Before the Building Practitioners Board

	BPB Complaint No. C2-01816
Licensed Building Practitioner:	Kevin Garton (the Respondent)
Licence Number:	BP 107389
Licence(s) Held:	Carpentry and Site AOP 1

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:	17 July 2018
Decision Date:	30 July 2018

Board Members Present:

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

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.

Contents

Introduction 2
Function of Disciplinary Action 2
Evidence 3
Board's Conclusion and Reasoning 7
Negligence and/or Incompetence 9
Contrary to a Building Consent 10
Disrepute 11
Appendix One – Respondent's Detailed Response 13

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 (s 317(1)(b) of the Act);

(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

(c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) 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.

Evidence

[5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. 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] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Kevin Garton	Respondent
[Omitted]	Complainant
[Omitted]	Builder

[7] The Complaint related to a relocatable dwelling. The dwelling was initially being constructed by [Omitted] for his own use with the assistance of his father who was also supervising the restricted building work on the build. Part way through construction the Complainant entered into a conditional sale and purchase agreement to buy the completed dwelling on a section owned by [Omitted] from [Omitted]. The conditions of sale included that a property inspection was completed and a code compliance certificate was issued.

[8] The Complainant's understanding was that, as she had originally approached the Respondent at Advance Build to enquire about a relocatable home, and that as the building consent named Advance Build (the Respondent's business) as the builder, and that it was based on Advance Build plans and specifications, that the Respondent was responsible for the build.

[9] The Complainant also submitted that the Respondent, in providing a record of work for the restricted building work he carried out and/or supervised he was providing certification that the associated building work was compliant and had been completed to an acceptable standard. She stated, in her Complaint:

> *I consider that Kevin Garton, BP 107389, should be held accountable for negligence or incompetence in his role as the LBP who supervised the work and provided a Record of Building Work (RoW) on 30 October 2013. The RoW*

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

dated 30 October 2013 was in respect of Building Consent 2013 - 705 issued on 28 February 2013.

My understanding of the purpose of a RoW provided by a supervising LBP is to attest to the fact that the LBP provided direction and oversight of the building work to the extent that the LBP ensured that the building work:

Was performed competently,

Complied with the building consent and the plans and specifications to which the building consent relates, and

Was Code compliant.

The faults that Kevin Garton, the supervising LBP, overlooked during the construction of the house are serious and violate a number of Building Code clauses. In addition, the house does not comply with BC 2013 - 705 and there is no formal documentation on the Building Authority's file to support changes to the Building Consent. Local builders who have visited the site and two independent building inspectors have commented on the many examples of poor workmanship.

[10] The building work in question commenced in March 2013 and completed on or about 30 October 2015. It was part constructed off site (but not at Advance Build's fabrication plant) prior to being transported to site in or about December 2013, tied into foundations and finished. Code of compliance was granted in November 2015. The Complainant maintained that that code compliance certificate had been issued in error and she advised that she was taking other action in this respect.

[11] The matters that the Complainant raised in her complaint included issues with the roof system, cladding, foundations, drainage, internal finishing and decking. The Complainant included reports from various persons including from [Omitted], [Omitted] and [Omitted]. The Complainant set out:

[Omitted] inspected the roof system and confirmed that the installation was not Code compliant. [Omitted] stated that their warranty applied only to the product that left their factory and did not include the faulty installation of a roof system.

[Omitted] cladding representative inspected the property and found that the installation of the cladding was faulty and commented on the over punched nails, the spacing of the nails and the failure to leave the required gap between the cladding and some window flashings.

Based on the photographs that [Omitted] took on site, [Omitted], [Omitted], made the following comments about Advance Build's installation of the external cladding on the house:

Big gaps between board -As per figure 7, board must be face fixed.

Punched Nails -As per clause 5.3, all nails must be driven flush with the board surface.

Joint are too close to stud - As per clause 6, joints may be located centrally between studs no closer than 150 mm from the edge of a stud.

