ask him to provide in writing three things –

(a) his or her response [to the complaint]; and

(b) any relevant information; and

(c) any evidence that he or she wishes to provide

Paragraphs (a) and (b) are met by the request for "comments" on the complaint and for "any additional relevant information". However para (c) was not met because Mr Beattie was not asked for any evidence he wished to provide. Had there been, in accordance with the regulations, a reference to "evidence" as distinct from "information", this may well have alerted Mr Beattie to the fact

that he could call evidence from other persons, e.g. his own expert witnesses. Whether he *would* have done so is a matter of speculation; what matters is that the right to have that advice at that stage was not given. It is true that Mr Beattie later received advice from the Chairman (his letter of 14 March 2011 advising of the hearing) which included advice of his right to call evidence at the hearing, but Mr Beattie should have received similar advice under reg 7(2)(c) prior to the Board making its decision to proceed with the complaint – a decision in turn based on the Registrar's report.

(d) There is also a slight problem with the calculation by the Registrar of the 20 working days which he gave for a response. (This period presumably comes from the "Board's Complaints Procedures" referred to in the letter, as it is not to be found in the regulations.) The time given for a response (by 8 February 2011) is a 20 working day period which must have started from *and included* the first working day of the 2011, viz. 10 January. However the definition of "working day in s 7 of the Act means that 10 January is not included as a working day, as the excluded period ends "with the close of 10 January".

Lack of time to prepare for the hearing

[24] To compound the problems with the Registrar's report Mr Beattie was then given less than the required 15 day's clear notice of the hearing. (This must have occurred through unfamiliarity with the relevant legislation and I accept was unintentional.) Mr Beattie notes at para 9 of his affidavit that he received notice of the disciplinary hearing by letter dated 14 March 2011 requiring him to appear before the Board on 4 April 2011.[16] That notice was given under reg 12 which requires that notice be given to the parties "at least 15 working days before the date set for the hearing". When a notice is sent by post - as this letter was, addressed to Mr Beattie at 'Old Russell Road, Hikorangi RD4' - under s 394 of the Act the letter is deemed to be received by that person at the time at which the letter would have been "delivered in the ordinary course of post".

[25] I am not aware of any case giving guidance on what the words "in the ordinary course of post" might mean in a particular case. The Court of Appeal over 10 years ago suggested that a similar "deeming provision" in s 14 of the Tax Administration Act 1994 was "based on

[16] This letter is at p 319 of Vol 2, not at p 240 as Mr Corkill's very helpful chronology states.

[meaning perhaps, 'required'?] an estimate of when delivery [by post] would normally be expected".[17] In my view that must mean at least two days after posting to Mr Beattie's rural delivery address, in which case notice of the hearing was not given to Mr Beattie until Wednesday 16 March 2011. That day would then be excluded under s 35(2) of the Interpretation Act 1999. Further, by virtue of s 35(4) of the same Act "a period of time described as ending before a specified … event [here, the commencement of the hearing] does not include … the day of the act or event". Thus the date of hearing (4 April)[18] had to be excluded, as well as the day of Mr Beattie's deemed receipt of the notice.

[26] On this basis the 15 working days' notice period started on Thursday 17 March and the 15th day would be on Wednesday 6 April, so that the hearing could not be held before Thursday 7 April. Thus the notice was 3 days short of the required 15 working days.[19]

[27] However the problem does not end there, for not all of the 12 working days actually allowed was of use to Mr Beattie because of a separate problem with the Registrar's report. That report was not sent to Mr Beattie until 18 March 2011, a week after it was finalised and (it appears) given to the Board on 11 March – and it was not received until 21 March – see Ms Goddard's affidavit para 2(c). So Mr Beattie got it two weeks before the hearing. By contrast the regulations imply that the report is sent to the respondent at the same time as it is sent to the Board - see reg 7(1)(c) and (d). Admittedly no time limit is stated but they are two steps that appear together in reg 7; and further the 15 working days notice that the respondent is required to have for the hearing could be largely meaningless if he does not know what the report is saying, e.g. as to which facts are being treated as agreed and which disputed. Thus of the required 15 working days notice of the hearing only ten were of full effect to Mr Beattie.

