Before the Building Practitioners Board

	BPB Complaint No. CB25187
Licensed Building Practitioner:	Xiang Li (the Respondent)
Licence Number:	BP 130642
Licence(s) Held:	Carpentry and Site AOP 1

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	Complaint
Hearing Location	Auckland
Hearing Type:	On the Papers
Hearing Date:	9 October 2019
Decision Date:	19 December 2019

Board Members Present:

Richard Merrifield, LBP, Carpentry Site AOP 2 (Presiding)
Mel Orange, Legal Member
David Fabish, LBP, Carpentry Site AOP 2
Robin Dunlop, Retired Professional Engineer
Rob Shao, LBP, Carpentry Site AOP 1

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.

Board Decision:

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

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Introduction

[1] The hearing resulted from a complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations[1] to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offence the Board resolved to investigate was 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

[2] 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].

[3] 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."*

[4] 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. It does not have any jurisdiction over contractual matters.

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

Evidence

[5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed[5]. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

[6] 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.

[7] In this case the Board decided that no further evidence was required. If a Respondent provides further evidence or submissions the Board takes them into account. If they request an in-person hearing this is given consideration.

[8] The Respondent was engaged to carry out building work on a new residential dwelling that was being constructed under a building consent. The building work included restricted building work.

[9] Building work commenced on or about 1 February 2018. The contract for services was terminated on or about 17 December 2018. The Complainant raised an allegation that the Respondent had not provided documents for a Code Compliance Certificate (CCC) application. Further inquiries of the Complainant ascertained that the Complainant had not received a record of work for the restricted building work that the Respondent had carried out or supervised.

[10] The Respondent provided a response to the complaint. The response stated that the complaint was commercial in nature. A copy of correspondence dated 19 February 2019 with regard to the CCC application was provided. It noted that various documents were still required. There was not reference to records of work.

[11] A further submission dated 3 September 2019 was provided in anticipation of the hearing. It stated that the Respondent had provided a record of work without having received a final payment and that a code of compliance certificate (CCC) had been issued on 7 March 2019. A copy of the CCC was provided but a copy of his record of work was not.

[12] The matter was adjourned. Enquiries were made of the territorial authority to ascertain if a record of work had been provided as claimed. The Auckland Council provided a copy of a record of work dated 2 November 2018.

Board's Conclusion and Reasoning

[13] 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

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

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 be disciplined.

[14] The question for the Board was whether, in providing the record of work to the territorial authority but not the owner, the Respondent had satisfied the requirements of section 88(1) of the Building Act. In this instance the Board decided that he had.

[15] The Board noted that under section 44 of the Act the obligation to apply for a building consent is on the owner. An application must be made to the building consent authority. Under section 212 of the Act a territorial authority must perform the functions of a building consent authority within its district.

[16] Similarly, under section 92 of the Act the obligation to apply for a code compliance certificate is on the owner. Again, the application must be made to the building consent authority.

[17] Notably, under section 92, when an application is made for a code compliance certificate it must include any records of work:

> *(2A) If applicable, the owner must include with the application any records of work provided by licensed building practitioners under section 88(1).*

[18] The provisions in section 92 imply that, when a code compliance certificate application is made and a record of work is provided, then if the record of work was not provided by a person other than the owner, its provision was made under the agency of the owner.

[19] The provisions of sections 216 and 217 of the Act are also instructive as regards the maintenance of and access to records of work. Section 216 provides:

> ***216 Territorial authority must keep information about buildings***
>
> *(1) A territorial authority must keep reasonably available any information that is relevant to the administration of this Act to enable members of the public to—*
> *(a) be informed of their obligations under this Act; and*
> *(b) participate effectively under this Act.*
>
> *(2) The information that must be kept by a territorial authority under subsection (1) includes—*
> *(a) all plans and specifications submitted to the territorial authority in relation to an application for a building consent; and*
> *(b) any of the following information issued or received by the territorial authority in respect of a building:*
> *(iva) records of work and certificates of work provided by licensed building practitioners under section 45(2) or 88(1)(a):*

[20] Under section 216(3)(b) the information is to be kept at least for the life of the building to which the information relates.

[21] Section 217 provides

> ***217 Access to certain information kept by territorial authority***
>
> *(1) A person—*
>
> *(a) has a right to access the information referred to in section 216(1) and (2); and*
>
> *(b) must, on request, be given access to that information by the territorial authority during ordinary office hours.*

[22] The combined effect is that once a record of work is in the possession of the territorial authority the owner also has access to it.

[23] The legislative history of the record of work provisions show that they are designed to create a documented record of who did what in the way of restricted building work under a building consent. It ensures all those involved in carrying out or supervising restricted building work can be identified by the owner (and any subsequent owner) and the territorial authority along with the restricted building work they carried out.

[24] In this respect it is noted that the territorial authority's record is one that runs with the property over its lifetime and, as it is a public record, it can be accessed by not only the owner but also by other persons interested in the property.

[25] Given these factors the Board considers that that the provision of a record of work to the territorial authority promotes the purposes for which a record of work is provided.

[26] Looking at the present case a code compliance certificate was issued and a record of work was provided to the territorial authority as part of that process. On the basis of the above, the Board finds that when the record of work was provided by the Respondent to the territorial authority it was, in effect, also provided to the owner. The Board has made this finding on the basis that it was supplied under the owner's agency and the owner then had open access to it.

[27] The remaining factor for the Board to consider is the timeliness of the provision of the record of work. The record of work was dated prior to the termination of the contract and the code compliance certificate issued shortly thereafter. The Board therefore finds that it was no unreasonable delay.

Signed and dated this 19th day of December 2019

Richard Merrifield
Presiding Member