

Before the Building Practitioners Board

	BPB Complaint No. CB26121
Licensed Building Practitioner:	Rick Aarts (the Respondent)
Licence Number:	BP137334
Licence(s) Held:	Roofing – Profiled metal roof and/or wall cladding.

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	4 October 2023
Decision Date:	16 October 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AoP 2
Ms K Reynolds, Construction Manager
Mr P Thompson, LBP, Carpentry, Quantity Surveyor

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Finding:

The Respondent **has not** committed a disciplinary offence.

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Summary

- [1] The Respondent, an employee of a roofing contractor, both carried out and supervised the installation of a new roof on a residential dwelling. The work was restricted building work. A commercial dispute arose, and a new contractor was engaged. After the new contractor had started carrying out remedial work, an opinion was sought as to the quality and compliance of the roofing work. The report detailed various items but was not able to distinguish between the work of the two contractors.
- [2] The Respondent accepted that aspects of this work were substandard, and the Board found that there had been departures from acceptable standards. However, the Board decided that those departures did not reach the threshold for a disciplinary finding.
- [3] With respect to the Respondent’s record of work, the Board found that there was a good reason for the failure to provide it. The finding was made on the basis that some of the Respondent’s building work had been replaced, and he was not sure what he should provide a record of work for.

The Charges

- [4] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.¹
- [5] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], Auckland, have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act;
 - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act; and
 - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he is to carry out or supervise, or has carried out or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act.
- [6] The Board gave notice that in investigating the grounds of complaint under sections 317(1)(b) and (d), the Board would be considering the matters set out in the report of Sean [OMITTED] dated 10 May 2022 and, in particular, those summarised at numbers 1-18 of the report.

Evidence

- [7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [8] The Respondent appeared together with his employer, Nicola Noble, who assisted him and gave evidence. Ms Noble is not a Licensed Building Practitioner or a roofer. She is the owner of NYC Roofing Limited, which was contracted to install a roof on a new residential dwelling.

¹ Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

² The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [9] The Complainant was the owner of the main contractor, [OMITTED]. The installation took place at about the time of the Covid lockdowns and at a time when contractor resources were scarce. [OMITTED] did not have a trading history with NYC Roofing.
- [10] NYC Roofing operates with a single Licensed Building Practitioner (the Respondent), a number of directly employed staff (4-6 persons) and a number of sub-contractors, some of whom have their own Licensed Building Practitioners. With respect to the roof complained about, the installation was carried out by employed staff. The Respondent accepted that he was the supervising Licensed Building Practitioner. He stated that he had experience with the type of roof installed and that he was on site when the work was being carried out and was checking it as it was being completed.
- [11] The roof was started but not completed by NYC Roofing. The Complainant stated that the roof framing was ready prior to Christmas and that there was some urgency to the installation because the framing had been exposed to the elements for an extended period. Ms Noble and the Respondent stated that the roof was measured in the first week of February 2022, work started on 17 March 2022, it was a complex roof, and some 11 days of work were spent on it, and NYC was dismissed from the site on 13 April 2022. Ms Noble and the Respondent noted that NYC was not given notice of quality or compliance issues until some three months after they had been removed from the site and that they were very busy when the work was carried out because of issues caused by the Covid lockdowns.
- [12] As noted, [OMITTED] replaced NYC with a new contractor, who started on 14 April 2022, the day after NYC was dismissed. The Complainant gave evidence that they were replaced because they were not consistent in their effort to complete it, and there were issues with the quality of the work. [OMITTED] obtained an independent report on the quality and compliance of the roof. That report was prepared by Mr [OMITTED], who appeared and gave evidence. Mr [OMITTED] identified 18 issues, some of which related to incomplete as opposed to noncompliant or substandard work. The full table of issues is annexed to this decision as an appendix. Mr [OMITTED]'s inspection of the roof took place on 10 May 2022, after new contractors had been working on the roof.
- [13] The Respondent's general position was that the roof was not complete, NYC had not been given an opportunity to review its work or to attend to any quality or compliance issues, which it would ordinarily do prior to completion. The Respondent and Ms Noble also noted that there had been some supply problems with brackets and that some of the flashings supplied had been folded incorrectly. The Respondent did accept that certain aspects of the roof had not been carried out in a compliant manner or to an acceptable standard (items 8, 10 and 12 in Mr [OMITTED]'s report).
- [14] The Board questioned the witnesses present with regard to those issues noted in Mr [OMITTED]'s report that may have reached the threshold for disciplinary action. With respect to certain aspects, Mr [OMITTED] was not able to distinguish between the work carried out by the Respondent or under his supervision and that which had

been completed by a subsequent contractor. Evidence was heard that some of the items noted in Mr [OMITTED]'s report did not relate to the work completed by NYC.

