

Before the Building Practitioners Board
At [omitted]

BPB Complaint No. C2-01136

IN THE MATTER OF

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315

AGAINST

[The Respondent], Licensed Building Practitioner No. [omitted]

DECISION OF THE BUILDING PRACTITIONERS' BOARD

1 Introduction

- 1.1 [Omitted] (the Complainant) lodged a complaint with the Building Practitioners' Board (the Board) on 12 December 2014 in respect of [omitted], Licensed Building Practitioner (the Respondent).
- 1.2 The complaint alleged the Respondent has, in relation to building work in respect of [omitted] failed, without good reason, to provide a record of work, on completion of the restricted building work as required by s 88(1) of the Act (s 317(1)(da)(ii) of the Act).
- 1.3 The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 28 September 2012.
- 1.4 The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- 1.5 The following Board Members were present at the hearing:
- | | |
|--------------------|----------------------|
| David Clark | Chairman (Presiding) |
| Mel Orange | Board Member |
| Richard Merrifield | Board Member |
| Catherine Taylor | Board Member |
- 1.6 The matter was considered by the Board in [omitted] on 12 August 2015 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- 1.7 The following other persons were also present during the course of the hearing:
- | | |
|--------------|--------------------------------------|
| Ian Murray | Registrar's Representative |
| Greg La Hood | Assisting Registrar's Representative |
| Gemma Lawson | Board Secretary |
| [Omitted] | Respondent |

[Omitted] Complainant

[Omitted] Witness

[Omitted] Witness

Members of the public were present.

- 1.8 No Board Members declared any conflicts of interest in relation to the matters under consideration.

2 Board Procedure

- 2.1 The “form of complaint” provided by the Complainant satisfied the requirements of the Regulations.
- 2.2 On 30 April 2015 the Registrar of the Board prepared a report in accordance with regulations 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint.
- 2.3 On 28 May 2015 the Board considered the Registrar’s report and in accordance with Regulation 10 it resolved to proceed with the complaint that the Respondent failed, without good reason, to provide a record of work on completion of restricted work as required by s 88(1) of the Building Act (s 317(1)(da)(ii) of the Act).
- 2.4 On 21 July 2015 at 9.30 a.m. a pre-hearing teleconference was convened by David Clark, Board Chair. The Respondent and Registrar’s Representative were both present. The hearing procedures were explained and the Respondent’s attendance at the substantive hearing was confirmed.

3 The Hearing

- 3.1 The hearing commenced at 2 p.m.
- 3.2 At the hearing the Board was assisted in the presentation of the case by the Registrar’s Representative.
- 3.3 Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

4 Substance of the Complaint

- 4.1 The complaint related to an alleged failure by the Respondent to provide a record of work to the owner of a residential dwelling on the completion of restricted building work.

5 Evidence

- 5.1 The Respondent was engaged by the Complainant in November 2013 to convert a property from three flats to two. At the time of the engagement design documentation and engineering details were available and a building consent had been granted.
- 5.2 The Respondent provided materials and unlicensed building labour. He did not work on the property himself. His involvement was as a supervisor.

- 5.3 The builder on site confirmed that restricted building work was carried out. As far as he was concerned he was, at all times, working under the supervision of the Respondent.
- 5.4 The Respondent also accepted that restricted building work had been undertaken.
- 5.5 The restricted building work included foundation and subfloor framing, walls (framing), bracing (plasterboard), damp proofing (bathroom) and waterproofing (windows).
- 5.6 The Complainant stated she engaged the Respondent by way of a verbal arrangement which included when payments would be made. This included final payments being made once the work was completed to support additional lending on a revaluation.
- 5.7 Issues arose in July 2014 when it became apparent, following strip out, that the plans and engineering would have to be revised and an amended building consent obtained as assumptions made at commencement were not proven. Also, as funds became tight and costs escalated, the relationship between the Complainant and the Respondent deteriorated.
- 5.8 The Respondent's position was that he discontinued his involvement in July 2014 when issues over payment arose.
- 5.9 The Complainant maintained the Respondent continued to supervise until at least October 2014.
- 5.10 The Complaint provided various emails which supported her contention including an exchange in October 2014 where a record of work was asked for. The Respondent's replies to the emails implied that he was still engaged in the project.
- 5.11 A record of work provided in December 2014 for foundations and subfloor framing work undertaken up until July 2014.

