

## Before the Building Practitioners Board

	BPB Complaint No. C2-01771
Licensed Building Practitioner:	Nigel Nicholas (the Respondent)
Licence Number:	BP 125214
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	Tauranga
Hearing Type:	In Person
Hearing Date:	26 April 2018
Decision Date:	23 May 2018

#### Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)  
Mel Orange, Legal Member  
Bob Monteith, LBP Carpentry and 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 Regulations<sup>1</sup> 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*<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.

## 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

<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

<sup>5</sup> *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] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Nigel Nicholas	Respondent
[Omitted]	Complainant
[Omitted]	Witness, Project Manager, [Omitted]
[Omitted]	Witness, Builder.

[7] The Respondent was engaged by [Omitted] to construct a new transportable home at the [Omitted]. The Respondent constructed two dwellings of similar design at the same time. One allegedly had significant issues with the build. The other did not. The Complaint related to the dwelling that had the issues.

[8] The issues with the build came to light after it had been transported and located on site for a purchaser. A new licensed building was engaged to rectify issues that had been noted. The issues included allegations as regards

*External:*

1. *Soakers on corners were bent and bashed.*
2. *Fascia and left side of house was totally out of line.*
3. *Spouting hasn't been installed to correct fall.*
4. *Linea weatherboards have not been correctly installed, i.e. joined on studs instead of past the studs as per hard these installation details, poor joins, and wavy boards - total re-clad required including repainting.*
5. *Kitchen window not installed properly, massive gap in right hand side.*

*Internal:*

1. *Several walls not plum and most walls have bows that are outside BRANZ.*
2. *When removing some Gib board in order to straighten the walls it was discovered the bracing was an adequate and nailing of walls was inadequate including sufficient nailing to the floor. This resulted in a further Gib board being removed and now we have removed most Gib board on the walls. This will involve labour to remove Gib board, labour to rectify framing, labour to reinstall Gib board, cost to dispose old Gib board and cost to supply replacement Gib board plus stopping and painting.*
3. *Scullery wasn't fitted properly, not nailed off and the cavity door was not opening.*

4. *Ceilings not level - especially in the lounge/kitchen/dinning. Cost to remove Gib in this area repack ceiling batons and install new Gib, stopping and paint.*
5. *All the internal doors not fitted properly; with poor framing and inconsistent gaps around the doors. In some cases doors were hung on the wrong side.*
6. *Wardrobe doors in main bedroom - handles not installed in incorrect position.*
7. *Hallway walls not even -there was a 16/20mm level difference from the lounge end to bedroom end.*
8. *Hallway ceiling hatch not installed in centre.*
9. *Wrong nails used in some cases- 3 inch instead of 4inch. Insufficient quantity in most frames.*
10. *Nailing of Gib often not going into the timber frames, just through the Gib.*
11. *Damage to framing timber throughout house, exposed nails. Packers used in place of full length studs in at least 3 walls*

- [9] In support of the allegations various photographs were provided as were Council Site Notices and internal quality assurances check sheets. The photographs did not cover all of the alleged matters and some did not necessarily show what was alleged to be non-compliant. The internal quality assurance process was managed by [Omitted]. The issues noted above were not identified. A letter from James Hardie, the provider of the weatherboards was also provided. It noted non-specific findings as regards the weatherboard install.
- [10] Evidence was heard that damage to weatherboards which was shown in photographs was most likely caused by grinding carried out by a labourer who was working for another tradesperson.
- [11] On the other matters there was differing evidence as to whether the work carried out was compliant or not when it was completed. In general the Respondent denied the allegations raised in the complaint and/or denied responsibility of the building work alleged to be non-compliant.
- [12] The Complainant gave evidence that the house had been transported by a reputable and experienced transport company that had been used in the past and that there were no issues with the transportation.

### Board's Conclusion and Reasoning

- [13] 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.
- [14] The Board made its decision on the basis that there was insufficient evidence to establish that the Respondent had been either negligent or incompetent. In particular there was insufficient supporting evidence to establish the non-compliance alleged or that the Respondent was responsible for it. The Board also noted that of two dwellings built at the same time and using the same methodology one had what were alleged to have been significant issues and the other did not.
- [15] As noted above the Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*<sup>6</sup> where Justice McGrath in the Supreme Court of New Zealand stated:

*[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.*

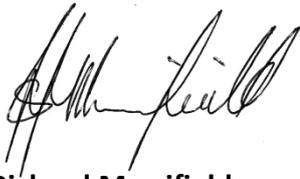
*[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to "the reasonable satisfaction of the Tribunal". A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal's reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.*

- [16] Having applied the tests outlined in *Z v Dental Complaints Assessment Committee* the Board has decided that it has not been proven, on the balance of probabilities, that the alleged conduct has been committed.

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<sup>6</sup> [2009] 1 NZLR 1

Signed and dated this 23<sup>rd</sup> day of May 2018

A handwritten signature in black ink, appearing to read 'R. Merrifield', written in a cursive style.

**Richard Merrifield**  
Presiding Member