

Before the Building Practitioners Board

	BPB Complaint No. CB26457
Licensed Building Practitioner:	Daniel Forman (the Respondent)
Licence Number:	BP128438
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 and Decision Date:	1 October 2024

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Mr D Fabish, LBP, Carpentry and Site AoP 2
Mr P Thompson, LBP, Carpentry and Site AoP 3, Quantity Surveyor

Appearances:

George Wietzke for the Respondent.

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.

Disciplinary Finding:

The Respondent **has not** committed a disciplinary offence.

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Summary

- [1] The Respondent was contracted to carry out an extension to an existing dwelling. The build was interrupted at the framing stage by weather events and insurance claims relating to cyclone Gabrielle.
- [2] During the build, a retaining wall was constructed to retain the ground between the extension and the existing dwelling. The Board investigated the compliance of that retaining wall. Its investigations ascertained that the retaining wall, which had been part of the early designs but was removed from the consented plans, was built in a compliant manner and that an appropriate process for its inclusion in the build had been followed.
- [3] When the Respondent’s building work was paused, the Complainant sought a report from Prendos. The report established the state of the building work and noted both incomplete and allegedly non-compliant building work. The Board’s findings, as regards the building work that was alleged to have been carried out in a negligent or incompetent manner, was that the issues under investigation were not serious and that they did not meet the threshold for disciplinary action.

- [4] An allegation was also made that the Respondent had failed to provide a record of work on completion of restricted building work. The Board's finding was that completion occurred when the complaint was made and, on that basis, a disciplinary offence had not been committed.
- [5] Finally, the Board also investigated the Respondent's contract processes to ascertain whether there had been a breach of the Code of Ethics or whether the Respondent had conducted himself in a disreputable manner. The Board found that the Respondent had not conducted himself in an unethical or distributable manner.

The Charges

- [6] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a Complainant to prove the allegations. The Board sets the charges and decides what evidence is required.¹
- [7] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act;
 - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act;
 - (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) of the Act contrary to section 317(1)(da)(ii) of the Act;
 - (d) breached the code of ethics prescribed under section 314A of the Act contrary to section 317(1)(g) of the Act; and
 - (a) conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute contrary to section 317(1)(i) of the Act.
- [8] In further investigating the Respondent's conduct under sections 317(1)(b) and (d) of the Act, the Board gave notice that it would be inquiring into the matters raised in the Initial Assessment Report dated 29 September 2023 by [OMITTED] of Prendos (Page 84 of the Board's file) and in particular any workmanship issues with the

¹ 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. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

² The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

retaining wall and the renovations and the implementation of temporary measures to protect the building works under construction and the existing house.

[9] With respect to the allegation that the Respondent breached the Code of Ethics (section 317(1)(g) of the Act), the specific provisions of the Code that the Board gave notice that it would further investigate were:

10. You must comply with the law

(1) *When you carry out or supervise building work, you must ensure that the building work complies with the following:*
(a) *the Building Act 2004*

21. You must price work fairly and reasonably

(2) *If you become aware that a contract for building work may involve additional costs, you must –*
(a) *advise your client as soon as practicable; and*
(b) *obtain their agreement before the additional costs are incurred.*

25. You must conduct your business in a methodical and responsible manner

In conducting any business that involves carrying out or supervising building work, you must take all reasonable steps to ensure that-
(a) *accurate records of money received and paid out are maintained; and*
(b) *a record of other appropriate documents is maintained.*

[10] The conduct to be further investigated in respect of the above was the Respondent's contract administration processes and, in particular, the quotation, which omitted significant items which were within the scope of work and the way in which cost fluctuations and variations were addressed with the Respondent's client. In respect of the alleged breach of Principle 10 (act within the law), the matter that will be further investigated is the absence of a building contract.

Evidence

[11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. 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.

[12] The Board's investigations were, in accordance with the Complaints Regulations, carried out in two phases. The first phase, or the Registrar's phase, involved the collation of the complaint and response and the representation of that information for the Board to make a decision as to whether the matter should proceed to a hearing. The second phase, the Board's investigations, took place at the hearing. In the lead-up to the hearing, the Board received further evidence and submissions from both the Complainant and the Respondent through his legal counsel. Counsel

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

also provided detailed submissions for the hearing. The additional evidence and submissions provided a fuller picture of the matters the Board was investigating. The hearing provided an opportunity for the Board to test the additional evidence and submissions received.

Negligence or Incompetence

[13] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,⁴ that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*⁵ test of negligence.⁶ To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.⁷ A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.⁸ If it does not, then a disciplinary finding cannot be made.

Has the Respondent departed from an acceptable standard of conduct

- [14] When considering what an acceptable standard is, the Board must consider the purpose of the Building Actⁱ as well as the requirement that all building work must comply with the Building Code⁹ and any building consent issued.¹⁰ The test is an objective one.¹¹
- [15] The conduct under investigation in relation to negligence or incompetence was that set out in a report completed by [OMITTED] of Prendos and, in particular, any workmanship issues with the retaining wall and the renovations and the implementation of temporary measures to protect the building works under construction and the existing house.
- [16] Dealing with the retaining wall, the building work started on 16 January 2023 with excavation work to create the building platform for an extension to a circa 1950s holiday home that was to be built in front of and below the existing dwelling. As part

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. 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.

