

Before the Building Practitioners Board

	BPB Complaint No. CB25355
Licensed Building Practitioner:	Tony Songhurst (the Respondent)
Licence Number:	BP 129264
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	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	6 October 2020
Decision Date:	12 October 2020

Board Members Present:

Chris Preston, Chair (Presiding)
Mel Orange, Deputy Chair, Legal Member
Rob Shao, LBP, Carpentry and Site AOP 1
Frank Thomas, LBP, Roofing

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 did not carry out or supervise the building work complained about and has not, therefore, committed a disciplinary offence.

The Charges

- [2] 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 contrary to section 317(1)(b) of the Act, IN THAT, he may have:
 - (i) incorrectly measured and ordered windows; and
 - (ii) supervised unlicensed persons who may have carried out building work in a non-compliant or unacceptable manner in relation to the installation of windows, the installation of attic stairs and/or the installation of structural elements in the roof, roofing iron and flashing; 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.

¹ 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

[3] 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.

[4] 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.”

[5] 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 persons⁵:

... 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.

[6] Finally, 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. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act which deals with disrepute.

[7] The above commentary on the limitations of the disciplinary process are 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.

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

Inquiry Process

- [8] 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.
- [9] 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.

Consolidation

- [10] 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.
- [11] The Board sought agreement for consolidation of this matter with complaint number CB25356. The consent of all those involved was forthcoming. The two matters were consolidated.

Evidence

- [12] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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 heard evidence at the hearing from:

Tony Songhurst	Respondent
<i>[Omitted]</i>	Respondent in CB25356
<i>[Omitted]</i>	Complainant
<i>[Omitted]</i>	Summoned witness

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [15] The matter before the Board related to the alteration of an existing dwelling. The building work, excluding the removal and installation of new window joinery, was carried out under a building consent. The building work included restricted building work.
- [16] The building work complained about related to the install of new windows, the supply and install of the incorrect attic stairs and the installation of structural elements in the roof, roofing iron and flashings. The Complainant provided documentary evidence and photographs in support of the complaint, including reports obtained and photographs of the allegedly deficient work.
- [17] The Complainant made a complaint about two licensed building practitioners, the Respondent and *[Omitted]*. The Respondent, in his response to the complaint, stated that *[Omitted]* was the licensed building practitioner who had carried out or supervised the building work. Notwithstanding the statement that he did not carry out or supervise any of the building work, the Respondent provided a record of work which he had provided to the Territorial Authority on 30 July 2019. He stated he provided it on the basis that *[Omitted]* would not provide one.
- [18] *[Omitted]* also responded to queries about his involvement and outlined the building work that he had undertaken. He stated that he carried out the replacement of windows, the installation of new trusses, a new roof and the installation of new internal framing. *[Omitted]* went on to state that he considered he was not acting as a licensed building practitioner supervisor, but that the Respondent was, that he did not sign-off any work and that the Respondent was responsible for sign-off. He commented that he felt he had to carry out the work in the manner in which the Respondent directed and not the manner in which he would have carried it out if he was not under the direction and control of the Respondent. *[Omitted]* was not able to expand on this statement at the hearing.
- [19] The issues with regard to windows also included an allegation that the windows had not been measured correctly by the Respondent and that, as a result of incorrect measurements, the new windows would not fit and had to be replaced with the original window joinery. The Respondent gave evidence that he did measure the windows, but that the measurements had to be taken from the exterior as he was not able to gain access to measure them from the inside.
- [20] With regard to roofing issues, the Board was provided with an email from *[Omitted]* to the Complainant which outlined items which he considered needed to be attended to following the Respondents involvement in the building work. The items listed, which were reviewed at the hearing, were:
- (a) Insufficient purlins – evidence heard was that a combination of old and new purlins had been used. The old purlins did not meet building consent or code requirements;

- (b) Failure to use blue screws – *[Omitted]* stated he could not observe whether they had been used to affix purlins and that it was an item that would have to be checked. *[Omitted]* stated the correct screws were used;
- (c) Incorrect roofing laps – *[Omitted]* gave evidence that the laps were the wrong way around and that capillary action may cause leaks. *[Omitted]* gave evidence that he did not install the roofing, but that staff members did. He passed sheets up and trusted that they had installed the iron correctly. *[Omitted]* did not carry out a physical check of the iron;
- (d) Flashings installed incorrectly – *[Omitted]* stated that the work looked incomplete with one flashing still having the protective plastic on it and that some were not screwed off. *[Omitted]* accepted that some of the flashings were not correct but also noted that some were and may have been incomplete. The Respondent and *[Omitted]* stated that a mobile scaffold would have been sourced to rectify issues and that the scaffolding had been removed due to payment issues.

[21] The Complainant stated the attic stairs had to be removed and new attic stairs were installed. He stated that the issues were, in the main, aesthetic in nature.

[22] Mr Songhurst noted that there were payment issues which resulted in the work not being completed.

Board's Conclusion and Reasoning

[23] 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); or
- (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.

[24] The Board reached its decision on the basis of the evidence heard that the Respondent was not carrying out or supervising the building work. *[Omitted]*, the respondent in the related matter, was the person that was carrying out and supervising and, as such, it is appropriate that he be the person that the Board disciplined.

- [25] The Respondent should note, as regards the record of work that be provided, that it was a false or misleading document. He did not carry out or supervise any restricted building work. His provision of a record of work for that which he did not do defeats the purpose of the record of work regime which is to create a written record of who did or supervised what on a consented build. As there are no disciplinary offences relating to false or misleading documentation within the disciplinary regime, the Board cannot take the matter any further.

Signed and dated this 2nd day of November 2020

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

Chris Preston
Presiding Member