

Before the Building Practitioners Board

BPB Complaint No. C2-01750
Licensed Building Practitioner: [the Respondent]
Licence Number: [Omitted]
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	Dunedin
Hearing Type:	In Person
Hearing Date:	12 July 2018
Decision Date:	1 August 2018

Board Members Present:

- Chris Preston (Presiding)
- Richard Merrifield, LBP, Carpentry Site AOP 2
- Bob Monteith, LBP Carpentry and Site AOP 2

Appearances:

Don MacRae, Barrister and Solicitor, Morgan Coakle – 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.

Board Decision:

The Respondent **has not** committed a disciplinary offence under section 317(1)(b) and 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 Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
- (b) 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.

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

- [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.

Procedure

- [5] Prior to the hearing the Respondent sought an adjournment to instruct legal counsel. The Respondent’s legal counsel provided submissions in support of the application. Those submissions advised who the licensed building practitioner who carried out the building work was and also clarified why the Respondent had issued a record of work. Counsel inquired whether, in light of the new information, the Board would proceed with the matter.

- [6] The Board issued a Minute noting that whilst the Respondent had provided clarification of the circumstances around the build, and had identified a responsible licensed building practitioner, the Board did not have sworn testimony before it to make a decision whether or not the Respondent is responsible for the building work. The Board noted it would proceed so as to determine whether the Respondent was the person responsible for the building work to which the complaint relates or whether a Board Inquiry should be initiated into the licensed building practitioner the Respondent had identified. The Board further noted:

*If, at the hearing, the Board **accepts** that the Respondent was not the responsible licensed building practitioner then it would not proceed any further as regards the building work but it would further investigate the matters relating to the issue of the Respondent’s record of work.*

*If, at the hearing, the Board **does not accept** that the Respondent was not the responsible licensed building practitioner then it would then consider whether an adjournment to allow the Respondent to be able to prepare his defence as regards the building work is appropriate.*

The Respondent should note that if he was to file sworn affidavits from himself and the identified licensed building practitioner as regards who carried out or supervised the building work then the Board may reconsider whether it proceeds on the scheduled date and it may, depending on the

⁴ [2016] HZHC 2276 at para 164

contents of such affidavits, issue further directions as regards how the matter would proceed.

- [7] Prior to the hearing the Respondent filed affidavits from himself and from [Omitted] .
- [8] At the hearing the Board advised that the hearing would be conducted in two parts, as a result of the late submission that the Respondent did not undertake or supervise any of the building work and that it was undertaken by [Omitted] :
- (a) an investigation into who did and/or supervised the building work in question; and
 - (b) following an adornment to consider the above, an investigation into the record of work and what further or other investigations/inquiries would be made.
- [9] The hearing proceeded on the above basis. [Omitted] was cautioned that he was a witness but that on the basis of his testimony and the affidavit he provided his conduct may form the basis of a future Board Inquiry.

Evidence

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. 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.
- [11] In addition to the documentary evidence before the Board heard evidence at the hearing from:
- | | |
|----------------|--|
| [Omitted] | Respondent |
| [Omitted] | Complainant |
| Stephen Corson | Dunedin City Council |
| [Omitted] | Licensed Building Practitioner, Site Foreman |

The First Investigation – Who Carried out or Supervised the Building Work

- [12] The Respondent gave evidence that he visited the site nearly every day to provide instruction as to what work needed to be done that day, to assist in developing solutions to building work issues in what appeared to be a “project management role” but did not do any physical building work other than being on the digger for a while. He did not supervise [Omitted].
- [13] [Omitted] confirmed he was the foreman and licensed building practitioner who directed and controlled three other people on site. He was asked if he had been unduly influenced by the Respondent in how he carried out and supervised the

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

building work to which he answered he had not. He accepted he was the person responsible for carrying out and for supervising the building work on site.

Board's Conclusion and Reasoning on the First Investigation

- [14] The Board accepted the evidence that the Respondent did not carry out or supervise any of the building work and as such it has decided that the Respondent **has not** carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act).
- [15] No further action will be taken.

The Second Investigation – Record of Work

- [16] The Respondent stated that he provided a record of work in ignorance of the requirements. Earlier submissions from him noted that he provided one when the complaint was made on the basis that, given the complaint, he was obliged to provide one. At the hearing he accepted that he should not have issued one.
- [17] The Board advised the Respondent that, based on his own admission that he was “ignorant” of his obligations as to the provision of a record of work and that he should not have provided one in this instance, it considered his record of work to have been a false declaration. The Board decided, in order to expatiate the process, to issue an indicative decision as regards the false declaration and to seek further submissions from the Respondent.
- [18] The Board has further considered the matter. It notes there are no disciplinary charges that relate to provisions of a false or misleading record of work⁶. The only disciplinary provision that would apply is that of disrepute under section 317(1)(i) of the Act. The threshold for disrepute matters is, however, 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.

- [19] Given the above the Board does not consider that the matter would reach the threshold and as such it will not resolve to undertake an inquiry with respect to potential disrepute.

Board's Conclusion and Reasoning on the Second Investigation

- [20] Given the above 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

⁶ Compare with section 143(1)(f) of the Electricity Act 1992 where it is a disciplinary offence “to have failed to provide any return required under any enactment relating to prescribed electrical work or to have provided a false or misleading return”.

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).

- [21] The Board does, however, caution the Respondent as regards his conduct. He displayed a lack of regulatory knowledge and it is strongly recommended that he brings himself up to date. In this respect he should note that there are free resources available through the Board and the MBIE websites and that there are online training modules that can be completed.

Further Investigations

- [22] The Board noted the conduct of [Omitted] and that there may be grounds for him to face disciplinary action. In this respect the Board has a discretion to consider a licensed building practitioner's conduct by way of a Board Inquiry, that is without the receipt of a complaint from an individual.
- [23] The Board has decided that it will initiate a board Inquiry into the conduct of [Omitted] and it instructs the Registrar to prepare a Registrar's Report under regulation 18 of the Complaints Regulations.

Signed and dated this 1st day of August 2018


Chris Preston
Presiding Member