

BPB Complaint No. C2-01186

Under the Building Act 2004 (the Act)

IN THE MATTER OF

An inquiry by the Building Practitioners' Board
under section 317 of the Act

AGAINST

[the Respondent], Licensed Building
Practitioner No. BP [omitted]

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 1 May 2015 in respect of [the Respondent], Licensed Building Practitioner.
- [2] The complaint alleged the Respondent has, in relation to building work at [omitted]:
- (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
 - (a) 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).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 5 June 2013.
- [4] On 29 May 2015 the Complainant advised that a resolution had been reached with the Respondent and sought to withdraw the complaint.
- [5] On 24 September 2015 the Board met, noted the withdrawal and resolved to proceed with the matter as a Board Inquiry.
- [6] The Board has considered the matter under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- [7] The following Board Members were present at the hearing:
- | | |
|--------------------|--------------------------|
| Richard Merrifield | Deputy Chair (Presiding) |
| Mel Orange | Board Member |
| Robin Dunlop | Board Member |
| Dianne Johnson | Board Member |
| Catherine Taylor | Board Member |
| Bob Monteith | Board Member |
- [8] The matter was considered by the Board in Wellington on 11 May 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.

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- [9] Gemma Lawson, Board Secretary, was also present during the course of the hearing. Members of the public were not present.
- [10] No Board Members declared any conflicts of interest in relation to the matters under consideration.

Board Procedure

- [11] On 15 February 2016 the Registrar of the Board prepared a report in accordance with reg 19 and 20 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with its inquiry.
- [12] On 10 March 2016 the Board considered the Registrar's report and in accordance with reg 22 it resolved to proceed with the complaint 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).
- [13] On 15 April 2016 the Respondent was sent a Notice of Hearing advising that the matter would be dealt with on the papers and that the Respondent could appear, if he so wished, by video or telephone conference.

Function of Disciplinary Action

- [14] The common understanding of the purposes 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 Kingdom¹.
- [15] In New Zealand the High Court noted in *Dentice v Valuers Registration Board* :

Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.
- [16] It must also be noted that the Board only has jurisdiction with regard to “the conduct of a licensed building practitioner” and with respect to the grounds for discipline set out in s 317 of the Act. It cannot investigate matters outside of those grounds, does not have any jurisdiction over contractual matters and cannot deal with or resolve disputes between a complainant and the person who is the subject of the complaint.

¹ *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

The Hearing

- [17] The hearing commenced at 10.50 a.m. The Board admitted and considered the evidence.

Substance of the Inquiry

- [18] The conduct the Board was investigating was whether the Respondent had failed to provide a record of work on the completion of restricted building work.

Evidence

- [19] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*² where Justice McGrath in the Supreme Court of New Zealand stated:

[102] 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.

[105] 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.

- [20] Building work commenced on 11 March 2015. It included an extension and recladding work under a building consent. Restricted building work took place.
- [21] A dispute as regards the quality of the work and the security of the site arose. The Respondent was asked to leave the site on 27 March 2015 and a record of work was requested by email on 9 April 2015 by the owner of the property. The Respondent's invoice was disputed in the same correspondence.
- [22] On 13 April 2015 the owner of the property received an email from the Respondent stating the record of work would be provided on full payment of the invoice.
- [23] The Respondent provided a response to the Board which stated he attended a site meeting on 20 April 2015 at which time he was asked for a record of work and was told he could not fix any work. The Respondent advised that he has been carrying a \$12,000 bill since then. He considered his work to be work in progress.

² [2009] 1 NZLR 1

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- [24] The Respondent and the home owner entered into an arrangement which included the home owner withdrawing their complaint to the Board in return for the Respondent issuing a record of work and foregoing his claim for further payments, although the Board does not know the terms of the settlement.
- [25] A record of work dated 30 May 2015 was issued and provided to the owner as a result of the settlement.
- [26] The record of work was not provided to the territorial authority. The Respondent stated he was not aware of this obligation, instead believing it was the owner's responsibility.

