

## Before the Building Practitioners Board

	BPB Complaint No. CB25259
Licensed Building Practitioner:	Andrew Horn (the Respondent)
Licence Number:	BP 104294
Licence(s) Held:	Carpentry

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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	Board Inquiry
Hearing Location	Wellington
Hearing Type:	In Person consolidated with CB25258
Hearing Date:	11 March 2020
Decision Date:	19 March 2020

#### Board Members Present:

Chris Preston, Chair (Presiding)  
Mel Orange, Deputy Chair, Legal Member  
David Fabish, LBP, Carpentry and Site AOP 2  
Bob Monteith, LBP, Carpentry and Site AOP 2  
Rob Shao, LBP, Carpentry and 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 Board Inquiry into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> 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 contrary to section 317(1)(b) of the Act, IN THAT, he may have undertaken demolition work including the framing and support of the existing building before the issue of a building consent, and the deck and substrate was allegedly constructed in an incompetent manner; and
- (b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act, IN THAT, he did not provide a record of work for restricted building work that he may have undertaken.

## 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.

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

<sup>2</sup>*R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>3</sup>[1992] 1 NZLR 720 at p 724

- [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*<sup>4</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.”*

- [4] In a similar vein the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons<sup>5</sup>:

*... 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.*

### **Inquiry Process**

- [5] 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.
- [6] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

### **Background to the Board Inquiry**

- [7] The Board inquiry arose from a hearing into complaint number CB24817<sup>6</sup>. The Respondent was identified at that hearing as a person who may have carried out building work in a manner which may have breached the provisions of section 317 of the Act.

### **Consolidation**

- [8] 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

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<sup>4</sup> [2016] HZHC 2276 at para 164

<sup>5</sup> *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

<sup>6</sup> Refer Board Decision *Thompson* [2019] BPB 24817

substantially the same subject matter and the complainant and the licensed building practitioner in respect of each complaint agree to the consolidation.

- [9] The Board sought agreement for consolidation of this matter with complaint number CB25258. The consent of all those involved was forthcoming. The two matters were consolidated.

### **Evidence**

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>7</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.

- [11] 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.

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

Andrew Horn	Respondent
[Omitted]	Witness for Mr Horn
[Omitted]	Respondent in CB 25258
[Omitted]	Witness for Mr [Omitted]
[Omitted]	Licensed Building Practitioner, Carpentry, summonsed witness

- [13] The Respondent was an employee of [Omitted] who had been contracted to carry out repair work to a residential dwelling that had been partially destroyed in a fire by way of the property insurer.

- [14] The Respondent was one of a number of Licensed Building Practitioners who were under the employ of [Omitted] who were involved in the project.

- [15] The Respondent gave evidence that he would provide a limited amount of assistance at the site and that he would often be asked to drop in on his way home to help out.

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<sup>7</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [16] The Respondent was questioned about a photograph that showed him on a deck during the build. The Respondent noted that in the photograph he was not wearing protective clothing and that the tools shown were not his. [Omitted] gave evidence that the Respondent did fix some decking sheets and that he did some trims and finishing but did not work on the substrate. The deck was not a primary means of access to the dwelling.
- [17] The Respondent also gave evidence that he relied on his manager with regard to whether a building consent had been issued prior to the building work being undertaken.

### **Board's Conclusion and Reasoning**

[18] 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);
- (b) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act);

and **should not** be disciplined.

[19] The Board reached its decision on the basis that the conduct identified under section 317(1)(b) was not sufficiently serious enough to warrant disciplinary action. In this respect the Board applied the tests set out by Justice Gendall in *Collie v Nursing Council of New Zealand*<sup>8</sup> 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.*

[20] The Board does caution the Respondent that, as a Licensed Building Practitioner, he has a duty to ensure that all building work is carried out in accordance with a building consent. This requires that, prior to undertaking the building work, a copy of the full building consent is on site or that he has satisfied himself that an exception to the requirement for a building consent applies. It is not enough to simply rely on the assurances of others.

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<sup>8</sup>[2001] NZAR 74

- [21] In terms of a record of work the Board accepted that the Respondent did not carry out any restricted building work. As such there was no obligation to produce or provide a record of work.

Signed and dated this 19<sup>th</sup> day of March 2020

A handwritten signature in black ink that reads "Chris Preston". The signature is written in a cursive style with a horizontal line underlining the name.

**Chris Preston**  
Presiding Member