Before the Building Practitioners Board

	BPB Complaint No. CB25826
Licensed Building Practitioner:	Jason King (the Respondent)
Licence Number:	BP 110704
Licence(s) Held:	Roofing – Liquid Membrane Roof; Torch on Roof Membrane

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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	Whangarei
Hearing Type:	In Person
Hearing and Decision Date:	15 December 2022

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, LBP, Design AoP 2
Mrs J Clark, Barrister and Solicitor, Legal Member
Mr G Anderson, 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.

Disciplinary Finding:

The Respondent **has not** committed a disciplinary offence under section 317(1)(b) of the Act.

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Summary of the Board's Decision

[1] The Respondent **has not** committed the disciplinary offence of carrying out or supervising building work in a negligent or incompetent manner.

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 Regulations[1] to hold a hearing in relation to building work at [OMITTED], Northland. The alleged disciplinary offences the Board resolved to investigate were 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) in that:

(a) he may have failed to ensure that a building consent or an amendment to the existing building consent was in place prior to him undertaking the work; and/or

(b) as detailed in the report of Mr Rennie dated 18 May 2022.

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].

[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:

[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

> *"… 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 persons[5]:

> *… 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 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.

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.

[9] 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.

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

Evidence

[10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[6]. 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.

[11] 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.

[12] In addition to the documentary evidence before the Board, it heard evidence at the hearing from:

Jason King, the Respondent

[OMITTED], the Complainant

[OMITTED], witness for the Respondent

John Rennie, Special Advisor to the Board

[OMITTED], Waterproofer

[OMITTED], Licensed Building Practitioner, BP[OMITTED]

[OMITTED], Tiler (by videoconference)

Rick Poole, Far North District Council (by videoconference)

[13] The Respondent was engaged to re-waterproof the decks of a dwelling in [OMITTED], and the work was undertaken between October 2014 and May 2015. The Respondent stated that *"the work did not require a building consent"* and one was not obtained (Document 2.2, Page 77 of the Board's file). The Complainant alleged that poor workmanship by the Respondent caused leaking issues into the rooms below the terrace decks from July 2015 to date.

[14] The Respondent gave evidence that although a two-layer torch applied membrane was in a specification provided by Hitchins, who had developed a remediation report and recommendation, he used a Traffigard membrane and Covercol Rapid Tiling System. The Respondent's position was that the Hitchin's recommended solution was not viable once the Respondent saw under the tiles and the windows were removed. There was only a 20mm upstand into the house and, therefore, inadequate room to do a double-layer torch on membrane.

[15] The dwelling was originally constructed in 2005 under a building consent that was issued pursuant to the Building Act 1991. A Code Compliance Certificate was never

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

applied for. The Respondent stated that the building had extensive leaking from the time it was built and that he had no involvement in the original construction of the building or the original waterproofing of the deck. The Respondent gave evidence that he did not know the building did not have a Code Compliance Certificate, and he had no knowledge of the original building consent.

[16] The Complainant confirmed that there had been prior water ingress issues and that the window and door units were removed, new double-glazed aluminium units were installed, and the exterior of the house was re-plastered. The roof was replaced with enviroclad welded seam membrane, a different product from the original. The decks surrounding the dwelling had also been rebuilt with a different construction method than that which was consented. No amendment to the original building consent was obtained for this further work. She further stated that she had no idea that a Code Compliance Certificate had not been sought or obtained.

[17] The Respondent said that he had been to the property to investigate further water ingress a number of times and was willing to assist in solving the problem. After the 2014 initial re-waterproofing work, in July 2015, there was a small pinhole found in the membrane when a builder removed a window. The Respondent said that this was not the source of the ongoing leak, but he repaired this at his cost. He later used a thermal imaging camera but could not find the cause of the leak.

[18] In August 2022, the Respondent obtained a report from Hitchins, the supplier of the waterproof system used by the Respondent. The report concluded –

> *"The Deck Waterproofing membrane was completely waterproof and finished to a very professional standard at time of application 8 years ago…The visible areas of the membrane are in perfect condition…However, there are fixings in the timber framing of corner columns that have penetrated the membrane and is very likely causing water ingress."* (Document 7.3.2, Page 2220 of the Board's file)

[19] Mr Rennie was appointed as a Special Advisor to the Board pursuant to section 322(1)(d) of the Act to assist the Board in the investigation of this complaint. Mr Rennie produced a report dated 18 May 2022, which was provided to the Respondent in advance of the hearing.

[20] Mr Rennie was asked by the Board to consider:

(a) Was the original renovation work on this property completed in accordance with the approved building consent documents?

(b) Had the deck membrane that formed part of the original renovations met the Building Code B2 durability 15 year external moisture requirements

(c) Was the waterproofing membrane work carried out by the Respondent within the durability requirement of the original work?

(d) Was a building consent required for the repair waterproofing membrane work carried out by the Respondent?

[21] At the hearing, Mr Rennie confirmed his report. He explained that the original construction of the decked terrace and the original waterproofing was not completed in accordance with approved building consent documents. He noted that as the building consent was issued under the Building Act 1991, the original consent did not lapse, and although there was no obligation to apply for the Code Compliance Certificate, one had not been obtained.

