

BUILDING PRACTITIONERS INQUIRY BOARD

Reasons for Decision

Building Practitioner:	Patrick Whitehead (the Practitioner)
Referred by:	Director of Building Control
Proceedings:	Referral of Inquiry to the Building Practitioners Board (the Board) in accordance with section 34(1)(a) of the <i>Building Act 1993</i> .
Inquiry Board:	Patrick McIntyre (Presiding Member) Sam Nixon Adam Aitken
Date of Hearing:	3 October 2018
Date of Decision:	19 th August 2019

Background

1. On 29th March 2018 the Director of Building Control (the Director) referred a matter to the Building Practitioners Board (the Inquiry Board) for inquiry under section 34 (1) (b) of the *Building Act 1993* (the Act). The matter relates to allegations that the Building Practitioner committed offences against s 55 and s 34S (g) of the Act and regulation 16 (a) of the Building Regulations.
2. The Director had decided pursuant to s 34(1) (b) of the Act that there was evidence of 11 instances of professional misconduct, within the meaning of s 34S (a) and (g) of the Act.
3. Section 34S of the Act provides (relevantly) as follows;

34S Professional misconduct

A building practitioner is guilty of professional misconduct if, on completion of an inquiry, the Inquiry Board is satisfied on the balance of probabilities that the practitioner:

(a) has committed an offence against this Act or the Regulations; or

....

(g) is otherwise guilty of professional misconduct.

4. Section 55 of the Act provides as follows:

55 Building permit required

A person must not carry out building work unless a building permit in respect of the work has been granted and is in force under this Act and the work is carried out in accordance with the permit.

5. Section 57 of the Act provides as follows:

57 Schedule 3 to apply

Schedule 3 applies to and in relation to an application for a building permit, and a permit, under this Part.

6. Schedule 3 relevantly provides as follows:

Schedule 3 Building permits and occupancy certification
sections 57, 70(2)(a), 72B(2)(a), 72E(4)(b) and 76C of the Act

.....

3 Form of application

An application for a building permit or occupancy certification must be in an approved form, must contain the information required by the form and must be accompanied by the documents, if any, prescribed for the purposes of this clause.

4 Form of building permit or occupancy certification

A building permit or occupancy certification must be in an approved form.

7. This is the decision of the Inquiry Board convened pursuant to section 34J of the Act to hear and determine those charges referred to in 2 above and 10 below. This Inquiry Board consists of Patrick McIntyre (Presiding Member), Mr Sam Nixon and Mr Adam Aitkin.
8. In response to Directions made at a Directions Conference on 29 May 2018 the Ms Nicola Leach of the office of the Solicitor for the Northern Territory, wrote by email to the Inquiry Board on 5 July 2018 attaching a Statement of Facts agreed between the parties and signed on their behalf. Various documents were referenced within and attached to the Statement of Facts and the entirety of that email and attached documents are as set out in Schedule A.
9. Schedule A discloses the nature and particulars of the eleven charges of professional misconduct referred to in paragraph 2 above; distinguishes between facts agreed between the parties and those in dispute and identifies the charges admitted by the Practitioner.
10. At a Directions Hearing on 11th July 2018;
 - a. the Practitioner admitted charges 1, 6-9 and 11 having provided the Board with a written response to each charge which (where relevant) are as set out in Schedule B attached;
 - b. The Practitioner confirmed that although he had previously obtained legal advice and representation, he would be representing himself at the hearing;
 - c. Counsel for the Director, having indicated the intention of the Director to abandon the prosecution of charge 10, sought to withdraw that charge; and
 - d. The Inquiry Board held over the question of whether the Director had power to withdraw a charge referred to the Board for inquiry under s 34 (1)(b) of the Act.

11. The Building Act makes provision for the manner in which the Inquiry Board is to undertake the inquiry in section 34K of the Act as follows:

34K Conduct of inquiry generally

- (1) Subject to this Division, the procedure for an inquiry must be determined by the presiding member for the inquiry.
 - (2) The Inquiry Board is not bound by the rules of evidence but is bound by the rules of natural justice.
 - (3) The inquiry must be conducted with as little formality and technicality, and with as much expedition, as this Act and the Regulations and a proper consideration of the matter being inquired into permits.
 - (4) The Inquiry Board must keep a record of its proceedings in the inquiry.
12. The cooperation of the parties and the preparatory work performed by them enabling the provision of the material comprising Schedules A and B greatly assisted the Inquiry Board in its work, and the parties are to be congratulated for the professionalism with which they conducted themselves during this inquiry.
13. The hearing of the Inquiry took place on 3 October 2018; the Director represented by Mr Joshua Ingrames of counsel and the Practitioner representing himself.
14. In addition to the material mentioned in Schedules A and B the following affidavits were tendered at the hearing:
- a. Affidavit of R Lloyd 22 August 2018;
 - b. Affidavit of P Hadfield 30.8.18
 - c. Affidavit of P Whitehead 19.9.18.
- 15 Each of those deponents were cross-examined on their affidavits and whilst there are differences between them each of them impressed the Inquiry Board as genuine and honest witnesses.

