NORTHERN TERRITORY OF AUSTRALIA

BUILDING PRACTITIONERS BOARD

In the Inquiry into

the matter of: THE DIRECTOR OF BUILDING CONTROL

and

IAN DONALD GUM

A Registered Building Practitioner

REASONS FOR DECISION

The Complaint

1. Under section 26 of the *Building Act* (NT) ("the Act") a person may complain to the Director of Building Control ("the Director") about a building practitioner on one or more of the following grounds:

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

   (b) the practitioner has carried out work in a negligent or incompetent manner;

   (c) the practitioner is otherwise guilty of professional misconduct.

   In the Act and in these Reasons, "the Regulations" refers to the Building Regulations made under section 168 of the Act.

2. On 2 January 2007 Danielle Eisenblatter (the "complainant") made a written complaint to the Building Advisory Services ("BAS") office in Alice Springs about incomplete building work at 26 Spicer Crescent, Alice Springs ("the residence") carried out by Ian Donald Gum ("the practitioner"). The grounds of the complaint were that:

    2.1. No written contract had been entered into between the practitioner and the complainant;

    2.2. Work had been carried out in a negligent or incompetent manner (the complaint listed in excess of 15 concerns); and

    2.3. The works were behind schedule and the practitioner had gone away for 2 weeks.

3. It is necessary to set out the history of the matter subsequent to the making of the complaint in some detail.

    3.1. By letter dated 12 January 2007 the Director formally notified the practitioner of the complaint pursuant to section 29 of the *Building Act* and requested a response by 22 January 2007. The notification was in the approved form: see section 167A of the Act. A written response was not received by that date although on 24 January 2007 the complainant and the practitioner both signed a list of complaints which was given to the Director's office.

    3.2. On 21 March 2007 the Director again wrote to the practitioner requesting a response by 4 April 2007. A response was received by

facsimile transmission on 17 April 2007. It is not necessary to go into the detail of the complaint and this response at the moment. Suffice to say that the response did not address the complaint to the Director's satisfaction.

3.3. The Director wrote to the practitioner on 12 June 2007 requesting further information regarding rectification of certain defects appearing in the complaint and in the list dated 24/01/07 (above) and other information concerning the building contract and the inspection reports which were required by section 63(5) of the Act. A response was requested by 22 June 2007. Yet again, no response was received.

3.4. Section 28 of the Act provides that the Director may dismiss the complaint without investigating it in certain circumstances. In this case the Director did not dismiss the complaint. Section 30 provides that the Director must investigate the complaint if he does not dismiss it.

3.5. On 2 November 2007 the Director decided to proceed to a formal investigation and wrote to the practitioner requiring a response from the practitioner pursuant to section 33(1) of the Act by 19 November 2007.

3.6. The Director's letter dated 2 November 2007 revealed that the following matters were included in the investigation:

a) Failing to enter into a contract with the complainant;

b) Making a false declaration (by completing the Evidence of Building Contract form dated 18 October 2006) that the practitioner had entered into a contract with the complainant;

c) Failing to carry out prescribed works in accordance with the building permit;

d) Making a false declaration that, as a registered building contractor, the practitioner had carried out, or was in charge of carrying out, prescribed building works in accordance with the building permit;

e) Carrying out prescribed building works found to be non-compliant with the Building Code of Australia and the Act and Regulations and which were the subject of a valid claim under the Home Building Certification Fund; and

f) Allegations that the practitioner was guilty of serious negligence or incompetence in carrying out the building works as detailed in the report by IrwinConsult dated 25 September 2007 (to which further reference will be made during the course of these Reasons).

The practitioner was asked to respond to the allegations and also state his intentions about rectifying the alleged breaches of the Building Code of Australia.

3.7. It should be noted that the Director's letter of 2 November 2007 did not specifically state that the concerns listed in the complaint dated 2 January 2007 would be the subject of the investigation (except perhaps to the extent that they may have been covered by the allegations in paragraph 3.6 above). When asked to comment on this feature of the case, the Director submitted that the matters outlined in the

complainant's letter dated 2 January 2007 and in the Director's letter dated 12 June 2007 were definitely included in the investigation "in a global form". We will return to that submission: see paragraph 27 below.

3.8. On 6 December 2007 the practitioner had a telephone conversation with Ms Parry of BAS Darwin in which he explained that he had been in hospital and had only just seen the Director's letter dated 2 November 2007; he provided some comments and assured Ms Parry that, although he was due to re-enter hospital soon, he would respond in writing "before Christmas". Time to respond was extended by Ms Parry to accommodate the practitioner's request [16/06/08 lines 1046 -1049].

