Before the Building Practitioners Board

	BPB Complaint No. C2-01793
Licensed Building Practitioner:	David Walls (the Respondent)
Licence Number:	BP 129975
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	Auckland
Hearing Type:	On the Papers
Hearing Date:	6 June 2018
Decision Date:	14 June 2018

Board Members Present:

Chris Preston (Presiding)
Mel Orange, Legal Member
Robin Dunlop, Retired Professional Engineer
Catherine Taylor, Lay Member

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.

Board Decision:

The Respondent **has not** committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

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Introduction

[1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offence the Board resolved to investigate was that the Respondent 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).

Function of Disciplinary Action

[2] 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*[2] and in New Zealand in *Dentice v Valuers Registration Board*[3].

[3] 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*[4] 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."*

[4] 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. It does not have any jurisdiction over contractual matters.

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[1] The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.
[2] *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.
[3] [1992] 1 NZLR 720 at p 724
[4] [2016] HZHC 2276 at para 164

Evidence

[5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. 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.

[6] The Complainants alleged the Respondent had failed to provide a record of work for restricted building work carried out on a new build that commenced in April 2015. The Complaint set out that the building work came to an end on 13 April 2016 when the building contract was terminated. The Complainants noted a contractual dispute and a refusal to provide a record of work through until 22 December 2016 when they state a partially completed record of work was provided. A further record of work was requested in March 2017.

[7] The Respondent refuted that the record of work provided in December 2016 was not complete stating that it covered the restricted building work that he carried out and/or supervised noting that he could not supervise trades in which he was not licensed. The documentation provided to the Board included that record of work. It was dated 18 April 2016. The Respondent stated that he provided it to his lawyer on the lawyer's request on 18 April 2016 and that the lawyer held it thereafter.

[8] Prior to the hearing the Respondent provided a copy of a District Court decision relating to the matters before the Board. It was supplied on the basis that it was relevant to the date at which the contractual relationship came to an end. It is noted that the Court held:

> *[56] By refusing to comply with the Dispute notice which was served on them the Defendants (the Complainants) were in breach of the contract and therefore their purported cancellation of the contract on 13 April 2016 was unlawful and of no force and effect.*
>
> *[57] The Plaintiff (the Respondent) has succeeded in these proceedings on the Defendant (the Complainants) unlawfully cancelled the contract.*

[9] The judgment does not state a date on which the contract did come to an end.

[10] The Respondent also provided submissions based on the District Court decision including that:

> *The Court held that [Omitted] attempt to cancel the contract was unlawful.*
>
> *At this stage we still had intentions of completing the build, and our main focus was dealing with the illegal actions the [Omitted] were undertaking.*
>
> *During this time, I have admitted to not supplying the Memorandum to the [Omitted] on their original request date, but soon after it was submitted to my Lawyer. As at that point in time the communication between both parties*

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

was done via our respective Lawyers. To my knowledge, it was not requested again until December 2016, which by that time the [Omitted] lawyers had already received it prior to December.

Yes, I did not supply the Memorandum in Early April 2016 when requested, and technically I can see how this looks, but my lack of supplying this is not through ill-intention, but more so the fact that we believed we were still under contract to still complete the job, so the Memorandum request was not valid or required at this point in time.

I have built numerous homes around the North Island of New Zealand and stand proudly beside each one, and I have no issues supplying memorandum for all my work, as I have done so on this instance, so it is all defined to a point of when It was supplied and was is validly requested and was there any delaying in any council processes due to the late delivery of the memorandum. The Memorandum was requested by [Omitted] in the same letter that he was attempting to illegally cancel the contract, and prior to the work being completed. We were trying everything we could to resolve the issue in accordance with the contract so that we could complete the work in accordance with the contract. [Omitted] simply refused to follow the procedures set out in the contract to enable us to resolve the dispute.

Board's Conclusion and Reasoning

[11] The Board has decided that the Respondent **has not** 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 should be disciplined.

[12] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work[6].

[13] Failing to provide a record of work is a ground for discipline under section 317(1)(da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had "good reason" for not providing a record of work on "completion" of the restricted building work.

[14] The Board discussed issues with regard to records of work in its decision C2-01170[7] and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be

[6] Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011
[7] *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.

[15] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.

[16] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states "on completion of the restricted building work …".

[17] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. This did not occur in the present case. Building work came to an end on 13 April 2016 when the Complainants purported to cancel the contract. The District Court has held that the cancellation was illegal.

[18] No further building work was carried out after 13 April 2016. There was an ongoing commercial dispute. The Respondent has submitted that he had an intention of returning and completing the building work. There is no evidence to support this claim, either in the documentation before the Board or in the District Court decision.

[19] The Board does, however, accept that there can be a period during which contractual and commercial negotiations may take place and during which there may be an intention to return. A point in time will, inevitably, be reached when the relationship has come to an end and no further building work will be carried out.

[20] The Board also notes that recent District Court decisions[8] have noted the requirement in section 87 of the Act to notify the Territorial Authority of a change of licensed building practitioner and that this can be taken into account when considering whether the requirement for a record of work from the former or original licensed building practitioner has been triggered. In those cases there were commercial disputes, building work in question had not been completed and there was a possibility that the original licensed building practitioner might return to carry out further building work. There are similar background facts in this case and no evidence before the Board of a section 87 notice having been given.

[21] Turing to the facts a record of work was completed on 18 April 2016. It was held by the Respondent's lawyer. It was provided on 22 December 2016 by the lawyer. The Complainant has alleged the record of work was deficient. The Respondent has refuted this. The Act does not contain provisions that relate to the accuracy or completeness of a record of work. Only that one must be provided in the required form. One was on 22 December 2016. This is the date that the Board will use to determine the matter.

[8] *Ali v Kumar et al* [2017] NZDC 23582 and *Bell v MBIE et al* [2017] NZDC 23847

[22] The question for the Board then is when, between 13 April 2016 and 22 December 2016, did the point in time arise when it would have been apparent that no further restricted building work would be undertaken. In this respect the evidence before the Board is not clear and it is on this basis that the Board finds that the disciplinary offence has not been committed. In essence there is insufficient evidence to ascertain when completion occurred and thus when the record of work was due.

Signed and dated this 14th day of June 2018



Chris Preston
Presiding Member