

Before the Building Practitioners Board

	BPB Complaint No. CB25885
Licensed Building Practitioner:	Nicholas Day (the Respondent)
Licence Number:	BP 136949
Licence(s) Held:	Carpentry; Site AoP1 and AoP2; Design AoP2

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Board Inquiry
Hearing Location	Auckland
Hearing Type:	In Person
Hearing and Decision Date:	8 November 2022

Board Members Present:

- Mr M Orange, Chair, Barrister (Presiding)
- Mrs F Pearson-Green, LBP, Design AoP 2
- Ms J Clark, Barrister and Solicitor, Legal Member
- Mr G Anderson, LBP, Carpentry and Site AoP2

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Finding:

The Respondent **has not** committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

Contents

Summary of the Board’s Decision	2
The Hearing	2
The Charges	2
Function of Disciplinary Action	2
Inquiry Process	3
Evidence	4
Board’s Conclusion and Reasoning	5

Summary of the Board’s Decision

- [1] The Respondent **has not** committed the disciplinary offence of failing to provide a record of work on completion of restricted building work.

The Hearing

- [2] The Board, on receiving a Registrar’s Report in respect of the matter, reviewed the file and decided to deal with it by way of a Draft Decision.
- [3] The Respondent disputed the findings in the Draft Decision and sought a hearing. The Draft Decision was set aside, and a hearing was scheduled.
- [4] On 21 July 2022, the Complainant gave notice that they no longer wanted to pursue the matter. By Board Minute dated 28 July 2022, the Board resolved to continue with the matter as a Board Inquiry.

The Charges

- [5] The hearing resulted from a Board Inquiry about the conduct of the Respondent and a Board resolution under regulation 22 of the Complaints Regulations¹ to hold a hearing in relation to building work at [OMITTED], Auckland. The alleged disciplinary offences the Board resolved to investigate were that the Respondent may have 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).

Function of Disciplinary Action

- [6] 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

¹ The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.

- [7] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. 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 The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

- [8] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁵:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [9] Finally, the Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.

- [10] The above commentary on the limitations of the disciplinary process are important to note as, on the basis of it, the Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

- [11] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar’s Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is

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

⁴ [2016] HZHC 2276 at para 164

⁵ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.

- [12] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Evidence

- [13] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [14] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [15] In addition to the documentary evidence before the Board, it heard evidence at the hearing from the Respondent and the Complainant (by videoconference).
- [16] In his written response to the Investigator the Respondent confirmed his involvement with the project as –*“We took over this project from another builders who had the framing and roofing completed. We then proceeded with the project and closed the building in, completed the firewall, insulation, windows, preline, postline and internal fit off for the secondary unit...”* (Document 2.2.7, Page 66 of the Board’s file).
- [17] The Respondent advised that his last day working on-site was in April 2021. He stated that he was expecting to return after the client had made decisions on how to proceed with the firewall.
- [18] The Respondent said that he participated in discussions with the Complainant and the Council over the firewall requirements and that he costed doing a block wall in May 2021. The Complainant agreed the Respondent had costed doing this work.
- [19] On 26 June 2021 the Respondent emailed the Complainant inquiring as to progress on the project and he replied on the same day- *“We are waiting for engineer to visit the site.”* (Document 10.3.1, Page 1173 of the Board’s file).
- [20] The Respondent gave evidence that he heard nothing further from the Complainant until he received the complaint to this Board.

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [21] The Complainant said that he engaged another builder to complete the firewall work on 29 July 2021. He told the Board that he telephoned the Respondent to tell him this. The Respondent refuted this.
- [22] The Complainant emailed the Respondent on 2 November, asking for his record of work. (Document 2.1.25, Page 37 of the Board’s file). The Respondent said that this email went to his spam folder and that it was from an email address that was different from that used for communications during the project.
- [23] The Complainant said that he tried to contact the Respondent by email and telephone calls. The Respondent says, apart from the 2 November 2021 email, there has been no contact from the Complainant.
- [24] The Complainant lodged his complaint with this Board on 5 November 2021. The Respondent was informed of the complaint by email on 12 November 2021.
- [25] The Respondent provided a record of work to the Complainant on 29 November 2021. (Documents 2.5.1 and 2.5.2, Pages 80 and 81 of the Board’s file).

Board’s Conclusion and Reasoning

- [26] The Board has decided that the 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.
- [27] There is a statutory requirement under section 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.⁷
- [28] Failing to provide a record of work is a ground for discipline under section 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 C2-01170⁸ 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.

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

- [30] The starting point with a record of work 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). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [31] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”. As was noted by Justice Muir in *Ministry of Business Innovation and Employment v Bell*⁹ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [32] As to when completion will have occurred is a question of fact in each case.
- [33] There was no clear evidence before the Board that the Respondent was informed that his building work had come to an end, which would have amounted to “completion” of the Respondent’s building work and triggered the obligation to do his record of work.
- [34] In June 2021, the Respondent still had an expectation that he was returning to the site, and the Board does not consider the evidence supports the Complainant having told the Respondent he had engaged another builder to complete the work.
- [35] The Board accepts that the first the Respondent knew that he was no longer returning to the project was the receipt of the complaint to this Board. The Respondent then provided his record of work.
- [36] As such, the Board finds that no disciplinary offence has been committed under section 317 (1) (da) (ii) of the Act.

Signed and dated this 22nd day of November 2022



Mr M Orange
Presiding Member

⁹ [2018] NZHC 1662 at para 50