

Before the Building Practitioners Board

	BPB Complaint No. CB25920
Licensed Building Practitioner:	Antonie Posthuma (the Respondent)
Licence Number:	BP 101535
Licence(s) Held:	Carpentry, Site AoP 2

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	Board Inquiry
Hearing Location	Christchurch
Hearing Type:	In Person
Hearing and Decision Date:	24 February 2023

Board Members Present:

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

Appearances:

E Tobeck for the Respondentm

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.

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

[3] 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], Lincoln. 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, AS DETAILED IN the report of Darin [OMITTED] dated 13 September 2021 on pages 7 and 8 of the report (Document 2.1.28-2.1.29, Pages 42 and 43 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 Act, IN THAT, he may have installed the Titan Façade Panel contrary to the manufacturer’s specifications.

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.

- [4] On 14 September 2022, the Complainant advised that she no longer wishes to proceed with the complaint. On 21 September 2022, the Board received submissions from Counsel for the Respondent proposing that a hearing was not required. The Board issued a Minute advising that the matter would continue as a Board Inquiry.

Function of Disciplinary Action

- [5] 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.

- [6] 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.”

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.

Evidence

- [8] 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 that allow it to receive evidence that may not be admissible in a court of law.
- [9] 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

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

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.

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

Antonie Posthuma	Respondent
[OMITTED]	Expert for the Respondent
[OMITTED]	Expert, [OMITTED]
[OMITTED]	Witness, Licensed Building Practitioner
[OMITTED]	Witness, Licensed Building Practitioner

[11] The Board also summoned Mr [OMITTED], building surveyor, who provided a report on the building work to give evidence. He did not appear. The hearing proceeded in his absence on the basis that other witnesses present would be able to provide evidence as regards the quality and compliance of the building work.

[12] The Respondent's company, Grace Builders Limited, was contracted by another building company, [OMITTED], to undertake the carpentry work on a new residential build. Grace Builders did not complete all of the contracted building work as a result of [OMITTED] running into financial difficulties. Issues were raised after Grace Builder's engagement came to an end. Grace Builders were not informed of those issues, which were dealt with by [OMITTED].

[13] Grace Builders were informed of the issues which led to the complaint prior to [OMITTED] being placed in liquidation. Grace was informed that [OMITTED] was dealing with it, and an insurance claim had been made. After [OMITTED] went into liquidation, the issues were directly brought to their attention and Grace Builders worked directly with the owners to deal with the issues raised. Following that remediation, the owners expressed their satisfaction with the outcome and withdrew their complaint.

[14] [OMITTED] provided a project manager, [OMITTED]. Mr [OMITTED], the [OMITTED] Operations Manager, acted as a client liaison with Grace Builders. The majority of the contact between [OMITTED] and the Grace builders on-site was by way of Mr [OMITTED], including the resolution of on-site issues.

[15] The Respondent did not carry out any of the building work but did supervise Grace Builders staff. The issue before the Board was whether in light of issues complained about, that supervision was adequate. The staff that were being supervised included Mr [OMITTED], who was the on-site leading hand. Mr [OMITTED] was not, at the time, a Licensed Building Practitioner.

[16] The Respondent submitted that the build was not complex and that he considered that the level of supervision he provided was adequate and in line with the Ministry of Business Innovation and Employment supervision guidance documentation that

had been issued⁷. The Respondent took that position on the basis that the staff were experienced, he was familiar with their level of skill and knowledge and he was in regular contact with them.

- [17] The Respondent gave evidence that at the time of the build, he had a large commercial job (a retirement village) underway and that he had a team of builders on that site. The team included multiple Licensed Building Practitioners. Other than the commercial job, he had one other build underway. It was also for [OMITTED] and was nearing completion. It was located near the [OMITTED] build, and the same team was carrying out that build under his supervision. There were no issues with that build.
- [18] The Respondent stated that he attended the site as required but not less than once every one to two weeks and that he was in daily contact with Mr [OMITTED], who had worked for him for approximately 16 years, commencing with his training as an apprentice. The Respondent did not call for Council inspections but did check the building work on site and at critical points. He had a high level of faith and confidence in the builders on-site. The Respondent did not receive or review inspection reports. Mr [OMITTED] did.
- [19] Mr [OMITTED] gave evidence that it was the first time he had built with Titan Panel. The Respondent stated he had carried out some two to three builds prior to the present build with Titan Panel but had not completed one using the most recent manufacturer's installation instructions. Mr [OMITTED] stated he reviewed the plans and specifications in advance of the build. It was noted, however, that aspects of the cladding installation were completed in accordance with how Mr [OMITTED] would ordinarily carry out cladding installs as opposed to it being completed in accordance with the [OMITTED] technical documentation. Mr [OMITTED] stated that the Respondent provided assistance with the set out of the panels for a negative detail but did not provide any further direction on how to install Titan Panels.
- [20] The issues raised in Mr [OMITTED]'s report, which the Board was investigating, were contained in a report completed after Grace Builders' involvement had come to an end and after persons under [OMITTED]'s direction and control had carried out further work on the cladding. The report noted:

