

Before the Building Practitioners Board

	BPB Complaint No. C2-01774
Licensed Building Practitioner:	Mario Videtta (the Respondent)
Licence Number:	BP 128451
Licence(s) Held:	Roofing AOP Concrete or Clay Tile, Profiled Metal Roof, Wall Cladding, Roof Membrane

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:	6 June 2018
Decision Date:	25 June 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Catherine Taylor, Lay Member

Appearances:

Stuart Robertson, Barrister and Solicitor, Kensington Swan

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 Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offence 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

Procedure

- [5] The matter was originally set down for a hearing on 22 May 2018. An adjournment was sought by the Respondent as a result of new evidence being presented by the Complainant shortly before the scheduled hearing date. The adjournment was granted.

Evidence

- [6] 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.

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

Maria Videtta	Respondent
[Omitted]	Complainant
[Omitted]	Witness

- [8] The Respondent's business, Auckland Roofcraft Limited, was engaged to complete a re-roof of the dwelling at [Omitted]. The building work was carried out as unconsented building work under clause 1 Schedule 1 of the Act. The work was subcontracted to [Omitted] an experienced but unlicensed roofer. The Respondent did not carry out any building work. The issue for the Board was the Respondent's supervision of the building work.
- [9] The Complainant alleged the new roof leaked. He claimed it was as a result of poor workmanship and that there was an over reliance on silicone. Remedial work was undertaken to locate and prevent the leak. The Complainant alleged the leak was the result of a poorly installed Decktite. The Respondent gave evidence that there was evidence of historic leaks but not of any recent leaks.
- [10] The Complainant also raised issues with painting work that was undertaken by Auckland Roofcraft Limited. The Board ruled that the matters pertaining to the painting work are not within the Board's jurisdiction.
- [11] The Complainant provided an inspection report from [Omitted]. It raised various issues with the re-roof.
- [12] The Complainant determined that the re-roof had to be redone. He engaged a new contractor to complete it. Photographs were taken as part of the deconstruction of the existing roof. These were provided to the Board along with an opinion from [Omitted] which raised the following issues:
1. Central ridge flashing not sealed where it sits over barge flashings to Dutch gables.

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

2. Troughs of corrugations had been turned up under the main ridge (and under apron flashings to Dutch gables).
3. Some fixings securing the ridge passed through the troughs instead of crests of corrugations.
4. Cover of the ridge over roofing along ridge line measured 100mm and 90mm.
5. Troughs of corrugations at hips not turned up. Some fixings securing hip flashings passed through the troughs instead of crests of the corrugations. Corner triangles of underlay missing in each corner of the roof, and some butt joined instead of lapped. Underlay in the main body of the roof correctly installed. No timber supports under the roofing down either side of the hip boards.
6. Roof was fastened to every second tile batten. Battens are secured to the rafters by an original single nail.
7. New purlins now installed with supports down the hips.
8. Cladding and apron flashings to Dutch gables removed to enable installing of purlins to support the roof and apron flashing. There was no support under the original installation with the apron flashing stitched to the roofing and the roofing sheets not secured to a purlin adjacent to the Dutch gables.
9. The vent pipe relied on heavy applications of sealant for weather security. Droplets holding on the roof around the pipe were sitting on a thin layer of sealant which had been wiped off the roof.
10. The original cover flashing around the pipe was not removed and the new EPDM flashing forced down to sit around its base creating ponding. This was filled with sealants.
11. The EPDM and original cover flashing were removed. The pipe was re flashed to a watershed flashing, to eliminate the accumulation of dirt/moisture building up on the topside of the original EPDM flashing. Sealant used to seal a side lap above the pipe was removed.
12. Two of the long roofing sheets were replaced where paint had been spilt on the roof.
13. A total of 3 long sheets and 4 short sheets were replaced along with a new wide cover ridge flashing to enable the reuse of the roofing sheets. The barge flashings were also replaced.
14. The hip flashings were reused.

[13] The photographs were reviewed at the hearing. The Respondent accepted that there were some items that had not been completed to an acceptable standard but overall he maintained that the re-roof had been carried out to an appropriate standard and that the issues were minor. The Respondent also provided a written schedule where each of the photographs and allegations were responded to in detail. Legal Counsel for the Respondent also submitted that no evidence had been provided that showed that any of the matters complained about failed to meet the Roofing Code of Practice.

[14] The Respondent also provided a written statement and a letter from [Omitted] to him. In respect of the Respondent's supervision he stated [Omitted] had 10 years

roofing experience and had worked as an independent contractor to his business for more than 5 years. He also stated:

In the early years, he [Omitted] was constantly supervised and he has been upskilling throughout this time. In recent years, he has worked far more independently. Over his complete work history I have heard nothing but good reports from previous employers and satisfied customers. Included in the work he has done for ARL, he would have re-roofed approximately 400 buildings. In this particular case, the work is not of a difficult technical nature. He has been taught to do this type of work by constant repetition. He also assumed that as he had done one or two similar to this, that repeating the process here was applicable. I assumed the same.