Other problems with the Registrar's report

[28] In addition to these matters of process raised by Mr Beattie, which in my view necessitate that the appeal be allowed, there are other, quite serious problems with the report which relate generally to the role of the Registrar's report and to Dr Gatley's part in that.

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[17] ***Commissioner of Inland Revenue v Sea Hunter Fishing Limited*** (CA142/01, 13 December 2001, per Blanchard J) at para 21

[18] As the transcript of the hearing shows, the hearing started at 10am on 4 April 2011.

[19] Even if "the ordinary course of post" meant the day after posting, the notice in this case would have been two days short.

These problems all go to whether Mr Beattie was treated fairly, and although he would not have had the legal knowledge to articulate them as I have done, he certainly complained that he had not received fair treatment in this matter and had objected to Dr Gatley's involvement.[20] I mention them now for the future guidance of the Registrar and the Board:

(a) Although the Registrar's report stated that "no recommendation was made as to the merit or otherwise of the complaint", it attached a lengthy and very detailed report from Dr Gatley which went deeply into the merits of the complaint.

(b) The Registrar's report is required by reg 8(1)(b) to contain "the Registrar's summary of the facts as agreed and as disputed between the parties". This is obviously intended to assist the Board in make its decision as to whether to proceed with the complaint (reg 10). In this case the Registrar's report contained no such summary – it is not even attempted. Under the heading "details of the complaint and summary of facts" the Registrar simply refers to Dr Gatley's report which is attached, and says that it is to be read as forming part of the Registrar's report. One therefore is forced to go into a lengthy report occupying 27 pages plus 11 appendices that fill three ring-binder folders (Vols 3, 4 and 4A) to try and find a summary as per reg 8(1)(b), but it is not apparent. Nowhere do the Registrar or Dr Gatley provide the Board with this help it was intended to have. The lack of a clear summary of what was agreed and what was disputed would have made it more difficult for the Board to carry out its task, but also more difficult for an unrepresented respondent to focus on the points in issue.

(c) Dr Gatley's report went well beyond what reg 7(4) envisaged had he been appointed by the Board as a special adviser under s 322 of the Act and then been used by the Registrar under reg 7(4). It also went well beyond his own description of his brief at paras 19 and 42 (to "assist him [the Registrar] to prepare and provide a report to the Board in accordance with regulations 7 and 8"). In fact, there is some confusion apparent in Dr Gatley's own account of his role, as he had told Mr Beattie at the outset (his letter of 24 May 2010, at Vol 3 p 25) that "the Board has commissioned me to provide the Registrar with a report" – not "to assist the Registrar in preparing his report". It may be that Dr

[20] On this last point see foot of p 1 of Mr Beattie's letter to the Chairman dated 17 March 2011 (exhibit "B" to Ms Goddard's affidavit).

Gatley's extensive experience as an arbitrator and adjudicator encouraged him to act in that sort of role, rather than as an assistant in preparing a Registrar's report.[21] Possibly also the Registrar was left a little in awe of Dr Gatley. Certainly he deferred to him in a way that interfered with the performance of his own duties.[22]

(d) I not this problem because the Registrar's role is a largely neutral one, providing copies of the information from both sides and summarising for the Board the facts that are agreed and those in dispute. As I illustrate in the next subparagraph, Dr Gatley's report lacks the balance that would be expected if he were simply helping the Registrar perform his statutory role. (On the other hand the Registrar very adequately and succinctly (and without reference to Dr Gatley's report) gave his own view as to whether reg 9 applied – i.e. whether the complaint could be dismissed without a hearing.)

