

BPB Complaint No. C2-01477

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

Rakesh Lal, Licensed Building Practitioner
No. BP 125349

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [The Complainant] lodged a complaint with the Building Practitioners Board (the Board) on 10 August 2016 in respect of Rakesh Lal, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged that the Respondent has, in relation to building work at [omitted] :
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
 - (b) carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 9 July 2013.
- [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:
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|-------------------|-----------------------------|--|
| Mel Orange | Board Member
(Presiding) | Legal Member appointed under s 345(3) of the Act |
| Brian Nightingale | Board Member | Registered Quantity Surveyor and Registered Construction Manager |
| Robin Dunlop | Board Member | Retired Professional Engineer |
| Catherine Taylor | Board Member | Layperson |
| Bob Monteith | Board Member | Licensed in Carpentry and Site Area of Practice 2 |

- [6] The matter was considered by the Board in Auckland on 1 March 2017 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- [7] The following other persons were also present during the course of the hearing:
- | | |
|--------------------|---|
| Elizabeth Nicholls | Board Secretary |
| Rakesh Lal | Respondent |
| Dave Jacques | Legal Representative for the Respondent |
| [omitted] | Interpreter for the Respondent |
| Denise Whelan | For the Complainant |
| Malcolm Arnold | Witness for the Complainant |
| Glynn Robertson | Witness for the Complainant |
| [omitted] | Witness, licensed building practitioner, designer |
| [omitted] | Witness, representative of the home owner |
| [omitted] | Witness, main contractor |
- [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 3 November 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 1 December 2016 the Board considered the Registrar's report and in accordance with reg 10 it resolved to proceed with the complaint that the Respondent:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act); and
 - (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).
- [12] The Board included disrepute under s 317(1)(i) of the Act for investigation as there was evidence in the documentation presented to it with the Registrar's Report that the Respondent may have been misusing his licence by allowing others to undertake restricted building work without him actually supervising it.
- [13] On 20 February 2017 a pre-hearing teleconference was convened by Mel Orange. The Respondent was present, the hearing procedures were explained and the Respondent's attendance at the substantive hearing was confirmed.

Function of Disciplinary Action

- [14] 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 Kingdom¹.

[15] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*²:

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.

[16] In *McLanahan and Tan v The New Zealand Registered Architects Board*³ 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.”

[17] The same applies as regards the disciplinary provisions in the Building Act.

[18] It must also be noted that the Board has jurisdiction 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.

The Hearing

[19] The hearing commenced at 1.10 pm.

[20] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

[21] The Respondent had provided a response sheet to the Board which indicated he required an interpreter noting that he understood and spoke English but did not understand somethings. One had not been arranged. Mr Lal’s daughter was accepted by the Board as an interpreter for the purposes of the hearing and was sworn in as such.

[22] At the commencement of the hearing the Respondent’s Counsel stipulated that no issue was taken with the allegation that the work complained about was substandard and non-compliant. The Respondent, however, maintained that the work was not carried out under his supervision and therefore he was not responsible for it. The hearing proceeded on this basis.

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

² [1992] 1 NZLR 720 at p 724

³ [2016] HZHC 2276 at para 164

Substance of the Complaint

- [23] The complaint related to substandard and non-compliant building work allegedly carried out under the supervision of the Respondent. The Complainant alleged the Respondent had been negligent and or incompetent in his supervision of the work.

Evidence

- [24] 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*⁴ 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.

- [25] It is to be noted that under s 322 of the Act the Board has relaxed rules of evidence:

322 Board may hear evidence for disciplinary matters

- (1) *In relation to a disciplinary matter, the Board may—*
- (a) *receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the disciplinary matter, whether or not it would be admissible in a court of law:*

- [26] The building work was carried out by the main contractor [omitted] who stated he used Mr Lal as the licensed building practitioner. A complaint was also made by the Complainant against [omitted], the designer.

- [27] The Complainant set out that:

- (a) a building consent was issued for “exterior re-cladding of the dwelling” on 2 October 2015;

⁴ [2009] 1 NZLR 1

- (b) restricted building work was undertaken on site from 8 October 2015 and is ongoing;
- (c) as a re-clad project on site issues were mainly weathertightness and remedial structural works; and
- (d) a stop work notice was placed on site on 10 February 2016.

