

## Before the Building Practitioners Board

	BPB Complaint No. C2-01642
Licensed Building Practitioner:	Luke Gilberd (the Respondent)
Licence Number:	BP 130881
Licence(s) Held:	Carpentry

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

#### Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	Palmerston North
Hearing Type:	In Person
Hearing Date:	19 March 2018
Decision Date:	4 April 2018

#### Board Members Present:

Chris Preston (Presiding)  
Mel Orange, Legal Member  
Robin Dunlop, Retired Professional Engineer  
Bob Monteith, LBP Carpentry and 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.

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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 Regulations<sup>1</sup> to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent 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 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.
- [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*<sup>4</sup> 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.

<sup>1</sup> The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

<sup>2</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

## Evidence

- [5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>5</sup>. 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 Board heard evidence from:
- |                    |                              |
|--------------------|------------------------------|
| Luke Gilbert       | Respondent                   |
| William Hursthouse | Special Adviser to the Board |
| [Omitted]          | [Omitted]                    |
- [7] The Board attempted to contact the Complainant who had expressed an interest in providing evidence and submissions to the Board. The Complainant could not be contacted at the number he had provided.
- [8] The Complainant identified the Respondent as the licensed building practitioner who had carried out or supervised restricted building work. The Respondent, in his response to the Complaint, denied having carried out or supervised any restricted building work. The response stated contractors had carried out the restricted building work but they were not identified.
- [9] The Respondent gave evidence. He stated that he did not carry out any building work at the site. His role was to provide project management. Contractors were engaged to provide the carpentry services. He noted that the [Omitted] operating model was to engage contractors to carry out all building work. [Omitted] employees only project managed those who were engaged to carry out building work. He did not know who the actual builders were other than that it was a company by the name of [Omitted]and that [Omitted] and [Omitted]were the builders.
- [10] [Omitted] also gave evidence that the Respondent did not carry out any building work and that [Omitted] was contracted to complete the build. They relied on [Omitted] to provide a record of work and did not have a system to identify who actually carried out or supervised the restricted building work on projects.
- [11] The Board also questioned the Respondent as to the design of the decks. The Respondent confirmed that the decks were part of the consented structure and that one of them was the only means of access to a minor dwelling that formed part of the overall consent.
- [12] The Special Adviser completed a site visit. He noted there were two separate dwellings each of which has a deck and each of which is attached to the related dwelling through the cladding. He also noted that the deck and associated stairs to the minor dwelling were the only means of access to the living space within it.

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<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

### **Board's Conclusion and Reasoning**

- [13] The Board has decided that the Respondent **has not** 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 should not be disciplined.
- [14] The Board's considerations required two steps. The first was to determine whether the building work was restricted building work as defined in the Act. The second was whether, if it was restricted building work, the Respondent had failed to provide a record of work for it.
- [15] In respect the first question the Board finds that it was restricted building work and as such that a record of work for it was or is required. The Board's reasoning on this follows.
- [16] With regard to the second point the Board did not receive any evidence to substantiate that the Respondent carried out or supervised the restricted building work in question and as such he had no obligation to provide a record of work. It is on this basis that the Board finds that the Respondent has not committed a disciplinary offence.

### Were the Decks Restricted Building Work

- [17] Turing to deal with the reasons why the Board considers that the building work was restricted building work it notes the differences in opinions between the opinion received from the Technical Assessor engaged by the Board and the Registrar. The Technical Assessor's opinion was that the construction of the decks in question was restricted building work.
- [18] The Registrar considered the building work was not restricted building work as the decks in question did not form part of the primary structure of the house. In essence the opinion was that it would only have been restricted building work had the decks been cantilevered into the super structure of the house.
- [19] The Technical Assessor considered it was restricted building work on the basis that a deck came within the definition of "building" in the Act and that, as it came within that definition, its construction necessarily involved work on the deck's primary structure.
- [20] Turning to the legislative provisions section 84 of the Act requires that all restricted building work be carried out or supervised by a licensed building practitioner who is licensed to carry out or supervise the work. Under section 88 of the Act the licensed building practitioner who carried out or supervised the restricted building work must provide a record of work to the owner and to the territorial authority on completion.

