

Before the Building Practitioners Board

	BPB Complaint No. CB25128
Licensed Building Practitioner:	Steven Arthur (the Respondent)
Licence Number:	BP 109054
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	Auckland
Hearing Type:	In Person
Hearing Date:	8 August 2019
Decision Date:	14 August 2019

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
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 Board inquiry 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 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.

Background

- [3] The Board inquiry arose out of a complaint made to the Board about another licensed building practitioner. That complaint did not proceed to a hearing under regulation 9 of the Complaints Regulations as the person identified had not carried out the building work complained about. The Registrar's Report in respect of that complaint identified the Respondent as the person who may have carried out the work and, as a result, the Board resolved to initiate a Board Inquiry into the conduct of the Respondent.

Evidence

- [4] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. 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.

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

- [5] 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.
- [6] In addition to the documentary evidence before the Board heard evidence at the hearing from the Respondent.
- [7] The matters under investigation were the manner in which a deck and associated balustrade and handrail were constructed. The Board had been provided with photographs of the work and statements which indicated it may have been completed in a substandard manner. Specifically, there were concerns with overpunched nails and whether a grabbable handrail that complied with clause D1 of the Building Code had been installed.
- [8] The Respondent gave evidence that he both carried out and supervised the work. He accepted that portions of the decking and balustrade had not been nailed in accordance with acceptable industry standards and that, in certain instances, a nail gun should not have been used and/or that a soft tip on a nail gun should have been used. The Respondent noted that the substandard work was limited to small areas and that he had not, as a result of a commercial dispute between the owner and the head contractor, been able to return to the site to carry out remedial work.
- [9] With regard to the handrail the Respondent gave evidence that a separate 55mm wide handrail had been installed on a bracket following a final inspection. The handrail and balustrade that had been installed was as per the consented plans, but the council considered it was not as per the requirements of the building consent. A photograph of the installed separate handrail was provided.

Board's Conclusion and Reasoning

- [10] 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.
- [11] Whilst the Respondent accepted that some of the work had not been completed to an acceptable standard the Board did not consider that the failings were serious enough to warrant him being disciplined by the Board. It also noted that the additional handrail installed did meet the requirements of the Building Code in that it was a grabbable handrail.
- [12] When considering negligence and incompetence the Board notes that they are not the same. In *Beattie v Far North Council*⁵ 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.

⁵ Judge McElrea, DC Whangarei, CIV-2011-088-313

- [13] 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.
- [14] 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*⁸ it was stated as “an inability to do the job”.
- [15] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test⁹. 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.
- [16] 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 purposes of the Act¹⁰ which are outlined above. 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 practitioner¹¹.
- [17] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹² 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.

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

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It

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 *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹² [2001] NZAR 74

¹³ (1989) 16 NSWLR 197 (CA) at 200

includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [19] It is with regard to seriousness that the Board has decided that the Respondent's conduct does not warrant it disciplining him. The membrane was not the Respondent's work and issues with plasterboard fixing and tiles were minor in nature. There was not a serious departure from acceptable standards.

Signed and dated this 14th day of August 2019

A handwritten signature in black ink that reads "Chris Preston". The script is cursive and fluid, with the first letters of "Chris" and "Preston" being capitalized and prominent.

Chris Preston
Presiding Member