

## Before the Building Practitioners Board

	BPB Complaint No. CB25735
Licensed Building Practitioner:	Alan Simpkin (the Respondent)
Licence Number:	BP 102247
Licence(s) Held:	Design AoP 2

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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	By videoconference
Hearing Type:	In Person – consolidated with CB25734
Hearing Date:	6 April 2022
Decision Date:	14 April 2022

Board Members Present:

- Mr M Orange, Deputy Chair, Barrister (Presiding)
- Mr D Fabish, LBP, Carpentry and Site AOP 2
- Mrs F Pearson-Green, LBP, Design AOP 2
- Mr R Shao, LBP, Carpentry and Site AOP 1
- Ms K Reynolds, Construction Manager

#### 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 Respondent was negligent for not ensuring that legal access rights were checked and verified when designing a dwelling for a building consent but will not be disciplined on the basis that the matter did not, as a result of surrounding circumstances including reliance on other technical experts, reach the required seriousness threshold for the Board to take disciplinary action.

### 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 Regulations<sup>1</sup> to hold a hearing in relation to building work (design work) at Lot 4 [OMITTED]. The alleged disciplinary offence the Board resolved to investigate was that the Respondent may have carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- [3] The Board gave notice that the issues to be investigated at a hearing were whether the Respondent, as a Licensed Design AoP 2 Practitioner, failed to carry out building work (design work) in an acceptable manner when preparing and/or presenting a building consent application with designed vehicle access over a right of way, to which no rights were granted to the lot to which the building consent related, noting:
- (a) Certificate of Title 226438 and Deposited Plan 355505 shows Lot 20 as a legal access held in eight shares by the Lots 5,6,7,8,9,10,11 and 12 and does not contain any legal rights of access from or for lot 4;
  - (b) The proposed subdivision plan makes reference to Lot 20 being divided into eight shares as noted above; and
  - (c) The Site Plan for Lot 4 shows the location of a garage and adjacent driveway that discharge via a vehicle crossing onto an “Access Road” to [OMITTED]. The Access Road is Lot 20.

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<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.

### **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 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>.

### **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.

### **Consolidation**

- [6] 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.
- [7] The Board sought agreement for consolidation of this matter with Board Inquiry number CB25734. The consent of all those involved was forthcoming. The two matters were consolidated.

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

- [8] The matter came to be the Board's attention as a result of a complaint about a Mr [OMITTED], the main contractor of a new residential dwelling build. The complaint was that the dwelling had been designed with a garage that required access over a right of way to which the land had no right of access over. The Board noted that the matters complained about related to design work and that two Licensed Building Practitioner designers had been identified as having been involved in the design work, which resulted in a building consent being issued. The Board resolved to carry out Board Inquiries into those two practitioners and to discontinue its investigations into Mr [OMITTED].
- [9] Prior to the hearing, the Respondent protested the Board's jurisdiction variously submitting that the issues to be investigated were civil matters. The Board responded in a Minute noting the definition of building work and of design work in the Act and directing that the matter would proceed to a hearing.
- [10] Following the issue of the Board's Minute, Counsel representing the Respondent made submissions that the matter should not proceed. Again, the submission was

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<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

that it was a contractual matter which did not come within the Board's jurisdiction. It was also submitted that there was insufficient evidence as another Licensed Building Practitioner had carried out the design work. A Board Minute was issued noting that the two Licensed Building Practitioners being investigated at the consolidated hearing had each identified the other as being responsible and that a consolidated hearing would allow the Board the opportunity to investigate the conflicting positions.

- [11] Prior to the hearing, both Licensed Building Practitioners filed further information clarifying their roles in the design work. The evidence noted below summarises the positions.

