

NORTHERN TERRITORY OF AUSTRALIA
BUILDING PRACTITIONERS BOARD

In the Inquiry into
the matter of

THE DIRECTOR OF BUILDING CONTROL

And

MICHAEL KEITH BAXTER

A Registered Building Practitioner

REASONS FOR DECISION

1. This matter was referred to the Building Practitioners Board by the Director of Building Control ("the Director") pursuant to section 34(1)(b) of the *Building Act* (NT) ("the Act"). The Building Practitioners Board must hold an inquiry into a matter that is referred to it by the Director (see section 34G of the Act) and for that purpose constitute an Inquiry Board under section 34J.
2. The parties to the inquiry were the Director and the Practitioner (section 34M). Both parties were legally represented. The inquiry was recorded; references to the transcript appear in these reasons.

Agreed Facts

3. The Inquiry Board was presented with an agreed statement of facts a copy of which is attached. Whilst we have carefully noted all of the agreed facts we will reproduce some of them to provide context for this decision:
4. The facts establish that –
 - (a) Michael Keith Baxter is and was at all times material to this matter a registered building practitioner ("the Practitioner").
 - (b) The Practitioner contracted with Mr Mitchell Gibson and Mrs Sasha Gibson for the construction of a residential building at Lot 4523 (No 516) Lowther Road Virginia ("the building").
 - (c) On 18 September 2007 the Practitioner signed a Builder's Declaration, pursuant to section 69 of the Act, declaring that the building work had been carried out in accordance with the building permit issued for the premises. An Occupancy Permit for the premises was issued on 26 September 2007.

- (d) On 20 March 2008 Sasha Gibson ("the Complainant") submitted a written complaint by email to Building Advisory Services ("BAS") alleging that the Practitioner had failed to rectify certain defects relating to the construction of the building.
- (e) The main issue raised by the complaint concerned an alleged failure to adequately or appropriately waterproof and paint the exterior walls of the building, which were allegedly blighted by the appearance of some sort of "residue" and discolouration.
- (f) The external rendering and painting were not carried out by the Practitioner personally but through the engagement of separate sub-contractors.
- (g) When confronted with the complaint by BAS, the Practitioner responded by denying any fault. He stated that the exterior walls had been sealed correctly with one coat of masonry sealer and two coats of paint. He suggested that the residue on the walls could have been caused by the garden reticulation system.
- (h) On 5 September 2008 the Practitioner stated that he was unwilling to visit the site as the owners were abusive towards him. He indicated that he was willing to inspect the building in company with officers of BAS.
- (i) On 15 October 2008 the Director authorized an investigation of the complaint pursuant to section 30 of the Act. A report had been prepared by Irwinconsult suggesting that there had been a failure to paint the exterior of the building in accordance with the requirements of the *Building Code of Australia*. [That Code applies to the building by force of Regulation 4 of the *Building Regulations*.]
- (j) In response to a letter from the Director dated 15 October 2008 the Practitioner replied by letter dated 5 November 2008 to the effect that the staining of the exterior walls was perhaps a result of the paint being applied prior to the rendering having fully cured.
- (k) The Practitioner has acknowledged that the external walls require further attention and has offered to arrange for the necessary work to be done.
- (l) The owners are unwilling to allow the Practitioner or his sub-contractor to carry out further work on the building.

Professional Misconduct

5. Section 34P(1) of the Act provides:

"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.”
6. The Director alleges that the Practitioner is guilty of professional misconduct in terms of section 34S(a). Section 34S 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 –
- (a) has committed an offence against the Act or the Regulations;”
7. Section 34S sets out other bases on which a practitioner can be found guilty of professional misconduct but they do not concern us. The Director alleges that the requirements of section 34S are satisfied because the Practitioner committed an offence against Regulation 41D of the *Building Regulations* which provides: “For section 48A(1)(b) of the Act, the prescribed building contractor must supervise the person by the level of personal oversight the contractor considers appropriate, having regard to the person’s skill and experience.”
8. It is therefore necessary to turn to section 48A(1) of the Act which requires prescribed building work to be carried out by a person who is –
- “(a) a prescribed building contractor; or
- (b) being supervised by a prescribed building contractor in accordance with the Regulations.”
9. The case was presented to us by the parties on the basis that the alleged misconduct relates specifically and solely to the rendering and paintwork applied to the external walls of the building. At the inquiry, and notwithstanding the report of Irwinconsult referred to at para 4(i) above, the Practitioner did not concede that the treatment of the walls was in breach of the requirements of the *Building Code of Australia*. The Practitioner’s counsel, Mr Lawrence, submitted that on the evidence the Inquiry Board could not be satisfied exactly what went wrong with the job; the Director’s legal representative, Mr Timney, did not contest this submission. More importantly, the Practitioner did acknowledge that, whatever went wrong, the weather proofing was sub-standard and the shortfall occurred in circumstances where the sub-contractors attending to that part of the building work were not adequately supervised by the Practitioner.
10. The agreed facts in conjunction with the admissions given by the Practitioner’s counsel enable us to decide under section 34P(1)(a) that the Practitioner is guilty of professional misconduct by reason of his failure to comply with Regulation 41D.
11. The Director did not submit that there should be any additional action taken under section 34U (transcript lines 326,327). We now turn to section 34T.

