

Before the Building Practitioners Board

	BPB Complaint No. CB25054
Licensed Building Practitioner:	Kunrong Chen (the Respondent)
Licence Number:	BP 130993
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	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	2 July 2019
Decision Date:	15 July 2019

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
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 under section 317(1)(b) or (d) of the Act.

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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 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); and
 - (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).

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.”

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

- [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 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.
- [6] 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.
- [7] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|--------------|--------------------------------|
| Kunrong Chen | Respondent |
| Doug Lithgow | Auckland City Council |
| [Omitted] | Complainant |
| [Omitted] | Office Manager for Complainant |
- [8] The Complainant’s main concern was that he had made full payment to the Respondent who had not completed all the work that he had been paid for. This included such things as door hardware and stair hand rail and, in the case of Lot 5, that the Respondent had re-used cladding materials which, in his view, were not acceptable and needed to be replaced as it had been rejected by the Housing New Zealand Inspector.
- [9] The Complainant in respect to the cladding on Lot 5 claimed that the flashing installed between the two different cladding types was not installed as per the Building Consent and that the finish was of a poor quality.
- [10] In reply the Respondent presented several photo’s showing the finished work, being the door hardware and the stair handrail, as well as the finished and painted cladding.
- [11] On questioning from the Board, he confirmed that he did not do the above work as he was no longer on site. The work was completed by other contractors and in the case of the reused cladding the Complainant said it had been replaced by another contractor.

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

- [12] Mr Lithgow when shown the picture of the re used cladding which had several holes penetrating it from its previous use was asked if this could be repaired in situ to an acceptable standard or whether it would need to be replaced. His view was that the holes could be filled, sanded, painted and that this would be acceptable to the Council.
- [13] He was also asked if the moving of the flashing to be fitted on the joist was acceptable even it was not strictly in line with the Building Consent. He confirmed that this would be accepted by the Council as meeting building code requirements.

Board's Conclusion and Reasoning

- [14] 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.
- [15] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

- [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 Courts⁸.
- [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 test¹⁰. The first is for the Board

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)

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 assessment of what is appropriate conduct, bearing in mind the purpose of the Act¹¹. 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 practitioner¹².

[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 Code¹³ and be carried out in accordance with a building consent¹⁴. 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

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

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 this case the Board considered that the primary issue was contractual in that the Complainant claimed he had paid for work to be done and completed and it was not.
- [25] In the case of the issues with Lot 5 in respect of the cladding given the evidence of the Council the Board is of the view that this does not reach the threshold for a disciplinary outcome.

Contrary to a Building Consent – Minor Variations

- [26] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. Section 40 of the Act provides:

40 Buildings not to be constructed, altered, demolished, or removed without consent

- (1) *A person must not carry out any building work except in accordance with a building consent.*
- (2) *A person commits an offence if the person fails to comply with this section.*
- (3) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.*
- [27] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code. In doing so the building consent process provides protection for owners of works and the public at large. This accords with the purposes of the Act.
- [28] 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.
- [29] If changes are made to what is stipulated in the building consent and the correct process for the change is not used then the building work can be said to have not been completed in accordance with the building consent. Unlike negligence contrary to a building consent is form of strict liability offence. All that need be proven is that the building consent has not been complied with, no fault or negligence must be

established¹⁶. The Board does, however, consider that the seriousness of the disciplinary offending still needs to be taken into account.

- [30] The only issue before the Board was the moving of the flashing down to allow it to be secured to the joists. The Council witness gave evidence that this was a sensible thing to do and would have been accepted by it as being compliant with the Building Code. The Board does make the comment that such changes should be discussed with the Council to determine if a change to the building consent was required. This was not done.
- [31] The Board will not, however, take action this time as the matter is not sufficiently serious enough but places the Respondent on notice that he needs to be more diligent in respect to handing changes to the consented documents.

Signed and dated this 15th day of July 2019



Chris Preston
Presiding Member

¹⁶ *Blewman v Wilkinson* [1979] 2 NZLR 208