Window Head -As per figure 12, minimum S mm gap is required between bottom edge and window head flashing.

No stop ends on head flashing -As per figure 12, stop ends must be installed.

[12] The [Omitted] report was supported with photographs of building work that was complained about. It covered the areas noted in paragraph [11] above. An appendix to the Complaint specified individual items complained about.

[13] The Respondent provided a written response to the Complaint by way of his lawyer which denied the allegations and noted that the matters complained about were not matters that the Respondent had carried out or supervised. The response noted:

a. *He (the Respondent) had a limited role in the construction of the house which was confined to works carried out at a yard where the house was partially built at [Omitted]*

b. *Once the partially built house left the yard and was transported to site at [Omitted], he had no further role in finishing off the house;*

c. *The construction works were to be finished off by other contractors who he was not supervising;*

d. *The limited supervisory work that Mr Garton did was carried out competently, in compliance with the building consent, plans and specifications to which the building consent related and was code compliant.*

[14] The response also noted council inspections were passed and that:

6. *Mr Garton's supervisory role at the yard was limited to construction of the subfloor, erection of wall framing, installation of cladding and the position of the roof cladding and flashings. He also supervised the window installation and airseals/flashings at the yard. Mr Garton's supervision of these works were completed to the necessary standard at that stage of construction.*

8. Prior to the building leaving the site, Mr Garton made his son aware that the roof flashings weren't complete. [Omitted] had engaged a roofing contractor to complete this work once it was moved to site.

9. At this stage, now the building had reached a lockable state, it was transported to site at [Omitted]. Mr Garton was made aware that the building suffered some minor damage during transportation but he was not engaged to supervise this work. Once the building left the yard, Mr Garton had no further involvement with the finishing off. This work was to be completed by contractors engaged by his son.

10. Sometime later, Mr Garton visited the house at [Omitted] to supervise the construction of the deck. He observed that the construction had been carried out in compliance with the building code - safety for falling etc.

[15] In response to the Complaint's detailed appendix the Respondent provided the details set out in Appendix One of this decision.

[16] The Complainant provided further detail in support of her complaint post the issue of the Registrar's Report. The further detail included a critique of various matters in the Registrar's Report.

[17] Included in the documentation before the Board were two records of work. One was from the Respondent. It noted the Respondent had supervised:

Foundations and sub floor framing	*~~Install timber pile foundations (subfloor fixings and braces by others)~~* *Garage concrete slab & footings, bearers, floor joists, flooring deck piles & framing*
Walls	*Install prenailed wall frames & tie downs*
Roof	*Install roof trusses, purlins & tiedowns* *~~rafters, purlin & tie downs~~* *~~Veranda rafter, purlin & tiedowns~~*
Bracing	*Roof strap bracing* *GIB bracing panels*
Other	*Timber handrail to decks*
Roof cladding or roof cladding system	*Profiled roofing and flashings* *Roof underlay* *netting*
Wall cladding or wall cladding system	*Building wrap & flashings* *Windows, tape & foam seal* *Cladding & fixings* *Eaves & fascia*

[18] The other record of work was from a licensed building practitioner who had also completed foundation work. It noted the author had carried out and supervised:

Foundations	*Install timber pile foundations (subfloor fixings*

and sub floor framing *and braces by others)*

[19] At the hearing the Respondent clarified that he both carried out and supervised the restricted building work noted in his record of work. The building work prior to transportation was completed over weekends and that he was present for about 90% of it. The Respondent also stated, contrary to what was set out in his lawyer's correspondence, that he was involved in some aspects of the build through till the end. He also accepted that his statements at the hearing as to the extent of his involvement were at variance with some of those in Appendix One such as the completion of barges, facia and flashings which he accepted he did carry out and supervise.

