

## Before the Building Practitioners Board

	BPB Complaint No. CB25963
Licensed Building Practitioner:	Xianlong Zeng (the Respondent)
Licence Number:	BP 133074
Licence(s) Held:	Carpentry and Site AOP 1

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

#### Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Board Inquiry
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	14 September 2022
Decision Date:	7 October 2022

#### Board Members Present:

Mr M Orange, Deputy Chair, Barrister (Presiding)  
Mr C Preston, Chair  
Ms J Clark, Barrister and Solicitor, Legal Member  
Ms K Reynolds, Construction Manager  
Mr G Anderson, LBP, Carpentry and Site AOP 2

#### Appearances:

Ms Watson-Hughes, Counsel for the Registrar

#### 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 disciplinary offences under section 317(1)(b),(d), (da)(ii), (e) and (i) of the Act.

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### Summary of the Board’s Decision

- [1] The Board found that the Respondent has not carried out or supervised building work in a negligent or incompetent manner, or in a manner that was contrary to a building consent, or that he failed to provide a record of work in respect of restricted building work. It made its decisions on the basis that there was no evidence to establish that the Respondent had carried out or supervised building work at either of the two properties which were the subject of the investigation.
- [2] The Board also found that the Respondent has not conducted himself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute or, for the purpose of another person becoming licensed, made any declaration or representation knowing it to be false or misleading on the basis that there was insufficient evidence to prove, on the balance of probabilities, that those disciplinary offences had been committed.

### The Charges

- [3] The hearing resulted from a Board Inquiry about the conduct of the Respondent and a Board resolution under regulation 22 of the Complaints Regulations<sup>1</sup> to hold a hearing in relation to building work at [OMITTED], Queenstown and [OMITTED], Wanaka. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

In respect of [OMITTED], Wanaka

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act) IN THAT:
- (i) building inspections were not called for as required under the building consent; and
  - (ii) the building work noted in an engineering report produced by [OMITTED] of [OMITTED], dated 5 February 2021, and those identified in failed Council inspections and a Notice to Fix may not have been carried out to an acceptable standard; and

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<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.

- (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) IN THAT:
  - (i) building inspections were not called for as required under the building consent; and
  - (ii) the building work noted in an engineering report produced by [OMITTED] of [OMITTED], dated 5 February 2021, and those identified in failed Council inspections and a Notice to Fix may not have been carried out in accordance with the building consent issued; 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); and
- (d) 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) IN THAT he may have knowingly or recklessly allowed his licence to be used for restricted building work that he did not supervise or intend to supervise; and

In respect of [OMITTED], Queenstown:

- (e) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act) in respect of the matters set out in failed building inspections recorded on the building consent file; and
- (f) 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) in respect of the matters set out in failed building inspections recorded on the building consent file; and
- (g) 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
- (h) 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) IN THAT he may have knowingly or recklessly allowed his licence to be used for restricted building work that he did not supervise or intend to supervise; and

In respect of the licensing of Mr [OMITTED] (BP [OMITTED]):

- (i) for the purpose of becoming licensed himself or herself, or for the purpose of any other person becoming licensed,-
  - (i) either orally or in writing, made any declaration or representation, knowing it to be false or misleading in a material particular; or
  - (ii) produced to the Registrar or made use of any document, knowing it to contain a declaration or representation referred to in subparagraph (i); or
  - (iii) produced to the Registrar or made use of a document, knowing that it was not genuine (s317(1)(e) of the Act); and
- (j) 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).

[4] In further investigating (i) and (j) above, the Board gave notice that it would be inquiring into whether the Respondent made representations or provided documentation as regards building work that Mr [OMITTED] (BP [OMITTED]) carried out under the Respondent's supervision at [OMITTED], Wanaka and [OMITTED], Queenstown prior to Mr [OMITTED] becoming licensed and in support of Mr [OMITTED]'s licensing application noting that the Respondent has denied any knowledge or involvement in the building work at those properties.

[5] This hearing was consolidated with complaints CB25846, CB25859, and CB25964 in respect of which Mr [OMITTED] (BP [OMITTED]) was the Respondent. A separate decision for those complaints has been issued.

### **Function of Disciplinary Action**

[6] 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>.

[7] 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*

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<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

*maintained in order to protect clients, the profession and the broader community.”*

- [8] 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.*

- [9] 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.
- [10] 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**

- [11] 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.
- [12] 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.

