

Before the Building Practitioners Board

	BPB Complaint No. CB24101
Licensed Building Practitioner:	Christopher Corbett (the Respondent)
Licence Number:	BP 115428
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	Board Inquiry
Hearing Location	Christchurch
Hearing Type:	In Person
Hearing Date:	9 April 2019
Decision Date:	15 May 2019

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
Mel Orange, Legal Member
Faye Pearson-Green, LBP Design AOP 2

Appearances:

Chris Shannon, Barrister and Solicitor, Duncan Cotterill, 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 Board Inquiry into the conduct of the Respondent and a Board resolution under regulation 22 of the Complaints Regulations¹ 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*² and in New Zealand in *Dentice v Valuers Registration Board*³.

[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*⁴ Collins J. noted that:

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

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

“... 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.

Consolidation

- [5] The Board may, under Regulation 13, consolidate two or more complaints into one hearing but only if the complaints are, in the opinion of the Board, about substantially the same subject matter and the complainant and the licensed building practitioner in respect of each complaint agree to the consolidation.
- [6] The Board sought agreement for consolidation of this matter with complaint number C2-01919. The consent of all those involved was not forthcoming. The two matters were not consolidated.

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.
- [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:
- | | |
|---------------------|--|
| Christopher Corbett | Respondent |
| [Omitted] | Witness, Licensed Building Practitioner, Carpentry |
| [Omitted] | Witness, Residential Roofing |
- [10] The building work to which the Board Inquiry related came about as a result of earthquake damage to the subject property. The Complainant engaged [Omitted] to undertake repairs as well as alterations to the dwelling. A reroof was part of the intended work. A building consent was obtained. The consent did not include the reroof but did cover flashings between building work under the consent and the reroof. The Respondent was engaged to undertake the reroof as a subcontractor.

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

- [11] Following a commercial dispute with the main contractor the Complainant commissioned a report from [Omitted] of Maynard Marks. The report identified issues with the reroof. The report was supported by photographs of the noted items.
- [12] The Maynard Marks report included a Table of Construction Defects and Damage. The Board’s investigations focused on the issues identified in the Defects Table that the Respondent was associated with which were:

Incorrect Roof Construction.
The roof has not been installed in accordance with specifications of the drawings contained within the building consent documents. The drawings require that an eave flashing is installed along the base perimeter of the roof above the bottom purlin within the roof and the underlay laid above.
The underlay cannot be seen and is thought to terminate on top of the bottom purlin. This construction causes an opening between the roof termination and the gutter allowing any condensation moisture collected below the roof sheet and wind-blown moisture to enter the roof construction potentially causing damage.
The roof cladding has been poorly cut leaving visible distortions, burrs and rags (Swarf) to the cut edges. The unprotected cut edge will cause premature corrosion to the steel sheets.
Steel roof cladding does not turn down into gutters. This is allowing salts and detritus to accumulate on the bottom edge of the roof sheet, which in time will accelerate corrosion and reduce the roofs serviceable life.
Incorrectly installed roof flashings.
Flashings to dormer windows have been poorly installed incorrectly lapped and are reliant on sealant.
Barge flashings are different in width on adjacent sides the roof over the dormer windows on the north elevation. Wind Zone extra high, should be 200mm. Missing fixing on the south west corner barge flashing.
Dormer sill apron flashing made up of multiple pieces of flashing over a short length and not one continuous flashing. The flashings are reliant on sealant.
There is a potential issue with construction sequencing of the flashings at the roof wall junction with the adjacent property 3a Longhurst Terrace. (No safe access available to be able to inspect).

- [13] The Respondent gave evidence that he was not aware that there was a building consent in place. The project documentation he was issued with, including preliminary plans, only stated that it was a reroof. He was not aware that flashings that intersected with the new cladding were part of the consent.
- [14] The Respondent did not complete all of the intended work as a result of concerns he held over aspects of the building work around dormer windows and the cutting back of underlay. Flashings were not installed around the dormers when he left the job. He did not know who had completed that work. He stated that if he had completed the reroof as he had intended then he would have tidied up items that required

remediation. He did not carry out or supervise the installation of the barges, or guttering.

- [15] The photographs provided with the Maynard Marks report included photographs of roofing iron that had been roughly cut. The Respondent gave evidence that it was cut with snips, that there was no swarf, and that it would have been tidied as part of the completion work. With regard to gutter turn downs the evidence heard was that turn downs are not required on high pitch roofs but that over the dormers down turns were completed. The Respondent also gave evidence that a photograph of a flashing that had excessive sealant was not complete in that an over-flashing was yet to be installed.
- [16] The documentation before the Board included a record of work from the Respondent dated 27 February 2015 which stated he had carried out the roof cladding system with a notation of "fit roof and associated flashings". The Respondent gave evidence that his business practice was to issue blank signed records of work to his main contractor for them to complete on his behalf at the completion of a project. Notwithstanding he claimed that the record of work produced was not issued under his authority and that it was a fraud.

Board's Conclusion and Reasoning

- [17] 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.

- [18] The reasons for the Board's decisions follows.

Negligence and/or Incompetence

- [19] 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.

- [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

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

into. This is described as the *Bolam*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

- [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*⁹ it was stated as “an inability to do the job”.
- [22] 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 Act¹⁰. 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 practitioner¹¹.
- [23] The Board accepted that the Respondent had not completed the building work and that if he had of completed it that he would have attended to the matters raised in the Maynard Marks report. At the same time the Board cautions the Respondent against the approach of dealing with quality and workmanship issues at the end of the project rather than as and when they arise. The current case is an example of why. Contracts can come to a premature end and if they do the opportunity to rectify issues can be lost. The Board also considers that licensed building practitioners should be aiming to get building work right the first time as opposed to having to rectify and remediate substandard work as part of a snag list.
- [24] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has not departed from what the Board considers to be an accepted standard of conduct.

Record of Work

- [25] 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 work¹².
- [26] As a result of section 401B(1) of the Act restricted building work only applies to building work that is carried out under a building consent. It follows that building work carried out under an exemption from the requirement for a building consent such as those provided for in Schedule 1 of the Act is not restricted building work.

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 at p.33

¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹² Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

- [27] The reroof was not consented. As such it was not restricted building work. A record of work was not required for it.
- [28] Flashings that intersected with the new cladding did form part of the building consent. A record of work was required for that limited aspect of the work. A record of work was provided. The Respondent stated it was not provided with his consent. He had, however, provided a blank signed record of work and had a business practice in place whereby his main contractor could provide a record of work on his behalf. No instructions were issued revoking the instructions. On face value it was a valid record of work. On this basis the Board finds that a record of work was provided.
- [29] The Respondent is cautioned as regards his record of work practice. The system he uses is open to abuse and he runs the risk that a record of work may not be provided as per the requirements of the Act on completion. He places a lot of trust in other persons but he is the one who will face disciplinary action if that trust is abused.

Signed and dated this 15th day of May 2019


Chris Preston
Presiding Member