Section 34T of the Act

12. Section 34T is in these terms:

"34T. Disciplinary Action by Inquiry Board

If, on completion of an inquiry, the Inquiry Board decides under section 34P(1)(a) 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 \$5,000;
- (e) suspend the practitioner's registration for a specified period (not exceeding 3 years);
- (f) cancel the practitioner's registration."

13. Mr Timney made these submissions:

- (a) The Practitioner should be reprimanded – see section 34T(a);
- (b) A small fine of 10% of the maximum of \$5,000 should be applied – see section 34T(d);
- (c) The fine would operate as a "specific deterrence". It would be a relatively minor penalty compared with the reprimand which would appear on the Practitioner's "record".

14. Mr Lawrence asked us not to issue a reprimand. He submitted that:

- (a) Whilst not suggesting that the *Sentencing Act* (NT) applies to this matter, it would be appropriate for the Inquiry Board to exercise a discretion along the same lines as is available to a Court under section 7 of that Act.

- (b) In particular, the Inquiry Board should consider a disposition without recording a "conviction". Such a decision would be in keeping with the broad discretion conferred by section 34T of the Act.
 - (c) As evidence of the Practitioner's favourable antecedents, Mr Lawrence submitted two written references and a four page project list.
 - (d) The effect of recording a "conviction" would be "extremely grave". In his submission, the proper exercise of the discretion of the Inquiry Board would allow imposition of a fine and/or reprimand whether or not a "conviction" is recorded.
 - (e) Mr Lawrence did not submit that it was open to the Inquiry Board to refrain from taking any of the actions specified in section 34T.
15. Mr Timney made these further submissions:
- (a) The *Sentencing Act* does not apply to this matter. If the legislature had intended to confer a discretion along the lines of section 7 of the *Sentencing Act*, specific provisions to that effect would have been included in the Act.
 - (b) The appropriate penalty is a reprimand. The Practitioner should have been more vigilant in supervising the renderer whom he had never used before this job was undertaken.
 - (c) Having regard to the decision of Dr J Lowndes in *Lee v Agents Licensing Board* [2009] NTMC 039 the Inquiry Board should consider if it is restricted to selecting just one of the range of penalties specified in section 34T of the Act.
16. Before making a decision in relation to section 34T it will be helpful to note the following additional submissions which we accept:
- (a) This is the first complaint concerning the Practitioner that has been referred to the Director;
 - (b) While there was some initial reluctance on the part of the Practitioner, he eventually accepted responsibility for the complaint and offered to perform remedial work.
 - (c) The fact that the Practitioner was not able to rectify the work was attributable to the owners' refusal to cooperate. [We have not heard from the complainant so we leave open the question of whether the owners' refusal was reasonable.]
 - (d) The Practitioner has admitted his breach of Regulation 41(d) at an early stage of the inquiry thereby sparing the Inquiry Board, the parties and witnesses from the time and trouble of a contested inquiry.

- (e) The defects which gave rise to the complaint have been rectified. They were of a cosmetic nature. They did not affect the structural integrity of the building or create any health or safety risks.
- (f) The Practitioner has been operating as a builder in the Territory for about ten years. He is a reputable builder who won Home of the Year awards in 2002 and 2009.
- (g) The Practitioner used a new renderer on the building. When he was first confronted by the complaint, his unwillingness to accept it reflected a genuine belief that his sub-contractors would have done everything properly.
- (h) When the Practitioner eventually inspected the building he saw the problem and accepted responsibility to rectify it. The Practitioner has not used the same renderer again.

