

Before the Building Practitioners Board

	BPB Complaint No. C2-01890
Licensed Building Practitioner:	David Lees (the Respondent)
Licence Number:	BP 118360
Licence(s) Held:	Carpentry

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	Whangarei
Hearing Type:	In Person
Hearing Date:	3 October 2018
Decision Date:	5 November 2018
Board Members Present:	
	Mel Orange, Legal Member (Presiding)
	David Fabish, LBP, Carpentry Site AOP 2
	Robin Dunlop, Retired Professional Engineer

Appearances:

Jonathan Lees, Solicitor for the Respondent

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 by the Whangarei District Council about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at multiple addresses. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

In respect of [Omitted]:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act);
- (b) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act); and
- (c) 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

In respect of [Omitted]:

- (d) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
- (e) 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).

Procedure

[2] At the commencement of the hearing the Board noted that with regard to [Omitted] the building work was exempt work under Schedule 1 of the Building Act and as such it was not carried out under a building consent. The Board therefore advised that it

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

would not be further investigating the allegation under section 317(1)(d) with regard to that property.

- [3] The Board also clarified that the matters it would be further investigating at the hearing in respect of [Omitted] would be:
- (a) Building work that was contrary to the building consent with regard to an element of the roofing structure;
 - (b) Design work as regards the above changes to the roof structure;
 - (c) Negligence and/or incompetence with regard to retaining wall structures in respect of:
 - (i) carrying out building work that required a building consent without first obtaining one; and
 - (ii) the building work carried out on the retaining wall structures.

Function of Disciplinary Action

- [4] 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*² and in New Zealand in *Dentice v Valuers Registration Board*³.
- [5] 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*⁴ 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 maintained in order to protect clients, the profession and the broader community.”

- [6] 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

- [7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. 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.

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

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[8] 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.

[9] In addition to the documentary evidence before the Board heard evidence at the hearing from:

David Lees	Respondent
Brian Cook	Team Leader, Inspections, Whangarei District Council
Paul Cook	Manager, Building Consenting, Whangarei District Council
Katie Heslop	Compliance Monitoring Team, Whangarei District Council
Fred Higgison	Building Control Officer

[10] The Board also summonsed Jason Pearce who was an employee of the Whangarei District Council. He had laid the complaint on behalf of the Council. He did not appear. Counsel for the Respondent submitted that the Respondent had been prejudiced in his defence through the non-appearance of a key witness.

[11] The complaint from the Whangarei District Council alleged that, in undertaking the construction of a new dwelling at [Omitted], the Respondent:

- (a) undertook design work without a design licence and carried out building work without consent;
- (b) failed to follow the consented documents resulting in works being stopped;
- (c) redesigned parts of the building that were affected by the stoppages without applying for formal amendments, despite being told he could not submit the designs, he continued to do so;
- (d) undertook extensive landscaping using heavy machinery which included cut and fill operations, construction of retaining walls and the removal of a boundary fence without obtaining the neighbour's permission or consent; and
- (e) built retaining walls not to standard resulting in the failure of some of the walls.

[12] The complaint noted that remedial works were required to rectify issues with retaining walls and that this will require a new building consent. The Council as Complainant noted that it had rejected an application for an amendment to the

current building consent for the dwelling, as it considered the retaining walls to be a stand- alone issue.