We have reviewed the [OMITTED] – Site Observation Form which identifies three items with the Titan Façade Panel as non-compliant with the relevant manual. These items are as follows:

- 1. The horizontal joints using T socket continually along wall, rather than cut for each panel*

⁷ Guidance documentation can be issued under section 175 of the Act. Any information published is a guide only and, if used, does not relieve any person of the obligation to consider any matter to which that information relates according to the circumstances of the particular case.

2. *CLD Structural Cavity Battens – Vertical joints must have CLD batten to bottom of sheet for sealants to be applied over.*
3. *The uPVC vent strip is cut between the CLD Structural Cavity Battens that form the vertical joint. Vent strip continuous due to the batten not correctly installed.*

Further e-mail correspondence from Technical Manager [OMITTED] has provided the following comments regarding the defective Titan Façade Panel installation:

4. *Having investigated into the site observation and photos of panel installation on site, I can confirm the installation of Titan Façade Panels doesn't comply with Titan Façade Panel technical specification and therefore is not covered under the warranty.*
5. *The installation would have to be rectified for the product to be covered under the warranty.*
6. *There are few issues that can be addressed without the removal of the panels. But there may be some other issues which cannot be rectified without the removal of the panels. Without looking at it myself, it is hard for me to say as to how many panels may need removal.*

- [21] Mr [OMITTED] accepted that he had not installed the T socket as per the manufacturer's instructions. He stated it was a mistake in that he had not noted the requirement to cut the T sockets. Mr [OMITTED], who wrote the manufacturer's instructions, stated that the T socket needs to be cut because, if it is left as in a continuous line, movement in one panel can cause transmit to other panels. Cutting the T Sockets keeps each panel isolated from the other panels. Mr [OMITTED] stated the T socket could be cut to size after it was installed as a continuous line.
- [22] With respect to the second item noted above, Mr [OMITTED] stated there was a risk of water wicking up behind the panels to the framing through capillary action. He noted that both this and the third item could be easily remediated. Mr [OMITTED] stated he did the installation how he would normally do a cladding install as opposed to it being done in line with the manufacturer's instructions.
- [23] Mr [OMITTED] expressed his opinion that the issues raised were technical in nature and easily remediated. He did not consider that a full reclad was not required (12 sheets were removed and re-installed, but in respect of work completed after the Respondent's involvement came to an end). He stated that the cladding was, with the benefit of the remedial work completed by Grace Builders, now compliant and that a warranty would attach to it.
- [24] The Respondent accepted that aspects of the cladding had not been carried out in accordance with the consented documentation, as the specific requirements had been missed.

Board's Conclusion and Reasoning

- [25] 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).
- [26] The Respondent did not carry out any building work. He did supervise it, and, as the work under investigation was restricted building work⁸, there was a legal requirement that it be supervised by a Licensed Building Practitioner⁹. There were issues with the Respondent's supervision. They manifested themselves in the matters that were under investigation. The Board's finding, however, was that whilst there were some issues with the compliance of the building work and with the adequacy of the Respondent's supervision, the conduct did not reach the threshold for the Board to make a disciplinary finding.

Negligence and/or Incompetence

- [27] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. 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.
- [28] 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 Act¹¹. 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 practitioner¹².
- [29] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

⁸ The work related to the external moisture management system of a residential building and, as such, under clause 5 of the The Building (Definition of Restricted Building Work) Order 2011 it was restricted building work.

⁹ Section 84 of the Act.

