

Before the Building Practitioners Board

	BPB Complaint No. CB25365
Licensed Building Practitioner:	Nigel Jellyman (the Respondent)
Licence Number:	BP 114540
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	Tauranga
Hearing Type:	In Person
Hearing and Decision Date:	28 July 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

Appearances:

Michael Douglas, Legal Counsel for the Respondent

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 about 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:
- (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) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); and
 - (c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [2] The Board noted, when it decided to proceed to a hearing, that there was contradictory evidence as to who had supervised the restricted building work. *[Omitted]*, the main contractor and unlicensed builder on the building site², had informed the Tauranga City Council that he was being supervised by the Respondent. The Respondent denied any involvement in the building project.
- [3] If the Respondent was the supervising licensed building practitioner, as alleged, then his supervision may have been negligent or incompetent, or it may have resulted in building work being carried out which was not in accordance with a building consent.

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

² Mr Foster has since been granted a Carpentry Licence.

- [4] If the Respondent was not the licensed building practitioner, then *[Omitted]* may have committed an offence under section 85 of the Act and be liable to prosecution. That section provides:

85 Offences relating to carrying out or supervising restricted building work

- (1) *A person who is not a licensed building practitioner commits an offence if he or she carries out restricted building work while not supervised by a licensed building practitioner who is licensed to carry out or supervise the carrying out of restricted building work of that kind.*
- (2) *A person who is a licensed building practitioner commits an offence if he or she—*
- (a) *carries out restricted building work and is not licensed to carry out restricted building work of that kind; or*
- (b) *supervises restricted building work and is not licensed to carry out or supervise the carrying out of restricted building work of that kind.*
- (3) *Subsection (1) and (2)(a) do not apply to a person to whom the owner-builder exemption applies in respect of the restricted building work in question.*
- (4) *A person who commits an offence under this section is liable on conviction to a fine not exceeding \$20,000.*

- [5] The Board decided that a hearing was required to allow the Board to assess the veracity of the witnesses so as to determine if the Respondent was the supervising licensed building practitioner.

- [6] The Board notified the Respondent that, if the Board determined that the Respondent was the supervising licensed building practitioner then the Board would, in further investigating the alleged conduct under sections 317(1)(b) and 317(1)(d) of the Act, focus on the level and adequacy of any supervision provided. It further notified the Respondent that, if he was the supervisor, that it would also investigate whether the Respondent had brought the regime into disrepute by agreeing to be the licensed building practitioner with no actual intention of supervising the restricted building work.

Function of Disciplinary Action

[7] 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*³ and in New Zealand in *Dentice v Valuers Registration Board*⁴.

[8] 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*⁵ 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.”

[9] In a similar vein, the Board’s investigation and hearing process are 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 persons⁶:

... 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.

[10] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

[11] 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.

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

⁶ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

Evidence

- [12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁷. 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.
- [13] 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.
- [14] In addition to the documentary evidence before the Board, it called a number of witnesses to give evidence.
- [15] At the commencement of the hearing, *[Omitted]* gave sworn testimony that he was not supervised by the Respondent at the time the restricted building work was carried out. He stated he had made the admission that he was not being supervised of his own free will. He further stated that had made a mistake and that he apologised for his actions.
- [16] The Board decided, on the basis of the admission from *[Omitted]*, that no further evidence was required.

Board's Conclusion and Reasoning

- [17] 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) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act); or
 - (c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act)
- and **should not** be disciplined.
- [18] The Board made its decision on the basis that it had sworn testimony from *[Omitted]* that he was not being supervised by the Respondent when the building work was carried out.

⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [19] The Board will, as a result of its findings, refer *[Omitted]* to the Ministry of Business Innovation and Employment on the basis that he may have breached section 85 of the Act.

Signed and dated this 13th day of August 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