3.9. On 29 February 2008 the Director, having received no response from the practitioner, concluded the investigation and made various findings against the practitioner. The Director found that there was sufficient evidence that the practitioner was guilty of professional misconduct and, pursuant to section 34(1)(b) of the Act, referred the matter to the Board for inquiry. The Director also determined that there was prima facie evidence that the practitioner failed to provide information and documents as required by section 33(1) and referred that matter to the Board for inquiry. The practitioner was duly notified of these developments by the Director's letter dated 29 February 2008 giving reasons for his decision as required by sub-sections 34(2) and 34(3) of the Act.

The Inquiry

4. The Board is required by section 34G of the Act to hold an inquiry into a matter referred to it by the Director under, inter alia, section 33(1) or section 34(1)(b). Section 34P provides that, on completion of an inquiry, the Board as constituted for the inquiry must decide, in accordance with section 34S, whether or not the practitioner the subject of the inquiry is guilty of professional misconduct and, if the practitioner is guilty, decide the further action to be taken under section 34T and whether or not to take additional action under section 34U.

5. In conducting an inquiry the Board is not bound by the rules of evidence but is bound by the rules of natural justice: section 34K. The parties to the inquiry are the Director and the practitioner: section 34M(1). Mr Mossman appeared at the inquiry as the Director's representative: section 34M(2). The practitioner chose to represent himself and did not obtain the services of a lawyer.

6. This case has features of significant complexity and novelty. Our task has not been made any easier by the relative imbalance in the quality of the submissions received. Whilst we acknowledge the capable assistance given by Mr Mossman, we also stress that we have endeavoured to give the practitioner every chance to present his side of the story. In trying to come to a balanced decision, we have had to examine a considerable amount of evidence in fine detail. It has also been necessary for us to pause on a few occasions to consider how best to proceed in circumstances where we are conscious of breaking new ground in what we believe to be the first inquiry under Division 3A of Part 3 of the Act involving the conduct of a building contractor. Hence, regrettably, the inquiry may have become more prolonged than the parties anticipated.

7. Section 34S of the Act provides:

> "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;
>
> (b) is guilty of a pattern of negligent or incompetent conduct or serious negligence or incompetence in carrying out particular work;
>
> (c) had authorised or permitted an employee, or another person engaged to do work on the practitioner's behalf, to work as a building practitioner in a category of building practitioner in which the employee or other person is not registered;
>
> (d) obtained his or her registration by fraud or misrepresentation;
>
> (e) has had his or her authority to practise as a building practitioner in a place outside the Territory cancelled or suspended, otherwise than for failure to renew the authority;
>
> (f) is guilty of conduct referred to in section 33(1)(a) or (b) or 34E(1)(a) or (b); or
>
> (g) is otherwise guilty of professional misconduct".

8. Subparagraphs (a), (b), (f) and (g) of section 34S are relevant for the purpose of the inquiry. The Director alleged that the practitioner:

- has committed various offences against provisions of the Act and/or the Regulations;
- is guilty of serious negligence or incompetence in carrying out work at the residence;
- is guilty of conduct referred to in section 33(1)(a); and
- is otherwise guilty of professional misconduct.

9. We are assisted by the following remarks made by a differently constituted Inquiry Board in the matter of Izod (decision 22/06/07):

   9.1. The term "professional misconduct" has a varied and adaptable meaning and may be influenced by general law as well as statutory provisions; see *Kennedy v The Council of the Incorporated Law Institute* (1939) 13 ALJ 563.

   9.2. The meaning of the term is not restricted by subparagraphs (a) to (f) of section 34S. Subparagraph (g) expressly leaves open the additional possibility that the practitioner "is otherwise guilty of professional misconduct".

10. We also have in mind that subparagraph (b) requires a "pattern" of negligent or incompetent conduct or "serious" negligence or incompetence. In our opinion these requirements are to be read disjunctively. Be that as it may, the section clearly does not proscribe mere mistakes such as can occur from time to time in the work of an otherwise generally competent builder.

11. Whilst we are free to come to our conclusions, we do agree with the observations made recently by the NSW Administrative Decisions Tribunal in *Building Professionals Board v Boulle* [2008] NSWADT 80 (at para 39) that the legislation- in this case section 5(a) of the Act - is "expressed in such a way that any failure, however minor, in complying with [*the Act or the Regulations*] might give rise to a finding of unsatisfactory professional conduct". We also agree with that tribunal's approach that "a tempered view should always be taken, not an absolutist one" in making findings with regard to a failure to comply with the Act or the Regulations recognising that "the finding is a disciplinary one going to the reputation and standing of a practitioner" (*Boulle* again at para 39).

