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<b>CITATION:</b>	<b>Building Professionals Board v Cotten [2008] NSWADT 118</b>
<b>DIVISION:</b>	General Division
<b>PARTIES:</b>	APPLICANT Building Professionals Board  RESPONDENT Barry Cotten
<b>FILE NUMBER:</b>	073167
<b>HEARING DATES:</b>	12 February 2008
<b>SUBMISSIONS CLOSED:</b>	12 February 2008
<b>DATE OF DECISION:</b>	21 April 2008
<b>BEFORE:</b>	O'Connor K - DCJ (President); Hayward P - Non Judicial Member
<b>CATCHWORDS:</b>	Disciplinary Findings and Order
<b>MATTER FOR DECISION:</b>	Principal matter
<b>LEGISLATION CITED :</b>	Building Professionals Act 2005 Building Professionals Regulation 2007 Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Regulation 2000Environmental Planning and Assessment Regulation 1994
<b>CASES CITED:</b>	Building Professionals Board v Boulle [2008] NSWADT 80
<b>REPRESENTATION:</b>	APPLICANT A Grey, solicitor  RESPONDENT No appearance
<b>ORDERS:</b>	1. The Tribunal finds the Respondent guilty of unsatisfactory professional conduct 2. The Tribunal: (a) orders the respondent to pay to the Board a fine of \$5,500 (50 penalty units)

(b) orders that the respondent can not apply for a certificate of accreditation within two years from the date of this order.

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## REASONS FOR DECISION

1 The Building Professionals Board (the Board) has applied under the *Building Professionals Act 2005* (BP Act) for disciplinary findings and orders relating to the conduct of Mr Barry Cotten, who at the relevant times was an accredited certifier.

2 The BP Act regulates those who practise as accredited private certifiers, and has replaced earlier legislation which had been in force since 1998. The BP Act and the *Building Professionals Regulation 2007* (BPR) commenced full operation on 1 March 2007. The Building Professionals Board is responsible for the investigation of complaints against accredited certifiers, the taking of disciplinary action and the referral of matters to the Tribunal for determination by the Tribunal.

3 The Board may investigate and make disciplinary orders in respect of unsatisfactory professional conduct (but not professional misconduct): s 31(2) and (4). If it is of the view, after investigation, that the conduct if proven might lead the Tribunal to find that the certifier has engaged in professional misconduct, it must refer the matter to the Tribunal for hearing and determination: s 31(3). The Board is obliged to continue to deal with complaints that were on foot under the previous scheme: BP Act, Sch 2 cl 3(1).

4 Mr Cotten's last accreditation (for the 2002-2003 year) expired on 20 July 2003. The Board has power to investigate and deal with a complaint against an accredited certifier after the certificate has lapsed. Section 20(2) provides:

‘(2) A complaint against an accredited certifier may be made and dealt with even though the relevant certificate of accreditation has been suspended or cancelled or has lapsed. For that purpose, a reference in this Part to an accredited certifier includes a reference to a person whose certificate of accreditation has been suspended or cancelled or has lapsed.’

5 The Board and the Tribunal may decline to deal with a complaint against a former certifier. Section 20 continues:

‘(3) Despite subsection (2), the Board may decide not to investigate or make a decision under section 31 on a complaint (or may decide to terminate an investigation or dismiss proceedings in relation to a complaint) if the person who is the subject of the complaint is no longer an accredited certifier.

(4) Despite subsection (2), the Tribunal may decide not to determine an application for a disciplinary finding against an accredited certifier (or may decide to dismiss proceedings for such an application) if the person to whom the application relates is no longer an accredited certifier.’

6 In our view, this is clearly a case that warrants attention, and no submission was made to the contrary.

7 The application results from the investigation of a complaint by an affected individual (the adjoining owner) made 25 September 2003 in relation to the issuance of a construction certificate and a final occupation certificate for a mixed residential and commercial development at 214 Clovelly Road, Randwick. The final occupation certificate had been issued on 29 June 2003.

8 The Board's attempts to serve the application and supporting material on Mr Cotten were unsuccessful.

The Tribunal directed the Board to effect service formally. This was successful, see affidavit of service sworn 10 October 2007. Mr Cotten made his only substantive reply to the matters alleged by a letter dated 5 October 2007 to the Board, which the Board filed in the Tribunal on 13 December 2007. Mr Cotten did not appear at the hearing. There was an amendment to the application at hearing, which was allowed as it was not prejudicial to Mr Cotten (noted below).

