

Before the Building Practitioners Board

	BPB Complaint No. CB25912
Licensed Building Practitioner:	Paul Reed (the Respondent)
Licence Number:	BP102784
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	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

Appearances:

D Russ 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.

Disciplinary Finding:

The Respondent **has not** committed a disciplinary offence.

Contents

Summary of the Board’s Decision	2
The Board	2
The Charges	2
Function of Disciplinary Action	3
Inquiry Process	4
Consolidation	4
Evidence	4
Roof Underlay	6
Low E Glass.....	7
Garage Door	7
LED Light Strip.....	7
Shower	7
Insulation	7
General Submissions.....	7
Board’s Conclusion and Reasoning	8

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

- [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], 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, and

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.

(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.

[4] In investigating the grounds for discipline, the Board gave notice that it would be considering whether the Respondent's coordination, oversight and/or management of the project may have resulted in materials being used which were contrary to those specified in the building consent.

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."

[7] 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.

[8] 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)

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

or it reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

- [9] 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

- [10] 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.
- [11] 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

- [12] 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.
- [13] The Board sought agreement for consolidation of this matter with complaint number CB25933. The consent of all those involved was forthcoming. The two matters were consolidated.

Evidence

- [14] 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.
- [15] 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

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

Paul Reed	Respondent
[OMITTED]	Respondent in CB25933
[OMITTED]	Complainants
[OMITTED]	Witness, report writer
[OMITTED]	Witness, [OMITTED] representative
[OMITTED]	Witness, Licensed Building Practitioner

[17] The Board also received an affidavit from the Respondent and written submissions from Counsel for the Respondent.

[18] The Respondent's company (Paul Reed Homes Limited) was engaged to construct a new residential dwelling for the Complainants. The build was initially priced by Paul Reed Homes. Cost savings of circa \$50,000 were sought by the Complainants. Various changes to the materials to be used were made to make cost savings. Some of those changes are the subject of this decision.

[19] The Respondent did not carry out or supervise any of the building work. He did have an administrative role in the build. [OMITTED] was the Licensed Building Practitioner who carried out and supervised the carpentry work on Site. Other sub-trades were engaged by Paul Reed Homes to carry out the build. In particular, [OMITTED] were subcontracted to supply and install the roof. [OMITTED] was the Licensed Building Practitioner that [OMITTED] was contracted to install the roof.

[20] The Complainants raised issues with the following product changes:

- (a) A change of roofing underlay used – Bituminous Roofing Underlay was used in place of Thermakraft Covertex 407 that was on the consented plans;
- (b) Low E glass not used in external joinery;
- (c) An uninsulated garage door being installed when an insulated door was on the consented plans;
- (d) LED light strip not installed under kitchen cabinets;
- (e) A 1-metre wide shower cubicle was installed whereas a 1.2-meter cubicle was on the consented plans;
- (f) A change to the type of insulation installed – Pink Batts were installed, whereas Knauf was specified.

[21] The Complainants provided contract and consent documents in support of their complaint, along with dispute documentation and correspondence.

Roof Underlay

- [22] The Complainant's evidence was that whilst they had agreed to a change to the roofing materials, they did not and would not have agreed to a change to the underlay. Mrs [OMITTED] stated that as a nurse who had worked in a burns ward, she did not want to have a bituminous product used in her home. The Respondent stated that the change was made to save cost. The Complainants gave evidence that the Respondent had misled or tried to mislead them about the cost of the replacement underlay.
- [23] The product was supplied by [OMITTED], and installed by Mr [OMITTED] the licensed roofer. Mr [OMITTED] gave evidence that he had not seen the building consent and that he had just installed what was supplied.
- [24] The Board was provided with copies of pricing from [OMITTED]:
- Estimate – 27 June 2018 – supply and install Zinacore 0.40 Veedek ...
Flamestop underlay*
- And
- Estimate – 27 June 2018 – supply and install Zinacore 0.40 Veedek ... Self
Supporting underlay*
- Job Specific Tags:
We have allowed Standard Black Self Supported Underlay Only, not
flamestop as per plan*
- [25] The second estimate was accepted on 8 August 2018 and an order was placed on 19 October 2018.
- [26] The Respondent's evidence was that the change was brought to the Complainants' attention and that the architect was also made aware of the change. The Complainants maintained that they were not informed of the change and that if they had been they would not have agreed to it.
- [27] No minor variations or amendments to the building consent were submitted to accommodate for the change prior to the substituted underlay being installed. A minor variation was issued after the completion of the work.
- [28] Counsel for the Respondent submitted:
- The substitute paper was code compliant, the roof inspected and passed by Council and, when raised by the complainant, the matter resolved by Council as a minor variation.*
- This issue cannot be described as a deliberate departure from accepted standards, or serious negligence portraying indifference and abuse.*
- It is further noted that the responsible LBP, Mr [OMITTED], issued a Record of Works for the roof (including paper) as the LBP responsible for the works and*

further as the LBP supervising the works. The respondent was entitled to rely on the Record of Works.

Low E Glass

- [29] The Complainants maintained that Low E glass with argon fill was consented, and that they agreed to the deletion of argon as a cost-saving but stated they still expected Low E glass to be installed. After completion, the Complainants became aware that Low E glass had not been used.
- [30] The Respondent's affidavit stated that there was a conflict between the build contract and the building consent and the consented plans and, specifically, the window schedule specified argon gas but not Low E glass.

Garage Door

- [31] The Complainants' position was that a "Sectional Color Steel Insulated Garage Door" was included in the consented plans and specification. The Respondent's position was that there was a conflict between the consented plans and the specifications, and the means of insulating the garage door was not specified.

