

BPB Complaint No. C2-01370

IN THE MATTER OF

Under the Building Act 2004 (the Act)

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

AGAINST

Jason Williams, Licensed Building Practitioner
No. BP 107954

DECISION OF THE BUILDING PRACTITIONERS' BOARD

Introduction

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 8 March 2016 in respect of Jason Williams, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged the Respondent has, in relation to building work at [omitted]:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) 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
 - (c) 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 17 June 2011.
- [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:
- | | |
|--------------------|-------------------|
| Chris Preston | Chair (Presiding) |
| Richard Merrifield | Deputy Chair |
| Dianne Johnson | Board Member |
| Bob Monteith | Board Member |

C2-01370

[6] The matter was considered by the Board in Auckland on 11 October 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
Jason Williams	Respondent
[Omitted]	Witness for Respondent

Members of the public were not present.

[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 30 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. It included an addendum dated 1 August 2016.

[11] On 1 August 2016 the Registrar of the Board prepared a memo containing additional information about the record of work for the site, which had been provided after the publication of the 30 June 2016 report.

[12] On 4 August 2016 the Board considered the Registrar's report (including the additional information) and in accordance with reg 10 it resolved to proceed with the complaint 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) 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
- (a) 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).

[13] On 3 October 2016 a pre-hearing teleconference was convened by Richard Merrifield. The Respondent was present and the hearing procedures were explained and the Respondent's attendance at the substantive hearing was confirmed.

[14] On 4 October 2016 the Complainants advised that they did not want to attend the hearing and they set forth reasons why. The Board instructed on 6 October 2016 that they would not have to attend but that the Board and the Respondent could put questions to the Complainants in writing for them to answer prior to the hearing.

C2-01370

- [15] The Board also confirmed with both the Complainants and the Respondent that an Adjudication Decision referred to by them in relation to the complaint could be used as part of the evidence for the hearing.
- [16] The Complainants written answers to the six questions put to them by the BPB were received on 10 October 2016 and copied to the Respondent. The Complainants also provided a written submission which was accepted into evidence.
- [17] The Complainants provided an electronic copy of the Construction Contracts Act (CCA) determination and a document they had provided to the Adjudicator in response to the CCA claim.

Function of Disciplinary Action

- [18] 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.
- [19] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*²:
- 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.*
- [20] 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.

The Hearing

- [21] The hearing commenced at 10.45am.
- [22] Persons giving evidence were sworn in, their evidence was presented and they answered questions from the Board.
- [23] At the hearing the Board was assisted by Counsel for the Registrar who provided an opening submission which was read into the record.

Substance of the Complaint

- [24] During 2015 the Respondent was contracted by the Complainants to construct a new residential property to their consented design on their land in Silverdale. Towards the end of the building works a dispute arose over the invoicing of variations to the

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

² [1992] 1 NZLR 720 at p 724

C2-01370

works and the fee to be charged for project management. The Respondent left site on or about 27th December 2015 in expectation that practical completion had been achieved. The Complainants arranged with the Auckland City for a final inspection to be undertaken on or about 02 March 2016. This result was a “fail” with twelve items identified on the Site Inspection Notes.

- [25] It was alleged that the Auckland Council Building Inspection Outcome report shows that the inspection failed because the work carried out or undertaken by the Respondent was negligent or incompetent.
- [26] It was also alleged that the Respondent failed to provide a record of work on completion of restricted building work.
- [27] It was further alleged that the Respondent’s behaviour in generating inaccurate invoices had brought the LBP scheme into disrepute.

Evidence

- [28] 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*³ 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.