Board's Conclusion and Reasoning

- [27] 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 territorial authority on completion of restricted building work.
- [28] 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.
- [29] The Board discussed issues with regard to records of work in its decision C2-01170³ 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 provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [30] The statutory provisions do not stipulate a timeframe for the licensed person to provide a record of work. The provisions in s 88(1) simply states "on completion of the restricted building work ...".
- [31] The Board has consistently held that completion can occur before all of the restricted building work has been carried out as a result of intervening circumstances. In this instance the Respondent's engagement on the site came to an end and as such he was not going to be able to complete any further restricted building work. This occurred on 9 April 2015.
- [32] The Board has also repeatedly stated that a record of work cannot be used as leverage to obtain payment. It was clear from the correspondence before the Board that the record of work was being used as such in this case.
- [33] There was a delay of just over a month and the issue of the record of work followed a settlement between the Respondent and the owner. In this respect the Board notes that the settlement is not binding on it and agreements which purport to prevent a legal process by a tribunal are not enforceable. As such it is not prevented by the settlement from carrying out its inquiry.
- [34] In some instances a delay of just over a month might be acceptable. However, any delay which results from the record of work being used as leverage is not acceptable.
- [35] The Board notes that the Act provides that a record of work must be provided to both the owner and the territorial authority⁴. The latter was not provided with its record of

³ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

⁴ s 88(2)

work. The Respondent has stated he was ignorant of his obligation in this respect. Ignorance of the law is never a defence. The record of work provisions have now been in force for a considerable period of time and there have been extensive communications programmes to disseminate the message to licensed building practitioners to inform them of their obligations.

- [36] Finally s 317(1)(da)(ii) of the Act provides for a defence of the licensed building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists then it is open to the Board to find that a disciplinary offence has not been committed. No good reasons were advanced by the Respondent.

Board Decision

- [37] The Board has decided that the Respondent has 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.

Disciplinary Penalties

- [38] The grounds upon which a Licensed 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 Actⁱ.
- [39] 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 submissions on those matters.
- [40] 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 the financial loss incurred by the Respondent.
- [41] Given the nature of the disciplinary offending, the mitigation already heard and the level of penalty decided on the Board has decided to dispense with calling for further submissions.
- [42] As stated earlier the purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct.
- [43] The Board notes the mitigation presented and considers a censure is appropriate.

Costs

- [44] Under s 318(4) the Board may require the Respondent “to pay the costs and expenses of, and incidental to, the inquiry by the Board.”
- [45] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular

circumstances of each case. The judgement in *Cooray v The Preliminary Proceedings Committee*⁵ included the following:

“It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment.”

[46] The judgment in *Macdonald v Professional Conduct Committee*⁶ confirmed the approach taken in *Cooray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers’ Board, *Owen v Wynyard*⁷ where the judgment referred with approval to the passages from *Cooray* and *Macdonald* in upholding a 24% costs order made by the Board.

[47] In *Collie v Nursing Council of New Zealand*⁸ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate. It is not hard to see that the award of costs may have imposed some real burden upon the appellant but it is not fixed at a level which disturbs the Court’s conscience as being excessive. Accordingly it is confirmed.

[48] The Board notes the matter was dealt with on the papers and that this has reduced the costs of the hearing. In all the circumstances the Board considers the sum of \$500 to be a fair and reasonable contribution.

Publication of Name

[49] As a consequence of its decision the Respondent’s name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners’ scheme as is required by the Act.

[50] The Board is also able, under s 318(5) of the Act, to order publication over and above the public register:

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.

[51] As a general principle such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing.

[52] The Board does not consider that further publication is required.

⁵ HC, Wellington, AP23/94, 14 September 1995

⁶ HC, Auckland, CIV 2009-404-1516, 10 July 2009

⁷ High Court, Auckland, CIV-2009-404-005245, 25 February 2010

⁸ [2001] NZAR 74

Penalty, Costs and Publication Decision

[53] For the reasons set out above, the Board directs that:

Penalty: Pursuant to s 318(1)(d) of the Building Act 2004, the Respondent is censured.

Costs: Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$500 (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 s 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.

Right of Appeal

[54] The right to appeal Board decisions is provided for in s 330(2) of the Actⁱ.

Signed and dated this 25th day of May



Richard Merrifield
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.

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- (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.*