

Before the Building Practitioners Board

	BPB Complaint No. CB24490
Licensed Building Practitioner:	Ashok Maharaj (the Respondent)
Licence Number:	BP 122781
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	Auckland
Hearing Type:	In Person
Hearing Date:	22 January 2019
Decision Date:	13 February 2019

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2

Appearances:

Robert Warburton 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 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 offence the Board resolved to investigate was that the Respondent 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).

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*² and in New Zealand in *Dentice v Valuers Registration Board*³.
- [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*⁴ 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] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Evidence

- [5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. Under section 322 of the Act the Board has

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

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 [2016] HZHC 2276 at para 164

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

relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

- [6] 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.
- [7] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|---------------|---|
| Ashok Maharaj | Respondent |
| [Omitted] | Complainant |
| [Omitted] | Complainant |
| [Omitted] | Witness for the Complainant, Licensed Building Practitioner |
- [8] The Respondent was contracted to build a new residential dwelling for the Complainants. The contract was entered into by Victory Homes and Developers Limited. The Respondent was the sole shareholder and director of that company. The Respondent and the Complainants were known to each other.
- [9] The building work commenced in or about 12 September 2017.
- [10] On 2 March 2018 Victory Homes and Developers Limited was placed into liquidation on the application of the Commissioner of Inland Revenue.
- [11] On 5 March 2018 the Respondent entered into a new contract with the Complainants to complete the dwelling. The contracting party was Keyline Homes and Projects Limited an existing company under the control of the Respondent.
- [12] At the time of the new contract the Complainants had paid a deposit and had paid four progress payments to Victory Homes and Developers Limited. Progress payments covered demolition of an existing dwelling, completion of concrete slab, completion of wall and roof framing and completion of the top roof.
- [13] The new contract mirrored the old contract with the exception of hand written notations, a change in the contract price and a change of the contracting entity. The first five progress payments (which included the deposit) were highlighted in yellow. The expressed intention of the contracting parties was that the build would be completed for the amount of the remaining progress payments. The contract price equalled the remaining progress payments. The hand written annotations included a clause that the house would be completed by 30 April 2018.
- [14] Immediately following the execution of the new contract the Respondent tendered an invoice for \$40,000 being progress payment claim number 7 for exterior doors

and windows. Sequentially the next payment due was progress payment claim 6 which was for wall linings and/or veneers.

- [15] The Respondent gave evidence that he approached [Omitted] and requested that progress payment 7 be paid in advance of the work being completed and that this was agreed to. A copy of the invoice provided to the Board included a notation stating “please pay this invoice today”. It was counter signed by [Omitted]. The Respondent stated that he needed immediate payment so as to fund the purchase of the windows and doors as he had no capital to fund the activities of the new company. The Respondent also gave evidence that in return for the advance payment he would ensure that sufficient workers were put on the job to meet the agreed completion date.
- [16] [Omitted] stated that whilst he initially agreed to the payment he discussed it further with his wife that evening and that they decided not to pay in advance of the work being completed given what had happened to Victory Homes and Developers Limited. They instructed their bank not to pay the invoice.
- [17] The complaint set out that a deposit was paid under the new contract together with a personal advance to the Respondent of \$6,000. At the hearing the Complainants’ evidence was that no progress or other payments under the new contract were made.
- [18] No work was carried out under the new contract. A contractual dispute ensued which is still being resolved by way of court action.

Board’s Conclusion and Reasoning

- [19] The Board has decided that the Respondent **has not** 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.
- [20] Conduct which brings or is likely to bring the regime into disrepute is that which cause the public to hold the regime in low esteem. The conduct must be looked at objectively. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*⁶ the Court of Appeal held that:
- the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*⁷
- [21] The Board’s concerns with the Respondent’s conduct, at the time of it considering the Registrar’s Report, related to the allegation that he had taken a deposit in respect of the new contract and had then not completed any building work.

⁶ [2012] NZCA 401

⁷ [2012] NZAR 1071 page 1072

- [22] The evidence before the Board at the hearing was that no payments (other than a personal advance) under the new contract were made. Given this there was no evidence of behaviour that would amount to disrepute. The matters between the Respondent and the Complainants amount to contractual issues over which the Board does not have jurisdiction.
- [23] The Board did note that there were aspects of the Respondent's conduct that did not amount to a disciplinary offence but which does warrant comment from it.
- [24] Firstly it was ill advised to borrow money from the Complainant. The money was, however, freely advanced and the Board does acknowledge that the Respondent and Complainant were known to each other.
- [25] Secondly the Respondent's contractual documentation was poor. The Board doubts the contract used would meet the requirements set out in part 4A of the Act. It was also noted that the disclosure documentation required under the associated regulations was not provided (these are matters over which the Board does not have jurisdiction). The Respondent needs to ensure that he meets his statutory obligations.

Signed and dated this 13th day of February 2019



Chris Preston
Presiding Member