[15] In terms of the Respondent's supervision procedures his written statement set out:

My role as supervisor: I employ experienced contractors to do the work they are expert in. During the first year of their employment I check all their work to gauge competency for the various types and difficulty levels. Once I have ascertained their skill level, I am able to give them jobs that they can either do independently or where I can choose to supervise them to increase their skill level. [Omitted] is a highly skilled contractor and we have had an excellent working relationship for enough time that I do not need to monitor him closely but, if he feels that he wants my advice or reassurance, then he asks.

[16] The letter from [Omitted] noted:

This job was done at the start of Winter 2017; I was not well and, if anyone showed a lack of supervision of my men, it was me, but what upsets me the most is that you are being held responsible for this. If anyone should be held responsible, it is me.

[17] The Respondent also gave evidence that he has morning coffee catch ups with his contactors where work in progress is discussed and that he checked three jobs completed by [Omitted] prior to the job that led to the Complaint and three jobs completed after it. He stated that there were no quality or compliance issues with any of them. He also gave evidence that [Omitted] carries out a single job at a time for him. He accepted that the building work carried out and as shown in the photographs was not typical of [Omitted] work.

Board's Conclusion and Reasoning

[18] 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) and should not be disciplined.

[19] The Respondent did not carry out any building work. The building work was not carried out under a building consent and was therefore not restricted building work. As such it did not have to be carried out or supervised by a licensed building

practitioner. The Board has, however, previously held that the definition of supervise in section 7⁶ of the Act must be interpreted in such a way as to give effect to the purpose of the legislation which includes the regulation and accountability of licensed building practitioners and, as such, that it includes work carried out without a building consent⁷. The Board's position is that under the disciplinary provision in section 317(1)(b) supervision applies to all building work carried out under the supervision of a licensed building practitioner.

- [20] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁸ 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.

- [21] 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*⁹ test of negligence which has been adopted by the New Zealand Courts¹⁰.
- [22] 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*¹¹ it was stated as "*an inability to do the job*".
- [23] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹². 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.
- [24] 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 Act¹³. The test is an objective one and in this respect it has been noted that the purpose of

⁶ Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

⁷ Board Decision C2-01143 dated 14 April 2016

⁸ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

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

¹¹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹² *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹³ *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 practitioner¹⁴.

[25] 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.*

[26] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁵ and be carried out in accordance with a building consent¹⁶. 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.

[27] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁷ 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.

[28] The matter for consideration is whether the Respondent has been negligent or incompetent in his supervision of the building work.

¹⁴ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁵ Section 17 of the Building Act 2004

¹⁶ Section 40(1) of the Building Act 2004

¹⁷ [2001] NZAR 74

- [29] In C2-01143 the Board discussed the levels of supervision it considers will be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances including:
- (a) the type and complexity of the building work to be supervised;
 - (b) the experience of the person being supervised;
 - (c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;
 - (d) the number of persons or projects being supervised; and
 - (e) the geographic spread of the work being supervised.
- [30] The Board also needs to consider whether the work met the requirements of the building code and if not the level of non-compliance.
- [31] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992¹⁸. The definition of supervision in that Act is consistent with the definition in the Building Act and as such the comments of the court are instructive. In the case Judge Tompkins stated at paragraph 24:
- "As is made apparent by the definition of "supervision" in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations."*
- [32] Turning to the facts of the case as they relate to the matters above the Board notes:
- (a) the re-roof was not overly complicated;
 - (b) the person who carried out the building work had extensive experience in the type of building work carried out;
 - (c) the Respondent had worked with the [Omitted] for five years and was very familiar with the standard of his work; and
 - (d) whilst the Respondent's business may have had multiple jobs underway the person being supervised was only completing one job at a time.
- [33] The Board also notes that the Respondent had a general supervision process in place. He stated that he closely supervises new contactors until such time as he is

¹⁸ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

confident in their abilities and that once he is he reduces the level of supervision. He had applied this methodology to his supervision of [Omitted]. As a result he did not actively supervise [Omitted] but was in contact with him. The Respondent did get involved once issues with the re-roof were raised.

- [34] There were some quality and compliance issues with the building work. The Respondent's evidence as regards jobs completed by [Omitted] before and after the Complaint job and [Omitted] letter indicate that the alleged compliance and quality issues that arose were out of the ordinary.
- [35] Taking the above factors into account the Board considered that the Respondent was neither negligent nor incompetent in his supervision of the building work. The Board has reached this decision on the basis that the Respondent had adequate supervision processes in place for the person who actually carried out the building work given their work history and the nature of the specific job and that the quality and compliance issues were minor and were, on the evidence of the Respondent, a one off. The Board considered, in the present case, that it should take into account the Respondent's overall supervision processes which were adequate, not just the supervision on one job that did not go well.
- [36] The Board does, however, caution the Respondent that whilst in the present case his supervision processes were considered adequate, his hands-off approach to supervision of persons with whom he is familiar may not always be appropriate. The Board would expect an associated quality assurance system to be in place and had it not been a single incidence of poor quality work by [Omitted] the Board may well have reached a different conclusion.

Signed and dated this 25th day of June 2018



Chris Preston
Presiding Member