- [13] With regard to [Omitted] the complaint alleged the Respondent constructed a low-level deck which does not comply with the building code. Although the deck is less than 1 metre above the ground making it exempt under Schedule 1 of the Act, the work must still comply with the building code. Specifically the complaint alleged the Respondent had installed 100 x 50 rough sawn pegs as foundations (not piles) and had also used 100 x 50 R/S timber for the deck joists. The joists were stated to span 2.4 metres which was well outside the NZS3604:2011 standard.
- [14] The Complainant provided council records and photographs of the building work in support of the complaint.
- [15] The Respondent provided a response to the Complaint which formed part of the Registrar's Report. At the hearing the Respondent provided a more detailed account of the events by way of a written brief of evidence together with annexures.
- [16] The Board also heard further evidence with regard to the matters outlined in paragraphs [2] and [3] above.
- [17] Critically the Board heard that the building work on the roofing structure complained about was carried out by [Omitted], a licensed building practitioner ([Omitted]), who was licensed in Carpentry at the time the building work was carried out. [Omitted] developed the concept that was proposed to avoid potential issues with a butynol internal gutter and framed the concept and called for the relevant inspections. The Council submitted that the related inspections noted the Respondent's name as the licensed building practitioner associated with the building work. In questioning the Council witnesses stated that their process is to record the licensed building practitioner who is identified at the time of the building consent as the licensed building practitioner for inspections regardless of who is actually on site or who booked the inspections.
- [18] With respect to the design of the change to the roof structure the Respondent provided evidence that he completed the design under the supervision of a registered architect who is deemed to be an authorised person under the Act. In particular the Respondent provided copies email correspondence to and from the architect and the design licensed building practitioner involved in the project. He also provided a copy of a Design Memorandum from the designer that was sent to the Council on 22 March 2017. The Respondent further provided evidence that, having searched the Council file, the Council had received the correspondence and the Memorandum.
- [19] The Respondent's brief of evidence also contained further detail as regards landscaping work and retaining walls. Counsel for the Respondent submitted that as the retaining walls were under 1.5 metres they were exempt from the requirement to obtain a building consent under Schedule 1 of the Act.

- [20] There were three areas of retaining walls. One area was established to create a platform to assist with the building of the intended residence and evidence was heard that as a result of Regional Council intervention it was temporarily back filled as a matter of urgency to prevent a potential Resource Management Act breach. Evidence was also produced that the finished height was less than 1.5 metres, once fill was placed at the base. The intention was to remove the fill at a later date, install drains, and back fill the retaining wall correctly.
- [21] The second retaining wall was a silt trap built above the first retaining wall. It was described as a temporary retaining wall.
- [22] The third area of retaining walls formed part of the access way. It was intended to be permanent. It was under 1.5 metres in height. It would carry a surcharge from vehicles above it.
- [23] The Respondent gave evidence that he was the only licensed building practitioner involved in the construction of the retaining walls.
- [24] The Council gave evidence that a resource consent was not required for the retaining walls.
- [25] With respect to the deck at [Omitted] the Board heard evidence that it was a temporary structure designed to last for five years as the owner's intention was to demolish the associated dwelling and build a new residence. Perimeter piles were installed. Pegs were used instead of piles in the centre of the structure. The height to ground at the highest point was approximately 200mm.

Board's Conclusion and Reasoning

- [26] 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);
 - (b) carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act); or
 - (c) 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.
- [27] The reasoning for the Board's decisions follows.

Negligence and/or Incompetence

- [28] There were various matters that the Board was considering regarding whether the Respondent had been negligent or incompetent. They were:
- (a) failure to obtain a building consent for retaining walls at [Omitted];
 - (b) the building work in relation to the retaining walls; and
 - (c) the building work in relation to the deck at [Omitted].
- [29] Whilst the Board found that the Respondent had, in certain respects, been negligent it decided that the negligence was not sufficiently serious enough to warrant a disciplinary outcome.
- [30] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁶ 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.*
- [31] 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*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.
- [32] 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*⁹ it was stated as "*an inability to do the job*".
- [33] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. 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.
- [34] 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 Act¹¹. The test is an objective one and in this respect it has been noted that the purpose of

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

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

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

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 practitioner¹².

[35] 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.*

[36] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. 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.

Failure to Obtain a Building Consent

[37] Looking at the failure to obtain a building consent, section 40 of the Act states that building work must not be carried out except in accordance with a building consent. Section 41 of Act provides for limited exceptions from the requirement for a building consent and in particular it states a building consent is not required for any building work described in Schedule 1 of the Act. The onus is on the person carrying out the building work to show that one of the exemptions applies.

[38] The Board has found in previous decisions¹⁵ that a licenced person who commences or undertakes building work without a building consent, when one was required, can

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

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ Refer for example to Board Decision C1030 dated 21 July 2014

be found to have been negligent under section 317(1)(b) of the Act. Full reasoning was provided by the Board in decision C2-01068¹⁶.