LED Light Strip

- [32] This was another matter where the Complainants noted that the work was not in accordance with the building consent. The Respondent's position was that the issue related to the work of a registered electrician and that he was not responsible for work carried out by another trade.

Shower

- [33] The Complainants' and the Respondent's evidence differed as regards the shower base. The Complainants' evidence was that the builders were responsible for the change. The Respondent's evidence was that it was constructed to the correct size but that the tiler was at fault.
- [34] The Respondent stated that he did not carry out or supervise any of the work complained about.

Insulation

- [35] The Complainants alleged that Pink Batts had been used, whereas Knauf was specified. The Respondent noted he did not carry out or supervise the installation of the insulation and that the insulation installed did comply with the specification. Further, he stated that silencer batts were installed in areas that had been omitted by the architect. The consented specifications included details for Pink Batts, and the plans made reference to Pink Batts.

General Submissions

- [36] The Complainants submitted a written closing statement. The statement argued that the Respondent was a supervisor of the building work and that he was responsible

for it. The statement also traversed the Complainants' views on how the Respondent had conducted himself.

[37] Counsel for the Respondent made a general submission that the matters complained about could not be described as deliberate departures from accepted standards, or serious negligence portraying indifference and abuse.

[38] Counsel also submitted:

24. *Many of the issues raised by the complaint are matters of a contractual nature and/or arise from a change in specification or a conflict between plans and specifications. Where issues of this nature arose, PRH and the respondent made generous concessions, meeting the requests of the complainants. In many cases this was at the cost of PRH.*

25. *The issue of most significance concerns the roof. Regarding the use of different building paper, the respondent says this was a consequence of the complainants requirements for cost savings on the roof component of the build. The respondent accepts that the change in building paper meant the building paper selected was different to that specified in the consent documents. However, the alternative paper was code compliant, inspected and accepted by Council for code compliance purposes and was ultimately the subject of an agreed minor variation to the consent. Responsibility for the lap issue lies with the LBP roofing, Mr [OMITTED]. The issue was identified and resolved. The lap issue was not a matter for which the respondent was responsible and was rectified by the LBP.*

Board's Conclusion and Reasoning

[39] 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.

[40] The Respondent's conduct was being investigated by the Board under the auspices of his Site AoP 2 Licence. The reason why the investigation was not proceeding on the basis of his Carpentry Licence was that another Licensed Building Practitioner had carried out and supervised the building work and the principles of the licensing regime are that each Licensed Building Practitioner is responsible for their own work.

[41] The scope of a Site Licence includes the coordination and oversight of building work. Coordination and oversight are not defined terms. The Licensed Building Practitioners Rules 2007 (the Rules) does, however, provide some guidance.

Competency 3 – Organise and Manage Building Projects, note the following competencies:

3.1.1 Read and interpret working drawings, specifications, schedules and quantity lists.

3.1.2 Identify need for, and seek clarification and/or additional design documentation from the Design Lead, as required.

3.1.3 Establish a building site and manage ongoing operations.

3.1.4 Monitor construction site performance.

- [42] The Board has found in past decisions that a Site Licence holder can be held to have been negligent if when in a project management, coordination or oversight role, they allow changes to a building consent to occur without ensuring that the correct change processes are followed prior to the related building work being undertaken.
- [43] The issue in the matter related to product changes or substitutions, the most serious of which was the change to the roofing underlay. The product used complied with the Building Code. It was not what was specified on the building consent. The roofing material that was installed was stipulated in the building consent. A change to the building consent was not processed for the change to the underlay until after the building work was carried out.
- [44] The Respondent did not carry out or supervise the work. Mr [OMITTED] did. He was licensed to carry out the work and was responsible for its quality and compliance.
- [45] The other changes were less significant, and, with the exception of the LED lighting, which was the responsibility of a registered electrical worker, there was conflicting provisions in the consented documentation and they were, from a quality and compliance perspective, minor in nature. Further, in relation to those changes, much of the evidence received and the focus of the complaint was contractual in nature. As noted earlier in this decision, the Board cannot deal with contractual disputes or allegations. Taking those factors into account, the Board decided those matters did not warrant a disciplinary finding.
- [46] Turning to the underlay, taking the evidence before it into consideration, the Board decided that whilst the Respondent may have had some responsibility for ensuring a process was followed when the underlay was changed, the conduct did not reach the threshold required by the courts for the Board to make a disciplinary finding.
- [47] In this respect, the New Zealand Courts have stated that an assessment of negligence incompetence in a disciplinary context is a two-stage test⁹. The first is for the Board to consider whether the practitioner has departed from the acceptable

⁹ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[48] When considering seriousness, the courts have stated:¹⁰

[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.

[49] 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.

[50] Turning to building contrary to a building consent, again there were issues, but they were not serious enough to uphold the complaints and, in particular, it was noted that the change of underlay was eventually approved as a minor variation. The Respondent should note, however, that in the future, he should ensure that the correct process for minor changes to the consent is followed. This can include ensuring that the agreement of the owner is obtained and that the designer and building consent authority are consulted prior to building work being undertaken. The rationale for these latter steps is to ensure that the variation is actually minor before work is undertaken and that the variation will still meet Building Code and will not adversely affect other parts of the building work. Put quite simply; a minor variation has to be agreed to by all the key parties prior to it being undertaken, not once it has already been done.

Signed and dated this 16th day of December 2022

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

¹⁰ *Collie v Nursing Council of New Zealand* [2001] NZAR 74