[20] The Respondent stated that, notwithstanding the above, he only had a limited involvement in the finishing work once the building was located on site but that he did construct the deck and stairs and that he did do the sub floor fixing and install baseboards. He also stated he was not responsible for ensuring that damage that had occurred during transport but that he did point the damage out to [Omitted].

[21] Both [Omitted] and the Respondent stated that a roofer was to be engaged to rectify roofing and flashing issues caused by transportation and to complete roofing. This did not occur. [Omitted] had been hospitalised at about the time it was meant to have been undertaken but took no steps to ensure it had been completed and worked on an assumption that it had been.

[22] [Omitted] also stated that most of the finishing work was undertaken by him and his friends but that it did not involve restricted building work. He was aware that there were items that had to be remediated but again worked on the assumption that all building matters were acceptable as a code of compliance certificate was issued.

Board's Conclusion and Reasoning

[23] 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 or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);

(c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)

and **should not** be disciplined.

[24] There was no doubt that there were matters as regards the build that did not meet building code requirements and/or were not completed to an acceptable standard. The question for the Board was the degree to which the Respondent was responsible for the matters complained about.

[25] In this respect the Board does note that the Complainant has misinterpreted the function and purpose of a record of work. A record of work given by a licensed building practitioner does not, of itself create any liability, that would not otherwise exist. Section 88(4) provides:

> *(4) A record of work given under subsection (1) does not, of itself,—*
>
> *(a) create any liability in relation to any matter to which the record of work relates; or*
>
> *(b) give rise to any civil liability to the owner that would not otherwise exist if the licensed building practitioner were not required to provide the record of work.*

[26] The legislative history of the record of work provisions show that they are designed to create a documented record of who did what in the way of restricted building work under a building consent. A record of work avoids uncertainty in situations where a single lead contractor (who may or may not be licensed) has engaged with the owner and/or territorial authority by going beyond those persons to all those that are carrying out restricted building work. It ensures all those involved in carrying out or supervising restricted building work can be identified by the owner (and any subsequent owner) and the territorial authority along with the restricted building work they carried out.

[27] Records of work are not statements as to the compliance or quality of the restricted building work that they cover. The declaration that is required by the associated regulations is simply that the licensed building practitioner "carried out or supervised the restricted building work recorded …"

[28] Given the above the Complainant's submission that the record of work was an assurance that the restricted building work was performed competently, complied with the building consent and the plans and specifications to which the building consent relates, and was Code compliant was misinformed.

[29] The Board considered that the matters that required attention and in particular remediation and which formed the basis of the Complaint were, in the main, items that needed to be attended to as part of finishing and that responsibility for them fell to the owner [Omitted], not to the Respondent. There were also items, such as foundation work and drainage work that other licensed persons were responsible for.

[30] The Board found that those items that the Respondent was responsible for were such that they did not reach the seriousness threshold as outlined in the following.

[31] Notwithstanding the Board's findings the Respondent should note that his conduct, whilst not meeting the threshold for disciplinary action, was not exemplary and that in future he is cautioned to take more care.

[32] The Respondent should also note that when completing a record of work he must record that he has both carried out and supervised restricted building work if he does carry out aspects of it and, if necessary, distinguish between that which he carried out and that which he supervised.

Negligence and/or Incompetence

[33] Turning to the allegation of negligence and incompetence the Board notes that they 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.*

[34] 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 Courts[8].

[35] 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"*.

[36] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test[10]. 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.

[37] 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 Act[11]. 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 practitioner[12].

[38] The Board notes that the purposes of the Act are:

> ***3 Purposes***

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

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.

[39] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code[13] and be carried out in accordance with a building consent[14]. 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.

[40] Turning to seriousness in *Collie v Nursing Council of New Zealand*[15] 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.*

[41] It is in considering the seriousness of the matters that the Respondent was responsible for being matters pre-transport and issues with regard to the decking at site were not such that, having consideration to the foregoing discussion, were not such that a disciplinary action should follow.

