

Before the Building Practitioners Board

	BPB Complaint No. CB25834
Licensed Building Practitioner:	Kumar Vasist (the Respondent)
Licence Number:	BP133299
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	Complaint
Hearing Location	Wellington
Hearing Type:	In Person
Hearing Date:	9 August 2023
Decision Date:	15 September 2023

Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2
Mr D Fabish, LBP, Carpentry and Site AoP 2
Mr G Anderson, LBP, Carpentry and Site AoP 2

Appearances:

Mr M Wolf, for the Respondent

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

- [1] The Board was investigating whether the Respondent had brought the regime into disrepute by failing to ensure a build guarantee and a works insurance were in place. The Respondent did not engage in the investigation process. He did attend the hearing. At the hearing, the Respondent provided a copy of a guarantee for the build and gave evidence that the property was covered by a global insurance policy. He was not able to produce evidence to substantiate that claim.
- [2] To find that a disciplinary offence has been committed, there must be evidence which establishes the ground of discipline to the required standard of proof. With respect to the build guarantee, there was no disreputable conduct. With regard to the works insurance, the Board was not able to establish, to the required standard, that a policy was not in place. As such, it could not make a finding that the Respondent had brought the regime into disrepute.

The Charges

- [3] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.¹
- [4] In this matter, the disciplinary charges the Board resolved to further investigate² were that the Respondent may, in relation to building work at [OMITTED], Wellington, have conducted himself 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.

¹ 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. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

² The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

- [5] The Board gave notice that the issues it would further investigate at a hearing would be whether the Respondent may have:
- (a) failed to procure and/or provide works or construction insurance cover for the project;
 - (b) provided false or misleading insurance documentation; and/or
 - (c) failed to procure and/or provide a third-party guarantee as provided for the in the building contract entered into.

Procedure

- [6] The matter had a protracted path to a hearing. The Respondent did not engage in the initial investigative process in that he did not provide a response to the complaint other than to state that he did not carry out any of the work complained about and that he was looking to fix the issues and complete the contract.
- [7] The Board did not proceed with the allegations relating to the quality and compliance of the building work on the basis that the Respondent did not carry out or supervise the work. The Board identified [OMITTED], Licensed Building Practitioner (BP[OMITTED], Carpentry), as a person who may have carried out or supervised the building work that was complained about. On that basis, it initiated an inquiry into Mr [OMITTED]'s conduct, and it resolved to hold a hearing to further investigate his conduct.
- [8] The Board would remind the Respondent that, as a Licensed Building Practitioner, he is, in the context of disciplinary proceedings, expected to cooperate and to be prepared to answer the allegations³. This can include engaging in the initial investigation process. In this respect, it can be to a practitioner's advantage to engage as, with a full explanation and supporting evidence before it, the Board may decide that it will not further investigate the allegations. In this matter, the costs associated with the hearing of the matter may have been avoided if the Respondent engaged in the process.

Consolidation

- [9] The Board may, under Regulation 13, consolidate two or more matters into one hearing, but only if the matters are, in the opinion of the Board, about substantially the same subject matter and consolidation is agreed to.
- [10] The Board sought agreement for consolidation of this matter with complaint number CB25938 (the inquiry into [OMITTED]). The consent of all those involved was forthcoming, and the two matters were consolidated.

³ *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

Evidence

- [11] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. 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.
- [12] The Respondent's company, Thor Construction Group Limited⁵, was engaged by the Complainants to construct a residential dwelling. The Respondent contracted [OMITTED], a Licensed Building Practitioner, to carry out the building work. Mr [OMITTED] was an employee of another company. Partway through the build, Mr [OMITTED] left his employment and was not able to continue with the build. Mr [OMITTED], an employee of Thor (the respondent in the consolidated matter), continued the build. When he took over from Mr [OMITTED], the foundations, frames and trusses had been completed. The build was not completed by Thor.
- [13] The Respondent described his role as the project manager. He organised materials and subcontractors but did not carry out any of the building work. He was responsible for the administration of the contract.