9 There are three matters raised in relation to Mr Cotten's conduct. The first is that the plans approved by the construction certificate issued 8 November 2000 were not in accordance with the development consent in various ways. The second is that the proposed building did not comply in various ways with certain requirements of the Building Code of Australia (BCA). The third is that the final occupation certificate dated 29 June 2003 was improperly issued because the building was not suitable for occupation in accordance with its classification under the BCA because it did not comply with certain egress requirements.

10 The material parts of the Board's application, as amended, follow:

### **Disciplinary finding/s sought:**

#### *1. (First disciplinary finding sought)*

Pursuant to sections 31(2) and (3) of the Building Professionals Act 2005 (the BP Act) the Building Professionals Board (*the Applicant*) makes application for a disciplinary finding against Mr Barry Cotten (*the Respondent*), being a finding of professional misconduct, or in the alternative of unsatisfactory professional conduct, in respect of the matters set out below.

### **General description of conduct:**

A. A complaint was made pursuant to s.109V of the Environmental Planning and Assessment Act 1979 (the EP & A Act) by Mr K Papadopoulos to the Department of Infrastructure, Planning and Natural Resources on or about 25 September 2003 against the Respondent about his conduct as a certifying authority in relation to a development at 214 Clovelly Road, Clovelly.

B. The Respondent was at all material times accredited as an accredited certifier and principal certifying authority pursuant to s.109T of the EP & A Act.

The Respondent was accredited under the Building Surveyors & Allied Professions Accreditation Scheme (the BSAP Scheme) and Neil Cocks, Director, Building Professionals Branch, Department of Planning had been appointed by the Minister under Clause 199(3)(a) of the Environmental Planning and Assessment Regulation 2000 (the EP & A Regulation) to administer the BSAP Scheme.

C. The complaint has been investigated pursuant to section 109W of the EP & A Act by officers of the Department of Planning on behalf of Mr Cocks.

D. The authority of Mr Cocks expired with the commencement of the Building Professionals Act 2005 (the BP Act) on 1 March 2007. Pursuant to Clause 3(1), Schedule 2 of the BP Act, the Applicant is required to continue to deal with the complaint as a complaint under Part 3 of the BP Act.

E. By issuing a construction certificate and an occupation certificate in respect to the development the Respondent has engaged in conduct;

(a) occurring in connection with the exercise of an accredited certifier's functions as a certifying authority that fell short of the standard of competence, diligence and

integrity that a member of the public is entitled to expect of a reasonably competent accredited certifier; and/or

(b) by which he contravened the EP & A Act.

## **PARTICULARS**

### **A Issue of construction certificate**

#### **(1) Relevant legislative provisions**

(a) Section 109F(1)(a) of the EP & A Act provides:

*109F Restriction on issue of construction certificates*

*A construction certificate must not be issued with respect to the plans and specifications for any building work or subdivision work unless the certifying authority is satisfied that:*

*(a) the requirements of the regulations referred to in section 85A(5) have been complied with.*

(b) Clause 79G(1)(a) & (b) of the Environmental Planning and Assessment Regulation 1994 provides:

*(1) A certifying authority must not issue a construction certificate for building work unless it is satisfied of the following matters:*

*(a) that the design and construction of the building (as depicted in the plans and specifications and as described in any other information furnished to the certifying authority under clause 79B) are not inconsistent with the development consent,*

*(b) that the proposed building will comply with the relevant requirements of the Building Code of Australia.*

#### **(2) Particulars of Conduct**

##### **Non-compliance with BCA**

(a) The Respondent issued Construction Certificate No. 5200 on 8 November 2000 in respect of a development, namely, the construction of a residential flat building with ground level shops and basement parking, at 214 Clovelly Road, Randwick (the development).

(b) The construction certificate approved the plans and specifications described as:

*“Plans by Sophos Design, numbered A (01-10)-A and dated August 2000”* (the approved plans).

(c) The proposed building depicted in the approved plans did not comply with the requirements of the *Building Code of Australia* (the BCA) as in force at the time that the application for the construction certificate was made.

##### **Particulars of non-compliance with BCA**

The building as depicted in the approved plans does not comply with the

requirements of clause D1.9(d)(i) of the BCA in that the stairway from the rear building discharges at a point in excess of 15 metres from a doorway providing egress to a road or open space or from a fire isolated passageway leading to a road or open space.

### **Inconsistency with development consent**

(d) The approved plans were inconsistent with the plans forming part of Development Consent No. 99/1172 granted by Randwick City Council (the development consent plans).

