

Before the Building Practitioners Board

	BPB Complaint No. C2-01942
Licensed Building Practitioner:	Mark Hanson (the Respondent)
Licence Number:	BP 130700
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	Wellington
Hearing Type:	In Person
Hearing Date:	23 January 2019
Decision Date:	11 February 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer

Appearances:

Alan Knowsley, Solicitor, Rainey Collings 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.

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 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.

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

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

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

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:
- | | |
|-------------|----------------------------|
| Mark Hanson | Respondent |
| [Omitted] | Witness, Building Surveyor |
| [Omitted] | Witness for the Respondent |
- [8] The Respondent was engaged to carry out building work in the interior of a Versatile barn to create a living space. A building consent was issued for the conversion but it only covered sanitary plumbing. The Respondent was aware that the Complainant would be using the shed to live in whilst constructing a main residence on the property.
- [9] The conversion had been designed by a licensed building practitioner with a design licence. The design and specification was provided to the Respondent. Framing for the living space was constructed inside of the Versatile metal framing. The internal framing was insulated. There were no points of load transfer other than within a storage space. No structural changes were made to the existing building.
- [10] The Complainants obtained a report from [Omitted] post its completion. The report set out various allegations as regards plywood linings including that:
- (a) the plywood sheets have been installed in a random method and there is no uniformity to the sheet layout;
 - (b) most sheets have been installed with the grain of the plywood running vertically, however some sheets have been used with the grain running horizontally;
 - (c) the plywood sheets have been butted together and there is no gap, as required, to allow for movement of the sheets;
 - (d) some of the plywood sheets have pulled away from the framing;
 - (e) the plywood sheets have been fixed to the studs with nail gun brads although the specification sheet states to use only flathead nails or screws;
 - (f) there is evidence that the plywood has been glued to the framing, although this does not appear to be every stud;

- (g) there is no uniformity to the spacing of the plywood fixings. (h) Some fixings are missing from the perimeter of the sheets. (i) Undersized fixings were used to fix the plywood to the framing;
 - (h) the plywood used on the door frames has been patched at the base however full lengths should have been used;
 - (i) there has been movement to the interior wall, which has caused the plywood linings to pop the fixings, split, and bulge outward; and
 - (j) the timber framing was too wet when the linings were installed. There are no records of moisture content (MC) to the timber, as this was not part of the building consent requirements. However, wet timber causes movement as it dries.
- [11] The report also set out issues with doors that had been made by the Respondent from wet rough sawn timber including that gaps had formed from timber shrinkage and with the fixing of plywood sheets in a storage space that had been created above an internal ceiling. The report writer also expressed a concern over whether the structure could sustain the loads created by the storage area.
- [12] The Respondent provided a written response to the complaint. In it he noted a commercial dispute with the Complainant and that he had not been afforded the opportunity to rectify issues because of that dispute. He also submitted that the building work was not restricted building work.
- [13] At the hearing the Board heard evidence that the lifting of the plywood was the result of environmental factors in the internal living space where there would have been extensive expansion and contraction of the sheets through moisture take up from living in and drying from an installed log burner. It was noted that gaps between plywood sheets would have been advisable but that this was not on the design and was not what the Complainant wanted. It was also noted sealing on both sides of the plywood would have been advisable but it had not been specified and that the Complainant was to undertake the sealing of the sheets. [Omitted] agreed that the moisture levels would have been less if the building was not lived in.
- [14] Reference was made by [Omitted] to a Carter Holt Harvey (CHH) non-structural ply specification and a copy of it was admitted into evidence. There was no specification for the actual ply supplied and installed. The Respondent stated that he was referred to the CCH specification which he did use. It contained minimal direction.
- [15] The Respondent gave evidence that he glued and nailed the plywood but that some incorrect fixing nails may have been used by accident. He produced an invoice which showed the purchase of the correct length fixings.
- [16] With regard to the storage area the Respondent gave evidence that the Complainant wanted the ply flooring to be temporarily fixed to allow for future access to the sub space for the possible install of services. He also gave evidence that the structure

over which the storage area was created was more than adequate for the loads to be created and that the design of it was more than was required under NZS 3604.

- [17] With regard to the doors that the Respondent built he stated that he gave the Complainant various options including kiln dried dressed timber but that rough sawn wet timber was chosen for aesthetic and cost reasons. He noted both he and the designer had not endorsed the use of wet rough sawn timber. The Respondent gave evidence that he screwed the timber boards used to allow for future adjustment.

Board's Conclusion and Reasoning

- [18] 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.
- [19] There were two aspects the Board was considering in the context of negligence and incompetence. The first was whether a building consent was required for the building work undertaken. In this respect the Board was satisfied that what was undertaken came within the provisions of Schedule 1 of the Building Act in that it was exempt from the requirement to obtain a building consent.
- [20] The Respondent is cautioned, however, to take care in future with regard to the requirement for a building consent and to ensure that he carries out full enquiries to ensure one is not required prior to commencing the building work.
- [21] The second concern was with regard to the building work itself. In this respect the Board has decided that whilst the Respondent could have done better his conduct was not sufficiently serious enough to warrant a disciplinary outcome. In coming to its decision the Board has applied the following test.
- [22] 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.*
- [23] 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.
- [24] 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*

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)

reasonably expected ability or skill level". In *Ali v Kumar and Others*⁹ it was stated as *"an inability to do the job"*.

- [25] 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.
- [26] 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.
- [27] 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.*

- [28] 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

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)

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

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.

- [29] 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.

- [30] When looking at the building work in question the Board's main concern was with the installation of the plywood. The Board noted that environmental factors were the main contributing factor. Neither the designer nor the Respondent turned their mind to those factors. More care should have been taken by both and consideration given to how the materials would perform in the environment.
- [31] The Board also considered that the Respondent should have taken more care in the installation of the ply wood. Correct fixings should have been used throughout and the grain of the material installed should have been consistently matched.
- [32] The Board finds that neither of the above matters are serious enough to warrant a disciplinary outcome. In coming to this decision the Board has also noted the comments of the Court of Appeal in *Pillai v Messiter (No 2)*¹⁶:

... 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.

Signed and dated this 11th day of February 2019



Richard Merrifield
Presiding Member

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

¹⁶ (1989) 16 NSWLR 197 (CA) at 200