

Before the Building Practitioners Board

	BPB Complaint No. CB25573
Licensed Building Practitioner:	Ruo Lan (the Respondent)
Licence Number:	BP 114484
Licence(s) Held:	Design AOP 2 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	Board Inquiry
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	25 November 2020
Decision Date:	7 December 2020

Board Members Present:

Mr Orange, Deputy Chair, Legal Member (Presiding)
Mr Fabish, LBP, Carpentry and Site AOP 2
Mr Monteith, LBP, Carpentry and Site AOP 2
Ms Pearson-Green, LBP, Design 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.

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Summary of the Board’s Decision

- [1] The Respondent’s conduct did not reach the required threshold for the Board to make a disciplinary finding. Accordingly, the Board has decided that the Respondent has not committed a disciplinary offence.

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].
- [3] Prior to the Board considering a Registrar’s Report, and making a regulation 10 decision under the Complaints Regulations, the Complainant withdrew the complaint. The Board proceeded, under regulation 17(2) of the Complaints Regulations, with the matter as a Board Inquiry.
- [4] 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:
 - (i) made design changes to a deck, exterior door and deck without following and acceptable process; or
 - (ii) supervised the carrying out of building work.
 - (b) breached section 314B(b) of the Act contrary to section 317(1)(h) of the Act, IN THAT, he may have carried out design work that required a Design AOP 3 licence in that the dwelling may have been a Category 3 building under the Building (Designation of Building Work Licensing Classes) Order 2010 whereas the Respondent is licensed for Category 1 and 2 Buildings.

¹ The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

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*² and in New Zealand in *Dentice v Valuers Registration Board*³.

[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*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.”

[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 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.

[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.

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

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

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

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 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.

- [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:

Ruo Lan	The Respondent
[Ommitted]	Homeowner
[Ommitted]	Homeowner

- [15] The homeowners engaged the Respondent to design and project manage an alteration to an existing dwelling that was split into two units. The building work was extensive and required a building consent. The Respondent completed the designs and applied for the building consent as the owner's agent. He also contracted, by way of his company VS Construction Limited, to provide the building services required to complete the build. He personally undertook the management of the overall project. He did not carry out or supervise any restricted building work. He contacted a Licensed Building Practitioner ([Ommitted] Carpentry) to carry out the building work. Council inspection records noted [Ommitted] as the Licensed Building Practitioner associated with the build. The Complainant did not witness the Respondent carrying out any building work.
- [16] The dwelling that was being renovated was sited on a sloping section. It was a complex dwelling with four levels and a roof loft. Whilst it was described as being two dwellings it was a single residence on one lot with provision for two habitable spaces. Those spaces were not divided into separate legal titles or units. The building

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

was, for the purposes of the Building (Designation of Building Work Licensing Classes) Order 2010, a Category 2 Building in that it was neither a Category 1 or Category 3 Building as it had a Risk Matrix score of greater than 12 and was less than 10 meters in height as defined in the Order.⁷

- [17] The Complainant and Respondent were at odds over whether information with regard to design changes was sent and received. The Respondent maintained that the Complainant was kept informed. Email communications with attachments were provided as part of the documentation before the Board. The Complainant's position was that it was not clear that changes had been made, not all of the information sent had been received, and that the information that was received was within the context of payment issues and was, as such, overlooked.
- [18] The Board was provided with the building consent authority's documentation as part of the hearing files. Included in the documentation were two building consent amendments. One was for a change to the fire protection system from an active to a passive system. The other was for a change to the ground floor rumpus room. There was also evidence of 10 minor variations that were processed on-site. The Board questioned the Respondent as to the process he used for amendments and minor variations. The Respondent described his processes noting the contractual processes as well as the interactions required with the building consent authority prior to the building work being carried out.
- [19] The Respondent was questioned about why he had not anticipated the issues that resulted in the need for design changes to an exterior door when he developed the design for a building consent. He noted that it was not practicable, once on-site and the underlying structure was exposed, to build the deck area as designed. Specifically, he noted that a beam was not where it was expected or the size it was expected to be and that a design change was needed to accommodate. The Respondent maintained that the Complainant was made aware of and agreed to the change in both writing and verbally on-site. The Complainant stated that it was only after the change had been made that he was made aware and that early emails with the changes were overlooked as they dealt with payment issues. The Complainant stated that it was not obvious to him on site that the change had been made as he did not venture down to the lower levels during the build. A minor variation dated 20 December 2019 was issued for the change.

Board's Conclusion and Reasoning

- [20] The Board has decided that the Respondent **has not** committed a disciplinary offence and **should not** be disciplined.

⁷ Under the Building (Designation of Building Work Licensing Classes) Order 2010, building height means the vertical distance between the upper surfaces of the floors of the building's lowest and highest storeys. Floor does not include a mezzanine floor or a rooftop area. Storey means a portion of the building between the upper surface of a floor (floor A) in the building and the upper surface of the next above floor in the building; or if there is no next above floor in the building, the lower surface of the ceiling or roof above floor A.

[21] There were three specific issues that the Board was investigating. The first matter was whether the Respondent had been negligent, or incompetent as regards his design processes. Negligence and incompetence are not the same. In *Beattie v Far North Council*⁸ 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.

[22] 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, in this case, a licensed building practitioner with a design license. This is described as the *Bolam*⁹ test of negligence which has been adopted by the New Zealand Courts¹⁰.

[23] 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*”.

[24] The New Zealand Courts have stated that 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.

[25] In terms of 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.

⁸ Judge McElrea, DC Whangarei, CIV-2011-088-313

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)

¹³ [2001] NZAR 74

[26] 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.

[27] The Board, on reviewing the evidence, noted that whilst there was some evidence of design work that may not have been completed to an acceptable standard, the conduct did not reach the seriousness threshold as outlined in the above decisions. The Board accepted that adequate processes, from a building consent authority perspective to deal with design changes, were undertaken.

[28] The Board does, however, consider that the Respondent could have done better as regards his contract administration and his interactions with his client. It would be advisable for him, in the future, to clearly document changes by way of the variation order process contained in his contract. It is also recommended that he clearly identify changes made to a design by way of amendments or minor variations.

[29] It was also noted by the Board that the Respondent did not see the need for changes to his designs to be highlighted in subsequent versions of his plans. The Board noted that whilst that may be the case when he is both the designer and the head contractor, it may not always be that his designs will be implemented by a person that he is directing. As such, he should ensure that any licensed person picking up and using the plans can identify, from one version to the next, what the changes are.

[30] The second matter that was before the Board was whether the Respondent might have carried out or supervised building work that he was not licensed to carry out. There was clear evidence that an appropriately licensed person was on-site carrying out the carpentry work. There was also no evidence that the Respondent had not carried out any carpentry work.

¹⁴ (1989) 16 NSWLR 197 (CA) at 200

- [31] The final matter was whether the Respondent carried out design work outside of his competency. In the respect the Board was satisfied that the dwelling was a Category 2 Building and that, as such, it came within the competency of a Design AOP 2 Licence.

Signed and dated this 22nd day of December 2020

A handwritten signature in black ink, appearing to be 'M. J. Orange', written in a cursive style with a long horizontal stroke extending to the right.

M. J. Orange
Presiding Member