

Before the Building Practitioners Board

	BPB Complaint No. CB25513
Licensed Building Practitioner:	Frances Dodge (the Respondent)
Licence Number:	BP 129378
Licence(s) Held:	Design AoP 1

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	Board Inquiry
Hearing Location	Wellington
Hearing Type:	In Person
Hearing and Decision Date:	28 October 2020

Board Members Present:

Mel Orange, Deputy Chair, Legal Member (Presiding)
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP, Carpentry and Site AOP 2
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.

Disciplinary Finding:

The Respondent **has not** committed a disciplinary offence.

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Summary of the Board’s Decision

- [1] The Respondent has not committed a disciplinary. The Respondent’s conduct did not reach an acceptable standard but the transgressions were not, in the circumstances, serious enough to warrant a disciplinary outcome.

The Charges

- [2] The hearing resulted from a Board Inquiry into the conduct of the Respondent and a Board resolution under regulation 22 of the Complaints Regulations¹ to hold a hearing in relation to building work at *[Omitted]*.
- [3] 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) IN THAT, the Respondent may have carried or supervised an inaccurate site measure, and/or failed to determine the true boundary line position, and/or used existing plans for measurements and on-site construction detail instead of on-site measurements and/or site confirmation and surveys, which may have resulted in on-site errors.

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.

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

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 a Board Inquiry into *[Omitted]* (CB25448). The consent of all those involved was forthcoming. The two matters were consolidated.

Background to the Board Inquiry and Hearing

- [7] The Board Inquiry arose out of a complaint about building work on an alteration and addition to an existing dwelling carried out at *[Omitted]*. As part of the Board's investigations into that matter, it identified issues with the design work carried out to obtain a building consent.
- [8] Prior to the hearing, the Presiding Member held a prehearing conference with the Respondent. A separate prehearing was also held with *[Omitted]*. Both respondents indicated that they would file a submission with the Board, which set out their acceptance of responsibility for the matters the Board was investigating. *[Omitted]* filed a submission on 17 September 2020 on behalf of both himself and the Respondent. The Respondent accepted the submission as being applicable to her.
- [9] On the basis of the submission received, the Board decided not to call witnesses and to deal with the matter on the basis of a simplified hearing.

Inquiry Process

- [10] 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.

Evidence

- [11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. 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.
- [12] 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

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

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.

[13] In addition to the documentary evidence before the Board it heard evidence from the Respondent and from [Omitted].

[14] The submission received from [Omitted] prior to the hearing included the following statement:

Frances Dodge was newly employed by me as an Architectural Designer, and this was her first renovation project. Although she carried an LBP, she was considered to be training with me at the time and as an employee of the business. I didn't consider her to be solely responsible for this or any other project she worked on, as I was the LBP supervisor for all Prime Design's work. Frances was also only involved in the measure up, and preliminary concept design. With that in mind, I am also happy to accept responsibility for her complaint. Frances was a great employee and always very thorough in her work that she carried out. I have included Frances in this email so she can verify this.

[15] [Omitted] was the Design Licensed Building Practitioner who signed and submitted the Certificate of Work for the design when a building consent was sought. As such, he took responsibility for the design work.

[16] The Respondent made the following statement when she initially responded to the Board Inquiry:

2. My involvement in the works was limited to the concept design. I carried out an initial site visit & measure up with the Architectural Manager of Prime Designs Wellington Ltd [Omitted] in August 2017 after starting at Prime Designs in July 2017. From there I drew up a set of concept designs for the proposed alterations. After the clients were happy with the basic concept drawings the job was then handed over from me to [Omitted] and his team to complete the technical/working drawings and work through all the required details, measurements etc.

3. [Omitted] was supervising my work as the owner/managing director of Prime Designs. I had made him aware that I had minimal renovation experience at this time as my experience to date had only been involved in new builds. I was relying on assistance from the Architectural Manager who came on site with me to carry out the measure up and the supervision and guidance from [Omitted]. I was not supervising any other person.

[17] The Respondent's involvement in the development of the building consent was to develop a concept design. As noted above, to do this, she carried out a site visit and did a site measure with the assistance of another employee. She was not involved in developing working drawings for the building consent.

- [18] At the hearing, the Respondent stated that it was the first time she had developed a concept for an alteration. Her previous experience had been with new builds. She stated she was more focused on the concept than on technical or compliance matters. She did not receive direction from *[Omitted]* as to what was required on-site for a site measure prior to her attending to carry out the site visit. She reiterated the statements made in her written response noted above.

Board's Conclusion and Reasoning

- [19] 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.
- [20] The Board decided that whilst there were aspects of the Respondent's conduct that fell below an acceptable standard her overall conduct, in the circumstances of the case, was not such that a disciplinary outcome should follow.
- [21] In this respect she has taken into account the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁵ as regards the threshold for disciplinary matters:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

- [22] Also, in *Pillai v Messiter (No 2)*⁶, the Court of Appeal stated:

... 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.

- [23] On the basis of those decisions, the Board has taken the position that seriousness is a matter for consideration by it in determining whether a licensed building practitioner has committed a disciplinary offence.
- [24] Looking at the Respondent's conduct, she was, at the time, working outside of her personal competence⁷ as she had no experience in design work for alterations. She recognised this and sought the assistance of a more experienced, albeit unlicensed, person. She also considered she was working under the direction of *[Omitted]*, her employer. She made mistakes and made assumptions that impacted the building consent design, as did *[Omitted]*. *[Omitted]* has taken responsibility for those mistakes. He was the person who issued the certificate of work stating that the

⁵ [2001] NZAR 74

⁶ (1989) 16 NSWLR 197 (CA) at 200

⁷ Under section 314B(b) of the Act a licensed building practitioner must only work within their competence and it is an offence under section 317(1)(h) of the Act to breach section 314B.

design was compliant. Given those factors, the Board has decided that the Respondent's conduct was not serious enough to warrant a disciplinary outcome.

- [25] The Respondent is, however, cautioned to ensure that she is mindful of her personal competence and that she only carries out design work within it. She is also reminded that a Design AoP 1 licence relates to design work with a risk matrix score of 12 or less.

Signed and dated this 16th day of November 2020

A handwritten signature in black ink, appearing to be 'M. J. Orange', written in a cursive style with a long horizontal stroke extending to the right.

M. J. Orange
Presiding Member