

Before the Building Practitioners Board

	BPB Complaint No. CB25148
Licensed Building Practitioner:	Jianxiong Cai (the Respondent)
Licence Number:	BP 126258
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	Board Inquiry
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	17 December 2019
Decision Date:	11 February 2020
Board Members Present:	
	Chris Preston (Presiding)
	Mel Orange, Legal Member
	Bob Monteith, LBP Carpentry and Site AOP 2
	Rob Shao, LBP, Carpentry and Site AOP 1

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.

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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);
 - (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); 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).

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:

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

“... 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] 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 persons⁵:

... 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.

- [5] 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.
- [6] The above commentary on the limitations of the disciplinary process are important to note as, on the basis of it, the Board Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

- [7] 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.
- [8] 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.

Background to the Complaint

- [9] The matter originally came to the Board as a complaint. The Complainant in the matter sought to withdraw. The Board resolved to continue the matter as a Board Inquiry.

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

Evidence

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. 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] 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.
- [12] In addition to the documentary evidence before the Board heard evidence at the hearing from the Respondent.
- [13] The original complaint arose as a result of a Ministry of Business Innovation and Employment operation investigating building work in the *[Omitted]* region. The two complaint addresses were identified as a result of Abatement Notices being issued for lack of sediment control on each site. The notices were supported by photographs. They were issued to *[Omitted]* in respect of *[Omitted]* and to *[Omitted]* in respect of *[Omitted]*.
- [14] The Respondent was identified as a carpenter involved in the building work. The complaint allegations were brought to his attention. He did not, however, respond to the complaint.
- [15] At the hearing the Respondent was questioned as regards the Abatement Notices. He stated that he had not, at the time of the build, been aware of the Abatement Notices. He also stated that, as a labour only contractor, he had to follow and comply with the owner's directions and that the owners were managing the builds.
- [16] With regard to records of work he stated that he provides them on request to the main contractor.

Board's Conclusion and Reasoning

- [17] The Board has decided that the Respondent **has not**:
- (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); or
 - (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

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

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 not** be disciplined.

- [18] The Board decided, in respect of the Abatement Notice, that the Respondent was not the responsible person. Whilst the Board expects a licensed person to comply with lawfully issued notices it accepts that he was not, at the time, aware of its issue.
- [19] The Board does note that the matter may not have needed to go to a hearing if the Respondent had provided a response to the complaint in the first instance. He is reminded that as licensed person he is expected to engage in an investigation process.
- [20] With regard to the records of work the Board notes that neither the owner nor the territorial authority has raised any concerns of the non-provision of records of work. As such the Board has decided that it was not necessary to further investigate the allegations.
- [21] The Respondent is reminded that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to demand one. He must act of his own accord and not wait for others to remind him of his obligations.

Signed and dated this 11th day of February 2020

A handwritten signature in black ink that reads "Chris Preston". The signature is written in a cursive, flowing style with a horizontal line underlining the name.

Chris Preston
Presiding Member