

Before the Building Practitioners Board

	BPB Complaint No. C2-01898
Licensed Building Practitioner:	David Holloway (the Respondent)
Licence Number:	BP 117125
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	Christchurch
Hearing Type:	On the Papers
Hearing Date:	30 October 2018
Decision Date:	20 November 2018
Board Members Present:	
	Chris Preston (Presiding)
	Mel Orange, Legal Member
	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 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 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*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.

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

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 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] The complaint related to the failure to provide a record of work on completion of restricted building work. The property to which the complaint relates is a mixed-use building. It contains both residential apartments and commercial premises. The rating records for the property note that it is zoned Business – Neighbourhood Centre Zone and that the land use is Multi Use within Industrial. The description of improvements is – Clinic, Flat, Restaurant, Salon.

Board's Conclusion and Reasoning

- [8] 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 be disciplined.
- [9] The Board has reached its decision on the basis that the building work undertaken was not restricted building work.
- [10] Section 401B of the Act allows building work to be declared as restricted building work by Order in Council⁶.

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

⁶ 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.*

[11] The Building (Definition of Restricted Building Work) Order 2011 was 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.*

[12] 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:

- (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.

[13] It is the first element that has not been satisfied in this case. The building work was not carried out on a “house” or “a small-to-medium apartment building”.

[14] Clause 3 of the Order provides definitions of those and other relevant terms:

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*

Small-to-medium apartment building *means a building that –*

- (a) *contains 2 or more residential units or residential facilities; and*
- (b) *does not contain parts that are neither residential units nor residential facilities; and*
- (c) *has a maximum calculated height of less than 10m.*

- [15] The building was a mixed-use structure. It contained both commercial and residential premises. As such it was not a “house” as defined.
- [16] To be a “small-to-medium apartment building” the building has to satisfy all three of the elements in the definition. If one or more elements are not satisfied then the building is not a small-to-medium apartment building.
- [17] In this instance the building contained parts that were not residential units or residential facilities as defined above. On this basis the building was not a small-to-medium apartment building.
- [18] As the building was neither a house nor a small-to-medium apartment building it was not restricted building work. As such a record of work was not required.

Signed and dated this 20th day of November 2018


Chris Preston
Presiding Member