The Issues at hearing

16. It was clear that both the Director and the Practitioner relied upon the documentary evidence in relation to the building projects that were the subject of charges 2, 3, 4 and 5.
17. It was ultimately common ground that each of the charges relate to building work that required a building permit to be granted and in force, prior to the commencement of the works.
18. Until the hearing, in relation to charge 5, the Practitioner had asserted that because the relevant works 'were emergency a building permit was not required.'¹
19. Ultimately, the Practitioner conceded at the hearing that his defence of charge 5 could not be made out and entered a plea of guilty thereto.
20. The concession was properly made once the Practitioner understood that none of the emergency provisions of section 85 and 86 nor section 100-106 of the Act

¹ See

applied. We have further to say concerning this aspect of the matter below at paragraph 70.

21. In relation to each of the charges 2, 3 and 4 the Practitioner asserted in his defence that he had been informed by the principal building practitioner in respect of each building project who had engaged the Practitioner, that 'a building permit was required and is in place' [the Representations]; prior to the Practitioner undertaking the works.
22. In each case the Practitioner relied upon the Representations of another Building Practitioner rather than himself inspecting a written building permit prior to commencing the respective works.
23. Although he did not use these words, it is abundantly clear that the Building Practitioner asserts that at the time he undertook the respective works he honestly and reasonably believed:
 - a. The Representations;
 - b. That building permits could be oral rather than written; and
 - c. That written building permits could be granted retrospectively in confirmation of oral building permits.
24. In respect of charges 2-4 it ultimately became clear that they would be made out unless the Practitioner was able to establish a defence to these charges with a plea of honest and reasonable mistake of the type referred to in *Proudman v Dayman* (1941) 67 CLR 536 [the *Proudman v Dayman* issue].

Consideration of the Issues

25. At the conclusion of the hearing the parties were invited to prepare written submissions on the *Proudman v Dayman* issue.
26. The Practitioner did not provide any written submissions.
27. In his written submissions, Mr Ingrames, noting that the Practitioner was unrepresented, quite properly 'sought to present these submissions in a way that might be taken to be in a role similar to counsel assisting the Board (as opposed perhaps to a prosecutor).'
28. Those written submissions were of considerable assistance to the deliberations of this Board of Inquiry.
29. Having explored the relevant jurisprudence in relation to this issue Mr Ingrames submitted as follows:

'Ultimately, the defence of honest and reasonable mistake will be available to a building practitioner unless the offence is determined to be one of absolute liability.'
30. We agree.
31. Furthermore, we agree with his later submission that charges 2-4 are offences of strict liability.

32. Consistent with the approach adopted by Mr Ingrames and referred to at paragraph 28 above, and noting the general reluctance of courts to treat regulatory offences as offences of absolute liability, he left to this Inquiry Board the task of determining whether or not the Building Act 'is so clear and unambiguous as to admit of no other construction'².
33. In *Raelene Rosas v Leigh Cahill*, dealing with the Liquor Act, Blockland J applied *Kruger v Kidson* stating:

'For some time it has been settled that a person is not guilty of a regulatory offence in the Northern Territory unless they have voluntarily committed the act.'³
34. We conclude that there is no clear and unambiguous intent apparent in the Building Act to require this Inquiry Board to determine that an offence under s55 Building Act is an offence of absolute liability.
35. Accordingly, the defence of honest and reasonable mistake is available to the Practitioner if made out on the evidence.
36. We conclude that the Practitioner honestly and mistakenly held the belief set out in paragraph 24a and that if it had been true that 'a building permit was required and is in place' the Practitioner would not be guilty of the charges 2-4.
37. In respect of each of the charges 2-4 the Representations were made to the Practitioner by a Building Practitioner well known to him and in circumstances where there was no apparent reason for the Practitioner to disbelieve the Representations.
38. If the belief set out in paragraph 24a were held reasonably the Practitioner, the *Proudman v Dayman* issue will have been made out and the Practitioner will not have had at the time 'voluntarily committed the act' that is the subject of the charges 2-4.
39. We now turn to the question of whether or not the beliefs set out at paragraphs 24b-24c are of any assistance in resolving the *Proudman v Dayman* issue.
40. It is clear from section 57 of the Act and Schedule 3 that both an application for and a building permit certification must be in an approved form.
41. Regulation 14 requires that a copy of the permit be provided to the relevant owner.
42. Compliance with these regulatory provisions would be impossible were the Building Act interpreted to mean that building permits could be granted other than in writing.
43. Section 55 of the Act requires that a building permit 'has been granted and is in force' prior to the building work being undertaken.

