

Before the Building Practitioners' Board  
At Auckland

**BPB Complaint No. C2-01439**

**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**

Sean Durrant, Licensed Building Practitioner  
No. BP 118221

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**DECISION OF THE BUILDING PRACTITIONERS' BOARD**

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**Introduction**

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 30 June 2016 in respect of Sean Durrant, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged the Respondent has, in relation to building work at [omitted] 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 28 June 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:
- |                    |                             |  |
|--------------------|-----------------------------|--|
| Richard Merrifield | Deputy Chair<br>(Presiding) | Licensed in Carpentry and Site Area<br>of Practice 2 |
| Mel Orange         | Board Member                | Legal Member appointed under s<br>345(3) of the Act  |
| Robin Dunlop       | Board Member                | Retired Professional Engineer                        |
| Bob Monteith       | Board Member                | Licensed in Carpentry and Site Area<br>of Practice 2 |
- [6] The matter was heard in Auckland on 7 December 2016.

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[7] The following other persons were also present during the course of the hearing:

Sarah Romanos	Board Secretary
Sean Durrant	Respondent
Paul Chambers	Legal Representative for the Respondent
[Omitted]	Witness, Licensed Building Practitioner
[Omitted]	Complainant
[Omitted]	Complainant

[8] Members of the public were present.

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

### **Board Procedure**

[10] The “form of complaint” provided by the Complainant satisfied the requirements of the Regulations.

[11] On 5 September 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.

[12] On 15 September 2016 the Board considered the Registrar’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 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 30 September 2016 the Respondent was sent a Notice of Hearing outlining that the matter would be dealt with on the basis of the papers before the Board but that the Respondent could attend by phone or video conference or in person at his own cost.

[14] The matter was set down to be heard on the papers by the Board on 9 November 2016. On 6 October 2016 further submissions were received from the Respondent. Those submissions raised matters which the Board considered would require oral evidence. As such the matter was adjourned for a hearing on 7 December 2016, notice of the same was given to the Respondent and required witnesses were summonsed.

[15] On 25 November 2016 a prehearing conference was held with the Respondent. The hearing procedures were explained and his attendance at the hearing was confirmed.

### **Function of Disciplinary Action**

[16] 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 Kingdom<sup>1</sup>.

[17] In New Zealand the High Court noted in *Dentice v Valuers Registration Board*<sup>2</sup>:

*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.*

[18] In *McLanahan and Tan v The New Zealand Registered Architects Board*<sup>3</sup> 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.”*

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

[20] It must also be noted that the Board has jurisdiction only 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 1 pm.

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

## Substance of the Complaint

[23] The allegation was that the Respondent failed to provide a record of work on completion of restricted building work.

## Evidence

[24] 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*<sup>4</sup> where Justice McGrath in the Supreme Court of New Zealand stated:

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

<sup>2</sup> [1992] 1 NZLR 720 at p 724

<sup>3</sup> [2016] HZHC 2276 at para 164

<sup>4</sup> [2009] 1 NZLR 1

*[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.*

[25] The Complainant engaged the Respondent to carry out building work which included restricted building work at his property. The work commenced on or about 23 September 2015 and proceeded through till 23 or 24 December 2015. The intention was for the work to resume in the New Year. Subcontractors engaged by the Respondent did carry out further building work during February 2016.

[26] A payment dispute arose in the New Year between the Respondent and the Complainant following the issue of a final invoice for completion on 26 January 2016. As a result of that dispute no further restricted building work was carried out by the Respondent.

[27] A record of work dated 27 July 2016 was supplied to the territorial authority. It is stamped as having been received on 28 July 2016. A record of work was not provided to the owner at the same time.

[28] The Respondent initially responded to the complaint by way of his lawyer who provided a letter dated 8 August 2016. In it he set out that the record of work was made difficult by the Complainant's conduct toward his client. A copy of a Statement of Claim by the Respondent as Plaintiff was included with the response. The Statement of Claim notes the final invoice was sent on 26 January 2016 and a breakdown of the invoice was provided on 3 February 2016. Paragraph 24 of the Statement of Claim states:

*Shortly after the provision of the breakdown requested by the defendants (the Complainant), the defendants contacted the plaintiff refusing to pay. The plaintiff considered that non-payment by the defendants amounted to repudiation by the defendants. The plaintiff then suspended work on the property and informed the defendants that refusal to make payment to the plaintiff would result in cancellation of the contract.*

[29] The Statement of Claim went on to state that on 18 March 2016 the Complainant offered a settlement and at the hearing both the Respondent and the Complainant accepted that at this stage negotiations were ongoing and there was still a possibility that the Respondent would be returning to complete the restricted building work.