(e) In terms of balance, a number of points arise. Dr Gatley sets out the details of the Council's complaint *within* his report, but (apart from excerpts quoted by him at para 32) relegates Mr Beattie's response, including its addenda, to an appendix of his report (Appendix 7). At para 27 he refers to the 8 February 2010 time limit given to Mr Beattie but omits his own instructions and his failure to contact Mr Beattie until that time had almost expired. At para 34 he offers what appears to be his own personal responses or answers to the concerns of Mr Beattie he has quoted, in the process seeming to tell the Board what they should think of those concerns. Commencing at para 35 he then proceeds to isolate the competencies against which Mr Beattie's conduct could be considered, and to frame several questions that the Board might want to put to Mr Beattie at a hearing – in the course of this drawing attention to various evidence given against Mr Beattie, e.g. by Mr Longman and Mr Gardiner. Here and elsewhere Dr Gatley acts as though he had been appointed by the Board as a special adviser under s 322 of the Act (which he had not been) and was advising the Board, not the Registrar.

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[21] Curiously Dr Gatley does not give his qualifications either in his evidence (see transcript page 59) or in his report. Instead the Board relies on those qualifications as stated by the Registrar at para 10 of his report. (same reference).

[22] As the Registrar said in evidence to the Board, "I really deferred to Dr Gatley in terms of the body of the report: Board's transcript p 58.

Consequences of these errors

[29] Do these various lapses matter? It was submitted that the Board listened carefully to Mr Beattie's case and considered all his material, and came to the same view as all others who considered this matter before them. On this last point, the Board was the first body asked to decide on Mr Beattie's professional competence. They had to bring an independent mind to that task – independence being a statutory requirement (s 321). Nothing anyone had decided before their hearing could dictate the outcome.

[30] On the first issue, that they listened carefully to Mr Beattie's case, I am sure they did do so. Indeed, there is no evidence that the Board has acted otherwise than in good faith. The concern is however, is that *if* Mr Beattie had taken up the opportunity that he should have been given to supply evidence to the Registrar; and/or *if* Dr Gatley had contacted Mr Beattie promptly in the "New Year" (say on 11 January, when time started running again for Mr Beattie) instead of waiting till 2 Feb, so that Mr Beattie had more time to respond; and/or *if* the Registrar had provided a summary of facts agreed and in dispute as part of his report; and/or *if* Dr Gatley had limited himself to assisting the Registrar with his statutory report and refrained from expressing his personal views about Mr Beattie's concerns and pointing to the evidence against him; and/or *if* the notice of the Board's hearing that Mr Beattie received had not been three days short – if any combination of these events had ensued, the Board may have decided that the complaint did not warrant further investigation, or that (upon investigation) it should be dismissed.[23]

[31] In any event, the various statutory provisions that have been infringed against can be seen as a procedural counterweight to the extensive powers of the Board to receive evidence of any sort and to act in an inquisitorial manner.[24] One must assume the legislature saw them as important in achieving a fair process for all parties.[25]

[32] Had there been only one, or possibly two, such failing(s) it might in theory be possible to analyse its consequences as the events unfolded and to see whether it was likely to have made any difference to the outcome. Where, however, there are so many different concerns,

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[23] For example, it is probably not possible to quantify the degree of reliance placed by the Board on Dr Gatley's report supplied by the Registrar.
[24] See s 322 of the Act and reg 14.
[25] Even without the "counterweight" issue, the failure to follow a procedure laid down by the legislation is commonly seen as an aspect of fairness. See e.g. Michael Fordham *Judicial Review Handbook* 4th ed (2004) at para 60.1.10. Where the grounds of appeal are not limited by statute, unfairness is a proper ground of appeal.

and they all flow from a failure to follow the statutory procedures designed to protect the interests of building practitioners, it is not possible to do this. Cumulative procedural errors can rob the Board's process of integrity, or the assurance of integrity, in a way that cannot be overcome so easily – even if that course is open legally.[26]

The Board's expertise

[33] The expertise of this particular tribunal is not in question. It is clear from the terms of the Act and from the qualifications and experience of its members as recorded in the transcript of its hearing.