12. We agree with the Director's submission that the Act does not define "serious", "negligence" or "incompetence". We do not require a definition to understand those terms. Borrowing from Rich J in *Kennedy v The Council of the Incorporated Law Institute* (above) a practical guide still applied by other tribunals when considering allegations of professional misconduct is that the particular transaction must be judged as a whole to see whether it betokened unfitness to be a practitioner in whom confidence could be placed.

13. The Director has submitted that workmanship issues relating to the finish of the job were not serious enough to come within the complaint provisions of the Act which are "more concerned with the very serious matters relating more appropriately to the structural sufficiency, safety and amenity of the building works": see paragraph 27.5 below. He put breaches of the Building Code of Australia in the latter category. It is not necessary for us to decide this point but we are by no means convinced that the complaint provisions (and in particular section 26(b) of the Act) should be given such a restricted application.

14. It is worth noting incidentally that the Building Code of Australia is incorporated into the Regulations: Section 4 of the Regulations. Section 20A of the Regulations requires a person who carries out prescribed building work to make a declaration in the approved form stating that the work has been carried out in accordance with the building permit.

15. The inquiry into both matters proceeded in Alice Springs from Monday 16 June 2008 to Thursday 19 June 2008 inclusive, when oral evidence was received from the Director's witnesses:

    - Mrs. Josie Parry, senior investigator, of BAS Darwin;
    - The complainant;
    - Mr. Neil Clarke, a civil engineer and structural engineer, of IrwinConsult;
    - Mr. Allan Murray, building contractor, of Murray Maintenance Service; and
    - Mr. Peter Zagorski, building certifier, of BAS Darwin.

    A transcript of the inquiry was prepared and the applicable lines of that transcript are referred to in this decision.

16. The practitioner gave evidence himself and called another witness, Mr. David Cantwell. The Board was interested in hearing from another two witnesses, namely Mr. Ben Symonds (the complainant's de facto partner) and Mr. Andrew Jones (an employee of Mr. Cantwell). When given the opportunity to provide submissions in relation to the potential evidentiary value of these two witnesses,

both parties asked the Board to complete the inquiry without that additional evidence. We complied with the parties' wishes.

17. The building work carried out by the practitioner involved the construction of additions to the residence consisting of "infill extensions" and a veranda (sometimes referred to as a patio). In his report dated 25 September 2007 (exhibit 15) Mr Clarke of IrwinConsult pointed out that prior to the extensions, the roof of the residence was Brownbuilt sheeting profile secret fixed, a profile no longer available to the practitioner. This setback was compounded by some poor choices in the method of fixing and co-ordinating the new roofing materials. The practitioner terminated the new veranda roof where it connected at the junction with the old roof sheeting, resorting to some unsatisfactory improvisation in joining the different roofing materials: see paragraphs 30.2, 30.4, 30.5 and 30.6 below in relation to these problems.

18. The practitioner was at all times a registered building practitioner under Part 3 of the Act being a prescribed building contractor residential (restricted). We should also explain that the extensions to the residence constituted class 1a and class 10 building works and were, therefore, "prescribed building work" within the meaning of section 41G of the Regulations.

Findings

19. We are satisfied on the balance of probabilities that the practitioner committed offences against the Act (or the Regulations) in that:

    19.1. The practitioner contravened section 48B(1) of the Act which prohibits commencing or continuing to carry out prescribed building work without entering into a building contract with the owner of the land.

Section 48B(1) does not apply if the value of the work is less than the prescribed amount: section 48B(3). The prescribed amount is $12,000.00: section 41J of the Regulations.

There was ample evidence that the value of the building work was more than the prescribed amount ($12,000) and otherwise of the ingredients of this offence and at any event the practitioner admitted his guilt [18/06/08 lines 3797-3802].

19.2. <u>The practitioner contravened section 55 of the Act by carrying out building work without a building permit.</u>

The evidence revealed that the work started in early October 2006 [16/06/08 lines 1536-1538] and the concrete floor was laid in the infill on or shortly after 18 October 2006 [16/06/08 line 1564] but the permit did not issue until 6 November 2006 (exhibit 2 attachment "B"). The practitioner also frankly admitted that he committed this offence [17/06/08 line 3509] but see paragraph 30.16 concerning what is, according to the practitioner, a regular practice in the industry.

19.3. <u>The practitioner further contravened section 55 of the Act by carrying out the work otherwise than in accordance with the permit.</u>

Evidence was received from Mr Clarke of IrwinConsult in his report dated 25 September 2007 (exhibit 15) that the work was not carried out in accordance with the building permit. The structural layout and makeup of the new roofs was substantially different from the drawings associated with the permit. Again, the practitioner confirmed that he did not complete the work in accordance with the approved plans [18/06/08

lines 607-612 and 3849-3850]. The practitioner admitted that he had changed the plans without getting engineering input as required by Section 21 of the Regulations "Certificates by Other Persons". See also the explanation in paragraphs 30.7 to 30.10 inclusive of these Reasons.