### **Particulars of inconsistencies**

(i) The approved plans depict an additional window to the western elevation of the rear building on the third level.

(ii) A window on the western elevation of the front building is depicted as a square opening in the approved plans whereas it is depicted as a rectangular window on the development consent plans.

(iii) The approved plans depict brickwork articulation on levels one and two on the western elevation of the front building.

(iv) The western wall on the third level of the front building has been extended by up to ~~1.8 metres and the western wall of the rear building has been extended by up to 1 metre~~ 18 cms [amended at hearing 12 February 2008].

(e) By issuing the Construction Certificate in respect to the development, the Respondent has engaged in conduct:

- occurring in connection with the exercise of an accredited certifier's functions as a certifying authority that fell short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited certifier; and/or

- by which he contravened the Act.

### **Issue of Occupation Certificate**

#### **(1) Relevant legislation**

Section 109H(1)(c) of the EP & A Act provides:

*(1) A final occupation certificate must not be issued to authorise a person to commence occupation or use of a new building unless the certifying authority is satisfied:*

*(c) that the building is suitable for occupation or use in accordance with its classification under the Building Code of Australia*

#### **(2) Particulars of Conduct**

(a) The Respondent issued a Final Occupation Certificate dated 29 June 2003 in respect to the development at 214 Clovelly Road, Clovelly.

(b) (i) The Final Occupation Certificate issued by the Respondent classified the

various parts of the building as “*Class 5 (Office) Class 7 (Car Park) Class 2 (Residential)*”

(ii) The approved plans describe the two front ground floor occupancies of the building as “Shop One” and “Shop Two”.

(iii) The classification of a shop under the BCA is Class 6.

(c) At the time of issuing the Final Occupation Certificate the building was not suitable for occupation in accordance with its classification under the BCA.

### **Particulars of unsuitability**

The building as constructed does not comply with the requirements of clause D1.9(d)(i) of the BCA in that the stairway from the rear building discharges at a point in excess of 15 metres from a doorway providing egress to a road or open space or from a fire isolated passageway leading to a road or open space.

(d) By issuing the Final Occupation Certificate in respect to the building, the Respondent has engaged in conduct:

- occurring in connection with the exercise of an accredited certifier’s functions as a certifying authority that fell short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited certifier; and/or

- by which he contravened the Act.

### **7. Orders sought**

The Applicant seeks the following orders:

That the Tribunal makes a finding that the Respondent has been guilty of professional misconduct, or in the alternative, of unsatisfactory professional conduct, and make a decision under s.34 BP Act.

11 In support of the application, the Board’s evidence is provided in an affidavit of Frank Rupolo, Departmental Investigator, sworn 27 November 2007. The affidavit has annexed a detailed exhibit, setting out the history of the investigation and internal proceedings in respect of the matters the subject of the application (the Folder).

12 *Inconsistency with Development Consent.* The items particularised went to matters that were the source of the original complaint. The Tribunal inspected the plans, and is satisfied that the particulars set out at para A(2)(d) of the application are established.

13 In his letter dated 5 October 2007, Mr Cotten contended that the development was generally in accordance with the development consent. The Tribunal is satisfied that the items were inconsistent with the development consent, and accordingly cl 79G(1)(a) and (b) of the EP & A Reg was breached.

14 *Non-Compliance with BCA.* The proposed plans approved by a construction certificate must comply with the relevant requirements of the BCA: cl 79G(1)(b). The issue raised here went to fire safety. In this development there were shops to the street front and the residential component was made up of two three storey towers one above the shops with the second tower (purely residential) to the rear of the first tower.

15 A residential building is a Class 2 building. The allegation is that the proposed buildings on the approved

plan did not comply with the following BCA requirement, D1.9(d)(i):

**‘Travel by non-fire-isolated stairways or ramps**

(d) In a Class 2 ... building, a required non-fire-isolated stairway or non-fire-isolated ramp must discharge at a point not more than –

(i) 15 m from a doorway providing egress to a road or open space.’

16 As to this matter, Mr Cotten said in his letter of 5 October 2007 that it was his professional assessment at the time of the issue of the construction certificate that the travel distance complied.

17 The Board referred the Tribunal to the Plans at page 015 of the Folder and photographs 37, 39, 45, 49 and 52 contained in the Folder. There was a courtyard between the two towers which, as completed, had substantial plantings on either side of a path going from the bottom of the second tower to a door at the foot of the first tower, inside which was a further passage to the street. The courtyard was an open-air one. The Tribunal is satisfied that the travel distance from the base of the second tower stairs to the open road was 25 metres. The Board submitted that the danger to second tower occupants in the event of fire was exacerbated by the fact that the last part of the escape journey would be through an enclosed part of the first tower.

