Before the Building Practitioners Board

	BPB Complaint No. CB25101
Licensed Building Practitioner:	Tony Gamble (the Respondent)
Licence Number:	BP 120704
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:	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.

Contents

Introduction 2

Function of Disciplinary Action 2

Evidence 3

Board's Conclusion and Reasoning 5

Building Consent 5

Building Work 6

Penalty, Costs and Publication .... **Error! Bookmark not defined.**

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 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].

[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.

---

[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

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:

Tony Gamble	Respondent
[Omitted]	Witness for the Respondent
[Omitted]	Complainant
[Omitted]	Witness, Building Surveyor

[8] The Complainant experienced a flooding event as a result of a burst water main in the ceiling of her property, a 1984 constructed single level dwelling. Her insurer arranged repair work to be undertaken. The repairs involved two contractors. The first carried out general repairs which included the removal of plasterboard wall linings. During the first contractors repairs waterproofing membranes were damaged.

[9] The Respondent, under instructions from the insurer, was engaged to remove tiles and plasterboard linings from around a bathroom and ensuite including from behind an existing wet area shower so as to repair the membranes. Following removal, he reinstalled non-structural plasterboard and prepared the area for a subcontractor to apply a waterproof membrane and tiles. Preparation included the creation of a plinth between the baths supporting framework to allow for an upstand in the membrane around it. The subcontractor, who was a licensed applicator, installed the membranes. The work did not proceed to tiling.

[10] Following the completion of the membrane the Complainant raised issues with the quality and compliance of the building work. In particular she raised issues with the quality of the membrane and the failure to remove tiles from under a bath frame prior to the waterproof membrane being installed.

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

[11] The Respondent accepted that the membrane was substandard but noted that his services were terminated prior to his being able to have remedial work carried out by the applicator. The Complainant noted that the insurer had taken the position that the membrane had been completed to an acceptable standard.

[12] With regard to the tiles under the bath the Respondent noted that the tiles under the frame were pre-existing and that he cut the tiles in the bathroom back to the line of the bath. He further noted that original waterproofing membrane had not extended to the bath and that the wall behind and underneath the bath was not lined.

[13] The Complainant also raised an issue as to whether the building work should have been carried out under a building consent. She raised this after the work being carried out by the first contractor was underway and at the time the Respondent was carrying out his work.

[14] The Complainant engaged a building surveyor to review the work that had been completed. [Omitted]completed a site visit and provided a report. He expressed his opinion that the work was substandard, that the building work was restricted building work and that a building consent should have been obtained prior to the work being carried out.

[15] At the hearing [Omitted] stated that his concerns, as regards a building consent, was the extent of the plasterboard that was removed which, in his opinion, included plasterboard that may have been providing bracing although he was unable to confirm that it was. Evidence was heard that the majority of the plasterboard, including that which may have been a bracing element, was removed by the first contractor. Photographs of exposed framing showed metal angle bracing cut into framing as the primary means of bracing. [Omitted] also considered that a building consent was required for the repair of the wet area shower and that Schedule 1 of the Building Act did not apply.

[16] [Omitted] provided an opinion that the bath should have been removed, the tiles under it removed and waterproofing extended under it prior to the bath being reinstalled with a new treated timber frame. In his opinion a new treated frame was required to meet Building Code requirements. The Respondent gave evidence that his instructions from the insurer did not extend to removal of the bath.

[17] Evidence was provided that the plasterboard that the Respondent did install had insufficient fixings. The Respondent accepted that the fixings, which were installed by a staff member were inadequate.

Board's Conclusion and Reasoning

[18] 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.

[19] The Board's consideration under section 317(1)(b) were two-fold. Firstly, it was inquiring into whether a building consent was required. It was also further investigating the quality and compliance of the building work carried out.

[20] The Board has decided that a building consent was not required. It has also decided that whilst there were some minor quality and compliance issues that the seriousness of the conduct was not such that a disciplinary outcome is required. The reasons for the Board's decisions follows.