Inquiry Board's discretion

17. The decision of Dr Lowndes in *Lee v Agents Licensing Board* is not on point. Dr Lowndes had before him section 44B of the *Agents Licensing Act* (NT) which sets out the powers of the Agents Licensing Board after an inquiry under that Act. In that sense it is true that section 44B is the counterpart of section 34T of the Act. But unlike section 34T, the wording of section 44B includes "or" between the various powers thereby indicating (as Dr Lowndes decided) an intention that they operate disjunctively. Section 34T states that the Inquiry Board "may take any of the following actions". Unlike section 44B, the word "or" does not appear between the specified actions. There is no other indication that the Inquiry Board is restricted to only one of those actions. We will proceed on the basis that "may" allows a broad discretion to take any one or more of the actions specified in sub-paragraphs (a) to (f).
18. As will be seen we have decided to take action not because we consider that we are bound to do so but because we consider it an appropriate exercise of our discretion. That being so it is unnecessary for us to determine if "may take" means that we are at liberty not to take any action at all under section 34T. We have not come to any conclusion about the correctness of Mr Lawrence's submission (paragraph 14(e) above). That question can be put aside until it falls for consideration in another case.
19. The *Sentencing Act* (NT) applies to Courts (see section 4 of that Act). It does not apply to the matter under consideration by this Inquiry Board. Section 7 of that Act empowers a Court to refrain from recording a conviction where a Court finds a person guilty of an offence. The powers of the Inquiry Board do not extend to recording a conviction, a procedure known only in criminal cases. In a loose sense it could be argued, by analogy, that an approach along the lines of section 7 is available if section 34T of the Act can be correctly applied by not taking any of the specified actions after a finding of guilt is made. In other words it could be open to the Inquiry Board to impose no penalty notwithstanding the finding of guilt. We repeat that without determining that question we have come to the view that the Practitioner

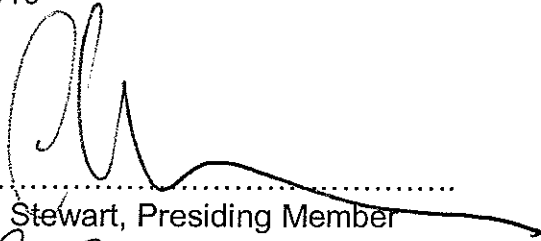
should be penalised. We do not want to comment upon the circumstances which may persuade an Inquiry Board that it would be appropriate to refrain from imposing a penalty except to say that in our view that conclusion would rarely be justified. The circumstances of this matter would not enable us to reach that conclusion even if it were open to us. As will presently be discussed, it behoves a registered practitioner to develop the practice of minimizing exposure to allegations of professional misconduct by ensuring that each complaint is dealt with promptly and appropriately.

Decision on penalty

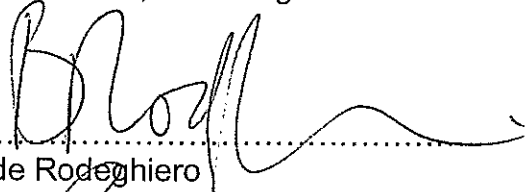
20. We have considered whether to impose a penalty and, being satisfied that a penalty should be imposed, secondly, what penalty is appropriate. We have in mind the submissions referred to above. We observe that, unlike cases to which the *Sentencing Act* applies, it was open to the Practitioner to forestall all consequences - the Director's investigation, this inquiry and a penalty - by more readily acknowledging the complaint. It is likely that the Complainant's sense of grievance has become more deeply entrenched as the complaint provisions of the Act were accessed.
21. In our view a reprimand is appropriate for minor misconduct. As the seriousness of the breach increases, a fine, or a combination of reprimand and fine, becomes appropriate in cases where a suspension or disqualification is not called for.
22. We are satisfied that there is no need for the public to be protected by suspension or disqualification of the Practitioner's registration and Mr Timney did not suggest to the contrary. The Practitioner's professional misconduct was not very serious and, after initial reluctance, he took steps to acknowledge responsibility and offer rectification. He has facilitated a prompt and economical disposal of this inquiry. We therefore consider that he is entitled to the imposition of a relatively light penalty.
23. Mr Timney suggested that a reprimand as well as a fine should be imposed. We are not prepared to go that far. Were it not for Mr Lawrence's submissions we would have been inclined to reprimand the practitioner and leave it at that. Mr Lawrence has submitted that a reprimand would have more serious consequences for the Practitioner than a civil penalty (transcript lines 568-570). Whilst we are not convinced that this is so, guided by the submissions made to us, we have concluded that a civil penalty of \$500 is appropriate. There will be no reprimand.
24. As has been noted (paragraph 12 above) sub-paragraph (b) of section 34T empowers the Inquiry Board to require the Practitioner to pay all or a specified part of the Director's costs. Mr Timney has conceded (transcript line 789) that the Director is not making any claim for costs in this case.
25. The decision of the Inquiry Board is that:
 - (a) The Practitioner is guilty of professional misconduct.
 - (b) The Practitioner is to pay to the Territory a civil penalty of \$500.
 - (c) There will be no order as to costs.

- 26. We are prepared to hear from the Practitioner if he has any difficulty paying the civil penalty promptly.

