

Before the Building Practitioners Board

	BPB Complaint No. C2-01933
Licensed Building Practitioner:	Jaswant Singh (the Respondent)
Licence Number:	BP 124621
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:	19 February 2019
Decision Date:	8 April 2019

Board Members Present:

Chris Preston (Presiding)
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP, Carpentry Site 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 under section 317 of the building Act 2004.

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Penalty, Costs and Publication	Error! Bookmark not defined.
Penalty	Error! Bookmark not defined.
Costs.....	Error! Bookmark not defined.
Publication	Error! Bookmark not defined.
Section 318 Order	Error! Bookmark not defined.
Submissions on Penalty, Costs and Publication	Error! Bookmark not defined.
Right of Appeal	Error! Bookmark not defined.

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) 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
 - (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).

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

¹ The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

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.

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:

Jaswant Singh

Respondent

Steven McMillan

Witness (Council)

[Omitted]

Complainant

- [8] A summary of the issues is as follows:
- [9] The building work commenced in May 2017, the respondent left the site soon after and the building work remained unfinished and exposed to the elements in December 2017. The respondent did not complete the project and a replacement builder was used.

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

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

- [10] The replacement builder demolished all the work that the Respondent had done and started again.
- [11] On May 25 2017, the first Council inspection failed.
- [12] The inspection failed the bottom plate fixings external walls. Regarding the wall framing the inspector's comment was to follow gib recommendations for stud fixing and that the boundary position is required to clarify which studs required 8Kn fixings.
- [13] The inspector commented to follow bulletin re building wrap, solid noggin and stud anchors if less than 1m to boundary. Moving cut to wall could mean no fire rating required at all.
- [14] After the failed inspection, the respondent commissioned [Omitted] to undertake a survey which demonstrates where the property ends and another begins. The survey shows the garage corner breaching the one metre non-building exclusion zone and the legal boundary.
- [15] The Respondent did not remedy the work that failed the first Council inspection and the Complainant had no contact with the respondent for over three months.
- [16] The Respondent has not provided a record of work due to a commercial dispute with the Complainant.

Evidence at the hearing:

- [17] At the hearing the Respondent gave evidence that he had undertaken the work in a professional manner and that the issues raised by the Complainant and the Council inspection would have been addressed had he been allowed to return to site.
- [18] The Council witness confirmed that the first Council inspection had failed in that the building work at that stage did not fully comply with the building consent details.
- [19] The Complainant confirmed that he had become frustrated at the time it was taking to have the Respondent return to site and fix the issues and complete the work.
- [20] As a result, he engaged another builder who recommended that the work be demolished and rebuilt which was done.

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);
- (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);

[22] The reasons for the Board's decision follow.

Negligence and/or Incompetence

[23] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁶ Judge McElrea noted:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.

[24] 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.

[25] 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*".

[26] The New Zealand Courts have stated that 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.

[27] 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

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

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]

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

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.

[28] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
 - (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[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.

[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.

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

¹⁵ [2001] NZAR 74

- [31] It was unclear from the evidence that there were any significant errors in the construction except for some minor issues that could have been addressed by the Respondent had he been allowed to return to site.
- [32] Part of the reason he was not allowed to do so was the Complainant's frustration over the time it was taking to address the issues as identified in the Council inspection and to complete the work.
- [33] The Complainant decided to engage another builder and on the advice of the replacement builder demolish all the Respondent's work.
- [34] It was not clear to the Board that this was required and there was no independent report undertaken that verified that all the building work needed demolition.
- [35] Given the above factors the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has not departed from what the Board considers to be an accepted standard of work but does take the opportunity to make it clear to the Respondent that attention to detail is important.
- [36] This ground for discipline is not upheld.

Contrary to a Building Consent

- [37] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Code has been complied with and the works will meet any required performance criteria. In doing so the building consent process provides protection for owners of works and the public at large.
- [38] Except for some minor issues that could have been corrected had the Respondent been allowed to return to complete the work it was not clear to the Board that a significant breach of the building consent had occurred.
- [39] This ground for discipline was not upheld.

Record of work

- [40] 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 work¹⁶.
- [41] 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.
- [42] The Board discussed issues with regard to records of work in its decision C2-01170¹⁷ and gave guidelines to the profession as to who must provide a record of work, what

¹⁶ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁷ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

- [43] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [44] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”.
- [45] Section 317(1)(da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits but the threshold for a good reason is high.
- [46] The Board accepts that all the original building work had been replaced and has in the past accepted that if this was known soon after the relationship between the original builder and the complainant had ended then a ROW from the original builder would not be required.
- [47] This ground for discipline is not upheld.

Signed and dated this 8th day of April 2019



Chris Preston
Presiding Member