18 The Tribunal raised with Mr Grey for the Board the question of whether the courtyard met the ‘open space’ requirement. If so the second tower’s stairwell would be compliant. The definition of ‘open space’ in the BCA is:

‘a space on the allotment, or a roof or similar part of a building adequately protected from fire, open to the sky and connected directly with a public road’.

19 We accept that the lack of direct connection to a public road means that the plans were non-compliant.

20 *Occupation Certificate*. The particulars under (2) in this part of the application refer to two matters. The first matter is a failure properly to classify the various parts of the building. Mr Cotten gave as applicable classifications ‘Class 5 (office)’, ‘Class 7 (car park)’ and ‘Class 2 (residential)’. He did not include the classification applicable to the shops component of the development. As previously noted, there were two shops. Accordingly, the classification ‘Class 6 (shops)’ should also have been shown. We are satisfied that this omission is proven.

21 The second matter goes to the same omission as was identified in respect of the construction certificate – the distance between the final point of egress from the development and the bottom of the second tower stairwell. The case is put a little differently at this point from the way it was put in connection with the issuance of the construction certificate. The allegation is that at the time of the issuing of the final occupation certificate the building was ‘not suitable’ for ‘occupation in accordance with its classification under the BCA’. The same provision, BCA 1.9(d)(i), is then relied upon. We accept that a failure of the degree identified here to meet a fire safety requirement is sufficient to render a building ‘not suitable for occupation’.

22 In that regard we note that the requirement that was infringed was relevant to all occupants of the second tower, and went to the very significant issue in a multi-residential context of safe egress from fire. It may be that an omission that was limited as to the number of occupants it potentially affected or that involved a subject matter of less importance may not be such as to justify the conclusion that it was one that resulted in the building not being suitable for occupation. This allegation is established.

**Disciplinary Finding**

23 We are satisfied that the particulars in support of each of the charges have been proven.

24 The question therefore is whether the standard of professional competence set by the legislation has been transgressed. As this is a pre-March 2007 case, the standards are those found in the definitions in s 109R of the EP & A Act:

*‘professional misconduct*, in relation to an accredited certifier, means conduct that is unsatisfactory professional conduct of a sufficiently serious nature to justify suspension of the accredited certifier’s accreditation as an accredited certifier or the withdrawal of the accredited certifier’s accreditation.’

25 What is ‘unsatisfactory professional conduct’ is defined as follows:

*‘unsatisfactory professional conduct* includes conduct (whether consisting of an act or omission):

(a) occurring in connection with the exercise of an accredited certifier’s functions as a certifying authority that falls short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited certifier, or

(b) by which an accredited certifier exercises his or her functions as a certifying authority in a partial manner, or

(c) by which an accredited certifier wilfully disregards matters to which he or she is required to have regard in exercising his or her functions as a certifying authority, or

(d) by which an accredited certifier fails to comply with:

(i) any relevant code of conduct established by the accreditation body by which he or she is accredited, or

(ii) any other Act or law prescribed by the regulations, or

(e) by which an accredited certifier contravenes this Act, whether or not he or she is prosecuted or convicted for the contravention.’

26 The purpose of the accreditation system and the disciplinary provisions is the protection of the public. The Tribunal’s focus at this point of its inquiry should be the objective gravity of the conduct. See further, *Building Professionals Board v Boulle* [2008] NSWADT 80 at [57].

27 In the original letter of complaint, the neighbour expressed five concerns about the certifier’s conduct. Of these, only one was reflected in the application placed before the Tribunal, the first one – put by the neighbour as follows: that the building ‘has not been built as per the DA drawings submitted and approved’, and continuing: ‘This has an impact on our light and privacy factor.’ The other matters raised mainly had to do with water overflow and drainage issues. Council orders were issued dealing with some of these matters. Others were found, on inspection, to be compliant. The complaint did raise a specific fire safety issue (to do with the roof). The fire safety issue that was brought forward in the present application was a different one, identified in the course of investigation.

28 There were a series of omissions to do with windows and the balcony. Taken together, they are sufficient to warrant a finding that Mr Cotten’s conduct showed a lack of competence and diligence sufficient to justify a finding of unsatisfactory professional conduct. The omission in respect of fire egress was relatively serious given that it related to a fire safety matter. On the other hand, we note there is no evidence that it has ever been remedied (nor is there any evidence of official orders to that effect being issued), pointing, we think, to a view on the part of the relevant authorities that the omission does not lie at the worse end of the



spectrum of fire safety issues affecting buildings. Accordingly, we do not consider that the omission, viewed in isolation, amounts to professional misconduct.

