

## Before the Building Practitioners Board

	BPB Complaint No. CB25953
Licensed Building Practitioner:	Karsten Jaeger-Oehlert (the Respondent)
Licence Number:	BP117288
Licence(s) Held:	Carpentry

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

#### Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	8 February 2023
Decision Date:	24 February 2023

#### Board Members Present:

Mrs F Pearson-Green, LBP, Design AoP 2 (Presiding)  
Mr D Fabish, LBP, Carpentry and Site AoP 2  
Mrs J Clark, Barrister and Solicitor, Legal Member  
Mrs K Reynolds, Construction Manager

#### 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.

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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 Charges

- [2] The hearing resulted from a Complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations<sup>1</sup> 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 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

- [3] 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*<sup>2</sup> and in New Zealand in *Dentice v Valuers Registration Board*<sup>3</sup>.
- [4] 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*,<sup>4</sup> 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*

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

<sup>2</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

<sup>3</sup> [1992] 1 NZLR 720 at p 724

<sup>4</sup> [2016] HZHC 2276 at para 164

*maintained in order to protect clients, the profession and the broader community.”*

- [5] 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 persons<sup>5</sup>:

*... 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.*

- [6] 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.
- [7] 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**

- [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.

### **Evidence**

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>6</sup>. 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.

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

<sup>6</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [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 it, the Board heard evidence at the hearing from:
- The Respondent
- [OMITTED], the Complainant
- Dong Wang, Auckland City Council Inspector
- [OMITTED], Project Manager
- [13] This project was the conversion of a ground level garage to a lounge/kitchen/dining area, alterations to an existing ground floor studio and the construction of a new deck and stairs above an existing concrete patio.
- [14] The Complainant advised that he drew up the plans and submitted them for building consent. The building consent was issued on 7 November 2018.
- [15] Mr [OMITTED] was contracted by the Complainant to supply materials and labour for the project. Mr [OMITTED] and his crew of two (including his son) carried out the work, but none of them were Licensed Building Practitioners. Mr [OMITTED] contracted the Respondent to be the supervising Licensed Building Practitioner for the restricted building work on the project.
- [16] Mr [OMITTED] gave evidence that he considered the only restricted building work in the project to be the construction of the new deck, and that was all that the Respondent needed to supervise.
- [17] The Respondent agreed that he was contracted to Mr [OMITTED] for the supervision of the restricted building work. He had worked with Mr [OMITTED] on other occasions. There was no written contract.
- [18] The Respondent stated that the agreement was to supervise the first part of the work only and that he supervised some internal non-structural framing work, which was not restricted building work. The Respondent understood that the only restricted building work was the deck construction and that this was being deferred until later.
- [19] The Respondent stated that he had a meeting at the house with Mr [OMITTED] in November/December 2018. Mr [OMITTED] could not recall the date of that meeting. The Board asked when he had engaged the Respondent, and he said, "*can't remember exactly*", and in response to whether the contract was entered into before Mr [OMITTED] had commenced work, he again replied "*not sure, can't remember*".

