

Before the Building Practitioners Board

	BPB Complaint No. CB25615
Licensed Building Practitioner:	John Hand (the Respondent)
Licence Number:	BP 121241
Licence(s) Held:	Carpentry and Site AoP 2

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	Wellington
Hearing Type:	In Person
Hearing Date:	27 July 2021
Decision Date:	2 August 2021

Board Members Present:

Mr C Preston, Chair (Presiding)
Mr M Orange, Deputy Chair, Barrister
Mrs F Pearson-Green, LBP, Design AOP 2
Ms J Clark, Barrister and Solicitor, Legal Member

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.

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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] At the hearing, the Respondent stated that he did not respond to the original complaint as he did not receive it. He confirmed that it had been sent to the correct address. He stated that he did not take the matter seriously when he was later contacted by phone to ask if he was going to respond.

The Charges

- [5] The hearing resulted from a complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were 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

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

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).

- [6] Prior to the hearing, the Complainants advised that the record of work had been received and that they did not want to pursue the complaint. The matter proceeded as a Board Inquiry.

Function of Disciplinary Action

- [7] 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 in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.

Inquiry Process

- [8] 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 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.
- [9] 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.

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

Evidence

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁴. 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.
- [11] 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.
- [12] In addition to the documentary evidence before the Board heard evidence at the hearing from the Respondent.
- [13] The Respondent was engaged to carry out building work on an alteration to a residential dwelling. The building work was carried out under a building consent and included restricted building work for which a record of work must be provided on completion. The Respondent's building work started on 17 October 2019 and came to an end on or about 1 July 2020.
- [14] The complaint was that the Respondent had refused to provide a record of work following completion. A complaint about the refusal was made on 20 September 2020. The file indicated that there was an ongoing commercial dispute between the Complainant and the Respondent and that, in the Complainant's view, the record of work was withheld as a result of the non-payment of funds.
- [15] The Respondent provided a verbal response to the complaint. He stated he had hand-delivered a record of work on 27 November 2020 to the Complainant (the owner) but that he had not provided it to the Territorial Authority. A record of work signed and dated 29 May 2020 was provided to the Board on 3 December 2020. The Respondent also noted an ongoing dispute.

⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [16] The building consent file was obtained from the Council (Territorial Authority). It did not contain a record of work from the Respondent. At the hearing, the Respondent stated that he had, in fact, also provided the record of work to the Territorial Authority in December 2020.
- [17] At the hearing, the Respondent outlined that he took the job over from another builder and that it was his usual practice to apply for a code compliance certificate at the end of a build. His evidence was that he had made an arrangement to be the agent for the owners to obtain the code compliance certificate and that, up until the time that he provided the record of work in November 2020, he was working on the premise that he was going to make the code compliance certificate application. The Respondent stated that he was attempting to obtain and collate all of the compliance documentation required for a code compliance certificate up until the point in time when he provided the record of work. It was at that point in time that he believed he was no longer engaged to obtain the code compliance certificate.
- [18] The Board was provided with correspondence between the Complainant and the Respondent with regard to documentation. The correspondence referred to documentation but not specifically to the Respondent's record of work. The correspondence did refer to the Respondent continuing to work to obtain a code compliance certificate.

Board's Conclusion and Reasoning

- [19] 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.
- [20] The Board's Draft Decision was made on the basis of the limited response provided to the complaint. With the benefit of further evidence and clarification at the hearing, a different decision was made.

- [21] 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 work⁵.
- [22] 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.
- [23] 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*⁶ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.
- [24] In the current matter, completion of the restricted building work occurred in July 2019. A record of work was provided on 27 November 2020. Up until that point in time, the Respondent was working on the premise that he was acting as the owner’s agent and that he was collecting the documentation required to obtain a code compliance certificate. That position may, on an objective reading of the correspondence between the Complainant and the owner, have been unreasonable. The Board did, however, decide that the Respondent subjectively held that belief and that he was operating on that basis. The Board, therefore, decided that the offence had not been committed.
- [25] The Board does, however, caution the Respondent as regards his record of work practices. As noted, the law requires that a Licensed Building Practitioner who carries out or supervises restricted building work provides a record of work to the owner and the Territorial Authority on completion of their restricted building work. Whilst, on occasions, the licensed person may act as an agent for the owner and may collect documentation on their behalf, the agency does not release them from their

⁵ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁶ [2018] NZHC 1662 at para 50

obligation to provide the record of work to the Territorial Authority in a timely manner.

- [26] Furthermore, the Respondent should note that, where there is a commercial dispute and the restricted building work has been completed, he must promptly provide a record of work. He should also note that records of work must not be withheld for commercial reasons.

Signed and dated this 2nd day of September 2021

A handwritten signature in black ink that reads "Chris Preston". The signature is written in a cursive, flowing style.

Mr C Preston
Presiding Member