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

## Evidence

- [13] 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.
- [14] 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.
- [15] In addition to the documentary evidence before the Board, it heard evidence at the hearing from:
- Xianlong Zeng (BP 133074), the Respondent
  - [OMITTED], Complainant for CB25859, Building Consent Officer
  - [OMITTED], Engineer, [OMITTED]
  - [OMITTED] (BP [OMITTED])
  - [OMITTED] (BP [OMITTED])
- [16] [OMITTED] was summonsed as a witness but did not attend.
- [17] The Respondent and the Board were assisted by an interpreter, Ms Bi.
- [18] Mr [OMITTED], the Queenstown District Council Building Consent officer (at the time) and now team leader for inspections at the Council, was the Complainant in respect of a complaint against Mr [OMITTED]. He stated that he was on-site at [OMITTED] 3-4 times during the building project and that Mr [OMITTED] was running the site. Mr [OMITTED] gave evidence that the Respondent was never seen on site by himself or the other Council officers carrying out inspections.
- [19] The Respondent's Licensed Building Practitioner's license was shown to the Council by Mr [OMITTED] at the Framing & Bracing – Prewrap inspection on 14 August 2020 (Document 4.3, Page 350 of the Board's file on CB25846). Mr [OMITTED] gave evidence that Mr [OMITTED] said the Respondent was the Licensed Building Practitioner supervising the building work. The Council took Mr [OMITTED]'s word for this, and there was no process to check this was correct.
- [20] The Respondent said Mr [OMITTED] contacted him through an advertisement to ask his advice on construction methods. He stated that Mr [OMITTED] had never worked for him and that he had never been to the two project sites that are the subject of the complaints.

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

- [21] The Respondent advised the Board that he went to Queenstown on 6 September 2019 at Mr [OMITTED]'s request. He checked a job of Mr [OMITTED]'s, which was at the framing stage and did the record of work for that property. He was paid for doing this. He could not recall the address of that property, but it was not either of the two properties at the centre of these complaints. The Respondent confirmed that he no longer had any documents which would provide the address of the property.
- [22] The Board showed the Respondent the photo of his Licensed Building Practitioner's license in the Council inspection report for [OMITTED]. (Document 4.3, Page 350 of the Board's file for CB25846). Initially, the Respondent said that Mr [OMITTED] asked for a photocopy of the Respondent's Licensed Building Practitioner's license, and he did not recall when he sent it to Mr [OMITTED]. After further questioning from the Board, the Respondent stated he did not know why or when Mr [OMITTED] had a copy of his license and that Mr [OMITTED] was *"trying to use my name without my consent"*. The Respondent gave evidence that he did not consent to his license being used by Mr [OMITTED] and did not know why his license was associated with this project.
- [23] The Respondent acknowledged that he had been contacted by the assessor as a referee for Mr [OMITTED] to obtain a Licensed Building Practitioner's license. He described the telephone call as very quick, and he thought it was only in relation to the project he had visited in September 2019 at Mr [OMITTED]'s request. The Respondent said that Mr [OMITTED] told him that he had put the Respondent's name down as a referee.
- [24] The Respondent denied all involvement with or knowledge of the [OMITTED] and [OMITTED] projects. The assessor's report was put to the Respondent, and he denied making many of the statements recorded in it. (Document 2.5.20, Page 43 of the Board's file on CB25964).
- [25] In particular, the Respondent denied having said he *"worked with [Mr [OMITTED]] over the last 3 years"* and *"he employed him as a contract builder on many projects over that time"*, and *"he visits the project sites regularly"*.
- [26] The Respondent gave contradictory evidence on his impression of Mr [OMITTED]. He agreed, when put to him by the Board, that he had formed a view of Mr [OMITTED]'s work based on the one-day visit to Queenstown in September 2019 and had been supportive of him to the assessor.
- [27] However, the Respondent then told the Board his opinion of Mr [OMITTED] was that he had *"very poor skills of carpentry work"* and that he had seen mistakes in the framing work on the Queenstown project he visited. The Respondent agreed that he did not express this view to the assessor.

- [28] The Board questioned the Respondent on his relationship with Mr [OMITTED]. The Respondent stated that he did not know him personally, he had had “*maybe 5 conversations*”, and that was mostly when Mr [OMITTED] had questions.
- [29] His last contact with Mr [OMITTED] was, on the Respondent’s evidence, in 2019-2020 and was in respect of a Registrar’s investigation into another complaint about 20 [OMITTED] (which the Board determined did not warrant further investigation on 26 May 2021<sup>7</sup>). On this call, the Respondent was told by Mr [OMITTED] that “*he will sort it out*”. The Respondent attempted to contact Mr [OMITTED] after his conversation with the assessor but could not reach him.
- [30] Mr [OMITTED], a Licensed Building Practitioner, was the other referee put forward by the Respondent. Mr [OMITTED] did the foundation work at both the [OMITTED] and [OMITTED] properties. He stated that he never saw the Respondent at either site.
- [31] Based on the Respondent’s denial of knowledge of and involvement with [OMITTED] and [OMITTED], the Board did not, at the hearing, canvass with the Respondent the evidence in relation to the carrying out or supervising of defective building work at those sites.