19.4. <u>The practitioner contravened section 69(3) of the Act by making a declaration that the building work was carried out in accordance with the building permit which declaration the practitioner knew to be false.</u>

The declaration was signed on 4 May 2007. His admission [18/06/08 lines 3849-3850] tends to establish this offence as well as the preceding offence.

19.5. In our opinion, the particular circumstances of each of the above offences taken in isolation are sufficiently serious to amount to professional misconduct. All the more so when the offences are taken together.

20. The job taken as a whole was extremely unsatisfactory. The evidence given by Mr Clarke shows that the practitioner's failure to properly complete the work went well beyond mere mistakes. In our view, Mr Clarke's evidence well and truly establishes serious negligence or incompetence in that:

20.1. There was evidence of shoddy workmanship with regard to inadequate welds [16/06/08 lines 2957-2959] and dubious bolted connections which required upgrading [16/06/08 lines 2964-2972]. To make matters worse, the practitioner's worker had used a filler instead of a proper weld and sprayed over it. There is a dispute about the practitioner's knowledge of these actions. He did say that when his attention was directed to the

problem by Mr Symonds he saw to its rectification [18/06/08 lines 2697-2718].

20.2. The concrete slab on the veranda was not constructed to the specified thickness of 100mm being the measured thickness of only 60-70mm at the core tested locations [16/06/08 lines 3032-3054].

20.3. The practitioner did not provide steel wall framing and a lintel over the window in the infill area as required by the approved structural drawings [16/06/08 lines 3056-3071 and 3134-3138].

20.4. The practitioner did not appear to be sure if he fixed the new structural columns to the walls as required by the approved drawings [18/06/08 lines 3470, 3586]. He felt that the requirement was wrong but did not take up the issue with the engineer.

20.5. The practitioner pan-fixed the Topdek metal roofing over the infill area instead of using crest fixing [16/06/08 line 2873] which resulted in leaks [16/06/08 line 2874]. Evidently, the clips which are normally used to fix the Topdek sheeting were not available so the practitioner pan-fixed them instead. According to Mr Clarke, the practitioner should have waited for the clips [16/06/08 lines 3218-3220]. Mr Murray confirmed that the leaks were coming from the pan-fixing [17/06/08 lines 1968-1971]. The practitioner accepted that he should not have pan-fixed the infill roof [17/06/08 line 1050 and line 3093]. Later we will refer to evidence which we have accepted by way of explanation mitigating the seriousness of the practitioner's failure: see for example the

practitioner's submissions at paragraphs 29.5, 29.8 and 30.12 of these Reasons.

20.6. Mr Clarke was unable to verify that the steel posts supporting a new beam were connected to the slab as required by the approved drawings [16/06/08 lines 3072-3088]. The evidence does not enable us to make a formal finding of fault in that regard except to the extent that the practitioner admitted using a dyna-bolt (a weaker connection) instead of a chem-set fixing as specified [18/06/08 line 3322]. When an alternative fixing to the one specified on the approved drawings is used, it must be equivalent or better. Otherwise the engineer must approve the change. In this case, the use of a dyna-bolt instead of a chem-set is grossly inadequate.

21. It is obvious that some of the findings in paragraph 20 of these Reasons could have provided a basis for further instances of breaches of section 55 of the Act (carrying out work otherwise than in accordance with the building permit) but we do not think that these niceties need to be explored. It is more important to look at the substance of the allegation and the fact that, one way or another, it constitutes professional misconduct. We are satisfied that the above aspects of the practitioner's conduct taken as a whole can be aptly described as serious negligence or incompetence.

22. There was evidence of other failures which were clearly substandard but we are not prepared to find that they were serious enough to be put into the category of professional misconduct. Some of these failures were close to the borderline but we have resolved the doubt in favour of the practitioner.

22.1. Borderline failures resulted in the provision of unsuitable flashing. The flashing where the Pro-dek and the Topdek meet at the wall line is ugly and not weatherproof [16/06/08 lines 2875-2888]. The flashing where the Topdek joins the old Brownbuilt roof is not satisfactory but according to Mr Clarke it would be very difficult to get a good waterproof joint there [16/06/08 lines 2911-2916].

