

Before the Building Practitioners Board

	BPB Complaint No. CB25114
Licensed Building Practitioner:	Robert Fielder (the Respondent)
Licence Number:	BP 125113
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	Auckland
Hearing Type:	In Person
Hearing Date:	25 September 2019
Decision Date:	16 October 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

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 had carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act) in that he may have carried out building work that required a building consent without one having been obtained.

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.

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

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

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 the Complainants and the Respondent.
- [8] The Complainants clarified the building work that was undertaken at their property. They gave evidence that building work was carried out by the Respondent on two structures as follows:
- Sleepout: the sleepout was an existing structure that was approximately 30 years old that was used as a smoko room. The Respondent replaced a pergola attached to it, replaced internal linings and replaced an existing shower with a similar shower system in the same location.
- Portacom: the portacom was a transportable structure that was used on construction sites by the Complainant. The Respondent installed new linings in the structure. The Complainant replaced a shower and toilet in the same position with similar fittings.
- [9] Evidence was received that all plumbing and electrical work was carried out by registered persons.

Board's Conclusion and Reasoning

- [10] 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.
- [11] The Board's considerations in relation to negligence and/or incompetence related to a possible failure to ensure a building consent was obtained for building work that may have required one prior to it being carried out.
- [12] All building work must be carried out in accordance with a building consent. Section 40 of the Act provides:
- 40 Buildings not to be constructed, altered, demolished, or removed without consent**
- (1) *A person must not carry out any building work except in accordance with a building consent.*

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

(2) *A person commits an offence if the person fails to comply with this section.*

[13] The process of issuing a building consent and the subsequent inspections under it ensure independent verification that the Building Code has been complied with and that the works will meet the required performance criteria in the Building Code.

[14] In *Tan v Auckland Council*⁶ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

[37] ... those with oversight (of the building consent process) are in the best position to make sure that unconsented work does not occur.

[38] ... In my view making those with the closest connection to the consent process liable would reduce the amount of unconsented building work that is carried out, and in turn would ensure that more buildings achieve s 3 goals.

[15] The *Tan* case related to the prosecution of a project manager of a build. The project manager did not physically carry out any building work. The High Court on appeal, however, found that his instructions to those who did physically carry out the work amounted to “carrying out” for the purposes of section 40 of the Act.

[16] The Board considers the Court in *Tan* was envisaging that those who are in an integral position as regards the building work, such as a licensed building practitioner, have a duty to ensure a building consent (or an amended building consent) is in place prior to building work being carried out. It follows that failing to do so can fall below the standards of care expected of a licensed building practitioner.

[17] There are limited exceptions to the requirement for a building consent. These are provided for in section 41 of the Act. The main exception is building work described in Schedule 1 of the Act and this is further provided for in section 42A of the Act. The burden is on those that seek to rely on an exception to show that the building work comes with that exception.

[18] The building work carried out came within various clauses of Schedule 1 including clauses 6, 7 and 32 which state:

6 Pergolas

Building work in connection with a pergola.

7 Repair or replacement of outbuilding

⁶ [2015] NZHC 3299 [18 December 2015]

The repair or replacement of all or part of an outbuilding if—

- (a) the repair or replacement is made within the same footprint area that the outbuilding or the original outbuilding (as the case may be) occupied; and*
- (b) in the case of any replacement, the replacement is made with a comparable outbuilding or part of an outbuilding; and*
- (c) the outbuilding is a detached building that is not more than 1 storey; and*
- (d) the outbuilding is not intended to be open to, or used by, members of the public.*

32 Repair, maintenance, and replacement

- (1) The repair and maintenance of any sanitary plumbing and drainage in or associated with a building, provided that comparable materials are used.*
- (2) Replacement of sanitary plumbing and drainage in or associated with a building, provided that—*
 - (a) a comparable component or assembly is used; and*
 - (b) the replacement is in the same position.*
- (3) However, subclauses (1) and (2) do not include the following building work:*
 - (a) complete or substantial replacement of a specified system; or*
 - (b) repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or*
 - (c) repair or replacement of any water heater (unless permitted under clauses 36 to 38).*

- [19] Given those provisions the Board has decided that a building consent was not required and as such that the Respondent has not committed a disciplinary offence.

Signed and dated this 16th day of October 2019



Richard Merrifield
Presiding Member