

Before the Building Practitioners Board

	BPB Complaint No. CB24002
Licensed Building Practitioner:	Brad Forsyth (the Respondent)
Licence Number:	BP 108854
Licence(s) Held:	Carpentry

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	Board Inquiry
Hearing Location	Hamilton
Hearing Type:	In Person
Hearing Date:	2 April 2019
Decision Date:	10 May 2019

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
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.

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Introduction

[1] The hearing resulted from a Board Inquiry into the conduct of the Respondent and a Board resolution under regulation 22 of the Complaints Regulations¹ 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

Consolidation

[5] The Board Inquiry resulted from evidence disclosed in the Registrar’s Report for a complaint about the conduct of Marshall Hutt (CB24100) on which the Board resolved to hold a hearing. With the consent of those concerned in the respective hearings the hearings were consolidated.

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] 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.

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

Brad Forsyth	Respondent
[Omitted]	Witness for the Respondent
[Omitted]	Complainant
[Omitted]	Complainant
Steve Alexander	Special Advisor to the Board
Marshall Hutt	Respondent in CB24100
[Omitted]	Witness for the Respondent in CB24100

[9] The Complainants engaged [Omitted], Mr Hutt’s company, to undertake the construction of a new residential dwelling under a building consent. The carpentry work was subcontracted to 4 Site builders Limited. Brad Forsyth, the principle of that company, was the licensed building practitioner on the project. Mr Forsyth gave evidence that whilst he carried out the set out of the site his non licensed employee [Omitted] carried on with the job and that he was being supervised by [Omitted]. Mr Hutt’s position was the opposite to this, i.e. that Mr Forsyth was the supervising licensed building practitioner.

[10] The Complainants made various allegations including that there were unacceptable delays in the build and quality issues with the work itself. Photographs and other documentation were provided in support of the allegations.

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

- [11] The Board engaged the assistance of a Technical Assessor to review the allegations and provide a report. The hearing focused on the issues noted in the report.
- [12] Mr Hutt gave evidence that when he had originally priced the house [Omitted] had the capacity to deliver but that sales of other houses changed this and that by the time the Complainants confirmed the purchase the production schedule was full. This resulted in delays in the project and quality issues which Mr Hutt stated he regretted and apologised for. He stated that he was not proud of the final product but that his business did have a long-standing good reputation.
- [13] Mr Hutt and Mr Forsyth both noted that there were extended periods of wet weather over the period of the build and that this may have affected the pile foundation and levels of the dwelling as the ground settled and the building dried.

Showers

- [14] The Technical Assessor noted that the base tends to retain water around the outside edge and that whilst there were generally adequate falls across the shower tray towards the drain there was a low point on the outer side around the perimeter.
- [15] Mr Hutt noted that [Omitted] had engaged licensed sub trades including for the installation of the shower and this was done under his direction. He stated the shower was checked at the time of installation and there were no issues. Both he and Mr Forsyth believed foundation settlement may have caused the issue.

Bathroom Floor Sealing

- [16] The Technical Assessor noted that the bathroom floor was particle board and that provision had not been made for moisture impervious membranes.
- [17] Mr Hutt and Mr Forsyth both stated that a treated strand board was used and that it had been sealed with a clear sealant and that this was what had been consented. They considered subsequent wear and tear on the floors which had not been covered had caused a deterioration in the sealing. The Technical Assessor's opinion was that the floor would still be non-compliant.

Living Room Floor

- [18] The Technical Assessor noted that he had not been able to carry out a full survey of levels but that there was suggestion of a deviation from horizontal which was greater than 5mm within a 10 metre length and possibly greater than 10mm.
- [19] Mr Hutt and Mr Forsyth both considered settlement may have been responsible and that the foundation was done in consultation with a Geotech engineer. The Technical Assessor doubted that would have been the cause.
- [20] [Omitted] noted there was a peak in the floor when it was laid. He considered that it had not been sanded back correctly in preparation for floor covering. The Complainant gave evidence that the floor covering installer had to use a filling compound prior to laying the coverings.

