Before the Building Practitioners Board

	BPB Complaint No. CB25215
Licensed Building Practitioner:	Wayne Lavatai (the Respondent)
Licence Number:	BP 130312
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:	29 October 2019
Decision Date:	11December 2019

Board Members Present:

Chris Preston (Presiding)
David Fabish, LBP, Carpentry and Site AOP 2
Robin Dunlop, Retired Professional Engineer
Faye Pearson-Green, LBP Design AOP 2
Rob Shao, LBP, Carpentry and Site AOP 1

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.

Contents

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 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);

(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

(c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) 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].

[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

[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.

Evidence

[5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have 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] 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:

Wayne Lavatai	Respondent
[Omitted]	*[Omitted]*

[8] The Respondent undertook building work on the Complainant's deck, based on the approved building consent and amendment documentation. This required the Respondent to demolish the existing non-complying tiled timber deck and deck joist structure, remove plastered Hardies Monoteck cladding on the existing columns and remove some weatherboard cladding adjacent to the deck. He then rebuilt the new deck sub- structure as per the building consent and amendment documentation, lay plywood substrate to correct falls, flash the new structure to the existing structure, apply waterproofing membrane, re-clad existing columns and re-fix weatherboards to the house and install a new glazed balustrade.

[9] During the demolition of the existing plastered Hardies Monotek cladding and recladding of the columns the Respondent did not observe that the existing columns were not straight. The Complainant argued the Respondent should have noticed this before the recladding was carried out. The respondent noted that, apart from

[4] [2016] HZHC 2276 at para 164
[5] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

removing the cladding he didn't touch the columns and that he completed the building work as per the approved plans which had noted the existing H5 post and framing to remain. The Respondent attempted to agree on a solution to the issue with columns that were not straight but was not able to do so.

[10] In addition, the waterproofing subcontractor to the Respondent laid 1.5mm TPO Grey membrane, a substituted product to Viking enviroclad deck membrane that was specified in the consented amendment documentation. A warranty form and PS3 were supplied by the approved, licenced applicator *[Omitted],* which was retrospectively accepted by the Complainant and approved by the Council.

[11] Following a tribunal hearing about a dispute between the Complainant and the Respondent the Respondent provided a record of work.

Board's Conclusion and Reasoning

[12] 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);

(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); or

(c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act)

and should not be disciplined.

[13] The reasons for the Board's decisions follows.

<u>Negligence and/or Incompetence</u>

[14] 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.*

[15] 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] Judge McElrea, DC Whangarei, CIV-2011-088-313

into. This is described as the *Bolam*[7] test of negligence which has been adopted by the New Zealand Courts[8].

[16] 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"*.

[17] 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.

[18] 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 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].

[19] 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:*

[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)
[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

> *(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.*

[20] 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.

[21] 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.*

[22] On this occasion the Board, having heard submissions from the Respondent, was of the view that the level of noncompliance with the Building Consent and poor work did not meet the threshold set out above. Notwithstanding the Respondent was advised by the Board, at the hearing, that he should make sure, in the future, to pay more attention to the work he is being asked to do and to make sure both he and the subcontractors he uses are following the building consent.

<u>Contrary to a Building Consent</u>

[23] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued.

[24] 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.

[25] 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.

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

[26] 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.

[27] There was evidence before the Board that a membrane had been substituted. This should have been dealt with as a minor variation prior to the work being completed. It was not but it was subsequently accepted by the building consent authority.

[28] 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 established[16]. The Board does, however, consider that the seriousness of the disciplinary offending still needs to be taken into account.

[29] On this basis, and on the basis that it was a minor matter, the Board has decided that it will not impose a sanction in respect of it. As noted above, however, the Respondent is reminded that there is a requirement to ensure that changes to a building consent, even if minor, are dealt with appropriately and that approvals are gained prior to the work being completed.

Record of Work

[30] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work .

[31] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.

[32] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work …”.

[33] In most situations’ issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. In this instance there was an ongoing dispute. Once it was resolved a record of work was provided.

[34] The Board has held in previous complaints that where there is a genuine dispute and a reasonable expectation that more restricted building work may be carried out that completion will not occur until such time as it is clear that no further work will be completed.

[35] The Board found that this was the case in the present case and that a record of work was provided within a reasonable period of the dispute being determined. Accordingly, the ground of discipline is not upheld.

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

[36] The Respondent is reminded, however, that he should promptly attend to the provision of records of work and that they cannot be withheld for commercial reasons.

Signed and dated this 11th day of December 2019

Chris Preston
Presiding Member