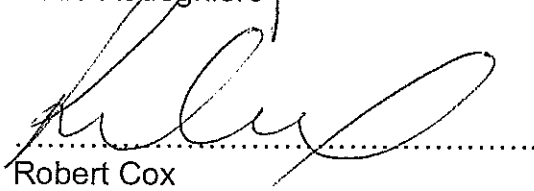
Dated 16 February 2010

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John Stewart, Presiding Member

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Bede Rodeghiero

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Robert Cox

In the matter of

Michael Baxter

and

The Director of Building Control

Background to complaint: Agreed précis of facts

1. Mr Michael Keith Baxter was registered as a Building Contractor Residential (Restricted) by the Building Practitioners Board on 12 July 2006. His registration has been renewed once and is now due to expire on 12 July 2010. Mr Baxter's registration number is 14151CR.
2. Mr Baxter contracted with Mr Mitchell Gibson and Mrs Sasha Gibson for the construction of a residential dwelling at Lot 4523 (No 516) Lowther Road Virginia.
3. On 18 September 2007 Mr Baxter signed a Builder's Declaration, pursuant to section 69 of the *Building Act* (the Act) declaring that the building work had been carried out in accordance with the building permit issued for the premises. An Occupancy Permit for the premises was issued on 26 September 2007.
4. On 20 March 2008 Ms Sasha Gibson submitted a written (email) complaint to Building Advisory Services (BAS) alleging that Registered Building Contractor, Michael Keith Baxter, had failed to rectify defects relating to the construction of her house.
5. The complaint raised a number of issues. The main issue, of central concern to BAS, related to an alleged failure to adequately or appropriately waterproof and paint the exterior walls of the house, which had allegedly resulted in residue on the external walls and discoloration. The external rendering and painting were not carried out by Mr Baxter personally but through the engagement of separate sub-contractors.
6. On 27 May 2008 a letter of notification of the complaint was sent to Mr Baxter by Ms Carol Popple of BAS pursuant to section 29 of the Act inviting a response by 17 June 2008. Specific particulars of the complaint were not set out in the letter from Ms Popple, however a copy of the letter (email) of complaint from Ms Gibson was enclosed with the letter.
7. By letter dated 16 June 2008 Mr Baxter responded to the various complaints denying any fault in respect of the allegations. In relation to the exterior paintwork, he stated that the walls had been sealed correctly with one coat of masonry sealer and two coats of paint. Mr Baxter suggested that the residue on the walls could have been caused by the reticulation system watering the garden.
8. On 16 July 2008 a site inspection was conducted by BAS officers Carol Popple and Matthew Hughes in the presence of Mr and Mrs Gibson. The officers noted the existence of residue on the external walls.

9. On 21 July 2008 a technical report, prepared by BAS Technical Officer Matthew Dewse, advised that the film on the external walls suggests that the walls had not been sealed as required by the Building Code of Australia (Part 3.3.4.12 Waterproofing for single skin masonry walls);
10. On the 11 August 2008 the practitioner was advised that, in the opinion of BAS officers who inspected the premises, the residue on the exterior walls was not caused by watering of the garden and requested that the practitioner personally visit the site to inspect the alleged defects.
11. On 5 September 2008 Mr Baxter advised, in a telephone call to Ms Popple of BAS, that he was unwilling to visit the site as the owners were abusive towards him. Mr Baxter indicated he was willing to visit the premises in company with BAS officers.
12. On 15 October 2008 a formal investigation pursuant to section 30 of the Act was approved by the Mr Paul Mossman, delegate for the DBC, on the basis of the matters referred to in a report prepared by Irwinconsult, namely the failure to paint the exterior of the premises in compliance with the BCA.
13. By letter dated 15 October 2008, Mr Mossman wrote to Mr Baxter advising that he had authorized an investigation of the complaints pursuant to section 30 of the Act. The letter further advised that the investigation concerned an allegation of professional misconduct pursuant to sections 45S(a), (f) and (g) of the Act and set out the particulars of alleged breaches. Mr Baxter was requested to respond to each of the allegations by 6 November 2008.
14. By letter dated 5 November 2008 Mr Baxter responded and advised (amongst other matters) that in his opinion the staining of the exterior walls was maybe a result of the paint being applied prior to the rendering having fully cured. Mr Baxter agreed that the external walls required repainting and offered to perform that work through the agency of a subcontractor.
15. On 3 December 2008 Mr Baxter attended an inspection of the premises in the company of BAS officers Carol Popple and Peter Zagorski. Mr Baxter advised that, in his view, the problem with the exterior walls was likely caused by the render or the paint. He confirmed that he was prepared to arrange for the problem to be rectified.
16. On 5 December 2008 Ms Popple advised Mr Baxter that the owners were unwilling to allow him or his subcontractors to carry out the repair works.