[21] The Technical Assessor noted:

5.13 *While the original builder may have provided an insufficiently level and straight floor, equally the laminate installer should not install the laminate if the floor is not in suitable condition to receive his product.*

5.14 *Overall, with the information that is available, the most likely explanation for the movement is that the laminate is not sitting tightly on the floor in this region, causing an accentuated movement in the tall, narrow shelves adjacent.*

Ceiling

[22] The allegation was that the ceiling in the living area was not straight and had a wavy effect. The Technical Assessor noted that, based on visual observations only, he did not consider that the ceiling looked unacceptably out of line or wavy.

[23] Butt joints in materials were discussed. [Omitted] stated that a compliant gap was left between materials. The Technical Assessor noted that there were two butt joints in the ceiling, and that they were visible in the photos and that distortion can occur with expansion. He doubted that the sheets had been installed with gaps.

Lintel

[24] Evidence was heard as regards an area where plasterboard had pushed out. Mr Forsyth stated he had wanted to remove a window and reinstall it so as to deal with the issue but that Mr Hutt would not allow him to.

Cladding

[25] The Technical Assessor noted minor issues. The main issue raised was with wedges at door facings. These were loose and some fell out. [Omitted] noted they were difficult to glue in place and they were a common problem with the product and that the same had happened on a neighbouring house. Mr Hutt noted a recent change in specifications and that it was a maintenance issue.

[26] The Technical Assessor also noted that fibre cement board had not been installed on batten. [Omitted] stated it was on battens. A lack of silicon between joints was also raised. Mr Hutt stated it was the painter's job.

Garage Lining

[27] The Technical Assessor considered the garage lining was more suited to an agricultural shed than a domestic garage. It was a patchwork of different sized sheets. [Omitted] stated he was told to just use what was available. The garage was insulated. A minor variation to the building consent was not obtained for the insulation.

Delays

- [28] Mr Hutt was questioned as regards the delays between the first final inspection in September 2017 and the issuing of a code compliance certificate in January 2018 noting that there were only minor items to be attended to. He stated they were locked out in December but was not able to account for why issues had not been attended to.

Board's Conclusion and Reasoning

- [29] 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.
- [30] The Board did not accept that the Respondent was not the Supervisor of [Omitted]. He was his employer and his company took on the contract to carry out the carpentry work on the build. There were issues with the build and with the acceptable standards of aspects of it such that the Respondent was negligent in his supervision. The negligence was not, however, serious enough to warrant a disciplinary outcome.
- [31] 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*⁶ test of negligence which has been adopted by the New Zealand Courts⁷.
- [32] The New Zealand Courts have stated that assessment of negligence in a disciplinary context is a two-stage test⁸. 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.
- [33] 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 Act⁹. 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 practitioner¹⁰.

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁷ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹⁰ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

[34] The conduct in this instance was in relation to the Respondent's supervision. Supervision is defined in section 7¹¹ of the Act. The definition states:

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.

[35] In C2-01143 the Board also 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.

[36] The Board also needs to consider whether the work met the requirements of the building code and if not the level of non-compliance.

[37] The person carrying out the build under the Respondent's supervision was experienced and the build was not complex. The non-compliance issues, was significant to the Complainants were not serious from a building code compliance perspective. It is within this context that the Board has considered whether or not the conduct has meet the seriousness threshold.

[38] In *Collie v Nursing Council of New Zealand*¹² the Court's noted, as regards the seriousness 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.

[39] In *Pillai v Messiter (No 2)*¹³ the Court of Appeal stated:

¹¹ 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.

¹² [2001] NZAR 74

¹³ (1989) 16 NSWLR 197 (CA) at 200

... 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.

- [40] Taking the above tests into consideration the Board decided that the Respondent's conduct was not sufficiently serious enough to warrant a disciplinary outcome.
- [41] Whilst the Board has made the above finding the Respondent is cautioned as regards his hands-off approach to supervision. He would be well advised to obtain a copy of the Supervision Guidelines developed by the Ministry of Business Innovation and Employment and to put them into practice.

Signed and dated this 10th day of May 2019



Chris Preston
Presiding Member