

Before the Building Practitioners Board

	BPB Complaint No. CB25825
Licensed Building Practitioner:	Simon Grant (the Respondent)
Licence Number:	BP 108124
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	Board Inquiry
Hearing Location	Nelson
Hearing Type:	In Person consolidated with CB25825
Hearing and Decision Date:	13 April 2022
Board Members Present:	
	Mr M Orange, Deputy Chair, Barrister (Presiding)
	Mr C Preston, Chair
	Mrs F Pearson-Green, 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.

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Summary of the Board’s Decision

- [1] The Board found that the Respondent had not committed a disciplinary offence on the basis that there was insufficient evidence to establish that the building work under investigation was carried out by the Respondent when he was a Licensed Building Practitioner.

The Charges

- [2] The hearing resulted from a Board Inquiry 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 offences the Board resolved to investigate were that the Respondent may have:
- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner contrary to section 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 contrary to section 317(1)(d) of the Act.
- [3] In further investigating the allegations under sections 317(1)(b) and 317(1)(d) of the Act, the Board gave notice that it would be inquiring into the quality and compliance of the installation of the corrugated iron wall cladding and associated weatherproofing flashing and seals to the wall cladding, penetrations, window and door openings.

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

¹ The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

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.

Inquiry Process

- [5] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. 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.

Background to the Board Inquiry

- [6] The Board inquiry was initiated on the basis of information contained in a complaint about Mr [OMITTED], and his response to it, which identified the Respondent as a Licensed Building Practitioner who may have carried out or supervised the building work under investigation.

Consolidation

- [7] 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.
- [8] The Board sought agreement for consolidation of this matter with complaint number CB25672. The consent of all those involved was forthcoming. The two matters were consolidated.

Evidence

- [9] 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 that allow it to receive evidence that may not be admissible in a court of law.
- [10] 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.
- [11] In addition to the documentary evidence before the Board heard evidence at the hearing from:

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

Simon Grant	Respondent
[OMITTED]	Licensed Building Practitioner, Carpentry, respondent in matter CB25672
[OMITTED]	Senior Building Technical Officer, Tasman District Council
[OMITTED]	Licensed Building Practitioner, Carpentry
[OMITTED]	Witness for the respondent in matter CB25672

- [12] The Respondent was assisted at the hearing by Mr [OMITTED].
- [13] The Board also summoned Mr [OMITTED], Building Control Officer, Tasman District Council. Due to a family bereavement, he was not able to attend.
- [14] The complaint related to an alteration and extension to a residential dwelling. The building work was carried out under a building consent. The building work included restricted building work for which a record of work must be provided on completion.
- [15] The Board was provided with building consent Council inspection documentation. Included in it was a Site Inspection Report of 16 March 2020, which noted:
- Site Communication:** *Concerns have been raised with the installation of the cladding as there is water damage showing on one of the door jambs.*
- 1: Please explain why no sill flashings were installed?*
- 2: Meter box flashings appears to be incorrect as well?*
- 3: Cladding has been installed hard down to the base flashing?*
- 4: No in seal foam installed on joinery.*
- [16] The matters raised were at the centre of the Board's investigations.
- [17] Mr [OMITTED] was engaged to carry out the consented building work after another contractor had started but not completed the alterations. Mr [OMITTED] worked on the alteration aspect of the build, and when he finished on site, the building work on it had not been completed. The extension had not been started. Mr [OMITTED] carried out and supervised some of the building work on the alteration (cladding and structural work) and also engaged the Respondent to assist with cladding and the installation of windows.
- [18] Mr [OMITTED]'s involvement in the building work came to a premature end. Up until 12 September 2019, the Respondent was carrying out building work as a subcontractor to Mr [OMITTED]. After that date, he contracted his labour directly to the owner. Mr [OMITTED] continued to supply some materials. As of 12 September 2019, the cladding had been installed to a point where windows could be installed.
- [19] The Respondent was a Licensed Building Practitioner up until 18 September 2019, when his licence was suspended. As of 18 September 2019, he ceased to be a

Licensed Building Practitioner as a result of the suspension. He gave evidence that he assumed Mr [OMITTED] would have been supervising him from 18 September 2019 but also conceded that he was not aware, at the time, that his licence had been suspended.

