

Before the Building Practitioners Board

	BPB Complaint No. CB25230
Licensed Building Practitioner:	Steven Palmer (the Respondent)
Licence Number:	BP 122264
Licence(s) Held:	Carpentry and Site AOP 1

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:	26 February 2020
Decision Date:	25 March 2020

Board Members Present:

Mel Orange, Legal Member (Presiding)
Richard Merrifield, LBP, Carpentry and Site AOP 2
David Fabish, LBP, Carpentry and Site AOP 2
Robin Dunlop, Retired Professional Engineer
Faye Pearson-Green, LBP Design AOP 2

Appearances:

Chris Patterson, Barrister, 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.

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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 at *[Omitted]*. 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, the building work may not have been completed in accordance with a resource consent issued;
 - (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 Act, IN THAT, the building work may not have been completed in accordance with a resource consent issued; and
 - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act, IN THAT, he may not have provided a record of work within a reasonable period to time of completion of restricted building work.

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.

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] 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 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.

- [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 are important to note as, on the basis of it, the Board Board’s inquiries, and this decision, focus on and deal 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.

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

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. The hearing is not a review of all of the available evidence.
- [11] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|------------------|--|
| Steven Palmer | Respondent |
| <i>[Omitted]</i> | Complainant |
| <i>[Omitted]</i> | <i>[Omitted]</i> , witness for the Complainant |
| <i>[Omitted]</i> | <i>[Omitted]</i> , witness |
| <i>[Omitted]</i> | <i>[Omitted]</i> , witness |
- [12] The Complainant together with *[Omitted]*, as trustee of a family trust (the Trust), purchased a residential dwelling from *[Omitted]*, a company owned by *[Omitted]*. At the time of purchase a resource consent and a building consent, both in the name of *[Omitted]* had been issued. Prior to the building work starting the ownership and title in the land passed to the Trust.
- [13] The Respondent by way of his company Hi Tech Property Development Limited was engaged by *[Omitted]*, another company related to *[Omitted]* on a contract basis to carry out the carpentry work on the build. *[Omitted]*, a development company, provided back office support and project management to the project including the management and payment of subtrades and the supply of materials.
- [14] Toward the end of the build when it was nearing practical completion a resource management inspection was carried out. Failed items were noted. In particular it was noted that a pool gate opened the wrong way and that privacy screens had not been installed to one of the elevations. Issues were also raised with the landscaping. The requirement for privacy screens on the particular elevation was noted in the resource consent but not in the building consent plans.
- [15] The Complainant made a complaint to the Board about the failed resource consent inspection alleging that the Respondent was responsible for the associated building and landscaping work.

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

- [16] With regard to the privacy screens the evidence before the Board was that neither the Complainant nor the Respondent were aware, during the build, of the resource consent requirements.
- [17] The landscaping was carried out by a separate subcontractor engaged by *[Omitted]*.
- [18] In terms of the pool gates the Board was provided with evidence from the Complainant that the Respondent provided project management services over and above the management of the carpentry work in relation to the pool and that he or his staff carried out some of the work. The evidence included an invoice purported to have come from Hi Tech Property Developments which the Complainant received by way of *[Omitted]*. The Respondent refuted that it was his invoice and reaffirmed that he was not engaged to provide project management. Following the hearing the Respondent filed an affidavit stating that he did not invoice for the work covered by the invoice provided by the Complainant. He provided a copy of his form of invoice. It was significantly different from the invoice provided by the Complainant.
- [19] The Board also heard evidence as to the involvement of other persons employed or engaged by *[Omitted]*. In the early stages of the build through to ground floor framing David Living was managing the build. In or about April or May 2018 *[Omitted]* took over as a licensed building practitioner who was overseeing builds for *[Omitted]*. *[Omitted]* gave evidence that he was also involved in the installation of the gate and the reasons why it was constructed and installed in the manner it was. The Board noted that the consented fence differed from that which was supplied by *[Omitted]* and installed.
- [20] With regard to the record of work the Respondent gave evidence that he provided his record of work to *[Omitted]* on completion. He noted that the owner on the building consent was *[Omitted]* and that, as far as he was aware, *[Omitted]* was the owner and that he knew *[Omitted]* was linked to *[Omitted]* and *[Omitted]*.

Board's Conclusion and Reasoning

- [21] 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);
 - (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); or
 - (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act)
- and **should not** be disciplined.

[22] The reasons for the Board's decisions are as follows.

Louvres

[23] The Board accepted that, on the evidence before it, that the Respondent was not aware of the requirement for the louvres identified in the failed resource consent inspection to be installed. The Board finds that he is not responsible for the failing.

Land Scaping

[24] The Respondent did not have any connection with the landscaping. Once again, the Respondent is not responsible for the issues raised in the failed resource consent inspection.

Record of Work

[25] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work⁷.

[26] The Board accepted that the record of work was provided by the Respondent on completion to the entity that he considered was the owner. Whilst a copy was not provided to the territorial authority the Board has decided that the failure to do so does not warrant the Board making a finding under section 317(1)(da)(ii) of the Act.

Pool Gates

[27] The Board did note that the pool gate was installed in a noncompliant manner. It considered that the Respondent did have some involvement in the installation of the gate. It has decided, however, that the conduct was not sufficiently serious enough to warrant a disciplinary outcome. In coming to this decision the Board has considered the comments of Justice Gendall 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.

⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁸ [2001] NZAR 74

[28] The Board also notes that 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.

[29] It is on the basis of the thresholds as outlined above that the Board has decided that the Respondent has not committed a disciplinary offence.

Signed and dated this 25th day of March 2020

A handwritten signature in black ink, appearing to be 'M. Orange', written in a cursive style.

Mel Orange
Presiding Member

⁹ (1989) 16 NSWLR 197 (CA) at 200