

Before the Building Practitioners Board

	BPB Complaint No. CB25933
Licensed Building Practitioner:	Kyle Middelplaats (the Respondent)
Licence Number:	BP121434
Licence(s) Held:	Roofing – Profiled Metal Roof and/or Wall Cladding

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:	29 November 2022
Decision Date:	1 December 2022

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, LBP, Design AoP 2
Mr D Fabish, LBP, Carpentry and Site AoP 2
Ms K Reynolds, Construction Manager

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 was not serious enough to warrant a disciplinary finding. As such, the Board decided that he had not committed a disciplinary offence.

The Board

- [2] The Board is a statutory body established under the Building Act.¹ Its functions include receiving, investigating, and hearing complaints about, and to inquire into the conduct of, and discipline, licensed building practitioners in accordance with subpart 2 of the Act. It does not have any power to deal with or resolve disputes.

The Charges

- (a) The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations² to hold a hearing in relation to building work at [OMITTED], Ohoka. The alleged disciplinary offences the Board resolved to investigate were that the Respondent may have:
- (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, AS DETAILED in the report of Mr [OMITTED] (Document 2.1.31, Page 44 of the Board’s file); 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

¹ Section 341 of the Act.

² The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

Act, IN THAT, he may have installed materials which were contrary to those specified in the building consent

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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

[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*,⁵ 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 persons⁶:

... 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 breaches the Code of Ethics for Licensed Building Practitioners⁷ (the Code) or it reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

⁶ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

⁷ a Code of Ethics for Licensed Building Practitioners was established by an Order in Council (the Code). It came into force on 25 October 2022 by clause 2, Building (Code of Ethics for Licensed Building Practitioners) Order 2021

- [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.

Consolidation

- [10] The Board may, under Regulation 13, consolidate two or more complaints into one hearing but only if the complaints 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 complaint agree to the consolidation.
- [11] The Board sought agreement for consolidation of this matter with complaint number CB25912. 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 committed⁸. 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.
- [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.

⁸ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

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

Kyle Middelplaats	Respondent
[OMITTED]	Respondent in CB25912
[OMITTED]	Complainants
[OMITTED]	Witness, report writer
[OMITTED]	Witness, [OMITTED] representative
[OMITTED]	Witness, Licensed Building Practitioner

[15] [OMITTED] was engaged to construct a new residential dwelling for the Complainants. The build was initially priced by [OMITTED]. Cost savings of circa \$50,000 were sought by the Complainants. Various changes to the materials to be used were made to make those savings. The changes included the type of roofing material and underlay.

[16] The Respondent installed and supervised the installation of the roof as a subcontractor to [OMITTED], who measured and supplied the materials. The Respondent had three experienced staff members on site. [OMITTED], in turn, were subcontracted to [OMITTED].

[17] The Respondent did not consult the building consent prior to carrying out the install. He stated he relied on his past experience to determine how the work was to be carried out. He did have access to and awareness of Roofing Association of New Zealand guidance documentation.

[18] The consented detail around junctions between different pitched roof structures differed from the actual roof lines, with conflicting consented details around of eave overhangs. Mr [OMITTED] stated the consent was on site in a lock box and that most contractors had access to it. Mr [OMITTED] was not on site when the roofing work was carried out.

[19] The Complainants raised issues with the roofing work and provided a report from Mr [OMITTED]. The matters complained about included:

- (a) A change of roofing underlay used – Bituminous Roofing Underlay was used in place of Thermakraft Covertek 407 that was on the consented plans;
- (b) The installation of flashings, including a lack of cover at the change of pitch and the manner in which flashings that were replaced with pan flashings were installed; and
- (c) A failure to turn down iron sheets where they went into spouting.

[20] The four low pitch roofs and associated flashings were replaced by different Licensed Building Practitioner as subcontractor of [OMITTED].

Roof Underlay

- [21] A complaint about roofing underlay was also made about Mr [OMITTED] with respect to the processes used to make the change.
- [22] As noted, the roofing underlay was supplied by [OMITTED] under instruction from Mr [OMITTED]. The Respondent was not involved in any of the discussions about the materials that would be used.

Flashings

- [23] The Respondent accepted that some of the flashings were not installed with the correct amount of cover.
- [24] The flashings that were replaced with pan flashings were installed at junctions between different pitch roof structures. Mr [OMITTED] stated that the work was compliant with E2 of the Building Code but that there were issues with the aesthetics of how it was completed.

Turn Downs

- [25] The Respondent accepted that he had not turned down the sheets where they entered the guttering and that he should have.

Board's Conclusion and Reasoning

- [26] 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.
- [27] The Respondent accepted that he had carried out building work that did not meet the requirements of E2 of the Building Code with respect to flashing cover and turn downs. Other matters complained about were compliant but not visually acceptable to the Complainants.
- [28] 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*⁹ test of negligence which has been adopted by the New Zealand Courts¹⁰.

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)

[29] The New Zealand Courts have stated that an assessment of negligence in a disciplinary context is a two-stage test¹¹. 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.

[30] When considering seriousness, the courts have stated:¹²

[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.

[31] It is on this basis that the Board, which includes persons with extensive experience and expertise in the building industry, considered the conduct complained about under section 317(1)(b) of the Act, did not reach the threshold for disciplinary action.

[32] Turning to building contrary to a building consent, again there were issues, but they were not serious enough to uphold the complaints.

[33] The Respondent is reminded that when carrying out building work, it is a requirement that the building consent is followed. That can only be done if the Licensed Building Practitioner is familiar with the consent. It was concerning that the Respondent had not obtained or viewed the building consent for this job.

Signed and dated this 16th day of December 2022



M Orange
Presiding Member

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹² *Collie v Nursing Council of New Zealand* [2001] NZAR 74