Negligence or Incompetence

- [29] It was not in dispute that the Respondent left site before the final inspection was requested, that the Complainants arranged for this to be undertaken and that the 02 March 2016 inspection result was a “fail” with twelve items identified in the Auckland City Site Inspection Notes.
- [30] It was the Respondent’s evidence at the hearing that he attended a meeting with a senior council official to discuss the 2 March 2016 inspection findings and was able,

³ [2009] 1 NZLR 1

C2-01370

with reference to photographic evidence, to explain the “as built” construction sufficient to satisfy the inspector that the carpentry matters related to the base of the wall cavity and the flashing at the junction of the soffit and the top of the wall were no longer an “*issue*”. This verbal account was consistent with the Respondent’s written evidence which had included an email thread between the Respondent and the council officer and handwritten notes on a page from the 02 March Inspection Report which accompanied the email thread. It was also consistent with the Complainant’s response to written enquiry from the BPB that the twelve matters identified in the 02 March Report were either “*complete or overridden by Mike Frost, Senior Building Inspector*”.

- [31] The Complainant’s evidence is that they are still without (not particularised) producer statements and a minor variation to the building consent for the change of material used for the fascia and are therefore unable to finalise the paperwork for the application for a Code Compliance Certificate. It was the evidence of the Respondent at the hearing that he does not hold these documents, has not instructed his subcontractors to withhold them and that as the Complainants had a close working relationship with all the sub-contractors they can ask for the producer statements directly. This verbal account was supported by the Respondent’s witness a qualified but unlicensed carpenter who worked alongside the Respondent on this project. It was the Respondent’s evidence that the design had been undertaken by the Complainant’s designer and that they are in a position to arrange for the minor variation to be documented with the council.

Disrepute

- [32] The Complainant’s evidence to support the allegation of conduct that brings the regime into disrepute is linked to the invoicing for the building and project management of the works. This evidence has been considered by an Adjudicator under the Construction Contracts Act and a payment order made. The CCA Determination was submitted as evidence.

Record of Work

- [33] The Complainants, on the complaint form, alleged that they had not received a Record of Work from the Respondent. There is no dispute that the building works included restricted work and that the requirement that a Record of Work be provided by the Respondent arose at the time the restricted work had been completed being between Xmas 2015 and New Year. Additional information was provided to the BPB after the Registrar’s report was published, but before the decision was made to proceed with the complainant, which included, both a copy of the completed Record of Work dated 1 February 2016 and an acknowledgement from the Complainants that they had indeed received it previously.
- [34] It was the evidence of the Respondent that his witness had taken the building consent file envelope home for safe keeping during the Christmas break and that this file was placed in the letter box at the site on or about 2 February 2016 with the house keys and two copies of the Record of Work. The Respondent had not handed the file, Records of Work and keys to the Complainants as he had been refused entry onto the site.
- [35] The Respondent told the Board that the Records of Work were from a triplicate book he uses with one copy for the Owners, one copy to be submitted with the application for the CCC and one for his own records. The Respondent advised that once he

C2-01370

became aware that the Owners had not provided the second copy from the building consent file to the council he forwarded a duplicate of his own copy to them.

Board's Conclusion and Reasoning

Negligence or Incompetence

[36] In considering whether the Respondent has carried out or supervised building work in a negligent or incompetent manner the Board has had regard to the case of *Beattie v Far North Council*⁴. Judge McElrea provided guidance on the interpretation of those terms:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.

[44] In my view a "negligent" manner of working is one that exhibits a serious lack of care judged by the standards reasonably expected of such practitioners, while an "incompetent" manner of working is one that exhibits a serious lack of competence.

[46] The approach I have adopted recognises that the terms "negligent" and "incompetent" have a considerable area of overlap in their meanings, but also have a different focus - negligence referring to a manner of working that shows a lack of reasonably expected care, and incompetence referring to a demonstrated lack of the reasonably expected ability or skill level.

[37] The Board has also considered the comments of Justice Gendall in *Collie v Nursing Council of New Zealand*⁵ as regards the threshold for disciplinary matters:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

[38] The Board found that the evidence from the senior council officer confirmed that the Respondent had not carried out or supervised carpentry work in a negligent or incompetent manner.

[39] The Board found that the Respondent is not withholding documentation from the Complainants.

Disrepute

[40] The disrepute disciplinary provision in the Act is similar to legislation in other occupations including medical professionals, teachers, lawyers and conveyancers, chartered accountants, financial advisors, veterinarians and real estate agents. The Board considered the disrepute provisions in Board Decision C2-01111⁶ and discussed the legal principles that apply.

