

Before the Building Practitioners Board

	BPB Complaint No. CB25236
Licensed Building Practitioner:	Baydon Phillips (the Respondent)
Licence Number:	BP 106369
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	Christchurch
Hearing Type:	In Person
Hearing Date:	5 December 2019
Decision Date:	26 February 2020
Board Members Present:	
	Chris Preston (Presiding)
	Mel Orange, Legal Member
	Faye Pearson-Green, LBP Design AOP 2
	Rob Shao, LBP Carpentry Site AOP 1

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
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 at *[Omitted]*. The alleged disciplinary offence the Board resolved to investigate was that the Respondent carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) 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] 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. It does not have any jurisdiction over contractual matters.

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

Evidence

- [5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. 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.
- [6] 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.
- [7] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|------------------|---|
| Baydon Phillips | Respondent |
| <i>[Omitted]</i> | Witness, Project Manager |
| <i>[Omitted]</i> | Witness, Licensed Building Practitioner |
- [8] The Respondent was engaged to carry out earthquake repairs under a scope of works provided to him by the *[Omitted]* by way of the *[Omitted]*. The work was carried out the exemptions from building consents provided in Schedule 1 of the Act.
- [9] The Complainant raised a number of issues with the building work provided the Board including that:
- an engineer's report was not obtained prior to the work being undertaken;
 - bearers were excessively checked out to 30mm compromising structural integrity of the bearer;
 - bearers were inadequately packed with wrong type of wood;
 - packers were used across the grain;
 - a new pile installed under main bedroom was inappropriate;
 - the fixing of piles was substandard with insufficient staples which were not looped or fixed;
 - pile size footing and fixing was inadequate;
 - there was an inappropriate use of floor levelling compound on timber flooring; and
 - a PS3 was not provided.

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [10] The Complainant provided reports from various third-party experts on the quality and compliance of the building work complained about in support of the allegations.
- [11] The Respondent provided a response to the complaint. He noted that the work had been signed off by *[Omitted]* to whom he was contracted. Post the sign off he was asked by *[Omitted]* to carry out remedial repairs which he was prepared to do. The owners, however, would not allow him to return to carry out any further work. The Respondent did not accept that he had been either negligent or incompetent when carrying out the repair work.
- [12] The Respondent provided specific responses to the allegations as follows:
- engineer's report – this was an *[Omitted]* responsibility;
 - bearers were excessively checked out – this was the repair strategy from *[Omitted]*, however, in hindsight, he acknowledged it was not to the Building Code;
 - packing – completed as per advice from *[Omitted]* but his practices have since changed;
 - new pile – in the scope of works from *[Omitted]*;
 - fixing of piles – completed as per advice from *[Omitted]*. His practices have since changed;
 - pile size footing – repair strategy from *[Omitted]*;
 - floor levelling compound - repair strategy from *[Omitted]*;
 - a PS3 was not provided – the contract was with *[Omitted]* who told him not to provide the paperwork to the owner.
- [13] The Complainant also raised issues, supported by expert reports, over incorrect levels in the house that had not been rectified and hogging in the floor that had not been dealt with adequately.
- [14] The Respondent submitted that the central issue was that the Complainant was not satisfied with the *[Omitted]* repair strategy, which the Respondent had no control over, and, in relation to floor levels, that “from the photos received [in the complaint] it appears this work has never been undertaken thus we cannot be held accountable for movement over the last four years”.
- [15] At the hearing the Respondent accepted that there were three piles that were not completed to an acceptable standard but that overall the building was in a better state when he finished as compared to when he started. With regard to hogging he stated that the repair was added as a variation and that he did as good a job as could be done under the limitations imposed. A complete repair would have involved major work which had not been authorised.

- [16] The Respondent reiterated that he had not been allowed to return to the property to rectify the issues noted. He also gave evidence that much of what was raised in the reports provided to the Board related to pre-existing defects and/or damage and that the Complainant was seeking a full foundation replacement which *[Omitted]* would not fund.
- [17] The Respondent also gave evidence as regards the processes used by *[Omitted]* and *[Omitted]* noting that the instructions were often vague and that variations had to be approved by them.
- [18] The Board questioned the Respondent as regards who carried out the repair work. The Respondent stated that he had a licensed building practitioner on the site who was supervising the work. He was, at the time, based in his office where he would carry out desk top reviews of completed work. *[Omitted]* corroborated this. A check of the Register of Licensed Building Practitioners confirmed that the person named was licensed at the time the work was carried out.

Board's Conclusion and Reasoning

- [19] 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.
- [20] The Board has made its decision on the basis that the Respondent did not carry out or supervise any of the building work. It is a fundamental tenant of the licensed building practitioner regime that each licensed person is responsible for the work that he or she carries out or supervises. As another licensed person supervised the work, he is the person who is responsible for the quality and compliance of the work, not the Respondent.
- [21] The Board further notes that even if the Respondent had of been the responsible licensed building practitioner the matters complained about would not have reached the threshold for disciplinary action. The reason is that only a small portion of the work complained about was carried out by the Respondent's business and the transgressions noted were not serious enough to warrant a disciplinary outcome. In making this comment that Board has taken the directions of the Courts as regards the threshold for disciplinary action into account⁶:

[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.

⁶ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

Signed and dated this 26th day of February 2020

A handwritten signature in black ink that reads "Chris Preston". The signature is written in a cursive style with a horizontal line across the middle of the name.

Chris Preston
Presiding Member