22.2. We also point out that the practitioner pan-fixed the Pro-dek metal roofing over the veranda instead of using crest fixing [16/06/08 lines 2822-2852] with the result that the roof leaked [16/06/08 lines 2867-2868]. The practitioner had also used a grey flexible sealant (Orminoid or Grip-Set or similar) in an ineffective attempt to improve the waterproofing capability of the veranda roof. With respect to this aspect of the job we are of the opinion that, while the practitioner's workmanship left something to be desired, it is not sufficiently serious to constitute professional misconduct. We have taken account of the evidence referred to at paragraphs 30.3 and 30.11 of these Reasons.

23. There was hardly any challenge to Mr. Clarke's evidence. In fact, Mr Clarke's evidence was supported by the practitioner's own admissions in many respects. Even where not expressly admitted, we were prepared to fully accept Mr. Clarke's evidence much of which we were able to confirm by inspecting the premises in the presence of the parties. The overall result fell far short of the standard to be expected of a competent builder.

24. We also find that in the circumstances described in paragraphs 3.8 and 3.9 above the practitioner failed without reasonable excuse to provide information

as required by a reasonable request from the Director dated 2 November 2007 pursuant to section 33(1)(a) of the Act.

24.1. The information was not provided by 29 February 2008 although it must be said that the practitioner did provide some sort of response, albeit inadequate, on 6 December 2007. On 3 April 2008 the practitioner purported to provide a response dated 4 January 2008 [there is no cogent evidence that the response was already provided on 4 January 2008]. At any event, the response still did not adequately address the various requests contained in the Director's correspondence.

24.2. The practitioner's evidence was confusing ranging between admissions of non-compliance and seeking to excuse himself by reason of his personal circumstances [18/06/08 lines 3968-3994, 4046-4058 and 4125]. Undoubtedly, the practitioner had serious health issues but to our minds they do not adequately explain his failure to comply with the Director's requests.

25. The Board have been asked to find that the practitioner was guilty of professional misconduct by reason of:

25.1. a further offence against section 69(3) of the Act by making a false declaration on 18 October 2006 [exhibit 2, document "B"] that there was in existence a contract to build as required by section 48B of the Act; and

25.2. his poor workmanship, poor work practices and poor customer relations.

26. With regard to the allegation in paragraph 25.1 the Director submits that the practitioner admitted that he had signed the form entitled "Evidence of Building Contract" knowing that there was no formal contract in place as required by the Act [18/06/08 lines 3856-3876]. There was evidence that on 6 December 2007 during a telephone conversation with Ms Parry, the practitioner insisted that the form itself constituted a contract. When Ms Parry explained the difference between a contract and evidence of a contract the practitioner admitted that he had not entered into a contract and said he was unaware of that requirement. Section 41H of the Regulations clearly identifies the requisite contents of building contracts. The practitioner confirmed his misapprehension in evidence and said that in his experience it was a common misapprehension among builders [17/06/08 lines 3620-3626]. That may be so, but the evidence has established to our satisfaction that enough information has been made available to building practitioners (including the practitioner) about the requirements of the Act and Regulations. This sort of confusion cannot be excused. The practitioner should have known better and a finding of professional misconduct is made in this respect.

27. As regards the allegation in paragraph 25.2:

    27.1. The Director points to the complainant's evidence in her written complaints and her oral testimony [16/06/08 pages 37-78 and 96-124]. The practitioner denied the allegations [18/06/08 line 4356].

    27.2. A difficulty with these allegations is that they have not been properly particularised in the Director's submissions and we cannot be satisfied that the practitioner was adequately informed that they were the subject of an investigation and that the practitioner was given an adequate

opportunity to respond. The Act calls for specific disclosure of the complaint for the purpose of the investigation: a point illustrated by section 31 which requires the Director to give a building practitioner particulars of another complaint.

27.3. Throughout the course of the consideration of the matter by the Director, the complainant continued to introduce new complaints about the practitioner's workmanship and work practices. Although many of these complaints may have been justified and particularised, the material as it stands is unsatisfactory.

27.4. We think it is important to be satisfied that due process was observed throughout the investigation as well as at the inquiry. In our view the scope of the investigation was limited to the matters particularised in the Director's letter dated 2 November 2007. There was no specific reference in that letter to "poor workmanship, poor work practices and poor customer relations" as subjects of the investigation and we therefore do not consider that they should properly be regarded as capable of giving rise to further findings of professional misconduct. Admittedly, the Director's letter dated 29 February 2008 did refer to those alleged failures in a general sense. However, even if we were permitted to make further findings of professional misconduct with respect to those allegations, the precise basis of those findings does not readily emerge from the material presented to us.

27.5. The complaints should be viewed in the light of the submission by the Director's representative that workmanship issues going to the finish of the job, whilst manifesting a lack of care and attention, were not serious

enough to come within the complaint provisions of the Act [18/06/08 page 92].