⁵ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁶ Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁷ In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as “a demonstrated lack of the reasonably expected ability or skill level”. In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as “an inability to do the job”

⁸ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [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”.

⁹ Section 17 of the Building Act 2004

¹⁰ Section 40(1) of the Building Act 2004

¹¹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent’s subjective considerations.

of the groundwork, an existing concrete pathway in front of the existing dwelling and a set of concrete stairs adjacent to the dwelling had to be removed. The Respondent's evidence was that to achieve the required finished floor level of the alteration and because of the removal of pathway and stairs, excavations were more than had been expected, and the slope of the cut between where the new extension was to be built in the existing dwelling was steeper and greater than had been expected.

- [17] A review of the design documentation for the extension showed that in early designs, including engineering designs, a retaining wall had been provisioned between the existing dwelling and the extension. The retaining wall was designed by the engineer who had provided structural designs for the extension. The design that was submitted for a building consent included details of a retaining wall. During the RFI process, the designer omitted that retaining wall design. An alternative of battering the slope between the existing dwelling and the extension was consented.
- [18] Because of the change in on-site conditions, it became apparent that battering would not be sufficient and that the originally envisaged retaining wall would be required. On 19 January 2023, the Respondent sought the assistance and input of the designer and the engineers. Construction of the retaining wall commenced. Pile holes were drilled before the weather event Cyclone Gabrielle. Protection of the excavation was put in place. However, the magnitude of the event caused the pole holes to collapse, the excavation face to collapse, and the existing dwelling to be partly undermined. The engineers were consulted, and a new retaining wall design was developed, taking into account the new existing dwelling surcharge. The re-design retaining wall construction commenced in early March and was completed soon after. The wall that was initially commenced did, however, meet the design parameters provided to the Respondent.
- [19] The weather event and subsequent rain events caused erosion. Clay and silt were deposited behind the retaining wall and underneath the subfloor structure that had been constructed for the extension. Some temporary weather and silt protections had been installed. Those proved to be inadequate for the level of inundation that was experienced during what was an unprecedented rain event.
- [20] As part of the contractual arrangements for the build, the Complainant was responsible for organising contract works insurance. After the weather event, the Complainant made an insurance claim. He accepted that the claim process caused some delays to the building work.
- [21] A commercial dispute between the parties to the contract then arose. As a consequence, work ceased, and the Complainant sought a report from [OMITTED]. That report outlined the state of the building work when the Respondent's work stopped, and [OMITTED] gave evidence that the primary purpose of the report was to set a line regarding where the Respondent's building work had been taken up to.

He accepted that the building work he reported on was, in many respects, incomplete. He did raise some compliance issues.

- [22] One issue was whether there was sufficient ground clearance under the subfloor of the extension. The report was completed after Cyclone Gabrielle, and there was little evidence of material that had been deposited under the subfloor as a result. The Respondent maintained that there was adequate ground clearance and crawlspace and that work that was not complete under the subfloor could have been completed notwithstanding the limited crawlspace.
- [23] [OMITTED]'s report indicated that stainless steel connections were to be used in the subfloor. At the hearing, it was established that the subfloor fixings that had been used were stainless steel and that the reference was to the requirement for any further fixings to be stainless steel.
- [24] [OMITTED] also noted that the subfloor inspection for piles and foundations had not taken place. The Board received evidence that established that the Building Consent Authority had issued a waiver for that inspection on the basis that there was engineering oversight.
- [25] Another issue raised was the manner in which flooring had been installed on top of the subfloor. [OMITTED] noted that the flooring was not installed in accordance with the manufacturer's instructions. The Respondent stated that it was installed in the manner that it was because the construction of the retaining wall required machinery access and that by installing the flooring in the manner that it was, they could continue with the erection of framing to other areas of the building.
- [26] Finally, in terms of issues other than incomplete work, concerns were raised with the sequencing of the removal of a chimney and potential health and safety risks on the basis of an observed lean of the chimney. The Respondent outlined the process that he was going to use to remove the chimney. He noted that he wanted to have the extension frames erected prior to taking the existing chimney down. The chimney had been braced whilst construction was ongoing, and the Respondent gave evidence that the chimney had a pre-existing lean.

Was the conduct serious enough

- [27] The Board considered that whilst there had been some minor departures from acceptable standards, the conduct noted above was not serious enough for the Board to make a disciplinary finding.

Has the Respondent been negligent or incompetent

- [28] The Respondent has not conducted himself in a negligent nor incompetent manner.

Contrary to a Building Consent

- [29] Building consents provide detailed plans and specifications for building work. They are issued by Territorial or Building Consent Authorities on the basis that the building work will meet the provisions of the Building Code.¹² Once issued, there is a requirement that the building work be carried out in accordance with the building consent.¹³
- [30] If building work departs from the building consent issued, the Board can find that a disciplinary offence under section 317(1)(d) of the Act has been committed. The Board does not have to find that departure was deliberate or a result of negligent conduct.¹⁴ The Board does, however, consider that the seriousness of the conduct under investigation does have to be taken into account.

