

Before the Building Practitioners Board

	BPB Complaint No. CB25515
Licensed Building Practitioner:	Andrew Meale (the Respondent)
Licence Number:	BP 125225
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:	1 December 2020
Decision Date:	10 December 2020

Board Members Present:

Mr. M. Orange, Deputy Chair, Legal Member, Chair (Presiding)
Mr. D. Fabish, LBP, Carpentry and Site AOP 2
Mr. R Shao, LBP, Carpentry and Site AOP 1
Mr. F. Thomas, LBP, Roofing, Registered Plumber

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 as, whilst there were compliance issues, the Respondent’s conduct was not serious enough for the Board to impose a disciplinary sanction.

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 may have 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 carried out or supervised work that which was not completed to an acceptable standard and/or work that required a building consent. In proceeding with the matter, the Board gave notice that it would, at the hearing, focus on the matters set out in a report from *[Omitted]*.

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.

³ [1992] 1 NZLR 720 at p 724

- [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.
- [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.

⁴ [2016] HZHC 2276 at para 164

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

Consolidation

- [10] The Board may, under Regulation 13, consolidate two or more complaints or inquiries into one hearing but only if they are, in the opinion of the Board, about substantially the same subject matter and the complainant and the licensed building practitioner in respect of each matter agrees to the consolidation.
- [11] The Board sought agreement for consolidation of this matter with Board Inquiry number CB25591. The consent of all those involved was forthcoming. The two matters were consolidated.

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:

<i>[Omitted]</i>	The Complainants
Andrew Meale	Respondent
<i>[Omitted]</i>	Respondent in CB25591
<i>[Omitted]</i>	<i>[Omitted]</i>

- [15] The Board also summoned *[Omitted]* to the hearing. He was the head contractor but was not a licensed building practitioner. He failed to appear. The Board also tried to locate and summon *[Omitted]*, an on-site builder, but was unable to do so.
- [16] The Complainant's noted that their main concern, and disappointment, was with the main contractor and project manager, *[Omitted]* of *[Omitted]*. The Board explained that it has no jurisdiction over *[Omitted]* as he is not a Licensed Building Practitioner.
- [17] The building work that the complaint related to involved the extension of a deck area located from a lounge area and new access stairs, as well as the reclad of a basement area, the lining of internal walls, and the creation of internal storage shelving in the garage.
- [18] The building work was carried out by a number of subcontractors who were engaged by *[Omitted]*. These included the Respondent in this matter and in the consolidated

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

hearing matter. Evidence was also heard that a number of unlicensed labourers were also engaged by *[Omitted]* and that they were not under the supervision or direction of either of the two respondents. The building work that each of the respondents did carry out and which the Board was investigating was:

Andrew Meale	Decking work Internal linings and shelving
<i>[Omitted]</i>	Cladding work Installation of timber studs in the garage

- [19] Focusing on the building work undertaken by this Respondent, the issues with the deck included an inconsistent tread height at the top and bottom of the stairs. The Building Code requires a uniform tread height through a set of stairs. The Respondent stated that pre-cut stringers had been supplied by *[Omitted]* and that an adjustment to the first and last riser was required in order for the stringers to fit the area they were to be fitted to. He noted that the ground around the tread could be raised and stated the top tread issue was an oversight. The Respondent stated he was not able to cut his own risers as a result of budget constraints and noted that he was a subcontractor and that *[Omitted]* was providing materials.
- [20] Evidence was also received by way of *[Omitted]* and his report that not all deck fixings and connections had been installed. The Respondent stated that the deck was not complete and that the intention was to install them, or ensure that they were installed, prior to completion. *[Omitted]* stated that it would have been feasible for the fixings and connections to be installed at a later point in time, although he noted it may have been more difficult than doing it during construction. The Respondent accepted that missing washers on balustrade posts was an oversight by his workers.
- [21] *[Omitted]*'s report also noted that the required Building Code gap between cladding and decking had not been left. The Respondent gave evidence that the lowest cladding board had been removed, that another board had not yet been obtained, and that the intention was to remove the strip of decking where the cladding was to be installed and to rip it so as to create the gap when the cladding board was installed. The strip of decking was not, he stated, permanently affixed to the deck structure.
- [22] The Complainants raised issues with shelving that failed. They considered that the wooden doweling used was inadequate. The Respondent stated that he had wanted to use pipe but that the Complainants wanted wooden dowels and that he felt the dowels were adequate but that the shelves had been overloaded.
- [23] The Respondent is no longer undertaking work for *[Omitted]*.

Board's Conclusion and Reasoning

- [24] 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.
- [25] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test⁷. 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.
- [26] 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 Act⁸. 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 practitioner⁹.
- [27] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁰ 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.*
- [28] In *Pillai v Messiter (No 2)*¹¹ 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.*
- [29] The Board decided that whilst there was building work that had not been completed to an acceptable standard, it did not consider that the work that had been completed reached the threshold noted above for the Board to impose a disciplinary sanction. The Board accepted that the work on the deck was not complete and whilst the sequencing of the work may not have been the most efficacious it was accepted that the missing fixings could still be installed. The stair tread heights were not compliant but the issues were not serious enough to warrant a disciplinary

⁷ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

⁹ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹⁰ [2001] NZAR 74

¹¹ (1989) 16 NSWLR 197 (CA) at 200

outcome. There was insufficient evidence as regards the shelving to determine whether the work was substandard to not. Notwithstanding the finding, the Respondent is cautioned to take care in the future to ensure that the building work that he undertakes or supervises meets Building Code requirements.

- [30] The Board did note a comment by the Respondent that he was engaged as a result of an advert he placed stating that he was available to sign off restricted building work. The Respondent is reminded that if he has not personally carried out the restricted building work, then he needs to ensure that he is actively supervising the work whilst it is being carried out to ensure that it meets quality and compliance requirements. The Respondent is directed to supervision resources that the Board has on its website for further detail on the Respondent's obligations as a supervisor.

Signed and dated this 8th day of January 2021

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

Mr M. Orange
Presiding Member