27.6. At any event, the complainant herself gave evidence that the practitioner had taken action to rectify the work which had given rise to many of her complaints.

27.7. The reasons in paragraphs 27.5 and 27.6 possibly help to explain why these broad allegations have not been particularised either for the purpose of the investigation or in the Director's submissions to this inquiry. Be that as it may, we are inclined to make no findings with respect to these "catch all" allegations.

Submissions in relation to sections 34T and 34U

28. The matters referred to in paragraphs 19, 20, 24.1 and 25.1 of these reasons were all brought to the practitioner's attention during the course of the Director's investigation. We refer in particular to the letter from the Director dated 2 November 2007. The Director submits that:

28.1. A reprimand pursuant to section 34T(a) would be inadequate.

28.2. The practitioner should be required to pay the whole of the Director's costs of the inquiry amounting to $18,030.88: Section 34T(b).

28.3. The practitioner should be required to reimburse the HBCF Fund for the total costs of the rectification works undertaken in accordance with the claim made by the complainant: Section 34T(c).

28.4. The Board should exercise their discretion as appropriate regarding any order pursuant to section 34U.

29. The practitioner submits in effect that:

29.1. After a recent storm at Alice Springs he received numerous requests for help but not one request related to any of his jobs. We take this as a submission that his work is generally satisfactory or at least that any complaints have been addressed.

29.2. He has not deliberately made false statements but he admits to mistakes and poor judgement.

29.3. The plans for the extensions in the premises were prepared by a draftsman, submitted by the owner and passed by an engineer and certifier.

29.4. He did not make any changes to the approved plans. Changes were made by Mr. Cantwell.

29.5. There is a letter from Stratco dating 28 March 2007 stating that the Topdek roofing can be pan-fixed with two self-drilling screws per pan. (The letter also states that the builder is responsible for ensuring that all fixings are adequately sealed to prevent leakage.).

29.6. Customer relations were not promoted by people wandering around the worksite at various stages and Mr. Symond's provocative behaviour [see 18/06/08 line 4389 and Mr Cantwell's evidence 18/06/08 lines 4915 and 5064].

29.7. Drawing 06111-050-2 clearly shows that the roofing is not continuous. (We are unable to verify this submission; to the contrary, the drawings generally indicate continuous sheeting).

29.8. The practitioner defends his use of Topdek because the drawings specify Spandeck or similar to match existing 2 degree pitch. (The Stratco brochure – exhibit 10 – confirms that Topdek is suitable for roofs with pitches as low as 1 degree).

29.9. The practitioner disputes Mr. Clarke's evidence that the roof was 1 degree pitch.

29.10. The building works do not need to be demolished. The practitioner is prepared to get new plans drawn and certified as built.

29.11. The practitioner confirms his guilt of "some" offences as alleged but he is in the process of making sure similar conduct will not happen again.

<u>Other relevant circumstances</u>

30. We shall now move on to mention some other relevant circumstances:

30.1. Section 41H of the Regulations sets out the requirements for a contract for the purpose of section 48B(2) of the Act. There are 8 requirements, and the only document which could possibly be a candidate for classification as a contract (namely the practitioner's quotation no. 55) fell well short of those requirements.

30.2. According to Mr Clarke [16/06/08 lines 2802-2815] "the biggest mistake on this job was the original set of drawings"; "the original draftsman, or

building designer called for a continuous roof deck"; and "the roof profile that the building designer called up wasn't used either". The practitioner "used two Stratco products which in themselves are.... good products suited for low, flat roofs". He added that the best way to approach the job would have been to remove the roofing material entirely from the building [16/06/08 lines 2933-2934].

30.3. Mr Clarke said "there's probably not a building code clause that actually says the patio has to be waterproof, even though it probably is good workmanship to be waterproof" [16/06/08 lines 2838-2841]. "So the roof manufacturers are a little more liberal with how they fix their patio roofs and they do allow pan fixing for the product known as Pro-dek in the patio" [16/06/08 lines 2843-2846].

30.4. Mr Clarke said that the designer left it to the builder to sort out the roofing issues [16/06/08 lines 2807-2808] including the flashing between the different roofing materials [16/06/08 lines 3011-3012]. The constraints of the original building in combination with the design of the extension were problematic [16/06/08 lines 3027-3028].

30.5. Mr Clarke said that, by not insisting that the design problems were sorted out, the practitioner transferred the problems to himself. A competent builder would not leave himself in the position of taking such unnecessary risk [16/06/08 lines 3228-3232]. By contrast, the practitioner relied upon Stratco to recommend a roofing solution [18/06/08 line 1091] and, as already stated, now recognises that he should have used clip locks to fasten the infill roof.