<u>Building Consent</u>

[21] Under section 40 of the Act all building work must be carried out in accordance with a building consent. There are, however, limited exceptions to the general rule. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception.

[22] In this instance the Board found that the building work that the Respondent carried out came within the provisions of clause 1 of Schedule 1. That clause provides:

> ***1 General repair, maintenance, and replacement***
>
> *(1) The repair and maintenance of any component or assembly incorporated in or associated with a building, provided that comparable materials are used.*
>
> *(2) Replacement of any component or assembly incorporated in or associated with a building, provided that—*
>
> > *(a) a comparable component or assembly is used; and*
> >
> > *(b) the replacement is in the same position.*
>
> *(3) However, subclauses (1) and (2) do not include the following building work:*
>
> > *(a) complete or substantial replacement of a specified system; or*
> >
> > *(b) complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire-safety properties; or*
> >
> > *(c) repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or*
> >
> > *(d) sanitary plumbing or drainlaying under the Plumbers, Gasfitters, and Drainlayers Act 2006.*

[23] Looking at the building work there were two elements that may have required a consent. The first was the removal and reinstatement of plasterboard linings. The second was the repair of an existing wet area shower.

[24] The work on plasterboard linings that the Respondent carried out came within the definition of repair and maintenance. The work was not a complete or substantial replacement of a component contributing to the building's structure. Nor had the materials failed to meet the durability requirements of the Building Code. It was the replacement of a component with a comparable component in the same position (a like for like replacement). As clause 1 applied a building consent was not required.

[25] The repair of the wet area shower also came within the provisions of clause 1. It was also a like for like replacement. This applies even though the concluding provision of clause 1 excludes sanitary plumbing as no work on the sanitary fixings was carried out.

[26] It is to be noted that even if building work comes within Schedule 1 there is no impediment to a homeowner seeking a building consent for the work. It must, however, be applied for prior to the building work being carried out as retrospective building consents cannot be issued.

[27] It should also be noted that the building work that was carried out was not restricted building work. This is because the restricted building work provisions in the Act only applies to building work carried out under a building consent as section 401B of the Act state that restricted building work is not to apply to building work for which a consent is not required.

<u>Building Work</u>

[28] With regard to the building work there were some defects. These were a membrane that was substandard and the poor fixing of plasterboard to which tiles were to be fixed. There was also an allegation that tiles under a bath frame should have been removed and that the bath's framing should have been replaced with treated timber.

[29] The Respondent accepted that the membrane was not acceptable. He did not carry out that work and stated it would have been attended to prior to any tiling taking place. He also accepted that the plasterboard was not adequately fixed to the framing. He gave evidence that he followed instructions as regards the tiles and that the tiles under the bath were as per the original installation.

[30] [Omitted] considered the bath framing should have been replaced with treated timber as this was a building code requirement. In this respect the Board notes that section 42A(2)(b) of the Act which deals with building work carried out under a building consent applies. It provides:

> *(2) Subsection (1) is subject to the following conditions:*

> *(a) the building work complies with the building code to the extent required by this Act:*
> *(b) after the building work is completed, the building,—*
> > *(i) if it complied with the building code immediately before the building work began, continues to comply with the building code; or*
> > *(ii) if it did not comply with the building code immediately before the building work began, continues to comply at least to the same extent as it did then comply.*

[31] In essence the building work continued to comply to the extent that it previously did.

[32] When considering negligence and incompetence the Board notes that they 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.*

[33] 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 Courts[8].

[34] 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"*.

[35] 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.

[36] 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 Act[11] 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

---

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

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].

[37] Turning to seriousness in *Collie v Nursing Council of New Zealand*[13] 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.*

[38] In *Pillai v Messiter (No 2)*[14] 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 includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.*

[39] 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

Chris Preston

Chris Preston
Presiding Member

[12] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71
[13] [2001] NZAR 74
[14] (1989) 16 NSWLR 197 (CA) at 200