[41] The Board, in C2-01111 considered whether the conduct complained of needs to be conduct carried out in the capacity of a licensed building practitioner. The Board

⁴ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁵ [2001] NZAR 74

⁶ Board decision dated 2 July 2015.

C2-01370

notes that in the professions listed above there is no requirement for the conduct to have been in the course of carrying out that person's trade or profession. For example in the High Court held in *Davidson v Auckland Standards Committee No 3*⁷ a company director, who, in the course of his duties as a director was charged with offences under the Securities Act 1978, had brought the legal profession into disrepute. He held a lawyer's practising certificate at the time, however, he was not providing legal services. It was submitted in the case that when the acts are outside of the legal practice, only acts which exhibit a quality incompatible with the duties of the legal profession, for example dishonesty or lack of integrity, could bring the legal profession into disrepute. This was rejected by the Court.

- [42] Similarly in a determination of the *Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants*⁸, convictions for indecent assault and being found without reasonable cause in a building was found to bring the profession into disrepute as it was inconsistent with the required judgment, character and integrity.
- [43] Turning to the conduct which brings or is likely to bring the regime into disrepute the Act does not provide guidance as to what is "disrepute". The Oxford Dictionary defines disrepute as "the state of being held in low esteem by the public"⁹ and the courts have consistency applied an objective test when considering such conduct. In *W v Auckland Standards Committee 3 of the New Zealand Law Society*¹⁰ the Court of Appeal held that:

*the issue of whether conduct was of such a degree that it tended to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, were irrelevant.*¹¹

- [44] As to what conduct will or will not be considered to bring the regime into disrepute it will be for the Board to determine on the facts of each case. The Board will, however, be guided by finding in other occupational regimes. In this respect it is noted disrepute was upheld in circumstances involving:
- criminal convictions¹²;
 - honest mistakes without deliberate wrongdoing¹³;
 - provision of false undertakings¹⁴; and
 - conduct resulting in an unethical financial gain¹⁵.

- [45] It is also noted that there are a number of cases where the conduct related to specific or important tasks a licensed building practitioner is required to complete within their occupations. Often such behaviour is measured within the context of a code of conduct or ethics. A code is yet to be established within the Building Act although

⁷ [2013] NZAR 1519

⁸ 24 September 2014

⁹ Online edition, compilation of latest editions of *Oxford Dictionary of English, New Oxford American Dictionary, Oxford Thesaurus of English and Oxford American Writer's Thesaurus*, search settings UK English, accessed 12/05/15

¹⁰ [2012] NZCA 401

¹¹ [2012] NZAR 1071 page 1072

¹² *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

¹³ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

¹⁴ *Slack, Re* [2012] NZLCDT 40

¹⁵ *Colliev Nursing Council of New Zealand* [2000] NZAR 7

C2-01370

provision for one is made. What is clear from the cases though is that unethical or unprofessional conduct can amount to disreputable conduct.

- [46] The Board found that the conduct of the Respondent, that is the subject of this charge, relates to contractual matters, and that these matters have been considered under other legislation and in any event do not meet the threshold for disciplinary action to be taken.

Record of Work

- [47] 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 work¹⁶.
- [48] 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.
- [49] The Board discussed issues with regard to records of work in its decision C2-01170¹⁷ 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.
- [50] Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [51] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in s 88(1) simply states “on completion of the restricted building work ...”. The Board has interpreted this as soon after completion.
- [52] The Board has found that the time taken to provide the Record of Work was not unreasonable in the circumstances of this complaint.

Board Decision

- [53] The Board has decided that Respondent has not:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) 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);
 - (c) 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).

¹⁶ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁷ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

C2-01370

and should not be disciplined.

Signed and dated this 4th day of November 2016

A handwritten signature in blue ink that reads "Chris Preston". The signature is written in a cursive style and is positioned above a horizontal line.

Chris Preston
Presiding Member