**Before the Building Practitioners Board**

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| | BPB Complaint No. CB25269 |
| Licensed Building Practitioner: | Gary Best (the Respondent) |
| Licence Number: | BP 131059 |
| 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 | Whangarei |
| Hearing Type: | In Person |
| Hearing Date: | 27 February 2020 |
| Decision Date: | 27 February 2020 |

Board Members Present:

Mel Orange, Legal Member (Presiding)
Richard Merrifield, LBP, Carpentry, Site AOP 2
David Fabish, LBP, Carpentry, Site AOP 2
Rob Shao, LBP, Carpentry, Site AOP 1

**Appearances:**

Mr B Alcorn, Barrister and Solicitor, Fee Langstone, 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 into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] 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 contrary to section 317(1)(b) of the Act; and/or

(b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act.

[2] The Board notified the Respondent that the hearing would focus on the list of site issues provided by the Complainant and on the allegation that building work to a change to a stairs and garage wall was undertaken prior to an amendment to the building consent being granted.

## Function of Disciplinary Action

[3] 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].

[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] 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."*

[5] In a similar vein the Board's investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint's Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons[5]:

> *… 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.*

[6] Finally, 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. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act which deals with disrepute.

[7] The above commentary on the limitations of the disciplinary process are important to note as, on the basis of it, the Board Board's inquiries, and this decision, focus on and deal with the serious conduct complained about.

**Inquiry Process**

[8] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges and it decides what evidence is required at a hearing to assist it in its investigations. In this respect the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.

[9] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

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[4] [2016] HZHC 2276 at para 164
[5] *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

**Evidence**

[10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[6]. 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.

[11] 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.

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

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| Gary Best | Respondent |
| *[Omitted]* | Witness for the Respondent |
| *[Omitted]* | Licensed Building Practitioner, summoned witness |

[13] The Respondent was engaged, on a labour only basis, to carry out the carpentry work on a new residential dwelling for *[Omitted]*. The Building work proceeded through to the point where the roof was being installed. At that stage the Respondent's engagement with *[Omitted]* was brought to an end as a result of concerns about the quality and compliance of the building work being undertaken by the Respondent. A second carpenter,*[Omitted]*, was engaged by the *[Omitted]* to complete the build.

[14] *[Omitted]*, a representative of *[Omitted]*, made a complaint to the Board about the quality and compliance of the building work carried out by the Respondent. He provided a list of some 98 alleged issues along with a marked-up plan showing the location of the items and supporting photographs. He also provided records of two failed building consent authority inspections.

[15] The Board also noted, in considering the complaint at the regulation 10 phase of the complaint investigation, that building work with regard to a change to stairs and a garage wall which required an amendment to the building consent may have been carried out prior to the amendment being granted.

[16] The Respondent's position was that *[Omitted]* were constantly pushing to have the work progressed to the point where payment claims could be made from the owner. This resulted in the work being somewhat disjointed and it progressing to new stages without earlier stages being completed. He also noted that he did not have control over subcontractors and subtrades and that often they were called to site when the building work was not ready for their input.

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

[17] The Respondent maintained that the issues raised in the complaint were, in the main, in respect of incomplete work. He noted that he did not call the inspections, that the work was not ready for the inspections called, and that he was not informed of the issues raised by *[Omitted]*. He stated the first he became aware of them was when he received the complaint. He noted that he was not given an opportunity to complete the incomplete work or to rectify other issues.

[18] The Respondent also gave evidence that a change to the internal layout of the house (non-structural) by *[Omitted]* and the owners resulted in issues with the positions of pre-cut frames and gaps in the framing.

[19] The Board, which includes persons with extensive industry experience and knowledge, questioned the Respondent and *[Omitted]*, about eight items in the list which, to the Board, appeared as if they might have been quality and or compliance issues. The Respondent submitted that steel portal frames installed by a subcontractor caused many of the structural issues noted. *[Omitted]* agreed with the submission.

[20] The Respondent did accept that there were some issues with rigid air barrier board installed by his staff but noted that he was in the process of remediating that when his contract came to an end.

[21] The evidence as regards the changes to the stairs and garage wall was that the Respondent followed the engineering instructions and details he was provided and that he was not dealing with building consent matters.

**Board's Conclusion and Reasoning**

[22] 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) 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.

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

<u>Negligence and/or Incompetence</u>

[24] Negligence and incompetence are not the same. In *Beattie v Far North Council*[7] 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.*

[25] 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

[7] Judge McElrea, DC Whangarei, CIV-2011-088-313

those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*[8] test of negligence which has been adopted by the New Zealand Courts[9].

[26] 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*[10] it was stated as *"an inability to do the job"*.

[27] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[11]. 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.

[28] With regard to seriousness in *Collie v Nursing Council of New Zealand*[12] 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.*

[29] In *Pillai v Messiter (No 2)*[13] 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.*

[30] It is on the basis of the seriousness of the matters before the Board that it has decided that the Respondent has not been negligent nor incompetent.

[31] Whilst there was some evidence of building work that did not reach an acceptable standard, such as the installation of the rigid air barrier, most of it was either incomplete work or the knock-on effect of the steel portal frames installed by others or internal layout changes. The Board noted that the Respondent was a labour only builder, was not responsible for sub trades, did not call for the inspections, and that he was being pressured to complete work out of sequence. As such the Board has decided that the Respondent has not committed a disciplinary offence.

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[8] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[9] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[10] Ali v Kumar and Others [2017] NZDC 23582 at [30]
[11] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[12] [2001] NZAR 74
[13] (1989) 16 NSWLR 197 (CA) at 200

<u>Contrary to a Building Consent – Building Consent Changes</u>

[32] Under section 40 of the Act all building work must be carried out in accordance with a building consent.

[33] Building consents are granted under section 49 of the Act. A building consent can only be grated if the provisions of the Building Code will be satisfied. Section 49 provides:

> ***49 Grant of building consent***
>
> *(1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.*

[34] Once a building consent has been granted any changes to it must be dealt with in the appropriate manner. There are two ways in which changes can be dealt with; by way of a minor variation under section 45A of the Act; or as an amendment to the building consent. The extent of the change to the building consent dictates the appropriate method to be used. The critical difference between the two options is that building work under a building consent cannot continue if an amendment is applied for.

[35] In the instance the changes to the stairs and garage wall required an amendment. As building work cannot be carried out without a building consent, and an amendment to a building consent is to be treated as if it were an application for a building consent, it follows that any building work that relates to an amendment cannot be carried out until the amendment is granted.

[36] From a strict liability perspective, the Respondent should not have carried out any building work once the decision to change the stairs and garage wall had been made. The Board noted, however, that he was operating under instructions given by an engineer and that he was not dealing with consenting matters.

[37] In this respect the Board considers that the judicial directions as regards seriousness need to be applied. As such it has decided, on the basis of the above factors, that the disciplinary offence has not been committed.

Signed and dated this 27th day of March 2020

**Mel Orange**
Presiding Member