[22] Mr Rennie further concluded that the failure of the membrane was identified *"during 2014, or earlier",* and the work was carried out in 2014, both of which were within 15 years of the original construction. However, it was Mr Rennie's view that as the Code Compliance Certificate had never been issued, the minimum durability requirements outlined in Clause B2:Durability 2.3.1 would not be applied to the original membrane. In essence, his opinion was that the 15-year durability requirement would start once a Code Compliance Certificate was issued.

[23] Finally, Mr Rennie concluded that the replacement of the waterproofing membrane altered the original construction and, therefore, the replacement work did not fall within Schedule 1 of the Building Act exemption. As such, a building consent, or an amendment to the original building consent, was required for this replacement work.

[24] Mr Rennie gave evidence that he was not able to determine where the ongoing leaks were coming from.

[25] Mr [OMITTED] undertook the deck reconstruction in 2014 and gave evidence that he had had no involvement with the building prior to this date and no knowledge of the original building consent or lack of a Code Compliance Certificate. The original construction of the deck was not in accordance with the details on the building consent.

[26] Mr [OMITTED], who did the original waterproofing of the deck, stated that he had no memory of the project and, despite trying to locate his records, he could not find any. He stated that he had no idea the building was not built in accordance with the original consent.

[27] Mr [OMITTED], the tiler of the replacement deck, advised that he had done many jobs with the Respondent over the years and that he had no problem with the Respondent's workmanship on this project.

[28] Mr Poole from the Far North District Council gave evidence that an amendment to the original building consent was required for the work done by the Respondent and the work done by other contractors in respect of the re-plastering, re-roofing and replacement of the windows. He confirmed that the Code Compliance Certificate was never applied for and pointed to a 19 September 2005 letter from the Council,

which set out the outstanding aspects to be attended to before the certificate could be issued. (Document 5.1, Page 2192 of the Board's file).

[29] The Complainant herself undertook some testing to try to determine the location of the leaks. There was no expert or forensic evidence produced to support the cause or position of the current leaks.

Board's Conclusion and Reasoning

[30] 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.

[31] 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].

[32] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test[9]. 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 or, in other words, whether the conduct was serious enough.

[33] 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 Act.[10] 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 practitioner[11]

[34] The Board notes that the purposes of the Act are:

> ***3 Purposes***
>
> *This Act has the following purposes:*

[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] *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)
[10] *Martin v Director of Proceedings [*2010] NZAR 333 at p.33
[11] *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

> *(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.*

[35] In terms of seriousness, in *Collie v Nursing Council of New Zealand,*[12] the court 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.*

[36] In *Pillai v Messiter (No 2),*[13] 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.*

<u>Water ingress</u>

[37] There was no evidence presented which established a causal link between the Respondent's waterproofing work and the leaks. The water tests undertaken by the Complainant, herself, do not reach the level of evidence necessary to establish that causal link. The Board notes that Mr Rennie could not state the cause of the leaks, the Respondent's investigations had failed to find a cause, and the Hitchins report suggested it was not the Respondent's work but rather damage to the membrane caused by others. Given those factors, there is insufficient evidence to make any

[12] [2001] NZAR 74
[13] (1989) 16 NSWLR 197 (CA) at 200

findings on the cause of the leaks and therefore no basis to place that liability on the Respondent.

Building consent

[38] Schedule 1 of the Act describes building work for which building consent is not required and includes the following exempted building work:

> ***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.*

[39] In this case, *"The original membrane constructed comprised a liquid applied membrane as detailed in the Hitchins report".* (Document 5.1, Page 2158 of the Board's file).

[40] A Code Compliance Certificate had not been obtained for the dwelling. As such, the building consent issued under the 1991 Act was still in place and operative. Any building work carried out on the dwelling either had to be completed in accordance with that consent or, if changes were to be made, an amendment to that consent had to be obtained prior to the work being carried out. Neither occurred in this instance. Further, because a Code Compliance Certificate had not been issued, Schedule 1 of the Act does not apply. It was not repair, maintenance or replacement because the work had not been completed.

[41] It was clear from the evidence at the hearing that the Respondent was a part player in a huge rework of the building with many contractors and other licensed building practitioners involved. All of the contractors undertook work for which a building consent should have been obtained. In that sense. it is unfair to single out the Respondent as the only one to carry the responsibility for doing work without a building consent. It was also evident that none of the parties involved were aware that a Code Compliance Certificate had not been issued on this building in respect of the original construction work.

[42] The Respondent's part in the rework was minor in comparison to others, and there were multiple instances of no amendment to the building consent being obtained for building work when it should have been. As such, in accordance with the cases discussed, the Respondent's conduct does not reach the threshold of seriousness required to find that a disciplinary offence has been committed.

[43] The Board notes, however, that in the future, the Respondent, as a Licensed Building Practitioner, should turn his mind to the need for a building consent and should, at the least, make inquiries about whether a building consent is required or be in a position to give advice to the owners that inquiries should be made with the Building Consent Authority to ascertain whether a building consent is required.

[44] Based on the above conclusions, the Board finds that the Respondent has not committed a disciplinary offence under section 317(1)(b) of the Act.

Signed and dated this 10th day of February 2023

Mr M Orange
Presiding Member