

BPB Complaint No. C2-01521

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners Board under section 315 of the Act

AGAINST

Graham Sievewright, Licensed Building Practitioner No. BP 108054

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [Omitted] (the Complainant) lodged a complaint with the Building Practitioners Board (the Board) on 17 October 2016 in respect of Graham Sievewright, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged that the Respondent has, in relation to building work at [Omitted] 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).
- [3] The Respondent is a Licensed Building Practitioner with an External Plastering (Solid Plastering and Proprietary Plaster Cladding Systems) Licence issued 8 September 2011. He was licensed until 9 June 2016.
- [4] The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- [5] The following Board Members were present at the hearing:

Richard Merrifield	Deputy Chair (Presiding)	Licensed in Carpentry and Site Area of Practice 2
Mel Orange	Board Member	Legal Member appointed under s 345(3) of the Act
Robin Dunlop	Board Member	Retired Professional Engineer
Bob Monteith	Board Member	Licensed in Carpentry and Site Area of Practice 2

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- [6] The matter was considered by the Board in Auckland on 8 March 2017 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- [7] The Board Secretary, Gemma Lawson, was present for the hearing.
- [8] No Board Member declared any conflict of interest in relation to the matters under consideration.

Board Procedure

- [9] The "form of complaint" provided by the Complainant satisfied the requirements of the Regulations.
- [10] On 15 December 2016 the Registrar of the Board prepared a report in accordance with reg 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint.
- [11] On 25 January 2017 the Board considered the Registrar's report and in accordance with reg 10 it resolved to proceed with the complaint that the Respondent carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act).
- [12] The Board's resolution was based on information received from the Registrar that the Respondent was licensed in solid plastering and not in proprietary plastering cladding systems (PPCS) and as such was not licensed to carry out the work allegedly carried out.
- [13] On 1 February 2017 a Notice of Proceeding was sent to the Respondent stipulating 8 March 2017 as the date of the hearing. A further Notice of Hearing dated 17 February 2017 advising of the time and place of the hearing was sent. The notices set out the Board's hearing procedures.

Service of Proceedings

- [14] The Board must be satisfied that the complaint has been brought to the attention of the Respondent and then that he has been given notice of the hearing.
- [15] With regard to bringing the complaint to the attention of the Respondent reg 7(2) of the Regulations states that the Registrar must provide a copy of the complaint to the Respondent and ask him to provide a response. The Registrar endeavoured to do this at the address provided by the Respondent on the Register¹.
- [16] Normally this course of action would suffice as licensed building practitioners have an obligation under s 302 of the Act to keep their details up to date. However the Respondent voluntarily suspended his licence on 9 June 2016² and under s 297(1) of the Act a person is no longer a licensed building practitioner, for the purposes of the Act, for the period of his suspension. As such the obligation to keep the Register current ceased before the complaint arose.
- [17] This is relevant as an attempt was made to serve the complaint on the Respondent in person on 21 October 2016 at his last known address. The occupants at the address advised that he had moved to Australia and was no longer living at that residence

¹ Under s 301(1)(d) a licensed building practitioner must provide an address for communications under the Act.

² A license can be voluntarily suspended under s 296 of the Act.

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- [18] The complaint was also sent to the Respondent on 9 November 2016 by email to the address provided by him when he was licensed.
- [19] With regard to the notices of the hearing they must, under reg 12 of the Regulations, provide at least 15 days' notice of the hearing. The notices were again sent to the last known address.
- [20] The questions for the Board therefore are has the Respondent been given effective notice of the complaint and effective notice of the hearing.
- [21] The Act provides in s 394 that service of any notice under the Act can be made as follows:

