

Before the Building Practitioners Board

	BPB Complaint No. CB25196
Licensed Building Practitioner:	Simon Stovell (the Respondent)
Licence Number:	BP 130247
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	Board Inquiry
Hearing Location	Napier
Hearing Type:	In Person
Hearing Date:	30 January 2020
Decision Date:	6 March 2020

Board Members Present:

Chris Preston (Presiding)
David Fabish, LBP, Carpentry and Site AOP 2
Bob Monteith, LBP, Carpentry and Site AOP 2
Faye Pearson-Green, LBP Design 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.

Board Decision:

The Respondent **has not** committed a disciplinary offence.

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Introduction

- [1] The hearing resulted from a Board Inquiry into the conduct of the Respondent and a Board resolution under regulation 22 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) 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).

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:

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

“... 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] 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.

- [5] 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.
- [6] The above commentary on the limitations of the disciplinary process are important to note as, on the basis of it, the Board Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

- [7] 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.

Consolidation

- [8] 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.

⁵ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

- [9] The Board sought agreement for consolidation of this matter with complaint CB25035, a complaint in respect of the same building work. The consent of all those involved was not forthcoming. The two matters were not consolidated.

Evidence

- [10] 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.
- [11] 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.
- [12] In addition to the documentary evidence before the Board heard evidence at the hearing from the Respondent. A number of witnesses were summoned but failed to appear.
- [13] The Board Inquiry arose out of a complaint about the relocation of a dwelling. [Omitted] had been engaged by the dwelling owner to carry out the foundation work preparatory to the house being shifted to its new location. The Respondent was engaged by [Omitted], the director and shareholder of [Omitted] and the respondent in CB25035 to project manage the building work. [Omitted] maintained that the Respondent had carried out the building work complained about in CB25035, other than the digging of pile holes. The Respondent denied that he had carried out or supervised any building work.
- [14] The Board Inquiry was undertaken as a result of the respondent in CB25035 claiming that it was the respondent who had either undertaken or supervised the placement of the piles and the securing of the house to the piles and other subfloor work.
- [15] The Respondent outlined the work that he believed [Omitted] undertook and clarified that when he first attended site, which was the 16th of July 2018, he observed that the piles had been positioned, concrete poured, and the house dropped onto the piles and fixed. There was a photo on file that supported this as it was dated prior to the visit by the Respondent.
- [16] The Respondent made comment that his understanding of the work that [Omitted] and his company did was through to the securing of the house on the foundations and the subfloor work and that this is what he saw when he first visited the site.
- [17] The Respondent claimed he did not do any of the subfloor work prior to the Council inspection and was therefore not required to provide a record of work.

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

- [18] Given that [Omitted] did not attend the hearing there was no further evidence to support the claims by [Omitted] that the Respondent had anything to do with the substandard foundation work noted by the Council in an inspection dated 30 October 2018.

Board's Conclusion and Reasoning

- [19] 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);
 - (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) (s 317(1)(da)(ii) of the Act);

and should not be disciplined.

- [20] As noted above the Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*⁷ where Justice McGrath in the Supreme Court of New Zealand stated:

[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to "the reasonable satisfaction of the Tribunal". A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal's reasonable

⁷ [2009] 1 NZLR 1

satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

- [21] In the present case there was no evidence to support the allegations made by [Omitted] that the Respondent was involved in the substandard foundation work. There was evidence, as outlined above, that he had not been involved with the job until after the faulty work had been undertaken.
- [22] Additionally, the Board made a finding in CB25035 that [Omitted] was responsible for the substandard work and for a failure to provide a record of work. The Board has disciplined him for that.
- [23] Given the above factors the Board finds that there is no evidence to substantiate the that any of the disciplinary offence have been committed.

Signed and dated this 6th day of March 2020

A handwritten signature in black ink that reads "Chris Preston". The signature is written in a cursive, flowing style.

Chris Preston
Presiding Member