- [15] With regard to the provision of a record of work, the Respondent submitted that, without further information, he did not know what work was his and what work had been removed and redone. In this respect, the Board did receive evidence that the subsequent contractor had removed and replaced portions of the roof that had previously been completed by NYC. The new contractor has provided a record of work that covers all of the roof and associated flashings.

Negligence or Incompetence

- [16] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁴ that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*⁵ test of negligence.⁶ To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.⁷ A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.⁸ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct?

- [17] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act⁹ as well as the requirement that all building work must comply with the Building Code⁹ and any building consent issued.¹⁰ The test is an objective one.¹¹
- [18] There were aspects of the work carried out or supervised by the Respondent that were not completed to an acceptable standard. However, most of the items raised in Mr [OMITTED]'s report related to work that had not been completed, and some issues raised were not his work. Therefore, the question for the Board is whether the

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

⁵ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁶ Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁷ In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as “a demonstrated lack of the reasonably expected ability or skill level”. In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as “an inability to do the job”

⁸ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [21] “Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness”.

⁹ Section 17 of the Building Act 2004

¹⁰ Section 40(1) of the Building Act 2004

¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent's subjective considerations.

conduct under investigation reaches the threshold for disciplinary action. In other words, was it serious enough?

Was the conduct serious enough?

[19] In *Pillai v Messiter (No 2)*,¹² an Australian Court of Appeal decision that has been adopted by the Superior Courts of New Zealand, the court stated:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

[20] The roofing issues raised and which can be attributed to the Respondent, were either minor in nature, incomplete, or may have been remediated prior to the roof being completed. However, of concern to the Board was the approach taken that work could be remediated rather than the focus being on getting it right the first time. The licensing regime was introduced in order to improve the overall quality and compliance of building work. In this respect, during the first reading of changes to the Act around licensing,¹³ it was noted by the responsible Minister:

In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.

[21] It was also noted that some of the substandard work was completed under the Respondent's supervision. Supervise is defined in section 7 of the Act. The definition states:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

[22] It was apparent that closer attention was needed to some of the work that was completed under supervision. Again, however, the question for the Board is whether the supervision failings were sufficiently serious enough to warrant a disciplinary outcome.

[23] Looking at both Respondent's building work and supervision failings, the Board decided that whilst there were some elements of concern, they were not so serious as to require a disciplinary finding. The Respondent is, however, cautioned. In the

¹² (1989) 16 NSWLR 197 (CA) at 200

¹³ Hansard volume 669: Page 16053

future, he needs to be more vigilant with his supervision and aim to get the work he is responsible for right the first time.

Has the Respondent been negligent or incompetent?

[24] The Respondent has not been negligent or incompetent.

Contrary to a Building Consent

[25] Building consents provide detailed plans and specifications for building work. They are issued by Territorial or Building Consent Authorities on the basis that the building work will meet the provisions of the Building Code.¹⁴ Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹⁵ Building consents also stipulate the number and type of inspections the issuing authority will carry out during the build.¹⁶ Inspections ensure independent verification that the building consent is being complied with.

[26] If building work departs from the building consent issued, the Board can find that a disciplinary offence under section 317(1)(d) of the Act has been committed. The Board does not have to find that departure was deliberate or a result of negligent conduct.¹⁷ The Board does, however, consider that the seriousness of the conduct under investigation does have to be taken into account. As such, even if the Respondent's building work departed from the building consent, the Board must also decide if the conduct fell seriously short of expected standards.¹⁸ If it does not, then a disciplinary finding cannot be made.

[27] As with the finding with regard to negligence, the contraventions and the conduct were not serious enough for a finding that the Respondent has breached section 317(1)(d) of the Act.