[34] I agree with the submissions of both counsel on the subject of tribunal expertise and consider that, accepting the greater willingness of appellate Courts (partly as the result of *Austin, Nicholls & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141) to substitute their own findings for those of the tribunal appealed from, an expert tribunal such as the Board retains a considerable advantage in the assessment of evidence on technical matters within its expertise. Under the Act its word is not final, but if it has approached its task in the correct manner its opinions must carry considerable weight.

Conclusion thus far

[35] As a result of these various problems, both the substance and the appearance of fair dealings with complaint have been seriously compromised and in the interests of justice a new hearing is required - if indeed the complaint is to continue. I have refrained from expressing a view on Mr Beattie's competence as I prefer to leave that for the Board to consider.

Miscellaneous points raised by Mr Beattie

[36] I have set out in an appendix to this decision my view on some of the non-process matters of concern to Mr Beattie which are not strictly relevant to this decision but may help the parties in the future. They arise in the main under para 2.2.4 of his Notice of Appeal:

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[26] "When a mandatory procedure is set out in a statute, it must be followed": *de Smith's Judicial Review* (6th ed, 2007) para 7-011, dealing with express statutory requirements, such as we have here. Of course, as the learned authors note at para 5-053, the whole language of "mandatory" versus "directory" requirements is now suspect, but as a matter of context the cumulative effect of these requirements in this case can only be what the law has previously called "mandatory".

> "No account was taken of the detailed submission and supporting documentation I made to the hearing" [meaning, presumably, the Board's hearing of the complaint].

Appeal against penalty

[37] In case I am wrong in the above I can deal briefly with the question of penalty. I have considered whether the Board's expertise in building matters should dissuade this Court from interfering in this area but have concluded that this being an unusual case and only the third appeal it had dealt with,[27] the Board was entitled to some guidance on how a case of this type (if proved) might be handled at the "disposition" stage.

[38] The Board was very reasonable in its order for costs and its directions concerning publication but, even if the complaint had been made out, in my view it was not appropriate to make an order restricting Mr Beattie in his area of design to Area of Practice 2. He had got into an argument with the Council about whether they would issue a building consent to his client, but neither side backed down and so no consent was issued.[28]

[39] This is not to say that loss or damage must ensue before there can be negligence or incompetence; rather, on the facts of this case, where no prior proved complaints against the practitioner were alleged,[29] where he had a dispute with the Council, and where no building work was carried out on the basis of his design work, something more in the nature of a warning would have been appropriate. The point had already been made by the complaint process, if the complaint was upheld by the Board. Anything more could have been achieved for example by a censure under s 318(1)(d) of the Act. To reduce his area of design work was, in my view, quite unnecessary and clearly excessive in the circumstances described.[30]

The cross-appeal: meaning of "negligent" in s 317(1)(b) of the Act

[40] The term "negligent" in s 317(1)(b) must be understood as part of a wider expression, "has carried out or supervised building work … in a negligent or incompetent manner".

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[27] See para 2 of the Registrar' report

[28] The Council's refusal was later found to be right. However Board member Mr Clark's question to Dr Gatley (transcript p 63) is still pertinent:

" … isn't there a risk that people in that situation could be assessed as being incompetent just because they don't agree with a Council's assessment of what should be submitted as part of the building consent?"

[29] The Council was wrong to make a generalised statement about Mr Beattie's level of competence before stating its complaint (see para 2 of its letter of 8 April 2010), but I assume the Board ignored that.

[30] It was also excessive to prevent Mr Beattie from doing level 1 design work – which was no doubt unintended but follows from the wording of the decision, to restrict Mr Beattie to "Area of practice 2" (not "1 and 2").

