

Before the Building Practitioners Board

	BPB Complaint No. CB24384
Licensed Building Practitioner:	Dennis Peat (the Respondent)
Licence Number:	BP 107127
Licence(s) Held:	Site AOP 2

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:	19 March 2019
Decision Date:	11 April 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP Carpentry and Site AOP 2

Appearances:

David Clark, Wilson McKay, Barrister and 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 under section 317(1)(b) of the Act.

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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 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 carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) 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:

“... 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.

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

Evidence

- [5] 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.
- [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] Prior to the hearing the Board noted that it had received documentation that formed part of an adjudication under the Construction Contracts Act (the Adjudication). Section 68 of the Construction Contracts Act 2002 provides that such information is confidential unless disclosure of it has been agreed to. The Board therefore sought the consent of those involved in the adjudication to the disclosure. This was provided as was a Minute from the Adjudicator noting an agreement between the adjudication parties to the confidential information being made available. The Adjudication file was subsequently made available to the Board. It should be noted that large portions of it were not relevant to the matters before the Board. This was especially the case as regards matters of a contractual nature.
- [8] In addition to a high volume of documentary evidence received the Board heard evidence at the hearing from:
- | | |
|-------------|--------------------|
| Dennis Peat | Respondent |
| [Omitted] | Complainants |
| [Omitted] | Witness, [Omitted] |
- [9] The board also allowed the Complainant to submit further evidence to support or corroborate allegations made at the hearing following its completion and for the Respondent to respond to what was filed.
- [10] The Respondent's business Goldline Construction Limited was engaged to construct a new residential dwelling for the Complainants. The Complainants, who were familiar with building having undertaken a high number of developments, and the Respondent were known to each other from previous building projects. The build commenced in February 2017. On 22 December 2017 the Respondent issued a Notice of Practical Completion. The Complainants did not accept that the build had been completed. A code compliance certificate is yet to issue. The build is the subject of ongoing contractual disputes.

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

- [11] The complaint made to the Board raised a number of issues and was supported by an affidavit from [Omitted] that had been prepared for the Adjudication. The affidavit contained further detail on the matters raised in the complaint. The items raised were:
- (a) louvers incorrectly installed;
 - (b) in-situ concrete wall constructed with blocks;
 - (c) balustrade incorrectly installed;
 - (d) damage to roof and gutter;
 - (e) damage to interior doors and install issues;
 - (f) issues with paint finishes;
 - (g) damage to concrete floors;
 - (h) no front steps;
 - (i) incorrect sealant on front door;
 - (j) issues with exterior soffit, barge and flashing finishes;
 - (k) damage to garage door and floor; and
 - (l) damage to driveway.
- [12] At the hearing the Complainants submitted a “Summary of Issues” which listed 66 defect items. Some, but not all, of those items formed part the original complaint. The Board was mindful of the requirements of natural justice⁶. The principles of natural justice require that hearings are conducted in a manner that ensures that the Respondent is given a fair opportunity to be heard and to contradict evidence against him or her, and that the decision-making process is conducted fairly, transparently and in good faith. Given many of the issues on the Summary had not been previously raised the Board focused on those where fair notice had been given. The same applied to aspects of the additional information provided. It was only taken into consideration to the extent that it related to the allegations under consideration at the hearing.
- [13] The Board noted that the Respondent did not engage in the investigation process at the Registrar Report phase of the complaint process⁷. The Respondent did not provide a response to the complaint. When the Board considered the Registrar’s Report under regulations 9 and 10 of the Complaints Regulations it only had the uncontested evidence in the complaint before it. The Respondent submitted that he was restricted from responding by the Adjudication proceedings. Whilst that may have been the case the Board does consider that it is incumbent on a licensed building practitioner to engage in the complaints process⁸.

⁶ Section 283 of the Act requires that the Board comply with the principles of natural justice.

⁷ Regulation 7(2) of the Complaints Regulations stipulates that the Registrar seek a response from the licensed building practitioner.