[42] Had the Respondent been responsible for remediation of matters on site once the building had been transported then the finding would have been different.

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

[43] The same applies to the building contrary to a building consent. Had the Respondent been the person who was responsible for completing the dwelling and for final

[13] Section 17 of the Building Act 2004
[14] Section 40(1) of the Building Act 2004
[15] [2001] NZAR 74

compliance then the Board may have found that he had carried out building work contrary to a building consent. As he was not the Board has not made that finding.

Disrepute

[44] Finally with regard to disrepute the Board considered the disrepute provisions in Board Decision C2-01111[16] and discussed the legal principles that apply.

[45] The Courts apply an objective test when considering disrepute. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*[17] the Court of Appeal held that:

> *the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant*.[18]

[46] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:

- criminal convictions[19];
- honest mistakes without deliberate wrongdoing[20];
- provision of false undertakings[21]; and
- conduct resulting in an unethical financial gain[22].

[47] The Board did not receive or hear any evidence that indicated that any of the above conduct had occurred. As such the Board finds that the Respondent has not brought the regime into disrepute.

Signed and dated this 30th day of July 2018

[16] Board decision dated 2 July 2015.
[17] [2012] NZCA 401
[18] [2012] NZAR 1071 page 1072
[19] *Davidson v Auckland Standards Committee* No 3 [2013] NZAR 1519
[20] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401
[21] *Slack, Re* [2012] NZLCDT 40
[22] *Collie v Nursing Council of New Zealand* [2000] NZAR 7

Chris Preston
Presiding Member

Appendix One – Respondent's Detailed Response

1. Faulty installation of the roof system:

(a) Ends of barge flashings incomplete: Agree but this did not form part of his supervisory role.

(b) External corners not fixed: Agree but this did not form part of his supervisory role.

(c) Barge and fascia flashings not fixed: Agree but this did not form part of his supervisory role.

(d) Roof sheet fixings overtightened: Agree but it is still watertight.

(e) Roof fixings skewed: Do not know but no effect on watertightness.

(f) Soft edge flashing: Agree but this did not form part of his supervisory role.

(g) Barge and fascia flashing damaged: Agree but occurred while being transported to site.

(h) Under/lashings: Disagree and this did not form part of his supervisory role. Other contractors were to complete.

(i) Gaps in barge flashings: Agree but this did not form part of his supervisory role. Other contractors were to complete.

(j) External corner is open: Agree but this did not form part of his supervisory role. Other contractors were to complete.

(k) Internal corner is open: Agree but this did not form part of his supervisory role. Other contractors were to complete.

2. James Hardie Cladding:

(a) Cladding over some windows... : Agree but still weathertight.

(b) Buttjoints: Disagree.

(c) Cladding fixtures overpunched: Disagree.

(d) Cladding not staggered: Agree but still weathertight.

(e) Butt Joints opening up: Agree but this was caused by transport damage and it is still weathertight.

(f) External cladding not fixed: Agree but this was caused by transport damage.

3. Foundations:

(a) Timber cross-bracing is a composite: Agree, but this was passed by Council.

(b) Timber cross-bracings are touching the ground: Agree but the ground has been filled since moving to site.

(c) Some posts have not been chamfered: Agree, but this was passed by Council and was not part of Mr Garton's supervisory work.

(d) Pile plates are installed into the end grain of wood; Agree, but this was passed by Council. This was not part of Mr Garton's supervisory work.

4. Drainage:

None of the drainage work was supervised by Mr Garton. These were not in the scope of his engagement.

5. Internal:

(a) Gaps in the sealant: None of this internal work was supervised by Mr Garton. These were not in the scope of his engagement.

(b) Area between bath and wall lining not sealed: Not part of Mr Garton's supervisory work.

(c) Crack in the lining: Damage sustained during transport to site and not part of Mr Garton's supervisory work.

6. Deck:

None of the items listed under this heading are RBW or licensing issues.