[41] I agree with the Council that the Board has misconstrued the word "negligent" in s 317(1)(b) of the Act by applying the concept of negligence from the law of torts. The absence of damage can be relevant to penalty (as I have just stated) but is not determinative of liability.[31] I accept the submissions made on this point by Mr McKay. There are no previous cases relating to s 317 of the Act but in a case cited by Mr McKay decided under a similar provision of the Heath Practitioners Competence Assurance act 2003,[32] it was held that the common law concept of negligence is not applicable:

> It is highly unlikely the drafters of s100(1)(a) HPCA Act envisaged those prosecuting health practitioners would need to prove all criteria required by the common law to establish negligence on the part of a health practitioner. In the Tribunal's view, the term "negligence" as used in s100(1)(a) of the HPCA Act ['amounts to malpractice or negligence"] focuses on a practitioner's breach of their duty in a professional setting. The test as to what constitutes negligence in s100(1)(a) of the HPCA Act 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 health 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 the standards of a responsible body of the practitioner's peers.

[42] That is a most helpful way of putting the test, and I was told by counsel that this approach has been consistently followed and upheld in cases under the Heath Practitioners Competence Assurance act 2003. However, in a case brought to my attention by Mr Corkill,[33] Gendall J stressed that not all negligence or malpractice amounts to professional misconduct but only "behaviour that falls seriously short of what is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness".[34] While the legislation I am considering does not require a finding of "professional misconduct", this is a timely reminder that disciplinary sanctions should not be applied unless there is a serious issue being addressed. (The fact that no loss or damage has occurred can be very relevant in that context but is not determinative of the matter.)

[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. The phrase appears to have been taken from s 21 of the Chartered Professional Engineers of New Zealand Act 2002, where it has not been the subject of any reported legal analysis of its meaning. The difference

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[31] However, loss or damage is not limited to building failure. The flaw (if found before failure) may still require remedial work, which will have a cost. Negligent design work, if paid for, has had a cost.

[32] New Zealand Health Practitioners Disciplinary Tribunal, Dr DB Collins QC (as he then was) Chairperson, decision 8/Med04/03P, 18 April 2005, at para 62

[33] ***Collie v Nursing Council of New Zealand*** [2000] NZAR 74

[34] at para 21, following similar reasoning by Elias J in ***B v Medical Council of New Zealand*** (High Court, Auckland, HC11/96, 8 July 1996)

between "negligent" and "incompetent" is difficult to state. Because words take their meaning from their context, both terms – "negligent" and "incompetent" – have to be considered in the context of that whole phrase - one in which the adjective describes a *manner* of carrying out work, as distinct from the skills of the worker. Thus while in ordinary speech "incompetent" generally refers to someone lacking in the basic skills required for the job, an incompetent *manner* of working would be one that suggested or exhibited incompetence.

[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 (or deficit in the required skills) judged by the four areas of design competence[35] in Schedule 1 of the Licensed Building Practitioner Rules 2007.[36]

[45] However, these Rules state, for each of the four "competencies" (i.e. areas of competence), that "this competency may be demonstrated by meeting *some or all* of the performance indicators" listed in the rules (emphasis added). In other words, not all performance indicators must be met in every case to gain registration. It would be a matter for the judgment of the Board whether a failure to meet one or more performance indicators in a particular case was sufficiently serious to constitute an incompetent manner of work for disciplinary purposes. I suggest that the Board may derive assistance from the High Court's comment (made, admittedly, regarding negligence) about the need for "behaviour that falls seriously short of what is to be considered acceptable".

[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.[37]

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[35] These are described as "competencies" in the Rules.

[36] Such rules are proposed by the Chief Executive of the Ministry responsible for administration of the Act (s 354), then submitted to the Board for approval (s 356) and are made once approved by the Minister (s 361). (As to the status of the rules, see s 362.)

[37] *Garner's Dictionary of Legal Usage* 3rd ed (2011) p 440 under the heading "incompetence; incompetency" suggests that the former should be used "when referring to less than acceptable levels of ability". Likewise *Words and Phrases Legally Defined* 4th ed (2007) vol 1 p 1186, under the heading "incompetent", cites an old case about "the failure to afford the requisite skill which had been expressly or impliedly promised": *Harmer v Cornelius* (1858) 22 JP 724 at 724 per Willes J.