### Evidence

- [12] The Board must be satisfied, on the balance of probabilities, that the disciplinary offences alleged have been committed<sup>4</sup>. 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.
- [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 heard evidence at the hearing from:
- |              |   |
|--------------|---|
| Alan Simpkin | Respondent  |
| [OMITTED]    | Licensed Building Practitioner, Design AoP 2, respondent in CB25734 |
| [OMITTED]    | Licensed Building Practitioner, Carpentry                           |
- [15] As noted above, the issue before the Board related to the development of a design which required access to a garage over a right of way that the land on which the dwelling was situated had no access rights.
- [16] The design used was a standard plan used by Mr [OMITTED]'s business, [OMITTED]. Changes were made to it to accommodate the site and to maximise the view, including switching the garage from one side of the house to the other. Access to that garage was over a right of way. Lot 4, on which the dwelling was built, did not have an easement for access over that right of way. The access issue was not identified during the design, consenting or build stages. The issue only became apparent after the build had been completed when one of the adjacent lots that did have access rights over the right of way complained about the use of the right of way by Lot 4. Mr [OMITTED] stated that it came as a surprise that there was an issue.

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<sup>4</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [17] The Respondent gave evidence that he had a long-term working relationship with [OMITTED] and that [OMITTED] undertook much of the pre-design work and due diligence for designs that he was asked to develop.
- [18] Mr [OMITTED] gave evidence that the diligence carried out by [OMITTED] included obtaining and checking the title and any encumbrances on it, developing initial sketches and computer-aided design drawings, developing costings, instructing surveyors, engineers (geotechnical and structural as required) and other professionals and obtaining any required resource consents with the assistance of external consultants. Once the preliminary work was completed, the collected material was provided to a design professional to develop building consent documentation. [OMITTED] would, once the documentation had been developed, submit the building consent application. [OMITTED] also act as the liaison between the design professional and the owners. Mr [OMITTED], in response to questions from the Board, stated that he relies on the architect instructed to check setbacks and recession planes, but he considered that issues as regards easements and restrictive covenants were matters that both would attend to.
- [19] Mr [OMITTED] confirmed that Element Planning had been engaged to obtain a resource consent and that it was expected that the planners would bring any notable issues to their attention.
- [20] The Respondent confirmed that the above process was what occurred with Lot 4 and that he does the [OMITTED] work at a reduced rate on the basis that preliminary work is done by them and they apply for the building consent and deal with any resource consent issues. He also gave evidence that he had met Mr [OMITTED] and the owners on site prior to undertaking the design work and that the proposed design was discussed. Access issues over the right of way were not raised or discussed. The Respondent's position was that he was following the instructions as regards positioning of the garage and access to it from the owners and [OMITTED]. Mr [OMITTED] noted that Lot 4 had only recently been purchased and that the owners would have, as part of the purchase, carried out their own due diligence as regards the title and deposited plan.
- [21] The Respondent confirmed that he had received the title as part of the package supplied by [OMITTED]. He stated they were working on the assumption that the title had been checked during the purchase process and that there was access over the right of way for Lot 4. At this point in the project, the building consent design work was subcontracted to Mr [OMITTED] who provided the Licensed Building Practitioner Certificate of Work for the Building consent application.
- [22] The Board was provided with a copy of the Arcline Design Draughting Checklist for Lot 4. It was completed by Arcline staff and passed onto Mr [OMITTED] to develop the building consent documentation. It contained the following notations:

***SITE INFORMATION***

*Current Title*

*Title Consent Notices*

*Any Easements*

*Boundary angles and distance*  
*Building distance to boundary*  
*Contour plan*  
*North Arrow*  
*Driveway position / Type*  
*Power / Telephone Connection*  
*Datum position and Height*  
*H.T.B position*  
*Road Name*  
*Location*  
*Lot / DP Number*  
*Wind Zone*  
*Seaspray Zone*

- [23] The checklist was annotated with handwritten notes. Beside *Site Information* was a line encompassing the full list and a notation “as topo” and a tick underneath. The reference to “topo” was to a topographical plan developed by a surveyor. It did not identify any access issues or the easements that were appurtenant to Lot 4, and the Respondent gave evidence that he would have expected any access issues to have been identified by the surveyor.
- [24] The Respondent accepted that, to an independent reader such as Mr [OMITTED], the notation would indicate that the listed items had been checked and dealt with. The Respondent provided an updated Arcline checklist and noted that they are now more diligent with their pre-design due diligence and do not place as much reliance on pre-checks carried out by others. The Respondent was of the opinion that the right of way access issue would, under the current processes used, have been identified.
- [25] The Respondent described the non-identification of the access issue as an oversight.
- [26] The Respondent also gave evidence that the outsourced job was managed by [OMITTED], an Arcline employee. He was, at the time, licensed as a Design AoP 1 Licensed Building Practitioner.

