Before the Building Practitioners Board

	BPB Complaint No. CB25036
Licensed Building Practitioner:	Mark Van Den Anker (the Respondent)
Licence Number:	BP 109578
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	Auckland
Hearing Type:	In Person
Hearing Date:	24 September 2019
Decision Date:	13 November 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design AOP 2
Rob Shao, LBP, Carpentry Site AOP 1

Appearances:

Ian Stevenson, Barrister and Solicitor 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 offences the Board resolved to investigate were that the Respondent:

(a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) 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. This is important to note as the

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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

Complainant raised various contractual matters and provided documentation pertaining to contractual issues that were outside of the Board's jurisdiction.

Consolidation

[5] The Board may, under Regulation 13, consolidate two or more complaints into one hearing but only if the complaints are, in the opinion of the Board, about substantially the same subject matter and the complainant and the licensed building practitioner in respect of each complaint agree to the consolidation.

[6] The Board sought agreement for consolidation of this matter with complaint number CB25048. The consent of all those involved was forthcoming. The two matters were consolidated.

Evidence

[7] 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 relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

[8] 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.

[9] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Mark Van den Anker	Respondent
[Omitted]	Respondent in CB25048
[Omitted]	Complainant
[Omitted]	Carpenter, witness for the Complainant
[Omitted]	Summonsed Witness
[Omitted]	Summonsed Witness by phone

[10] The complaint related to an extension and alteration to the Complainants' residential dwelling. The building work was carried out under a building consent. The Respondent was engaged to continue with the building work and to carry out remedial work after the initial builder's engagement was brought to an end. The Complainant made complaints about the first builder (complaint number CB25037), the Respondent, [Omitted] an employee of the Respondent (complaint number CB25048), the roofer [Omitted] (complaint number CB25047) and a designer

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

[Omitted] (CB25108). The complaint against the designer did not proceed to a hearing.

[11] The Complainants obtained various reports on the quality and compliance of the building work that had been carried out. Most of the issues noted relate to the first builder (complaint number CB25037) and the roofer (complaint number CB25047). The issues the Board were investigating in relation to the Respondent and [Omitted] were in respect of issues identified in [Omitted]'s report on building work on a dormer window and an entrance area around the back door to the dwelling.

[12] With respect to the dormer [Omitted] identified various issues in a Defects/Scope of Works Opinion Table with dormer flashings, roof/wall alignment and weatherboard installation. His opinion was that the building work had not been carried out in accordance with the building consent in that the work did not reflect the consented plans; windows and weatherboards were installed incorrectly; that there was a risk the dwelling would leak and that the acceptable solution E2/AS1 had not been adhered to; and that building work had progressed without the necessary inspections being called for and carried out.

[13] The Respondent and [Omitted] responded to the allegations on the basis that the building work, as reviewed by [Omitted], was only temporary in nature; that the work was not complete; and that they were waiting for design instructions. Their joint submission was that the dwelling had been closed in to weatherproof it when there was a forecasted delay in the building work.

[14] [Omitted] gave evidence that the general methodology and sequencing used by the Respondent and [Omitted] was not logical and that there were simpler means of weatherproofing available.

[15] With regard to the rear door the allegation was that the building work was not in accordance with the building consent and that the manner in which it had been carried out meant that the installation of a stair landing and handrail would be compromised.

[16] The Respondent and [Omitted] gave evidence that the building work was carried out in accordance with the building consent and that it was a design issue. The Complainant submitted that, if it was as per the consent, then the issues should have been identified on site prior to the building work being carried out and a design solution sought before the work was commenced.

Board's Conclusion and Reasoning

[17] The Board has decided that the Respondent **has not**:

(a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); or

(b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act);

and should not be disciplined.

[18] Firstly, it must be noted that under the licensed building practitioner regime each licensed person is responsible for his or her own work provided that work is within the scope or limits of their licence. As such the Board can only hold a licensed building practitioner accountable for the building work that they carried out or supervised. The converse is that, from a disciplinary perspective, they cannot be held accountable for the work of another licensed building practitioner. As such many of the issues identified in the complaint and in the reports provided to the Board by the Complainant fell outside of the Board's jurisdiction, as regards the Respondent, as they related to other licensed persons and in this respect it is noted that there are other complaints and hearing in progress in respect of those persons.

[19] With regard to the back door the Board finds that the work was carried out in accordance with the building consent. The issue was a design issue and whilst it may have been prudent for the Respondent to have raised the issue, it was not negligent of him not to have done so.

[20] Turning to consideration of the issues with regard to the dormer window the matter came down to whether the building work was complete or was temporary. If it was complete, then it could be said that it had been carried out in a manner that was not in accordance with acceptable standards or in compliance with the building consent issued. If it was temporary and there was an intention to remove and replace what had been built, then the Board could not find that the Respondent had been negligent or incompetent or that he had built contrary to a building consent.

[21] In considering the matter the Board did note that the manner in which the Respondent completed what he described as temporary work was not necessarily logical. There were simpler means of carrying out temporary weatherproofing and the Board suspects that the intention may have been to do more than just temporarily weatherproof the area. That said it did not have sufficient evidence to prove, on the balance of probabilities, that such an intention existed.

[22] In this respect the Board notes the statements of Justice McGrath in the Supreme Court of New Zealand in *Z v Dental Complaints Assessment Committee*[6]:

> *[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.*
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> *[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.*

[23] The Court of Appeal noted the requirement for strong evidence and in this instance the Board has found that such evidence was not before it.

[24] The Board does, however, caution the Respondent that he should be aiming to get building work completed in a manner that does not require rework so as to obtain compliance. In essence the Board considers that licensed building practitioners should be aiming to get building work right the first time. In the first reading of changes to the Act around licensing[7] it was noted by the responsible Minister:

> *In February this year the Minister announced measures to streamline and simplify the licensed building practitioner scheme. A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.*

[6] [2009] 1 NZLR 1
[7] Hansard volume 669: Page 16053

[25] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation[8]:

> *The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.*
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> *We cannot make regulation more efficient without first getting accountability clear, and both depend on people having the necessary skills and knowledge. The Building Act 2004 will be amended to make it clearer that the buck stops with the people doing the work. Builders and designers must make sure their work will meet building code requirements; building owners must make sure they get the necessary approvals and are accountable for any decisions they make, such as substituting specified products; and building consent authorities are accountable for checking that plans will meet building code requirements and inspecting to make sure plans are followed.*

[26] The Respondent should take heed of the above and put it into practice in the future.

Signed and dated this 13th day of November 2019

Richard Merrifield
Presiding Member

[8] Hansard volume 669: Page 16053