- [20] The only other time the Respondent went to the site was for the first Council inspection on 17 December 2018. The Council inspector at this inspection was Mr [OMITTED], and the Respondent recalled meeting him and telling him his Licensed Building Practitioner's licence details for recording on the Council inspection sheet. (Document 4.7, Page 317 of the Board's file).
- [21] The Council inspector who was at the second inspection on 13 February 2019, Mr Wang, was a witness at the hearing. The Respondent gave evidence that he was not at this second inspection. Mr Wang did not remember whether he had seen the Respondent on-site at this inspection. The Respondent stated that he had never met Mr Wang.
- [22] However, at the second Council inspection on 13 February 2019, Mr Wang included a photograph of the Respondent's Licensed Building Practitioner's licence. (Document 4.7, Page 329 of the Board's file). Mr Wang said that he took the photograph, but that he is not holding the license. The Respondent acknowledged it was possible that he had given his licence to Mr [OMITTED] to present at that second inspection.
- [23] The Complainant agreed with the Respondent that they had met only once, at the first inspection. He had assumed the Respondent's continued involvement in the project and that the Respondent was the Licensed Building Practitioner required to provide the record of work at the end of the project. The Complainant did not know that the Respondent had ended his involvement with the project. He wrote in an email dated 23 April 2021 to the Respondent – "*We did not know that you had fallen out with [OMITTED]. That would explain why you did not turn up much.*" (Document 2.1, Page 13 of the Board's file).
- [24] The Board then explored the removal of the garage door and the status and timing of this work in relation to the Respondent's engagement by Mr [OMITTED].
- [25] As recorded on the approved building consent plans the existing garage door was to be removed and replaced with "*new double glazed/Aluminium joinery French windows with side lights to be hung in existing door opening*" (Document 4.1, Page 223 of the Board's file).
- [26] Mr [OMITTED] said that he and his crew put the door frame in and did the damp proofing. Mr [OMITTED] did not consider this work to be restricted building work because the replacement French door was being put back in the same place as the original garage door. The Complainant stated that he had supplied the recycled French door unit, it was smaller than the existing opening and detailed on the consent. He went on to say that the recycled unit was single-glazed, and he engaged Metro glass to upgrade the glazing to double-glazing on-site. Mr [OMITTED] said he had installed the nib and framing around the French door unit to reduce the existing opening size to suit the recycled unit, including installing all the flashing, sealants, beads, and sheet cladding.

- [27] Mr [OMITTED] initially said the replacement door was in place when the Respondent came to the site the first time to meet with Mr [OMITTED]. Later under questioning, Mr [OMITTED] said he could not recall if the French window was in place when the Respondent came to the site. He said –*“not too sure, long time ago”*.
- [28] The Complainant said that work started a couple of months after the building consent issued, which was 7 November 2018. He also said that work started on site late November/early December 2018. The Complainant and Mr [OMITTED] agreed that the removal of the garage door and its replacement with the French door was one of the first work items carried out.
- [29] The Respondent said that the replacement French door was in place when he first came to the site. Mr [OMITTED] said that the Respondent did not give any advice to Mr [OMITTED] in respect of the garage door replacement, as far as he could remember.
- [30] It was pointed out by Mr Wang that the photograph with the first Council inspection on 17 December 2018 shows the replacement French door in place. (Document 4.7, Page 321 of the Board’s file). It is also noted on this inspection that the Council requested a minor variation for the detail of the changes to the French door installation.
- [31] The Respondent understood after the inspection on 17 December 2018 that he was to have no more involvement at that point unless or until the construction of the deck was proceeding. Mr [OMITTED] agreed. The Respondent said that, in his view, the arrangement terminated before any Restricted Building work was done, and, therefore, so as far as he was concerned, no record of work was required from him.
- [32] The Respondent was asked by the Board whether he had looked at the consented plans for the project. He stated that he had only paid attention to them in respect of the deck.
- [33] In a closing statement, the Complainant apologised that it had gone this far and expressed a wish that the Respondent had contacted him. He simply needed his Code Compliance Certificate and had no idea the Respondent was not involved in the whole project. The Complainant now had the Code Compliance Certificate and was not concerned about the outcome of this hearing.
- [34] The Respondent said, in closing, that if he had seen the project out to the end, he would have provided a record of work for the French door replacement, but that it did not play out that way. He stated that he was disappointed to be before the Board, he wanted to comply and uphold standards and did not want to be a problem. The Respondent apologised for the way the matter had gone.

#### **Board’s Conclusion and Reasoning**

- [35] 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.

- [36] 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.<sup>7</sup>
- [37] 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.
- [38] 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.
- [39] The first issue for the Board to deal with is whether the building work carried out was restricted building work.
- [40] Section 84 of the Act provides:
- All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work*
- [41] Section 401B of the Act allows building work to be declared as restricted building work by Order in Council<sup>8</sup>. It only applies to building work that is carried out under a building consent.
- [42] The term restricted building was defined by the Building (Definition of Restricted Building Work) Order 2011. Clause 5 of the Order stipulates:

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<sup>7</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

