

BPB Complaint No. C2-01364

IN THE MATTER OF

AGAINST

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners Board under section 315 of the Act

Blake Boyd, Licensed Building Practitioner
No. BP 113876

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [Omitted] (the Complainant) lodged a complaint with the Building Practitioners Board (the Board) on 25 February 2016 in respect of Blake Boyd, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged that the Respondent has, in relation to building work at multiple addresses¹ 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 Foundations (concrete or timber pile foundation; walls and concrete slab-on-ground) Licence issued 9 March 2012.
- [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:

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| Richard Merrifield | Deputy Chair (Presiding) | Licensed in Carpentry and Site Area of Practice 2 |
| Mel Orange | Board Member | Legal Member appointed under s 345(3) of the Act |
| Robin Dunlop | Board Member | Retired Professional Engineer |

¹ [Omitted]

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| | Bob Monteith | Board Member | Licensed in Carpentry and Site Area of Practice 2 |
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- [6] The matter was considered by the Board in Auckland on 22 February 2017 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:
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| | Alastair Dumbleton | Counsel for the Registrar |
| | Gemma Lawson | Board Secretary |
| | Blake Boyd | Respondent |
| | [Omitted] | Witness for the Respondent |
- [8] No Board Member declared any conflict 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 21 June 2016 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 28 July 2016 the Board considered the Registrar's report and in accordance with reg 10 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).
- [12] On 10 February 2017 a pre-hearing teleconference was convened by Richard Merrifield. The Respondent was present, the hearing procedures were explained and the Respondent's attendance at the substantive hearing was confirmed.

Function of Disciplinary Action

- [13] 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 Kingdom².
- [14] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*³:
- Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously*

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

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.

[15] 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 with their architect. The disciplinary process for architects exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

[16] The same applies as regards the disciplinary provisions in the Building Act.

[17] It must also be noted that the Board 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.

The Hearing

[18] The hearing commenced at 10.20 a.m.

[19] At the hearing the Board was assisted in the presentation of the case by the Counsel for the Registrar.

[20] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.

Substance of the Complaint

[21] The allegation was that the Respondent failed to provide records of work on completion of restricted building work on the following sites:

- 104 Liberty Crescent, Beachlands;
- 9 Maraetai Heights Road, Maraetai;
- 66 Liberty Crescent, Beachlands;
- 26 Defender Crescent, Beachlands;
- 38 Defender Crescent, Beachlands;
- 34 Defender Crescent, Beachlands;
- 100 Liberty Crescent, Beachlands,
- 1 Puriri Road, Beachlands, and
- 49 Sovereign Street, Flat Bush.

⁴ [2016] HZHC 2276 at para 164

Evidence

- [22] 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*⁵ 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.

- [23] The Respondent carried out and/or supervised restricted building work being the construction foundations over a number of premises for Stonewood Homes East Auckland Limited.
- [24] The Complainant alleged that the Respondent failed to provide records of work on completion of the restricted building work despite numerous requests to do so.
- [25] The Respondent provided a written response to the complaint. He stated he had completed the records of work and was holding them pending a meeting with the Complainant. The meeting had not proceeded. He subsequently sent the records of work to Stonewood as the agent for the owner and he considered that in doing so he had satisfied the requirements of s 88 of the Act including the requirement to provide it to the Territorial Authority.
- [26] At the hearing the Respondent gave evidence that his wife [Omitted] completes the records of work as part of the administrative process for their business. The Respondent then signs the records of work and they are then emailed to the main contractor as the agent for the owner and to the territorial authority directly. This process was done sporadically but the current process used is to complete them within a month of the completion of the restricted building work.
- [27] The Board questioned the Respondent as to whether he carried out the restricted building work or whether it was done under his supervision. He stated that each building site had a licensed building practitioner in charge of it but he considered he

⁵ [2009] 1 NZLR 1

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had overall responsibility. On that basis he signs all of the records of work using his licence number.

- [28] As a result of this evidence the Board adjourned the matter to allow the Respondent to provide evidence satisfactory to the Board showing that there were licensed building practitioners on each of the sites complained about carrying out the restricted building work and/or supervising any unlicensed persons on site.
- [29] On 1 March 2017 the Respondent sent records of work in respect of all but one of the properties complained about to the Board. These were completed by Gavin Barchard BP125526. Mr Barchard has been licensed in Carpentry since 28 September 2013. A record of work for the final property⁶ was sent to the Board on 6 March 2017. Again it was completed by Mr Barchard.

Boards Conclusion and Reasoning

- [30] There is a statutory requirement under s 88(1) of the Act for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work⁷.
- [31] 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.
- [32] The Board discussed issues with regard to records of work in its decision C2-01170⁸ 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.
- [33] Each and every licensed building practitioner who carries out or supervises restricted building work must provide a record of work.
- [34] The Board is aware that, in some quarters, it is common practice for one licensed building practitioner to provide a record of work for all restricted building work completed within their class of licence where in fact more than one licensed building practitioner has actually carried out restricted building work. Such a practice does not reflect the provisions of s 88(1) of the Act which states:
- “Each licensed building practitioner who carries out (other than as an owner-builder) or supervises restricted building work under a building consent must, on completion of the restricted building work, provide the persons specified in subsection (2) with a record of work, in the prescribed form, stating what restricted building work the licensed building practitioner carried out or supervised...”*
- [35] The use of the word “each” makes it clear that every licensed building practitioner who carries out restricted building work has to complete a record of work for the work they did.
- [36] It must also be noted that the reference to supervision in the context of records of work is to the supervision of persons who are not authorised to carry out restricted

⁶ 1 Puriri Road

⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁸ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

building work, i.e. non-licensed persons. A licensed building practitioner does not require supervision by virtue of their own licence – they are authorised to carry out restricted building work. Even if one practitioner was to consider that they were in overall charge of a building site and of the work being carried out under a building consent (such as where they hold a Site Licence) the wording “each licenced person...” in s 88 cannot be ignored.

- [37] The wording of the section is clear. The obligation is for each and every licensed building practitioner to provide a record of work for the restricted building work they carried out under a building consent irrespective of whether there may be another licensed building practitioner on site who may be providing overall supervision. Persons who provide a record of work for restricted building work that other licensed building practitioners have completed could be exposing themselves to potential disciplinary liability.
- [38] In the present case a licensed building practitioner was present at each of the properties complained about. That practitioner carried out the restricted building work and was supervising non-licensed workers. As such he was the person who was required to issue records of work and he has now done so.
- [39] On this basis the Respondent did not have any obligations, under the Act, as regards the records of work and as such has not committed a disciplinary offence.
- [40] It should also be noted that there are no disciplinary offences under the Act as regards issuing a false or misleading return or document. As such, even though the Respondent issued records of work for restricted building work that he neither carried out nor supervised, no disciplinary action can be taken against him for this.

Board Decision

- [41] 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 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 not be disciplined.

Signed and dated this 20th day of March 2017.



Richard Merrifield
Presiding Member