

Before the Building Practitioners Board

	BPB Complaint No. CB 25738
Licensed Building Practitioner:	Tony Arlidge (the Respondent)
Licence Number:	BP 112199
Licence(s) Held:	Carpentry and 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	Tauranga
Hearing Type:	In Person
Hearing Date:	31 May 2022
Decision Date:	3 June 2022

Board Members Present:

Mr C Preston, Chair
Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Ms J Clark, Barrister and Solicitor, Legal Member
Mr G Anderson, LPB, Carpentry and Site AOP 2

Appearances:

Mr Sebastian Hartley 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 under section 317(1)(b) of the Act.

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Summary of the Board’s Decision

- [1] The necessary elements of the disciplinary offence were not established on the basis that the Respondent did not supervise the building work complained about.

The Charges

- [2] The hearing resulted from a Complaint about 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 carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- [3] In further investigating the matter, the Board inquired into matters detailed in the report of Mr [OMITTED], Director, [OMITTED] (Document 2.1.26, Page 45 of the Board’s file) and, in particular:
- (a) the quality and workmanship of the cladding installed
 - (b) whether the Respondent ought to have known and advised the owner that a building consent was required for the structural work discovered on the removal of the original cladding (as set out in section 5, pages 8-11 of Mr [OMITTED]’s report) (Document 2.1.34-2.1.37, Pages 53-56 of the Board’s file).
 - (c) Whether the Respondent considered the cladding in place may have potentially contained asbestos (fibrolite sheets), given the age of the dwelling, and what he did to address this issue.

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

Function of Disciplinary Action

[4] 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.

[5] 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.”

[6] 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 persons⁵:

... 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.

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

[8] 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.

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 *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

Inquiry Process

- [9] 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.
- [10] 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.

Background to the Complaint

- [11] The Respondent is an employee of Building Services BOP 2018 Limited. The company was contracted by the Complainant to do repairs and alterations to a dwelling in Te Puke. The building work was not carried out under a building consent. The work involved replacement of the cladding on the north wall of the home with Hardies linear board planking, installation of new aluminium windows for the entire house and some internal kitchen work.

Evidence

- [12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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.
- [13] 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.
- [14] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Tony Arlidge, the Respondent

Scott Arlidge, Director of Building Services BOP 2018 Limited

[OMITTED], Complainant, Homeowner

[OMITTED], Homeowner

[OMITTED], Director, [OMITTED]

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [15] Mr Scott Arlidge gave evidence that he is a qualified carpenter with about 15 years' experience at the time of this project. He is not a Licensed Building Practitioner. He carried out the work on this site with 2 apprentices. He is the sole director and shareholder of Building Services BOP 2018 Limited.
- [16] The work was undertaken pursuant to clauses 1, 8, 11 and 12 of Schedule One of the Act as building work for which a building consent was not required.
- [17] Mr Scott Arlidge advised that the Respondent, his father, is an employee of the company. The Respondent generally scoped and priced work for the company. On this project, his involvement was to write up the contract, and he occasionally visited the site to *"view what the boys were doing"*. He did not carry out any work.
- [18] Extensive evidence was presented orally at the hearing and in the documents provided to the Board, on the work at issue and the standard of workmanship. Given, however, the decision the Board has reached it is not necessary to canvas this evidence in detail or to make any findings on the credibility of the witnesses.
- [19] The Board notes the evidence in respect of the asbestos inquiries made before work commenced. The Respondent gave evidence that he took 3-4 samples *"representative of the [fibrolite sheet] materials on site"* and had them tested by Analytica Laboratories on 1 May 2020. The laboratory's report stated that asbestos was *"absent"*. (Document 4.2.2, Page 199 of the Board's file).
- [20] The Complainant acknowledged that the Respondent was on the *"paperwork side"* and she knew the work was going to be carried out by Mr Scott Arlidge. When asked by the Board whether she expected the Respondent to be on site and supervising she gave evidence that she *"didn't think much of it."*
- [21] As regards the possible need for a building consent for the structural work revealed after the removal of the cladding, the Respondent told the Board that he recognised a building consent was necessary. He was in the process of making inquiries and pricing the further work to take to the Complainant when the company's contract was terminated by the Complainant.
- [22] In respect of the original scope of work, Mr Scott Arlidge gave evidence that he checked with the Western Bay of Plenty District Council that this was not restricted building work and did not require a building consent as it was a *"like for like"* replacement under Schedule One of the Act.

Board's Conclusion and Reasoning

- [23] 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.
- [24] The Respondent did not carry out any building work, and the Building Work was not restricted building work as defined in the Act. As such, there was no requirement under the Act for the building work to be carried out or supervised by a Licensed

Building Practitioner. This is because of the combined effect of section 401B and 84 of the Act. Section 401B of the Act allows building work to be declared as restricted building work by Order in Council⁷. It only applies to building work that is carried out under a building consent. Section 84, in turn, provides:

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

- [25] There are no restrictions on who can carry out building work that comes within clauses 1, 8, 11 and 12 of Schedule One of the Act.
- [26] It was clear that the actual building work was carried out by Mr Scott Arlidge. The Respondent's role in this project was limited. He did not carry out any building work, and he was not required to supervise the work done by Mr Scott Arlidge and the two apprentices. Any supervision the Respondent may have done was notional and was not statutorily required.
- [27] In previous Board decisions, it has found that the definition of supervise in section 7⁸ of the Act must be interpreted in such a way as to give effect to the purpose of the legislation, which includes the regulation and accountability of licensed building practitioners and, as such, it includes work carried out without a building consent. The Board's position has been that under the disciplinary provision in section 317(1)(b) of the Act, supervision applies to all building work carried out under the supervision of a Licensed Building Practitioner.
- [28] The circumstances of the present case differ from those that have previously come before the Board, where it has found that Licensed Building Practitioners were responsible for building work that was not restricted building work under their supervision. In this matter, the evidence established that the Respondent did not have a supervisory role in the building work. Furthermore, his being a Licensed Building Practitioner was not a matter relevant to the Complainant in entering into the contract with Building Services BOP 2018 Limited. As such, the Board finds that

⁷401B *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.*

⁸ Section 7:

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

- (a) *is performed competently; and*
 (b) *complies with the building consent under which it is carried out.*

the Respondent is not responsible or answerable for any alleged workmanship issues on this project.

- [29] 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. Mr Scott Arlidge, who carried out the work, is not a Licensed Building Practitioner. Therefore, the Board has no jurisdiction to inquire into his workmanship.
- [30] Accordingly, the Board finds that the Respondent has not committed a disciplinary offence.

Signed and dated this 15th day of June 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.

Mr M Orange
Presiding Member