Disrepute

- [14] Conduct which brings or is likely to bring the regime into disrepute is that which may result in the regime being held in low esteem by the public. Examples include:
- criminal convictions;⁶
 - honest mistakes without deliberate wrongdoing;⁷
 - provision of false undertakings;⁸ and
 - conduct resulting in an unethical financial gain.⁹
- [15] The Courts have consistently applied an objective test when considering such conduct.¹⁰ The subjective views of the practitioner, or other parties involved, are irrelevant. The conduct need not have taken place in the course of carrying out or supervising building work.¹¹
- [16] To make a finding of disreputable conduct, the Board needs to determine, on the balance of probabilities,¹² that the Respondent has brought the regime into

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁵ The Respondent is the sole shareholder and director of Thor Construction Group Limited.

⁶ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

⁷ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

⁸ *Slack, Re* [2012] NZLCDT 40

⁹ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

¹⁰ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

¹¹ *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

¹² *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. 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.

disrepute and that conduct was sufficiently serious enough for the Board to make a disciplinary finding.¹³

- [17] The matters under investigation related to the provision of construction insurance and a third-party guarantee. The Complainants stated that neither had been provided and submitted that, as regards construction insurance, their bank required a policy that was specific to their property as opposed to cover provided by a general policy.
- [18] At the hearing, the Respondent provided the Board with a copy of a third-party guarantee that covered the dwelling from Stamford Insurance. The Complainants stated that they were not aware of the policy. It was, however, a valid policy and it did cover the property under investigation.
- [19] With respect to construction works insurance, the Complainants gave evidence that their bank required construction insurance that was specific to their property. The building contract did not specify a site-specific policy.
- [20] The Respondent gave evidence that he had global construction works insurance in place throughout the build, which covered multiple builds that he had under construction. The Certificate of Insurance that the Board was provided with had expired. The Broker for the insurer confirmed that the cover had not been renewed and was not in place.
- [21] The Respondent maintained that he had insurance in place with another insurer. He was given time to produce evidence to substantiate the insurance cover. Notwithstanding, he was not able to produce any written evidence of the cover. Counsel submitted:

2. *The respondent has made enquiries with his insurance broker but has not been able to obtain the requested information.*
3. *Notwithstanding, the respondent's evidence, as given at the hearing, is that his building company had insurance in place for the period of the Contract Works by way of its global construction works insurance policy and accordingly the contractual requirement for construction works insurance was satisfied.*

- [22] As noted, 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*,¹⁴ 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

¹³ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

¹⁴ [2009] 1 NZLR 1

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.

- [23] The Board has taken the Court’s statements into account, particularly the need for stronger evidence where the allegations are serious. On that basis, the Board has decided that there is insufficient evidence to establish, on the balance of probabilities, that a policy was not in place. It follows that there is insufficient evidence to find that the Respondent has brought the regime into disrepute.

Code of Ethics

- [24] A Code of Ethics for Licensed Building Practitioners has been introduced. It came into force on 25 October 2022, which means the matters under investigation could not be considered under it. The Respondent should note, however, that clause 25 of the Code requires that accurate records are maintained:

25 *You must conduct your business in a methodical and responsible manner*

In conducting any business that involves carrying out or supervising building work, you must take all reasonable steps to ensure that—

- (a) accurate records of money received and paid out are maintained; and*
- (b) a record of other appropriate documents is maintained.*

- [25] A works insurance policy is a document that the Board considers should be kept and maintained and which should be able to be produced when requested. The Respondent is, therefore, cautioned to keep better records of key documents.

Signed and dated this 11th day of October 2023

A handwritten signature in black ink, appearing to be 'M Orange', written in a cursive style with a long horizontal stroke extending to the right.

M Orange
Presiding Member