

Before the Building Practitioners Board

	BPB Complaint No. CB25089
Licensed Building Practitioner:	Peter Henderson (the Respondent)
Licence Number:	BP 112332
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	Tauranga
Hearing Type:	In Person
Hearing Date:	1 October 2019
Decision Date:	12 November 2019

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Faye Pearson-Green, LBP Design AOP 2
Rob Shao, LBP, Carpentry 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.

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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 or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) 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.

Consolidation

- [5] The Board may, under Regulation 13, consolidate two or more complaints into one hearing but only if the complaints are, in the opinion of the Board, about substantially the same subject matter and the complainant and the licensed building practitioner in respect of each complaint agree to the consolidation.
- [6] The Board sought agreement for consolidation of this matter with complaint number CB25192. The consent of all those involved was forthcoming. The two matters were consolidated.

Evidence

- [7] 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.
- [8] 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.
- [9] In addition to the documentary evidence before the Board it heard evidence at the hearing from both respondents and from [Omitted] who was a project manager for [Omitted] when the Respondent’s work was carried out.
- [10] The building work in question was remedial work undertaken on a home that had been built at the [Omitted] yard and transported to site. The owners of the home raised various issues with the build and [Omitted] made a complaint about the builder that had completed the construction at the yard. That complaint⁶ was not upheld on the basis that there was insufficient evidence.
- [11] Remedial work was carried out on site to address issues raised by the owners and prior to a code compliance certificate for the dwelling being issued. The owners then made a complaint about the Respondent and [Omitted] who subcontracted to the Respondent in respect of the remedial work. The complaint was supported by an inspection carried out by [Omitted], a Registered Building Inspector, who had carried out an inspection of the house for the owners and who had provided a Preliminary Defect Report. He noted:

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

⁶ Complaint number C2-01771

3.2 *We understand that the entire exterior of this dwelling has been totally re-clad a second time since the original construction and the western wall of the lounge / dining room has been re-clad a third time. We also understand that numerous 'repair' attempts have been made to the interior finishing and painting*

3.3 *It is alleged that these 'repairs' and the general workmanship of this dwelling is of a below average standard and widespread remedial work will be required to bring it up to an acceptable standard for a brand new dwelling.*

[12] [Omitted] identified a list of exterior and interior defects that required attention.

[13] The Respondent gave evidence that he was only engaged to strip and replace areas of plasterboard (including bracing plasterboard) where the underlying framing needed to be straightened and to remove and replace weatherboards with new boards. He noted that he was not authorised by [Omitted] to attend to all of the items that may have required remedial work and that there were other workers who had been employed by [Omitted] working on weatherboards at the same time and that this did cause some weatherboard alignment issues. The Respondent also noted that the work was completed in accordance with acceptable solutions and the building consent and that [Omitted] had passed the weatherboards as being acceptable and that all of the work has been passed by the building consent authority and that a code compliance certificate was issued.

[14] The Respondent was questioned as to whether the bracing plasterboard was inspected by the building consent authority once it had been completed. He gave evidence that the building consent authority had advised, prior to the work being carried out, that the presentation of photographs of the completed work would suffice.

Board's Conclusion and Reasoning

[15] 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);

and should not be disciplined.

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

Negligence and/or Incompetence

- [17] 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.*
- [18] 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*⁸ test of negligence which has been adopted by the New Zealand Courts⁹.
- [19] 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*".
- [20] 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.
- [21] 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.
- [22] 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—*

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

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

- (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.*

[23] 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.

[24] In this instance the Board has decided that there was insufficient evidence to establish that building work had been carried out in a negligent or incompetent manner. In this respect the Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*¹⁶ where Justice McGrath in the Supreme Court of New Zealand stated:

[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable

¹⁴ Section 17 of the Building Act 2004

¹⁵ Section 40(1) of the Building Act 2004

¹⁶ [2009] 1 NZLR 1

satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

- [25] Whilst there were alleged issues with the building work there was insufficient evidence to establish that the Respondent was responsible for the areas complained about. Moreover, the work that was completed by the Respondent was accepted by the building consent authority as having been completed to code and building consent requirements.

Contrary to a Building Consent

- [26] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued.
- [27] 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.
- [28] The Board's concern was that the plasterboard that had been replaced and which was a bracing element had not been inspected. The Board accepted the evidence that the building consent authority had been consulted prior to the work being carried out and that an arrangement to certify it was in place.

Observations

- [29] Whilst the grounds of discipline have not been upheld the Board did note that those involved in the building work put themselves at risk through the contracting mechanisms used. There was a general lack of coordination between contractors and a lack of understanding as to who was responsible for what. In this respect it should be noted that whilst a licensed building practitioner may contact on a labour only basis it does not absolve them of their responsibilities under the Act. Vigilance and due care is still required.

Signed and dated this 12th day of November 2019



Chris Preston
Presiding Member