394 Service of notices

- (1) *Any notice or other document required to be served on, or given to, any person under this Act is sufficiently served if it is—*
- (a) *delivered personally to the person; or*
 - (b) *delivered to the person at the person's usual or last known place of residence or business; or*
 - (c) *sent by fax or email to the person's fax number or email address; or*
 - (d) *posted in a letter addressed to the person at the person's usual or last known place of residence or business.*
- [22] Given the provisions of s 394 it could be said that effective notice has been given by sending notices to the last known mail and email addresses. No response has been received from him and as such it is not known whether actual service and notice has occurred.
- [23] The Act and the Regulations also require that the Board observe principles of natural justice when making its decisions. The principles of natural justice require that hearings are conducted in a manner that ensures that the Respondent is given a fair opportunity to be heard and to contradict evidence against him.
- [24] The content of the rules of natural justice and the standards of fairness are flexible, depending on the nature of the power being exercised and effect of the decision on personal interests. Natural justice can operate at differing levels, depending on the nature of the decision. The more significant the decision, the higher the standards of disclosure and fair treatment.
- [25] Turning to the matters at hand, the Board has to balance the need for administering its functions under the Act with ensuring fairness in its decision making. In this respect it is noted that the Act does not provide the Board with any alternate method of servicing of notices such as substituted service which other jurisdictions can have recourse to. This in turn makes it difficult to proceed with complaints in situations such as that which is being dealt with.
- [26] The Board also notes the decision it has made with respect to the complaint is that the Respondent has not committed a disciplinary offence. Given this outcome and taking into account the discussion above as regards natural justice the Board does not consider the Respondent has, in this case, been prejudiced by there being no proof of actual service.

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Function of Disciplinary Action

- [27] 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 Kingdom³.
- [28] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*⁴:
- Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.*
- [29] In *McLanahan and Tan v The New Zealand Registered Architects Board*⁵ Collins J. noted that:
- “ ... the disciplinary process does not exist to appease those who are dissatisfied with their architect. The disciplinary process for architects exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”*
- [30] The same applies as regards the disciplinary provisions in the Building Act.
- [31] It must also be noted that the Board has jurisdiction only with regard to “the conduct of a licensed building practitioner” and with respect to the grounds for discipline set out in s 317 of the Act. It cannot investigate matters outside of those grounds, does not have any jurisdiction over contractual matters and cannot deal with or resolve disputes between a complainant and the person who is the subject of the complaint.

Substance of the Complaint

- [32] The original complaint to the Board was in respect of a failure to provide a record of work on completion of restricted building work. As stated above the Board was provided with a report and supporting documentation that noted the Respondent was licensed in Solid Plastering only. As the evidence disclosed that the type of plastering work carried out was PPCS the Board resolved to pursue a disciplinary charge under s 317(1)(c) of the Act that the Respondent had carried out restricted building work which he was not licensed to carry out.

Evidence

- [33] 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*

³ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

⁴ [1992] 1 NZLR 720 at p 724

⁵ [2016] HZHC 2276 at para 164

*Complaints Assessment Committee*⁶ 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 satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

[34] As outlined above the Respondent did not respond to the complaint.

[35] As part of the evidence before it the Board was provided with a Certificate under s 313 of the Act. This section provides:

313 Certificate of Registrar to be conclusive evidence

- (1) *A certificate signed by the Registrar, or any person authorised by the Registrar, in relation to the matters referred to in subsection (2) is for all purposes conclusive evidence, in the absence of proof to the contrary, of those matters specified in the certificate.*
- (2) *The matters are—*
 - (a) *that any person was or was not a licensed building practitioner at any particular time or during any period specified in the certificate; or*
 - (b) *that any entry in the register is as stated in the certificate; or*
 - (c) *that the description of building work and building inspection work that a person is [licensed] to carry out or supervise is as stated in the certificate.*
- (3) *The certificate must be dated.*

[36] The Certificate noted that the Respondent was, at the time of the alleged conduct, licensed in both Solid Plastering and PPCS.

⁶ [2009] 1 NZLR 1

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Boards Conclusion and Reasoning

- [37] As the Certificate provided to the Board notes the Respondent had the appropriate licence for the restricted building work carried out and the Certificate is conclusive evidence, the Board finds that the disciplinary offence has not been committed.

Board Decision

- [38] The Board has decided that Respondent has not carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or supervise (s 317(c) of the Act) and should not be disciplined.

Signed and dated this 21st day of March 2017.

A handwritten signature in black ink, appearing to read 'Richard Merrifield', written in a cursive style.

Richard Merrifield
Presiding Member