

Before the Building Practitioners Board

	BPB Complaint No. CB25732
Licensed Building Practitioner:	Malcolm Hendry (the Respondent)
Licence Number:	BP104840
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	[Omitted]
Hearing Type:	In Person
Hearing and Decision Date:	23 November 2022

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AoP 2
Ms K Reynolds, Construction Manager
Mr G Anderson, LBP, Carpentry and Site AoP 2

Appearances:

Q Davis and S Kim 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 of the Board’s Decision

[1] The Respondent has not committed a disciplinary offence. The Board made its decision on the basis that whilst there was some evidence of building work that had not been completed to an acceptable standard, the matters complained about did not reach the threshold for the Board to make a disciplinary finding.

The Board

[2] The Board is a statutory body established under the Building Act.¹ Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, Licensed Building Practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

The Charges

[3] The hearing resulted from a Board Inquiry into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations² 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);

¹ Section 341 of the Act.

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

- [4] 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 reports completed by [Omitted].

Function of Disciplinary Action

- [5] 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

- [6] 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*,⁵ 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."

- [7] In a similar vein, the Board's investigation and hearing process is not designed to address every issue that is raised in a complaint or by a Complainant. The disciplinary scheme under the Act and Complainant's Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁶:

... 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.

- [8] Finally, 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. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

- [9] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board's inquiries, and this decision, focus on and deal with the serious conduct complained about.

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

⁶ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

Inquiry Process

- [10] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a Complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar's Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.
- [11] Whilst a Complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a Complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Evidence

- [12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [13] 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.
- [14] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|----------------|--------------------------------|
| Malcolm Hendry | Respondent |
| [Omitted] | Licensed Building Practitioner |
- [15] The Board also received an affidavit from the Respondent and legal submissions from Counsel.
- [16] The Board had summoned [Omitted]. He failed to attend. The Board Officer made contact with [Omitted]. He informed her that he would not be attending and stated his reasons. In the circumstances, the Board decided to proceed with the hearing and that it would not take any further action as regards the non-attendance.
- [17] The complaint related to a renovation of a circa 1970 holiday home in the [Omitted]. The dwelling was remote, with no road access. All materials had to be shipped to the site. It was submitted that the matters before the Board needed to be viewed through the limitations the site location presented.

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [18] In terms of background, [Omitted] was engaged to carry out the renovations on a labour-only contract provided by the Complainant. A full quote with a breakdown of materials had previously been provided. [Omitted] stated that the Complainant retained the final say on the materials that would be used and that the Complainant notated changes to the materials list that the Complainant wanted to make or wanted to supply. [Omitted] arranged and managed the delivery of materials to the site by way of a barge. He stated that the Complainant would, at times, dictate what when on specific barge loads.
- [19] A building consent had been issued for the building work, and some work had been carried out by others prior to [Omitted]s' engagement. Prior to commencing the building work, [Omitted] suffered a medical event that prevented him from being able to carry out the work himself. He contracted the Respondent on a labour-only basis to carry out and supervise. [Omitted] and the Respondent had worked together in the past. [Omitted] also supplied three experienced staff members to assist the Respondent. They worked under the Respondent's supervision. [Omitted] provided some minor assistance on-site on one or two occasions but did not carry out or supervise any building work. He did organise materials and assisted with on-site decisions made to progress the work. [Omitted]s' and the Respondent's engagement on the site came to a premature end, with some work being left in a partially or temporarily complete state.
- [20] [Omitted] and the Respondent both noted that the plans provided were basic and that, in some instances, more detail was required. There was some interaction with the architect early on, but the Respondent stated that the architect advised him that the Complainant was not prepared to pay him for any further services, and that the architect would not be assisting to resolve any on-site design issues.
- [21] The Respondent stated that any changes to the building consent as the build progressed were not his responsibility (for example, roofing).
- [22] At the commencement of the hearing, the Board stipulated that the matters from the [Omitted] report that it would further investigate at the hearing were:
- (a) Asbestos removal;
 - (b) Building wrap and battens;
 - (c) Sub structure;
 - (d) Roof extension; and
 - (e) General construction issues.
- [23] The Board advised it would not be investigating other matters as they were either minor in nature or represented building work that other licensed persons were responsible for.

Asbestos

- [24] Asbestos was identified in building materials on site. Work Safe investigated the matter. It did not carry out any enforcement action. The Respondent did undertake

training on asbestos as a result. He stated that he now has far more informed practices for dealing with asbestos.

- [25] The building consent application did not identify that there were any hazardous substances on site. The building consent had generic but not specific references to asbestos. The Respondent, at the time, had a rudimentary knowledge of how to deal with asbestos. He did take precautions when removing cladding (approximately 10m² of material) and soffit materials (approximately 10-15m² of material) that may have contained asbestos. It was not until the last of the soffit materials was removed and an asbestos sticker was exposed that he became aware that asbestos was contained in that material. The Respondent then informed [Omitted] and the Complainant of the find.
- [26] The Respondent described the precautions he used, which included the use of personal protective equipment, the wetting down of materials as they were removed, avoiding cutting or breaking sheets, the use of a commercial vacuum, and the containment of materials in plastic.

