

BUILDING PRACTITIONERS INQUIRY BOARD

Reasons for Decision

Building Practitioners:	Tick of Approval Pty Limited and Elizabeth Ashton
Referred by:	Director of Building Control
Proceedings:	Referral of Inquiry to the Building Practitioners Board (the Board) in accordance with section 34G of the <i>Building Act</i> .
Inquiry Board:	David Richard Baldry (Presiding Member) Robert Cox Graham Lockerbie
Date of Decision:	2 March 2018

Background

1. On 18 August 2017 the Director of Building Control referred a matter to the Building Practitioners Board (the Board) for inquiry under section 34(1)(b) of the *Building Act* (**Act**). In general terms, the matter relates to the granting of a building permit by Tick of Approval Pty Limited, in its capacity as a building certifier, without the builder having given Tick of Approval Pty Limited a copy of an RBI policy document or a fidelity certificate.
2. Further and more detailed background information is as follows:
 - a. At all relevant times:
 - i. Nathan Drummond and Samantha Drummond (**Owners**) owned a property located at 356 Wheewall Road Berry Springs (**Property**); and
 - ii. Tick of Approval Pty Limited was a licensed building certifier and Elizabeth Ashton was a director and nominee under the Act of Tick of Approval Pty Limited and they were licensed building practitioners under the Act.
 - b. On 10 June 2015 the Owners entered into a building contract (**Contract**) with a builder described therein as 'Tony White – Wetland Homes' (**Builder**). It is unclear from the evidence before us whether the builder was a company known as Wetland Homes or that Wetland Homes was a business name used by Mr White, but for the purposes of this inquiry, ascertaining that detail is unnecessary.
 - c. Tick of Approval Pty Limited acted as the building certifier for the building works the subject of the Contract.
 - d. Mr White prepared an application for a building permit and asked Elizabeth Ashton to cause Tick of Approval Pty Limited to issue a building permit without requiring the Builder to provide a fidelity fund certificate or RBI policy document by advising her that the works were a transportable home and, therefore, did not require a fidelity fund certificate or RBI policy document.

- e. Ms Ashton accepted the Builder's assertion to that effect and on 27 August 2015, Tick of Approval Pty Limited, via its nominee and director, Elizabeth Ashton granted building permit 695/5437/001 in respect of prescribed building works at the Property.
- f. Tick of Approval Pty Limited granted the building permit without having been given a copy of an RBI policy document or a fidelity certificate by the residential builder.
- g. The residential builder commenced the works, but on 19 November 2015 the Builder either went into liquidation or Mr White became a bankrupt, without having completed the building works.
- h. The owners could not then make a claim on the fidelity fund and were financially unable to continue the building works at that time.
- i. The Owners have incurred considerable consequential damage as a result of having to engage another builder to complete the building works and due to the associated works completion delay.

Consideration of the Issues

3. S. 59(1B) of the Act provides that a building certifier must not grant a building permit for prescribed residential building work unless the residential builder who will carry out the work gives the building certifier the RBI policy document, or a copy of the fidelity certificate, in force for the work.
4. The building work in question was a class 1A residential building under the Building Code NT.
5. Regulation 5(5) of the Building (RBI and Fidelity Fund Schemes) Regulations, NT (**Regulations**) provides that a *residential building*, as that term is defined in the Regulations, includes class 1a buildings but does not include "*work in connection with the construction of a residential building that is entirely prefabricated or substantially prefabricated and is designed to be transported from the site of assembly or any subsequent site on which the building is located*".
6. There is no definition in the Act or the Regulations of the term substantially prefabricated.

Sentencing Hearing

7. At the sentencing hearing Mr Andrew George, of Counsel, appeared for the Director of Building Control and Mark Thomas, of Counsel, appeared for the Building Practitioners.
8. At the outset of the sentencing hearing Mr Thomas informed the panel that, while attempts had been made by the Building Practitioners to agree on an amount that might be paid by the Building Practitioners to the Owners of the Property to compensate them for the damage they had suffered due to not being able to make a fidelity fund claim when the Builder went into liquidation or Mr White was made a bankrupt, no agreement had been reached in that regard prior to the sentencing hearing.