6 Board's Conclusion and Reasoning

- 6.1 There is a statutory requirement under s 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the building consent authority on completion of restricted building work.
- 6.2 Failing to provide a record of work is a ground for discipline under s 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.
- 6.3 As a licensed person the Respondent should be aware of his obligations including those relating to the provision of records of work. The Board has previously held that a Record of Work is a statutory requirement, not a negotiable term of a contract¹. The requirement for it is not affected by the terms of a contract, nor by a contract dispute. Accordingly this of itself is not a good reason and the Board finds in this particular case that it was not a good reason to withhold.
- 6.4 The Respondent considered he only supervised the works up until July 2014 and should not be required to provide a record of work for restricted building work occurring after that date. The board notes that even if this was accepted the record of

¹ *Licensed Building Practitioners Board Case Decision C1100 3 June 2014*

work was not supplied until December 2014. It should have been supplied in or about July 2014 as this would have been the effective completion date the contractual relationship having been brought to an end.

- 6.5 It is also noted that the record of work supplied did not cover all of the restricted building work carried out up until July. Therefore, even if it had been supplied on completion, it would not have met the requirements of s 88(1) of the Act as it did not accurately state what restricted building work had been supervised.
- 6.6 On the evidence before the Board, however, it was clear that the Respondent's involvement extended beyond July and as such he should have provided a record of work for restricted building work that he supervised beyond that point in time.

7 Board Decision

- 7.1 The Board has decided that Respondent has failed, without good reason, to provide a record of work on completion of restricted work as required by s 88(1) of the Building Act and should be disciplined.

8 Disciplinary Penalties, Publication and Costs

- 8.1 The grounds upon which a Licenced Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Act¹. Under s 318(4) of the Act, the Board has the power to order the Respondent to pay the reasonable costs and expenses of, and incidental to, the Board's inquiry and pursuant to s 318(5) of the Act, the Board may publicly notify any disciplinary action taken against a Licensed Building Practitioner in any way it thinks fit.
- 8.2 The Board's Complaints Procedures allow the Board to either set out the Board's decision on disciplinary penalty, publication and costs or to invite the Respondent to make written submissions on those matters.
- 8.3 As part of the materials provided to the Board for the Hearing the Respondent provided submissions which were relevant to penalty, publication and costs and the Board has taken these into consideration. Included in this was details of the financial losses suffered, the liquidation of the Respondent's business and his requiring family assistance to avoid bankruptcy.
- 8.4 In all the circumstances the Board considers a censure to be the appropriate penalty.
- 8.5 As regards costs the Board has considered the Respondent's financial position has reduced the order for costs and the sum of \$500.00 is considered to be a reasonable amount toward the costs of and incidental to the Board's inquiry.
- 8.6 For the reasons set out above, the Board directs that:

Penalty: Pursuant to s 318(d) of the Building Act 2004, the Respondent is censured.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$500.00 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the register.

9 Right of Appeal

9.1 The Respondent has a right to appeal the Board decisions under s 330(2) of the Actⁱⁱ.

Signed and dated this 31st day of August 2015



David Clark
Presiding Member

ⁱ Section 318 of the Act

- (1) *In any case to which section 317 applies, the Board may*
 - (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ii Section 330 Right of appeal

- (2) A person may appeal to a District Court against any decision of the Board—
(b) to take any action referred to in section 318.

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) within 20 working days after notice of the decision or action is communicated to the appellant; or
(b) within any further time that the appeal authority allows on application made before or after the period expires.