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

- [30] Turning to seriousness in *Collie v Nursing Council of New Zealand*,¹⁵ 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.

- [31] In *Pillai v Messiter (No 2)*,¹⁶ which has been adopted in multiple New Zealand superior court decisions, the Australian 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.

- [32] Turning to the conduct in question, as noted, the Respondent did not carry out any building work. He did supervise it. Supervise is defined in section 7¹⁷ of the Act. The definition states:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

- [33] In C2-01143, the Board also discussed the levels of supervision it considers would be necessary to fulfil a licensed building practitioner's obligations noting that the level of supervision required will depend on a number of circumstances, including:

- (a) the type and complexity of the building work to be supervised;
- (b) the experience of the person being supervised;
- (c) the supervisor's experience in working with the person being supervised and their confidence in their abilities;
- (d) the number of persons or projects being supervised; and
- (e) the geographic spread of the work being supervised.

¹⁵ [2001] NZAR 74

¹⁶ (1989) 16 NSWLR 197 (CA) at 200

¹⁷ Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out.

[34] The Board also needs to consider whether the work met the requirements of the building code and, if not, the level of non-compliance.

[35] Supervision in the context of the Building Act has not yet been considered by the courts. It has, however, been considered in relation to Electricity Act 1992¹⁸. The definition of supervision in that Act is consistent with the definition in the Building Act, and as such, the comments of the court are instructive. In the case, Judge Tompkins stated at paragraph 24:

“As is made apparent by the definition of “supervision” in the Act, that requires control and direction by the supervisor so as to ensure that the electrical work is performed competently, that appropriate safety measures are adopted, and that when completed the work complies with the requisite regulations. At the very least supervision in that context requires knowledge that work is being conducted, visual and other actual inspection of the work during its completion, assessment of safety measures undertaken by the person doing the work on the site itself, and, after completion of the work, a decision as to compliance of the work with the requisite regulations.”

[36] There were compliance issues with the cladding work. They were not, however, overly serious and were remediated. Further, when looking at the adequacy of the supervision, the Board notes that whilst the Respondent’s supervision tended toward remote supervision, that may, in the circumstances, have been appropriate. The builders on site had worked for and with the Respondent for a long period of time, and the lead hand, Mr [OMITTED], had worked for him for 16 years. He was familiar with the worker’s capabilities and had confidence in them.

[37] Countering those factors, the builders on site did not have any experience with Titan Panel cladding, which is a product that needs to be installed carefully to ensure Building Code compliance. In such circumstances, closer supervision may have been warranted. Further, the Respondent, in reviewing the building work on site, should have picked up and dealt with the issues. It should not have been up to others to identify the issues and bring them to his attention. Also, the Board would have expected the supervising Licensed Building Practitioner to receive and review the Building Consent Authority inspection records as the work progressed.

[38] Balancing the above factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent had not departed from what the Board considers to be an accepted standard of conduct on the basis that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

¹⁸ *Electrical Workers Registration Board v Gallagher* Judge Tompkins, District Court at Te Awamutu, 12 April 2011

Contrary to a Building Consent

[39] The same tests as regards seriousness do not necessarily, apply to a charge under section 317(1)(d) of the Act, as building contrary to a building consent is a form of strict liability. Unlike negligence, all that needs to be proven is that the building consent has not been complied with. No fault or negligence has to be established¹⁹. The Board does, however, consider that the seriousness of the disciplinary offending still needs to be taken into account. On that basis, having taken into consideration the matters outlined above in relation to negligence, the Board has decided that the departures from the building consent were not serious enough to warrant a disciplinary outcome.

Respondent Cautioned

[40] The Respondent is cautioned as regards his supervision practices. A one-size-fits-all approach may not always be appropriate. A Licensed Building Practitioner should assess not only the competence of those carrying out the building work under supervision but also the complexity of the work and the familiarity of those who will be carrying it out. If the workers have not previously carried out the type of work, then closer or direct supervision may be necessary. That was the case in the present matter. The on-site workers had not previously installed Titan Panel. As such, closer supervision was required. Further, the Respondent should ensure that he obtains and reviews inspection reports as the work progresses.

Signed and dated this 15th day of March 2023

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.

M Orange
Presiding Member

¹⁹ *Blewman v Wilkinson* [1979] 2 NZLR 208