[47] I have also suggested that incompetence should be judged against the areas of competence measured under the relevant Rules. The Board's reasons for its decision of 9 May 2011 refer to the competencies applicable under the Rules to design/Area of practice 3, but the Board appears to jump from a finding that Mr Beattie did not give the Council reasonable grounds to issue a building consent, to a conclusion ("therefore …") that Mr Beattie failed to meet the required standard of competencies *1, 2, 3 and 4.* In fact, none of those four areas of design competence (and only one "performance indicator" out of 26 in the Rules) refers to the process of obtaining a building consent. For the assistance of the Board in the future, I suggest that the logic of this reasoning is not apparent.

[48] While I agree with the Council that the Board has applied a wrong test of negligence for the purposes of s 317 of the Act, I am not prepared to make any findings as to whether Mr Beattie's manner of work was negligent in this case and will leave that for the Board to determine on receipt of a new Registrar's report and (if the matter still proceeds) at a rehearing of this matter. For these reasons the cross-appeal is allowed in part.

Result

[49] Mr Beattie's appeal is allowed in part and the Board' decisions on liability and penalty are set aside. The appeal is not allowed in full as it is not appropriate that I substitute my own judgment for that of the Board on the issue of building and design standards. Under s337 of the Act and r 14.23 of the District Court Rules 2009, the complaint is referred back to the Board for it to consider afresh after considering the matters raised by this decision and getting a new report from the Registrar.[38] If it is then decided that the complaint should proceed further, the Board is directed to hold a fresh hearing because of the various problems with the first hearing as explained in this decision.

[50] The cross-appeal is also allowed but (for the same reason) in part only; the question of negligence is referred back to the Board for a decision on the facts in the light of the previous section of this judgment.

[38] If Mr Scully is still Registrar, and because of his perceived "conflict of interest", there would be merit in someone else being appointed as Acting Registrar, or in Mr Scully delegating to some other competent person the task of dealing with this case under s 312 of the Act.

Costs

[51] Costs are reserved. Partly because this has been a test case, and because Mr Beattie has not incurred legal costs, applications for costs are not encouraged, but if sought are to be made with full written submissions filed and served within 15 working days from the issuing of this judgment. Any submissions in opposition are to be filed and served within a further 10 working days, and any submissions in reply (limited to new matters only) within a further five working days.

Signed at Auckland at 3.45 p.m. this 14th day of November 2012

FWM McElrea
District Court Judge

Issued:

Appendix in Beattie v Far North District Council CIV--2011-088-313

A The alleged "conflict of interest" of Paul Cook - para 2.1.2 of notice of appeal

[1] This is spelled out at para 12.2 of Mr Beattie's affidavit. He says that he notified a building consent authority of a breach of a building consent, for which Paul Cook was responsible by constructing an unconsented retaining wall before Mr Cook became Building Controls Manager for Council. He then goes on to refer to Paul Cook as "the prime mover in the laying of the complaint against myself" and concludes that laying of the complaint "could not be viewed as anything other than a 'conflict of interest' and [that] the laying of the complaint was vexatious".

[2] This issue is irrelevant to the appeal because the legal issue is whether the complaint itself was valid, not whether it had been laid by someone with a 'conflict of interest'. Mr Cook's role with the Council would have been an executive one; he did not hold a judicial office of any sort and no legal authority is provided for saying that any purported 'conflict of interest' could upset a complaint which was in itself valid.

[3] Finally, the complainant was the Council, not Mr Cook. Indeed, the Board at para 4.3 of its decision dated 9 May 2011 notes that the complaint was from the Council over the signature of David Edmunds, the Chief Executive, and not from either Mr Christiansen or Mr Cook.