² Mr Ingrames cited *Kruger v Kidson* [2004] NTSC 24 @ [15] and *Chiou Yaou Fa v Morris* (1986) 46 NTR 1 @ p23 (and p17-26) and *Hiley J in Rigby v Taing* [2015] NTSC 16 @ [53] and jurisprudence cited therein.

³ [2013] NTSC 65 at para 22.

44. We conclude that building permit regime established by the Act does not contemplate that what would otherwise be conduct in breach of section 55 of the Act can be cured by the issue of a retrospective building permit.
45. It appeared to this Inquiry Board on the basis of the apparent conduct of other building practitioners referred to in the evidence before us and the beliefs (set out at paragraph 24b-24c) held by the Practitioner at the time; that those beliefs may be somewhat widespread in the building industry.
46. Such beliefs are not reasonably available on an ordinary reading of the Building Act and Regulations.
47. In any event they are of no assistance in respect of the Proudman v Dayman issue being as they are errors of law rather than mistakes of fact.
48. In his submissions Mr Ingrames urged upon us a conclusion that because the Practitioner had simply relied upon the Representations and had taken no other steps (for example asking to see a copy of the building permit) to ensure that a building permit was in fact in place; that we should conclude that his mistake was unreasonable.
49. In light of all the circumstances of this matter, particularly those set out in paragraph 37 herein, we have reached a different conclusion; that is the Practitioner held; at the time of his undertaking the works, an honest and reasonable belief (mistakenly) in the existence of exculpatory facts and that the Proudman v Dayman issue is determined in his favour.
50. We accordingly dismiss charges 2-4.
51. We now turn to the matters referred to in paragraph 11c.-11d above (the charge 10 issue).

Decision

52. Section 34 of the Act provides as follows:

Action on completion of investigation

- (1) On completion of the investigation, the Director must decide:
 - (a) whether or not there is evidence that a building practitioner the subject of the investigation has committed an offence against this Act or the Regulations and, if there is evidence, may decide to prosecute the building practitioner for the alleged offence; and
 - (b) whether or not there is evidence that a building practitioner the subject of the investigation is guilty of professional misconduct and, if there is evidence, must refer the matter to the Practitioners Board for inquiry.

53. Section 34P of the Act provides as follows:

Decision on inquiry

(1) On completion of an inquiry, the Inquiry Board must:

- a) decide, in accordance with section 34S, whether or not a building practitioner the subject of the inquiry is guilty of professional misconduct; and
- b) if the practitioner is guilty – decide the action to be taken under section 34T and whether or not to take additional action under section 34U.

- 54. This inquiry in respect of charge 10 is a referral pursuant to section 34 (1)(b) rather than section 34 (1)(a) of the Act.
- 55. The significant difference between those two sub-sections arises because the phrase 'may decide to prosecute' in section 34 (1)(a) of the Act stands in stark contrast to the phrase 'must refer the matter' in s34 (1)(b) of the Act.
- 56. The Director is not possessed of the statutory discretion set out in s34 (1)(a) of the Act in respect of a referral pursuant to s34 (1)(b) of the Act.
- 57. We have concluded therefore that the Director had no power to withdraw a charge 10.
- 58. As is apparent from page 10 of Schedule A the Director concedes that the material therein described and supplied to the Director provides a complete answer to charge 10.
- 59. We accordingly dismiss charge 10.
- 60. We now turn to consideration of what action this inquiry board shall take pursuant to s34T Building Act in relation to charges 1, 5, 6, 7, 8, 9, and 11 admitted by the Practitioner.
- 61. S34T provides as follows:

Disciplinary action by Inquiry Board

If, on completion of an inquiry, the Inquiry Board decides under section 34P(1)(a) of the Act that a building practitioner is guilty of professional misconduct, the Board may take any of the following actions in relation to the practitioner:

- a) reprimand the practitioner;
- b) require the practitioner to pay all or a specified part of the reasonable costs of the Director in the inquiry;
- c) require the practitioner to give an undertaking to do, or not to do, a specified thing:
 - i. at any time or during any period; or
 - ii. at a specified time or during a specified period;
- d) require the practitioner to pay to the Territory a civil penalty not exceeding 40 penalty units;
- e) suspend the practitioner's registration for a specified period (not exceeding 3 years);
- f) cancel the practitioner's registration.

62. It is clear that the Practitioner is entitled to consideration in his favour for his early admissions in relation to counts 1, 6, 7, 8, 9, and 11 and his co-operation with the Director both during investigation and in the preparation of this matter for hearing..