#### **Board’s Conclusion and Reasoning**

- [32] The Board has decided that the Respondent **has not**:

In respect of both [OMITTED], Queenstown and [OMITTED], Wanaka:

- (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);
- (d) for the purpose of becoming licensed himself or herself, or for the purpose of any other person becoming licensed:
  - (i) either orally or in writing, made any declaration or representation, knowing it to be false or misleading in a material particular; or
  - (ii) produced to the Registrar or made use of any document, knowing it to contain a declaration or representation referred to in subparagraph (i);  
or

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<sup>7</sup> CB25587



(iii) produced to the Registrar or made use of a document, knowing that it was not genuine (s317(1)(e) of the Act); or

(e) 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.

[33] The alleged offences in respect of both properties under sections 317(1)(b), (d) and (da)(ii) of the Act all require at their base for the Respondent to have been involved in carrying out or supervising building work.

[34] The Board accepts the evidence of the Respondent that he had no knowledge of or involvement with carrying out or supervising building work at either property. He has been consistent and adamant in this position since first being approached by the Investigator. To some extent, his evidence was corroborated by the evidence of Mr [OMITTED] and Mr [OMITTED]. No evidence is before the Board to contradict the evidence given by the Respondent.

[35] Accordingly, the Board finds that in respect of the disciplinary offences for both properties under sections 317(1)(b), (d), and (da)(ii) of the Act, there is no evidence to support a finding against the Respondent.

[36] In respect of the alleged offences, for both properties, under sections 317(1)(e) and (i) of the Act, the Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed.

[37] The relevant authority is *Z v Dental Complaints Assessment Committee*, where Justice McGrath in the Supreme Court of New Zealand stated:

*“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.*

*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.”*

- [38] The disciplinary offence under section 317(1)(e) requires that the Respondent knows that the representation or declaration that he is making is false or misleading. Knowing has been defined as “with knowledge” or “conscious”.<sup>8</sup>
- [39] The Respondent appeared to genuinely believe the property that was being discussed with the assessor was the one property the Respondent had visited and not [OMITTED] or [OMITTED]. There was no interpreter on the call with the assessor and this may have contributed to any misunderstanding on the Respondent’s part as to what he was being asked.
- [40] The Board finds, based on an assessment of the facts and the cases, that the Respondent did not knowingly make a false or misleading statement and, therefore, the disciplinary offence under section 317(1)(e) has not, on the balance of probabilities, been proved.
- [41] Nevertheless, the Board cautions the Respondent to protect his license. As a Licensed Building Practitioner, the Respondent should uphold the integrity of the scheme and should take his role as a referee for the obtaining of a license seriously.
- [42] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is “disrepute”. The Oxford Dictionary defines disrepute as “the state of being held in low esteem by the public”,<sup>9</sup> and the courts have consistently applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*<sup>10</sup>, the Court of Appeal held that:
- the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*<sup>11</sup>
- [43] As to what conduct will or will not be considered to bring the regime into disrepute, it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:
- criminal convictions<sup>12</sup>;
  - honest mistakes without deliberate wrongdoing<sup>13</sup>;

<sup>8</sup> Dictionary of New Zealand Law, published by LexisNexis New Zealand

<sup>9</sup> Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

<sup>10</sup> [2012] NZCA 401

<sup>11</sup> [2012] NZAR 1071-page 1072

<sup>12</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

<sup>13</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

- provision of false undertakings<sup>14</sup>; and
- conduct resulting in an unethical financial gain<sup>15</sup>.

[44] The Courts have stated that the threshold for disciplinary complaints of disrepute is high, and the Board notes that when the disciplinary provision was introduced to Parliament the accompanying Cabinet paper noted:

*This power would only be exercised in the most serious of cases of poor behaviour, such as repetitive or fraudulent behaviour, rather than for minor matters.*

[45] The alleged disreputable conduct was that the Respondent may have deliberately made false declarations or representations for the purpose of Mr [OMITTED] obtaining a license. The Board has taken into account the factors discussed above in relation to the alleged offence under section 317(1)(e). The Board finds that, on the balance of probabilities, the disciplinary offence under section 317(1)(i) has not been proved.

Signed and dated this 20<sup>th</sup> day of October 2022



**Mr M Orange**  
Presiding

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<sup>14</sup> *Slack, Re* [2012] NZLCDT 40

<sup>15</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7