- [20] Neither the Respondent nor Mr [OMITTED] took issue with the matters raised in the Council Site Inspection Report. They did, however, note that another person had, unbeknownst to them and after their involvement had ceased, installed expanding foam air seals around the windows without backing rods that had deformed cladding flashings and which prevented the installation of the compressible foam sealant to the cladding flashings without invasive deconstruction.
- [21] The Respondent gave evidence that the cladding was installed up to the windows, he measured the window and back flashing (excluding the sill flashings to the door units), the flashing list was given to Mr [OMITTED] to order through his ITM account. The window and door units already on site had been supplied with head flashings. The respondent installed the flashing when they arrived. No foam seals were on site when the back and facing flashing were installed. It was the Respondent's intention to install the compressible foam sealant later, notwithstanding that the associated joinery and flashings (excluding the sill flashing) had been installed. An invoice from Mr [OMITTED] to the owner dated 7 October 2019 and notated "installed by Simon" recorded the order. The Board was also provided with an ITM invoice for the flashing dated 7 October 2019. It was noted that the facing flashings that had been installed were steel, whereas the building consent specified wood facings with back flashings. The Respondent, in response to various questions as regards compliance with the building consent, noted that he was not aware of all of the design details specified in them and that he proceeded with the building work on the basis of his past knowledge and experience.
- [22] The Respondent was questioned about when the windows and associated flashings were installed. He stated it would have been about a week after he started contracting directly to the owner (19 September 2019) but that he could not recall exactly when it was. There was no other evidence before the Board that established when the windows were installed.

Board's Conclusion and Reasoning

- [23] 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 (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act);
- and **should not** be disciplined.

[24] The Board made its decisions on the basis that it was not able to establish, on the balance of probabilities, that the Respondent was licensed when the building work under investigation was carried out.

[25] Under section 297 of the Act, a person ceases to be a Licensed Building Practitioner when their license is suspended:

297 Effect of licensing suspension

(1) *A person is not a licensed building practitioner, for the purposes of this Act, for the period for which his or her licensing is suspended.*

(2) *At the end of the period of suspension, the person's licensing is immediately revived (unless there is some other ground to suspend or cancel that person's licensing under this subpart).*

[26] In effect, the Respondent was not a Licensed Building Practitioner when his licence was suspended. He was not authorised, during those periods, to carry out or supervise restricted building work.

[27] The Board only has jurisdiction over Licensed Building Practitioners. Given the wording of section 297, the Board does not have any jurisdiction over a person when their licence is suspended.

[28] The Respondent should note it is an offence under section 85 of the Act for an unlicensed person to carry out restricted building work, with the penalty being a fine not exceeding \$50,000. The prosecuting authority for offences under section 85 is the Ministry of Business Innovation and Employment, and a copy of this decision will be provided to the Building Practitioners. The Board cannot deal with such matters. The Respondent, if he carried out or supervised restricted building work when his licence was suspended, may have committed an offence under section 85 of the Act. Notwithstanding, as noted above, that is not a matter that the Board can proceed with.

[29] The Respondent should also, in future, take care when carrying out building work under a building consent to ensure that the consent is strictly complied with. In this respect, he should note that 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.*

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

(3) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a*

continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.

- [30] Any changes to a building consent must be dealt with by way of the processes stipulated in the Act, which are by use of a minor variation or an amendment to the consent. Those processes require engagement with the designer, other appropriate professionals, and the building consent authority prior to the changes being made. Put simply; a Licensed Building Practitioner cannot depart from the building consent and proceed in the manner that he or she thinks is best, even if that is a pragmatic approach. If they do, then they can face prosecution under section 40 of the Act and disciplinary action by the Board.

Signed and dated this 10th day of May 2022

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

Mr M Orange
Presiding Member