Failure to Provide a Record of Work

[28] A Licensed Building Practitioner must provide a record of work for any restricted building work that they have carried out or supervised to the owner and the Territorial Authority on completion of their restricted building work.¹⁹

¹⁴ Section 49 of the Act

¹⁵ Section 40 of the Act

¹⁶ Section 222 of the Act

¹⁷ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁸ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [21] "Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness".

¹⁹ Section 88(1) of the Act.

- [29] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work²⁰ unless there is a good reason for it not to be provided.²¹

Did the Respondent carry out or supervise restricted building work?

- [30] The Respondent carried out restricted building work in relation to the external moisture-management system of a house (roofing).

Was the restricted building work complete?

- [31] The Respondent's restricted building work was complete when NYC Roofing was dismissed from the site on 13 April 2023, and a new contractor was appointed. The reason is that as of 14 April 2023, the Respondent would not be able to carry out any further restricted building work.

Has the Respondent provided a record of work?

- [32] The Respondent did not provide a record of work on completion. The replacement contractor has, and it covers all of the roofing work.

Was there a good reason for the Respondent to withhold his records of work?

- [33] The Respondent did not provide a record of work because he was unsure what of his work remained and, as such, what it was that he should provide a record of work for. As there was evidence that some of the Respondent's work had been replaced, the Board accepted that he did have a good reason.
- [34] The Board did note that there may have been a payment dispute and that it may have also influenced the non-provision of a record of work. The Respondent should note that the Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [35] The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.
- [36] Finally, with regard to records of work, if the Respondent is not able to complete all of the anticipated restricted building work, he should provide a record of work for what has been completed and note the work that was not completed on it.

²⁰ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

²¹ Section 317(1)(da)(ii) of the Act

Did the Respondent fail to provide a record of work?

[37] The Respondent has not failed to provide a record of work on completion of restricted building work on the basis that he had a good reason.

Board's Decisions

[38] The Respondent has not committed a disciplinary offence.

Signed and dated this 16th day of November 2023

A handwritten signature in black ink, appearing to be 'M Orange', with a stylized, cursive style.

M Orange
Presiding Member

Appendix One – [OMITTED] Roof Observations

<u>Observations</u>	
STATEMENT	The roof is constructed from a Metalcraft, factory coated, swaged, Espan 407 roofing profile laid over ThermoKraft 215 roofing underlay to pitches of 4° and 27°. It is <u>fixed</u> to purlins at approximately 900mm c/s, intermediate purlins have been added but it is understood that the roof is not fixed to these purlins. Accessories are supplied to match.
1	Purlin/clip creasing is visible over the entire roof.
2	Some oil canning is evident.
3	Along the eaves line, the ends of the standing seams have been left open.
4	Along the eaves line in other areas of the roof, the ends of the standing seam have been folded back to form a 'closure'
5	Some of the above (item 4) are incomplete.
6	A number of ridge / hip line stop ends are not formed to the height of the sheet profile or the manufacturers recommended minimum height of 30mm, also in some places, not fully formed - Durability issue
7	Detailing at the dutch gable flashing junctions is not acceptable or considered to be weather-tight and are not as recommended - Durability issue
8	On at least one eaves line, the 'grab flashing' has been supplied and installed with the crush fold turned to show the wash coat - Durability issue
9	The hip, roof sheets on the verandah have been poorly 'finished' along the valley line - Durability issue
10	In places, the head barge flashing appears to stand off the roof profile.
11	The top face of the head barge flashing is holding water - This will effect the materials warranty.
12	The grab flashing at the head barge detail has been installed in peices.
13	Some surface rust is visible - This will effect the materials warranty.
14	Some scratching is visible - This will effect the materials warranty.
15	The change of pitch flashing is holding water and has a negative pitch in places - This will effect the materials warranty.
16	The junction between roof, and change of pitch flashing is unfinished and in its current form able to trap debris - Durability issue
17	In some areas, it is doubtful that the ridge flashing, when installed, will give the coverage of the roof as per the consented plans - Durability issue
18	Intermediate purlins have been installed, as noted above.

Section 3 of the Act

This Act has the following purposes:

- (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
 - (i) people who use buildings can do so safely and without endangering their health; and*
 - (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) people who use a building can escape from the building if it is on fire; and*
 - (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*