

Before the Building Practitioners Board

	BPB Complaint No. CB25106
Licensed Building Practitioner:	Hee Seok Shim (the Respondent)
Licence Number:	BP 124238
Licence(s) Held:	Site (Site 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:	3 September 2019
Decision Date:	8 October 2019

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.

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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 (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) 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.

Background

- [5] The Respondent holds a site licence. He is not authorised to carry out or supervise restricted building work. The complaint, as presented, indicated that the Respondent had been the supervisor of the restricted building work that had been carried out. It was on that basis that the Board decided to further investigate whether the Respondent had carried out or supervised restricted building work that he was not licensed to carry out or supervise and whether he had been negligent in how he had managed the build.

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:
- | | |
|---------------|-------------------------------------|
| Hee Seok Shim | Respondent |
| [Omitted] | Complainant |
| [Omitted] | Witness for the Respondent, Builder |
- [9] The Complainant engaged J & K Total Services Limited to carry out an alteration to her dwelling. A building consent had been issued for the building work. [Omitted], the sole director of and 50% shareholder of the company, carried out the build with his staff. [Omitted] is not a licensed building practitioner but does have considerable experience as a builder in the residential sector. He hired the Respondent to provide project management services and to ensure the restricted building work was supervised by a licensed building practitioner as per the requirements of the Act. It is noted that [Omitted] and the Respondent are joint directors and shareholders of JS Global Development Limited and as such are known to each other.
- [10] The Respondent, who holds a Site Area of Practice 2 Licence, gave evidence that he had engaged [Omitted] to be the supervising licensed building practitioner.

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

[Omitted] was licensed in Carpentry on 20 December 2013 (BP[Omitted]). [Omitted] was referred to in a Notification of Licensed Building Practitioner form submitted to the Auckland Council on 7 December 2015 as the licensed building practitioner would be doing “all carpentry work”.

- [11] The Respondent stated that he had worked on a number of projects with [Omitted] and that the normal course of events was that [Omitted] would be on site carrying out and supervising building work. On this occasion they were very busy with other building jobs and [Omitted] was working on a different site. As such he was not on site when the building work was being carried out. The Respondent stated that he did attend the site on one occasion some time prior to the building work being ready for an inspection to check the work that had been completed. The building inspection referred to was a Preline Building Inspection. It was carried out on 15 December 2015. It was recorded as a pass.
- [12] The Complainant raised various quality and compliance issues with the building work carried out by [Omitted]. The matters related to health and safety concerns, incomplete work, changes that had not been authorised by her and work that was poorly carried out. Included with the complaint were photographs of the matters complained about and a letter from another licensed building practitioner who was known to the Complainant corroborating the issues raised and noting that a beam installed did not meet building code requirements.
- [13] The Respondent gave evidence that neither he nor [Omitted] had any involvement in the building work post the Preline Inspection on 15 December 2015 which was recorded by the Council as a pass. He stated there were no issues with the building work up until that point in time.
- [14] A subsequent Council Preline Inspection dated 27 March 2018 recorded the building work as a fail. It noted “a dispute between the LBP and the owner”. It further stated:

Inspected work to consented plans only for the new study area.

Inspector’s Comments

- 1. Point loads to external wall incorrect to plan, there are no double trimming studs under the beam.*
- 2. Point loads for new beam to new study area has been covered to the internal side.*

This inspection has failed please this is not a full list for this inspection.

- [15] The Board was also provided with a copy of a Disputes Tribunal Order dated 24 August 2018. The proceedings were brought by the Complainant against the [Omitted] and J & K Total Services Limited. It noted that between 2016 and 2018 the complainant “continued some of the work herself with the assistance of friends”.

Board's Conclusion and Reasoning

[16] 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 (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act)

and should not be disciplined.

[17] Whilst the Board has found that the Respondent has not committed a disciplinary offence the Respondent should note that the Board had concerns with the Respondent's conduct. These are outlined under its discussion with regard to negligence and incompetence where it has found that the Respondent's conduct fell below the expected standard for a licensed building practitioner but that the negligence did not reach the threshold for a disciplinary finding. The Respondent is cautioned to take greater care in the future.

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

Not Licensed to Carry Out or Supervise Restricted Building Work

[19] The Board's consideration of the charge under section 317(1)(c) came about as a result of the complaint and complaint documentation indicating that the only licensed building practitioner involved in building work that was being carried out under a building consent was the Respondent who holds a Site Licence which does not authorise him to carry out or supervise restricted building work.

[20] As noted, the building work was carried out under a building consent and as such certain elements involved restricted building work. Under section 84 of the Act:

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

[21] Clause 5 of the Building (Definition of Restricted Building Work) Order 2011 (New Zealand) provides:

5 *Certain building work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work.*

(1) *The kinds of building work to which this clause applies are restricted building work for the purposes of the Act.*

(2) *This clause applies to building work that is—*

(a) *the construction or alteration of—*

(i) *the primary structure of a house or a small-to-medium apartment building; or*

- (ii) *the external moisture-management system of a house or a small-to-medium apartment building; and*
- (b) *of a kind described in subclause (3); and*
- (c) *of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.*
- (3) *The kinds of building work referred to in subclause (2)(b) are—*
 - (a) *bricklaying or blocklaying work;*
 - (b) *carpentry work;*
 - (c) *external plastering work;*
 - (d) *foundations work;*
 - (e) *roofing work.*

[22] The Respondent is a licensed building practitioner with a Site Licence.