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- [30] The Respondent provided a further response to the complaint by email dated 29 August 2016 wherein he stated:

*The normal route of the record of works is that we finish the work, have the last building inspection called the Final Inspection, I then do my record of works form, a form to apply for the CCC, get all other documents that are involved with the particular project & hand to the inspector on site the day the final inspection takes place or I send to or take physically to the council, as I have done this time with [omitted] record of works, I dropped it into the Orewa Council, and they sent to Waitakere council. If the owners require the form as I've told him before, you go to the council and retrieve it from their files.*

- [31] The Respondent provided a third written submission prior to the hearing dated 12 September 2016. In it he reviewed the relationship and stated:

*It was never about us holding back the record of works cert for money being owed, he simply never done as he was instructed to do and that is why he never received the records of works from us, as we were waiting on his reply, go figure.*

- [32] On 6 October 2016 a submission was received in support of the Respondent from [omitted] claiming the work was not complete and that there had not been any requests for a record of work. [Omitted] is a licensed building practitioner licensed in Carpentry since 7 June 2014. The Respondent in an email dated 6 October 2016 stated [omitted] was the head builder foreman on site running the job and was there 100% as the builder.

- [33] The Respondent also made a final written submission on 6 October 2016 that the work, and in particular the restricted building work, was not complete. He also stated:

*When building projects turn ugly, a ROW will be required, when the owner has kicked us off site, well, guess what, he never kicked us off site, we left site, when he didn't pay his invoices.*

- [34] At the hearing, as a result of the statement by [omitted] that he was there 100% as the builder, the Respondent was questioned as to the contents of his record of work and what restricted building work he actually carried out or supervised. [Omitted] was also questioned with regard to this. The following table sets out the responses received:

Type of Restricted Building Work	Record of Work as Returned	Actual Restricted Building Work Carried Out or Supervised by the Respondent
Foundations and subfloor framing	Supervised	Nil – carried out by [omitted]
Walls	Supervised	Nil – carried out by [omitted]
Roof	Carried out and supervised	Carried out only
Columns and Beams	Carried out and supervised	Carried out

<b>Type of Restricted Building Work</b>	<b>Record of Work as Returned</b>	<b>Actual Restricted Building Work Carried Out or Supervised by the Respondent</b>
Bracing	Supervised	Nil – carried out by [omitted]
Damp proofing	Carried out and supervised	Carried out
Roof cladding or roof cladding system	Carried out	Carried out
Ventilation system	Supervised	Nil – carried out by [omitted]
Wall cladding or wall cladding system	Supervised	Nil – carried out by [omitted]
Waterproofing	Supervised	Nil – carried out by [omitted]

- [35] The Respondent was also asked whether there was any restricted building work that had not been completed at the time the payment dispute arose. He stated there were several structural elements which required engineering and or architectural input prior to their completion. They were to be processed as minor variations to the building consent and then completed on site. He understood they were subsequently completed by another practitioner. The Complainant confirmed this.
- [36] The Respondent was also questioned as to when he considered the contract had come to an end and with regard to whether he would have returned and completed the outstanding restricted building work had the payment dispute been resolved. The Respondent maintained that whilst he considered the Complainant had committed an act of repudiation he had not cancelled the contract and that throughout the payment dispute discussions he would have returned if payment had been made.
- [37] The turning point as regards cancellation came when the Respondent was served with notice of the complainant. He attended the Council offices in mid-August 2016 to check who was the builder on record and ascertained that he had been replaced. The Complainant stated that they had given notice of a change to the building consent authority but did not give notice of the same to the Respondent. The building consent authority records show the change was to take effect from 16 May 2016 and was submitted on 12 May 2016.
- [38] The Respondent stated he proceeded to provide a record of work to the owner within 10 working days of becoming aware of the change. The Complainant accepted they had now received the record of work.
- [39] [Omitted] advised that he had also completed a record of work for the restricted building work that he carried out and/or supervised. He provided the owners with a copy of this at the hearing.