63. In his submissions on penalty Mr Ingrames drew our attention to the following:

‘In the decision of Building One Pty Ltd and Ian Izod (21 May 2014) at [18], the Board came to the decision- in similar circumstances to this one (in that multiple breaches were uncovered via an audit process in relation to a certifier that had also not noticed his own failings in process)- it was appropriate to make one overall penalty taking account of the totality of the practitioner’s professional misconduct.’

64. He also made the following submissions⁴ concerning penalty:

‘In all the circumstances, it is submitted that a civil penalty in the range of 8 penalty units and a reprimand (with a view to indicating that future breaches will warrant more serious consequences) is the appropriate course of action to take. Due to the various offences being committed over a number of years, with varying values to be attributed to penalty units each year, it is proposed that the value of the 8 penalty units could be by way of : 2 x \$144, 2 x \$149, 2 x \$153, 2 x \$154 = \$1,200.’

65. We agree that such an approach is appropriate in respect of this Practitioner’s offending.

66. However, taking into account that the Building Act regulatory regime is reliant upon the compliant work of certifiers to ensure the compliance of all other registered building practitioners; it is relevant to note that the penalty imposed personally upon Ian Izod in the decision referred to in paragraph 64 above was \$1750.00 in circumstances where it was not his first offence.

67. We have concluded, contrary to Mr Ingrames submissions that a civil penalty of 8 penalty units and a reprimand, would in the circumstances of the professional misconduct of this Practitioner, be excessive.

68. On the other hand we accept Mr Ingrames submission concerning the appropriate value of each respective penalty unit.

69. This Inquiry Board has determined that the appropriate action to be taken pursuant to section 34T of the Act is as follows:

- a. The Building Practitioner be reprimanded pursuant to Section 34T (a) of the Act.
- b. The Building Practitioner is required to pay to the Territory four (4) civil penalty units within 30 days of the date of the publication of this determination pursuant to Section 34T (d) the Act.
- c. The four penalty units are to be calculated as follows;
 - i. 1 unit at \$144.00
 - ii. 1 unit at \$149.00

⁴ At paragraphs 59 and 60 of his written submissions.

- iii. 1 unit at \$153.00; and
- iv. 1 unit at \$154.00

Making a total of \$600.00 to take account of the period over which the professional misconduct of this Practitioner occurred.

70. We take this opportunity to bring to the attention of the building industry generally that during this inquiry it has become evident that other building practitioners may be in the habit of following industry practices that are non-compliant with the Building Act such as

- i. Reliance upon verbal permits.
- ii. Reliance upon 'retrospective' permits.
- iii. Reliance upon other registered building practitioners to obtain permits instead of discharging their own responsibilities in that regard; and
- iv. Building 'urgent' or 'emergency' works without compliance with section 85 and section 86 of the Act.

71. Those practitioners should take notice that future professional misconduct arising from such non-compliant habits may attract more serious consequences in terms of section 34T of the Act actions than we consider appropriate in this matter.

72. This Inquiry Board directs that a copy of this determination be distributed to the parties and the Practitioner be advised in writing of the availability to the Practitioner of the relevant appeal mechanisms.

Rights of Appeal and Procedure for Commencing an Appeal under Division 4 of the Act

73. Section 35(d) of the Act states that a decision under section 34P that a building practitioner is or is not guilty of professional misconduct is an appealable decision.

74. Under section 36 of the Act, an appeal is to be made to the Local Court within 30 days of being notified of the decision.

75. Under section 36A of the Act, subject to section 36A(2), the appeal is to be a re-hearing of the evidence, or review of the information, before the Practitioners Board.

76. Section 36A(2) of the Act states that the Local Court may admit evidence or information that was not before the Practitioners Board only if the Court is satisfied there were special circumstances that prevented its presentation before the Board.

77. Section 36B of the Act states:

- a) in determining the appeal, the Local Court may:
- b) confirm the appealable decision; or
- c) vary the appealable decision; or
- d) set aside the decision and substitute another decision that could have been made instead of the appealable decision.

78. The Court may give orders it considers appropriate to give effect to its decision under subsection (1).
79. Section 36C of the Act states that the decision of the Local Court is final and is not subject to appeal.
80. Section 36D of the Act states:
- (1) Commencing an appeal does not affect the operation or implementation of the appealable decision.
 - (2) However, the Local Court may make an order staying or otherwise affecting the operation or implementation of so much of the appealable decision as the Court considers appropriate to effectively hear and decide the appeal.

Dated the 19th day of August 2019



Patrick McIntyre
Presiding Member



Sam Nixon
Member



Adam Aitken
Member