- [39] More recently the High Court in *Tan v Auckland Council*¹⁷ the Justice Brewer in the High Court stated, in relation to a prosecution under s 40 of the Act:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

- [40] The Board considers the Court was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent is obtained (if required). It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.
- [41] The questions for the Board to consider are, firstly whether a building consent was required. If it was then the second question is whether, at the time the building work was undertaken, the Respondent knew or ought to have known that a building consent was required.
- [42] Looking at the retaining walls the submission was that the clause 20 exemption in Schedule 1 of the Act applied. Clause 20 states:

20 Retaining walls

Building work in connection with a retaining wall that—

- (a) retains not more than 1.5 metres depth of ground; and*
- (b) does not support any surcharge or any load additional to the load of that ground (for example, the load of vehicles).*

- [43] Two of the retaining walls may have come within the above provision. The third, which formed part of the driveway access, carried a surcharge and as such it did not. A building consent was required.
- [44] The Board also heard evidence that the Respondent knew that the retaining wall would carry a surcharge and as such he should have known that a building consent was required.

¹⁶ Board Decision C2-01068 dated 31 August 2015

¹⁷ [2015] NZHC 3299 [18 December 2015]

- [45] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent departed from what the Board considers to be an accepted standard of conduct.
- [46] Considering the seriousness of the conduct the Board notes that in *Collie v Nursing Council of New Zealand*¹⁸ 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.

- [47] In *Pillai v Messiter (No 2)*¹⁹ the Court of Appeal 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.

- [48] The Board has taken the view that, in this instance, taking into account all of the factors of the complaint, that the conduct has not reached the seriousness threshold described by the Courts.

Building Work on the Retaining Walls

- [49] In a similar vein to the above the Board found that, whilst aspects of the building work in relation to the retaining wall that was built to create a construction platform were not done to an acceptable standard, the conduct was not serious enough to warrant a disciplinary outcome. In this respect the Board noted the complicating factor of the Regional Council's intervention.

Decking

- [50] The deck that was constructed did not meet the requirements of NZS 3604:2011 – Timber Framed Buildings. That standard is an Acceptable Solution in terms of building work meeting the requirements of Clause B Stability in the Building Code.
- [51] Looking at the Stability there are two aspects: B1 – Structure and B2 – Durability. The objective of B1 is safeguard people from injury caused by structural failure or loss of amenity and to protect other property from physical damage caused by structural failure. The objective of B2 is to ensure that a building will, throughout its life, continue to satisfy the other objectives of the Building Code. The performance requirement of B2 can be five years if the building elements are easy to access and replace and any failure would be easily detected.

¹⁸ [2001] NZAR 74

¹⁹ (1989) 16 NSWLR 197 (CA) at 200

- [52] Given the intended life of the deck and its low height, which meant the risk to persons and property was very low, the Board finds that the Respondent has not carried out building work in a manner that is contrary to acceptable standards.

Not Licensed to Carry Out or Supervise Restricted Building Work

- [53] The building work was carried out under a building consent and as such certain elements involved restricted building work. Under section 84 of the Act:

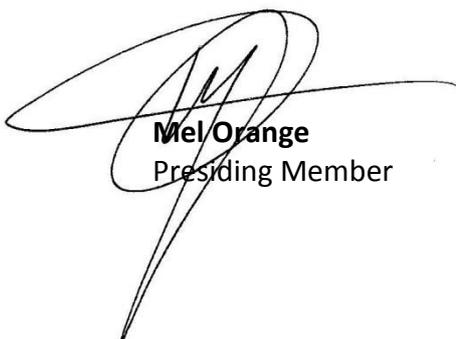
All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

- [54] At the time the Board considered the Registrar's Report, there was no evidence before it that there was a licensed building practitioner with the required class of licence carrying out or supervising the restricted building work.
- [55] At the hearing the Board was provided with evidence that the design work was carried out under supervision. As such the Respondent has not committed the alleged disciplinary offence.

Contrary to a Building Consent

- [56] The process of issuing a building consent, and the subsequent inspections under it, ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large. Any departure from the consent which is not minor (as defined in s 45A of the Act) must be submitted as an amendment to the consent before any further work can be undertaken. It is also an offence under s 40 of the Act to carry out building work other than in accordance with a building consent when one is issued.
- [57] There was evidence that building work on the roof had been carried out prior to a minor variation or amendment having been granted. There was also clear evidence that another licensed building practitioner was responsible for that building work.
- [58] Each and every licensed building practitioner is responsible for the building work that they carry out or supervised. As such the Respondent cannot be held accountable for the building work of another licensed person.

Signed and dated this 5th day of November 2018



Mel Orange
Presiding Member