[28] Associated notes submitted by the Complainant provided further detail of the issues and interactions between the Complainant and the Respondent. A background summary noted, as regards the Respondent:

Date	Notes
3 December 2015	LPB on site Rakesh Lal
24 January 2016	Rakesh Lal and [omitted] on site Rakesh Lal, now confirms he was and still is the responsible LBP, and has and will continue to supervise the works on site

[29] Site meeting and inspection notes provided showed, as regards the Respondent:

Date	Type of Document	Notes
8 October 2015	Site meeting	LBP – Details, Rakesh Lal, not present for this meeting
23 November 2015	Inspection form	LBP not present for this inspection. I have requested that the LBP be present for the next inspection
3 December 2015	Inspection form	Who attended: Rakesh Lal
26 January 2016	Inspection form	Who attended: Rakesh Lal
10 February 2016	Site meeting	Called [omitted] confirm inspection this morning requesting LBP be present. LBP did not show, whilst on site had call from LBP Rakesh 10.45 saying it was not his job. Some confusion as I met Rakesh at the last inspection and he informed me he was the LBP.
24 February 2016	Site Meeting	Rakesh Lal onsite has confirmed he is and was LBP Licence number 125349. He confirmed well will be supervision of works. Ensure Quality Assurance programme is signed and kept up to date prior to calling for inspection.

Date	Type of Document	Notes
27 June 2016	Site Meeting	LBP to be present at all future inspections.

- [30] The Respondent provided a written response to the complaint dated 19 August 2016. In it he noted that he had agreed with [omitted] that he would undertake and carry out work for him at the property provided he was paid and that he was able to check work carried out before any Council Inspection. He alleged his licence number had been misused by [omitted] who kept booking inspections without telling him about the work. He set out his dealings with [omitted] and the Council and details of how he had passed all inspections where he was the carpenter carrying out the building work on other projects.
- [31] The designer who prepared the consented plans gave evidence. He stated he was engaged by [omitted] as the owner. He had no involvement with the Respondent other than at a site meeting on 24 February 2016 where future work as regards a minor variation was discussed.
- [32] [Omitted] gave evidence that he had not met the Respondent. He was told by [omitted] whom he had engaged as a builder on previous jobs that the Respondent was the licensed building practitioner on the job.
- [33] [Omitted]'s evidence was that he had a long-term relationship with [omitted] having carried out numerous projects for him. He is not licensed. It was the first re-clad project he had undertaken. He used [omitted], the Respondent's brother, and others as the builders on the site. He uses foreign workers on work permits as labour. [Omitted] and the others on site were not licensed so he needed the Respondent to supervise the work. When asked who was the licensed person on site by the Council he provided them with a photocopy of the Respondent's licence which he had on record from a previous job. He stated he was not asked at the time of the work commencing to provide details of who the licensed building practitioner would be.
- [34] [Omitted] was questioned as regards the nature of the contractual arrangements between himself and the Respondent. He stated he normally pays the Respondent \$600 per inspection of work that had been carried out by others and that the inspection by the Respondent is normally done in advance of the Council inspection. He was vague as to what, if any, discussions with the Respondent took place prior to the job in question commencing. He did note that he had received a \$4,000 bill for the Respondent's services. The actual invoice dated 27 February 2016 was presented by the Respondent. It was for \$5,000 plus GST. Evidence of a \$1,000 payment made on the same date was also produced. It was accepted that no other payments had been made to the Respondent by [omitted]. There had been nine inspections and or attendances at site by the Council to the point in time when the invoice was tendered. The Respondent stated the balance of the invoice was for his services on the remainder of the job if he was used as the supervisor.
- [35] In questioning [omitted] accepted that he was giving instructions and directing the day to day work on site. He considered the requirement in the Building Act that restricted building work be carried out or supervised by a licensed building practitioner was satisfied by getting the worked checked by one when it had been completed. In this respect he said he called the Respondent before inspections but his evidence was vague and inconsistent. He was unable to answer questions as to

why he did not give the Respondent more notice of inspections or details of when he called him to site for inspections.