30.6. Mr Murray said he would have sent the design back to the architect to be fixed [17/06/08 line 319]. He would have asked for the flashing to be drawn up as well [17/06/08 line 329]. Once again, in contrast with this prudent approach, the practitioner designed the flashing and had Stratco make it up according to his design [17/06/08 line 1485].

30.7. The practitioner said that he changed the framework for the veranda and prepared some rough plans which he handed to the certifier [16/06/08 line 3312], Andrew Jones, at the end of October 2007 [17/06/08 line 1095 and exhibit 12a]. The practitioner said he was not asked for any engineering calculations or certification [17/06/08 lines 1125-1133]. He said he consulted Mr Cantwell in relation to the plan exhibit 12b and the change in size in the new beam. He said Mr Cantwell wrote on the engineering drawing [17/06/08 lines 1154-1166] and drew some lines [17/06/08 lines 1202-1242]. Additional concern was aroused by evidence at the inquiry that the detail in plan 12a was not followed in the works as built [18/06/08 lines 2467-2474].

30.8. Mr Cantwell confirmed that the practitioner had discussed some structural changes for the veranda and the new beam as well and that he (Cantwell) had contacted the engineer to get his approval. The plans should have been amended but it was not done [18/06/08 pages 133-135].

30.9. The practitioner also admitted that he changed the stud framing near the window head [17/06/08 line 2043] and that he thought the change had been inspected by Mr Cantwell and/or Mr Jones [17/06/08 line 2053].

30.10. The evidence was unclear as to precisely what changes were discussed with the inspector/certifier and what happened in relation to getting the plans properly amended. As we have already mentioned, Mr Jones may have been able to assist but he did not give evidence. Mr Gum admitted that he did not ask Mr Cantwell to obtain amended engineering drawings [18/06/08 line 5812].

30.11. The practitioner said that the grey waterproofing material (see para 22.2 above) was used on the veranda roof at the request of Mr Symonds [16/06/08 line 3350, 17/06/08 line 1525].

30.12. The problem with the leaking Topdek roof over the infill was addressed at the suggestion of the certifier, Mr Cantwell, by fixing two screws per pan [16/06/08 lines 3856-3867] and see exhibit 8. This expedient failed to stop the leaks [16/06/08 line 3908].

30.13. Mr Murray gave evidence that the cost of repairing the non-compliant work was about $26,000 including addressing all certification issues and repairing resultant damage (such as the water-damaged ceiling). Resultant damage is not covered by the HBCF claim.

30.14. Mr Murray also said that he usually relies on the certifier to approve changes in detail but if the change is structural then he would have to involve the engineer either directly or by requirement of the certifier [17/06/08 page 25].

30.15. The practitioner's evidence in relation to the certifier's inspections was vague and confused. He was not sure if the inspection reports in evidence at the hearing reflected all of the inspections that he arranged

[17/06/08 line 2258]. He had no independent records [17/06/08 line 2264].

30.16. The practitioner gave evidence of his awareness of a regular practice for small building jobs – once a building permit has been applied for – that the excavation is done and the site prepared for the concrete floor before the permit actually issues [17/06/08 lines 3537-3543].

30.17. There was conflicting evidence relating to the pitch of the roof of the residence. Sheet 22 of the building plan refers to minimum 2 degrees pitch in the infill roof to match the existing roof. On the other hand, Mr Clarke's report proceeds on the basis that the original Brownbuilt roof was 1 degree pitch. We have not found it necessary to determine the pitch of the roof.

30.18. It appeared that the practitioner had adopted loose practices in relation to certificates confirming that building components had been installed in accordance with manufacturers' specifications. He said it was a common practice to sign such a certificate without checking the work or without checking the fixing details [generally 18/06/08 pages 37,38].

30.19. The practitioner has severely impaired sight in his right eye; he can only distinguish between night and day. Late in October 2007 he had an accident which caused him to lose part of the sight of his left eye [18/06/08 pages 43,46]. His limited eye sight makes it difficult for him to use tools, read a spirit level and check his work.

30.20. The practitioner has asked his solicitor to draw up a building contract for future use. He says he will learn from these mistakes. He does not

enjoy paperwork and perhaps has relied on the certifiers more than he should [18/06/08 pages 57-60].

30.21. The practitioner admitted he had difficulty complying fully with Regulation 41(d) which requires a certain level of oversight of persons working on the site: see paragraph 20.1 of these Reasons for an example of this type of non-compliance.