9. The panel decided not to take those negotiations into account when assessing penalty, because they had not resulted in a settlement being agreed or for any monies to be paid to the Owners by the Building Practitioners.
10. To the extent that the written submissions prepared by Mr Thomas and delivered to the Inquiry Board on 16 January 2018 had not been superseded by the Building Practitioners' pleas of guilty, Mr Thomas relied upon those written submissions at the sentencing hearing and also made further oral submissions.
11. To the extent that the written submissions prepared by Mr George dated 22 January 2018 had not been superseded by the Building Practitioners' pleas of guilty, Mr George relied upon those written submissions at the sentencing hearing and also made further oral submissions.
12. In Mr Thomas' written submissions it was submitted that a breach of s. 59(1B) is not an offence against the Act, because s. 59 (1B) does not have any penalty applied to it, unlike ss. 59(1) and 59(2), which provide for maximum penalties.
13. No reference was made by the panel to that submissions during the sentencing hearing, because the panel took it to be the case that the aforesaid pleas of guilty must constitute an acceptance that the alleged offences were offences against the Act.
14. Even so, the panel rejects that submission, because:
 - a. s. 34S(a) of the Act provides that 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 has committed an offence against the Act or the Regulations;
 - b. the mandatory wording of the prohibition in s. 59(1B) of the Act against a building certifier granting a building permit for prescribed building work unless the residential builder who will carry out the work gives the building certifier the RBI policy document, or a copy of the fidelity certificate, in force for the work, makes it apparent that failing to comply with its requirements must constitute an offence against the Act; and
 - c. s. 34T of the Act provides that on completion of an inquiry, where the Inquiry Board decides that a building practitioner was guilty of professional misconduct, the Board may require the practitioner to pay the Territory a civil penalty not exceeding 40 penalty units.
15. Mr Thomas submitted that prior to causing Tick of Approval Pty Limited to issue a building permit for these works, Ms Ashton:
 - a. queried the builder's Mr White in relation to the description of the work as "3 bedroom steel frame custom orb cladded class 1a Dwelling on a concrete slab" and the absence of a fidelity certificate and understood from Mr White that the dwelling would be substantially pre-fabricated off site as:
 - i. the wall frames, window installation and external wall cladding would be completed off-site leaving only internal finishes to be completed on site; and

- ii. the roof trusses, roof battens and roof cladding would be built in segments off-site and those components installed on-site.
 - b. considered the relevant parts of the Regulations and, in particular, the substantially pre-fabricated exception in Regulation 5(5);
 - c. noted that that term was not defined in the Act or the Regulations;
 - d. investigated the Department of Lands, Planning and Environment legislation and policies and discovered that there were no definitions, facts sheets, building notes or industry standards that might have provided guidance as to what substantially prefabricated meant;
 - e. looked into the Department/industry publications regarding standards in connection with prefabricated constructions and noted that Fact sheet 12 states that a prefabricated house does not require residential building cover, and that there were no relevant definitions provided. Furthermore, she noted that residential building cover package questions and answers said, at question 3, that “at this stage prefabricated transportable homes are not included”;
 - f. conducted a review on the internet to determine the common definitions of “substantially”, “transportable dwelling”, “prefabricated dwelling” and “prefabricated”; and
 - g. Ms Ashton then concluded that the proposed construction built in sections and transported to site fell within the ambit of the exception provided under the Regulations.
16. Mr Thomas then submitted that:
- a. due to the research undertaken by Ms Ashton before issuing the building permit, there is no suggestion of recklessness on her part when coming to the conclusion that the building was a substantially prefabricated residence;
 - b. due to the presence of the *lacuna* in the legislation concerning the definition of the substantially prefabricated exception;
 - c. as there is no pattern of misconduct, ie this is a one off breach;
 - d. there being no record of any prior offences having been committed against the Act by the Building Practitioners;
 - e. given that the Building Practitioners have acted in a responsible and co-operative manner throughout the conduct of this inquiry; and
 - f. bearing in mind that the publication of a finding of professional misconduct on the part of the Building Practitioners would be likely to have a serious deleterious impact on their business reputations, it may be appropriate:
 - i. for the panel to exercise its discretion under s. 34R(3) of the Act not to publish this decision; and
 - ii. for no penalty to be imposed.
17. Mr Thomas also noted that In other legislation dealing with investigations of professional misconduct by professionals, such as the Legal Profession Act, there