⁸ *Daniels v Complaints Committee* [2011] 3 NZLR 850

- [14] The Respondent holds a Site Area of Practice 2 Licence. The holder of a Site Licence is not authorised to carry out restricted building work⁹. Restricted building work is building work in relation to a residential dwelling which is carried out under a building consent that relates to structural or weathertightness elements¹⁰.
- [15] The evidence before the Board was that the Respondent did not carry out or supervise (as defined in the Act) the building work. He contracted and/or used persons who held the required licenses to carry out the build and records of work from those persons had been submitted. He provided project management services. The focus of the Board's investigations was on his role as the holder of a Site Licence. The Holder of a Site Licence can provide coordination and oversight of construction¹¹.
- [16] The Board noted that, in respect of each item investigated, both the Complainant and the Respondent presented extensive and contradictory evidence. The Board also noted that the Complainant's were integrally involved in the build process and that there were a number of changes to the specifications as the build progressed. The evidence differed as to the process used for changes and whether or not they had been agreed to. The Respondent gave evidence that "as built" plans covering minor variations would be submitted to cover design changes as part of the code compliance certification. The Respondent also gave evidence and made submissions as regards the maintenance period and the opportunity to rectify snag list items being frustrated.

Board's Conclusion and Reasoning

- [17] The Board has decided that the Respondent **has not** carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- [18] The Board, in coming to its decision, had to carefully balance between what it considered were contractual matters and those that fell within its jurisdiction as regards the conduct of a licensed building practitioner. It also had to consider the extent to which it could consider the Respondent's conduct as regards the matters complained about given that other licensed building practitioners and licensed trades had also been involved in the build. This is because each licensed person is responsible, under the licensing regime for their own work and is accountable for their own conduct.
- [19] To the extent that the Respondent could be held accountable the Board has noted that as he has a Site License he can only be held accountable for "co-ordination or oversight". Co-ordination and oversight are not defined terms. The Licensed Building Practitioners Rules 2007 (the Rules) do, however, provide some guidance and whilst

⁹ Refer section 84 of the Act and clause 4 of the Building (Designation of Building Work Licensing Classes) Order 2010

¹⁰ Restricted building work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹¹ Clause 4 of the Building (Designation of Building Work Licensing Classes) Order 2010

those Rules use the term supervise and supervision throughout the Board does not interpret this as the supervision of restricted building work for the reasons outlined above.

- [20] The Rules, in Competency 3 – Organise and Manage Building Projects, note the following competencies:
- 3.2.1 *Read and interpret working drawings, specifications, schedules and quantity lists.*
 - 3.2.2 *Identify need for, and seek clarification and/or additional design documentation or specialist information from the Design Lead, as required.*
 - 3.2.3 *Implement site specific safety plans.*
 - 3.2.4 *Establish a building site and manage ongoing operations. May include but not limited to – access, site signage, temporary water, electricity, security fencing, temporary works and roading, other facilities, and compliance with resource consent conditions, building consent conditions and the Building Code.*
 - 3.2.5 *Monitor construction site performance. May include but not limited to – monitoring performance, monitoring construction programme, application of time management and quality assurance, ordering, scheduling materials and efficient use of materials.*
- [21] From the above competencies it is clear that issues which arise on-site can come within the purview of a licensed building practitioner with a Site Licence and that the Board can, therefore, consider the conduct of the Respondent. That said it was also clear to the Board that the on-site relationships and roles were not clear and that the Complainants had a high degree of involvement in the build and that this must also be taken into consideration.
- [22] The evidence before the Board was that there were multiple issues that arose. What is required is the Board be satisfied, on the balance of probabilities, that the Respondent is responsible for those issues and should be held accountable for them.
- [23] The relevant authority for the evidentiary standards the Board must be satisfied to is *Z v Dental Complaints Assessment Committee*¹² where Justice McGrath, in the Supreme Court of New Zealand stated:
- [102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more*

¹² [2009] 1 NZLR 1

probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

[24] Taking the above into consideration, and noting the divergent evidence presented by both the Complainant and the Respondent, both of whom were supported in their respective positions by experts, the Board has not been able to establish, to the required evidentiary standard, that the alleged disciplinary offence has been committed.

[25] The Board also notes that the New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹³. 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.

[26] Justice Gendall in *Collie v Nursing Council of New Zealand*¹⁴ noted, as regards the threshold for disciplinary matters:

[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.

[27] In *Pillai v Messiter (No 2)*¹⁵ 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.

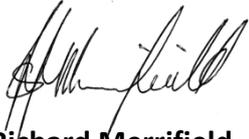
¹³ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁴ [2001] NZAR 74

¹⁵ (1989) 16 NSWLR 197 (CA) at 200

[28] The Board considers, to the extent that any of the Respondent's conduct may have come within the tests for disciplinary negligence, which is the departure by a licensed building practitioner from an accepted standard of conduct, that the conduct complained about was not sufficiently serious enough to warrant a disciplinary outcome.

Signed and dated this 11th day of April 2019

A handwritten signature in black ink, appearing to read 'Richard Merrifield', written in a cursive style.

Richard Merrifield
Presiding Member