

## Before the Building Practitioners Board

|                                 |                               |
|---------------------------------|-------------------------------|
|                                 | BPB Complaint No. CB25813     |
| Licensed Building Practitioner: | Garry Thomas (the Respondent) |
| Licence Number:                 | BP 116664                     |
| Licence(s) Held:                | Design AOP 2                  |

---

### 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           | Hamilton   |
| Hearing Type:              | In Person  |
| Hearing and Decision Date: | 3 May 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  
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.

## Contents

|   |   |
|---|---|
| <b>Summary of the Board’s Decision</b> .....  | 2 |
| <b>The Charges</b> .....                      | 2 |
| <b>Function of Disciplinary Action</b> .....  | 3 |
| <b>Inquiry Process</b> .....                  | 3 |
| <b>Evidence</b> .....                         | 4 |
| <b>Board’s Conclusion and Reasoning</b> ..... | 6 |

### Summary of the Board’s Decision

- [1] The Respondent has not committed a disciplinary offence. The Board’s decision was made on the basis that building work related to an amendment to a building consent was not carried out prior to the amendment being granted.
- [2] As regards the allegation of bringing the regime into disrepute the Board decided that, in the absence of the owners and the Respondent attending the hearing, there was insufficient evidence on the balance of probabilities, to uphold this ground of discipline

### The Charges

- [3] The hearing resulted from a complaint about 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 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, the drawings submitted for the original building consent application may be lacking in the appropriate and expected detail (in respect of the fireplace) and the process for the amendment of the building consent in respect of the fireplace may not have been undertaken correctly; and/or
  - (b) 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 contrary to section 317(1)(i) of the Act, IN THAT, he may have behaved inappropriately in his alteration of the original approved building consent drawing as detailed at page 11 of the Complaint Form (complaint file document 2.1.13, Page 23 of the Board’s files).

---

<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>.

[5] 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*,<sup>4</sup> 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.”*

[6] 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 persons<sup>5</sup>:

*... 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.*

[7] 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.

[8] The above commentary on the limitations of the disciplinary process is 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.

### Inquiry Process

[9] 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

---

<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

<sup>4</sup> [2016] HZHC 2276 at para 164

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

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.

- [10] 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.

### **Evidence**

- [11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>6</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.
- [12] 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.
- [13] The Respondent did not appear at the hearing. A prehearing conference was held with him in attendance on 3 February 2022. A hearing date that suited the Respondent was discussed. The Respondent indicated that he would attend. On the day of the hearing, the Respondent left a voice message with the Board Officer. It stated:

*Sorry. I've missed your calls over the last few days. I've been playing in the Masters Golf Tournament from Friday lunchtime and through to let yourself in after the price coming. And I won't return calls after I've had a few drinks. Just let you know I won't be attending this hearing. I think it's just over the top and also the fact that it's a vendetta on the against from Danielle Hooper from the job about two and a half years ago when I proved her wrong and she did not affect the thing. So yeah, I was speaking to a couple of people who will involve the job, the owners, and they're not willing to attend the hearing either because they feel they're not gonna be compensated fairly for their time away from their businesses in this room. So you have any queries, please give me a ring back. Yes, I will not be attending the hearing today. Thank you. I guess you also letting you know that I've also resigned as an LBP person and is retired now because of my age. I'm sixty eight and a half and had enough of all this bureaucracy in that scene. So yes, I've retired and will be in the living a better life now for not having this sort of working in rubbish thrown at me. Thank you very much.*

---

<sup>6</sup> Z v Dental Complaints Assessment Committee [2009] 1 NZLR 1

[14] The Board summoned the homeowners. Neither attended. The following summoned witnesses did attend:

[OMITTED] Complainant, Waipa District Council

[OMITTED] Fireplace installer

[15] The Respondent was the designer for a building consent application for an alteration and addition to a residential dwelling. The building consent plans developed by the Respondent depicted an original fireplace. The building consent issued did not authorise the installation of a new or replacement fire.

[16] Mr [OMITTED], a registered fireplace installer, gave evidence that he was engaged to install a fireplace at the residence but that he became aware, prior to any work being undertaken, that the building consent did not include the installation of a fireplace. He informed the homeowners that a building consent for a new fireplace was required before he could install it. He informed the owners that once they had purchased a fire, they should try it in various locations to determine where it should be installed.

[17] Prior to it actually being installed, and as part of an inspection on building work that had been carried out under the building consent that had issued, a Council building inspector raised concerns that the fire had been installed without a building consent having been issued for it. The witnesses present at the hearing put forward a theory that it may have looked as if the fire had been installed.

[18] The Complainant obtained a copy of a floor plan that was on-site and which contained a notation that, it was alleged, had been placed on the stamped plan after it was issued with the building consent. The notation was hatched in a cloud which is the standard practice used to denote updates to plans that have been prepared and presented for the purpose of obtaining an amendment to a building consent. The fireplace location was also hatched in a cloud. The notation stated:

*Fireplace of owner selection to be installed by approved installer with PS4 supplied for CCC.*

[19] The altered plan did not indicate, in any way, that it was a draft or that it had been prepared in advance of obtaining a building consent amendment. It did not contain an approved building consent amendment stamp.

[20] The Complainant took the position the altered plan had been provided to the owners to make it appear as if a fireplace had been consented when it had not.

[21] The Respondent provided a written response to the complaint. He stated the altered plan was developed so as to assist the owner to obtain a quote for a fire. He explained that he had an issue with his printer and that, as he hand draws his plans, he had used a copy of the building consent plan, which contained the Council's stamp. He accepted, in retrospect, that he should have removed the stamp from the copy.

[22] Subsequent to the issue over the fireplace consent being raised by the Council, a building consent for the fire was issued as a matter of urgency.

**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
- (a) 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.

[24] The Board accepted, on the evidence received from Mr [OMITTED], that the fire had not been installed without a building consent.

[25] The Board further noted that, without the evidence of the owners and the Respondent, it was not able to make a finding on the disciplinary issues before it. In essence, there was insufficient evidence on which to find, on the balance of probabilities, that the disciplinary offences had been committed. The Respondent is, nevertheless, reminded of the importance of following the correct building consent processes.

[26] The Board was disappointed that the Respondent decided not to appear. In this respect the Courts have stated that a practitioner should, in the context of disciplinary proceedings, be prepared to answer the allegations<sup>7</sup>. However, the Respondent has stated his intention to not renew his licence, and, as such, the Board decided that it was not necessary to adjourn the matter and summons the Respondent.

Signed and dated this 1<sup>st</sup> day of June 2022



**Mr M Orange**  
Presiding Member

---

<sup>7</sup> *In re C. (A Solicitor)* - [1963] NZLR 259 and *Vatsyayann v Professional Conduct Committee of The New Zealand Medical Council*, HC, Priestley J CIV-2011-419-511, CIV-2011-419-968