## Board's Conclusion and Reasoning

- [40] 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<sup>5</sup>.
- [41] 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.
- [42] The Board discussed issues with regard to records of work in its decision C2-01170<sup>6</sup> 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, whom a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [43] The starting point is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder).
- [44] 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..."*
- [45] 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 or supervised. The reference to supervision is to the supervision of persons who are not authorised to carry out restricted 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 licensed person..." in s 88 cannot be ignored.
- [46] In this respect the record of work provided by the Respondent was inaccurate as it stated he had supervised work which was actually carried out by another licensed person, [omitted]. Given this, [omitted] was required to complete his own record of work for the restricted building work he was responsible for and this has now been attended to.
- [47] The Board notes in this respect that the disciplinary offence under s 317(1)(da)(ii) relates only to the provision of a record of work, not to the accuracy or completeness of it. As such no disciplinary outcome can arise from the errors in the record of work

<sup>5</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>6</sup> *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

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under a s 317(1)(da)(ii). The Board could, however, consider the accuracy and completeness of a record of work under the more general provisions of s 317(1)(b) of the Act which covers negligence and incompetence but the Respondent was not charged under that provision so the matter can be taken no further.

- [48] What the Board can inquire into is the timeliness of the record of work. 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 ...”.
- [49] In most situations issues with the provision of a record of work do not arise. The work progresses and records of work are provided in a timely fashion. Contractual disputes or intervening events however, can lead to situations where the licensed practitioner, owner, or territorial authority’s perceptions may differ as to when the record of work must be provided. The Board has consistently held, however, that where it becomes apparent that a licensed building practitioner will not be able to carry out any further restricted building work on a site the obligation to provide a record of work falls due. This can occur for a variety of reasons including contractual disputes.
- [50] Similarly if a dispute arises and the restricted building work has been completed, but not the project as a whole, then, irrespective of the dispute a record of work should be produced and provided. In this case though, the Board was satisfied that there was outstanding restricted building work so the issue is when did the point in time arise at which the Respondent knew or ought to have known that he would not be carrying out any further restricted building work.
- [51] Turning to the facts before the Board there was evidence that building work was still being undertaken under the direction of the Respondent in February 2016. A payment dispute then arose and proceedings were issued in the District Court. Throughout this period the Respondent expressed an intention to return and complete the restricted building work if payment was made. He contended that the contract had not been cancelled. The Complainant agreed they were prepared to have him back in the early days of the payment dispute.
- [52] The evidence also showed that the Complainant engaged a new builder to complete the work in mid May 2016 and the Complainant accepted the Respondent was not given notice of this. In effect this was the point in time when it could be said that the Respondent would no longer be able to return and complete the restricted building work and as such was the date from which the obligation to provide a record of work arose.
- [53] The Respondent was not, however, aware of the change in circumstances. On his evidence the first he knew of it was in August 2016. A record of work was completed and dated 27 July 2016 and was provided to the territorial authority on 28 July 2016. The two dates do not coincide in that the Respondent stated he produced a record of work when he became aware of the change of builders but this was after the record of work was completed. Notwithstanding this, it is the time it took to provide the record of work to the owner that is critical and the Board has taken the date when the Respondent became aware of the new builder as the date of deemed completion and from which to assess any delay in providing the record of work.
- [54] Looking at the question of delay the Board has held in previous decisions that a record of work should be provided a short time after completion or, in this case, deemed completion. If the timeframe of some 10 days is accepted then the Board



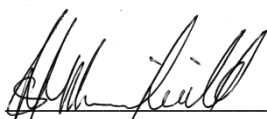
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does not consider the delay was unreasonable. The Board notes the Complainant did not contest this time and as such it is satisfied that the record of work was provided in a timely manner and that a disciplinary offence has not been committed.

**Board Decision**

- [55] 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 20<sup>th</sup> day of December 2016.

A handwritten signature in black ink, appearing to read 'Richard Merrifield', is written over a horizontal line.

**Richard Merrifield**  
Presiding Member