

## Before the Building Practitioners Board

	BPB Complaint No. C2-01842
Licensed Building Practitioner:	Jasyn Russell (the Respondent)
Licence Number:	BP 124780
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	Queenstown
Hearing Type:	In Person
Hearing Date:	13 September 2018
Decision Date:	1 October 2018

#### Board Members Present:

Chris Preston (Presiding)  
Mel Orange, Legal Member  
David Fabish, LBP, Carpentry Site AOP 2  
Robin Dunlop, Retired Professional Engineer

#### 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) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) 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) (s 317(1)(da)(ii) 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:

*“... the disciplinary process does not exist to appease those who are dissatisfied ... . The disciplinary process ... exists to ensure professional standards are*

<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

*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:
- |               |                                       |
|---------------|---------------------------------------|
| Jasyn Russell | Respondent                            |
| [Omitted]     | Complainant                           |
| [Omitted]     | Witness, Registered Building Surveyor |
| [Omitted]     | Witness for the Respondent            |
- [8] The Respondent was contracted by the Complainant to carry out renovations to an existing dwelling house under a building consent. The work involved the renovation of two bathrooms and a loft. The Complainant set out that the project would be carried out in two stages. The Complainant considered the Respondent was in charge of the entire job and of all sub trades.
- [9] There was no contract in place. The Respondent claimed that the value of the labour only building work was less than the threshold for a mandatory contract provided for in the Building (Residential Consumer Rights and Remedies) Regulations 2014 (\$30,000). The Complainant estimated that the total job would have been more than the threshold.
- [10] The early stages of the project proceeded in an orderly manner. On 6 December 2017 the Complainant left [Omitted] for 10 days and she claimed that when she returned the building work that had been completed whilst she was away was sub-standard. In particular she complained about tiling work, carpentry work, the work

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

of sub trades, damage to fittings and the overall finish of the building work completed.

- [11] The Respondent provided a written response to the Complaint in which he refuted the allegations and generally stated that the building work was not complete and or that he was not responsible for all off the sub trades. He noted an ongoing commercial dispute which the Complainant also referenced.
- [12] The Complainant advised that the building work is being completed by other contractors.
- [13] The Complainant commissioned and obtained a report on the condition of the building work from [Omitted] a Registered Building Survey. The report was provided to the Board. It contained a number of observations as to the quality and compliance of the building work. The report identified that some of the building work was not complete at the time of the report and that, amongst other things, the following items were of note:
- (a) Fyrelime Gib has been used in areas where Aqualine should have been used;
  - (b) A waterproofing membrane was not installed to the correct thickness and was absent behind an area of tiles; and
  - (c) Doors were not installed as per the consented plans.
- [14] At the hearing the Board heard evidence that the consented design was not consistent in that it referenced both Fyrelime and Aqualine in the same locations in different parts of the plans and specifications and that Fyrelime is an alternative to Aqualine in a wet area. The Respondent accepted that he had used Fyrelime in wet areas but stated that he had only done so in areas outside of the shower and that this was acceptable under the manufacturer's specifications where it is used under tiles and a membrane.
- [15] The Respondent also gave evidence that he applied the membranes and that whilst he was not a certified installer he was experienced and had been trained in its application. He also gave evidence that the membrane thickness was adequate and/or that it is not realistic to obtain an exact thickness over the whole of the membrane area. He also stated that there was a membrane under the tiles but that it was between a base layer of gib and a packing layer. [Omitted] noted that the requirement was for the membrane to be directly under the tiles.
- [16] With regard to doors and various trim and finishing items he stated that what was reported on and shown in photographs provided to the Board was incomplete or temporary building work.
- [17] The Respondent was questioned as to whether any of the building work that he carried out was restricted building work. He did not, at the time his involvement came to an end on the project, carry out any work on weathertightness elements or on structural elements of the building.

### 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) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) 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) (s 317(1)(da)(ii) of the Act);

and should not be disciplined.

[19] The reasons for the Board's decisions follow.

#### Negligence and/or Incompetence

[20] The first comment the Board would make is that this is a case where clear contractual arrangements between the Complainant and the Respondent would have been of value to them. It was unclear to the Board whether a mandatory contract was required and, even if it was the Board does not have jurisdiction over such matters. That aside the evidence before the Board showed a break down in communications, a lack of clarity over roles and responsibilities, and a failure to document variations. In such circumstances the potential for a contractual breakdown is greatly increased.

[21] Turning to the question of negligence and incompetence the Board found that whilst there were elements of the building work that did not meet the required standards the seriousness of the departures were not sufficiently serious enough to warrant a disciplinary outcome.

[22] The Board reached this decision on the basis of the direction the New Zealand Courts have given which is that consideration of negligence and/or incompetence in a disciplinary context is a two-stage test<sup>6</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] With regard to seriousness in *Collie v Nursing Council of New Zealand*<sup>7</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*

<sup>6</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>7</sup> [2001] NZAR 74

*which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.*

- [24] It is on this basis that the Board has found that the Respondent should not be disciplined. The Board accepted that building work in relation to doors and finishing items was not complete. With regard to the use of Fyreline it noted the lack of clarity in the design and that its use was permitted outside of the shower area. There were aspects of membrane application which did not meet acceptable standards but, as noted, the Board did not think that these were serious enough to warrant a disciplinary outcome.
- [25] The Respondent is, however, cautioned that more care needs to be taken in the future and that he should document any changes to the consented plans and specifications and ensure that these are accepted by the owner and the building consent authority.

#### Record of Work

- [26] 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 work<sup>8</sup>.
- [27] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [28] The first question to consider is whether any restricted building work was carried out. Restricted building work is defined in the Building (Definition of Restricted Building Work) Order 2011. Relevant to the current matter restricted building work includes the construction or alteration of the primary structure or the external moisture-management system of a house or a small-to-medium apartment building.
- [29] The consented design included restricted building work but the evidence heard was that those elements had not yet been carried out.
- [30] Given the above the Board has found that as no restricted building work had been carried out there was no requirement for a record of work to be provided.

Signed and dated this 1<sup>st</sup> day of October 2018



**Chris Preston**  
Presiding Member

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<sup>8</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011