

Before the Building Practitioners Board

	BPB Complaint No. CB25234
Licensed Building Practitioner:	Roger Heslop (the Respondent)
Licence Number:	BP 104196
Licence(s) Held:	Carpentry and Site AOP 2

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	Christchurch
Hearing Type:	In Person
Hearing Date:	1 September 2020
Decision Date:	21 September 2020

Board Members:

Chris Preston, Chair (Presiding)
Mel Orange, Deputy Chair, Legal Member
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP, Carpentry and Site AOP 2
Faye Pearson-Green, LBP, Design AOP 2

Appearances:

Andrew Marsh, Barrister 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. Whilst there were aspects of the building work that the Respondent carried out that could have been done better, the conduct did not reach the threshold for the Board to take disciplinary action.

The Charges

- [2] The hearing resulted from a complaint about 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 contrary to section 317(1)(b) of the Act, IN THAT, he may have set out and constructed foundations at the incorrect finished floor level and/or that he may have set out the foundation incorrectly resulting in it being out of alignment; and
 - (b) carried out or supervised building work or building inspection work that does not comply with a building consent contrary to section 317(1)(d) of the Act, IN THAT, he may have set out and constructed foundations at the incorrect finished floor level and/or that he may have set out the foundation incorrectly resulting in it being out of alignment.

Function of Disciplinary Action

- [3] 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.

- [4] 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.”

- [5] 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 Complaint’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 persons⁵:

... 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.

- [6] 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.

- [7] The above commentary on the limitations of the disciplinary process are 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.

Inquiry Process

- [8] 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.

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

⁵ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

Evidence

[9] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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.

[10] 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.

[11] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Roger Heslop	Respondent
[Omitted]	Complainants
[Omitted]	Licensed Building Practitioner
[Omitted]	Cadastral Surveyor
[Omitted]	Licensed Building Practitioner
[Omitted]	Building Consent Officer
[Omitted]	Building Consent Officer

[12] The Respondent was engaged by the Complainants to carry out the construction of the foundations for a new residential dwelling. [Omitted] was managing the build in that he was directly contracting the various trades needed to complete the build. The foundations have not, as a result of a commercial dispute between the parties, been completed.

[13] The two matters at issue at the hearing were the finished floor level (FFL), and the set out of the foundation relative to the boundaries.

[14] A Project Information Memorandum (PIM) issued to the Complainants prior to the building consent being granted. It provided:

Minimum Floor Level The higher of RL 4.8 in reference to the Lyttelton Vertical Datum 1937 (January 2018) or 600mm above the highest ground level intersecting the building footprint. This level is based on the dwelling site being within a flood hazard area identified by the Waimakariri District Council 0.5% AEP (1 in 200 year) flood mapping.

It has been noted this is significantly higher than the level provided on the building consent drawings. If the applicant wishes to use a lower finished floor

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

level then they will need to provide Council a flood study prepared by a suitably qualified person to support their proposed minimum FFL.