Was there building work that differed from the building consent

- [31] The Board did not consider that there was any building work that departed from the building consent. As such, the Respondent has not breached section 317(1)(d) of the Act.

Failure to Provide a Record of Work

- [32] A Licensed Building Practitioner must provide a record of work for any restricted building work that they have carried out or supervised to the owner and the Territorial Authority on completion of their restricted building work.¹⁵
- [33] 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 work¹⁶ unless there is a good reason for it not to be provided.¹⁷

Did the Respondent carry out or supervise restricted building work

- [34] The Respondent was engaged to carry out and/or supervise building work on a new residential dwelling under a building consent. His work included work on the primary structure of the extension, which is restricted building work.¹⁸

Was the restricted building work complete

- [35] The building work stopped because of contractual issues that arose in or about April 2023. The Respondent's evidence was that during 2023, he was attempting to return and continue with work. There was no formal contractual termination. The Respondent stated that the first point in time that he became aware that he would not be continuing was when he received the complaint. On that basis, the Board

¹² Section 49 of the Act

¹³ Section 40 of the Act

¹⁴ *Blewman v Wilkinson* [1979] 2 NZLR 208

¹⁵ Section 88(1) of the Act.

¹⁶ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁷ Section 317(1)(da)(ii) of the Act

¹⁸ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

finds that completion occurred when the complaint was made, which was in January 2024.

Has the Respondent provided a record of work

- [36] The Respondent has not provided a record of work. However, the complaint about its non-provision was made before completion had occurred. On that basis, the Board finds that, as completion had not occurred, the Respondent has not committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

Code of Ethics and Disrepute

Code of Ethics

- [37] The Code of Ethics for Licensed Building Practitioners was introduced by Order in Council.¹⁹ It was introduced in October 2021 and came into force on 25 October 2022. The obligations are new, but there was a transition period of one year to allow practitioners to become familiar with the new obligations. Whilst the Code of Ethics is new, ethics have been a part of other regulatory regimes²⁰ for some time, and the Board has taken guidance from decisions made in other regimes.
- [38] The Code also differentiates between Licensed Building Practitioners who are in business and those who are employed in that some of the ethical obligations only apply to those who are in business. In this matter, the Respondent was in business.
- [39] The disciplinary provision in the Act simply states, “has breached the code of ethics”. Most disciplinary regimes frame the charge as some form of malpractice or misconduct, and the Board has considered the allegations within such a framework and with reference to superior court decisions. Within this context, in *Dentice v Valuers Registration Board*,²¹ Chief Justice Eichelbaum stated the purposes of disciplinary processes are to:

Enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practice the profession in question; to protect both the public, and the profession itself, against persons unfit to practice; and to enable the professional calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

¹⁹ Building (Code of Ethics for Licensed Building Practitioners) Order 2021

²⁰ Lawyers, Engineers, Architects and Accountants, for example

²¹ [1992] 1 NZLR 720 at 724

Disrepute

[40] Conduct which brings or is likely to bring the regime into disrepute is that which may result in the regime being held in low esteem by the public. Examples include:

- criminal convictions²²;
- honest mistakes without deliberate wrongdoing²³;
- provision of false undertakings²⁴; and
- conduct resulting in an unethical financial gain²⁵.

[41] The Courts have consistently applied an objective test when considering such conduct.²⁶ The subjective views of the practitioner, or other parties involved, are irrelevant. The conduct need not have taken place in the course of carrying out or supervising building work.²⁷

Seriousness

[42] The threshold test applies to negligent or incompetent conduct also applies to Code of Ethics breaches and to disreputable conduct, in that the conduct has to be sufficiently serious enough for the Board to make a disciplinary finding.²⁸

Conduct Under Investigation

[43] The specific matters under investigation related to the Respondent's provision of a building contract and his contract administration processes.

[44] The Respondent, as part of the submissions and evidence filed prior to the hearing, provided copies of a contract and disclosure information for the project. The Complainant accepted that he had been provided with those documents. On that basis, the allegation does not require any further investigation.

[45] Turning to contract administration processes, the issue under investigation was whether cost fluctuations and variations had been dealt with in an appropriate manner. Again, as part of evidence and submissions filed, the Respondent provided the Board with copies of correspondence with the Complainant, which showed that the Respondent was following a process and was communicating with the Complainant regarding cost fluctuations and variations. On that basis, the Board was satisfied that further investigation was not necessary.

²² *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

²³ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²⁴ *Slack, Re* [2012] NZLCDT 40

²⁵ *Collie v Nursing Council of New Zealand* [2000] NZAR 7

²⁶ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

²⁷ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

²⁸ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

Board Decision

[46] The Respondent has not committed a disciplinary offence.

Signed and dated this 30th day of October 2024.



M Orange
Presiding Member

ⁱ Section 3 of the Act

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.*