are different degrees of misconduct with professional misconduct being the highest category with different penalty consequences and it is regrettable that the Building Act does not have a similar breakdown of degrees of censure and consequential penalty provisions.

18. The main submission by Mr George was to the effect that a breach of s. 59(1B) of the Act is an offence. He also agreed that s. 34R(3) of the Act does give the panel the discretion not to publish this decision.

Decision

19. On the balance of probability we find that both Building Practitioners were guilty of professional misconduct within the meaning of s. 34S(a) and (g) of Act by committing a breach of s. 59(1)(B) of the Act in the manner stated above.
20. The Panel considers that it should have been readily apparent to Ms Ashton that the building in question could not be substantially pre-fabricated in the manner seemingly described by the builder because:
 - a. the drawings and other documents upon which the building permit application was based, and upon which the Building Permit was granted were entirely consistent with a conventional 'site-built' method of construction – a method which typically incorporates prefabricated elements such as wall frames, roof trusses and window frames but nonetheless focuses on industry-standard on-site construction of a dwelling, and
 - b. the approved permit documents are in no way consistent with off-site construction of a residential building that is entirely or substantially prefabricated and is **designed to be transported from:**
 - i. the site of assembly; or
 - ii. any subsequent site on which the building is located, and
 - iii. therefore does not satisfy the conditions upon which a Fidelity Fund Certificate is not required and will not be issued.
21. It therefore appears to us that Ms Ashton has regrettably failed to make a properly considered professional decision in this instance and that that has lead the Building Practitioners to both be guilty of professional misconduct under the Act, due to having breached s. 59(1B) of the Act.
22. Even so, the panel considers that those breaches of the Act are at the low end of the possible spectrum of seriousness for such an offence.
23. The panel agrees that it does have power under s. 34R(3) of the Act not to publish this decision, but does not consider that it should exercise its discretion not to publish in this case, because:
 - a. the professional misconduct that has occurred has resulted in a serious adverse financial and emotional impact upon the Owners due to having to engage another builder to complete the building works and all the resulting delay in that occurring; and

- b. there is an important public interest, which should be observed, in there being no possible appearance that the Building Practitioners Board has failed to act in an open manner when dealing with instances of professional misconduct. We therefore consider that this decision should be published in the normal manner.
24. We also consider that a penalty should be imposed and we therefore order Elizabeth Ashton and Tick of Approval to each pay the Territory a civil penalty of 7 penalty units.
25. As at 2 March 2018 1 penalty unit amounted to \$154. The amount payable for 7 penalty units is therefore \$1,078.

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

26. S. 35(d) of the Act states that a decision under s. 34P that a building practitioner is or is not guilty of professional misconduct is an appealable decision.
27. Under s. 36 of the Act, an appeal is to be made to the Local Court within 30 days of being notified of the decision.
28. Under s. 36A of the Act, subject to s. 36A(2), the appeal is to be a re-hearing of the evidence, or review of the information, before the Practitioners Board.
29. S. 36A(2) 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.
30. S. 36B 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.
31. The Court may give orders it considers appropriate to give effect to its decision under subsection (1).
32. S. 36C states that the decision of the Local Court is final and is not subject to appeal.
33. S. 36D 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.

- (3) The order:
- (a) is subject to the conditions specified in the order; and
 - (b) has effect:
 - (i) for the period specified in the order; or
 - (ii) if no period is specified – until the Local Court has decided the appeal.



David Richard Baldry
Presiding Member
Building Practitioners Inquiry Board

16 April 2018