

Before the Building Practitioners Board

	BPB Complaint No. CB25042
Licensed Building Practitioner:	Victor Prakash (the Respondent)
Licence Number:	BP 132679
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:	7 August 2019
Decision Date:	15 August 2019
Board Members Present:	
	Mel Orange, Legal Member (Presiding)
	David Fabish, LBP, Carpentry Site AOP 2
	Faye Pearson-Green, LBP Design AOP 2

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 (s 317(1)(b) of the Act);
 - (b) 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
 - (c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) 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.

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

- [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.

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 the Respondent. It was noted that the Respondent had not engaged in the investigation prior to the hearing and had not provided a response to the complaint other than by way of a short email dated 1 April 2019 in which he discussed matters relating to the liquidation of his business. At the hearing he also noted that he had been constrained in providing evidence to the Board by the liquidator taking possession of business documentation.
- [8] The Respondent had been contracted to build a new residential dwelling under a building consent by way of his company Nationwide Building Services Limited. The Respondent was the licensed building practitioner supervising the build which commenced on or about 24 October 2017.
- [9] The build progressed to the stage where, on or about 22 October 2018, the frames and trusses had been erected. At this stage the Respondent’s company was experiencing financial difficulties. No further work was carried out and in November 2018 the Complainants brought the contract to an end. The Respondent’s company was liquidated.

⁴ [2016] HZHC 2276 at para 164

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

- [10] The Respondent stated that the financial difficulties related to a claim by an independent contractor who had carried out some of the foundation work on a charge up basis for additional payments. The Respondent stated he was unable to make those payments and that, as a result of financial constraints, he was also unable to pay workers and subcontractors on the site which resulted in the work stopping.
- [11] The Board enquired as to what, if any, steps the Respondent had taken to protect the frames and trusses, which had not been wrapped with a rigid air barrier, from the elements. He stated that he had advised the owners of the need to take steps and that flooring had been covered in plastic but that the covering had been removed by the owners. It was noted that it was a short period of time between when the frames and trusses were erected and when the contract came to an end and that a new builder took over the site.⁶
- [12] The Complainant raised health and safety issues with regard to rubbish on site and silt management. The Respondent gave evidence that photographs of rubbish which had been admitted were of rubbish that had been dumped on site by a subcontractor from another job who had a dispute with the Respondent. Other rubbish on site was excess rubbish removed from a skip prior to it being emptied. The complaint raised issues with illegal dumping of materials on their land. The Respondent stated that he had the rubbish removed. He also stated that the silt fence was temporarily removed to allow for the delivery of materials and the removal of rubbish and that it was interfered with by members of the public.
- [13] The Board was provided with council records in respect of the build. The records indicated that a small number of minor variations were outstanding during the build. The Respondent gave evidence that he consulted with the architect prior to making the changes and was given approval by the architect. He noted that he was not able to provide emails to support this as he no longer had access to his company records as a result of the liquidation of Nationwide Building Services.
- [14] With regard to the allegation that the Respondent had failed to provide a record of work on completion of restricted building work that Respondent gave evidence that he did provide one along with all other relevant documentation to the Complainants when he met them at a Z Service Station at Botany. He did not give a copy to the Territorial Authority. The Complainants were asked if had received a record of work. They did not respond to the query but did answer other questioned posed at the same time. It was noted that the complaint raised non provision of records as an issue but the Complainants did not specify what the records were.
- [15] The Respondent was asked to provide his record of work that he stated he had provided to the owners. He stated that he did not have a copy and that the only way he could provide it would be by getting it back off the Complainants.

⁶ An inspection dated 5 December 2018 notes a new builder was on site.

- [16] The complaint also raised issues with regard to the lack of progress on the build. The Respondent gave evidence that there were complicating factors including the impact of adverse weather conditions.

Board's Conclusion and Reasoning

- [17] 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) 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); or
- (c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)

and should not be disciplined.

- [18] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

- [19] 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*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.
- [20] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level*". In *Ali v Kumar and Others*⁹ it was stated as "*an inability to do the job*".
- [21] For the Board to find that a practitioner has been negligent or incompetent it needs to have received evidence which, on the balance of probabilities, meets the tests as outlined above. No such evidence was received. There was no doubt that there were contractual issues and delays during the build. Those issues, as presented in the evidence do not, however, come within the statutory framework of "building work". As such findings of negligence or incompetence with regard to them cannot be made.

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

Record of Work

- [22] 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 work¹⁰.
- [23] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [24] The Respondent stated he provided the Complainant with a record of work soon after his involvement in the project came to an end along with other documentation. The only evidence the Board had before it that a record of work had not been provided was a reference in the complaint to a failure to provide documentation. No specifics as to what the documentation that had not been provided was. The Complainant was asked to confirm whether or not a record of work had been received. No response was given.
- [25] Given the above facts there is no evidence on which the Board can make a finding that a record of work was not provided on completion.

Disrepute

- [26] Disrepute is the state of being held in low esteem by the public¹¹. The test is an objective one. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*¹² the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*¹³
- [27] The Board noted, in deciding to proceed with disrepute, that building materials may have been left in the elements for an excessive period of time which may have led to their deterioration. The evidence heard did not substantiate this.
- [28] The Board did note that the Respondent had a practice of invoicing for progress payments before the work had been carried out. He stated he had the Complainants consent for this. It is not a recommended practice and the Respondent is cautioned that he should obtain written variations to the contract if the terms of payment are to be varied.

¹⁰ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹¹ Online edition, compilation of latest editions of *Oxford Dictionary of English*, *New Oxford American Dictionary*, *Oxford Thesaurus of English* and *Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

¹² [2012] NZCA 401

¹³ [2012] NZAR 1071 page 1072

Procedure

- [29] The Respondent should note that, had he engaged in the disciplinary processes sooner and provided the responses he gave at the hearing at the Registrar's Report phase, the hearing may not have been necessary. As a result of his failure to engage the licensed building practitioner regime has possibly been put to unnecessary expense.

Signed and dated this 15th day of August 2019



Mel Orange
Presiding Member