#### **Board’s Conclusion and Reasoning**

- [27] The Board has decided that, whilst the Respondent carried out or supervised building work in a negligent manner, the matters under investigation did not reach the threshold for the Board to take disciplinary action and, as such, the Respondent **should not** be disciplined.
- [28] The Board’s considerations as regards negligence and/or incompetence were with respect of the Respondent’s design work.
- [29] The Respondent submitted that the matters complained about were not design work and/or were not restricted building work and, as such, the Board had no jurisdiction. The Board did not agree.
- [30] The term “building work” is defined in section 7 of the Act as follows:

*building work —*

- (a) *means work—*
  - (i) *for, or in connection with, the construction, alteration, demolition, or removal of a building; and*
  - (ii) *on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and*
- (b) *includes sitework; and*
- (c) *includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act; and*
- (d) *in Part 4, and the definition in this section of “supervise”, also includes design work (relating to building work) of a kind declared by the Governor-General by Order in Council to be building work for the purposes of Part 4.*

[31] The Building (Design Work Declared to be Building Work) Order 2007 declared:

**3 Design work declared to be building work**

- (1) *Design work of the specified kind is building work for the purposes of Part 4 of the Building Act 2004.*
- (2) *Design work of the specified kind means design work (relating to building work) for, or in connection with, the construction or alteration of a building.*

[32] Turning to restricted building work, it is also a defined term. The Building (Definition of Restricted Building Work) Order 2011 was passed to establish restricted building work. Clause 6 deals with design work. It states:

**6 Certain design work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work**

- (1) *The kinds of design work described in subclause (2) are restricted building work for the purposes of the Act.*
- (2) *The design work referred to in subclause (1) is the preparation of any drawing, specification, or other document, according to which—*
  - (a) *the primary structure of a house or a small-to-medium apartment building is proposed to be constructed or altered; or*
  - (b) *any external moisture-management system attached to or forming part of a house or a small-to-medium apartment building is proposed to be constructed or altered.*

- [33] Under that definition, the work under investigation was clearly not restricted building work. The definition of building work, however, is far wider. The phrase *for, or in connection with, the construction, alteration, demolition, or removal of a building* connotes a wide range of matters. It is not limited to the construction process and could, conceivably, include the matters under investigation.
- [34] It is also to be noted that, in terms of disciplinary jurisdiction, section 317(1)(b) of the Act refers to building work, and, as such, it is not confined to the narrower sub-category of restricted building work. This compares to other disciplinary provisions, such as section 317(1)(c), which does refer to restricted building work. Given the deliberate use of different defined terms, it is clear that the narrower definition of restricted building work does not apply to the Board's consideration of matters under section 317(1)(b) of the Act.
- [35] Looking further at the definition of building work, the Board, in interpreting the phrase, is required to do so in such a way as to give effect to the purpose of Parliament<sup>5</sup>. In this respect, it is noted that Rule 4 of the Licensed Building Practitioners Rules 2007 (the Rules) states:

**4 Minimum standard of competence for each class of licence**

- (1) *The minimum standard of competence for a class of licence is meeting all of the competencies set out for that class of licence in Schedule 1.*
- (2) *In determining whether a person meets a competency, regard must be had to the extent to which the person meets the performance indicators set out for that competency in Schedule 1.*

- [36] Within the competencies for Design Area of Practice 2, competency 3 stipulates:

**Competency 3: Establish design briefs and scope of work and prepare preliminary design.**

*This competency may be demonstrated by meeting some or all of the performance indicators in one or more of the following areas of practice.*

**3.2.2 Carry out or acquire site investigations and accurately document existing conditions.**

*May include but not limited to – existing building conditions and compliance, topography, immediate neighbourhood, services, streets, elements of the landscape.*

- [37] The reference to services and streets indicates that matters beyond just the building and the building code come within what is expected of a Licensed Building Practitioner with a Design Licence and that they include consideration of legal access.