- [15] The building consent specified FFL as FFL5.08 (+600 above natural ground based on a clear level section of 4.48m).
- [16] On 26 March 2019, prior to the build commencing the Respondent and [Omitted] met on site. The Respondent gave evidence that [Omitted] instructed a lower FFL and that [Omitted] was or would be dealing with the surveyor and with any required building consent changes. [Omitted] maintained that he was unaware of what the FFL was and that the Respondent was relied on to carry out the set out as per the consented plans and that he wanted the dwelling to be built in strict compliance with the building consent.
- [17] On 13 April 2019, a Council inspection noted that the FFL was not as per the building consent. The Respondent stated that [Omitted] assured him in a phone call on 15 April 2019 that the matter would be sorted. [Omitted] denied the phone call with the Respondent had taken place. The Respondent produced phone records which showed a 2-minute phone call from the Respondent to [Omitted] on the morning of 15 April 2019.
- [18] [Omitted] also gave evidence. It was noted that he was instructed by another surveyor, [Omitted], who was known to [Omitted], who was retired and did not do fieldwork. He set a bench mark height which was noted on the building consent and which would be used to determine levels.
- [19] [Omitted] from the Council, who carried out an inspection on 30 April 2020, gave evidence that he raised the FFL issue with [Omitted]. [Omitted] gave evidence that [Omitted] contacted a surveyor by phone to discuss the issue. [Omitted] stated he was not contacted by [Omitted] on that day. [Omitted] denied that he called a surveyor.
- [20] The Complainant confirmed that on 6 May 2019 he, and the Respondent, visited the Council to argue that the FFL was wrong.
- [21] Turning to the set out in relation to boundaries the Respondent gave evidence that [Omitted] wanted the house to be located as far back to the south as possible and that the Respondent was aware that the dwelling could not intrude into the flood zone set back. The Respondent stated that the set out was done in conjunction with [Omitted], who agreed with the siting. The Respondent noted that, as it was a rural location and a large section, there was some leeway with set out except for the flood set back. He submitted that the change would have been a minor variation and this was confirmed by [Omitted] of the Council.
- [22] [Omitted] stated that the set out as per the plans was critical as they had ensured that winter sun would be maximised and that he was not aware the at the set out was not as per the building consent. A survey by [Omitted] ascertained that the set out was 2 degrees out on the site.

[23] The Board also received, and took into account, post hearing evidence and submissions.

Board's Conclusion and Reasoning

[24] 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.

[25] The Board made its decision in respect of the FFL issue on the basis that [Omitted] was the person who was managing the build and that he issued the instructions and undertook to deal with the issue when it arose. Whilst [Omitted] was not a person who proclaimed expertise his role went beyond that of an interested owner to that of an active participant in the build. In this respect, the Board notes that [Omitted] received the PIM which stipulated the FFL options and the building consent which set the FFL, was on site with the Respondent when the FFL was established and when the FFL issue was raised by the Council, and that there was evidence that [Omitted] was dealing with the matter with a surveyor. The Board finds that, in such circumstances, it would have been reasonable for the Respondent to take [Omitted] instructions and to rely on his assurances that he was dealing with the matter.

[26] With regard to the set-out issue, the Board considered that the change was, in the circumstances, most likely a minor variation, and that, as with FFL issue, [Omitted] was aware of it and was the person dealing with building consent changes.

[27] In coming to its decision, the Board has noted the divergent evidence received. It did, however, have reservations about the credibility of [Omitted] evidence which tended to vary from that received from other witnesses and from documentary evidence before the Board. It was also critical to the Board's decision that the foundations had not been poured. Had they been poured the the Board's decision may well have been different as raising the floor level to meet the minimum council requirement would have been impracticable and expensive to rectify.

[28] Whilst the Board has not made any disciplinary findings it does consider that the Respondent should have obtained written evidence of approved changes (in the case of an amendment) or of the correct persons having been engaged in a change process (in the case of a minor variation) prior to commencing with on-site changes. In this respect had the foundations been poured without such documentation the Board's decision may well have been different as, when an amendment is required, all building work must stop until such time as the amendment is issued. In essence, as regards documentation, the Respondent could have done better, and he accepted as much in submissions made to the Board to the effect that he would, in future, insist on written confirmation or sign-off documentation being received.

- [29] Whilst the Board considers that the Respondent could have done better, it is required to apply the tests set down by the courts as regards the threshold for disciplinary matters. In *Collie v Nursing Council of New Zealand*⁷ as regards the threshold for disciplinary matters, Justice Gendall stated:

[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.

- [30] In *Pillai v Messiter (No 2)*⁸ 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.

- [31] On this basis, the Board has decided that the Respondent's conduct did not warrant any disciplinary action.

Signed and dated this 6th day of October 2020



Chris Preston
Presiding Member

⁷ [2001] NZAR 74

⁸ (1989) 16 NSWLR 197 (CA) at 200