[21] The Act does not define restricted building work other than to state that it will be as declared by the governor-General in Council<sup>6</sup>. The Building (Definition of Restricted Building Work) Order 2011 was therefore passed to establish restricted building work. Clause 5 of the Order stipulates:

5 *Certain building work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work*

(1) *The kinds of building work to which this clause applies are restricted building work for the purposes of the Act.*

(2) *This clause applies to building work that is—*

(a) *the construction or alteration of—*

(i) *the primary structure of a house or a small-to-medium apartment building; or*

(ii) *the external moisture-management system of a house or a small-to-medium apartment building; and*

(b) *of a kind described in subclause (3); and*

(c) *of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.*

(3) *The kinds of building work referred to in subclause (2)(b) are—*

(a) *bricklaying or blocklaying work;*

(b) *carpentry work;*

(c) *external plastering work;*

(d) *foundations work;*

(e) *roofing work.*

[22] On the basis of the Order there are three requirements which need to be met for building work to be restricted building work. Dealing with each as they relate to the case before the Board:

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<sup>6</sup> Refer section 401B: *Order in Council declaring work to be restricted building work*

(1) *The Governor-General may, by Order in Council made on the recommendation of the Minister, declare any kind of building work (other than building work for which a building consent is not required) or any kind of design work to be restricted building work.*

(2) *An order under subsection (1) may apply to any kind of building work or design work generally, or may apply to building work or design work in relation to particular types or categories of buildings or to particular parts of buildings.*

(3) *The Minister may recommend the making of an order under this section only if the Minister is satisfied that the kind of building work or design work in question is (or is likely to be) critical to the integrity of a building or part of a building.*

(4) *Building work or design work is not restricted building work if it relates to an application for a building consent made before the commencement of an order under subsection (1) declaring building work or design work of the same kind to be restricted building work.*

- (a) it must relate to the construction or alteration of the primary structure or the external moisture-management system of a house or a small-to-medium apartment building;
- (b) be of a kind described in subclause (3) of the Order;
- (c) be of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.

[23] The matter at issue in this case is whether building work on the decks were building work on the “primary structure” of a “house” or “a small-to-medium apartment building”. The Order provides definitions of various terms relevant to the consideration of this question:

**primary structure, in relation to a building,—**

- (a) means those of its building elements that are intended to contribute to its ability to withstand vertical or horizontal loads (for example, its beams, bracing, columns, foundations, roof, subfloor framing, and walls); and
- (b) includes any part of its primary structure

**house** means a free-standing, fully detached building consisting of a single residential unit (or a single residential unit and 1 or more residential facilities)

**household unit—**

- (a) means a building or group of buildings, or part of a building or group of buildings, used or intended to be used solely or principally for residential purposes and occupied or intended to be occupied exclusively as the home or residence of not more than 1 household; but
- (b) does not include a hostel or boardinghouse, or other specialised accommodation

**residential facility** means a part of a building that is not a residential unit, but is a facility (for example a corridor, foyer, garage, laundry, lift, sauna, or storage unit) whose principal or only purpose is ancillary to the use of a residential unit in the building (or 2 or more residential units in the building)

**residential unit** means a building, or part of a building, that is so designed that it is more suitable for being lived in by a single household or family than for any other use

[24] Whilst the Order provides specific definitions the definitions all use the term “building” and as such the definition of “building” in the Act also needs to be taken into consideration. Section 8 of the Act generally defines building as “a temporary or permanent movable or immovable structure”. A deck comes within this definition. Section 9 excludes certain structures from the definition of building. A deck is not excluded.

- [25] Looking then at the various definitions for house, household unit, residential facility and residential unit in the Order it is clear that the intention was that restricted building work was to apply to more than just the structure within which persons would reside. In particular the use of the phrasing “for residential purposes” in relation to a “residential unit” and the defined term “residential facility” and its use of the phrasing “ancillary to the use of a residential unit” supports this conclusion.
- [26] The Board also notes that the deck was physically connected to the structure of both the house and the minor dwelling and that it was used for access to the minor dwelling. In these respects definition of “primary structure” above and the provisions of the Building Code are also of relevance:

**Clause B1 – Structure**

**B1.1** *The objective of this provision is to:*

- (a) Safeguard people from injury caused by structural failure,*
- (b) Safeguard people from loss of amenity caused by structural behaviour,*  
*and*
- (c) Protect other property from physical damage caused by structural failure.*

**Clause D1 – Access**

**D1.1** *The objective of this provision is:*

- (a) Safeguard people from injury during movement into, within and out of buildings,*
- (b) Safeguard people from injury resulting from the movement of vehicles into, within and out of buildings, and*
- (c) Ensure that people with disabilities are able to enter and carry out normal activities and functions within buildings.*

- [27] Given these provisions and the analysis above the Board finds that the construction of the decks was restricted building work.
- [28] In coming to a decision the Board has also applied the general principles of statutory interpretation as regards giving words their natural meaning and as outlined in s 5 of the Interpretation Act 1999<sup>7</sup>.

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<sup>7</sup> Section 5 of the Interpretation Act 1999:

*Ascertaining meaning of legislation*

- (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.*
- (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*
- (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.*

Signed and dated this 4<sup>th</sup> day of April 2018

A handwritten signature in black ink that reads "Chris Preston". The signature is written in a cursive style with a horizontal line underlining the name.

**Chris Preston**  
Presiding Member