- [38] Looking at the matter another way, the Board considers that a person who engages a Licensed Building Practitioner with a Design Licence would reasonably expect them

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<sup>5</sup> Refer s 5 of the Interpretation Act 1999



to assess legal access rights together with consideration of any other registered easements, restrictive covenants, and other memorials which may impact the proposed design as part of the design process. In essence, an owner would expect that whatever is designed can legally be built as designed, and that includes being able to access what is designed.

[39] Given the above, the Board finds that consideration of legal access rights by a Licensed Building Practitioner with a Design Licence does come within building work.

[40] Turning to negligence and incompetence, the Board notes that they are not the same. In *Beattie v Far North Council*<sup>6</sup> Judge McElrea noted:

*[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.*

[41] Negligence is the departure by a Licensed Building Practitioner whilst carrying out or supervising building work from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into, in this case, a Licensed Building Practitioner with a design license. This is described as the *Bolam*<sup>7</sup> test of negligence which has been adopted by the New Zealand Courts<sup>8</sup>.

[42] Incompetence is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level*". In *Ali v Kumar and Others*,<sup>9</sup> it was stated as "*an inability to do the job*".

[43] The New Zealand Courts have stated that the assessment of negligence and/or incompetence in a disciplinary context is a two-stage test<sup>10</sup>. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[44] When considering what an acceptable standard is, the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act<sup>11</sup>. The test is an objective one and, in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner<sup>12</sup>.

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<sup>6</sup> Judge McElrea, DC Whangarei, CIV-2011-088-313

<sup>7</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>8</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>9</sup> *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

<sup>10</sup> *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>11</sup> *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

<sup>12</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

- [45] The Board also notes, as regards the allegations that were before the Board, that the licensing competency noted above is relevant.
- [46] Turning to the actual conduct under investigation, the Board decided that, whilst it would expect a Licensed Building Practitioner with a Design Licence to review a title and take into consideration any legal impediments and that the Respondent had failed to do so, on this occasion, the conduct was not serious enough to warrant disciplinary action.
- [47] The reasons why the Board considers a Licensed Building Practitioner with a Design Licence should expect all matters pertaining to the legal title to be assessed and taken into account have been canvassed above in relation to the definition of building work.
- [48] As for why the Board found that the Respondent had fallen below the expected standards, the Board noted that, firstly, the role of checking the title and encumbrances had, in essence, been outsourced to the building company. Whilst, at times, outsourcing may be appropriate, such as when it is to an equally or more qualified professional, such as a legal practitioner or a town planner, in this instance, it was not to a person or entity that was so qualified. Furthermore, there was no quality assurance assessment of the builder's processes to ensure that what they were doing and checking to provide confidence that what needed to be checked had been checked. Moreover, even if there had been, the Board would still expect the designer to carry out a check of what was provided. A design practitioner cannot, as occurred in this instance, simply rely on an assurance from an unqualified person.
- [49] In this instance, those checks, notwithstanding the check-sheets used, did not happen. The Respondent's revised processes and the evidence received from him at the hearing attested to the need for more robust internal checks, which he stated are now being undertaken.
- [50] In the various submissions received, the Respondent put forward that he had contracted out of responsibility for the matters under investigation. With regard to that submission, contracting out is something a Licensed Building Practitioner can do with their client as regards civil liabilities. They cannot, however, contract out of their duties or obligations as a Licensed Building Practitioner under the licensing regime. It is a statutory regime. The only way to opt-out of the obligations would be to relinquish a licence.
- [51] Given those factors, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent had departed from what the Board considers to be an accepted standard of conduct when he failed to identify a lack of legal access for the building as designed. As noted, however, the Board also decided that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

- [52] With regard to seriousness in *Collie v Nursing Council of New Zealand*<sup>13</sup>, the Court's noted, as regards the threshold for disciplinary matters, that:

*[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.*

- [53] When considering seriousness, the Board noted the elapse of time since the conduct took place as well as the fact that other professionals (a surveyor and a town planner) had not identified the issue during the design process. But for the involvement of those professionals, the Board decision would have been different.

Signed and dated this 13<sup>th</sup> 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

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<sup>13</sup> [2001] NZAR 74