

Before the Building Practitioners Board

	BPB Complaint No. CB26071
Licensed Building Practitioner:	Gilbert Arnold Kanon (the Respondent)
Licence Number:	BP116036
Licence(s) Held:	Carpentry and Site 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	Auckland
Hearing Type:	In Person
Hearing and Decision Date:	5 May 2023
Board Members Present:	
	Mr M Orange, Chair, Barrister (Presiding)
	Mr D Fabish, LBP, Carpentry and Site 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

[1] The Board initiated a Board Inquiry following a complaint received about the Respondent's brother. The issues under investigation were those that had been raised in various engineering reports, a failure to provide a record of work and an allegation that the Respondent may have carried out design work. The evidence, however, was that subcontracted Licensed Building Practitioners were responsible for the building work carried out in a substandard manner. Further, it was ascertained that a record of work had been provided and that design work had not been carried out. Given those factors, the Board found that the Respondent had not committed a disciplinary offence.

The Charges

[2] The prescribed investigation and hearing procedure is inquisitorial. The Board sets the charges and decides what evidence is required.¹

[3] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [Omitted], Auckland, 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, in respect of issues relating to internal wall and floor framing noted in Site Inspection Reports issued by [Omitted], Engineer, of [Omitted] and in respect of the entrance portico noted on page 15 of Report #10 dated 15 September 2020;
- (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; in respect of issues relating to internal wall and floor framing noted in Site Inspection Reports issued by [Omitted], Engineer, of [Omitted] and in respect of the entrance portico noted on page 15 of Report #10 dated 15 September 2020;

¹ 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.

² 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.

- (c) 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; and
- (d) breached section 314B(b) of the Act contrary to section 317(1)(h) of the Act, in that the Respondent may have carried out design work in relation to the entrance portico noted on page 15 of Report #10 dated 15 September 2020.

Consolidation

- [4] The Board Inquiry arose as a result of a Complaint that was made about [Omitted] (matter [Omitted]). The Board identified the Respondent as a person who may have also committed a disciplinary offence. The Board heard the two matters together as a consolidated hearing.

Evidence

- [5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. 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.
- [6] The Respondent was a shareholder and director of ZCAP Limited, a company that is now in liquidation. ZCAP was engaged by [Omitted] to undertake a multi-unit development.⁴ ZCAP acted as a head contractor. It, in turn, engaged various subcontractors to carry out building work.
- [7] The Respondent acted as the overall project manager. [Omitted], the Respondent's brother, was employed by ZCAP to provide health and safety oversight of the project.
- [8] As the build progressed, the Respondent maintained a digital record of work. The Board was provided with a copy of it. The record of work noted the various subcontractors that were engaged to carry out the various aspects of the building work. Included, with respect to the building work under investigation, were notes that [Omitted] and [Omitted] had carried out building work. Both entities had Licensed Building Practitioners carrying out or supervising the building work they were contracted to do.

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁴ The development was over five blocks and consisted of 25 multi bedroom units.

- [9] The Board questioned the Respondent and [Omitted] as regards the matters raised in various engineering reports. They identified that the building work that was non-compliant or that required remediation had been carried out and/or supervised by [Omitted]. This was corroborated by the consulting engineer for the project.
- [10] ZCAP did not complete the project. It was attending to remedial issues as they were raised up until when their contract was terminated.
- [11] The building practitioner licensing regime under the Act is based on individual responsibility and accountability. Each Licensed Building Practitioner who carries out or supervises restricted building work must provide a record of work, and each can be investigated and disciplined by the Board. It follows that even if one practitioner considers that they were in overall charge of a building site (such as where they hold a Site Licence), those who are actually carrying or supervising are those who carry the responsibility for ensuring the work is completed to an acceptable standard. In this matter, that was not the Respondent nor [Omitted]. As such, the Board cannot discipline them in relation to the substandard building work identified that was carried out by [Omitted].
- [12] The board did receive evidence in respect of the Respondent that some minor items that were noted in the engineering reports were carried out under his supervision. In respect of those items, however, to find that the Respondent was negligent (the charge under section 317(1)(b) of the Act), the Board needs to determine, on the balance of probabilities,⁵ that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work⁶ and that the conduct fell seriously short of expected standards.⁷ In this matter, the latter applied. The departures from acceptable standards and the conduct were not so serious as to warrant a disciplinary finding. The same applies to the charge under section 317(1)(d) of the Act.
- [13] In terms of the charge under section 317(1)(da)(ii) of the Act, the Respondent did supervise some restricted building work. He maintained a detailed record of work, which was retained on site and, as such, the owner had access to it. There was evidence that, soon after ZCAP left the site, the Territorial Authority also had access to it. On that basis, the Board finds that the disciplinary offence has not been committed. The Respondent is reminded, however, that each and every Licensed Building Practitioner must provide their own record of work.

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. 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.

⁶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁷ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [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".

- [14] Finally, in relation to the charge that the Respondent may have carried out design work in relation to a portico, evidence was received that the porticos were constructed in accordance with the architectural plans and that there were no engineering plans. Given those facts, the offence has not been committed. The Respondent is cautioned, however, that he should, in future, seek engineering plans or clarification of the construction methodology in such circumstances prior to commencing the work.

Signed and dated this 16th day of May 2023.

A handwritten signature in black ink, appearing to be 'M Orange', written in a cursive style with a large loop at the top.

Mr M Orange
Presiding Member