

## Before the Building Practitioners Board

	BPB Complaint No. C2-01923
Licensed Building Practitioner:	Graeme Butler (the Respondent)
Licence Number:	BP 115943
Licence(s) Held:	Carpentry

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

#### Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	Christchurch
Hearing Type:	In Person
Hearing Date:	14 November 2018
Decision Date:	18 November 2018

#### Board Members Present:

Chris Preston (Presiding)  
Mel Orange, Legal Member  
Robin Dunlop, Retired Professional Engineer  
Faye Pearson-Green, LBP Design AOP 2

#### 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.

#### Board Decision:

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

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## Introduction

- [1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
  - (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).

## Function of Disciplinary Action

- [2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.
- [3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*<sup>4</sup> Collins J. noted that:

<sup>1</sup> The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

<sup>2</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

*“... the disciplinary process does not exist to appease those who are dissatisfied ... . The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”*

- [4] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

#### **Evidence**

- [5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</sup>. 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.
- [6] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [7] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- |               |                    |
|---------------|--------------------|
| Graeme Butler | Respondent         |
| [Omitted]     | Complainant        |
| [Omitted]     | Witness, [Omitted] |
- [8] The Respondent’s company was contracted to carry out a new build for the Complainant under a building consent. The Complainant, who engage some of the contractors directly, raised the following issues with the build:
- (a) failure to use the consented cement board product on a chimney;
  - (b) failure of parts of the decorative stone overlay on the chimney which allegedly fell off as a result of the manner in which the cement board was installed;
  - (c) failure to install a transition flashing;
  - (d) a missed pre-line building inspection; and
  - (e) failure to install specified 13mm gib board.

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<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

### Cement Board

- [9] The complaint noted that Eterpan was stipulated in the building consent as the substrate. There was a notation that the substrate was to be affixed in strict accordance with manufacture recommendations and literature. The Complainant alleged that when the substrate had been installed a row of screws was missed. It was also alleged that screws were not flush and that tape had been applied to the edges of the substrate which was contrary to the manufacturer's specifications.
- [10] The plans variously referred to substrates for a Craftstone veneer as:
- (a) 9mm Eterpan fixed in accordance to Venticlad construction detail; and
  - (b) Eterpan substrate to be fixed in strict accordance with manufacturers recommendations and literature; and
  - (c) 7.5 BGZ sheet.
- [11] The Board heard further evidence that the corner tape was installed by the Craftstone installer who was an authorised installer and who had been engaged by the Complainant. The installer did not raise any issues with the substrate.
- [12] The Respondent accepted that a row of screws was missing but that the fixings were at 400 as opposed to 600 centres. He gave evidence that he used a washer with the screws and that he had installed Eterpan in the past.
- [13] The balance of the evidence heard was that the Craftstone failed as a result of issues with the adhesive used.

### Transition Flashing

- [14] The Respondent gave evidence that all flashings were the responsibility of the contracted roofer who was a licensed building practitioner.

### Pre-Line Inspection

- [15] The Respondent gave evidence that a pre-line inspection was not missed. He noted that building work would not have been able to progress without an inspection. The Board was provided with documentary evidence of the related inspection. The Respondent gave evidence that the out of sequence inspection the Complainant was referring to was a subsequent inspection which was required as a result of a head flashing not being present in the original inspection.

### 13mm Gib Board

- [16] The Respondent accepted that he made an error in failing to install the specified gib board in the master bedroom.
- [17] The Complainant gave evidence at the hearing as to the importance to her of the extra sound insulation the 13mm gib would have provided. The Respondent stated he had made enquiries which should the extra sound insulation the thicker gib would

have provided was minimal and that he had offered the Complainant compensation for the error and that he wrote off sums owed to him as a result of disputes with the Complainant.

### **Board's Conclusion and Reasoning**

[18] The Board has decided that the Respondent **has not**:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); or
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);

and should not be disciplined.

### Negligence and/or Incompetence

[19] Negligence and incompetence are not the same. In *Beattie v Far North Council*<sup>6</sup> Judge McElrea noted:

*[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*

[20] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*<sup>7</sup> test of negligence which has been adopted by the New Zealand Courts<sup>8</sup>.

[21] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level*". In *Ali v Kumar and Others*<sup>9</sup> it was stated as "*an inability to do the job*".

[22] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test<sup>10</sup>. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[23] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act<sup>11</sup>.

<sup>6</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>7</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>8</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>9</sup> *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

<sup>10</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>11</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner<sup>12</sup>.

[24] The Board notes that the purposes of the Act are:

### **3 Purposes**

*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.*

[25] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code<sup>13</sup> and be carried out in accordance with a building consent<sup>14</sup>. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[26] Turning to seriousness in *Collie v Nursing Council of New Zealand*<sup>15</sup> the Court's noted, as regards the threshold for disciplinary matters, that:

*[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.*

<sup>12</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

<sup>13</sup> Section 17 of the Building Act 2004

<sup>14</sup> Section 40(1) of the Building Act 2004

<sup>15</sup> [2001] NZAR 74

- [27] Looking at the building work in question the Board finds:
- (a) failure to use the consented cement board – the plans were inconsistent and it was reasonable in those circumstances for the Respondent to use the product that he did;
  - (b) craftstone product failure – the failure was not attributable to the Respondent’s building work. it was an adhesive failure. The adhesive was applied by an authorised practitioner engaged by the Complainant who also incorrectly applied the corner tape. The Respondent did miss a row of screws;
  - (c) failure to install a transition flashing – the flashing was installed by another a licensed roofer. Each licensed building practitioner is responsible for their own work. Accordingly the Respondent is not responsible for the issue;
  - (d) a missed pre-line building inspection – an inspection was carried out; and
  - (e) failure to install specified 13mm gib board – the Respondent did fail to install the specified gib board.
- [28] There are two matters where the Respondent has failed to build in accordance with acceptable standards; a failure to install a row of screws and the correct gib board to the master bedroom. The Board finds that neither matter was serious enough to warrant a disciplinary outcome. In coming to this decision the Board, which includes persons with extensive experience and expertise in the building industry, has applied the tests outlined in *Collie* above.

#### Contrary to a Building Consent

- [29] The only failure to build in accordance with the building consent was with regard to the gib board. As with the findings as regards negligence the Board finds that the matter is not sufficiently serious enough to warrant disciplinary action.
- [30] The Respondent is cautioned that, in the future, he needs to take more care to ensure he follows the consented plans and specifications.

Signed and dated this 18<sup>th</sup> day of December 2018



**Chris Preston**  
Presiding Member