Before the Building Practitioners Board

	BPB Complaint No. C2-01879
Licensed Building Practitioner:	Aaron Happy (the Respondent)
Licence Number:	BP 118727
Licence(s) Held:	Roofing – Profiled Metal Roof and/or Wall Cladding

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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

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	15 November 2018
Decision Date:	3 December 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Faye Pearson-Green, LBP Design AOP 2

Appearances

Natalie Tabb, Counsel 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.

Contents

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[1] to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offence 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).

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 or commercial disputes.

Evidence

[5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. Under section 322 of the Act the Board has

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[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:

Aaron Happy	Respondent
[Omitted]	[Omitted]

[8] The complaint was made by the owners of Unit 2 within a multi-unit strata title building. Riteline Limited had been engaged to carry out a reroof on the basis that it was a like for like replacement. The Respondent was a director and shareholder of Riteline.

[9] Various incidents occurred during the reroof causing damage and water ingress. The focus on the Board’s inquiries, however, was the manner in which the building work in relation to the reroof was carried out.

[10] The Complainants provided four various reports from [Omitted] which had been developed by [Omitted] following on site inspections of the reroofing work. [Omitted] noted various non-compliance issues in his first report. Subsequent reports noted that various noncompliance issues had not been attended to. New items were also identified. It was the noncompliance issues identified in those reports that the Board was further investigating and this was noted in its resolution to procced to a hearing.

[11] At the hearing the Respondent produced a written brief of evidence supported by various exhibits. The general tenor of the brief and exhibits was that the Respondent had neither carried out nor supervised the building work.

[12] The Respondent gave evidence that Riteline has six teams of roofers and that it also employs other licensed building practitioners. He carries out and/or supervises some of the work that Riteline contracts to do but mainly focuses on new build work and the higher end jobs.

[13] The job in question was given to a team of roofers under the supervision of a foreman whose job it was to project manage the reroof and to carry out the final compliance inspection. He produced time sheets and email correspondence to support this assertion. The person he identified was not a licensed building practitioner at the time but has since gained his roofing licence.

[14] [Omitted] was questioned as to who he dealt with on the site. He stated he had not dealt with the Respondent. He stated he had dealt with the foreman identified by the Respondent when he visited the site.

[15] The Respondent accepted that he had been to site on as many as six occasions. He gave evidence, however, that it was in relation to the damage that occurred in respect of water ingress and latterly in respect of a commercial dispute that arose.

Board's Conclusion and Reasoning

[16] 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.

[17] The building work in question was not carried out under a building consent. It was exempt work under clause 1(2) of Schedule 1 of the Act. As such the building work was not restricted building work. It did not, therefore, have to be carried out or supervised by a licensed building practitioner.

[18] The Board has, however, found in previous decisions[6] that the definition of supervise in section 7[7] of the Act extends to non-consented building work. The Board's position, therefore, is that under the disciplinary provision in section 317(1)(b) supervision applies to all building work carried out under the supervision of a licensed building practitioner.

[19] The question for the Board, in the present case, was whether the Respondent carried out or supervised any of the building work.

[20] In the present case there was evidence before the Board from that Respondent that he had neither carried out nor supervised the building work. There was no evidence before it that he had actually supervised. On this basis the Board finds, on the balance of probabilities that the Respondent did not carry out or supervise the building work complained about.

[21] It should be noted that when the Board resolved to proceed with the matter and hold a hearing the evidence provided by the Respondent at the hearing was not available to it. Had it been the matter might not have proceeded to a hearing.

[22] Furthermore as the person who did carry out the building work was not licensed (and did not have to be as the building work was not restricted building work) the Board has no jurisdiction over that person. If it is critical to a consumer that a licensed building practitioner carry out or supervise non-restricted building work

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[6] Board Decision C2-01143 dated 14 April 2016

[7] 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.

then it would be advisable for them to stipulate this in the contractual arrangements.

[23] Given the above the Board finds that the Respondent's conduct does not come within the grounds of discipline and that he has therefore not committed a disciplinary offence.

Signed and dated this 3rd day of December 2018

Chris Preston

Chris Preston
Presiding Member