

BPB Complaint No. C2-01204

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. BP [omitted]

COMPLAINT DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 3 June 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);
 - (b) has conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 27 January 2015.
- [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).
- [5] The following Board Members were present at the hearing:
- | | |
|--------------------|--------------------------|
| Richard Merrifield | Deputy Chair (Presiding) |
| Mel Orange | Board Member |
| Dianne Johnson | Board Member |
| Catherine Taylor | Board Member |
- [6] The matter was considered by the Board in Christchurch on 20 January 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.
- [7] The following other persons were also present during the course of the hearing:
- | | |
|---------------|-----------------|
| Sarah Romanos | Board Secretary |
| [Omitted] | Respondent |

Members of the public were not present.

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

Board Procedure

- [9] The “form of complaint” provided by the Complainant satisfied the requirements of the Regulations.
- [10] On 28 October 2015 the Registrar of the Board prepared a report in accordance with reg 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.
- [11] On 26 November 2015 the Board considered the Registrar’s report which included a Special Adviser’s report, and in accordance with reg 10 it resolved to proceed with the complaint 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 a certificate of work about any plans and specifications required to accompany the building consent application (s 317(1)(da)(i) of the Act).
- [12] On 17 December 2015 at 11:30 a.m. a pre-hearing teleconference was convened by Richard Merrifield. The Respondent and Counsel for the Registrar were both present. The hearing procedures were explained and the Respondent’s attendance at the substantive hearing was confirmed.

The Hearing

- [13] The hearing commenced at 1:00pm.
- [14] The Respondent was sworn in, his evidence was presented and he answered questions from the Board.
- [15] The Board Secretary also read the Counsel for the Registrar’s opening submission into the record of evidence.

Substance of the Complaint

- [16] The Respondent was contracted to complete exterior cladding work at the property.
- [17] Work commenced on 2 March 2015 and stopped on 15 March 2015, when the owner did not make a payment on the second invoice issued in accordance with the agreed payment terms.
- [18] The Complainant alleged that the quality of the Respondent’s work was poor, he failed to provide documentation until an invoice was paid, and he charged for more work than was completed.
- [19] The Respondent did provide the documentation and was then paid. However, the Respondent did not return to site and the Complainant cancelled the contract.

Evidence

- [20] 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*¹ 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.

- [21] Matters raised in the complaint relating to the contractual relationship and commercial dispute are outside the Board’s jurisdiction and were not considered. The Board did take into account the report from a Special Adviser (included in the Registrar’s report) who investigated and commented on the allegations that the building work undertaken by the Respondent was of poor quality.
- [22] The Special Adviser found that the Respondent had cut and installed the weatherboards in accordance with the consented plans and the problems with the weatherboards around the windows and doors being cut short arose because the: *external joinery windows and doors were not installed in accordance with the consented plan details or James Hardie Technical Specifications 2014.*
- [23] The Respondent was not responsible for the installation of the windows and doors.
- [24] Allegations that the weatherboards were ‘out of level’ were also not substantiated by the Special Adviser.
- [25] The Board then only needed to consider evidence that the Respondent failed to provide a record of work in accordance with s 88(1) of the Act.
- [26] The Complainant advised the Respondent in writing on 30 March 2015 that the contract was cancelled and that he was going to instruct an alternative contractor. The Complainant went on to state:
Concerning our builder (the alternative contractor) has also stated that you have cut the Linea weatherboards too short and there is likely to be additional defects in your work.
- [27] The Respondent stated that in his conversations with the Complainant relating to the payment of his invoice he understood the weatherboards he had placed on the

¹ [2009] 1 NZLR 1

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exterior were to be removed and replaced by the alternative contractor given the 'poor quality of his work'.

- [28] The Respondent was therefore unclear as to what information he should provide on a record of work and indeed if he should provide a record of work at all.

Board's Conclusion and Reasoning

- [29] 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.
- [30] 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.
- [31] The Board discussed issues with regard to records of work in its decision C2-01170² 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.

Good Reason for not Providing a Record of Work

- [32] 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. What then is a good reason?
- [33] To date there has only been one case where the Board has found there was a good reason for failing to provide a record of work. In case C1129³ the Board found that an employee licensed building practitioner had not committed a disciplinary offence in failing to provide a record of work in circumstances where he was not able to effectively supervise and had taken steps to try and rectify that situation. In the case the Board stated:

6.7 The reason put forward by the Respondent was that he could not provide the records of work as, in his opinion, he could not make the statement that he had actually supervised the work. The question for the Board then is whether a licensed person can be required to complete a record of work in circumstances where, through the actions of others, they cannot, in good faith, make the statements set out in the record. Or, to phrase it in the language of the Act, is this a good reason.

6.8 The Board is mindful, in considering this, that to find in the affirmative would be to potentially allow employed persons to avoid their responsibilities under their employment arrangements. The converse is, however, also a possibility. Finding that an employee must, irrespective of the circumstances they are placed in, complete a record of work for restricted building work they are supervising may place them in an untenable position. The Board should not be disciplining persons for refusing to make a false statement. Given this the Board considers that the circumstances under which an employee who is, as part of their employment, required to supervise restricted work may constitute

² Licensed Building Practitioners Board Case Decision C2-01170 15 December 2015

³ 26 November 2014

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a good reason not to complete a record of work but each case must be determined on its own merits.

- [34] The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them and their provision should be a matter of routine.
- [35] Each case will be decided by the Board on its own merits but the threshold for a good reason is high.
- [36] In this case, the Respondent was firmly of the view that the restricted building work he had completed before leaving the site was going to be removed and replaced by another builder.
- [37] He presented evidence from a decision by another tribunal which set out the additional costs incurred by the Complainant to replace the weatherboards he had installed.
- [38] The Board considered carefully the particular circumstances of this complaint, noting that a licensed building practitioner should provide a record of work on completion of restricted building work even if there are questions from the owner about the quality of work and the need for it to be redone. In such circumstances the licensed building practitioner should be very clear about what work has been completed, and may wish to include marked up elevations to support a description of the work completed up until leaving the site.
- [39] The Respondent was adamant that he had been told that the work was to be redone and on that basis did not provide a record of work. The Board accepted this evidence and considered it to be a good reason. The threshold to meet this test is, however, still high and it would be advisable for licensed building practitioners who find themselves in such circumstances to provide a record of work irrespective of whether their work may be redone or replaced.

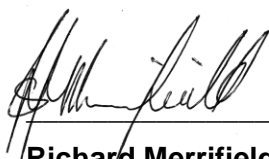
Board Decision

- [40] The Board has decided that 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 a certificate of work about any plans and specifications required to accompany the building consent application (s 317(1)(da)(i) of the Act) and should not be disciplined.

Right of Appeal

The right to appeal Board decisions is provided for in s 330(2) of the Act.

Signed and dated this 3rd day of March 2016



Richard Merrifield
Presiding Member