Before the Building Practitioners Board

	BPB Complaint No. C2-01814
Licensed Building Practitioner:	Warren Pointon (the Respondent)
Licence Number:	BP 100921
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:	21 June 2018
Decision Date:	30 July 2018

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
Bob Monteith, LBP Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design 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 under section 317(1)(b) of the Act.

Contents

Introduction 2
Function of Disciplinary Action 2
Evidence 3
Board's Conclusion and Reasoning 4
Right of Appeal 7

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 offence the Board resolved to investigate was 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 offence alleged has 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:

Warren Pointon	Respondent
[Omitted]	Complainant
[Omitted]	Complainant

[7] The hearing was conducted in two parts. The hearing was open to the public during the time the Complainants gave their evidence and the hearing was conducted in private when the Respondent provided his evidence. The Board had submissions from the Respondent as to why he wanted to give his evidence in private and the Board agreed to this.

[8] The Complainants outlined the issues they had which were workmanship and project management. The emphasis was on the project management. The parties had agreed to a contract of engagement and a fee of $70,000 to project manage the building work.

[9] In the Complainant's mind this not only included the coordination of onsite works by other sub trades but also the quality control of their work, the collection and presentation of invoices for payment, liaison with the council over minor variations and if required changes to the building consent.

[10] The Complainants allege that the respondent did not quality control all the work and gave some examples. These included that there were errors in the presentation of the invoices supplied by the sub trades, that the Respondent failed to advise the Complainants of minor variations and in the case of a significant change to the plan (being the change to the upper floor staircase) that the Respondent did not apply for a change to the building consent that was required.

[11] The Respondent in his evidence agreed that he was responsible for the coordination of the sub trades and to make sure their work was of an acceptable standard. He was on site most days to ensure this happened and remained prepared to make sure any issues that were raised would be dealt with and there were still some trades returning to fix minor issues or do completion work.

[12] He agreed that there were a few sub contactor invoices that had errors in them but there were not many and they were quickly fixed. He did accept however that he needed to make sure his systems caught such errors in the future.

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

[13] In the case of the need to apply for changes to the building consent he pointed to the building contract, section 2.2 (a), which stated that the owner shall "*ensure that all necessary consents have been obtained".* He also pointed to emails with the engineer in regards to the upper floor stair changes and was of the view that it was the owner, architect or the engineer who were responsible for any change to the consent.

[14] In terms of the workmanship issues and non-completed work while he did not disagree there were some issues they either had been dealt with or were being dealt with and were simply part of the normal building process and "snag list".

Board's Conclusion and Reasoning

[15] The Board has decided that the Respondent **has not** carried out or supervised building work or building inspection work in a negligent manner (s 317(1) (b) of the Act) and should be disciplined.

[16] 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.*

[17] 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].

[18] 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"*.

[19] 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.

[20] 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

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[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)

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].

[21] 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.*

[22] 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.

[23] 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.*

[24] In the case of the poor workmanship and uncompleted work the Boards view is that while it is the objective to always get building work completed correctly first time

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

the reality is this is not always the case and there are times when re work is required and this is generally done towards the end of the contract and at the contractors expense.

[25] In this instance while the Board feels some of the issues should not have happened and the Respondent is put on notice that as a holder of a Site AOP 2 licence quality control is one of the competencies, it does not feel the threshold for negligence or incompetence has been met.

[26] In the case of the amendments to the building consent and specifically the upper floor stairs the Board accepts that the Respondent did communicate with the engineer who was under the direct control of the complainant and that the contract says that consents are the responsibility of the owner. Having said this, the contract was less clear as to the responsibilities of the Respondent in the case of variations and recommends this is better covered in the contract going forward.

[27] Notwithstanding who was responsible for the changes to the building consent the Respondent accepted that he did not wait to see if the change to the consent had been issued. The Board in past decisions has made it clear that one of the fundamental principles underpinning the consent process is that contractors build to the consented drawing and to approved changes to the consent. This is also a requirement under section 40 of the Act which requires that all building work be completed in accordance with the building consent issued. That section makes it an offence to do otherwise. To undertake building work prior to the change being approved by the Council and sighting the approved changes, runs the risk of work being done only to find out that Council have not approved the change and the work done does not comply.

[28] Under section 45(4) of the Act an application for an amendment must be made as if it were an application for a building consent. This means that building work in relation to it cannot be carried out until such time as it is granted.

[29] It is also to be noted that the Licensed Building Practitioners Rules 2007 (the Rules) provide, as regards the competencies for a licensed building practitioner with a Site licence:

> 3.1.2 Identify need for, and seek clarification and/or additional design documentation from the Design Lead, as required.
>
> 5.1.1 Obtain site plans, design details and working drawings for building work under the practitioner's supervision, as required.
>
> 5.1.7 Identify and obtain appropriate documentation required by the owner/owner's agent to confirm compliance with the building consent.

[30] As such responsibility for building consent changes falls within the responsibilities of a licensed building practitioner with a Site Licence.

[31] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered that while the Respondent has departed from what the Board considers to be an accepted standard of conduct the respondent did have discussions with the Engineer and with Euro Class and simply nobody has taken the lead in making sure a variation to the consent was obtained.

[32] The Board does want to make it clear that in future the LBP makes sure that the appropriate consents and amendments are in place as should the LBP who undertook the work.

Right of Appeal

[33] The right to appeal Board decisions is provided for in section 330(2) of the Act[i].

Signed and dated this 30th day of July



Chris Preston
Presiding Member

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[i] ***Section 330 Right of appeal***
(2) A person may appeal to a District Court against any decision of the Board—
(b) to take any action referred to in section 318.

Section 331 Time in which appeal must be brought
An appeal must be lodged—
(a) within 20 working days after notice of the decision or action is communicated to the appellant; or
(b) within any further time that the appeal authority allows on application made before or after the period expires.