[23] The licensing classes designated under section 285 were created by Order in Council in the Building (Designation of Building Work Licensing Classes) Order 2010. It designates the types of building work that a licensed building practitioner can carry out or supervise. Under clause 4 of the Order Design the following are the types of building work each class of licence can carry out. A Site Licence is designated as a General Class of Licence. This compares to Carpentry which is a Trade Licensing Class. The following is the comparative provisions for each:

<i>Licensing class</i>	<i>Type of building work</i>
<i>General Licence Classes</i>	
<i>Site</i>	<i>Co-ordination or oversight of some or all of the construction or alteration of any building that is—</i> <i>(a) a category 1 building; or</i> <i>(b) a category 2 building; or</i> <i>(c) a category 3 building</i>
<i>Trade Licensing Classes</i>	
<i>Carpentry</i>	<i>Carpentry for any building that is—</i> <i>(a) a category 1 building; or</i> <i>(b) a category 2 building; or</i> <i>(c) a category 3 building</i>

[24] On the basis of the above a licensed building practitioner with a Site Licence cannot carry out or supervise restricted building work that is the construction or alteration of the primary structure of a house or a small-to-medium apartment building or the external moisture-management system of a house or a small-to-medium apartment

building. Their role is limited to that of co-ordination and oversight. It does not extend to supervision as supervise is a defined term in the Act⁶. The definition is:

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

- [25] At the time the complaint was made, and the Board considered the Registrar's Report, there was no evidence before it that there was a licensed building practitioner with the required class of licence carrying out or supervising the restricted building work.
- [26] Since receiving the report, the Board has been provided with evidence that a person with a Carpentry Licence, [Omitted], was notionally supervising the restricted building work. As such the Respondent has not committed the alleged disciplinary offence. The question of whether that supervision was adequate in the context of the Respondent's role is discussed next.

Negligence and Incompetence – Site Licence

- [27] The Board's decision to proceed to a hearing on the charge of negligence or incompetence was based on the evidence before it that the Respondent was the supervising licensed building practitioner. The evidence at the hearing was that another licensed building practitioner was supervising. As such, and as noted above, the Respondent's role was to provide co-ordination and oversight.
- [28] Co-ordination and oversight are not defined terms. The Licensed Building Practitioners Rules 2007 (the Rules) does, however, provide some guidance and whilst those Rules use the term supervise and supervision throughout the Board does not interpret this as the supervision of restricted building work for the reasons outlined above. The Rules include competencies that note the following competencies that relate to management of ongoing operations and the monitoring of construction site performance. It is within those roles that the Board has considered whether the Respondent was negligent or incompetent.
- [29] 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.*
- [30] 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

⁶ The terms is defined in section 7 of the Act.

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

into. This is described as the *Bolam*⁸ test of negligence which has been adopted by the New Zealand Courts⁹.

- [31] 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*”.
- [32] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹¹. 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 Act¹². 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 practitioner¹³.
- [34] 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:*

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

¹³ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

(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.*

[35] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹⁴ and be carried out in accordance with a building consent¹⁵. 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.

[36] Looking at the conduct in question the building work was carried out by an experienced builder. It was notionally supervised by [Omitted], a licensed building practitioner with a Carpentry Licence. The term “notional” has been used as the evidence before the Board was that rather than him taking an active role in the building process, he was engaged to undertake a check of the building work as it was carried out. That is not supervision the definition in section 7 of the Act is:

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.*

[37] The definition describes an active and on-going process.

[38] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992¹⁶. The definition of supervision in that Act is consistent with the definition in the Building Act and as such the comments of the court are instructive. In the case Judge Tompkins stated at paragraph 24:

“As is made apparent by the definition of “supervision” in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”

[39] The supervision arrangements for the restricted building work put in place by the Respondent who was project managing the build did not meet those requirements

¹⁴ Section 17 of the Building Act 2004

¹⁵ Section 40(1) of the Building Act 2004

¹⁶ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

and in this respect the Board finds that the Respondent's conduct has fallen below an acceptable standard. That said the Board has also found that the failings were not sufficiently serious enough to warrant a disciplinary outcome.

- [40] With regard to seriousness in *Collie v Nursing Council of New Zealand*¹⁷ the Court 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] In *Pillai v Messiter (No 2)*¹⁸ the Court of Appeal put it as:

... 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.

- [42] It is on this basis that the Board, which includes persons with extensive experience and expertise in the building industry, has decided that whilst the Respondent has displayed a lack of reasonably expected care in his coordination and oversight the conduct was not sufficiently serious enough. In this respect the Board took into account that the building work that was being carried out was not overly complicated and the on-site arrangements that were put in place which included using an experienced builder.

- [43] As previously noted the Board does caution the Respondent that in future, when he is the project manager at a site, he needs to ensure that active supervision of restricted building takes place.

Signed and dated this 8th day of October 2019


Chris Preston
Presiding Member

¹⁷ [2001] NZAR 74

¹⁸ (1989) 16 NSWLR 197 (CA) at 200