Building Wrap and Battens

- [27] The [Omitted] report noted:

It was intended that existing asbestos cladding would be encapsulated rather than removed using a safe, compliant and specified construction solution.

As is evident from the below images, a standard building wrap has been used in lieu of the specified ProClima Extasana Adhero membrane (blue in colour).

In addition to this, the specified Rosenfeld Kidson cavity battens have not been used in lieu of a standard radiata pine batten.

- [28] The Respondent gave evidence that the building wrap used was placed over the existing fibre cement sheet, some of which had been removed as described above to allow exterior joinery to be fitted. With respect to the change of building wrap, [Omitted] and the Respondent gave evidence that the product used was a good product and that the Council did not raise issues with its use. In terms of cavity battens, the evidence received was that the change was dictated by the Complainant, who questioned the cost of specified Rosenfeld Kitson castellated battens. [Omitted] queried the change with [Omitted], who advised that the change would be okay and that the critical factor was that there would be a cavity.

Sub Structure

[29] The [Omitted] report stated:

As is evident from the below attached images, non-compliant packing materials, including plywood, have been used in the packing of the square timber piles. This is not in accordance with New Zealand Standards 3604

[30] [Omitted] stated that the building work shown in photographs was part of non-consented work that was undertaken under his direction to remediate a hump in the floor. He stated that the Complainant was initially satisfied with the work and that it had not been completed. A cramp procured for the purpose of holding the floor joists down was still in place when they ceased working on the project. He stated that non-compressive materials and connections to the piles would have been completed if the work had progressed. The Respondent had no involvement with the work.

Roof Extension

[31] The [Omitted] report stated:

The pitch of the structural steel portal over the deck is different to the existing roof. The Contractor has attempted to incorporate the steel as fabricated and installed on site to suit the roof line without bringing this to the attention of the Trustees to agree the course of action before proceeding. The angle of the near-completed roof clearly is off-piste from the pitch of the steel and the result is aesthetically very noticeable.

[32] [Omitted] and the Respondent gave evidence that the measure-up for the steel work was completed by the supplier. The Respondent stated that he assisted the manufacturer to install the steel. The Respondent then framed the area in timber. In doing so, he ascertained that the steelwork and the existing roof line did not match. The Respondent stated he did what he could in trying to match the new work to the existing work. He noted that the consented plans stipulated a closed-in front gable but that the Complainant wanted the steel beam to be exposed and that, had it been closed in, the aesthetic issues noted would not have been visible. [Omitted] and the Respondent stated that a solution was developed in conjunction with the Complainant, which involved lifting an I beam and flashing it.

[33] Evidence received from a builder who carried out remedial work was that there was not an issue with the pitch of the roof but that the issue arose as a result of the manner in which the steelwork was installed.

General Construction Issues

[34] After taking an adjournment, the Board decided that it did not need to receive any further evidence as regards general construction issues outlined in the [Omitted] report.

Board's Conclusion and Reasoning

- [35] 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); or
 - (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.

- [36] The Board reached its decision on the basis that the matters before it did not reach the threshold required for the Board to make a disciplinary finding. Something more than just negligence or a finding of incompetence is required. There needs to be a deliberate departure from accepted standards or such serious negligence. In *Collie v Nursing Council of New Zealand*,⁸ the court put it as:

[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.

- [37] 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*⁹ test of negligence which has been adopted by the New Zealand Courts¹⁰.
- [38] 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*,¹¹ it was stated as “an inability to do the job”.
- [39] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹². 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.
- [40] It is with respect to the second stage that the Board has decided that the Board will not make disciplinary findings. In essence, there were elements of the building work that may not have been completed to an acceptable standard or in strict accordance

⁸ [2001] NZAR 74

⁹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹¹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹² *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

with the building consent issued, but those matters were not serious enough to warrant a disciplinary finding.

- [41] The Respondent is cautioned, however, as regards changes that may occur during a build and the need to follow correct processes if and when they occur. A Licensed Building Practitioner has an obligation to build in accordance with the building consent and to notify a Building Consent Authority of any breaches of the consent.¹³ If changes are to be made by way of a minor variation¹⁴ or an amendment, they must be dealt with in the appropriate manner before the changes are made, not after. Further, whilst a Licensed Building Practitioner may not be the person with the primary responsibility for processing the change, the need to ensure the change has been processed before they carry out the associated building work. This applies even if they are only engaged on a labour only basis.

Signed and dated this 20th day of December 2022.



Mr M Orange
Presiding Member

¹³ See section 89 of the Act.

¹⁴ Section 45A of the Act provides for minor variations.