29 The final question is whether, viewed as a whole, the omissions justify a finding of professional misconduct. In that regard, we have also taken into account that they recur at two certification stages. Our judgment is that the omissions are not so objectively grave as to warrant a finding of professional misconduct. We do not think that it is conduct of a 'sufficiently serious nature to justify suspension of the accredited certifier's accreditation as an accredited certifier or the withdrawal of the accredited certifier's accreditation'.

### **Appropriate Order**

30 The BP Act s 34(2) provides:

'(2) If the Tribunal finds that the accredited certifier is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may make any one or more of the following decisions:

- (a) caution or reprimand the accredited certifier,
  - (b) direct that such conditions as it considers appropriate be imposed on the accredited certifier's certificate of accreditation,
  - (c) order that the accredited certifier complete such educational courses as are specified by the Tribunal,
  - (d) order that the accredited certifier report on his or her practice as an accredited certifier at the times, in the manner and to the persons specified by the Tribunal,
  - (e) order the accredited certifier to pay to the Board a fine of an amount, not exceeding 1,000 penalty units, specified in the order,
  - (f) order the accredited certifier to pay to the complainant such amount (not exceeding \$20,000) as the Tribunal considers appropriate by way of compensation for any damage suffered by the complainant as a result of the unsatisfactory professional conduct or professional misconduct,
  - (g) suspend the accredited certifier's certificate of accreditation for such period as the Tribunal thinks fit,
  - (h) cancel the accredited certifier's certificate of accreditation,
  - (i) order that the accredited certifier cannot re-apply for a certificate of accreditation within such period (including the period of his or her lifetime) as may be specified by the Tribunal.
- (4) The Tribunal may not make an order under subsection (2) (f) without the consent of the complainant and the making of any such order does not affect any right of the complainant to bring an action to seek additional compensation.'

31 *Remedial Action.* The Tribunal enquired as to whether any remedial action had occurred in relation to either matters raised by the application. The Board said that at least as at March 2006 (referring to the Complaints Review Committee report in the Folder) there had been no action.

32 *Responsiveness.* Mr Cotten has not sought re-accreditation since allowing it to lapse in July 2003, which

was not long after he completed the certification of the development under notice in this case. He did not respond at any point to the complaint and investigation process. Even though he no longer had an accreditation when the complaint was made, he had a continuing responsibility flowing from the status and privileges conferred on him by the grant of accreditation to be responsive to the accreditation body's process. His failure to respond is a factor to be taken into account in making an order.

33 In his letter of 5 October 2007, Mr Cotten complained about how long the process has taken. We have commented in some other recent decisions on this issue. Clearly it is undesirable that disciplinary complaints be allowed to hang over a person's head for an inordinate length of time. This is a factor normally to be taken into account in favour of a respondent.

34 On this occasion, however, Mr Cotten did nothing to assist progress in the process. So it is only a minor factor favouring him.

35 In his letter of 5 October 2007 he expresses himself in a truculent and abusive way towards the Board. This is a factor that counts against him.

36 *Prior History.* The Board did not refer to any prior adverse disciplinary history.

37 *Assessment.* The ultimate purpose of disciplinary orders is the protection of the public. One of the functions of an order is to provide a marker to other members of the profession of the gravity of the conduct (general deterrence).

38 At hearing the Board sought an order pursuant to s 34(2)(i) that Mr Cotten not be permitted to apply for a certificate of accreditation for a period of time, at least two or three years. In our view, a limitation of this kind is appropriate.

39 We note, however, that Mr Cotten has not practised as an accredited certifier for almost five years. There must be some doubt as to whether he will seek reaccreditation. This is not like some cases we have encountered where there is some indication from the practitioner that he or she might in the future seek to reapply, once an immediate difficulty (such as illness) has passed.

40 In our view, therefore, there should also be an order which has an immediate impact. Such an order serves the purpose of general deterrence but also ensures that a specific impact on Mr Cotten is effected. Accordingly, a fine of 50 penalty units (i.e. \$5,500) will be imposed.

## **Order**

1. The Tribunal finds the Respondent guilty of unsatisfactory professional conduct

2. The Tribunal:

(a) orders the respondent to pay to the Board a fine of \$5,500 (50 penalty units)

(b) orders that the respondent can not apply for a certificate of accreditation within two years from the date of this order.

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