

## Before the Building Practitioners Board

	BPB Complaint No. CB26264
Licensed Building Practitioner:	Paul John Geraets (the Respondent)
Licence Number:	BP115788
Licence(s) Held:	Carpentry and Design AoP 2

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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

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Complaint or Board Inquiry	Complaint
Hearing Location	by audio-visual conference
Hearing Type:	In Person
Hearing Date:	8 November 2023
Decision Date:	11 December 2023
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
	Mr G Anderson, LBP, Carpentry and Site 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.

## Contents

Summary.....	2
The Charges .....	2
Limits of the Board’s Jurisdiction.....	3
Evidence.....	3
Background.....	3
Board Decision.....	4

## Summary

- [1] The Respondent designed and built a residential dwelling. The house leaked throughout the build and continued to leak after the Respondent had attempted remediation. Whilst the Board had no doubt that leaks were occurring, there was insufficient evidence to establish the cause of those leaks and, as such, that the Respondent’s conduct was the cause. Accordingly, the Board decided that there was insufficient evidence to make a disciplinary finding.

## The Charges

- [2] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.<sup>1</sup>
- [3] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> were that the Respondent may, in relation to building work at [OMITTED] have:
- (a) carried out or supervised building work, including design work, in a negligent or incompetent manner contrary to section 317(1)(b) of the Act; and
  - (b) carried out or supervised building work that does not comply with a building consent contrary to section 317(1)(d) of the Act.
- [4] The Board gave notice that, in further investigating the Respondent’s conduct under section 317(1)(b) and (d) of the Act, the Board would be inquiring into leaks complained about and whether the building work, including the design work, was compliant with clause E2 of the Building Code.

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<sup>1</sup> 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. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

<sup>2</sup> The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

### **Limits of the Board's Jurisdiction**

- [5] Disciplinary action under the Act is not designed to redress issues or disputes. In *McLanahan and Tan v The New Zealand Registered Architects Board*,<sup>3</sup> 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."*

- [6] The Complainants raised, in their complaint and at the hearing, issues of a contractual nature, including the Respondent's alleged failure to engage in a process to rectify issues with the build. Those are matters that the Board cannot investigate or determine. Nor can the Board make findings as regards contractual liability or breaches.

### **Evidence**

- [7] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>4</sup>. 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 evidence that the Board took into consideration when making its decision included additional evidence that the Board allowed to be filed after the hearing on 8 November 2023 had concluded.

### **Background**

- [9] The Respondent was engaged to design and build a residential dwelling from the Complainants. During the build, extensive leaks in and around exterior joinery were noted by the Complainants. The leaks continued after the Respondent had undertaken remedial work.
- [10] The Complainants provided clear evidence that leaks were occurring and that those leaks were extensive. The evidence included photographs and video footage of leaks occurring. The Complainants maintained that the cause was the Respondent's design, building work, or a combination of both. The Complainants obtained a report from another designer, [OMITTED]. He was critical of the design and considered it should not have been consented. Mr [OMITTED] did not point to specific causes other than the consented cladding system used. His suggested solution was to replace the existing cladding with a cavity system. No other expert opinions had been obtained.

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<sup>3</sup> [2016] HZHC 2276 at para 164

<sup>4</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [11] The Respondent put forward various theories as to why the leaks may have occurred including severe weather events and/or settling in of the rammed earth construction.

### **Board Decision**

- [12] The Board has decided that the Respondent has not committed a disciplinary offence. It has made that decision on the basis that there is insufficient evidence to make a finding that the Respondent's design or building work was causative. In this respect, whilst a natural conclusion would be that the Respondent (who was both the designer and the builder) must be at fault, within a disciplinary context, the Board must, in order to make a finding of negligence, incompetence, or building contrary to a building consent, receive evidence that establishes, on the balance of probabilities, that the Respondent's conduct fell below an acceptable standard. That requires a causative link between what is complained about and the subject of the complaint (the Respondent). In this respect, the design was consented, and the building work was carried out in line with that consent. There is evidence that leaks are occurring but no evidence as to why or how.
- [13] In terms of the standard of the evidence required, the Board is guided by *Z v Dental Complaints Assessment Committee*,<sup>5</sup> where Justice McGrath in the Supreme Court of New Zealand stated:

*[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.*

*[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.*

- [14] In this matter, the required strong evidence was not presented to the Board.

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<sup>5</sup> [2009] 1 NZLR 1

- [15] The Board notes that further evidence as to cause may, some time in the future, be obtained. If that should occur and the new evidence meets the test for fresh evidence not available at the time of this decision, the Board may entertain a further complaint.

Signed and dated this 20<sup>th</sup> day of December 2023

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

**M Orange**  
Presiding Member