30.22. Mr Cantwell's registration as a certifier was suspended between 14 February 2005 and 14 February 2007. A Victorian certifier, Mr Peter Bozinowski, was signing certificates for him. Inspections were done by Mr Andrew Jones. In circumstances where the practitioner was obviously depending to a large extent on the certifier to help him to achieve compliance with the requirements of the Act and Regulations, this rather dysfunctional arrangement was apt to make the job much more difficult for all concerned.

30.23. Mr Cantwell did not believe that many builders would understand the requirements of the Act or the Regulations. They would rely heavily on building certifiers and inspectors to interpret the requirements and give them advice [18/06/08 page 175]. The practitioner undoubtedly relied on the Occupancy Permit which was signed on 5 June 2007 as an indication that he had done well enough.

30.24. Section 60(b) of the Act provides for amendment of the building permit by the building certifier on application by the owner. In practice it appears that the builder may take up the request for amendment on the

owner's behalf [19/06/08 line 400]. Clause 1 of Schedule 3 to the Act provides for an agent to act with the owner's written authorisation.

31. We regard roof leaks as very serious issues. Aside from affecting the personal comfort and peace of mind of the inhabitants, unless rectified, leaks can cause the long-term breakdown of the building fabric and ultimately lead to the building becoming uninhabitable. Notwithstanding the letter from Stratco (see paragraph 29.5 above) we accept Mr Clarke's evidence that the practitioner should have waited for the clips. In any event, the practitioner was, as the letter from Stratco states, responsible for ensuring that all fixings are adequately sealed to prevent leakage. It is obvious that this aspect of the job was grossly deficient.

32. It is a circumstance for consideration in the practitioner's favour that to some extent the conduct of other professional or trades people contributed to his woes. We do not take their conduct into account by way of deflecting responsibility from the practitioner. In our view the practitioner is ultimately responsible for compliance with the provisions mentioned in paragraph 19 above. And the practitioner must assume responsibility for his serious negligence or incompetence as mentioned in paragraph 20 above.

33. There is a basis for the practitioner forming an erroneous belief that the certifier (loosely describing Mr Cantwell, Mr Bozinowski and/or Mr Jones as such) had adopted the changes in the drawings which were mentioned during the course of his discussions with Mr Cantwell and Mr Jones. Whilst this does tend to explain in part how the changes were made, it does not relieve the practitioner from his primary responsibility of ensuring that the work was carried out in accordance with the building permit (including the drawings) and that corresponding amendments were made to reflect any changes in the work as it

progressed. The practitioner's evidence (at paragraph 30.23) may well be correct. We suspect that the practitioner is not alone in reposing excessive faith in his building certifier but, as a matter of practice, that is a dangerous course for a builder to adopt. Without intending any criticism of building certifiers in general, building contractors should take their own steps to confirm that the building permit is complied with and that all changes have been appropriately managed. Far from trying to impose a counsel of perfection, ordinary commonsense dictates that these obligations required considerably more than the scant attention which the practitioner paid to them.

Orders

34. In short, we have decided that the practitioner is guilty of professional misconduct as detailed in paragraphs 19, 20, 24.1 and 25.1 of these Reasons. Having made and, we hope, adequately explained our findings we require further assistance before making any orders pursuant to section 34T or section 34U. We seek detailed submissions from both parties on these questions:

    34.1. Whether, having regard to the above findings, it would be appropriate to make an order under section 34T(a), 34T(d), 34T(e) or 34T(f) of the Act?

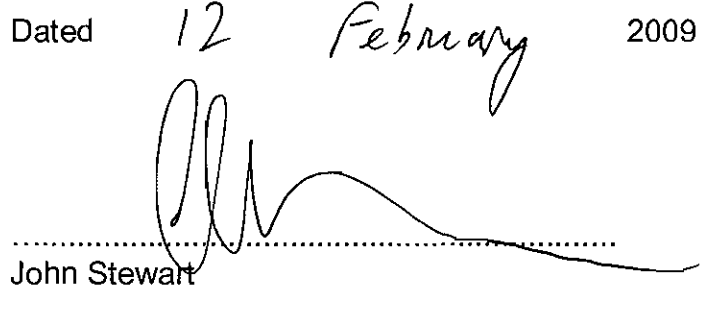
    34.2. What principles control the making of an order in accordance with section 34T(b) of the Act?

    34.3. Does a power to require the practitioner to reimburse the HBCF Fund arise on a proper application of section 34T(c)?

34.4. Should the Board direct the Director to audit the practitioner's work or conduct or both?

When preparing their further submissions the parties should consider if guidance can be obtained from the decisions of Courts or tribunals whether in the Northern Territory or elsewhere. The Registrar will contact the parties to make arrangements for these submissions to be made orally.

Dated 12 February 2009



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John Stewart

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Brendan Meney

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Paul Nowland