

Before the Building Practitioners Board

	BPB Complaint No. CB25372
Licensed Building Practitioner:	Jonathan McFarlane (the Respondent)
Licence Number:	BP 124199
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	Auckland
Hearing Type:	In Person
Hearing Date:	23 June 2020
Decision Date:	23 June 2020

Board Members Present:

Mel Orange, Deputy Chair, Legal Member (Presiding)
David Fabish, LBP, Carpentry and Site AOP 2
Bob Monteith, LBP, Carpentry and Site AOP 2
Faye Pearson-Green, LBP, Design AOP 2

Appearances:

Jo-Anne Knight 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.

Board Decision:

The Respondent **has not** committed a disciplinary offence.

Contents

Introduction	2
Function of Disciplinary Action	2
Inquiry Process	3
Evidence	3
Board’s Conclusion and Reasoning	5

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. 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.”

[4] In a similar vein, the Board’s investigation and hearing process are 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

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

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.

- [5] 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.
- [6] 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, focuses on and deals with the serious conduct complained about.

Inquiry Process

- [7] 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.
- [8] 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

- [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.

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

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

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

Jonathan McFarlane	Respondent
<i>[Omitted]</i>	Complainants
<i>[Omitted]</i>	<i>[Omitted]</i>
<i>[Omitted]</i>	LBP, Roof and Torch on Membrane
<i>[Omitted]</i>	Building Survey, report writer

- [12] The complaint related to building work carried out on a multi-storey block of retirement village units. The Complainants lived in Block D. Work had previously been carried out on Block A to remediate weathertightness issues under a building consent. The building consent also covered remedial weathertightness work for Block C. Work on two units in Block C had been carried out and completed, but not in accordance with the building consent issued. The Respondent was the main contractor for the work on both Block A and Block C.
- [13] Notices to Fix (NTF) were issued by the Auckland Council in respect of both Block A and Block C.
- [14] The Block A NTF noted that a different barrier system and construction methodology had been used. The Board heard evidence that an amendment to the building consent had been submitted but not acknowledged as received by the Council and that the matter was the subject of a determination under section 177 of the Act. A draft determination decision has noted the change was a minor variation and that an amendment to the building consent was not required. The Board also heard evidence that the amendment had been provided to the Respondent and that the work had been carried out on the basis of the instructions in the amendment.
- [15] The Block C NTF noted that the building work had not been completed in accordance with the building consent issued and that no inspections had been called. The Respondent gave evidence that the work undertaken was a temporary fix to deal with staining that was coming from an acoustic layer under deck tiles. It was not intended to be work under the building consent. The Board received evidence that the work under the building consent would not proceed until such time as the Block C units were vacated so as to minimise the impact on residents.
- [16] The Respondent stated that the methodology used for the temporary work was, under the directions of the village management, the same as the consented methodology in two recently completed blocks of units that had obtained code compliance.
- [17] The Respondent was questioned about why he did not obtain a building consent for the temporary fix. He stated that, at the time, he considered the work fell within clause 1 of Schedule 1 of the Act. He was not aware, when he carried it out, that building work which has failed to meet the durability requirements of the Building

Code cannot be carried out under the general repair, maintenance and replacement provisions in Schedule 1⁷.

- [18] There was no evidence that the temporary fix had failed. It has been in place for over three years.

Board's Conclusion and Reasoning

- [19] 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.

- [20] The issues the Board gave notice that it would further investigate were those raised in the two NTFs.

- [21] The Board accepted, as regards the NTF for Block A, that the Respondent was following the instructions issued by Babbage, which were issued as part of an amendment process. The Respondent should note that building work that relates to an amendment cannot proceed until such time as the amendment is granted. This is because of the provisions of section 45(4) of the Act which states:

- (4) *An application for an amendment to a building consent must,—*
 - (a) *in the case of a minor variation, be made in accordance with section 45A; and*
 - (b) *in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.*

- [22] As an amendment is to be treated as if it is an application for a building consent, it follows that if building work cannot be carried out without a building consent work relating to an amendment also cannot be carried out until that amendment is granted.

- [23] In this instance, the change was most likely only a minor variation. Work on minor variations does not have to cease whilst it is being considered, but it is good practice to check with a designer or the building consent authority that the work will comply with the Building Code prior to it being undertaken.

- [24] Turning to Block C, the issues were not what was done but that it was completed without a building consent. The Respondent's error was that he mistakenly considered clause 1 of schedule 1 applied. He did not make any queries, notwithstanding that he was aware a consent had been granted for similar work.

⁷ Clause 1(3)(c) of Schedule 1 of the Act

- [25] When considering negligence, which is the departure by a licensed building practitioner whilst carrying out or supervising building work from an accepted standard of conduct, the Board needs to consider the seriousness of that conduct.
- [26] In *Collie v Nursing Council of New Zealand*⁸ as regards the threshold for disciplinary matters:

[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.

- [27] In *Pillai v Messiter (No 2)*⁹ 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.

- [28] On this occasion, the Board has decided that whilst the Respondent should have known of the requirement for a building consent, or at least have made enquiries with suitably qualified persons as to whether one was required, his failure to do so was not sufficiently serious to warrant a disciplinary outcome. He is cautioned to be diligent in the future about whether building work does, or does not, require a building consent.

Signed and dated this 22nd day of July 2020



Mel Orange
Presiding Member

⁸ [2001] NZAR 74

⁹ (1989) 16 NSWLR 197 (CA) at 200