B Whether the code compliance certificate (CCC) issued by Mark Christiansen of the Council was for the subject buildings or an unrelated CCC – para 2.1.1 notice of appeal

[4] This alleged error of fact or 'conflict of interest' is also irrelevant. The grounds for it are at para 12.1 of Mr Beattie's affidavit. I accept for present purposes that the CCC in question was not 'unrelated' as the Board seemed to understand in its decision, but nevertheless, the Board held that there was no evidence of the alleged 'conflict of interest'. I would put it differently: The question in the appeal heard by Judge de Ridder was whether the FNDC correctly declined to issue a building consent. The question in this appeal relates to Mr Beattie's competence - not whether some Council officer had an ulterior motive in seeing that the application for building consent for remediation work was rejected.

C Whether Mr Beattie's risk analysis identified that there was no need to replace the cladding – para 2.1.3 of grounds of appeal

[5] Mr Beattie takes issue with the Board's statement under item (b) on page 13 of its decision that "his risk analysis did not identify that there was a need to replace the cladding of both buildings". Mr Beattie says that this should have said instead: "his risk analysis identified that there was not a need to replace the cladding" – the emphasis being on a thorough and comprehensive assessment of the buildings (etc).

[6] I accept that these two statements have different meanings, but taking the Board's decision as a whole, it is clear that it did not accept the stronger version preferred by Mr Beattie, namely that there *had* been a "thorough and comprehensive assessment of the buildings which identified the structural integrity of the existing cladding …" [from para 16.2 of the Beattie affidavit]. Instead the Board was prepared to say that no need to replace the cladding of both buildings was identified by Mr Beattie's risk analysis. That much is true. It has not been shown that there was any error of fact on the part of the Board in making that statement.

D Whether Mr Beattie's investigations were limited or extremely thorough – para 2.1.4 of notice of appeal

[7] Mr Beattie takes issue with the statement at item (e) on page 14 of the Board's decision that "His own investigations were limited and he relied on the WHRS assessment to supplement these." However, Mr Beattie does not quote the second sentence in para (e), which makes the further point that Mr Beattie relied on the WHRS assessment but did not agree with the WHRS assessor's recommendation that both buildings should be re-clad.

[8] The Board's statement has been shown to be correct in this respect and no error has been established. Mr Beattie's investigations may have been more extensive than the Board understood but they were limited, presumably by costs considerations, and he did rely in part on the WHRS assessment in establishing that moisture was present. (However there is nothing inconsistent in taking that sort of factual finding from the WHRS assessment but not agreeing with its proposed solution. The first is an issue of fact, the second one of opinion.)

E Alleged statement that "the proposed remediation solution should not be questioned" – para 2.1.5 of notice of appeal

[9] The reference in question is part of para 5.3 of the Board's decision on page 15 reading as follows:

> From the evidence, FNDC rejected in its entirety the application launched by Mr Beattie. FNDC ignored his assertions that it should rely on his assurance that given his status as a LBP Design 3, his proposed remediation solutions was acceptable and not to be questioned. The Board has, therefore, concluded that if there was a duty of care owed by Mr Beattie to FNDC (and the Board is not firmly persuaded by the argument proffered that this is the case), that such a duty of care was not breached because FNDC did not accept Mr Beattie's assurance and recommended solution.

[10] It is correct that Mr Beattie did not himself state that his view was "not to be questioned". He did however say (for example in his letter of 25 June 2009 to the Council – Vol 4A p 434):

> As the only accredited Licensed Building Practitioner (*LBP*) at Level 3 in both Design and Site we are the most qualified LBP the Far North District Council (*FNDC*) will encounter. The documentation provided with the application clearly demonstrates that the 'alternative solution' proposed meets the New Zealand Building Code. The inability of your staff to grasp the parameters of compliance will remain of grave concern to us.

In this way, Mr Beattie clearly gave the impression to the Council that he considered his qualifications were far superior to those of any Council staff member and that they were simply unable to comprehend the merits of his proposal.

[11] While some witnesses felt that Mr Beattie considered that his judgment was not to be questioned, I accept his submission that he never said that and the Board may have overstated the matter by referring to this as his "decision".

[12] Nevertheless, this part of the passage quoted above could be deleted entirely without changing the Boards conclusion that, *if* there was a duty of care owed by Mr Beattie to the Council (which the Board was not sure about), it was not breached because the Council did not accept his solution.