- [36] The Respondent gave evidence. He stated that he not aware of the building work until called to site on 3 December 2015. A letter [omitted] provided to the Board confirmed this. As at 3 December no restricted building work had been undertaken. The Council accepted that this was the case. The Respondent stated he was surprised to be called in and he gave evidence that he told the Council that he was not the licensed building practitioner for the job. Mr Robertson from the Council did not accept he was told this.
- [37] The Respondent outlined that he does his own jobs where he carries out the building work. The only time he has done supervision only jobs he has been for [omitted]. Other supervision jobs have been new builds where he has done the foundations and then supervised other restricted building aspects. The normal arrangement when he does this is that he shows the workers what has to be done and how it is to be done and he then checks it during its progress. He books the inspections when the work is ready to be inspected. He stated this did not occur with this job as he was not told about the work. As he had not been told about the work and had not been given the opportunity to supervise he did not accept that he was the supervising licensed building practitioner. He stated his terms of engagement had not been met and as such he was not responsible for the work and that he made this clear to [omitted]. He said he advised [omitted] of this on 4 December 2015. On 26 January 2016 he said he would continue to be involved if he could instruct and check. This did not happen. He was not aware that work was being carried out after that date and took no responsibility for it.
- [38] The Respondent stated that he was only called to site on two occasions by [omitted] and that it was just prior to when the Council was due to carry out an inspection. He stated communication difficulties and misunderstandings led to the Council believing he was the licensed building practitioner.

Submissions Received

- [39] Counsel for the Respondent submitted a licensed building practitioner being recorded by the building consent authority does not necessarily mean they are or will be that person. The licensed building practitioner has to actually accept the appointment.
- [40] He also submitted that the Respondent was disadvantaged by language issues and this led to a degree of confusion as to his role in the job. The actual person controlling and directing was [omitted] and that when the Respondent did agree to become involved [omitted] did not meet the terms of the engagement. It was a conditional acceptance and the conditions of being able to check and inspect were not met.

Boards Conclusion and Reasoning

- [41] There are three matters under consideration: negligence and/or incompetence; building contrary to a building consent and bringing the regime into disrepute. It has been conceded that the actual building work had been carried out in a negligent or incompetent manner and that it was completed in a manner that was contrary to the building consent issued. What is disputed by the Respondent is whether he was responsible for that work and, if so, whether his conduct would bring the regime into disrepute.

- [42] The Board has decided that the Respondent was not the supervisor of the building work that was undertaken at the site. As such he was neither negligent nor incompetent and a finding cannot be made against him as regards building contrary to a building consent. It follows that the disciplinary offence of disrepute under s 317(1)(i) need not be considered.
- [43] The Board has come to this decision on the basis that it has found that the actual person who was directing and controlling the building activity was [omitted] and that he was doing so without recourse to a licensed building practitioner. The Respondent was prepared to be involved and had some limited involvement when called in at the last minute on two occasions but the Board accepts his account that his engagement was conditional on his being able to actually perform his functions as a supervisor. Like any contractual relationship there must be offer and acceptance. The Respondent's evidence was that his acceptance was conditional and that those conditions were not met. The Board has accepted this evidence and considers the evidence before it was that [omitted] was pushing ahead with the work with scant regard for the legal requirement that the restricted building aspects of it be supervised.
- [44] The Board notes that the mere use of a licensed persons registration number and or notification of it to the building consent authority by persons other than the licensed building practitioner without their knowledge and consent does not make them responsible for the restricted building work.
- [45] The Board does consider, however, that the Respondent needs to take more care in his future dealings to ensure there is no ambiguity as to his role. He has not aided his situation in the present case by not documenting his arrangements. He did not take clear and concise notes of his interactions as they occurred or take steps to ensure key parties such as the Council were advised of his actual relationship to the building work. Given his language difficulties, which also complicated the situation, the Board would recommend that, in the future, he clearly records all transactions in writing.
- [46] The Board also notes that as the Respondent was not the supervising licensed building practitioner there was, as far as it is concerned, no licensed person on site carrying out or supervising restricted building work. Under s 84 of the Act restricted building work must be carried out or supervised by a licensed building practitioner. It is an offence under s 85 of the Act for a non-licensed person to carry it out. The Ministry of Business Innovation and Employment has jurisdiction over this section and the Board recommends that it consider issuing proceedings under it. In this respect the Board notes the comments in *Tan v Auckland Council*⁵:

[68] *If anything, I agree with Judge Thorburn that it is Mr Tan's interpretation that results in absurdity and injustice. It would indeed be nonsensical and "savagely unfair" on those "wielding the hammers and shovels" to expose them, and not those who supervise or instruct them, to prosecution.*

Board Decision

- [47] The Board has decided that the Respondent has not:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act);

⁵ CRI-20 15-404-323 [2015] NZHC 3299, Brewer J

- (b) carried out or supervised building work that does not comply with a building consent (s 317(1)(d) of the Act);
- (c) 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.

Signed and dated this 20th day of March 2017.

A handwritten signature in black ink, appearing to be 'Mel Orange', written in a cursive style.

Mel Orange
Presiding Member