<sup>8</sup>401B Order in Council declaring work to be restricted building work

- (1) *The Governor-General may, by Order in Council made on the recommendation of the Minister, declare any kind of building work (other than building work for which a building consent is not required) or any kind of design work to be restricted building work.*
- (2) *An order under subsection (1) may apply to any kind of building work or design work generally, or may apply to building work or design work in relation to particular types or categories of buildings or to particular parts of buildings.*
- (3) *The Minister may recommend the making of an order under this section only if the Minister is satisfied that the kind of building work or design work in question is (or is likely to be) critical to the integrity of a building or part of a building.*
- (4) *Building work or design work is not restricted building work if it relates to an application for a building consent made before the commencement of an order under subsection (1) declaring building work or design work of the same kind to be restricted building work.*

- 5 *Certain building work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work*
- (1) *The kinds of building work to which this clause applies are restricted building work for the purposes of the Act.*
  - (2) *This clause applies to building work that is—*
    - (a) *the construction or alteration of—*
      - (i) *the primary structure of a house or a small-to-medium apartment building; or*
      - (ii) *the external moisture-management system of a house or a small-to-medium apartment building; and*
    - (b) *of a kind described in subclause (3); and*
    - (c) *of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.*
  - (3) *The kinds of building work referred to in subclause (2)(b) are—*
    - (a) *bricklaying or blocklaying work;*
    - (b) *carpentry work;*
    - (c) *external plastering work;*
    - (d) *foundations work;*
    - (e) *roofing work.*

[43] On the basis of the Order, for building work that was carried out to be restricted building work, it must have been in relation to the construction or alteration of the primary structure or the external moisture-management system of the house.

[44] The relevant building work the Board focussed on was the replacement of the garage door with the French door. That work was carried out under a building consent, and the replacement of the garage door with the French window was the alteration of the external moisture management system of the house. Both Mr [OMITTED] and the Respondent failed to recognise this and proceeded under the assumption that the only restricted building work involved in the project was the construction of the new deck.

[45] Having established that the building work carried out was restricted building work, it follows that a record of work was required on completion as per the statutory requirement in s 88(1) of the Act and had to be provided to the owner and the territorial authority on completion of restricted building work<sup>9</sup>.

[46] The issue, in this case, was whether that responsibility fell on the Respondent. He only had an obligation to provide a record of work for the replacement French door

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<sup>9</sup> Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011



if he had in fact at the time the work was done been engaged by Mr [OMITTED] to supervise the work.

- [47] The Respondent accepted responsibility for the supervision of the restricted building work, and he acknowledged that his licensing details were given to the Council for that purpose.
- [48] It is not relevant that the Respondent did not think the door replacement was Restricted Building Work. A Licensed Building Practitioner is expected to familiarise him/herself with the consent documents and be aware of what restricted building work is involved. If the Respondent supervised the door replacement, then he would have an obligation to provide a record of work regardless of his mistaken belief that the work was not restricted building work.
- [49] The Respondent had limited engagement. He accepted and had no responsibilities after the first inspection. The critical issue is when he was first engaged as the supervisory Licensed Building Practitioner and whether this was before the garage door replacement work was undertaken.
- [50] The Board accepts that the evidence supports the conclusion that the replacement French door was in place when the Respondent attended the site for the first Council inspection on 17 December 2018. However, the Board has been unable to conclusively determine on the evidence before it, the date on which the Respondent was contractually engaged by Mr [OMITTED] and, significantly, whether that was before the garage door was replaced with the French door. The ability to determine this issue was impacted by the absence of a written contract between Mr [OMITTED] and the Respondent, the time that has passed since the events and, understandably, people's recall of exact dates.
- [51] The Board cannot definitively find that the Respondent was engaged as the supervising Licensed Building Practitioner at the time the garage door/French door replacement work was carried out. On that basis, the Respondent cannot be responsible for the supervision of work that was carried out before his engagement and he did not have an obligation to provide a record of work for that work.
- [52] The Respondent should note that, as the supervising Licensed Building Practitioner, he is expected to look at the work, and all of the compliance documentation and to be aware of what Restricted Building work is involved and, therefore, his record of work obligations.

[53] Based on the above findings, the Board finds that no disciplinary offence has been committed under section 317 (1) (da) (ii) of the Act.

Signed and dated this 13<sup>th</sup> day of March 2023

A handwritten signature in black ink, appearing to read 'F Pearson-Green', with a long horizontal flourish extending to the right.

**Mrs F Pearson-Green**  
Presiding Member