[13] It must be remembered that this statement is part of the Board's reasoning in applying a law of torts meaning of "negligence" and asking whether there was a breach of a duty of

care. Elsewhere I conclude that that analysis was wrong at law and for that further reason this disputed passage is irrelevant.

F Whether Mr Beattie was "on a crusade" (para 2.1.6 of notice of appeal)

[14] My view of this is that the Board has made too much of Mr Beattie's use of the word 'crusade', implying that he had lost objectivity. Mr McKay draws attention to the transcript of evidence from the Board hearing, which I have expanded to include the next sentence – transcript p 161,162 (Vol 1 pp 134,135):

> ...So it was actually a little bit of a crusade if you want to call it that, it was something I had to try to see if we could get the system going that could keep fixing these houses affordable. Because it seems to me that [for] every estimate for every house I deal with $300,000 is the bottom limit. Many of the houses were built for less than that.

[15] As I read this, Mr Beattie himself was somewhat tentative about the use of the word 'crusade' and appeared to be at a loss for a better term. However it is clear that he was keen to find solutions to 'leaky buildings' that would be affordable by the house owner, and that one does not always need to dismantle buildings to repair them, and he is to be commended for that. The Board acknowledges that this is a proper objective but at para 5.4 of its decision qualifies this acknowledgement:

> It was clear to the Board that Mr Beattie is strongly committed to the development of economically affordable solutions for the remediations for weather tightness failures. This is to be encouraged. Mr Beattie, however, stated that he was on a '*crusade*' and it would be a matter of concern to the Board if that compromised his performance of building (design) work in a professional, balanced and objective manner.

[16] While the Board there speaks hypothetically in the second sentence, it moves to a less equivocal position at para 5.20 of its decision which ends as follows:

> In pursuing what he describes as a 'crusade' against the building consent authorities, he would appear to have lost the objectivity that is expected of a LBP of his standing. Specifically, he did not perform his duties to the standard envisaged by the Rules in relation to Competencies 1, 2, 3 and 4.

[17] Putting these matters together, these two references to a 'crusade' (and a third at para 5.9, page 18 of the decision), coupled with the more definite connection made in the last reference (para 5.20) between the 'crusade' and a loss of objectivity, the Board seems to have adopted this as a 'theory of the case' to explain the evidence before it. And yet the single reference to the word 'crusade' which Mr McKay was able to provide from the transcript of

the hearing is almost apologetic in its context. Perhaps the Board thought it was an apt word to describe Mr Beattie's frame of mind, but it has obviously wounded him deeply when used to justify a finding (not necessary to the conclusion) of loss of objectivity.

[18] Mr McKay submits that this ground of appeal is immaterial. I assume this means that whether or not the Board used this expression is not relevant to the issue of whether it reached the right decision on the question of competence. I am not sure that this is correct. The Board's three-fold use of the term "crusade" suggests that it occupied a fairly central place in its reasoning. This, especially when coupled with problems arising from the Registrar's report, may well have caused the Board to come to a wrong conclusion.[39]

G Whether Mr Beattie "chose" to seek a determination from the DBH – para 2.17 of the notice of appeal

[19] I agree with Mr McKay that this is a very small point and not relevant to this appeal. However Mr McKay relies on a letter which I cannot find dated 25 June 2009 in which Mr Beattie apparently stated:

> The only peer review system we would entertain is via the DBH 'determination' process.

[20] Mr Beattie's position is contained in para 2.1.7 of his Notice of Appeal:

> I did not choose to seek a determination from the Department of Building and Housing (DBH). The FNDC refused a lodgement meeting and recommended the option of seeking a determination.

[21] I agree that in the scheme of things this point is irrelevant, although it may indicate an early unwillingness by the parties to talk things through that has led to the matter getting this far.

[39] Whether it has done so I have not decided and will be for the Board to consider afresh on a rehearing of this complaint.